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Criminal Law - Intoxication as a Defense: The Drunk and Dangerous Model - Montana v. Egelhoff

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CRIMINAL LAW—Intoxication as a Defense: the Drunk and Dangerous Model. *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996).

INTRODUCTION

What began as an adventurous journey into the Yaak region of the Montana mountains to pick mushrooms ended with two people dead and one serving an eighty-four year prison term.¹ The journey began when James Allen Egelhoff met up with John Christenson and Roberta Pavlova in early July while picking mushrooms.² On July 12th, 1992, the trio went to a nearby town in Christenson's vehicle to sell mushrooms and purchase alcohol.³ They purchased a case of beer and at around noon went to a party where they continued to drink most of the day.⁴

At around midnight on the evening of July 12, police officers responded to a potential drunk driver report and discovered Christenson's station wagon in a ditch along U.S. Highway 2.⁵ Pavlova and Christenson lay in the front seat, each dead from a gunshot to the head.⁶ Police found Egelhoff in the back seat intoxicated and yelling obscenities.⁷

Police discovered Egelhoff's .38 caliber handgun on the floor of the car with four loaded rounds and two empty casings.⁸ Egelhoff had gunshot residue on his hands⁹ and blood stains on his clothing. The blood stains matched Christenson's and Pavlova's blood.¹⁰

An hour after discovering Egelhoff, police measured his blood alcohol content at .36.¹¹ Despite his intoxication, Egelhoff was violent and aggressive. He struck two ambulance attendants as they loaded him into the ambulance¹², and he kicked a camera from a detective's hands later that even-

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

2. *Id.*

3. *Id.*

4. Petitioner's Brief at 4, *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996) (No. 95-566) (citing Trial Record at 660-61, 1127, *Montana v. Egelhoff*, 900 P.2d 260 (Mont. 1996) (No. 93-405) (on file with the *Land & Water Law Review*).

5. *Egelhoff*, 116 S. Ct. at 2016.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Petitioner's Brief at 8, *Egelhoff*, 116 S. Ct. 2013 (citing Trial Record at 240-41, 245-47, 248-50, 845).

11. *Egelhoff*, 116 S. Ct. at 2016.

12. One of the ambulance attendants testified at trial that Egelhoff had threatened to kill the ambulance attendant, and that Egelhoff was the most violent person with whom the ambulance attendant had ever dealt. Petitioner's Brief at 6, *Egelhoff*, 116 S. Ct. 2013 (citing Trial Record at 478-79, 483-87).

ing in the hospital emergency room.¹³

A Montana trial court convicted Egelhoff of two counts of deliberate homicide.¹⁴ Montana statutes define deliberate homicide as “purposely” or “knowingly” causing the death of another human being.¹⁵ Egelhoff claimed at trial that a fourth person must have committed the crime.¹⁶ To bolster his claim, Egelhoff attempted to introduce evidence of intoxication to show that he was not mentally or physically able to commit the murders “purposely” or “knowingly” due to his extreme level of intoxication.¹⁷ The court refused to allow the evidence under the authority of Montana Statute Section 45-2-203 which prohibits juries from considering evidence of intoxication in determining the existence of a requisite mental state.¹⁸

Egelhoff appealed his conviction arguing that the trial court violated his due process rights by denying him an opportunity to present evidence of intoxication at trial. The Montana Supreme Court overturned Egelhoff’s conviction ruling that Montana’s statute prohibiting intoxication as a defense violated the United States Constitution because “the prosecution’s burden of proof on the element of mental state was reduced.”¹⁹ The Montana Supreme Court agreed with Egelhoff’s due process argument and held that the trial court should have considered “all relevant evidence to rebut the state’s evidence on all elements of the offense charged.”²⁰

The State of Montana petitioned the United States Supreme Court for certiorari. The United States Supreme Court reversed the Montana Supreme Court, holding that Montana’s law abolishing the intoxication defense did *not* violate due process under the Fourteenth Amendment to the United States

13. Petitioner’s Brief at 7, *Egelhoff*, 116 S. Ct. 2013 (citing Trial Record at 701, 839, 849).

14. MONT. CODE ANN. § 45-5-102 (1997).

15. The jury in *Egelhoff* was instructed that “a person acts purposely when it is his conscious object to engage in conduct of that nature or to cause such a result . . . a person acts knowingly when he is aware of his conduct or when he is aware under the circumstances his conduct constitutes a crime; or, when he is aware there exists a high probability that his conduct will cause a specific result.” *Egelhoff*, 116 S. Ct. at 2016 (citing petition for certiorari 28a-29a, *Montana v. Egelhoff*, 900 P.2d 260 (Mont. 1996) (No. 93-405)).

16. *Egelhoff*, 116 S. Ct. at 2016.

17. *Id.*

18. The Montana legislature amended the language in 1987. Initially, intoxication was a defense to the specific intent element under Montana’s 1973 law. MONT. CODE ANN. § 45-2-203 (1996), construed in Petitioner’s Brief at 15, *Egelhoff*, 116 S. Ct. 2013. Montana’s current statute reads:

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

MONT. CODE ANN. § 45-2-203 (1997).

19. *Montana v. Egelhoff*, 900 P.2d at 265.

20. *Id.* at 266.

Constitution.²¹ The Court applied *Patterson v. New York* which held that to violate the Due Process Clause, a rule must “offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.”²² Relying on common law history and tradition, the Court held that the *Patterson* test had not been met.²³

The holding in *Egelhoff* presents a troubling dichotomy. On one hand is the jurisprudential interest in requiring the state to prove all elements, including intent, of a crime. On the other hand is the public policy concern in allowing the defense of drunkenness to mitigate a crime. In light of this dichotomy, this case note asserts that a better approach is to adopt a drunk and dangerous statute that makes committing a crime while intoxicated a punishable offense in itself. In so doing, this note briefly discusses the history of the intoxication defense and then explores the inconsistencies with both the Montana and Model Penal Code approaches.

BACKGROUND

Given pre-sixteenth century restrictions upon a criminal defendant’s ability to present evidence and testimony,²⁴ it is not surprising that early common law rejected intoxication as a defense to any crime.²⁵ Where defendants had no absolute right to call witnesses or present evidence, courts naturally recognized that intoxication could not mitigate criminal activity. One case held, “for when he was drunk he had no [u]nderstanding nor [m]emory; but inasmuch as that [i]gnorance was occasioned by his own [a]ct and [f]olly, and he might have avoided it, he should not be privileged thereby.”²⁶

However, in the nineteenth century, courts began to recognize the importance of proving state of mind as a separate element for serious crimes, and subsequently tended to be more sympathetic to intoxication as a defense to specific intent crimes.²⁷ In 1819, an English court first recognized intoxication as a defense to a specific intent crime. The court in *King v. Grindley*,

21. *Egelhoff*, 116 S. Ct. at 2024.

22. *Id.* at 2017 (citing *Patterson v. New York*, 97 S. Ct. 2319, 2322 (1977)).

23. *Id.* at 2018-19.

24. Until the sixteenth century, defendants had “no absolute right to call any witness or present any evidence in his own behalf.” Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 717 (1976) (quoting W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 224 (3d ed. 1944)).

25. See cases cited in *Egelhoff*, 116 S. Ct. at 2018-19.

26. *Egelhoff*, 116 S. Ct. at 2018 (quoting *Reniger v. Fogossa*, 75 Eng. Rep. 31 (K.B. 1550)).

27. In the nineteenth century, the scientific school of thought began to replace the classical mode of thinking. The scientific school attributed criminal behavior to environmental and biological aspects of one’s life, instead of assuming that crimes were motivated by immorality or sin. Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY, 482, 485-86 (1997).

a murder case, held that intoxication was a "circumstance proper to be taken into consideration."²⁸

Changing views toward alcoholism in the United States similarly affected the United States courts' views of intoxication as a defense. In 1956, the American Medical Association recognized that alcoholism was a disease.²⁹ This determination advanced the argument that alcoholics, while under the influence of alcohol, were similar to insane persons and could not form intent.³⁰ Believing that alcoholism was a disease, and not a choice, jurors became hesitant to convict defendants who had committed crimes while intoxicated.³¹

However, the ramifications of a lenient approach became obvious in the 1960s and 1970s, when the homicide rate in the United States began to climb,³² and the rate of alcohol consumption increased by thirty percent.³³ By 1990, alcohol consumption was implicated in about half of all homicides, and the typical intoxicated offender consumed approximately eighteen drinks before committing the crime.³⁴

Presently, twelve states have adopted approaches like Montana's approach either through common law or statute. These states include: Arizona,³⁵ Arkansas,³⁶ Delaware,³⁷ Georgia,³⁸ Hawaii,³⁹ Idaho,⁴⁰ Indiana,⁴¹ Mississippi,⁴² Missouri,⁴³ Montana,⁴⁴ South Carolina,⁴⁵ and Texas.⁴⁶ Montana-type laws prohibit defendants from offering evidence of intoxication even

28. *Egelhoff*, 116 S. Ct. at 2019 (citing *King v. Grindley*, Worcester Sum. Assizes 1819 MS.).

29. Keiter, *supra* note 27, at 486.

30. Two federal circuit courts held that punishing an alcoholic was similar to punishing an insane person, an infant or a leper. *Id.* (citing *Easter v. District of Columbia*, 361 F.2d 50, 52 (D.C. Cir. 1966); *Driver v. Hinnant*, 356 F.2d 761, 764-65 (4th Cir. 1966)).

31. Keiter, *supra* note 27, at 490 (citing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 148 (1993)).

32. *Id.* (citing RUTH MASTERS AND CLIFF ROBERSIN, INSIDE CRIMINOLOGY 42 (1990)).

33. *Id.* (citing Louis Jolyon West, *Alcoholism and Related Problems, An Overview*, ALCOHOLISM & RELATED PROBLEMS: ISSUES FOR THE AM. PUB. 1, 3 (1984)).

34. William F. Wiczorek, *Alcohol, Drugs and Murder: A Study of Convicted Homicide Offenders*, 18 J. CRIM. JUST. 217, 225 (1990).

35. ARIZ. REV. STAT. ANN. § 13-503 (West 1989 & Supp. 1996).

36. ARK. CODE ANN. § 5-2-207 (Michie 1997); *see also* *White v. State*, 717 S.W.2d 784, 787-88 (Ark. 1986).

37. DEL. CODE ANN. tit. 11, § 421 (1995).

38. GA. CODE ANN. § 16-3-4(c) (1996).

39. HAW. REV. STAT. ANN. § 37-702-230(1) (Michie 1994).

40. IDAHO CODE § 18-116 (1997).

41. IND. CODE ANN. § 35-41-3-5 (Michie Supp. 1997).

42. *McDaniel v. State*, 356 So. 2d 1151, 1161 (Miss. 1978).

43. MO. REV. STAT. § 562.076(1) (West 1979 & Supp. 1998).

44. MONT. CODE ANN. § 45-2-203 (1995).

45. *State v. Vaughn*, 232 S.E.2d 328, 330 (S.C. 1977).

46. TEX. CODE ANN. § 8.04(a) (West 1994) (cited in Keiter, *supra* note 27, at 518.)

for purposes of disproving the specific intent element of a specific intent crime.

The Model Penal Code expresses another approach to intoxication as a defense. Section 2.08, provides that "(1): Except as provided in Subsection (4) of this section⁴⁷, intoxication of the actor is not a defense unless it negates an element of the offense."⁴⁸ Many states have adopted this approach and only allow intoxication to negate the mental element of a crime.⁴⁹

PRINCIPAL CASE

The Supreme Court held that Montana's law restricting defendants from introducing evidence of intoxication as a criminal defense was not unconstitutional. The Court applied *Patterson v. New York*, which held that a regulation does not violate the Due Process Clause of the Constitution unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."⁵⁰

The Court, in determining whether the right to present intoxication as a defense was fundamental, focused on English common law and traditional definitions of fundamental rights. The Court determined that the intoxication defense is not "fundamental" because for centuries courts did not recognize it as such.⁵¹

In analyzing *Egelhoff*, the Supreme Court reasoned that laws which prohibit intoxication as a defense deter violent crimes. The Court stated that "a large number of crimes, especially violent crimes, are committed by intoxicated offenders; modern studies put the numbers as high as half of all homicides, for example."⁵²

Justice Ginsburg's concurrence focused on Montana's unequivocal right to make its own laws. She argued that states enjoy "wide latitude" in deter-

47. Subsection (4) indicates that intoxication is an affirmative defense if it is self-induced, or pathological. MODEL PENAL CODE § 2.08(4) (1998). Pathological is defined as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." *Id.* § 2.08(5)(c).

48. MODEL PENAL CODE § 2.08.

49. Two states admit intoxication evidence to negate "purpose," twelve states admit intoxication evidence to negate "purpose" or "knowledge," twenty-one states admit evidence of intoxication to negate "specific intent," and two states admit evidence of intoxication to negate "purpose" "knowledge," or "recklessness." Keiter, *supra* note 27, at 518-20 app.

50. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) cited in *Montana v. Egelhoff*, 116 S. Ct. 2013, 2017 (1996).

51. *Egelhoff*, 116 S. Ct. at 2019.

52. *Id.* at 2020 (citing THIRD SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL, AND HEALTH FROM THE SECRETARY OF HEALTH, EDUCATION AND WELFARE 64 (1978)).

mining the elements of criminal offenses.⁵³ Ginsburg contended that Montana's Legislature did not lower the prosecution's burden of proof, but rather indirectly re-wrote the elements of mens rea—which was its prerogative.⁵⁴

The dissent, authored by Justice O'Connor and joined by justices Stevens, Souter, and Breyer contended that denying a defendant the opportunity to present evidence of intoxication does violate a "fundamental" right.⁵⁵ The dissenting justices disagreed with the majority's determination that fundamental rights are only those found at early common law. In a separate dissent, Souter asserted Justice Harlan's teaching that "tradition is a living thing."⁵⁶ The dissenters cited a string of nineteenth century cases which allowed intoxication to negate the intent element of a specific intent crime.⁵⁷ They argued that recent cases provide better guidance than "crude" and "undeveloped" common law cases.⁵⁸ Placing a blanket exclusion on a whole category of exculpatory evidence, the dissenters argued, deprives a defendant of a fair opportunity to defend against the state's accusations and reduces the prosecution's burden of proving an element of a crime.⁵⁹

ANALYSIS

Egelhoff signified a shift in the way courts and state legislatures viewed intoxication as a defense. After *Egelhoff*, in one year's time, two states have amended their statutes to exclude voluntary intoxication as a defense, bringing the total to twelve.⁶⁰ While many states embrace the concepts behind *Egelhoff*, the general holding is problematic.

53. *Egelhoff*, 116 S. Ct. at 2024.

54. *Id.* at 2025. Souter's dissent also entertains the notion that states have a right to determine criminal elements: "A state may so define the mental element of an offense that evidence of defendant's voluntary intoxication at the time of commission does not have exculpatory relevance and, to that extent, may be excluded without raising any issue of due process." *Id.* at 2032.

55. *Id.* at 2026.

56. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

57. *Egelhoff*, 116 S. Ct. at 2030 (citing *People v. Robinson* 2 Park. Crim. 235, 306 (N.Y. Sup. Ct. 1855); *Swan v. State*, 233 Tenn. 136, 141-42 (1843); *State v. Donovan*, 16 N.W. 206, 206-07 (1883); *Mooney v. State*, 33 Ala. 419, 420 (1859); *Aszman v. State*, 24 N.E. 123 (Ind. 1890); *Pigman v. State*, 14 Ohio 555, 556-57 (1846); *Cline v. State*, 1 N.E. 22, 23 (Ohio 1855)).

58. *Egelhoff*, 116 S. Ct. at 2030 (quoting R.U. Singh, *History of the Defense of Drunkenness in English Criminal Law*, 49 L.Q. REV. 528, 537 (1933)).

59. *Id.* at 2026.

60. Six months after *Egelhoff*, Indiana overturned a previous case which allowed intoxication as a defense to all crimes. In *State v. Van Cleave*, the Indiana Supreme Court commented, "recently the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not require states to allow voluntary intoxication as a defense. Accordingly, *Terry* is no longer good law." *State v. Van Cleave*, 674 N.E.2d. 1293, 1302 n.15 (Ind. 1996). In addition, in July 1997 the Indiana Legislature adopted IND. CODE ANN. § 35-41-3-5 (Supp. 1997), which abandoned voluntary intoxication as a defense to all crimes and embraced the Montana-type law. Idaho also adopted a Montana-type law in 1997. IDAHO CODE § 18-116 (1997).

Egelhoff's Shortcomings

Egelhoff upheld Montana's law which prohibits *voluntary* intoxication as a defense, but allows *involuntary* intoxication as a defense. Distinguishing voluntary and involuntary intoxication is an admission that intoxication affects one's intent to act. Therefore, if intoxication does affect one's intent to act, Justice O'Connor was correct in her charge that Montana's law was an effort to "increase the likelihood of conviction of a certain class of defendants who might otherwise be able to prove that they did not satisfy a requisite element of the offense."⁶¹ The *Egelhoff* holding contradicts *Chambers v. Mississippi*, where the Court held that prohibiting a defendant from introducing exculpatory evidence violated that defendant's due process rights.⁶²

Masked by a "tradition" discussion, the Court is really saying that premeditation is not a necessary element of murder in the first degree. Under *Egelhoff*, a defendant could receive the greatest penalty imposed by the judiciary for "an act whose culpability is measured by the wrongdoing implicit in drinking rather than the intentional killing of another human being."⁶³ This pronouncement undermines one of the most fundamental roots of our judicial system—graduated culpability. Varying degrees of homicide indicate that our criminal justice system recognizes an important difference between acting with design or simply with disregard. Allowing state legislatures to casually subtract the premeditation element from the murder ~~one~~ equation places murder one and negligent homicide on equal levels and promptly returns our criminal justice system to its archaic beginnings.

The plurality in *Egelhoff* reconciles the due process concern by arguing that the state was required to show "considerable evidence" of intent.⁶⁴ For example, the Supreme Court accepted the argument that *Egelhoff* demonstrated the requisite design by retrieving the gun from the glove compartment and shooting each victim once in the head.⁶⁵ However, relegating the standard of proof from "beyond a reasonable doubt" to "considerable evidence" not only contradicts the firm holding in *In re Winship*,⁶⁶ but also confuses jurors.⁶⁷ Evidence of intoxication to negate specific intent is barred,

61. *Egelhoff*, 116 S. Ct. at 2026.

62. *Chambers v. Mississippi*, 93 S. Ct. 1038, 1049 (1973).

63. Ronald J. Allen, *Foreward: Montana v. Egelhoff—Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY, 633, 648 (1997).

64. *Egelhoff*, 116 S. Ct. at 2023.

65. *Id.*

66. *In re Winship* held that the Due Process Clause requires each element of a crime charged to be proven beyond a reasonable doubt. *In re Winship*, 90 S. Ct. 1068, 1072-73 (1970).

67. For more discussion on the Supreme Court requiring only "some evidence," see Allen, *supra*

but evidence of intoxication to explain why the defendant cannot remember what happened is permitted.⁶⁸ Jurors hear evidence of intent and evidence of intoxication, but are instructed not to consider intoxication with respect to intent. Because Montana has admitted that intoxication can affect intent, and jurors are likely to agree, such a counterintuitive approach brings confusion into the jury room.⁶⁹

The Model Penal Code Approach

Completely disallowing evidence of intoxication contradicts our criminal justice system because it compromises defendants' due process rights to introduce relevant evidence, lowers the state's burden of proof, and confuses jurors. The Model Penal Code (MPC) is an alternative to Montana's approach and one that many states follow.⁷⁰ It allows defendants to introduce evidence of intoxication to counter certain elements of a crime. Most states who have adopted the MPC approach allow intoxication to negate the specific intent element of a specific intent crime.⁷¹

However, the differentiation between specific and general intent is an irrational anachronism.⁷² Often, whether a crime requires specific intent comes down to the legislature's choice of language when framing the statute, and there is no substantive difference in the nature and quality of general versus specific intent crimes. For example, Wyoming has adopted the MPC approach and the Wyoming statutes employ a myriad of undefined terms to express the required mental state. These terms include:

believes, reasonably believing, has reasonable cause to believe, intentionally, knowingly or intentionally, intentionally and know-

note 63, at 645.

68. U.S. Supreme Court Official Transcript at 22, *Egelhoff*, 116 S. Ct. 2013 (No. 95-566) (on file with the *Land & Water Law Review*).

69. The attorney for the respondent articulated this by way of an example "So there's someone in the jury room saying I don't think this man was aware, and—because he was drunk. Another juror said, "I've taken an oath to follow these instructions, and this instruction said I can't take intoxication into account. They're both right, and they are mutually contradictory to one another." *Id.*

70. See Keiter, *supra* note 27, at 518-20 app.

71. *Id.*

72. Professor Fletcher offers a "Glossary of Intent" to resolve some of the confusion. He indicates that specific intent may mean three different things:

1. a well-defined, particular intent (e.g., an intent to deprive the owner permanently of property), or 2. an intent to realize a particular objective (if the intent is specific in this sense, undesired side-effects are not included) or 3. an intent that affects the species or degree of a crime and therefore may be negated by a claim of intoxication....General intent (*dolus generalis*). This can mean any of the following: 1. an intent simply to do the act that one does, or 2. a continuing intent that unites an unsuccessful attempt to kill with unintended killing in one complex sufficient for criminal homicide, or 3. the opposite of a specific intent as defined in B(3), or 4. the same as wrongful and criminal intent. . .

GEORGE FLETCHER, *RETHINKING CRIMINAL LAW*, 453-54 (1978).

ingly, intentionally, knowingly or recklessly, intentionally or in reckless disregard of the consequences, involuntarily, voluntarily, knowing, knowingly, know, knows or reasonably should know, with knowledge or probable cause to believe, maliciously, negligently, premeditated malice, purposely, and willfully.”⁷³

Which language calls for specific intent treatment is unclear. For example, murder in the first degree requires the defendant to act “purposely and with premeditated malice,”⁷⁴ and murder in the second degree requires the defendant to act “purposely and maliciously, but without premeditation.”⁷⁵ The Wyoming Supreme Court has interpreted murder in the first degree as a specific intent crime and murder in the second degree as a general intent crime.⁷⁶ This distinction indicates that “premeditation” is sufficient to meet the specific intent test—but is it necessary? Are crimes that require one to act “knowingly” or “purposely” specific intent crimes also?⁷⁷

The distinctions between specific and general intent are merely semantic and often illogical. Resting a defendant’s right to present a defense on arbitrary distinctions seems just as illogical as Montana’s approach which prohibited defendants from introducing evidence of intoxication altogether.

Given the lack of scientific evidence concerning how alcohol affects intent,⁷⁸ it is not surprising that both the Montana and the MPC approach seem tentative in recognizing the intoxication defense. Alcohol is a parasite that takes many forms depending on its host. For example, Egelhoff had a .36 blood alcohol level and had enough control of his faculties to hit the ambu-

73. Theodore E. Lauer, *Goodbye 3-Card Monte: The Wyoming Criminal Code of 1982*, 19 LAND & WATER L. REV. 107, 116-17 (1984).

74. WYO. STAT. ANN. § 6-2-101 (Michie 1997).

75. *Id.* § 6-2-104.

76. Crozier v. State 723 P.2d 42, 54 (Wyo. 1986). See also Bouwkamp v. State, 833 P.2d 486, 493 (Wyo. 1992).

77. The murder statute under which Egelhoff was convicted required that he act “purposely” or “knowingly,” and Montana treated it as a specific intent crime. MONT. CODE ANN. § 45-2-101 (1995).

78. “While it is widely recognized that alcohol and drug abuse are associated with criminality, neither the extent of this association nor its nature has been clearly identified.” Robin Room, *Drinking, Violence, Gender and Causal Attribution: A Canadian Case Study in Science, Law and Policy*, 23 CONT. DRUG PROBLEMS 649, 672 (1996) (citing R.V. Daviault (1994) 3 S.C.R. 63). The author goes on to state “the effects of various patterns of drinking on different types of intent are susceptible of empirical study. Such evidence might well improve the process of legislating and of legal decision making.” *Id.* at 679.

Medicine recognizes mental disorders that arise as a result of intoxication. They include: Delirium Tremens, Alcoholic Hallucinosiis, Pathological Intoxication, and Alcoholic Paranoia. For further discussion of these disorders, see S.J. HACKER ET AL., MENTAL DISORDER AND CRIMINAL RESPONSIBILITY 83-88 (1981). However, it is unclear if a person suffering from one of these mental disorders is unable to form volitional intent. In addition, recent studies indicate that intoxication in mentally healthy individuals cannot lead to automatism, but it nonetheless remains unclear how automatism bears upon intent. Harold Kalant, *Intoxicated Automatism: Legal Concept vs. Scientific Evidence*, 23 CONT. DRUG PROBLEMS 631, 638-46 (1996).

lance attendants, and kick a camera from the hands of a detective.⁷⁹ It seems that Egelhoff acted deliberately (though he claims he did not). However, a .36 blood alcohol could cause a different person to become completely incapacitated.⁸⁰

How then is the judicial system to determine what relevance intoxication has upon intent? One alternative is to simply allow the defendant to testify. However, this is problematic because defendants may confuse alcohol induced blackouts with automatism. Blackouts limit a person's ability to remember what happened while intoxicated.⁸¹ Automatism is a "behavior of which the person is unaware and over which that person has no conscious control."⁸² Defendants may be under the misperception that because they cannot remember committing the crime they could not have acted intentionally. However, research shows that all automatism involves blackouts, but all blackouts do not indicate automatism.⁸³

Drunk and Dangerous

Since it is unclear how intoxication affects intent,⁸⁴ one alternative is to change the focus of the debate by enacting a separate statute making it illegal to commit crimes while intoxicated. This approach would put the intent question on hold until there is more scientific evidence indicating how alcohol affects intent, while still providing a method for dealing with intoxicated offenders. Germany has adopted a drunk and dangerous statute which is a good starting point. The statute provides:

330A. (1) Whoever intentionally or negligently becomes intoxicated through the use of alcohol or other intoxicating substances is punishable up to five years in prison, if while in that intoxicated condition he commits a criminal act and if by virtue of the intoxication is not responsible for a criminal act (or his non-responsibility is a possibility). . . (2) In no event may the punishment be greater than that for the wrongful act committed in the state of intoxication.⁸⁵

The concept underlying this statute is that becoming intoxicated and subse-

79. See *supra* notes 12-13 and accompanying text.

80. Heavy drinkers can seem sober despite blood alcohol contents as high as 4.0. Kalant, *supra* note 78, at 642.

81. Kalant, *supra* note 78, at 640.

82. *Id.* at 634.

83. *Id.* at 640.

84. See *supra* note 78 and accompanying text.

85. Fletcher, *supra* note 72, at 847. See also Fischer, *Alcohol Consumption and the Liability of Offenders in the German Criminal System*, 23 *CONT. DRUG PROBLEMS* 707 (1996).

quently committing a crime is a punishable act in itself.⁸⁶

The drunk and dangerous model would allow a defendant to present evidence of intoxication and would preserve the state's burden of proof on all elements. Evidence of intoxication would therefore be one factor considered by the jury when determining whether the defendant intended the crime. While experts could not testify concerning the defendant's state of mind,⁸⁷ they could testify concerning the level of intoxication suffered by the defendant, typical effects of alcohol, and any mental ailment which may be relevant. In addition, juries would take into account the defendant's behavior during the incident, including the defendant's blood alcohol content (BAC) level. The evidence proffered would be similar to that in any other criminal trial, and the jury would weigh the evidence and make a reasoned determination.

In a criminal trial, there is always a risk that juries will simply acquit those with whom they sympathize and convict those with whom they do not. However, this risk is no greater in a trial involving intoxication than in any other similarly complicated trial. Clear, concise jury instructions play a large role in guiding juries through muddled jurisprudential waters. Since the drunk and dangerous approach is relatively simple, it would result in clearer jury instructions than either the Montana or the MPC approaches.

Under the drunk and dangerous model, if the state proves all elements of a crime except for intent because the defendant was intoxicated, the defendant would face a one to five year penalty for committing the crime while intoxicated. This approach seems to accommodate our criminal justice system because the punishment fits the crime. A defendant would not effectively "get off" due to intoxication, nor would a judge sentence a defendant for an intentional crime when the jury determines that he did not in fact form intent. In the sentencing phase, judges would have discretion to impose a penalty *up to* five years considering relevant factors such as involuntary or first time intoxi-

86. In 1962, the Supreme Court held that California's law making it illegal to "be addicted to the use of narcotics" was unconstitutional because it punished "status" instead of behavior. *Robinson v. California*, 370 U.S. 660, 663-65 (1962). The drunk and dangerous statute would probably withstand a challenge on these grounds because it does not punish one merely for being intoxicated, rather it punishes for being intoxicated *and* committing a crime. Therefore, it is not a crime based purely on status.

87. Even experts cannot accurately conclude what goes on in the mind of the defendant during the crime. The Wyoming Supreme Court addressed a similar issue in *Witt v. State*, which concerned battered women's syndrome. The court refused to allow a psychologist to testify as to the defendant's state of mind when she shot and killed her domestic partner. The court stated, "science has not yet produced the technology which allows experts to put themselves inside the person's head at the time an event took place." *Witt v. State*, 892 P.2d 132, 138 (Wyo. 1995) (quoting *State v. Richardson*, 525 N.W.2d 378, 383 (Wis. Ct. App. 1994)). See also FED. R. EVID. 704(b): "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." *Id.*

cation.⁸⁸

Principles of Deterrence

The drunk and dangerous statute seems to fit within our jurisprudential confines and responds to many of the concerns implicit in the Montana and the MPC approach. However, potential lenient sentences implicit in the drunk and dangerous model may undermine criminal deterrence, and subject society to increased crime.⁸⁹ “Laws that make offenders less vulnerable to punishment have rendered all other citizens more vulnerable to criminal violence.”⁹⁰ The plurality in *Egelhoff* relies heavily on this point.⁹¹

Arguably there are scenarios where a defendant would be “less vulnerable to punishment.” For example, under the drunk and dangerous approach, if a defendant were charged with first degree murder and effectively negated intent with an intoxication defense, that defendant would receive a maximum of five years incarceration. Five years is an offensively lenient approach for someone who took a human life, regardless of their intent.⁹² Therefore, complying with jurisprudential norms and maximizing criminal deterrence are conflicting principles. How are courts to protect a defendant’s due process rights while at the same time protecting society from a growing plethora of unintentional drunken crimes?

One alternative is to construct a drunk and dangerous statute which effectively aggravates instead of mitigates a defendant’s crime. For example state legislatures could draft drunk and dangerous provisions that allow a defendant to simultaneously be charged with the underlying crime and with drunk and dangerous. Therefore, if the prosecutor charges a defendant with burglary and drunk and dangerous and successfully proves both crimes, the

88. Arguably, a defendant could be involuntarily intoxicated, or intoxicated for the first time, and yet still intend a criminal act. This is true especially since there is no direct evidence indicating that intoxication inhibits intent. Therefore, both Montana and the MPC may have gone beyond what is rationally supportable by automatically excusing involuntarily intoxicated individuals.

89. Stricter penalties typically deter crime more efficiently than lenient penalties. Daniel I.A. Cohen, *The Jurisprudence of Unconscious Intent*, 24 J. OF PSYCHIATRY & THE L. 511, 547 (1996).

90. Keiter, *supra* note 27, at 516.

91. *Montana v. Egelhoff*, 116 S.Ct. 2013, 2018 (1996) (quoting 1 M. Hale, Pleas of the Crown 32-33. “the intoxicated defendant shall have no privilege by this voluntary contracted madness, but shall have the same judgement as if he were in his right senses.”; 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 25-26, explaining that the law viewed intoxication “as an aggravation of the offense rather than an excuse for criminal behavior.”; *United States v. Cornell*, 25 F. Cas. 650, 657-658 (1820) (“[d]runkenness is a gross vice, and in the contemplation of some of our laws it is a crime. . . . so far from it’s being in law an excuse for murder, it is rather an aggravation of its malignity”); *State v. Cross*, 27 Mo. 332, 338 (1858) (“if this deprivation is to relieve him of all responsibility or to diminish it, the great majority of crimes committed will go unpunished”).

92. However, in some instances drunk and dangerous would render a greater penalty depending on the crime. If the defendant were charged with a specific intent crime that carried a penalty of less than five years, if convicted of drunk and dangerous, the defendant could receive a penalty of up to five years.

defendant will receive a penalty for burglary and an additional penalty for committing burglary while under the influence—thereby aggravating the crime in all instances.⁹³

However, while this option seems palatable, science has not ascertained whether alcohol affects intent.⁹⁴ An approach that allows alcohol to aggravate all intentional crimes is based on an unfounded principle that drunken criminals always act intentionally and are somehow more culpable than those individuals who commit crimes sober.

Dealing with intoxication in criminal cases is a convoluted issue which legal scholars have fervently debated since the dawn of criminal law. One thing remains a certainty, there is no easy answer to this conundrum. *Egelhoff* is problematic because it undermines a defendant's due process rights, the prosecution's burden of proof, and is likely to confuse jurors. The drunk and dangerous statute is perhaps the most simplified approach yet presented. However, it too is not without fault. Until a better approach exists, jurisdictions must weigh the pros and cons of each approach before blindly following Montana's lead.

CONCLUSION

The German drunk and dangerous statute provides an alternative to the intoxication defense. It seems to balance the concerns of the Supreme Court in *Egelhoff* by preserving the prosecutorial burden of proof concerning all elements of an offense charged. In addition, the drunk and dangerous model is a more practical alternative because it allows the jury to weigh all of the evidence and does not differentiate between specific and general intent crimes.

Using the drunk and dangerous model, legislatures would deter crime not by limiting defenses, but rather by making it illegal to become intoxicated and commit crimes. This approach preserves a defendant's right to present evidence of intoxication and the prosecutorial burden of proof.

However, while the drunk and dangerous provision fits nicely in our jurisprudential boxes, it seems to thwart public policy concerns of deterring crime. Undoubtedly, under drunk and dangerous, crimes of inebriates would

93. This approach does not violate the Double Jeopardy Clause of the United States Constitution because according to the *Blockburger test*, two charges are not the same offense if each requires proof of a fact the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Therefore, burglary requires proof of intent, and drunk and dangerous requires proof of intoxication. However, in the case of unintentional crimes, charging a defendant with both crimes may be a double jeopardy violation because each offense would then *not* include a separate element.

94. See *supra* note 78 and accompanying text.

continue to escalate.⁹⁵

The concerns on both sides of this issue are virtually irreconcilable. In order to allow drunkenness to aggravate one's crime we must accept the notion that drunkenness does not affect intent. However, to treat defendants leniently we must believe that the intoxicated Egelhoff is a different person than the sober Egelhoff. Until science advances to a point where we can definitively determine how alcohol affects intent, we must prioritize these conflicting values. Given this alternative, it seems logical to support that of which we are certain—that defendants have a deeply rooted right to criminal due process, and ultimately the punishment should be proportional to the criminal conduct.⁹⁶

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95. However, there is no evidence that a stricter approach to crimes of inebriates would cause incidences to de-escalate. An empirical study concerning the affects of Montana's law on criminal deterrence may lead to some more definitive answers.

96. Don E. Scheid, *Constructing a Theory of Punishment Desert, and the Distribution of Punishments*, 10 CANADIAN J. OF L. AND JURIS., 441, 505 (1997).