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Montana v. Egelhoff--Reflections on the Limits of Legislative Imagination and Judicial Authority

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SUPREME COURT REVIEW

FOREWARD: *MONTANA V. EGELHOFF*— REFLECTIONS ON THE LIMITS OF LEGISLATIVE IMAGINATION AND JUDICIAL AUTHORITY

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Editor's note: This article is the result of an experiment conducted by Prof. Allen, the Journal, and the Crimprof List Server on the Internet. Prof. Allen posted the manuscript of this article on the list along with an open invitation to list members to discuss the article. What resulted was a unique open debate among prominent commentators about the article prior to its publication. We have appended this debate at the conclusion of the article. With the exception of minor spelling and font changes, we have left the messages as they were sent out on the list, to preserve the flavor of the debate as much as possible.

The Journal wishes to thank the members of the Crimprof List, and in particular Stephen Sowle, the list owner, for their help with this project.

To explore aspects of perception, psychologists use ambiguous pictures. One I remember from my childhood was, if looked at one way, two candlesticks side by side; looked at another, it was two elderly women staring at each other. The law has its own ambiguous pictures, primarily formed through the use of presumptions. Consider a cause of action defined in terms of negligence, which requires the taking of a risk a reasonable person would have perceived. Add that the violation of a safety statute creates a presumption of negligence and, voila, an ambiguous picture. Looked at one way, a plaintiff must prove negligence to recover, and violation of a safety statute is an indication of negligence; looked at another, a plaintiff must prove either negligence or the violation of a safety statute, regardless of negligence, to recover. As *Montana v. Egelhoff*¹ demonstrates, other kinds of eviden-

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¹ 116 S. Ct. 2013 (1996).

tiary rules and substantive definitions of liability can also create ambiguous pictures. When they do, if *Egelhoff* is typical, the resulting constitutional analysis is likely to be ambiguous, as well.

The case involves a reasonable legislative judgment, to-wit alcohol is generally speaking not mitigating of criminality. This judgment, regrettably, was contained in a curiously written state statute that says:

45-2-203. Responsibility—intoxicated condition. A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.²

This statute has four components:

1. An intoxicated person is criminally responsible for his conduct. This is not a surprise. That a person consumes alcohol prior to committing a bank robbery is hardly grounds for sympathy.
2. Intoxication is not a defense to criminality. See above.
3. Intoxication “may not be taken into consideration in determining the existence of a mental state which is an element of the offense.” What, exactly, does this mean? Is this simply a rule of evidence that excludes one category of evidence from consideration in determining mental elements? Or read in conjunction with point one above, is it instead a substantive rule that defines liability as either an act with all the requisite elements, including mental elements, or as a result (in this case death) caused by an intoxicated individual? In large measure, the opinions in *Egelhoff* are disputing which of these characterizations to give to the statute, thus converting the statute into a constitutional version of an ambiguous picture. There are, however, other matters that should have been discussed as well. More on this below.
4. Intoxication may not be taken into consideration “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.” The statute makes unintentional intoxication an affirmative defense, although it fails to specify the burden of persuasion by which a defendant must “prove that he did not know.” In some other case, this will be the basis of an appeal. It played no role in *Egelhoff* and I put it aside.

I asserted above that the Montana statute is curiously written.

² MONT. CODE ANN. § 45-2-203 (1995) (as amended in 1987), *quoted in* Montana v. Egelhoff, 900 P.2d 260, 264 (Mont. 1995).

Perhaps more accurate would be that it reflects a simplistic and unreflective solution to a real problem, one that creates as many problems as it solves. The obvious objective of the legislature was to ensure that violent and antisocial acts committed by individuals under the influence would not go unpunished. This objective could have been accomplished directly by providing liability for harmful acts done while intoxicated, and punishment could have been tailored both to the seriousness of the result and the level of intoxication. This would have facilitated examining the extent to which the legislature wished to create a strict liability offense. Instead, in an obvious failure of the legal imagination,³ the legislature simply added on a quick-fix provision to the extant criminal code, neglecting the incompatibility between the traditional structure of the criminal law and the quick fix. It is out of that incompatibility that the constitutional issues emerge. To analyze that incompatibility requires that we ask first: What exactly did the Montana Legislature do? If the answer is ambiguous, we must proceed to ask: Does it matter?

WHAT EXACTLY DID THE MONTANA LEGISLATURE DO?

Quite clearly, the Montana legislature was attempting to implement the judgment that, generally speaking, consumption of alcohol is irrelevant to criminality. This appears to have been an attempt to head off arguments that a person was deserving of special consideration because she was drunk at the time she committed the otherwise criminal act. Such arguments could be founded either on the view that the alcohol impaired the person's normal capacity for self-control, and thus mercy is in order, or alternatively that in fact an element—in particular a mental state—was not present, and thus that the act did not meet the legal requirements of criminality. In either event, the obvious target of the legislature was the person who, although perhaps "drunk," nonetheless is—or at least appears to be—in sufficient control of himself as to know at the time what he is doing: A gun is brandished, pointed and fired; it did not go off as the consequence of physical forces involving no directed human action. The argument for leniency is that "at the time" the person was not behaving as he normally would precisely because of his intoxicated state, and thus that the acts are more like that of a madman or are under the control of the alcohol rather than that of the personality of the perpetrator. The perpetrator may not even remember the events in question. In any event, the appeal to mercy is essentially that "That was not me who did the act. My will was subverted (in one way or

³ See generally ALAN WATSON, *FAILURES OF THE LEGAL IMAGINATION* (1988).

another) by the alcohol. I would never have done this were I sober.” To which the legislature responded: Tough luck. The problem is that the response is considerably broader than that, and highly ambiguous. The two points are inextricably woven together.

The statute could be understood as defining liability as either the articulated elements or simply as drunkenness coupled with articulated consequences. Either would suffice. This construction, which I will call the substantive interpretation, is the natural reading of the phrase “A person who is in an intoxicated condition is criminally responsible for his conduct.” A person who is in an intoxicated condition was criminally responsible for his conduct under the law prior to this change, so long as the necessary elements were present. Thus, the language easily bears the interpretation that a person is liable for his harmful conduct even if, because of alcohol, some mental requirement is not satisfied. Otherwise, the statute would be superfluous. Under this interpretation of the statute, murder would be the intentional killing (knowledge or purpose in Montana) of another human being through a voluntary act or death caused by a person who at the time was intoxicated.

There is another way to read the statute, however, which is why it is an ambiguous picture. The other way to read the statute, which is the evidentiary interpretation, is that it is merely a rule of evidence excluding evidence of intoxication on issues of mental states. This seems to be the most natural reading of the language “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.” Under this reading, the formal elements of liability remain the same, but one type of evidence may not be used to disprove them—evidence of intoxication. Thus, the prosecution would still have to “prove” all the requisite elements of murder beyond reasonable doubt, such as a voluntary act done with the “purpose” to bring about the death, or “knowing” that it was likely to occur, but the defendant could not respond to the prosecution’s case with evidence of intoxication that tended to disprove any of these mental elements.

The Montana Supreme Court concluded that the second interpretation was correct, that the legislature simply enacted a rule of evidence rather than changed the legal elements. The Supreme Court divided on this question, with Justice Ginsburg concurring in upholding the statute on the ground that it was an acceptable redefinition of the offense of murder.⁴ In an opinion for the plurality, Justice Scalia

⁴ *Egelhoff*, 116 S. Ct. at 2024 (Ginsburg, J., concurring).

agreed but on the ground that there is no difference between an evidentiary rule and a substantive redefinition.⁵ The dissenters, by contrast, were quite clear that the statute was a rule of evidence, and, regardless whether the legislature could have redefined the crime to achieve the same outcome, the rule as it stood violated the Constitution.⁶

So, the answer to the first question—what exactly did the Montana legislature do?—really is ambiguous. It either redefined the substantive contours of the statute, or it provided a rule of evidence. So we must proceed to the next question: Does it matter?

DOES IT MATTER?

What exactly the Montana legislature did unmistakably makes a difference to a defendant, although whether that pragmatic difference raises constitutional questions is ambiguous. *Egelhoff* does not provide much assistance in answering the constitutional question, however, because both Ginsburg's and Scalia's apparent view of the meaning of the statute verge on incoherent. I discuss these two points in turn, and in the remainder of the essay discuss what I believe to be the salient issues emerging from the case.

Consider first how the different interpretations of the Montana statute have the capacity to generate different outcomes, although in some cases the results might be the same. Under the substantive interpretation, a person who happens to be drunk, but still sufficiently in possession of her senses so that there is sufficient cognitive activity to permit willed bodily movements (voluntary act) and intent to commit, even if stupidly and later regretfully, the natural and probable consequences of those acts is simply out of luck. But so, too, apparently, is the person completely lacking even minimal cognitive activity. Like an irrebuttable presumption of negligence from the violation of a safety statute or the irrebuttable presumption of paternity when a child is born to a couple during wedlock, the finding of a death caused by a drunken individual would be murder. End of story. Thus, the state would not have to show any (other) evidence of any mental state. If the evidentiary exclusion interpretation is adopted, a much different situation is presented. Sufficient evidence of voluntariness and intentionality would have to be adduced to permit a finding of these elements beyond reasonable doubt, and the defendant would not be permitted to respond to that evidence with her own evidence of intoxication.

⁵ *Id.* at 2020-21 n.4 (plurality opinion).

⁶ *Id.* at 2026 (O'Connor, J., dissenting).

Now, consider the following hypotheticals:

1. A drunk person is driving a car, blacks out and runs over somebody. Under the substantive interpretation, this is murder; under the evidentiary interpretation, it is not murder, although it is surely some other crime.
2. A drunk person is in a bar with a gun in his waist band. He trips and falls; the gun goes off killing somebody. Under the substantive interpretation, this is murder; under the evidentiary interpretation, it is not.
3. A person is in a bar, drunk as a skunk. He pulls out a gun and jokingly points it at someone else. The gun goes off, killing the other person. The perpetrator in fact did not intend the act, and has no idea if he pulled the trigger. He certainly did not mean to. Under the substantive interpretation, this is murder; under the evidentiary interpretation, it is not. But, here note that the defendant might be convicted under either interpretation. Looking at these facts, but without knowledge of intoxication, a fact finder could easily conclude that the defendant willed his action and intended the consequence. Only through consideration of defendant's drunkenness would a different result most likely obtain, yet that is precisely what the evidentiary interpretation disallows.

Both Scalia and Ginsburg gave a different interpretation to the statute from either of the ones I have advanced, although one that is very hard to comprehend:

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."⁷

This formulation requires the resolution of a very strange counterfactual. It requires the fact finder to ask whether the mental elements "would have been" established had the defendant not been intoxicated, even though he was and even though he in fact may not have committed a voluntary act with the intent to bring out the forbidden consequence. What might that mean? Consider the reasoning of a fact finder faced with hypothetical #3 who is now told to analyze the counterfactual world in which the defendant was not intoxicated. But, there isn't just one counterfactual world of this type; there is an infinite number of them. Thinking backwards in a causal universe, one might very well conclude that the reason the defendant was not drunk is because, for any number of reasons, he did not go drinking.

⁷ *Id.* at 2024 (Ginsburg, J., concurring). Scalia seems to accept this interpretation. *Id.* at 2020 n.4 (plurality opinion).

And if he did not go drinking, he would not have been in the bar (or at least such a counterfactual world could exist if any could); were he not in the bar, he would not have been in a position to pull out the gun that accidentally went off. Maybe he was skiing in Colorado. Maybe he was sunbathing in Florida. And so on.

To this it might be responded that the fact finder is supposed to limit its consideration to a certain subset of all possible counterfactual worlds, perhaps those that place the defendant in the bar at the time in question. One might reasonably ask why that is so, but never mind, for this does not much change the problem. Suppose the fact finder is now thinking about those counterfactual worlds that place the defendant in the bar. But were the defendant not drunk, he certainly would never do anything so stupid as carry a gun (o.k., limit your counterfactuals further—the defendant has a gun) or pull it out and point it at somebody. After all, if you hypothesize that one thing is different—the defendant did not drink—you ought to ask what may be causally related to that now changed fact and adjust things accordingly.

If at this point the fact finder again is told to assume that the gun was pulled out and pointed, there is no point to engaging in counterfactual analysis except as a smoke screen for imposing strict liability on the defendant for the consequences of his acts while intoxicated. If all a fact finder may consider is that an assumedly sober but actually drunk individual pulled out a gun, pointed it, and pulled the trigger, the conclusion of murder is inescapable. But if that is the point, why distinguish the defendant who pulls out a gun, as in hypothetical #3 and the defendant who does not, as in hypothetical #2? Even though the fact finder may mistakenly believe to the contrary, there is no moral distinction between the two. They both were drunk, carried firearms, and accidentally killed somebody. It is merely fortuitous that in one case excluding evidence would lead to an inference of intentionality and in the other case it would not.

We thus see another reason why Ginsburg's assertion that the test is whether "the defendant killed under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication" is unconvincing. This assertion is equivalent to saying that a case in which "the defendant killed under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication" but in which the probability that the defendant did act with knowledge or purpose is 0.0 is somehow different from one in which it is *not* true that "the defendant killed under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication" and the

probability of knowledge or purpose is also 0.0. What difference could the misleading surrounding circumstances make?⁸

And so the bottom line is that, taken at face value, Ginsburg and Scalia's construction of the statute is strange ("consider a potentially infinite number of counterfactual worlds") and leads to a very strained distinction between cases which possess no significant differences. Indeed, to avoid this strained distinction, the statute is better read as imposing strict liability on intoxicated individuals.

Now suppose another counterfactual world—one in which Scalia and Ginsburg are reading this article. They would respond to my argument in the following fashion (I know this because it is my counterfactual world we are exploring): "It's all very interesting, but really beside the point. You know full well what we were saying. We were saying that the substantive change in the law is simply that the fact finder is to put aside any evidence of intoxication when deciding whether the mental states of mind necessary for murder were established." Well, perhaps so, but that means that the "substantive rule" is really just a rule of evidence, which is precisely what the dissent argued and what Ginsburg, at least, was denying.

Or was she? Perhaps she, like Scalia, was saying that it does not really matter whether you call this a rule of evidence or not. What matters is the actual effect of whatever you call it on the defendant, and the actual effect is obvious. The statute reduces the burden of persuasion on the State to prove the mental elements. It shifts what I called many years ago the relative burden of persuasion. However, the statute may, in some cases, reduce the relative burden of persuasion on the mental elements to 0.0. Again, these two points are intimately interrelated. Consider first the concept of shifts in the relative burden of persuasion:

Like the other evidentiary devices previously discussed, judicial comment merely alters the burden of persuasion. Compare two cases in which the only distinguishing feature is that one does not contain judicial comment and the other does. To make the exercise more concrete, assume the cases involve the charge of knowing possession of stolen goods. In each case, the only evidence of knowledge is the fact of possession of recently stolen goods. Assume further that judicial experience has yielded the insight that the possession of recently stolen goods is very highly correlated with knowledge of the nature of the goods. And finally, assume that the judicial insight is not widely possessed by the general populace who make up juries.

In the first case, without judicial comment, the jury might conceiva-

⁸ A question also asked by Breyer and Stevens in dissent. *Id.* at 2035 (Breyer, J., dissenting). Some people think we deserve our luck, which I suppose is one way to make sense of Ginsburg's argument.

bly convict, but certainly the chance of acquittal is higher than in the second case, in which the judge explains the implications of possessing recently stolen goods. The judge's comment increases the chance of conviction by enhancing the effect of the state's evidence. In order for the defendant to have the same chance of acquittal in the second case as in the first, he would have to adduce more persuasive rebuttal evidence than that advanced in the first case. Although the formal relationship between the state and the defendant has remained the same — the jury has applied the reasonable doubt standard in each case — the comment has modified what may profitably be called the relative burdens of persuasion by altering the factual matrix within which the jury reached its decision. The effect of judicial comment, then, is to shift the positions of the parties by modifying the relative burden of persuasion that a defendant bears on an issue, just as with affirmative defenses and placement of the burden of production.⁹

Substitute "exclusionary rule" or "substantive change in the law" for "judicial comment" in the preceding two paragraphs, and the point is obvious. By excluding relevant evidence on the "elements" of murder, the Montana statute does, just as the dissenters argue, lower the relative burden of persuasion.

To which Scalia and Ginsburg essentially say, "So what?" If the state can lower the burden of persuasion on factual issues directly, why can't the state do it indirectly by what looks like a burden shift in the guise of an evidentiary rule? But to make this argument, Scalia and Ginsburg must go one step further. They must anticipate that the relative burden of persuasion could be shifted to 0.0, that, in other words, a person like Egelhoff could be convicted of murder even though, taking into account the evidence of intoxication, no one would believe that the mental elements otherwise required to establish murder are true. And after all, why not? If the state can lower the burden of persuasion on intent and a voluntary act to .5, convert them into affirmative defenses, in other words, as Scalia and Ginsburg are saying the state may do, why stop there? Why not .3 or .1 or 0.0? The crucial and only question is whether the element must be proven beyond reasonable doubt. If the answer is no, then any burden of persuasion, including 0.0, is acceptable.

If what I have said is correct, then the bottom line, so far as we have gone (but we do have further to go) is that Ginsburg and Scalia are right. The Montana statute is odd in its definition of murder (and every other crime analogously) as the traditional elements or killing somebody while intoxicated (which is my view of what it does), but what is unconstitutional about enacting odd statutes? Moreover,

⁹ Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 331-32 (1980) (citations omitted).

suppose the state really meant to adopt something along the lines of Ginsburg's view of the statute, as the Montana Supreme Court suggested that the Montana legislature did. That would simply mean that Montana had enacted a really odd definition of murder, but what is unconstitutional about really odd statutes?

Two things might be, one relatively trivial, the other more profound but probably no longer viable. First the trivial. Statutes must meet some minimal level of rationality to survive due process analysis. Ironically, the harsher vision of the Montana statute (mine) is almost certain to survive this analysis, while the less harsh version (Ginsburg's) may not (but almost surely would). Under my view of what this legislation does, the only question is whether it is "rational" to punish somebody who kills while intoxicated. The question seems to answer itself, and remember that no argument of "equal protection" has ever been used (to my knowledge) to strike down the sentences provided for criminality. If the punishment for killing while intoxicated is to be struck down, it will be stricken because of the Eighth Amendment, which I discuss below, not because of a comparison to sentences provided for other crimes, including other definitions of murder.

Ginsburg view of the statute has greater problems, I think. It requires what for the most part is a nonsensical distinction between situations in which the mental elements are not true, but in one a counterfactual analysis could more easily (whatever this might mean) conclude that the mental elements existed whereas in the other no such counterfactual analysis could easily be done. Again, I think this makes no sense for lots of reasons, including that a counterfactual world could always be constructed in which a person, appearing not to intend what he did, did in fact so intend, but put this aside. Ginsburg's argument distinguishes between two people who did not intend to kill but did, and makes one a murderer and exonerates the other, at least of murder. Even here, though, enough of an argument could be made to get by rational basis scrutiny. Fewer errors exonerating intentional murderers will be made by allowing this distinction. In a few of the cases in which "the defendant killed under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication," the defendant may actually have intended the consequences, even though a rational fact finder looking at the evidence would conclude that he was too drunk to have formulated an intent. The probability of this occurring in cases where the evidence contains nothing to suggest an intentional actor, such as hypothetical #2 above, is probably considerably less, thus justifying a distinction between the situations.

What, then, are the salient issues in the case? I think Scalia and Ginsburg are correct that the proper question to ask is the constitutionality of the substantive statute, or one that could have been created to effect the same outcome as the evidentiary rule that actually was created. The dissenters are not persuasive because their arguments would reduce to drafting advice, although prior to *Egelhoff* this argument, unpersuasive as it is, was the only coherent justification of the various Supreme Court edicts on burdens of proof. In any event, even if the Montana legislature wrote a rule of evidence, striking it down on that ground, even though a revised substantive statute effecting the same result would be permissible, merely advises the Montana legislature on how to go about its drafting. Supreme Court justices have better things to do than give drafting advice. While the distinction between a "rule of evidence" and a "substantive change" is often an understandable one, in the present context the only significance is form, not substance. If the substance of a statute survives analysis, what constitutional right is adversely affected by its form? None that I can see.¹⁰

There is more to say about the substance of this statute, though. Scalia and Ginsburg both asserted that the Montana prosecutors had to produce some evidence of the defendant's mental state.¹¹ However, at least Ginsburg understood the basic thrust of the analysis above, that a conviction for murder could be obtained even though a rational person looking at all the available (but some not admissible) evidence would conclude that the probability of an intentional act is 0.0. This is why she said that "in a prosecution for deliberate homicide, the State need not prove that the defendant 'purposely or knowingly cause[d] the death of another,' in a purely subjective sense."¹² There is no other "subjective sense" than a "purely" subjective sense applicable to actual states of mind, which means that Ginsburg is acknowledging that actual states of mind need not be proven under the Montana statute. Whether Scalia understood this or not is unclear,¹³

¹⁰ See, e.g., 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 (1977). Of course, perhaps the problem is my eyesight. See, e.g., Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977). Also, the defendant is better off with the dissent's interpretation than that of the plurality. A rule of evidence is always more lenient than a rule of strict liability in this context.

¹¹ *Egelhoff*, 116 S. Ct. at 2022-23 (plurality opinion); *Id.* at 2024 (Ginsburg, J., concurring).

¹² *Id.* at 2024 (Ginsburg, J., concurring) (quoting MONT. CODE ANN. § 45-5-102(a) (1995)).

¹³ Scalia's defense of the statute included references to historical materials that do recognize the point, however. The "exemplar of the common-law rule," according to Scalia, is: "[I]f a person that is drunk kills another, this shall be Felony, and he shall be hanged

but unmistakably this is an implication of the statute.¹⁴ Therefore, the statute should be analyzed on that basis.

The proper question to ask, in short, is whether a redefinition of murder that eliminates intentionality and voluntariness in cases involving intoxication is constitutional. That the actual statute may be interpreted to limit the redefinition to situations where there is some evidence of these mental elements (and thus to subdivide the set of individuals who kill accidentally while intoxicated) is irrelevant for precisely the reason given by Ginsburg and Scalia for ignoring the evidentiary interpretation of the statute advanced by the dissenters: It is the substance of the matter which should control. Even if the Montana statute demands some evidence of the mental elements (which on its face I do not believe it does), that evidence could be completely unpersuasive considered in context. Thus, the constitutional analysis should turn on whether the mental elements of murder may be eliminated in the presence of proof of intoxication.

Well, can they? I guess so, since that is what *Egelhoff* stands for, a point concurred in by some of the dissenters.¹⁵ Nonetheless, I think the result shockingly, although understandably, wrong. The decision is shockingly wrong because it essentially eliminates the Eighth Amendment Cruel and Unusual Punishment Clause as a constraint on the proportionality of punishment. More precisely, it continues the Court's progression of reducing the proportionality component of the Eighth Amendment to virtual nonsignificance, and erects nothing in its place.

The real question in *Egelhoff* is precisely the same question at the center of the debate over presumptions and affirmative defenses that began some twenty years ago. That question is whether there are constitutional constraints on the redefinition of traditional substantive criminal offenses.¹⁶ Presumptions and affirmative defenses have precisely the same effect as the Montana statute. They change the requisite burden of persuasion or eliminate elements entirely, just as in

for it, and yet he did it through Ignorance, for when he was drunk he had *no Understanding* nor Memory; but inasmuch as that Ignorance was occasioned by his own Act and Folly, and he might have avoided it, he shall not be privileged thereby." *Id.* at 2018 (plurality opinion) (quoting *Reniger v. Fogossa*, 75 Eng. Rep. 1, 31 (K.B. 1550)).

¹⁴ O'Connor saw the point: "[The State's] interest is to ensure that even a defendant who lacked the required mental-state element—and is therefore not guilty—is nevertheless convicted of the offense." *Id.* at 2028 (O'Connor, J., dissenting).

¹⁵ See *id.* at 2032 (Souter, J., dissenting). O'Connor was more ambiguous. See *id.* at 2031 (O'Connor, J., dissenting). Breyer and Stevens withheld judgment. *Id.* at 2035. (Breyer, J., dissenting).

¹⁶ There are other kinds of constitutional constraints. I put them aside.

Egelhoff. Following *Mullaney v. Wilbur*,¹⁷ which struck down Maine's common law defense of provocation, it appeared not only as though the answer to the question whether there are constitutional limits on the definition of criminality was yes, but also that no affirmative defenses were allowable.¹⁸ This was too much for the Court, rightly so, and in *Patterson v. New York*¹⁹ it upheld a functionally identical statute articulated in the vocabulary of the Model Penal Code, signaling that it had erred in *Mullaney*.²⁰

The *Patterson* Court did not seem to be signaling that it had erred in *Winship*, the progenitor of the line, however. Indeed, at one point, it seemed to signal that it was adopting the most promising of the lines of analysis developed to explain the constitutional interest in the reasonable doubt standard, which is that the state must prove beyond reasonable doubt every fact necessary to ensure that the sentence is not disproportional to the crime.²¹ This interpretation of *Patterson* recognized that *Mullaney* was overruled, but that *Winship* remained viable. *Martin v. Ohio*²² casts doubt on the viability of *Winship* by upholding the affirmative defense of self-defense. If a person acting in self-defense can be convicted of murder, rather obviously very little is left of the proportionality argument.

Following *Martin*, only one issue seemed to be open: could a state eliminate intentionality from its definition of murder? *Egelhoff* quite clearly answers that question in the affirmative, at least in the presence of intoxication. I suspect that really does leave only one unanswered question: Can an accidental death in the presence of no culpable behavior be punished as murder? One hopes the answer to that question is no, but it is difficult to see an answer leading to that result that would also not lead to the conclusion that *Martin* and *Egelhoff* are wrongly decided or have other, remarkable, consequences. Consider, for example, the implications of resting the decision on the actual argument that Scalia and Ginsburg relied on, which depends on the production of some evidence of the mental elements. If it satisfies constitutional demands that "some evidence" of the necessary elements is adduced at trial, then *Winship*, which required that every fact necessary to establish criminality must be proven beyond reasonable doubt, has been overruled, and states may impose virtually any

¹⁷ 421 U.S. 684 (1975).

¹⁸ See Ronald J. Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977).

¹⁹ 432 U.S. 197 (1977).

²⁰ See Allen, *supra* note 9.

²¹ *Patterson*, 432 U.S. at 209 n.11.

²² 480 U.S. 228 (1987).

burden of persuasion on the elements of criminal offenses.

Winship may very well have been eliminated as an independent constitutional doctrine. In rejecting the state supreme court's argument about the shift in the relative burden of persuasion, Scalia asserted, apparently with Ginsburg's concurrence (for a total of 5):

What the court evidently meant is that, by excluding a significant line of evidence that might refute *mens rea*, the statute made it easier for the State to meet the requirement of proving *mens rea* beyond a reasonable doubt—reduced the burden in the sense of making the burden easier to bear. But *any* evidentiary rule can have that effect. “Reducing” the State's burden in this manner is not unconstitutional, unless the rule of evidence itself violates a fundamental principle of fairness (which, as discussed, this one does not). We have “reject[ed] the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions.”²³

This passage at face value asserts that, generally speaking, nothing stops a state from shifting the relative burden of persuasion; if that is true, it is hard to see what stops a state from shifting the explicit burdens. After all, substance, not form, should control.

As the plurality cast doubt on the continuing viability of *Winship*, it also as a corollary cast doubt on the meaning of *Chambers v. Mississippi*.²⁴ Most observers would have concurred with the Montana Supreme Court's reading of *Chambers*—that it creates an independent due process right to the admission of exculpatory evidence at trial. Perhaps most would not agree that “all” relevant evidence has to be admitted, but most of it does; and the more important the evidence, the greater its centrality to the case, the weightier is the argument for admissibility. Not so, said Scalia. All *Chambers* dealt with was the implications of a few erroneous evidentiary rulings:

Thus, the holding of *Chambers*—if one can be discerned from such a fact-intensive case—is certainly not that a defendant is denied “a fair opportunity to defend against the State's accusations” whenever “critical evidence” favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.²⁵

But, the rulings in *Chambers* were not erroneous under state law, and nothing in *Chambers* asserts they were. The only “error” in *Chambers* was that state law disadvantaged the defendant by making it more difficult to present a defense, which was held to violate due process (and is precisely the claim made by Egelhoff). Scalia's construction of

²³ *Egelhoff*, 116 S. Ct. at 2023 (plurality opinion) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 89 n.5 (1986)).

²⁴ 410 U.S. 284 (1973).

²⁵ *Egelhoff*, 116 S. Ct. at 2022 (plurality opinion).

Chambers is thus a repudiation of what it actually held, and converts it from articulating the free-standing principle of a defendant's right to present a defense into an exercise in policy review, and a curious one at that. Scalia has to be claiming that the evidentiary rulings were erroneous as a matter of federal law, since the Court has no power to review state law, but that makes no sense. In the context of *Chambers*, no federal issue is implicated by the state's construction of its own evidence rules, except the right to present a defense, which is undoubtedly why that right was the only one discussed by the *Chambers* court. The obvious implication is that the case is a dead letter. No general ground exists for reexamining state evidentiary policy, and if that is what *Chambers* did, it obviously was a mistake. Furthermore, if a defendant can be disadvantaged by an evidence rule concerning intoxication, why not by hearsay and voucher rules? Indeed, as the *Chambers* opinion demonstrates, many states had rules quite similar to Mississippi's. Employing the *Egelhoff* test of whether a state rule violates deeply rooted principles again generates the conclusion that *Chambers* was wrongly decided if, as the plurality in *Egelhoff* apparently asserts, the right to present a defense given the state's definition of elements is not a free-standing, deeply rooted principle.²⁶

Perhaps *Egelhoff* will come to rest on the second of the plausible arguments made about the limits of the State's power to define criminality in this context, which is that the common law form of criminality must be respected.²⁷ If that is the case, again I think the decision erroneous. The common law required proof of mental elements beyond reasonable doubt, not just the adducing of some implausible evidence of them, and permitted alcohol to negate "specific intent."²⁸ Scalia and Ginsburg's arguments respect the form of the common law form of criminality, but not its substance. And again, as they responded to the dissenters in *Egelhoff*, it is the substance of things that

²⁶ And if evidence rules merely define substantive liability, then again *Chambers* is a dead letter. Evidence rules could not impede the right to present a defense; rather, they would identify the substantive contours of liability.

²⁷ Allen, *supra* note 9, at 342-48; John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in Criminal Law*, 88 YALE L. J. 1325 (1979).

²⁸ The relevant common law did, in any event, which in my view is the law of this century. Citations to the common law of England of centuries past strike me as peculiarly unhelpful. If you go back far enough, you can find just about anything you like, ranging from no common law of crime to strict liability to highly particularized mental elements. What Scalia and others who use this argument neglect is that the "common law" is (was) constantly evolving, and thus they tend to make the mistake of pointing at a certain period as definitive or as beginning the definitive period without any explanation as to why that point in time is significant. More to the point, the views of the elite classes of earlier centuries bear no obvious relationship to contemporary problems. The idea that a modern, complex, urban culture like ours is explainable or should somehow be constrained or even influenced by the views of Coke, Hale and Blackstone borders on the ridiculous.

matters, not their form.

Following *Egelhoff*, then, individuals can be punished as murderers who are not proved beyond reasonable doubt to have committed a voluntary act with the intent to bring about the prohibited result, a result that can be reached either through the formal redefinition of crime or through the exclusion of evidence on particular elements. That is why it is shocking. It permits the most serious punishment we impose, apart from capital punishment, for an act whose culpability is measured by the wrongdoing implicit in drinking rather than the intentional killing of another human being. It is nonetheless understandable for two reasons. The first has to do with the difficulties and implications of encouraging the growth of a robust proportionality analysis; the second has to do with the consistent failure of the Supreme Court to follow through on its criminal law initiatives. I discuss these points in turn.

In retrospect, I think it clear that one explanation for the reversal of the Court's direction from *Mullaney* to *Patterson* is its recognition that substantive limitations on the definition of criminality tied to the idea of proportional punishment could create a horrible morass for the federal courts. The difficulties of tying proportionality review to burdens of persuasion have been adequately discussed in the literature²⁹ and need not be repeated here. It is sufficient to note that every fact relevant to degree of criminality or punishment could be swept up within the scope of a proportionality review. That could in turn generate a highly intrusive review of state criminal processes by the federal courts, and essentially shift sentencing authority from the state courts to the federal courts. Part of that review would entail sufficiency of the evidence review to determine that necessary facts were proven, in the federal court's mind, beyond reasonable doubt. Thus, not only could proportionality review bring state sentencing practices under the review and regulation of the federal courts; it could also bring the entire evidentiary process along for the ride. To a Court obviously trying to disentangle the federal courts from other kinds of intensive reviews of state law (death penalty, habeas corpus, abortion, reluctance to review even outrageous punitive damages awards), the prospect of substituting intensive reviews of state sentencing practices and sufficiency of the evidence would not be attractive.

The second reason that the Court's otherwise curious progression from *Winship* through *Mullaney* and *Patterson* to *Martin* and *Egelhoff*³⁰ is not all that curious is that it mirrors virtually every other foray

²⁹ See, e.g., Allen, *supra* note 17; Allen, *supra* note 9; Underwood, *supra* note 9.

³⁰ Actually, the plurality would even undercut what little there is of *Martin*. See *Egelhoff*,

of the Court into the constitutional aspects of the substantive criminal law, all of which are typified by early cases that seem to have lurking in them grand pronouncements that would curtail state control over the criminal law. In each case, those grand pronouncements were ground down to virtual insignificance in subsequent cases. The reversal from *Mullaney* to *Patterson* in just two years is one striking example. The checkered history of *Morissette v. United States*³¹ that apparently converted a potentially grand constitutional pronouncement into a rule of statutory interpretation is another.³² I think the progression from *Thompson v. City of Louisville*³³ to *Jackson v. Virginia*,³⁴ is similar. *Thompson* can be seen as laying the groundwork for generalized sufficiency of the evidence review. *Jackson* embraces the suggestion but immediately reduces it to practical insignificance: "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."³⁵ If, in the language of *Thompson*, there is any evidence of guilt, it will almost always meet the *Jackson* standard. *Robinson v. California*³⁶ had the potential to introduce a constitutionally required therapeutic regime to the substantive criminal law. Six years later, *Powell v. Texas*³⁷ put an end to such speculation.³⁸

These two points—the difficulty of a proportionality analysis and the failure of the Court's constitutional criminal law initiatives to mature—are closely related. The second is just a generalization of the first. All of these initiatives are similar to the burden of proof cases in their capacity to transfer seriously difficult and politicized issues from the states' legal and political processes to the forum of constitutional review in federal court. Quite sensibly, the Supreme Court does not want to mandate such large scale transfers of authority, especially not in such traditional state domains as the substantive criminal law.

The difficulty, if there is one, is that the failure to extend federal authority through constitutional decisions leaves no tools to deal with aberrational statutes like Montana's.³⁹ But perhaps there is nothing

116 S. Ct. at 2023 (plurality opinion).

³¹ 342 U.S. 246 (1952).

³² See JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 199-221 (3d ed. 1996).

³³ 362 U.S. 199 (1960).

³⁴ 443 U.S. 307 (1979).

³⁵ *Id.* at 319.

³⁶ 370 U.S. 660 (1962).

³⁷ 392 U.S. 514 (1968).

³⁸ See SANFORD H. KADISH & STEVEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 1011-37 (3d ed. 1995).

³⁹ Although it is not all that aberrational. *Id.*

to deal with. Perhaps the scope of the substantive criminal law and punishment are simply matters to be negotiated by the population and the legislature. That appeals to my basic instincts about appropriate governmental structures, but violates my sense that explicit provisions of legitimate law should not be simply ignored. Leaving the scope of punishment solely to state legislatures makes the Eighth Amendment Cruel and Unusual Punishment Clause largely a dead letter, save only for its implications in capital cases.⁴⁰ Maybe it should be a dead letter, the historical conditions giving rise to it largely having abated. My own preference is to maintain a rough proportionality requirement, perhaps one analogous to the rough sufficiency of the evidence review generated by *Jackson*, although one can reach this conclusion only after traversing a difficult road littered with such obstacles as original intent, the implications of changing social conditions for constitutional analysis, and the meaning of Fourteenth Amendment due process of law. The path down this road is so highly idiosyncratic that perhaps nothing useful can be said of it, and this point alone may stand as a ringing vindication of what the Court did in *Egelhoff*.

So, from start to finish, *Egelhoff* is an astonishing case. No matter how the statute is construed, it permits convictions for murder even though mental elements are not functionally, even though maybe formally, proved beyond reasonable doubt. It thus at a minimum continues the reduction of *In re Winship* to practical insignificance. The case solidifies the Supreme Court's indifference to the relationship between culpability and punishment, continuing also the reduction of the proportionality component of the Cruel and Unusual Punishment Clause to practical insignificance. And perhaps most astonishingly of all, in passing it casts considerable doubt on the meaning, indeed the very existence, of a defendant's right to present a defense. Of course, like the good ambiguous picture that it is, all these perceptions melt away if the statute is viewed as presenting the question of a state's power over the criminal law. If that power is plenary, which may be the message of *Egelhoff*, none of these implications are "astonishing" at all.

Many, but by no means all, of the astonishing perceptions also

⁴⁰ The proportionality concept is largely a dead lead anyway, under contemporary Supreme Court opinions. The Court has upheld egregiously punitive sanctions: *Rummel v. Estelle*, 445 U.S. 263 (1980) (life sentence under a recidivist statute for three crimes of fraud that netted less than \$230.00); *Hutto v. Davis*, 454 U.S. 370 (1982) (40 year sentence for possession and distribution of approximately 9 ounces of marijuana). The Court did strike down a life sentence for uttering a "no-account" check for less than \$100 in *Solem v. Helm*, 463 U.S. 277 (1983).

melt away if the case is viewed as simply about intoxication, for which there is some support tucked away in footnotes.⁴¹ Those same footnotes also suggest another perspective that also reduces to some extent the astonishment. In one Scalia asserts: "So long as the category of excluded evidence is selected on a basis that has good and traditional policy support, it ought to be valid";⁴² in the other: "[T]he historical disallowance of intoxication evidence sheds light upon what our society has understood by a 'fair opportunity to put forward a defense.'⁴³ If these passages simply mean that historical practice is relevant to constitutional adjudication, they are banal, of course. If they mean that the historical social disapproval of intoxication is relevant to the constitutionality of the Montana statute, then again banality is obvious. If they mean that the historical social disapproval of intoxication allows an intoxicated person who kills accidentally to be branded and sentenced as a murderer, astonishment begins to creep back in. And if they mean that the views of Coke, Hale, and Blackstone on peneological policy are of substantial significance in adjudicating the constitutionality of state penal statutes, full blown astonishment returns. These are the same gentlemen who believed, among many other quaint beliefs, that an age of majority (and thus criminal responsibility) ranging upward from age seven years old is acceptable, whose beliefs gave rise and sustenance to the bloody code of England, with its more than 200 capital offenses and under which individuals as young as ten were executed for stealing necessities.⁴⁴ Perhaps these passages mean only that our historical practices, and those of England, provide interesting data to be viewed through the lens of contemporary problems. So viewed, forbidding leniency because of intoxication is certainly acceptable, but equally clear should be that punishing an accidental killing as murder because the defendant was drunk is not.

I have one last point, which if valid rather ironically resuscitates the dissent in *Egelhoff*. It is based on another ambiguous picture slightly different from the one so far considered. So far my argument has rested on the point that if a rule of evidence can be reduced to a substantive criminal provision, then the constitutionality of the statute should be determined by the appropriateness of the substantive provision. If Scalia and Ginsburg are right, and on this point it looks to me like they are, every evidentiary rule can be reduced to a substantive

⁴¹ *Montana v. Egelhoff*, 116 S. Ct. 2013, 2017 n.1, 2021 n.6 (1996).

⁴² *Id.* at 2017 n.1.

⁴³ *Id.* at 2021 n.6.

⁴⁴ See Sara Sun Beale & Paul H. Haagen, *Revenge for the Condemned*, 94 MICH. L. REV. 1622 (1996).

provision. Suppose a state decided to exclude hearsay evidence on lack of intentionality—the argument that this can be construed as a “substantive” change to the law is precisely identical to that used in *Egelhoff*. “Hearsay evidence” is simply substituted for “evidence of intoxication.” Suppose further that all such statutes are acceptable redefinitions of crimes, a la *Egelhoff*. Legislatures may then preempt the essential distinguishing trait of courts, which I think is the individualized consideration of rights and obligations based on free evaluation of the evidence. A few words on this, and I will close.

In our jurisprudence, the legislative power extends to the creation of rules of general applicability, the judicial to the decision in particular cases. If a legislature can specify the implications of particular pieces of evidence, this pragmatic distinction between legislatures and courts is considerably reduced, perhaps even eliminated. An old Supreme Court case makes the point very well. *United States v. Klein*⁴⁵ now is mostly remembered as holding that Congress cannot by statute affect the scope of the Presidential pardon power. This is a misreading of the case. The Court makes the point, but as an afterthought. Its primary argument focuses on something else:

But the language of the [legislative] proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or acceptance, summarily made on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed. . . .

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

⁴⁵ 80 U.S. 128 (1872).

. . . the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.⁴⁶

So, we end where we began, with another ambiguous picture. According to the *Klein* court, prescribing the effect of evidence violates the judicial power, indeed tramples on the crucial distinction between the legislative and juridical powers. There is much to be said for the *Klein* view, although one thing that cannot be said is that modern courts have paid much attention to its lessons. Today, it is simply accepted that legislatures may prescribe rules of evidence for the courts. The Federal Rules of Evidence are a legislative creature, for example. The Court has even approved the legislative prescribing of the effect of particular kinds of evidence. *Usery v. Turner Elkhorn Mining Co.*⁴⁷ dealt with, among many other things, a federal statute forbidding the denial of black lung benefits solely of the basis of an x-ray. Without any apparent recognition of the depth of the problem, the Court found this acceptable, commenting that of course Congress has plenary authority over rules of evidence.

But if congressional authority over evidence is plenary, what does separate the legislative function from the judicial? This is the deepest question posed by *Egelhoff*, and it raises a related one. Everyone seemed to agree that the Montana courts had construed its statute to not eliminate the requirement of purpose and knowledge, even when a person was intoxicated. The Montana courts accepted, in other words, the dissenters' views. Even if all the previous arguments are accurate that the evidentiary interpretation of the statute collapses into the substantive one, still according to the Montana court, the legislature had not eliminated these elements. They merely prescribed rules of evidence that have the effect of generating conclusions that the elements are true, even though the courts exercising their own judgment on the evidence as a whole would have come to a different conclusion. But that is tantamount—nay, it is precisely—instructing the courts to give a certain effect to evidence, one different from that which the courts would give. If the statute is taken as construed by the highest court of the state, the normal principle of review of state statutes, then the question in *Egelhoff* is not whether the legislature can define the elements of criminality; rather, it is whether it can prescribe the effect of evidence and by doing so undermine or restrict the essential judicial function of particularized decision based on free

⁴⁶ *Id.* at 145-47.

⁴⁷ 428 U.S. 1 (1976).

evaluation of the evidence.

Klein said it could not; *Usery* said it can. Frankly, I don't see how *Usery* can be maintained and a robust distinction between courts and legislatures maintained at the same time. The modern age has neglected a profound problem, I think, with its too casual acknowledgment of plenary legislative authority over rules of evidence. Or is *Klein* just wrong, unsuited for modern times? I think it best to leave that question for the commentators, whose views follow immediately.

E-MAIL DEBATE AMONG COMMENTATORS

FROM: JOSHUA DRESSLER

I can think of no one better qualified to dissect *Montana v. Egelhoff* than Ron Allen, one of our nation's foremost scholars of evidence and criminal procedure, and the author of some of the most important articles on the law of presumptions.

I use the word "dissect" purposely because, I am afraid, Allen is studying the corpse of *In re Winship*. Short of a High Court-induced Resurrection, *Winship* is dead. Oh, it will remain technically true that criminal defendants are presumed innocent, and that the Government must prove guilt of a "crime" beyond a reasonable doubt, but the Court has sent the message—not once, but at least three times (*Patterson v. New York*, *Martin v. Ohio*, and now *Egelhoff*)—that this presumption is a technicality that need not long delay any legislature with contempt for the first principle of our criminal justice system.

Allen's analysis of *Egelhoff* and the current state of presumption law is persuasive and, as is always the case with his work, thoughtful, moderate (even understated), and rational. I would not presume (no pun intended) to take exception here with anything he has written about the case. (I leave that to others. Good luck.) Instead, I would like to focus on another important observation by Allen, one that I think deserves attention. Unlike with Ron's piece, my brief comments here will be immoderate (translation: a bit overstated). The temptations of Internet are too strong, alas.

Egelhoff is a sign of something bigger than even the death of *Winship*. It is a symptom—another symptom—of the fact that the Supreme Court is a victim of IGPS (Inchoate Grand Pronouncement Syndrome). Allen makes the point more diplomatically than I. He says that *Egelhoff*

mirrors virtually every other foray of the Court into the constitutional aspects of the substantive criminal law, all of which are typified by early cases that seem to have lurking in them grand pronouncements that would curtail state control over the criminal law. In each case, those grand pronouncements were ground down to virtual insignificance in

subsequent cases.

One example of IGPS, cited by Allen, is the Court's treatment of strict liability. In *Morissette v. United States*, the Justices seemed on the verge of saying that a person may not be convicted of a crime in the absence of proof of moral guilt by the actor. But, the Court marched up the mens rea hill only to back down and leave the matters in legislative hands. Herbert Packer would mock the Justices by saying that, based on the case law, "mens rea is an important requirement, but is not a constitutional requirement, except sometimes." See Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 107.

I prefer to focus here on three other lines of cases. First, there is *Robinson v. California*. In *Robinson*, the Court seemed oh-so-close to incorporating into the Constitution a just deserts principle: the Eighth Amendment prohibition on cruel and unusual punishment bars a State from using its criminal laws to punish a person for conduct that is the result of a condition beyond his or her control. Now, maybe this would have been too broad a principle (as I have tried to suggest in some of my excuse writings, I think it is), but it was a Grand Pronouncement in the making. The Court soon backed away (even in an opinion by Justice Marshall). After *Powell v. Texas*, all that was left of *Robinson* was the principle that a State may not punish a person for a status; a person may only be punished for conduct (but not necessarily even "voluntary" conduct). In today's world even *Powell* is a nice statement, one that I am not at all sure the current Court would make, but it moved the Justices far away from the GP of *Robinson*.

Then, we have *Coker v. Georgia*, where Justice White announced for the Court that the Eighth Amendment prevented Georgia from executing a recidivist rapist/murder and life term for rape, for the simple reason that, on the present occasion, the convicted man did not take a life. In essence—the lurking GP—was this: the Eighth Amendment bar on grossly disproportional punishment incorporates the retributive principle of just deserts (or, more accurately, the idea that even if the general justifying aim of the criminal law is utilitarian in nature, a matter for legislative determination, a state must honor certain retributive limits on utilitarianism, one of which is that punishment must not be retributively grossly disproportional). But, this GP died on the vine (if I may mix my metaphors), when the Court, 5-4, stood aside and allowed Texas to impose a life sentence on a minor league thief who had taken a third strike (*Rummel v. Estelle*). After a brief hiccup (*Solem v. Helm*), the Court effectively buried the proportionality principle (and *Coker's* GP reading of it) in non-capital cases in *Harmelin v. Michigan*.

And, now, we have the *Winship* line. *Mullaney v. Wilbur* seemed to

warn States that the Court was going to take the presumption of innocence seriously. The high court came close to saying that the State would have to carry the burden of proof, beyond a reasonable doubt, of disproving any defense or mitigating circumstance (or, at least, any one with an historical pedigree). Thus, it was taking seriously the idea that culpability (among other factors of a crime) mattered. *Patterson* implicitly overruled *Mullaney*, and showed us that a legislature could avoid the strictures of *Winship* by creative statutory drafting. *Egelhoff* shows that a State can do the same by inartful drafting. We are left with precious little of *Winship* except White's bland assurance in *Patterson* that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime" and that it "cannot 'validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.'" (Of course, after *Egelhoff*, there need not be many facts essential to guilt.)

What do these Great Pronouncements That Never Were have in common? In each of these lines of cases the Court seemed on the verge of realizing and saying something important, namely, that the criminal law is very different from civil law—so fundamentally so that it justifies constitutional recognition. Henry Hart made the point about the criminal law decades ago when he said that a criminal offense "is not simply anything which a legislature chooses to call a 'crime.' It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a 'criminal' penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community." [Hart, *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs* 401 (1958).]

In a world run by Lady Wootton [see "The Function of the Courts: Penal or Preventive?" in her book, *Crime and Criminal Law*] or Karl Menninger, Hart's observation might seem nonsensical. [Menninger wrote in his classic book, *The Crime of Punishment* (1968) that "the very word 'justice' irritates scientists. No surgeon expects to be asked if an operation for cancer is just or not."] To them, the purpose of the criminal and civil law is to work together to repress crime and treat criminals. In their view, there is little justification for drawing a firm line in the sand between civil and criminal commitment. But, in a society that believes that it is wrong to condemn people who are morally innocent or, to condemn persons more than they deserve, *Winship* had something profound to say—a genuinely Grand Pronouncement. Although the Court, even then afraid of GPs, tried

to couch the presumption of innocence on consequentialist grounds, the real point of *Winship* was deontological: “the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.” (Harlan, J., concurring in *Winship*.) This value is based on the idea that there is something special—different—about a *criminal* conviction—the community condemnatory feature Hart had in mind.

Hart has complained that “[i]f one were to judge from the notions apparently underlying judicial opinions, and the overt language of some of them, the solution of the puzzle [of what distinguishes criminal wrongs from civil wrongs] is simply that a crime is anything which is called a crime So vacant a concept is a betrayal of intellectual bankruptcy.”

How right he was. The Supreme Court, in particular, has provided us with a set of labels, most notably the labels “crime” and “criminal justice system” that are shells. They are bodies without a soul, at least, none that is visible in a constitutional realm. (We are apt to see that again when the Court hands down its opinion on sexual predator laws.) Now, in part, I concede that I sympathize with those who say that the Court is right not to be seduced into making Great Constitutional Pronouncements. After all, who are they to say to legislatures that they must recognize just desert principles in their laws? Isn’t that classically a matter for public debate and democratic resolution? But, we are talking here about some very basic principles of justice that, according to Justice Jackson are (were?) “as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” [*Morissette v. United States*].

That was a Grand Pronouncement, but one that the Court does not seem likely to repeat in the realm of criminal law anytime soon. *Egelhoff* shows us that the a majority of the Justices have a very cramped vision of their role as Justices. A Court that is prepared to say that a person may be punished for murder if he kills while voluntarily intoxicated (regardless of his genuine state of mind); or a Court that upholds a statute that requires a state to prove mens rea, but then allows the state to prevent the defendant from introducing relevant evidence that might raise a reasonable doubt regarding mens rea [these are among the possible readings of *Egelhoff*] is a Court that really does not believe that there is anything special about the criminal law (or, at least, anything special enough to deserve protection).

Soon, there may not be.

FROM: CHARLES NESSON

I've just read Ron's fine comment on *Egelhoff*. A significant part of his analysis turns on his assertion that the Ginsburg approach would permit "a conviction for murder . . . even though a rational person looking at all the available (but some not admissible) evidence would conclude that the probability of an intentional act is 0.0." That takes Ron to what he considers "the proper question to ask,"—i.e., "whether a redefinition of murder that eliminates intentionality and voluntariness in cases involving intoxication is constitutional." In the note appended below (written before seeing Ron's piece, but which, in number of ways, joins it nicely), I question whether Ginsburg (and Montana) would interpret the statute as Ron suggests. This, in turn, leads to a different view of the proper question to ask.

Hurrah for Ginsburg! She's the only one who got it right, full of good sense, and joined by nobody!

The case that first got me thinking about this issue is *People v. Register*, from New York. A guy comes into a bar carrying a gun, gets roaring drunk, gets into a fight and shoots another guy in the stomach, killing him. He's prosecuted under New York law for murder in the second degree. The New York court instructs the jury that it should not consider his intoxication in determining whether he acted with "depraved indifference" (the key phrase defining second degree murder in New York). The crime, says the New York court, is to be judged by objective standards.

Breyer says, that doesn't make any sense: Judging by objective standards would mean that intentionally sideswiping a car would look like negligence, and negligently running down a pedestrian in a crosswalk would look like intentional murder. Breyer is right, but only if he takes the "objective" language literally and to an extreme to which it need not be taken. He is assuming that evidence of inebriation would not be permitted to distinguish intentional crime from accident. In the bar room case, the defendant intended to pull the trigger and to hit his victim with the bullet. Had he claimed the shooting was an accident ("I passed out, and as I was falling I knocked over a table with a gun on it, and as it hit the floor it discharged, hitting the victim in the stomach"), there is no reason to think a court would have excluded the evidence of inebriation. Likewise, nothing in the Montana case says that Montana would ignore the classic line between intentional crime and accident. Montana, New York, and the other states that exclude evidence of intoxication do so on the issue of diminished capacity, not on the issue of accident or no capacity at all. In fact, Montana allowed *Egelhoff* to put on proof of his drunkenness in an effort (unsuccessful) to show that he was physically incapable of doing

the killings and therefore it must have been someone else. If Egelhoff claimed that he got drunk and fell down, unintentionally discharging a gun that just happened to shoot a bullet into each of the heads of his victims, we have no reason to think that Montana would bar his evidence. But, having shot two people in the head, he could not colorably claim accident. The issue of exclusion in the case is completely confined within the category of intentional crime, with the effect of the rule being to exclude evidence of intoxication only when offered to mitigate the degree of intent.

So, just because the Montana Supreme Court fell into the conventional mistake of talking about the exclusion of intoxication on the issue of murderous intent as an issue of evidence, the Supreme Court of the United States feels it has to follow suit, and in the process either screw up some very important constitutional evidence law (as the Scalia plurality opinion screws up *Chambers*) or rule that the exclusion of intoxication is unconstitutional (as the dissenters do), notwithstanding the eminent good sense of a rule that denies the voluntary drunk intentional killer a diminished capacity defense.

It is a shame that the plurality opinion goes off on its evidentiary analysis. Scalia is right, of course, when he observes that relevant evidence can be excluded even if offered by a defendant in a criminal trial. We are familiar with that idea when relevance is marginal and potential for confusion great. Rape shield laws, hearsay rules, privilege rules—all offer examples. But even in those categories I had thought a rule of reason would apply, calibrated to how probative the excluded evidence is, and how deeply its exclusion compromises a fair prospect of defense. That's what *Chambers* stood for. And now, according to Scalia, *Chambers* stands for nothing. He even misstates it, saying it was a case in which erroneous evidence rulings were so serious as to violate due process, whereas the doctrinal challenge of *Chambers* was that the evidence rulings were not erroneous. Mississippi's voucher and hearsay rules were not state of the art, but neither were they unconstitutional. It's just that, in combination, their application thwarted Chambers from putting on evidence of his innocence that seemed pretty damn powerful to the Supreme Court. The principle of the case was not that a defendant has a right to put on all relevant evidence, but rather that a state can't completely thwart a defendant from putting on credible proof that someone else did the crime. *Chambers* was interesting and important because the Court said, "even when states use lawful rules, there is still a constitutional interest in seeing that the rules produce justice."

In a footnote (note 4) Scalia acknowledges the power of Ginsburg's approach, and tries to equate his own to it, saying it makes no

difference whether a state accomplishes its result by redefining a crime or by establishing an evidence rule that makes it impossible to prove some element or defense to the crime. With this asserted equation, Scalia seems to say that his opinion must, therefore, make as much sense as Ginsburg's. This footnote, though, obscures two problems. First, if there is a valid equation, then Scalia need not have trashed *Chambers*. Since all agree that Montana could redefine the crime of murder to exclude any element of sobriety, it would follow that Montana could do the job with an evidence rule. *Chambers*, on this approach, is totally inapposite, and, therefore, need not have been distinguished (into oblivion). Second, the equation itself is highly vulnerable. Who says that a state can fiddle around with the definitions of crime indirectly through evidence rules? There is great value in maintaining the integrity of the process of proof, not allowing it to be undercut by irrebuttable presumptions and other forms of Catch-22 provisions that simultaneously offer defenses and then foreclose all means of proving them. The dissenters (including Breyer) were clearly inspired by the idea that "due process" embodies a principle that law should not speak with a forked tongue. Evidence rules should be rational. The process of proof should have integrity, regardless of what is being proved. Substantive changes in the elements of crimes should be made by changes in the substantive law, not by manipulating the rules of proof in ways that undercut their rationality. Scalia's footnote bypasses this idea (and the whole dissenting position) without explanation, or even recognition.

My question, on this second "forked tongue" principle, is whether the Montana rule implicates it. It's not like Montana said: "Burglary is breaking and entering in the night. We now establish an evidence rule that a defendant can't prove it was day." This would be a real Catch-22. The Montana intoxication rule is quite different. The "intent" element of murder is much more obscure, and therefore an evidence rule as a means of clarifying it seems much less arbitrary. The Montana murder law specifies killing which is "purposeful or knowledgeable." One could easily understand this aggregation of mental states to mean "not accidental." "Purpose" plus "or knowledge" = intentional = not accident. That's perfectly plausible. It is not apparent that "sobriety" or "clear-headedness" is an element of intentionality. Given this obscurity, Montana's choice to proceed by an evidence rule hardly seems an example of speaking with forked tongue. Ginsburg makes a pretty good point in noticing that the Montana rule is not even included in its evidence section, but rather is included in the sections that define the crimes.

The dissent can point to the fact that the Montana Supreme

Court said that evidence of intoxication was “obviously” relevant to the intent element of murder, which would seem to imply an interpretation of the Montana murder statute to include a requirement of clear-headedness. But even so, doesn’t the good sense of Ginsburg’s approach warrant at least a remand to Montana to see if they want to stick with their unnecessarily narrow reading of the intoxication statute as merely an evidence rule?

The bottom line, unfortunately, is a plurality opinion that unnecessarily trashes constitutional commitment to rationality in rules of proof, judged both by their procedural integrity and their substantive outcome, and even worse, trashes the basic principle of justice that *Chambers* bravely stood for.

FROM: DONALD R. STUART

Egelhoff appears to confirm that there is no constitutional principle in the United States under the due process clause or the Eighth Amendment against a legislature removing any meaningful fault requirement from a crime as serious as murder or preventing the trier of fact from considering evidence of intoxication relevant to a determination of intent. There also appears to be no constitutional violation of the presumption of innocence where the legislature removes the element of fault or creates an affirmative defence with the persuasive burden of proof on the accused. Please correct this crazy Canadian if I am wrong!

Ron Allen vacillates in his reaction. At several points he finds the result “shocking” but at pages 648 and 650 he states that “the idea of proportional punishment could create a horrible morass for the federal courts” and “Perhaps the scope of the substantive criminal law and punishment are simply matters to be negotiated by the population and the legislature.” Joshua Dressler also writes of the need for “Grand Pronouncements” but concedes at that he sympathizes with “those who say that the Court is right not to be seduced into making Great Constitutional Pronouncements.”

Why the hesitation? In law and order times politicians cannot be relied upon to assert basic principles of justice to protect the accused. There are no votes in being soft on crime. It may be undemocratic but I find it laudable that the Supreme Court of Canada, interpreting a Charter of Rights only entrenched in 1982, has asserted the following constitutional standards:

- (1) fault is required for penal responsibility whenever there is a threat to liberty;
- (2) the act must have been voluntary;
- (3) punishment must be proportionate and in particular intentional

acts must be punished more than negligent conduct; and (4) any persuasive burden of proof on the accused violates the presumption of innocence. (Under the Canadian Charter the State may persuade a Court that a violation is demonstrably justified.)

If the United States Supreme Court is so hands off do criminal law scholars have a responsibility to speak out at every opportunity?

It seems odd that the *Egelhoff* due process analysis turns so much on the state of U.K. law in the 19th century and earlier. Sir James Stephen (the author of the 1892 Canadian Criminal Code) said the following about Blackstone: "Blackstone was neither a profound nor an accurate thinker, and he carried respect for the system which he administered and described to a length that blinded him to its defects, and lead him in many instances to write in a tone of courtly, overstrained praise which seems absurd to our generation."

What of the 70-plus year 20th century history of the (unfortunate) House of Lords compromise that voluntary intoxication is a defence to so-called "specific" intent crimes or the approach of the Australian High Court to allow intoxication to be considered in any determination of intent?

In the particular context of murder, why didn't the Supreme Court consider the murder/manslaughter distinction entrenched as it is in so many Anglo-American jurisdictions? Justice Scalia relies heavily on the view that excluding drunkenness as a defence to murder will deter. If so, there should be evidence that jurisdictions with Montana style laws are safer. No such evidence is provided.

In Montana, when a drunk person kills, you must now consider the accused sober and ask whether he or she intended to kill. "Counter factual" devices surely do the law little credit. This is not to say that drunken killers never intend to kill. The circumstantial evidence in *Egelhoff* certainly points to a double assassination. But the possibility of murder conviction in any of the three hypotheticals provided by Ronald Allen strikes me as the exercise of blunderbuss State power. Most jurisdictions have fixed penalties for murder and flexible sentences for manslaughter. Doesn't a consideration of all the evidence to discover whether intent has been proved beyond reasonable doubt properly define those to be punished as murderers?

FROM: JOSEPH D. GRANO

I don't think that *Klein*, discussed at the end of Ron's article, is as broad as he makes it out to be, but I may have difficulty articulating the point.

After the Civil War, Congress passed a statute permitting the Treasury Department to sell abandoned or captured property. Any

person, however, who had never aided the enemy (i.e., the South) could claim the proceeds from such sale. What about those who had received presidential pardons? The courts had ruled that they were entitled to the proceeds from the sales.

Klein, who had a pardon, sued in the Court of Claims and won a judgment on May 26, 1869. The government filed an appeal on December 11. On April 30, 1870, the Supreme Court in another case affirmed a similar Court of Claims decision. Congress responded with a statute that not only made proof of pardon inadmissible in the Court of Claims but required the Supreme Court on appeal, in cases that turned on pardon, to dismiss the cause of action for want of jurisdiction. If the statute applied in Klein's case, its direction to the Court to dismiss the cause of action for want of jurisdiction was tantamount to ordering a reversal.

It was in this context that the Court said that the act was invalid for prescribing the rule for decision in a certain way. Nothing in *Klein* suggests that Congress can't prescribe the rules of evidence for federal courts.

Klein must also be read in conjunction with *Ex Parte McCardle*, which preceded it by only three years. In *McCardle*, the Supreme Court upheld the very controversial statute revoking appellate jurisdiction to hear appeals in habeas cases, like the one brought by McCardle (who essentially was challenging Reconstruction). Afraid, with some basis, that the Court was going to rule in McCardle's favor, Congress repealed the appellate jurisdiction it had only recently given the Court while McCardle's case awaited decision.

The Court was eager to limit *McCardle*. It got the chance in *Klein*. The Court said the act in *Klein* wasn't a real jurisdictional statute. Rather, it said the statute denied jurisdiction as a means to an end: denying pardons the effect the Court had said they had. The Court, under the statute, had jurisdiction until it determined that a certain fact (i.e. a pardon) existed. This, accordingly, was not a true exercise of the Congressional power to carve out exceptions to the Court's appellate jurisdiction.

It would be truly amazing if *Klein*, or any other case, stood for the proposition that Congress lacks the power to prescribe the rules of evidence for federal courts. First, the implied power to prescribe rules of procedure and evidence stems from the fact that Congress doesn't have to create the lower federal courts at all. Second, the necessary and proper clause gives Congress authority to pass all laws that are necessary and proper for carrying into execution all powers vested by the constitution in the United States or "in any Department or Officer

thereof.” This includes the judiciary.

Finally, I don’t know what it means to say, as Ron does in introducing *Klein*:

In our jurisprudence, the legislative power extends to the creation of rules of general applicability, the judicial to the decision in particular cases. If the legislature can specify the implications of particular pieces of evidence, the pragmatic distinction between legislatures and courts is considerably reduced, perhaps even eliminated.

FROM: DIANE AMANN

Can a legislature, Professor Allen asks, “prescribe the effect of evidence and by doing so undermine or restrict the essential judicial function of particularized decision based on free evaluation of the evidence”? In *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996), at least five Justices agree that if the Montana intoxication statute had constrained jurors to convict absent full and particularized proof of each element of the offense, the Due Process Clause would have been violated. *Id.* at 2024 (Ginsburg, J., concurring); *id.* at 2026-31 (O’Connor, J., dissenting); *id.* at 2032-34 (Souter, J., dissenting). Yet no violation was found because, in Justice Ginsburg’s view, the statute simply “redefined” the offense, and did not constrain jurors. *Id.* at 2024-26. But from the view of James Egelhoff—with which I became familiar in writing, for the National Association of Criminal Defense Lawyers, the lone amicus brief on his behalf—undue constraint of jurors’ decision-making is exactly what occurred.

Egelhoff had been found, prone and semiconscious, in the flattened back seat of a station wagon that had careened off a highway. *Montana v. Egelhoff*, 900 P.2d 260, 262 (Mont. 1995). In the front seat were a dead man and woman, a bullet through the head of each. Not only was Egelhoff “yelling obscenities” at the scene, 116 S. Ct. at 2016, he also was asking ambulance attendants, “Did you find him?” 900 P.2d at 263. There had been two guns in the car; only one was found. The State charged Egelhoff with two counts of deliberate homicide, in violation of MONT. CODE ANN. § 45-5-102 (1991), which permits imprisonment or execution of a defendant whom the State proves “purposely or knowingly cause[d] the death of another human being.” This statute attributes no significance to a defendant’s intoxication.

At trial, the State relied heavily on intoxication evidence. Through direct testimony of a State witness, jurors learned that Egelhoff’s BAC, or blood-alcohol concentration, had been .36 percent. (For some, this constitutes a lethal dose of alcohol. See DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 203 (4th ed. 1994)). The State’s evidence suggested that Egelhoff was violently drunk, though

still able to shoot the victims. 900 P.2d at 262-65. In response to the State's use of intoxication evidence, Egelhoff elicited expert testimony that with a .36 BAC, he likely was incapable of committing the homicides, and may have been suffering an alcoholic blackout at the time they occurred. The State then asked that MONT. CODE. ANN. § 45-2-203 (1991), be given as an instruction to jurors, as follows:

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

900 P.2d at 263. The trial court acceded, and Egelhoff was convicted.

This sequence of events reveals the contention that § 45-2-203 created a new offense to be a fallacy. Egelhoff was not charged with the offense of killing while intoxicated; rather, the charge of which he was given due notice was deliberate homicide, punishable only on proof that a defendant killed while possessing the requisite state of mind. Intoxication became an issue at trial, when the State adduced evidence in an effort to show that Egelhoff was drunk and violent yet capable of killing. Section 45-2-203 then emerged as a jury instruction, separate from the statement of elements of the offense. Jurors were permitted to consider intoxication evidence in support of all aspects of the State's theory. They were not free to evaluate intoxication evidence freely, however, for the instruction forbade them to consider any defense evidence undercutting the State's theory. Rather, in its instructional guise, Section 45-2-203 operated to compel jurors to convict absent sufficient particularized proof of mens rea. (Indeed, given that the State's theory related both to mental state and to physical capability, conviction may have resulted absent sufficient proof of actus reus as well).

Justice Ginsburg's contradictory view of the case both mystifies and disturbs. It mystifies because of its divination that the legislature has rewritten its homicide statute, using a method so subtle that even Montana's highest court did not discern the "redefinition." *See* 116 S. Ct. at 2033 (Souter, J., dissenting) (quoting 900 P.2d at 263-65). To require a legislature to amend its statute by a more direct method is not just "drafting advice"; at some point it is a command of the Constitution's notice requirements.

Justice Ginsburg's view disturbs because of its acceptance of the effect of "redefinition" in this case: late-in-the-day invocation of the intoxication statute to strip Egelhoff not only of his defense, but also of his most powerful evidence to challenge the State's offense. This

latter concern may be idiosyncratic. It does not relate to the question ostensibly presented; that is, whether a state may legislate against consideration of voluntary intoxication in determining mental state. *See id.* at 2016. But “highly case-specific error correction” is not, as the plurality in *Egelhoff* concedes, beyond the purview of the Court. *See id.* at 2022 (discussing *Chambers v. Mississippi*, 410 U.S. 284 (1973)). Had the Court not wished to engage in fact-specific adjudication, it should have dismissed *Egelhoff* as improvidently granted and waited for a petition that properly framed the question, rather than issuing this “astounding” decision.

FROM: RON ALLEN

Prof. Amann makes many good points. Let me stir one small corner of this pond:

Justice Ginsburg’s contradictory view of the case both mystifies and disturbs. It mystifies because of its divination that the legislature has rewritten its homicide statute, using a method so subtle that even Montana’s highest court did not discern the “redefinition.” *See* 116 S. Ct. at 2033 (Souter, J., dissenting) (quoting 900 P.2d at 263-65). To require a legislature to amend its statute by a more direct method is not just “drafting advice”; at some point it is a command of the Constitution’s notice requirements.

Perhaps there should be a notice requirement that means lay individuals should be put on notice, but there isn’t. The notice requirement is determined by whether a satisfactory legal construction can be placed on the statute. If memory serves, *Rose v. Lundy* is the best example (correct me if I have the wrong case). There a statue was upheld over a vagueness challenge on the ground that the lower court had once cited some other case that dealt with an analogous situation to the present one. Or something to that effect.

I am not so sure this is a bad thing. Could we really expect there to be true “notice” of the intricacies of the law of theft, for example?

FROM: RON ALLEN

Prof. Stuart writes:

Ron Allen vacillates in his reaction. At several points he finds the result “shocking” but at pages 648 and 650 he states that “the idea of proportional punishment could create a horrible morass for the federal courts” and “Perhaps the scope of the substantive criminal law and punishment are simply matters to be negotiated by the population and the legislature.” Joshua Dressler also writes of the need for “Grand Pronouncements” but concedes at that he sympathizes with “those who say that the Court is right not to be seduced into making Great Constitutional Pronouncements.”

Why the hesitation? Because there are serious questions of legiti-

mation. What one disapproves of may not easily map on to governmental arrangements. Moreover, suppose one took the position, as the liberals did twenty years ago, that the Court should "do the right thing." When the Court changes, and thus what it collectively thinks the "right thing" is changed, too, what ground does one have to object to the Court doing its now revised view of what the "right thing" is? Not a very good one, obviously, as the present predicament of constitutional liberals demonstrates quite dramatically. One is reduced to complaining that the Court is not doing what "I" think is the right thing, which is to most others not a very compelling argument.

FROM: RON ALLEN

Prof. Grano addresses one of most interesting, in my view, but neglected questions concerning the judicial power. He says:

It would be truly amazing if *Klein*, or any other case, stood for the proposition that Congress lacks the power to prescribe the rules of evidence for federal courts. First, the implied power to prescribe rules of procedure and evidence stems from the fact that Congress doesn't have to create the lower federal courts at all. Second, the necessary and proper clause gives Congress authority to pass all laws that are necessary and proper for carrying into execution all powers vested by the constitution in the United States or "in any Department or Officer thereof." This includes the judiciary.

Do you think that Congress could set up the lower courts and then pass a constitutional statute that says the courts must consult with their local congressmen before deciding any cases? I, actually, am a fan of greater includes the lesser arguments, but they have their limits.

Finally, I don't know what it means to say, as Ron does in introducing *Klein*:

In our jurisprudence, the legislative power extends to the creation of rules of general applicability, the judicial to the decision in particular cases. If the legislature can specify the implications of particular pieces of evidence, the pragmatic distinction between legislatures and courts is considerably reduced, perhaps even eliminated.

I am puzzled by this. Bills of Attainder are forbidden because courts, not legislatures, should decide whether conditions of liability are satisfied. If there are no constraints on the creation of rules of evidence, bills of attainder can easily be created: "Whenever Ron Allen is a party to any case whatsoever, the fact finder shall infer that the other side deserves to win." Ridiculous, of course, but I think it makes the point.

Take a less ridiculous example: *Usery*. The point of the legislation was to increase recoveries by coal miners, regardless whether they suf-

ferred from black lung disease. Why isn't that a bill of attainder in substance if not in form? Now, I raise the bill of attainder point not to convert the discussion into its nuances, but because it captures the point, I think, about the essence of the judicial function. If there are no limits on the legislative power to prescribe rules of evidence, the legislature may preempt the judicial power over facts. If so, what is left to the distinction between the two? And indeed, why couldn't "rules of evidence" be written to prescribe the outcome of legal interpretation as well?

As to his historical argument, it perfectly reflects the case, and maybe *Klein* is simply an historical anomaly. But the issue it raises isn't, I don't think. Correct me if I am wrong.

FROM: MARIANNE WESSON

Some assorted reflections on *Montana v. Egelhoff* (from one who could not stay out of the discussion despite her resolution just to lurk from time to time while doing her "real" work).

Could we view the series of cases from *Mullaney* to *Patterson* to *Sandstrom* to *Martin* to *Egelhoff* as asking the following question: When may a state offer the prosecution some relief from the heavy burden of proving every element of a crime beyond a reasonable doubt? We would count as "relief" in this sense either of the following: the assignment of some burden of proof to the defendant obligating him to refute the element (this can be accomplished through instructions, either straightforwardly, as in *Patterson*, or more subtly, as in *Sandstrom*); or a prohibition against the defendant's employment of some otherwise relevant evidence that tends to refute the element (as in *Egelhoff*). Viewed in this light, I believe the cases suggest that the answer was once "history and tradition" (*Mullaney*), then became, apparently temporarily, a sort of formal linguistic analysis of the text of the statute and of the instructions (*Patterson*, *Sandstrom*, *Martin*), and now is once again history and tradition (plurality opinion in *Egelhoff*). Note that criminal defendants can win (*Mullaney*, *Sandstrom*) as well as lose (*Patterson*, *Martin*, *Egelhoff*) under both touchstones.

Although I have quite enjoyed and agreed with much of the conversation about "Grand Constitutional Pronouncements," I am not sure I think *Egelhoff* signals a retreat from the kind of jurisprudence that would require a lofty judicial role. Indeed, I think one of the attractions of the *Patterson/Sandstrom* formalistic period is that once understood, the principle those cases suggested (well-characterized by Ron Allen as "drafting advice") could be applied by almost anyone. It required no wisdom, only a kind of bookkeeper's mentality. (Rather like the Rule Against Perpetuities. I once heard a story about a Trusts

and Estates teacher who tormented his students by bringing to class his very small daughter, who had apparently mastered the Rule and could unerringly produce the correct answer to any hypothetical requiring its application.)

I am not legal historian enough to quarrel with Justice Scalia's account of the place of the intoxication doctrines in the common law and how they interacted with the doctrine(s) of *mens rea*. His account does not smell quite right to me, and I look forward to the day when someone with more credentials than I might take it on. But it does seem to me that a doctrine that requires for its application the kind of nuanced, multi-sourced, and inherently disputable historical inquiry he produces in his opinion is more likely to lead to a larger judicial role in the adjudication of constitutional disputes over the substantive law of crimes than to a smaller. This is perhaps not a drawback to the method in the minds of some jurists. But it seems somewhat at odds with what I had taken to be Justice Scalia's jurisprudential commitments, which it would doubtless be somewhat flippant to characterize as "*Le text, c'est tout*" (although I think I will anyway).

I think I have a little more fondness than most for the now-discredited theory of this line of cases (that is, discredited by *Egelhoff*), that suggests they provided "drafting advice." The notion that a state may define crimes any way the political pressures on legislators will permit (subject to some very broad constitutional constraints like freedom of speech, press, association, and the right to privacy) has, IMHO, a lot of appeal. I also like the proposition that once they define the crimes, no fooling around with burdens or presumptions or rules of evidence designed to make the prosecutor's job easier is allowed. The respectable antecedents of this view (as Diane Amman notes) are the vagueness doctrine and the American tradition against common-law crimes. (Sure it was "formalistic," but have you read very many death penalty cases lately? I recommend the experience if you really want to see formalism run amok.) I liked *Patterson* and *Sandstrom* for their benign intentions, and their modest and comprehensible formal limitations.

So I like Justice Ginsburg's observation, also mentioned by Charles Nesson, that a careful reading of the Montana laws defining crimes would make clear to the reader that the requirement of "intention or knowledge" doesn't really apply to the intoxicated killer. It is, she says, as though the statute informed "You commit murder in Montana if you kill with intention or knowledge, unless you're drunk, in which case the intention or knowledge part doesn't matter (much)." But in the end I can't agree with her that the whole setup gives sufficient notice, because of the vagueness of that (much). Apparently in

Montana there is still a requirement that the prosecutor prove something about the defendant's mental state. Scalia says so, and so does even Ginsburg. Diane Amman's useful account makes clear that the prosecutor thought so too. It is just (as—was it David Kaye?—argues with his convincing critique of the "counterfactual" aspect of Ginsburg's reading) that it's very unclear what that requirement is. I think Ginsburg is inclined to give drafting advice, only perhaps more tolerant drafting advice than that given in *Mullaney* and *Sandstrom*. I like that in a Justice (and you gotta like a Justice who cites *The Secret Life of Walter Mitty* in a case that's not even about the law of attempt). But finally, I couldn't understand her drafting advice.

Doesn't it seem that the "historical" approach of the plurality here is presaged in *Medina v. California* (1992) and *Cooper v. Oklahoma* (1996)? In *Medina*, the Court held that California could place the burden of proving incompetence by a preponderance of the evidence on a defendant whose competency might be doubted. But in *Cooper*, the court unanimously recoiled from the assignment to the defendant of a burden to prove incompetence by clear and convincing evidence. Obviously the "formal" approach cannot justify this different treatment: under that approach, if competency were an "element" of the crime, no burden whatsoever could be placed on the defendant, and if it were not, any burden whatsoever could be assigned to the defendant. But the historical approach can, and did, justify both outcomes: the common law, history, and tradition, the majority argued in *Medina*, did or would have sanctioned the California approach. But (they held in *Cooper*) never the greater Oklahoma burden.

Another interesting parallel is the Court's consideration of confrontation clause claims by convicted defendants, which has rested heavily in recent years on whether the hearsay exception that authorized the prosecution's use of hearsay against the defendant was "firmly rooted." (If it is, the confrontation clause challenge will almost certainly fail.) Scalia has questioned this approach in confrontation cases (see the Thomas/Scalia concurrence in *White v. Illinois* (1992)), but he grasps it with enthusiasm here, even down to his use of the phrase "deeply rooted."

But perhaps the historical, "rootedness" approach will inure to the benefit of defendants. Consider, for example, the post-Hinckley Congressional enactments concerning the federal law of insanity. According to this statute, the burden of proving insanity rests on the defendant, by clear and convincing evidence. Using the formal approach, one would think this enactment perfectly constitutional: since insanity is an affirmative, rather than an element-negating, defense, any burden whatsoever may be placed on the defendant. Now, after

Cooper and *Egelhoff*, I'm not so sure.

FROM: SAMUEL PILLSBURY

I wanted to follow up on the comments of Joshua Dressler and Ronald Stuart about *Egelhoff* as an example of problems in the United States Supreme Court's approach to criminal culpability. I have some thoughts about the case as an intoxication case, then pick up on larger questions about the Supreme Court's reluctance to consider criminal law issues on their culpability merits. As to the latter, I should echo Josh's concern about going off topic—but on the premise that detours and distractions often prove to be the most memorable parts of trips, I include it as well.

Although *Egelhoff* may have broader implications, it is first and foremost an intoxication case—and a confusing one for the same reasons that many intoxication cases are—because of some bad analytic habits that legislatures and courts both employ. The assumption made by the legislature, and many of the justices, that we can sensibly treat intoxication as a unitary phenomenon in all cases is demonstrably wrong.

Ron Allen and Justice Breyer do an excellent job of pointing out that intoxication may present vital evidence about the ordinary interpretation of conduct, particularly whether harms are purposeful or accidental. Intoxication might also be relevant to the proof of the killer's identity—*Egelhoff* apparently made this argument. (See the Montana Supreme Court opinion and Diane Amann's comment.)

But in the usual homicide case, intoxication actually bolsters the prosecution's evidence of purposeful wrongdoing. Alcohol intoxication reduces inhibitions and makes persons far more likely to act on anti-social impulses than if sober. The person who feels the desire to slug someone for an obnoxious comment will restrain himself if sober but may well act on the impulse if drunk enough. Did the person purposely strike the insulter? You bet. What role did intoxication have? It lowered inhibitions, maybe it even exaggerated the original sense of injury from the comment. Intoxication made it MORE likely that the striking was purposeful, not less.

There is a separate issue about when clear-thinking, usually expressed as premeditation, is required. Montana seems to have eliminated premeditation as a murder element, a position that many support on the ground that it does not supply a reliable measure of culpability. This is consistent with the nineteenth century cases Justice Scalia cites and quotes deriding the use of intoxication to negate the deliberation/premeditation/cool thinking often associated with murder rather than manslaughter. Then there is the issue raised by *Egel-*

hoff in his defense of unconsciousness—an alcoholic blackout which might be a state like that of sleep-walking, where there is rational direction of the body but no consciousness. I will not address the factual underpinnings or moral merits of such an argument—it's enough here to recognize that it's a rather different one than others based on intoxication.

Finally, when the crime involves careless wrongdoing, intoxication may well negate the standard mens rea of recklessness, but on culpability grounds this is usually a mistake—which explains the law's general exclusion of intoxication argument here. If we focus, as many courts, commentators and legislators do, on awareness of risk, then intoxication will commonly negate that risk. (Here it's worth noting with respect to the eighteenth century quotes used by Justice Scalia—that lawyers of that day spoke of mens rea to refer to culpability generally, not necessarily the states of awareness that we predominantly use today.) Drunks do not see risks that sober people do. Does this mean that intoxication reduces culpability? Not necessarily. Awareness USUALLY correlates well with culpability.

But intoxication demonstrates the insufficiency of awareness as a true test of culpability. We blame the drunk driver for acting with indifference to the welfare of others on the street without regard to actual awareness of the danger. Awareness usually serves as a proxy for indifference—it demonstrates the attitude of not caring enough to look out for harms to others the person may do. Becoming intoxicated usually dulls awareness, but it may nevertheless serve as evidence of indifference. To the extent that the killing in *People v. Register* discussed by Charles Nesson was really a nonpurposive killing, it illustrates the point that drunken resort to violence can prove culpable indifference.

The main problem with *Egelhoff* in culpability terms is the failure to grapple with these important distinctions. Revealingly, there is little discussion, in any of the opinions, of how intoxication might have altered the culpability of Egelhoff. Is there any real possibility that the two persons in the car, found shot in the head, were killed by accident? Or by someone other than Egelhoff? Do we really think that the astonishingly intoxicated Egelhoff was a fundamentally different person for responsibility purposes than the sober Egelhoff? We need to discuss particular cases and their particular facts, as Ron Allen does with his various examples in his provocative essay, and not be satisfied with selective quotes and general observations about the dangers of the intoxicated as Justice Scalia is.

But I want to return to the question Josh Dressler emphasized—why the Court in its constitutional analysis has so often approached

culpability issues, and nearly as often shied away from them. The Court seems terrified of giving the central concept in criminal law—culpability—a constitutional dimension, despite language in the Due Process Clause and Eighth Amendment that would seem to give ample room for such a move. Very briefly—and I hope provocatively—I want to suggest a few reasons why I think the Court has made a bad choice concerning its constitutional role here. Obviously I have left off the countervailing, and significant concerns of federalism, constitutional restraint and the difficulties of culpability analysis itself.

Democratic Process. The criminally accused represent a small minority of population whose interests are normally discredited by elected officials. Why should we expect legislators to take great care or exercise good judgment in devising criminal laws that they normally expect will never apply to them or those they care about?

Time Roles—Court and Legislature. In criminal legislation particularly we have reason to fear the fads of public opinion—the crime of the week, the criminal “solution” of the week approach of legislatures. By contrast, on culpability issues courts bring to the table a valued sense of history, of long-term concerns with regard to culpability rather than simply short-term concerns with dangerousness.

Justice Writ Large and Small. Legislatures properly set general policy about criminal justice, but by their nature such institutions have a hard time imagining and focussing on the many individual nuances involved. Only courts face the faces—see the individuals and deal with their individual justice claims.

Discrimination and the Mask of Discretion. Most bad culpability rules—rules that make culpability determinations at odds with our best intuitions—will not become public controversies because their effects are often masked by the presumed judicious exercise of prosecutorial discretion. We assume—and generally it is true—prosecutors would not seek a murder conviction in a case of truly accidental homicide like the second example described by Ron Allen. But when the defendant is a member of the politically powerless, when he has a criminal record, when the police for whatever reason think he’s a real dirt bag, prosecution for murder may well happen. Now discretion does not save the system—but neither will there likely be a public outcry at an over-broad murder rule. Again courts are institutionally best situated to address this problem.

Fear of Right and Wrong Talk Generally. Finally, the Court’s reluctance to take up culpability as a serious concern mirrors a societal disquiet—at least among its elite membership—to discuss issues of right and wrong on their merits. We can talk about fair process until

our voices expire, but become hesitant when the subject of right and wrong comes up. The topic seems utterly subjective and dangerously divisive. Interesting how our faith in the value of discussion evaporates in the face of the most serious moral questions.

FROM: JOSHUA DRESSLER

Perhaps there should be a notice requirement that means lay individuals should be put on notice, but there isn't. The notice requirement is determined by whether a satisfactory legal construction can be placed on the statute. If memory serves, *Rose v. Lundy* is the best example (correct me if I have the wrong case).

Close. *Rose v. Locke*.

There a statue was upheld over a vagueness challenge on the ground that the lower court had once cited some other case that dealt with an analogous situation to the present one. Or something to that effect.

It was even worse than you suggest. The court had cited case law from another state applying a similar (vague) statute: this was supposed to put D on notice to check out the law in the other state. Had he done so, he would have found ANOTHER case (not the one cited) that was on point.

FROM: JERRY NORTON

I find it difficult to disagree with Ron Allen's criticisms of *Montana v. Egelhoff*, or with the threats which he believes it might represent to a whole history of due process limits on substantive and procedural criminal law. My initial reaction was that surely they don't have to go that far! This led me to speculate on some limitations on how far the decision might be projected. Aside from the obvious limitation—that there is no opinion for the court—I would suggest a couple of others.

First, as Professor Allen has suggested, this case may really only be about the intoxication defense. This defense has had a long history of "curious," if not downright illogical, statutes and rules. Witness the longstanding rule (Justice Scalia refers to it as the "new common law" rule) that voluntary intoxication may be a defense, but only for "specific intent" crimes. In applying this rule, courts often swim around among the varying meanings which "specific intent" may carry. Logically, intoxication shouldn't be a "defense" at all. The question should be whether or not the accused had the mens rea for the crime, and intoxication should simply be one factual consideration among many which are weighed in deciding whether the subjective mental state was present. However, few American jurisdictions have taken

this approach. Even the American Law Institute, in its drafting of the Model Penal Code, rejected this approach when it was advocated by Judge Learned Hand. Rather, it proposed what only amounts to a rewriting of the “specific intent” limitation to the intoxication defense. Perhaps the Supreme Court will come to view *Egelhoff* only as a case concerning a “curious” Montana statute, but one which is no worse than the curious statutes and rules found throughout the history of this hybrid defense.

My second point is that, even if the Court later assigns greater significance to *Egelhoff*, I’m not sure that it would be required to abandon *Chambers v. Mississippi*. The language used by Justice Scalia, which denigrates *Chambers*, seems to represent a view shared only by the Chief Justice and Justices Kennedy and Thomas. Justice Ginsburg’s concurrence lends no support to it. She argues that the Montana statute, in effect, defined murder as killing 1) while having a subjective mental state, or 2) while intoxicated (where a sober person would probably have had a subjective mental state). Combined, the two parts of this statute simply make the extent of intoxication irrelevant, she argues. If intoxication is irrelevant under this statute, and if the statute is otherwise constitutional, the exclusion of evidence of intoxication would not be a due process violation under *Chambers*. The four dissenters did not disagree with this reasoning. Their disagreement was with her conclusion that the two parts of the statute made intoxication irrelevant. Neither Justice O’Connor’s opinion for the four dissenters nor the separate dissent by Justice Breyer gives any comfort to Scalia and his three colleagues. Only Justice Souter offers any possibility. In part II of his separate dissent he acknowledges that Scalia’s argument might have been made by Montana—but that it wasn’t made. Souter’s language appears to go no farther than to announce an open mind on the issue of a newer and smaller *Chambers v. Mississippi*.

FROM: RON ALLEN

A number of you have made interesting points about the burden of proof analysis. The weirdness of the world we now seem to inhabit is for me well demonstrated by the somewhat obscure case of *Carella v. California*, 109 S. Ct. 2419 (1989), involving a conviction of grand theft for failure to return a rented car. The jury was instructed on two statutory presumptions:

1. Intent to commit theft by fraud is presumed if one who has leased . . . (blah blah blah) . . . fails to return the personal property within 20 days [and so on];
2. Whenever a person who has leased or rented a vehicle . . . willfully and intentionally fails to return the vehicle. . . within five days

after the lease . . . has expired, that person shall be presumed to have embezzled the vehicle.

The court reversed the conviction, on "standard" (whatever that might mean) burden of proof grounds. After *Egelhoff*, shouldn't it be clear that these presumptions merely specify the conditions of liability? And if for some reason "presumption" language is not within *Egelhoff's* reach, all California has to do is change the presumption language to "is guilty of" in the second case, and make analogous changes in the first.

FROM: DOUG MILLER

Ron Allen wrote (first quoting Professor Amann):

To require a legislature to amend its statute by a more direct method is not just "drafting advice"; at some point it is a command of the Constitution's notice requirements.

Perhaps there should be a notice requirement that means lay individuals should be put on notice, but there isn't. The notice requirement is determined by whether a satisfactory legal construction can be placed on the statute. If memory serves, *Rose v. Lundy* is the best example (correct me if I have the wrong case). There a statue was upheld over a vagueness challenge on the ground that the lower court had once cited some other case that dealt with an analogous situation to the present one. Or something to that effect.

I am not so sure this is a bad thing. Could we really expect there to be true "notice" of the intricacies of the law of theft, for example?

The notice point is crucial for those of us with a formalist bent. And the Court may well be addressing it this term. In *United States v. Lanier*, the Sixth Circuit threw out several convictions obtained against a state judge who had allegedly harassed employees as well as at least one litigant. The convictions were under 18 U.S.C. § 242, the criminal counterpart of 42 U.S.C. § 1983, and the charging documents specified "substantive" due process as the source of the underlying constitutional rights. Judge Lanier pointed out that the Supreme Court has never explicitly recognized an absolute substantive due process right to "bodily integrity," let alone a right to be free of harassment. Prosecutors argued that several recent cases in other circuits had recognized these rights; they relied in particular on a Fifth Circuit case involving sex between a school coach and a student. The Sixth Circuit held essentially that the rights being asserted were not sufficiently clear at the time of Judge Lanier's conduct. (There was also some question about whether all of Judge Lanier's conduct was "under color of" some law, as required by section 242.) *United States v. Lanier* will be argued in January or February 1997, I believe. If the Court reinstates Judge Lanier's convictions, I hope it leaves some remnant of

the notice requirement intact.

FROM: DIANE AMANN

Perhaps the Supreme Court will come to view *Egelhoff* only as a case concerning a “curious” Montana statute, but one which is no worse than the curious statutes and rules found throughout the history of this hybrid defense.

Montana’s statute may be “curious,” but it is not unique. At the time of briefing in *Egelhoff*, respondent’s conservative analysis revealed that three states—Delaware, Hawaii, and Missouri—already had upheld similar rules against constitutional due process challenges. Six others—Arizona, Arkansas, Georgia, Mississippi, South Carolina, and Texas—had approved preclusion of consideration of intoxication without undertaking constitutional analysis.

FROM: ABNER GREENE

Does the Montana penal code, as construed in *Egelhoff*, speak with a “forked tongue,” to borrow Charles Nesson’s phrase? Nesson concludes that it does not, but I would like to challenge that conclusion.

In short, my argument is that the combined instructions given to the *Egelhoff* jury violate due process because there is a substantial likelihood that the jury was not clear as to why it was convicting *Egelhoff* of murder.

We want juries to be clear as to the structure of blaming in the criminal law. It would be constitutional, in my judgment, for a state to say clearly to a jury “A defendant may be punished for murder for any death resulting from his or her conduct while intoxicated, regardless of the defendant’s state of mind at the time of the conduct.” Ron Allen seems to disagree with this conclusion, but I wonder whether Allen believes that the felony murder rule in its unmitigated form is unconstitutional. Surely there are defendants convicted of murder without proof of mens rea for the victim’s death.

But the *Egelhoff* jury, and other Montana juries in similar situations, may well convict a drunken killer of murder—blaming such a killer for the most heinous crime—based on a false version of the facts. Montana law on deliberate homicide requires that the prosecution prove that the defendant either purposely or knowingly caused the death of another human being. This requirement—as the Justices acknowledged—is not eliminated in cases of drunk defendants. For a jury to convict someone such as *Egelhoff*, it must conclude either that the defendant’s conscious object was to cause death or that he was aware that there existed a high probability that his conduct would re-

sult in death. The jury must believe, that is, that the defendant possessed a subjective state of mind that we blame most severely. That is how Montana law is written—proof of purpose or knowledge for deliberate homicide; purpose and knowledge defined as subjective states of mind.

The statutory provision foregrounded in *Egelhoff*—the one that forbids consideration of voluntary intoxication in determining “the existence of a mental state which is an element of the offense”—must be seen as part of the package of statutory provisions in play. This provision, combined with the definitions of deliberate homicide and of purposely and knowingly, makes it substantially likely that a jury in a case with death resulting from the conduct of a drunk defendant will blame that defendant for deliberate homicide when the defendant did not commit deliberate homicide. Nesson is wrong to suggest that Montana maintains the line between intentional crime and accident. There are plenty of cases in which a jury might infer subjective intent to kill from objective facts—say, a car hitting a pedestrian—where evidence of intoxication would reveal an accident.

Again, in my view, a state may punish as murder accidental killing while intoxicated. If the statute states this clearly, then a jury can decide whether it wants to blame a drunk defendant who kills while intoxicated for murder, regardless of that defendant’s mens rea. But the Montana statute speaks with a forked tongue; it opens the real possibility of a jury blaming a defendant for murder based on a false understanding of what happened. Juries may conclude from objective evidence that a defendant purposely or knowingly—as a subjective matter—killed, even in cases in which this conclusion is clearly false. It seems a core violation of due process to allow juries to blame defendants based on a false view of the facts. To allow a jury to say, essentially, “Yes, we want to blame this defendant as one who committed deliberate homicide, and yes, we know this is the most serious type of blaming a jury can do,” should require a full consideration of whether the defendant did, in fact, possess the statutory stipulated subjective mens rea. If Montana wants to dispense with such proof, it should do so in a way that makes clear to juries what they’re doing when they’re branding someone as a murderer.

FROM: DOUG MILLER

Abner Greene writes that the Montana statute speaks with a forked tongue, because it precludes consideration of intoxication, thereby leaving jurors with a false view of the facts. But isn’t this true whenever evidence is excluded over the objection of a criminal defendant? I think *Egelhoff* is wrong, but I don’t think this is the reason,

exactly.

There has to be a way to deal with all these burden-shifting evidentiary devices and bizarre drafting choices in a uniform manner. (Incidentally, shouldn't we also include practices such as judicial "comment on the evidence," allowed in California, and "summing up," the bane of many a British defense attorney? These also operate as so many "thumbs on the scales of Justice," to use a phrase popularized by (I think) Barbara Underwood.) To reopen a question raised earlier: is there any chance of resurrecting the proportionality doctrine in our lifetimes?

FROM: ADAM THURSCHELL

Message text written by Ron Allen (quoting Joseph Grano):

Prof. Grano addresses one of most interesting, in my view, but neglected questions concerning the judicial power. He says:

It would be truly amazing if *Klein*, or any other case, stood for the proposition that Congress lacks the power to prescribe the rules of evidence for federal courts. First, the implied power to prescribe rules of procedure and evidence stems from the fact that Congress doesn't have to create the lower federal courts at all. Second, the necessary and proper clause gives Congress authority to pass all laws that are necessary and proper for carrying into execution all powers vested by the constitution in the United States or "in any Department or Officer thereof." This includes the judiciary.

Ron Allen responds that:

Bills of Attainder are forbidden because courts, not legislatures, should decide whether conditions of liability are satisfied. If there are no constraints on the creation of rules of evidence, bills of attainder can easily be created: "Whenever Ron Allen is a party to any case whatsoever, the fact finder shall infer that the other side deserves to win." Ridiculous, of course, but I think it makes the point.

It's not a major theme of *Egelhoff* or of Ron Allen's piece, but it's worth noting that the *Klein* principle—that legislatures may not dictate rules for particular cases—is more than "simply an historical anomaly" (Allen), at least to Justice Breyer, who recently relied on this notion in his concurrence in *Plaut v. Spendthrift Farm, Inc.* (one of the rare instances in which the Court has struck down a Congressional statute on separation of powers grounds). Although I think it probably won't be reached, the *Klein* issue is also now pending before the 10th Circuit in the Oklahoma City bombing case—one of the government's and victims' arguments to allow victims both to view the trial and testify at a capital sentencing hearing (on appeal from the trial judge's exclusion of all victim-witnesses from earlier phases of the trial under FRE 615) is that 42 U.S.C. § 10608 (the statute granting special closed-circuit television access for victims in certain trials in which a

change of venue occurs) overrides Rule 615. Sec. 10608 was plainly passed solely to dictate a rule of decision to Judge Matsch (in fact, that's what the victims argue). Thus, via the (alleged) conflict with Rule 615, § 10608 arguably represents the type of legislative interference with a trial judge's ability to make evidentiary determinations that Ron Allen deplors at the end of his comment.

Again, this is very much a side issue as to *Egelhoff*, but I thought others might be interested in knowing that *Klein* isn't quite dead yet. (Full disclosure—I'm working on the case, so that judgment may be colored by partisan optimism).

FROM: MYRNA RAEDER

As an evidence professor, I had become quite used to formalism in presumptions and burden shifting after *Patterson* and *Martin*. I assumed a legislature could draft what it wanted so long as it was simply redefining crimes—isn't that why nobody ever seriously questioned the validity of felony murder (even the California Court at its most defense oriented stage upheld felony murder against claims that it imposed a conclusive presumption of malice and resulted in improper burden shifting). So what if *Martin* rendered self-defense meaningless as an affirmative defense because the same evidence was still relevant to raising a reasonable doubt. Reversal was only required when the legislature got it wrong, made an improper evidentiary presumption that was not a substantive law change, or the judge gave an instruction based on judicially promulgated evidentiary rules that operated to burden shift and/or interfere with the presumption of innocence. (An aside: does presumption of innocence have separate meaning for constitutional analysis or is it only an explanation of how burden shifting works?). The only other constitutional bar was an abstract proposition that you could not violate a traditional principle of justice, which had some meaning at the extremes—such as when our sensibilities are offended because a defendant must demonstrate incompetency by clear and convincing evidence. Although, I never have understood why competency isn't treated as an element that cannot be shifted to the defense, I assumed that as a matter of history, the Court viewed it as part of the underlying framework in which the elements of a specific crime are defined.

Not teaching criminal law, I hadn't focused on intoxication, but was simply waiting to see if some judge would instruct that alibi was an affirmative defense to be proved by the defendant, triggering what I hoped would be a real discussion of the limits of burden shifting, rather than a *Martin*-like approach that so long as the jury understood the same evidence could raise a reasonable doubt, no harm, no foul.

However, this never occurred because the case-law was pretty uniform that proof of alibi was negation of crime, not an affirmative defense. Thus, I naively read *Egelhoff* without a clue that *Chambers* was in danger of becoming extinct.

Unlike some, I have no problem with the proposition that it shouldn't matter if a legislature considers a presumption as evidentiary or substantive, so long as it really redefines the crime (although, I agree that if the State court hasn't considered it a redefinition, this should be given deference, because even if a state can redefine the law as indicated, if it didn't do so we have an advisory opinion by the Supreme Court). *Carella* always struck me as odd, because I agree with Ron that the presumption really reworked the elements of the offense—was it overruled *sub silentio* in *Egelhoff*? However, I think Ron's example that evidentiary revisions can now legitimize a law which in essence says Ron is always guilty (no matter how warranted) would offend due process, because it is aimed at a specific individual, which is not the way we historically have defined crimes. (All kidding aside, I have always admired Ron's incisive analysis which is admirably displayed in his *Egelhoff* essay, and am grateful to him for providing all of us with the opportunity to sort out our thoughts about *Egelhoff*).

The closer issue for me is under the present mode of constitutional analysis whether it is ok to say that all felons, child molesters, etc. are prohibited from presenting exculpatory evidence, such as lack of mens rea. While the legislature can broadly define crimes to encompass behavior by such categories of people, I get extremely queasy because we don't seem to be able to predict dangerousness, and isn't some of this status rather than conduct oriented, or edging into First Amendment freedoms if the suspect category is at heart, political (indeed I am awaiting the *Hendricks* decision as to commitment of sexual predators with some trepidation). Post-*Egelhoff*, I expect the focus will remain on whether the crime has truly been redefined. Thus, if a particular substantive statute has different evidentiary provisions aimed at different categories of people, it probably survives a due process challenge, unless *Carella* retains any life. In contrast, I think it still prohibited to have a substantive crime, and an evidentiary code provision that treats a particular category of people differently in all cases (regardless of whether the evidentiary provision is legislatively or judicially created).

In other words, even in the post-*Egelhoff* era, I have difficulty believing that a general provision in the evidence rules could constitutionally change the nature of every crime committed by someone in a disfavored category. I say this full knowing that evidence rules are not transsubstantive, particularly Rule 404(b) (prior bad acts), and 609

(convictions used for impeachment). But rules that disfavor criminal defendants generally have policy rationales that dictate admission, not exclusion of relevant evidence, and usually are not aimed at a specific category of defendant. I also recognize that 413-415 were aimed at sex offenders, but again the rule favors admission and has a host of other potential constitutional infirmities based on poor drafting and the admission of bad character as propensity if not otherwise relevant.

The closest to an evidentiary rule of exclusion aimed at a specific category is the rape shield, but the Supreme Court has held that to the extent evidence of bias is critical in determining the victim's credibility, its exclusion violates the confrontation clause (though *Olden* was not a rape shield case). Clearly, confrontation rights are now balanced against public policy (*Craig*), so the exclusion of some evidence the defendant claims is exculpatory will not violate the constitution. Thus, rape shields strike me as little different than other policy based exclusions for hearsay, privilege, etc which are not usually aimed at a specific category of offender (though I realize that state privilege law is rapidly aiming at categories of defendants, blocked only when it interferes with the right to cross examine).

What I do find disconcerting is that the dicta (thanks for small favors) in the plurality leaves little doubt that Scalia sees the exclusion of critical evidence which is trustworthy as being constitutional. Although *Egelhoff* did not exclude the intoxication evidence, but only prohibited its use on intent (to the extent jurors were not inclined to resort to nullification, another lurking issue when we start tampering with what jurors think is fair), the plurality left little doubt that complete exclusion of exculpatory evidence is ok when examined against valid public policy. As some have already suggested, isn't public safety always a good reason?

Hopefully, *Chambers* bashing will not obtain a majority, particularly since the Court cannot ignore Ron's valid criticism that contrary to Justice Scalia's view, *Chambers* was not a case in which the evidentiary rulings were incorrect, but one in which correct rulings impinged on the defendant's right to defend himself by proving his factual innocence. Yet *Egelhoff* will no doubt encourage the existing tendency of trial and appellate courts to narrowly construe *Chambers*, particularly since we all know how harmless error will smooth over many a rough edge.

Ironically, the minimalist approach of the Court to the confrontation clause, virtually admitting all hearsay in shouting distance of a firmly rooted hearsay exception, is now being mirrored in due process analysis. Mimi noticed this link. After redefinition, the only remaining question is whether the exclusion of evidence violates a funda-

mental principle of justice. Although both of these concepts originally were used to benefit the criminal defendant—excluding hearsay or limitations on cross that violated the confrontation clause and admitting hearsay or otherwise inadmissible evidence of the defendant required by due process—the current analysis reaches the opposite result—letting in more evidence against the defendant that is not subject to cross examination and keeping out evidence in favor of the defendant. I feel somewhat like Alice in the looking glass, or am I missing something? I used to say that the constitution trumped over conflicting evidentiary rules, now this advantage appears hollow.

A final thought on whether *Winship* is a dead letter. Long ago in *Patterson*, the Court backed away from its broadest policy pronouncement. We were told that the risk society must bear not to convict the guilty is “not without limits” and that “due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.” But as long as juries are told there is a presumption of innocence, whatever that means, *Winship* still lives. The underlying problem is that except when faced with defendants who jurors can relate to, the presumption of innocence has rarely had much content for defendants who are different than the jurors, regardless of whether the difference relates to race, ethnicity, religion, poverty, criminal record or the expression of unpopular views. Paradoxically, this makes the *Winship* requirement of proof beyond a reasonable doubt even more important in criminal cases. As long as *Egelhoff* is interpreted as a decision about a state’s ability to redefine crime, it doesn’t diminish current reasonable doubt analysis. To the extent it hinders proof of factual innocence, *Winship* has taken another hit. But, it may be that the Court has always been uneasy when dealing with certain culpability issues, such as intoxication, competency and insanity, so these cases should not be construed as stating general principles. I recognize that this conclusion may give more comfort to those of us who teach evidence, than to those who teach criminal law.

FROM: TIM O’NEILL

I think Abner Green made some very valid points. The problem is that Montana is pretending that they care about mens rea in murder when they really are saying that “If the defendant was drunk, don’t worry about mens rea.”

Take a look at pages 846-848 of George Fletcher’s *Rethinking Criminal Law*. He discusses a German statute which has an interesting approach which skirts the issue of whether someone who is dead drunk has the mens rea for some substantive crime. Instead, it creates a new

offense—committing a wrongful act after intentionally or negligently getting intoxicated. It treats “getting drunk” as the *actus reus*, “intentionally or negligently” as the *mens rea* for getting drunk, and the “wrongful act” is merely the result which triggers prosecution. This strikes me as a lot more intellectually honest than the legerdemain of *Egelhoff* or the ridiculous “specific intent/general intent” distinction.

FROM: FRANK BOWMAN

The comments of Ron Allen and others on the constitutional tangles created by the *Egelhoff* opinion as it was written, are penetrating and well-taken, but a careful examination of the Montana Criminal Code suggests that its treatment of intoxication in homicide crimes in fact presents no serious constitutional issue, and therefore that the Supreme Court need never have sown the thicket of difficulties that will now inevitably arise from *Egelhoff*. Put plainly, the U.S. Supreme Court (and the Montana Supreme Court, for that matter) simply misunderstood Montana homicide law, and because of that misunderstanding wrote an opinion that unnecessarily complicates broad swathes of substantive and procedural criminal law.

To begin, both Justice Scalia's plurality opinion and Justice O'Connor's dissent spend a good deal of space discussing the historical treatment of intoxication in criminal cases, and yet both either obscure (Scalia) or omit altogether (O'Connor) a fundamental point familiar to any first-year law student: The general, although certainly not invariable, rule in both England and America is, and has been for a long time, that intoxication may be raised as a defense to crimes requiring a “specific intent,” but is not a defense to “general intent” crimes. Justice Scalia mentions the distinction in describing the evolution of the common law away from a categorical prohibition against any defense reliance on intoxication, but by the end of his opinion one might be forgiven for concluding that the general/specific distinction had now faded into the mists of history in favor of, as he puts it, “the ‘new common law’ rule—that intoxication may be considered on the question of intent” As for Justice O'Connor, she flatly misstates the condition of modern American law, saying, “Courts across the country agreed that where a subjective mental state was an element of the crime to be proved, the defense must be permitted to show, by reference to intoxication, the absence of that element.” Of course, only a relatively few American jurisdictions permit introduction of intoxication to show the absence of all “subjective mental states.” The overwhelming majority observe something akin to the specific intent/general intent dichotomy, or (as in Montana) bar intoxication evidence on the question of mental state altogether. Justice

O'Connor's discovery of this supposed "agreement" between state courts to admit intoxication evidence virtually without limit is particularly curious because her home state of Arizona has had, since 1980 (while she was still on the state court bench), a statute permitting the defense of intoxication as to "intentional" crimes, but not as to offenses committed "knowingly," "recklessly," or with "criminal negligence."

This odd conspiracy of obfuscation between Scalia and O'Connor is of more than pedantic interest. The evolution and persistence of the general/specific intent dichotomy in modern American law is of particular significance in looking at the treatment of intoxication in the Montana statutory scheme governing homicide. Professor Allen and others have noted in passing that the Montana statute requires for conviction of "deliberate homicide" proof that the defendant acted either purposely or knowingly, but both the Court and most commentators have missed several significant points.

First, almost all the comments I have seen so far assume implicitly that in Montana "purposely" and "knowingly" have roughly the meaning ascribed to those terms by the Model Penal Code, in other words that a killing done "purposely" means a killing done with a desire to kill, and that killings committed "knowingly" involve acts performed with the knowledge that they are "virtually certain" to cause death. Even if the foregoing were an accurate definition of these terms under Montana law (and as we will see in a moment, it is not), the important point is that "purposely" (and other words like "intentionally" generally taken to have roughly the same meaning) is a specific intent in the accepted taxonomy, while "knowingly" is a general intent. Thus, the Montana statute lumps together in a single homicide category killings committed with general and specific intents.

This point is reinforced by a careful examination of the definition of "knowingly" in the Montana statute. In fact, the Montana legislature modified the Model Penal Code definition of "knowingly" in a significant way. The Model Penal Code says a person acts "knowingly" with respect to results when "he is aware that it is practically certain that his conduct will cause such a result." In Montana, a person acts "knowingly" when "the person is aware that it is highly probable that the result will be caused by the person's conduct." Thus, the Montana definition of "knowingly" subsumes a good percentage of cases that would elsewhere (and under the Model Penal Code) fall within the accepted definition of "recklessness"—that is, action taken despite a defendant's conscious recognition of a "substantial and unjustifiable risk" that the prohibited result will occur.

The suspicion that Montana intended to include in the "know-

ing" category much behavior categorized in modern codes as "reckless" hardens to certainty when we observe that, in Montana, there is no such thing as reckless homicide. Instead, below deliberate homicide in the Montana homicide hierarchy are only "mitigated deliberate homicide," which is classic heat-of-passion manslaughter, and negligent homicide, a crime penalizing objectively unreasonable behavior of a particularly "gross" or egregious kind.

Therefore, Justice Ginsburg and those who concur in her analysis are correct that the Montana legislature has "redefined" the culpable mental state for the most serious degree of homicide known to Montana courts, but it seems to me that Justice Ginsburg missed the true character of that redefinition by focussing exclusively on the intoxication statute, which is only a single component of the overall project. The principle "redefinition" occurred, not when the intoxication statute was adopted, but in 1973 when the Montana legislature consolidated the crimes of 1st and 2nd degree murder into the single category of "deliberate homicide." Despite the veneer of modernity created by the employment of the ALI-sanctioned terms of art "purposely" and "knowingly," the Montana homicide scheme is, in its essence, a re-creation of the common law of homicide. "Deliberate homicide" embraces all volitional choices to engage in conduct recognized by the actor to present, at the least, a very high risk of death—in short, something very like common law "malice." "Mitigated deliberate homicide" codifies the traditional heat of passion ground of mitigation. The only significant difference between Montana homicide law in 1996, and the law of Massachusetts in 1850, or England in 1920, is the addition of the category of "negligent homicide," which criminalizes deadly high-risk conduct which was objectively unreasonable, even though the defendant may not have subjectively perceived the risk at the time he acted.

Therefore, under Montana law, there is no form of homicide which is, properly speaking, a specific intent crime. Deliberate homicide feels like a specific intent crime because the prosecution can, should it wish, charge and prove purposeful conduct. But the minimally required culpable mental state for deliberate homicide is "knowingly," which, as we have seen, means in Montana no more than an aggravated form of recklessness. As a matter of logic, any proof by the prosecution of a subjective desire to kill is evidentiary surplusage, forensically useful but legally meaningless, akin to proving planning activity in a state that does not require proof of premeditation.

This view of Montana homicide law casts the *Egelhoff* opinion in a rather different light. The assumptions that frame the argument between Scalia and O'Connor, and which also undergird Ginsburg's rea-

soning, run something like this: (1) The Montana deliberate homicide statute requires proof of purposeful or knowing conduct. (2) The required culpable mental state for deliberate homicide is therefore akin to the types of "specific intent" as to which most American jurisdictions currently consider proof of intoxication logically and legally relevant. (3) Therefore, in order to uphold the Montana intoxication statute, either we must conclude that it is constitutionally acceptable for a state to exclude evidence logically relevant to the existence of an element of the crime (Scalia), or we must read the Montana intoxication statute to "redefine" the culpable mental state element of deliberate homicide from "purposely or knowingly" to "purposely or knowingly, or while drunk" (Ginsburg). If the Court had understood what it was looking at in the Montana homicide scheme, and where that scheme fit in the historical development of the criminal law, it could have held the Montana intoxication statute constitutional, at least as applied to *Egelhoff*, without breaking a sweat, and without ever facing the dilemma that makes the *Egelhoff* opinion so potentially far-reaching.

In the first place, the Montana intoxication and homicide statutes, taken together and properly understood, reproduce almost exactly what I understand to have been the universal law at the dawn of the Republic. Therefore, to find this statute unconstitutional, the court would have to have found that the common law of homicide, and its treatment of intoxication, as that law existed throughout the country at the time of the adoption of the Bill of Rights was unconstitutional, or alternatively, that something happened in the ensuing two hundred years to render this universally accepted component of the law of crimes unconstitutional. The argument from the *Egelhoff* dissent is that the necessary something was the rise at around the time of the adoption of the 14th Amendment of the "new common law rule" permitting the use of intoxication evidence to disprove certain types of mental states ("specific intent").

The fatal flaw in this argument is that, as far as excluding evidence, the Montana intoxication statute does nothing more than the "new common law rule." Both rules exclude intoxication evidence in cases involving "general intent" crimes. True, the "new common law" rule permits such evidence where "deliberation," "premeditation," or some other "specific" intent is an element of the crime. But, as we have seen Montana has no such requirement. Historically, the "new common law rule" regarding the limited admissibility of intoxication evidence was a response to the subdivision of the old unitary crime of murder into a hierarchy of criminally culpable killings distinguished by the presence or absence of an increasing number of meticulously

defined mental states. It seems to me hard to argue that Montana is at liberty to jettison the now-familiar multi-level structure for the most serious types of homicide, but that they are constitutionally prohibited from dispensing with ancillary rules which grew up in service of the discarded statutory model.

One can, of course, argue that the antiquity of a rule is no necessary defense to the claim that it violates due process. But it seems to me that the Montana statute can be defended quite well without resort to the claims of history. I think a fair reading of the Montana legislature's design is this: They did not say that, "Deliberate homicide can be committed purposely or knowingly, or while drunk." Nor did they say that, "Deliberate homicide can be committed purposely or knowingly, but as a matter of policy we choose to exclude from the jury's consideration intoxication evidence which is logically relevant to the existence of that statutorily defined mental state." Instead, I think they said, "We define the culpable mental state for deliberate homicide broadly to embrace any volitional choice to engage in conduct recognized by the actor to present a very high risk of death. When culpable mental state is defined in this way, we simply don't think that any degree of intoxication short of actual unconsciousness would suffice to disprove it. Therefore, in our legislative judgment, intoxication is logically, not legally (or rather legally because logically) irrelevant."

It might be argued that this interpretation of the Montana intoxication statute is unsustainable because the statute is a general one, applying not only to homicides, but to all other criminal offenses. One might argue that my interpretation turns on the idiosyncrasy of the deliberate homicide statute, lumping together purposeful and knowing conduct in the definition of a single offense. It is harder (though by no means impossible) to argue that intoxication is not logically relevant to proof of crimes whose mental state requirement is fulfilled only by purposeful behavior. If there were indeed many such crimes in Montana law, I would be obliged to argue either that the state legislature thought intoxication logically irrelevant to proof of purposefulness, or that the legislature intended the general intoxication statute to have one meaning in homicide cases and another meaning in all others. Neither of these are attractive positions. It turns out, however, that the culpable mental state for the most serious degree of virtually every crime against persons in the Montana criminal code is "purposely or knowingly." There are a number of crimes against persons whose culpable mental state is "knowingly," and others for which the required mental state is negligence. There are a very few crimes against persons in Montana with a culpable mental state of "pur-

posely" or "with purpose," but they are genuine rarities. Read as a whole, the Montana criminal code only reinforces the impression that the state legislature has for some years resolutely and consistently defined the required mental state for the most heinous offenses in a way virtually indistinguishable from common law "malice." Consequently, it is hardly implausible to think that the legislature precluded the admission of intoxication evidence generally because they have defined the required mental state for virtually every state crime in such a way that intoxication can quite reasonably be considered logically irrelevant. I recognize that my view of Montana law involves the legislature making a rule about what evidence is and is not relevant to proof of particular crimes, and thus drags us back at least a short distance into the thicket of Scalia's opinion. However, Scalia's misreading of the Montana statute forces him into defending exclusion of evidence which he concedes is logically relevant, and which his opponents are able to characterize as critical, to proof of an essential element of the crime. That seems to me a rather different thing than upholding a legislative judgment that the evidence at issue is, in fact, irrelevant to any element of the crime.

Moreover, one need not buy the idea that the Montana legislature actually believed that drunkenness is logically irrelevant to proof of their new version of "malice" in order to avoid the thickets of *Egelhoff*. Because all the prosecution must prove in a Montana deliberate homicide case is an aggravated form of recklessness, intoxication may be prohibited as a defense because, as Lord Edmund-Davies said in *DPP v. Majewski*, "[T]he drunkenness is itself an integral part of the crime, as forming, together with the other unlawful conduct charged against the defendant, a complex act of criminal recklessness." Without exploring here the well-known arguments against this reasoning, it seems to me very hard to contend that Edmund-Davies' position is so flawed that no legislature could constitutionally adopt his view.

If the reading of Montana law suggested here is correct, then Justice Ginsburg's remark that "the State need not prove that the defendant 'purposely or knowingly cause[d] the death of another' . . . in a purely subjective sense" is wrong and unnecessary. Justice Breyer's sensible critique of Ginsburg's formulation loses its force. And Montana law does not, as Ron Allen fears, produce at least some number of convictions where the probability that the defendant possessed the required mental state is 0.0.

Ron Allen closes his remarks with the suggestion that Egelhoff has dire implications for the balance between courts and legislatures in the criminal law. As I understand his comments, he worries that a rule which confers unfettered power on legislatures both to define

crimes and to determine the way evidence is used to prove those crimes undermines the historical role of courts in determining the applicability of evidence to particular cases. His concern may well be justified if the flawed reasoning of the *Egelhoff* opinion is applied and expanded in other settings. But it may bear mentioning that the result of the particular statutory scheme sustained in *Egelhoff* is a net transfer of power away from the legislature and to the courts. The penalty for deliberate homicide under Montana law (absent a death penalty proceeding) is 10 years to life. The choice of where in that range to place the defendant appears to be almost entirely discretionary with the judge. In short, the practical effect of the Montana statute is to equate drunken killers with contract hit men in the purely formal sense of convicting them of the same crime, but to place the practical consequences of that conviction almost entirely in the hands of a judicial officer, who may, and almost certainly will, consider intoxication in sentencing. We may or may not consider this a good policy choice, but it hardly represents a threat to the judicial-legislative balance.

FROM: DIANE AMANN

Regarding:

a careful examination of the Montana Criminal Code suggests that its treatment of intoxication in homicide crimes in fact presents no serious constitutional issue, and therefore that the Supreme Court need never have sown the thicket of difficulties that will now inevitably arise from *Egelhoff*. Put plainly, the U.S. Supreme Court (and the Montana Supreme Court, for that matter) simply misunderstood Montana homicide law, and because of that misunderstanding wrote an opinion that unnecessarily complicates broad swathes of substantive and procedural criminal law.

I am on my way away for the holiday and so have no time to double check this, but will offer it for consideration/confirmation: it is my recollection that because of the ambiguity caused by the disjunctive language in the Montana deliberate homicide statute, Montana courts had interpreted it to require a state of mind analogous to specific intent/purposefulness, notwithstanding the "knowingly" language. That seemed to be the premise from which the litigants, and, therefore, the Court, worked.

FROM: FRANK BOWMAN

I will defer immediately to any experienced Montana criminal lawyer who disagrees, but I've taken another look at Montana caselaw in light of Diane's recollections and I really can't find anything to support the view that Montana courts have somehow turned "deliber-

ate homicide" under 45-5-102 into a "specific intent" crime despite plain statutory language saying that the prosecution can prove either purposeful OR knowing conduct, and defining "knowingly" as, in effect, aggravated recklessness.

In the first place, I have been unable to find any case that substantiates the suggestion that Montana courts have judicially converted the disjunctive "or" into the conjunctive, thus somehow eliminating the option of proving only that a defendant acted "knowingly." The Montana Supreme Court says nothing to that effect in its *Egelhoff* opinion. Indeed, although there are some passages in the Montana Supreme Court's *Egelhoff* opinion where the phrases "knowingly or purposely" and "knowingly and purposely" are used interchangeably, the concurrence of Justice Nelson makes clear that purposely and knowingly are "two mental states." *State v. Egelhoff*, 900 P.2d 260, 268 (Mont. 1995).

More probative on the point, however, is *State v. Leyba*, 915 P.2d 794 (Mont. 1996). There, the Montana Supreme Court wrote: "We have stated: 'The State need not establish a specific purpose to kill.'" (citing *State v. Weinberger*, 665 P.2d 202, 208-09 (Mont. 1983)). In *Leyba*, the defendant raised, among other points, the issue of sufficiency of evidence to establish his culpable mental state for the crime of deliberate homicide. The court said nothing about the prosecution being required to establish purposefulness. To the contrary, it upheld the conviction saying, "There was sufficient evidence for the jury to find that Leyba acted knowingly, because even if death was not the intended result, he was aware of the high probability that such a result would be caused by his conduct." *Id.* at 799.

I suspect that some confusion may have been caused by the earlier case of *State v. Rothacher*, 901 P.2d 82 (Mont. 1995), decided in August 1995. *Rothacher* is a convoluted opinion whose nuances are beyond the scope of this discussion, but read carefully, it is an opinion about a badly worded jury instruction concerning the meaning of "purposely." Nowhere does it alter the definition of knowingly, or eliminate the prosecutorial option of proving deliberate homicide by establishing knowing conduct. If there were ever any doubt on the point, *Leyba* laid them to rest (and did so 6 weeks before *Egelhoff* was argued in the U.S. Supreme Court).

Again, I am open to correction from those who know better, and if Diane is right I will retire in embarrassment from the field. But my concededly quick foray into Montana case law leaves me convinced that "deliberate homicide" in Montana is now, and always has been, a general intent crime, as that term has been traditionally understood.