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Derrick Augustus Carter

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Bifurcations of Consciousness: The Elimination of the Self-induced Intoxication Excuse

*Derrick Augustus Carter**

I. INTRODUCTION

In early American and English common law, intoxication evidence did not excuse or mitigate criminal behavior.¹ Any person who destroyed his or her volition through intoxication was equally as culpable as a sober person for the legal consequences of a self-induced vice.² Voluntary drunkenness aggravated, rather than reduced, criminal liability.³

* Associate Professor of Law, Valparaiso University School of Law, Indiana. Formerly of the Michigan Appellate Defender Office, a division of the Michigan Supreme Court. I wish to thank Ruth Buckler for her encouragement and advice. I also wish to thank Shirley Mason-Carter and Ken Carter, posthumously, who inspired me to write this Article. Finally, I wish to thank Professor Ivan Bodensteiner and Professor JoEllen Lind for their editorial assistance.

1. *Montana v. Egelhoff*, 518 U.S. 37 (1996). In *Egelhoff*, Justice Scalia commented:

Drunkenness, it was said in an early case, can never be received as a ground to excuse or palliate an offence: this is not merely the opinion of a speculative philosopher, the argument of counsel, or the obiter dictum of a single judge, but it is a sound and long established maxim of judicial policy, from which perhaps a single dissenting voice cannot be found.

Id. at 44 (quoting 1 M. HALE, *HISTORY OF THE PLEAS OF THE CROWN* 32-33 n.3 (1736)). See generally R.U. Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 *LAW Q. REV.* 528 (1933).

2. See *Director of Public Prosecutions v. Beard*, 1920 App. Cas. 479. In *Beard*, Lord Birkenhead observed:

Under the law of England as it prevailed until early in the nineteenth century voluntary drunkenness was never an excuse for criminal misconduct; and indeed the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. . . . A man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man.

Id. at 494. See also *California v. Whitfield*, 868 P.2d 272, 290-93 (Cal. 1994) (Mosk, J., dissenting) (discussing the English and American history of intoxication).

3. *United States v. Cornell*, 25 F. Cas. 650, 658 (C.C.D.R.I. 1820) (No. 14,868) (“Drunkenness is a gross vice, and in the contemplation of some of our laws is a crime; and I learned in my earlier studies, that so far from its being in law an excuse for murder, it is rather an aggravation of its malignity.”); *New York v. Register*, 457 N.E.2d 704 (N.Y. 1983), cert. denied, 466 U.S. 953 (1984). In *Register*, the court observed:

The common law courts viewed the decision to drink to excess, with its attendant risks to self and others, as an independent culpable act In

As time evolved, changing societal attitudes on drinking eased the strict ban against the intoxication defense.⁴ Many judges recognized that the debilitating impact of excessive alcohol warranted admission of intoxication evidence to negate proof that the accused was physically and mentally capable of committing the crime.⁵ A few judges permitted the intoxication defense to negate proof of specific intent crimes, such as first degree murder, but continued to ban the intoxication defense to general intent crimes, such as rape.⁶ Today, the vast majority of states adhere to the specific-general intent formula in determining the admissibility of the intoxication defense.⁷

A growing number of states,⁸ however, are resurrecting the common law rule that bans the intoxication excuse to *all* crimes because of a renewed appreciation that self-induced intoxication is preventable and is a substantial cause of many crimes.⁹ Studies confirm that inebriation is involved in fifty

utilitarian terms, the risk of excessive drinking should be added to and not subtracted from the risks created by the conduct of the drunken defendant for there is no social or penological purpose to be served by a rule that permits one who voluntarily drinks to be exonerated from failing to foresee the results of his conduct if he is successful at getting drunk.

Id. at 709. See *Pigman v. Ohio*, 14 Ohio 555, 557 (1846) (“The older writers regarded drunkenness as an aggravation of the offense, and excluded it for any purpose.”).

4. *Egelhoff*, 518 U.S. at 46; see also DR. JOEL FORT, ALCOHOL: OUR BIGGEST DRUG PROBLEM 49 (1973). In chapter 3, *History of Alcohol*, Dr. Fort observed: While the early Americans were attempting to control the abuse of alcohol, laws were passed to increase the production of wine and spirits. The Puritans urged temperance, but not abstinence. In Massachusetts Bay Colony, brewing was the third most important industry; drunkenness was punished by whipping, fines, or the stocks. Thus, the tradition of totally opposite policies, of the right hand operating at cross purposes with the left, began very early in America.

Id.

5. *Register*, 457 N.E.2d at 709.

6. See Note, *Intoxication as a Criminal Defense*, 55 COLUM. L. REV. 1210, 1211 (1955).

7. See *infra* note 115 and accompanying text (describing the specific-general intent test).

8. 17 states joined in an Amicus Brief to *Montana v. Egelhoff*, 518 U.S. 37 (1996), in support of a states’ right to ban the intoxication excuse: Alaska, Arizona, Arkansas, Delaware, Hawaii, Kansas, Ohio, Oklahoma, Mississippi, Missouri, Nebraska, Nevada, New Mexico, Pennsylvania, South Carolina, Texas, and West Virginia.

9. Some of the other state legislatures have eliminated voluntary intoxication as a defense to criminal conduct and have made evidence of voluntary intoxication irrelevant for purposes of establishing the accused’s mental state. See *Arizona v. Ramos*, 648 P.2d 119, 121 (Ariz. 1982) (“Perhaps the state of mind which needs to be proven here is a watered down mens rea; however, this is the prerogative of the legislature.”) (interpreting ARIZ. REV. STAT. ANN. § 13-503 (1989)); *White v. Arkansas*, 717 S.W.2d 784 (Ark. 1986) (interpreting ARK. CODE ANN. § 5-2-207 (Michie 1987)); *Wyant v. Delaware*, 519 <https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

percent of homicides,¹⁰ sixty-two percent of aggravated assaults, and fifty percent of spousal abuses, rapes, and property offenses.¹¹ In addition to the correlation with violence, intoxication contributes to forty percent of automobile fatalities.¹²

A.2d 649 (Del. 1986) (interpreting DEL. CODE ANN. tit. 11, § 421 (1995)); *Foster v. Georgia*, 374 S.E.2d 188, 194-95, 196 (Ga. 1988), *cert. denied*, 490 U.S. 1085 (1989) (“[T]he law . . . excuses the young and the insane, out of tenderness towards an infirmity which is involuntary . . . [but] the law takes special care to exclude drunken men from the excuse, because their infirmity is voluntary.”) (interpreting GA. CODE ANN. § 16-3-4 (1998)); *Hawaii v. Souza*, 813 P.2d 1384, 1386 (Haw. 1991) (stating that the “legislature was entitled to redefine the mens rea element of crimes and to exclude evidence of voluntary intoxication to negate state of mind”) (interpreting HAW. REV. STAT. § 702-230 (1993)); *Lanier v. Mississippi*, 533 So. 2d 473 (Miss. 1988); *Missouri v. Erwin*, 848 S.W.2d 476 (Mo. 1983), *cert. denied*, 510 U.S. 826 (1994) (interpreting MO. REV. STAT. § 562.076 (1994)); *Commonwealth v. Rumsey*, 454 A.2d 1121, 1122 (Pa. Super. Ct. 1983) (stating that the legislative prerogative in defining mens rea is “constantly shifting adjustment between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man”) (interpreting 18 PA. CONS. STAT. ANN. tit. 18, § 308 (Purdon 1998)); *South Carolina v. Vaughn*, 232 S.E.2d 328 (S.C. 1977); *Hawkins v. Texas*, 605 S.W.2d 586 (Tex. Crim. App. 1980) (interpreting TEX. PENAL CODE ANN. § 8.04 (Vernon 1994)).

10. Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1682 (1981) (citing Goodwin, *Alcohol in Suicide and Homicide*, 34 Q.J. STUD. ALCOHOL 144, 154 (1973)).

11. See Robert A. Moore, *Legal Responsibility and Chronic Alcoholism*, 122 AM. J. PSYCHIATRY 748 (1966). Moore commented:

To demonstrate that the association of crime and alcohol is not insignificant, a sampling of a few statistics is enlightening. Of 882 felons arrested in a two year period in Cincinnati, 64% had a urine alcohol level of .10 percent or higher. In crimes of violence, the incidence varied from 67-88%. A four year study of 588 homicide cases in Philadelphia revealed that one or both parties had been drinking in 64 % of the cases In Cincinnati, 84 percent of 225 homicide victims had been drinking, and 44 percent had a blood alcohol level of .15 percent or higher

This is not an American phenomenon. In Yugoslavia, 60 to 80 percent of all crimes involve intoxication to some degree, with over half of the homicides committed during a state of pathological intoxication. The association of alcohol and crime was lower but not insignificant in Sweden: 39 percent of male offenders but only 4.2 percent of women offenders were intoxicated at the time of the offense. In Japan, it was found that 36 percent of arsonists, 27 percent of murders and 18 percent of assaulters had been intoxicated at the time of the crime, and 17.6 percent of all prisoners were intoxicated offenders.

Id. at 753.

12. According to the National Highway Traffic Safety Administration, approximately 40% to 50% of traffic fatalities are attributed to intoxication from 1988 to 1995. USA TODAY, May 23, 1997, at 4-A. Alcohol-related traffic fatalities as a percentage of the total:

Intoxication releases inhibitions, impairs judgement, incites hostile behavior, and unleashes one's criminal impulses.¹³ Intoxication is defined as a "disturbance of mental or physical capacities resulting from the introduction of substances into the body."¹⁴ The level required for intoxicated driving convictions varies from state to state, but most states recognize .10 percent blood-alcohol content as definitive evidence of drunk driving.¹⁵

	Total Fatalities	Alcohol Related Fatalities	% Fatalities Alcohol Related
1982	43,945	25,165	57.3%
1983	42,589	23,646	55.5%
1984	44,257	23,798	53.7%
1985	43,825	22,716	51.8%
1986	46,087	24,046	52.2%
1987	46,390	23,641	51.0%
1988	47,087	23,626	50.2%
1989	45,582	22,404	49.2%
1990	44,599	22,084	49.2%
1991	41,508	19,887	47.9%
1992	39,250	17,858	45.5%
1993	40,150	17,473	43.5%
1994	40,716	16,580	40.7%
1995	41,798	17,274	41.3%
1996*	42,065		
1997*	42,000	16,520	

* EZIO C. CERELLI, 1997 TRAFFIC CRASHES, INJURIES, AND FATALITIES - PRELIMINARY REPORT, at 1-2, 20; see also EIGHTH SPECIAL REPORT TO THE UNITED STATES CONGRESS ON ALCOHOL AND HEALTH 238 (1993).

13. See Monrad G. Paulsen, *Intoxication as a Defense to Crime*, 1961 U. ILL. L.F. 1, 1 (drinking intoxicants stimulates by "loosening the brakes, not stepping on the gas"). Each intoxicated individual will be governed by his underlying instincts, the personality pattern which emerges when he is under alcoholic influence is likely to be repeated each time he is in a similar condition. Furthermore, nearly all drunken offenders intend their criminal acts in a manner similar to sober men. Thus under alcoholic influence the person's intent remains unchanged; only the inhibitory influences normally restraining him are removed.

Id. See Note, *Intoxication as a Criminal Defense*, *supra* note 6, at 1211; see also Note, *Alcohol Abuse and the Law*, *supra* note 10, at 1682 ("Alcohol reduces one's sensitivity to external cues to behavior and dulls self-control and self-criticism.").

14. MODEL PENAL CODE § 2.08(5)(a) (1962). The definition of intoxication is not limited to alcohol but is sufficiently broad to include other personality altering substances, e.g., marijuana, LSD, cocaine, heroin, etc. See, e.g., MONT. CODE ANN. 45-2-101 (1997).

15. See FORT, *supra* note 4, at 29. Dr. Fort estimates that .10 is about four drinks within an hour, which may vary with body weight, tolerance, and digestion. See FORT, <https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

In response to the harm caused by self-induced intoxication, the State of Montana passed a statute stating that “[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”¹⁶ Banning this material defense, however, presented challenges, such as the due process right to present a defense, the due process right to present relevant evidence, and the constitutional propriety of reducing the prosecution’s burden of proof. The United States Supreme Court addressed these challenges in *Montana v. Egelhoff*.¹⁷

This Article examines the *Egelhoff* case as a stage to review national policies addressing the intoxication excuse. While the *Egelhoff* decision has little bearing on the majority of states, which adhere to the specific-general intent formula, many prosecutors and jurists are dissatisfied with the incongruous results of the specific intent test and with current lenient legislation concerning intoxication. Many states find Montana’s ban on the intoxication excuse very attractive.¹⁸ Other states are subjecting repeated drunken offenders who cause death to first and second degree murder prosecutions.¹⁹ These recent advances in the movement against the intoxication excuse stem from a renewed appreciation of the principles of causation and personal accountability. Abusive drinking prophetically causes foreseeable and harmful results. When intoxication evidence is filtered through principles of causation, Montana’s

supra note 4, at 29. At .10, there is some significant impairment of judgment, muscle coordination and vision. Reaction time is slowed. See FORT, *supra* note 4, at 28.

“The National Highway Safety Administration has determined that a typical 170-pound man has to consume more than four drinks on an empty stomach in one hour to exceed .08.” Michael Massing, *Why Beer Won’t Go Up in Smoke*, N.Y. TIMES MAG., March 22, 1998, § 6, at 48. Many states are reducing the required level of intoxication to .08. John Gibeaut, *Sobering Thoughts, Legislatures and Courts Increasingly are Just Saying No to Intoxication as a Defense or Mitigating Factor*, 83 A.B.A. J. 56, 62 (1997).

16. MONT. CODE ANN. § 45-2-203 (1997). The entire 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, injected, or otherwise ingested the substance causing the condition.

MONT. CODE ANN. § 45-2-203 (1997).

17. 518 U.S. 37 (1996).

18. See Gibeaut, *supra* note 15, at 58-59.

19. See *United States v. Fleming*, 739 F.2d 945 (4th Cir. 1984) (holding that extreme reckless drunk driving offense could be prosecuted as second degree murder), *cert. denied*, 469 U.S. 1193 (1985); *California v. Whitfield*, 868 P.2d 272 (Cal. 1994) (affirming a second degree murder conviction for an intoxicated driving offense); *New York v. Register*, 457 N.E.2d 704, 709 (N.Y. 1983), *cert. denied*, 466 U.S. 953 (1984).

approach of eliminating intoxication as an excuse for crime “has considerable justification.”²⁰

Part II of this Article first examines the factual and legal development of the *Egelhoff* case through the Montana Supreme Court and then assesses the United States Supreme Court’s decision upholding Montana’s intoxication ban.²¹ The *Egelhoff* case demonstrates that *fundamental due process* defenses must be examined through the lenses of *history and tradition*. Part III examines the *specific-general intent* formula that determines the admissibility of intoxication evidence in the majority of states. Part IV explores new legislative and prosecutorial approaches towards the intoxication defense and suggests defense strategies. Part V examines the principle of *causation*, which is the driving force behind society’s renewed intolerance of repeated intoxicated behavior that causes harm and death. Part VI concludes with a discussion of the societal ramifications of eliminating the intoxication excuse.²²

20. *Egelhoff*, 518 U.S. at 49.

21. This Article focuses on alcoholic, as opposed to drug, intoxication. While there is considerable overlap between alcoholic intoxication and drug intoxication, there are significant differences. Most drug use, unless prescribed, is illegal and witnesses are frequently scarce. The effects of alcohol intoxication are well-established, while the effects of drugs are still widely disputed. Ordinarily, the use of alcohol produces no mental illness except by long continued excessive use. On the other hand, the same result can be obtained overnight by the use of modern hallucinatory drugs like LSD. See generally Phillip E. Hassman, Annotation, *Effect of Voluntary Drug Intoxication Upon Criminal Responsibility*, 73 A.L.R.3d 98, 129-38 (1977 & Supp. 1996) [hereinafter Hassman, *Voluntary Drug Intoxication*]; Phillip E. Hassman, Annotation, *Drug Addiction or Related Mental State as Defense to Criminal Charge*, 73 A.L.R.3d 16 (1977 & Supp. 1996) [hereinafter Hassman, *Drug Addiction as Defense*]; G. Lunter, *The Effect of Drug Induced Intoxication on the Issue of Criminal Responsibility*, 8 CRIM. L. BULL. 731 (1972). In *Iowa v. Hall*, 214 N.W.2d 205 (Iowa 1974), Judge LeGrand noted:

We do not yet have the same scientific reliability on the effect of the use of drugs as far as criminal responsibility is concerned. But this should not tempt us to slough the matter off by lumping all drugs together with alcohol, where obviously many of them do not belong.

Id. at 213 (LeGrand, J., dissenting).

22. Habitual use of intoxicants can result in permanent mental disorder that remains even when the person is not under the influence of intoxicants. If the unsoundness of mind produced by long-term alcohol or drug abuse has become fixed or settled, the nearly universal rule is that the defendant may assert a traditional insanity defense. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 24.05, at 283-84 (2d ed. 1995). <https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

II. MONTANA V. EGELHOFF

A. *Factual Background*

James Egelhoff was accused of shooting two people to death near Troy, Montana. The evidence at trial revealed that Egelhoff accompanied John Christianson and Roberta Pavola throughout the evening of July 12, 1992 to various parties and bars.²³ Several witnesses testified at trial that they saw Egelhoff in John Christianson's station wagon, which was later discovered disabled in a ditch.²⁴ Several witnesses testified that they attempted to rescue those in the disabled car, but they were frightened away by Egelhoff, who shouted profanities and threats from the backseat of the station wagon.²⁵ Several witnesses testified that they saw two bodies "slumped over" in the front seat of the car.²⁶ The police discovered the bodies of John Christianson, shot in the back of the head, and Roberta Pavola, shot in the left temple, in the front seat of the station wagon. The police found James Egelhoff in the rear passenger compartment yelling obscenities.²⁷ Egelhoff's tennis shoe and gun were found on the front floor near the brake pedal.²⁸

Upon arrest, Egelhoff attacked the police and ambulance attendants. The police physically restrained Egelhoff for six hours at the hospital.²⁹ The state's forensic pathologist testified that Egelhoff's blood-alcohol content was .36 percent, a near lethal dose.³⁰ Forensics testing identified gunshot residue on Egelhoff's hands.³¹ Testimony by the state firearms examiner indicated that the bullet which killed Christianson originated from a gun with similar characteristics as Egelhoff's gun.³² Blood stains found on Egelhoff's pants and T-shirt were consistent with Christianson's and Pavola's blood.³³

James Egelhoff testified that he was so drunk he could remember very few details of the evening of July 12th. He did not remember the shooting, the parties, the ambulance attendants, or kicking the camera from the police

23. *Montana v. Egelhoff*, 518 U.S. 37, 40 (1996).

24. *Id.*

25. *Montana v. Egelhoff*, 900 P.2d 260, 262 (Mont. 1995).

26. Brief for Petitioner at *7, *Montana v. Egelhoff*, 518 U.S. 37 (1996) (No. 95-566), available in 1996 WL 19035.

27. *Egelhoff*, 518 U.S. at 40.

28. *Id.*

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

30. *Montana v. Egelhoff*, 518 U.S. 37, 40 (1996).

31. *Id.*

32. *Montana v. Egelhoff*, 900 P.2d 260, 262 (Mont. 1995).

33. Brief for Petitioner at *9, *Montana v. Egelhoff*, 518 U.S. 37 (1996) (No. 95-566), available in 1996 WL 19035.

photographer.³⁴ Egelhoff testified that he last remembered sitting on a hill passing a bottle of "Black Velvet" to John Christianson.³⁵ The defense contended that Egelhoff's intoxication level precluded Egelhoff from undertaking the physical tasks necessary to accomplish the murder.³⁶ Egelhoff denied committing the murders and blamed them on an unknown person.³⁷

At the conclusion of trial, the judge instructed the jury regarding Montana's statutory definition of a purposeful, knowing, and deliberate killing:

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 that there exists the high probability that his conduct will cause a specific result.³⁸

The trial judge also instructed the jury, over defense objection, that

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

35. *Id.*

36. *Id.*

37. *Id.* at 263.

38. MONT. CODE ANN. § 45-5-102(1)(a) (1997), provides: "A person commits the offense of deliberate homicide if: (a) he purposely or knowingly causes the death of another human being. . . ." Section 45-2-101(34) defines "knowingly" as follows:

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

MONT. CODE ANN. § 45-2-101(34) (1997). Section 45-2-101(63) defines "purposely" as follows:

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

MONT. CODE ANN. § 45-2-101 (63) (1997). A deliberate murder in Montana is punishable by death, or life imprisonment, or by a term of not less than ten or more than 100 years. *See* MONT. CODE ANN. § 45-5-102(2) (1997).

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voluntary intoxication is not a defense to the killing and is irrelevant to the existence of Egelhoff's mental state:

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.³⁹

The jury found James Egelhoff guilty of two counts of deliberate homicide. The judge sentenced Egelhoff to serve two consecutive terms of forty years in prison, plus two consecutive terms of two years in prison for possession of the gun, for a total of eighty-four years imprisonment.⁴⁰ James Egelhoff then appealed to the Montana Supreme Court.

B. The Montana Supreme Court

The Montana Supreme Court, in an opinion written by Justice Weber, unanimously reversed James Egelhoff's conviction and held that "Egelhoff was denied due process when the jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense."⁴¹ The court recognized that a purposeful and knowing killing results from a subjective mental state and intoxication evidence is relevant to that subjective mental state. The court stressed that it would be fundamentally unfair to permit the State to offer evidence in support of a purposeful and knowing killing without permitting the jury to consider the evidence that cast doubt upon Egelhoff's mental state.⁴²

Moreover, the intoxication instruction invaded the jury's province:

By instructing the jury that it may not consider intoxication evidence for purposes of determining a mental state of "knowingly" or "purposely," the jury may be misled into believing the State has proved the mental state beyond a reasonable doubt and that is why defendant cannot introduce evidence in opposition to a specific state

39. MONT. CODE ANN. § 45-2-203 (1997) (emphasis added).

40. *Montana v. Egelhoff*, 900 P.2d 260, 261 (Mont. 1995).

41. *Egelhoff*, 900 P.2d at 266-67 (holding that the decision applies retroactively to those cases pending on direct appellate review, but not to those on collateral review).

42. *Id.* at 265. In *Egelhoff*, the evidence was presented by the State to establish that Egelhoff acted "purposely" or "knowingly." Such evidence could be properly considered by the jury in its determination of whether or not he acted "purposely" or "knowingly." However, Egelhoff was not allowed to rebut such evidence with evidence that his level of intoxication precluded him from forming the requisite mental state. *Id.* at 266.

of mind. The state should never escape its burden of proof of each element of the offense.⁴³

The Montana Supreme Court noted that the burden of proof was not shifted; rather, it was reduced improperly:

Egelhoff was not allowed to rebut such evidence with evidence that his level of intoxication precluded him from forming the requisite mental state. As a result of the elimination of the opportunity of using this rebuttal evidence, the prosecution's burden of proof for the element of mental state was reduced.

This is a denial of due process. Due process is "the right to a fair opportunity to defend against the State's accusations." This right to present a defense is fundamental.⁴⁴

The Montana Supreme Court relied on several prior holdings of the United States Supreme Court: *In Re Winship*,⁴⁵ *Martin v. Ohio*,⁴⁶ *Sandstrom v. Montana*,⁴⁷ and *Chambers v. Mississippi*.⁴⁸ The Montana court recognized that the United States Supreme Court's collective holdings emphasized the strict burden placed on the prosecution to prove every element, especially intent, beyond a reasonable doubt.⁴⁹ *In Re Winship* emphasizes that "the reasonable doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'"⁵⁰ In *Martin v.*

43. *Id.* at 266.

44. *Id.* at 265 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)). The court also noted:

While Egelhoff was given the opportunity to present evidence of his level of intoxication, the instruction prevented consideration by the jury as it decided whether or not there was a reasonable doubt as to Egelhoff's acting "knowingly" and "purposely." Because the jury was not allowed to consider that evidence for such a purpose, the State was relieved of part of its burden to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. It was reversible error to instruct the jury not to consider it.

Id. at 266.

45. 397 U.S. 358 (1970) (holding that the State must prove every element of the offense beyond a reasonable doubt).

46. 480 U.S. 228 (1987) (holding that it was proper to place the burden of proof on the accused to prove self-defense by a preponderance of the evidence, but emphasizing in dicta that eliminating intoxication altogether would violate due process).

47. 442 U.S. 510 (1979) (holding that a jury instruction [on presumptions], which shifts the burden of proof on the accused's mental state is unconstitutional).

48. 410 U.S. 284 (1973) (holding that the right to present a defense is fundamental).

49. *Montana v. Egelhoff*, 900 P.2d 260, 264-66 (Mont. 1995).

50. *In re Winship*, 397 U.S. 358, 364 (1970). See also *Mullaney v. Wilbur*, 421 <https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

Ohio,⁵¹ the United States Supreme Court emphasized that eliminating the self-defense claim would improperly “relieve the State of its burden and plainly run afoul of [In re] Winship’s mandate.”⁵²

In deciding *Egelhoff*, the Montana Supreme Court diligently abided by the spirit of these prior holdings;⁵³ especially to a prior reversal in the landmark decision of *Sandstrom v. Montana*,⁵⁴ which reiterated the fundamental precept that jury instructions which shift the burden of proof of the accused’s mental state are unconstitutional. Nonetheless, the Montana prosecutor appealed to the United States Supreme Court,⁵⁵ which reversed by a 5-4 plurality decision, holding that the Montana legislature could ban the intoxication defense.⁵⁶ The plurality, in an opinion by Justice Scalia, handily disposed of the constitutional issues concerning burden of proof, relevance, and the admissibility of the intoxication defense.⁵⁷

U.S. 684, 700 (1975) (“It is critical that the moral force of the criminal law *not be diluted by a standard of proof* that leaves people in doubt whether innocent men are being condemned.”) (emphasis added).

51. 480 U.S. 228, 233-34 (1987).

52. *Id.*

53. *Montana v. Egelhoff*, 518 U.S. 37, 61 (1996) (Ginsburg, J., concurring) (“If the Montana Court considered its analysis forced by this Court’s precedent, it is proper for [the United States Supreme Court] to say what prescriptions federal law leaves to the States, and thereby dispel confusion to which we may have contributed, and attendant state-court misperception.”).

54. 442 U.S. 510, 520 (1979) (holding that an aged old instruction that “the law presumes that a person intends the ordinary consequences of his voluntary acts” is unconstitutional). The Court held that a reasonable juror possibly understood the instruction to create either a conclusive or burden shifting presumption that defendant possessed the necessary mental state. *Id.* “Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he charged.” *Id.*

55. Jurisdiction was invoked under 28 U.S.C. § 1257(a) (1994) (“Final Judgments or decrees rendered by the highest Court of the State . . . may be reviewed by the Supreme Court . . .”).

56. *Montana v. Egelhoff*, 518 U.S. 37 (1996).

57. The United States Supreme Court wrote a splintered opinion. Justice Scalia wrote a four-Justice plurality opinion. Justice Ginsburg concurred in the judgment. Justice O’Connor wrote a four-Justice dissent, although Justice Souter also wrote a separate dissent, as did Justice Breyer with whom Justice Stevens joined.

C. *The United States Supreme Court*

1. Burden of Proof

Justice Scalia declared that eliminating the intoxication defense does not shift the burden of proof because the accused bears no burden in showing intoxication.⁵⁸ Instead, eliminating the intoxication defense has the practical effect of “burden reducing” by making it easier for the government to prove its case of a purposeful and knowing killing:

“Reducing” the State’s burden in this manner is not unconstitutional, unless the rule of evidence violates a fundamental principle of fairness. We have “rejected 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.”⁵⁹

According to Justice Scalia, the prosecution satisfied its burden of proof by presenting “considerable evidence” from which the jury could have concluded that James Egelhoff acted “purposely” and “knowingly”; specifically, the jury considered the execution style manner of the killing, Egelhoff’s aggressiveness and coordination, and the forensics evidence.⁶⁰

Any evidentiary rule, according to Justice Scalia, can have the effect of reducing the prosecution’s burden of proof.⁶¹ “Reducing the state’s burden in this manner is not unconstitutional unless the rule of evidence itself violates a fundamental principle of fairness.”⁶² To determine fundamental fairness, one examines the tradition and history of the defense. History reveals that intoxication was not a cognizable defense at common law.⁶³

Justice Scalia distinguished *Martin v. Ohio*,⁶⁴ where the Court previously disapproved of eliminating self-defense, by explaining that self-defense may be a “fundamental [defense], a proposition that the historical record may support.”⁶⁵ Also, Justice Scalia explained in a footnote that the Court’s suggestions in

58. *Egelhoff*, 518 U.S. at 54 (“These decisions [*Sandstrom v. Montana*, 442 U.S. 510 (1979); *In re Winship*, 397 U.S. 358 (1970)] simply are not implicated here because, as the Montana court itself recognized, ‘the burden is not shifted.’”).

59. *Id.*

60. *Id.*

61. *Id.* See also *Arizona v. Ramos*, 648 P.2d 119 (Ariz. 1982) (holding that “a watered down mens rea” is the prerogative of the legislature) (citing *Powell v. Texas*, 392 U.S. 514, 535 (1968)).

62. *Montana v. Egelhoff*, 518 U.S. 37, 54 (1996).

63. See *supra* note 1 and accompanying text.

64. 480 U.S. 228 (1987).

65. *Egelhoff*, 518 U.S. at 55.

Martin are primarily dicta: “[I]t is to the holdings of our cases, rather than their dicta, that we must attend.”⁶⁶

Another case, not cited by Justice Scalia, foreshadowed *Egelhoff*'s conclusion that the accused has no constitutional right to introduce evidence of his intoxication. In *Fisher v. United States*,⁶⁷ the Supreme Court rejected the accused's claim that he had a constitutional right to present evidence of his mental disorder, which was short of insanity, in determining premeditation and deliberation.

[T]here was sufficient evidence to support a verdict of murder in the first degree, if petitioner was a normal man in his mental and emotional characteristics. But the defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits. In view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process.⁶⁸

“If the accused had no constitutional right to introduce evidence of a personal condition for which he was not responsible, then the accused has no right to introduce evidence of a condition which his own blameworthy conduct created.”⁶⁹

2. Relevance

Intoxication, the Court admitted, is relevant to intent, purpose, and knowledge.⁷⁰ However, the state legislature determines the limits as to relevancy.⁷¹ In Montana, as in most states, evidence is considered “relevant” if it makes a fact more or less probable.⁷² State evidentiary rules bar relevant

66. *Id.* The Court added: “If the *Martin* dictum means that the Due Process Clause requires all relevant evidence bearing on the elements of a crime to be admissible, the decisions we have discussed show it to be incorrect.” *Id.*

67. 328 U.S. 463 (1946).

68. *Id.* at 466.

69. Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 504 (1997).

70. *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996).

71. *Id.* (“Relevant evidence may, for example be excluded on account of a defendant's failure to comply with procedural requirements. . . . And any number of familiar and unquestionably constitutional evidentiary rules also authorize the exclusion of relevant evidence.”).

72. MONT. R. EVID. 401.

evidence that is incompetent, privileged, or misleading,⁷³ such as hearsay evidence, which is frequently unreliable.⁷⁴

Justice O'Connor, who led the dissent, agreed that "a defendant does not enjoy an absolute right to present evidence relevant to his defense";⁷⁵ however, she contended that Montana's rule "places a blanket exclusion on a category of evidence that would allow the accused to negate the offense's mental state element."⁷⁶ Justice O'Connor distinguished hearsay, which is a category of unreliable evidence, from intoxication, which is a category of highly reliable evidence directly related to guilt or innocence.⁷⁷ Justice O'Connor also emphasized that the accused has constitutional safeguards, such as the right to compulsory process⁷⁸ and the right to present exculpatory evidence.⁷⁹

Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations. Meaningful adversarial testing of the State's case requires that the defendant not be prevented from raising an effective defense, which must include the right to present relevant, probative evidence.⁸⁰

In response, Justice Scalia noted in a footnote that

73. MONT. R. EVID. 401.

74. MONT. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

75. *Montana v. Egelhoff*, 518 U.S. 37, 62 (O'Connor, J., dissenting).

76. *Id.*

77. *Id.* Justice O'Connor stated:

It is true that a defendant does not enjoy an absolute right to present evidence relevant to his defense. . . . But none of the "familiar" evidentiary rules operates as Montana's does. The Montana statute places a blanket exclusion on a category of evidence that would allow the accused to negate the offenses's mental state element. In so doing, it frees the prosecution, in the face of such evidence, from having to prove beyond a reasonable doubt that the defendant nevertheless possessed the required mental state.

Id.

78. *Id.* at 63 (asserting that "the Constitution prohibited a State from establishing rules to prevent whole categories of defense witnesses from testifying out of a belief that such witnesses were untrustworthy. Such action by the State detracted too severely and arbitrarily from the defendant's right to call witnesses in his favor") (citing *Washington v. Texas*, 388 U.S. 14 (1967)).

79. *Id.* (asserting that the "limitations on evidence may exceed the bounds of due process where such limitations undermine a defendant's ability to present exculpatory evidence without serving a valid state justification") (citing *Crane v. Kentucky*, 476 U.S. 683 (1986)).

80. *Id.*

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. We do not entirely understand Justice O'Connor's argument that the vice of Sec. 45-2-203 [eliminating intoxication] is that it excludes evidence "essential to the accused's defense." Evidence of intoxication is not always "essential" any more than hearsay evidence is always "nonessential."⁸¹

Justice Scalia conceded that the Court's prior holding in *Crane v. Kentucky*⁸² recognized that the defense has an opportunity to present reliable evidence that is central to the accused's claim of innocence.⁸³ But *Crane* also "makes perfectly clear that we were not setting forth an absolute entitlement to introduce crucial, relevant evidence."⁸⁴ In the absence of state legislation banning the defense, the exclusion of intoxication evidence might deprive a defendant of basic due process rights,⁸⁵ but the state legislature may limit the introduction of relevant evidence for "valid" reasons.⁸⁶

"Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out,' . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"⁸⁷

Justice Scalia recognized that the Montana legislature should have discretion on empirically relevant matters such as intoxication:

81. *Montana v. Egelhoff*, 518 U.S. 37, 43 n.1 (1996). This is a good point because most states recognize that intoxication is no defense to general intent crimes. There are many instances when intoxication evidence is not essential. See *supra* notes 6-7 and accompanying text.

82. 476 U.S. 683 (1986).

83. *Id.* at 690.

84. *Egelhoff*, 518 U.S. at 53 ("*Crane* does nothing to undermine the principle that the introduction of relevant evidence can be limited by the state for a valid reason.>").

85. See *Hopt v. People*, 104 U.S. 631 (1881) (holding that evidence of intoxication is material to a defense to first degree murder). The Court stated:

The condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime.

Id. at 633.

86. *Egelhoff*, 518 U.S. 37, 43 (1996).

87. *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)).

There is, in modern times, even more justification for laws such as Sec. 45-2-203 [eliminating intoxication] than there used to be. Some recent studies suggest that the connection between drunkenness and crime is as much cultural as pharmacological that is, that drunks are violent not simply because alcohol makes them that way, but because they are behaving in accord with their learned belief that drunks are violent. This not only adds additional support to the traditional view that an intoxicated criminal is not deserving of exoneration, but *it suggests that juries who possess the same learned belief as the intoxicated offender will be too quick to accept the claim that the defendant was biologically incapable of forming the requisite mens rea. Treating the matter as one of excluding misleading evidence therefore makes some sense.*⁸⁸

“In light of intoxication’s questionable relevance, its limited helpfulness, and the potential for its fraudulent use, Montana’s exclusion of intoxication may actually promote a primary goal of criminal justice—accurate factfinding.”⁸⁹

3. Elimination of a Defense

Justice Scalia recognized that, as a general proposition, the legislature specifies the applicable defenses. Eliminating a defense, however, conflicts with the accused’s reciprocal rights of cross-examination, compulsory process, and jury determination of all the elements to an offense.⁹⁰ The legislature, according to the Supreme Court, may eliminate a defense unless the ban violates a “fundamental principle of justice.”⁹¹ One of the Court’s established methods of due process analysis in determining “fundamental principles” is to consider whether the principle is deeply rooted in history and tradition.⁹² At early common law, intoxication did not excuse a crime; it aggravated a persons’ culpability.⁹³

Justice Scalia noted that at common law the intoxicated defendant had no special privilege based on self-contracted madness.⁹⁴ “Drunkenness, it was said

88. *Id.* at 51 (emphasis added).

89. Brief of the American Alliance for Rights and Responsibilities and the New York Chapter of Parents of Murdered Children as Amicus Curiae for Petitioner at *27, *Montana v. Egelhoff*, 518 U.S. 37 (1996) (No. 95-566), available in 1996 WL 17146.

90. *Egelhoff*, 518 U.S. at 62 (O’Connor, J., dissenting).

91. *Id.* at 43.

92. *Id.* at 44. See also *Hawaii v. Souza*, 813 P.2d 1384, 1386 (Haw. 1991) (holding that voluntary intoxication is a gratuitous defense and not a constitutionally protected defense to criminal conduct).

93. See *supra* notes 1-5 and accompanying text.

94. *Montana v. Egelhoff*, 518 U.S. 37, 45 (1996). See also Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1014 (1932) (“It is only within fairly modern times, <https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

in an early case, can never be received as a ground to excuse or palliate an offense: this is not merely the opinion of a speculative philosopher, the argument of counsel, or the obiter dictum of a single judge, but it is a sound and long established maxim of judicial policy, from which perhaps a single dissenting voice cannot be found."⁹⁵ The common law view was based on the Aristotlean notion that "two antisocial acts were committed: getting drunk and causing the harm to others."⁹⁶

Nor, at common law, could intoxication excuse *mens rea*.⁹⁷ "It is inconceivable," according to Justice Scalia, "that the legal commentators did not realize that an offender's drunkenness might impair his ability to form the requisite intent; and inconceivable that their failure to note intoxication's exception from the general rule was an oversight."⁹⁸ The historical reasons advanced in support of the rule eliminating intoxication as an affirmative defense or as an excuse to *mens rea* include the ease of counterfeiting the disability,⁹⁹ the attractiveness of the defense to avoid or mitigate responsibility,¹⁰⁰ and the prevalence of intoxication as an influential factor in homicide and many other crimes.¹⁰¹

Justice O'Connor, who dissented, took exception to Justice Scalia's historical analysis by noting that by the time the Fourteenth Amendment was ratified in 1868, many cases recognized the specific intent exception to the intoxication ban.¹⁰² In fact, many state courts recognized the specific-general intent rule as the foundation for common law concerning intoxication.¹⁰³ Justice

with the growing realization that criminal liability is to be sharply differentiated from moral delinquency, that intoxication has been allowed as an indirect defense insofar as it negatives the existence of a specific intent required for certain crimes.").

95. *Egelhoff*, 518 U.S. at 44 (quoting 1 HALE, *supra* note 1, at 32-33 n.3).

96. *Id.*

97. *Id.* at 45.

98. *Id.*

99. *Id.* ("Now touching the trial of this incapacity . . . this is a matter of great difficulty, partly from the easiness of counterfeiting the disability . . . and partly from the variety of the degrees of this infirmity.") (quoting 1 HALE, *supra* note 1, at 32).

100. *Id.* (quoting 1 FRANCIS WHARTON, WHARTON'S CRIMINAL LAW § 66, at 95 (1932)).

101. *Id.*

102. *Id.* at 69 (O'Connor, J., dissenting).

103. See *White v. Arkansas*, 717 S.W.2d 784 (Ark. 1986) (holding that "at common law, evidence of voluntary intoxication, while no excuse for a crime, could be admitted to show the defendant was incapable of forming the specific intent necessary for the crime") (citing *Wood v. Arkansas*, 34 Ark. 341 (1879)).

Many writers as early as the 17th century recognized that drunkenness could be an excuse for murder. See Sayre, *supra* note 94, at 997 ("[A]n intentional killing, whether from rage, drunkenness, or hidden displeasure, if committed 'on the sudden,' is considered at the opening of the seventeenth century to be without malice aforethought.").

O'Connor emphasized that the constitutional safeguards of compulsory process and cross-examination are also deeply rooted.¹⁰⁴ Justice Scalia noted, however, that the specific-general intent movement in America was "slow to take root," and lacked uniform application among the states.¹⁰⁵ The stern rejection of intoxication as a defense became a fixture of early American law.¹⁰⁶

4. Public Policy Implications

Besides "historical pedigree," due process analysis requires a careful policy description of the asserted fundamental principles.¹⁰⁷ Intoxication is neither justifiable nor excusable conduct. There may be some benefit in drinking alcohol to relieve social anxieties, but there is no public benefit or excuse in abusive drinking that causes harm to others. While Justice Scalia did not launch a philosophical tirade on utilitarian values, he noted the public policy implications of eliminating the intoxication defense.¹⁰⁸ A large number of violent crimes are committed by intoxicated offenders. Modern studies reveal that half of all homicides are caused or significantly influenced by

104. *Montana v. Egelhoff*, 518 U.S. 37, 71 (O'Connor, J., dissenting). Justice O'Connor asserted:

We cannot consider only the historical disallowance of intoxication evidence, but must also consider the 'fundamental principle' that a defendant has a right to a fair opportunity to put forward his defense, in adversarial testing where the State must prove the elements of the offense beyond a reasonable doubt As concepts of mens rea and burden of proof developed, these principles came into conflict, as the shift in the common law in the 19th century reflects.

Id.

105. Justice Scalia recognized that the origin of the specific intent formula is often traced to a 1819 English case, in which Justice Holroyd is reported to have held that "though voluntary drunkenness cannot excuse from the commission of crime, yet where, as on a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated [is] a circumstance proper to be taken into consider." *Id.* at 46 (citing *King v. Grindley*, Worcester Sum. Assizes (1819)). Years later, according to Justice Scalia, Justice Holroyd disavowed this position. *Id.* (citing *King v. Carroll*, 173 Eng. Rep. 64, 65 (N.P.)).

Many states still abided by the common law approach. *See, e.g., Harris v. United States*, 8 App. D.C. 20, 29 (1896); *McDaniel v. Mississippi*, 356 So. 2d 1151, 1158 (Miss. 1978) (noting that rule remained in effect until 1932); *Missouri v. Harlow*, 21 Mo. 446, 458 (1855); *New York v. Register*, 457 N.E.2d 704, 709 (N.Y. 1983), *cert. denied*, 466 U.S. 953 (1984) (noting that, in 1881, New York modified rule by statute); *New York v. Rogers*, 18 N.Y. 2, 9, 27 (1858) (stating that it "is not law" that jury should be instructed to consider intoxication of defendant in determining intent with which homicide was committed); *Vermont v. Tatro*, 50 Vt. 481, 491 (1878).

106. *Egelhoff*, 518 U.S. at 44.

107. *Id.* at 47.

108. *Id.* at 49.

intoxication.¹⁰⁹ Eliminating self-induced intoxication as an excuse for crimes deters drunkenness or irresponsible behavior, serves to incapacitate dangerous people, and inspires personal accountability.¹¹⁰

5. States' Rights

The decision posed in *Egelhoff* is a victory for states' rights in that a state may reduce the level of culpability considered sufficient to hold an intoxicated drinker criminally liable for a deliberate homicide. By leaving decisions to the legislative branch, society as a whole can respond to changing mores and progressive legal perceptions about inebriation. Many experts recognize that drinkers are not powerless in regulating their consumption.¹¹¹

Justice Scalia concluded:

"The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." The people of Montana have decided to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue. Nothing in the Due Process clause prevents them from doing so.¹¹²

109. *Id.* See also Note, *Alcohol Abuse and the Law*, *supra* note 10, at 1681-82.

110. *Montana v. Egelhoff*, 518 U.S. 37, 49 (1996). Justice Souter dissented because he believed the State of Montana did not present a valid justification for eliminating the intoxication defense. *Id.* at 73 (Souter, J., dissenting). Justice Souter commented:

A State may typically exclude even relevant and exculpatory evidence if it presents a valid justification for doing so. There may (or may not) be a valid justification to support a State's decision to exclude, rather than render irrelevant, evidence of a defendant's voluntary intoxication. Montana has not endeavored, however, to advance an argument to that effect.

Id.

111. In *Traynor v. Turnage*, 485 U.S. 535 (1988), the United States Supreme Court recognized the work of Herbert Fingarette that drinkers vary in degree and have the ability to regulate their consumption. *Id.* at 550-51 (citing Herbert Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 HARV. L. REV. 793, 802-08 (1970)).

112. *Egelhoff*, 518 U.S. at 56 (internal citations omitted). See *supra* notes 8-9 and accompanying texts for the states that currently ban the intoxication excuse and the other states which are considering the ban.

Besides upholding the state's right to eliminate the intoxication excuse, the *Egelhoff* decision also clarified the meaning of "fundamental" defenses.¹¹³ The decision ascertained that "fundamental" defenses must be determined from history and tradition. Yet intoxication, by many accounts, was a growing excuse in early American common law to first degree murder in several jurisdictions. Nevertheless, the Supreme Court ignored America's volatile history regarding alcoholic indulgence and narrowed its historical focus to the seminal stages of early American and English common law when intoxication aggravated, rather than mitigated, an offense. A "fundamental" defense must be one that is *uniformly* accepted in history. Only a "fundamental" defense can supersede a legislative ban.

III. BIFURCATIONS OF CONSCIOUSNESS: GENERAL AND SPECIFIC INTENT CRIMES

The Supreme Court's decision in *Montana v. Egelhoff* has little bearing on the majority of states which, unlike Montana, recognize the specific-general intent test to determine the admissibility of intoxication. Montana's statutory scheme of deliberate homicide differs considerably from the majority of states, which divide homicide into first and second degree offenses. Moreover, Montana is one of the few states that specifically bans intoxication as a defense to *all* major crimes. Approximately forty-three states allow intoxication as a

113. The elimination of the intoxication defense was not the primary issue before the Montana Supreme Court in *Egelhoff*. The primary issue concerned whether intoxication is relevant to mens rea. Montana Justice Nelson, in a concurring opinion, clarified Montana's position regarding the admissibility of the intoxication defense:

I write separately only because of my lingering concern that our decision will be misread as allowing an affirmative defense of voluntary intoxication in criminal cases. That is absolutely not so. This case is not about a defense. Rather, it deals with burden of proof and the fundamental obligation of the State to prove each element of a criminal charge—including mental state element—beyond a reasonable doubt.

Montana v. Egelhoff, 900 P.2d 260, 267-68 (Mont. 1995) (Nelson, J., concurring). However, the United States Supreme Court reviewed this issue because it was sufficiently preserved. *Egelhoff*, 518 U.S. 37 (1996).

In Delaware, where intoxication is no defense to any crimes, the court allowed the accused to testify to his own intoxication, but the accused could not present expert witnesses to the intoxication, nor could the lay witnesses testify as to defendant's normal behavior, nor could defense counsel argue defendant's intoxication as a defense during closing arguments. See *Wyant v. Delaware*, 519 A.2d 649 (Del. 1986).
<https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

defense to specific intent or purposeful crimes.¹¹⁴ The manner in which specific intent evolved as a pivotal mental element must be examined.

In early English history, the mental elements in criminal law overlapped with tort law into a general *Law of Wrongs*.¹¹⁵ Principles of causation and absolute liability settled personal injury disputes.¹¹⁶ While subjective intent played a role in punitive consequences, the accused was absolutely liable for causing harm to another. Jail, fines, or restitution interchangeably settled criminal law and tort claims.¹¹⁷

As time evolved, tort law and criminal law diverged, and the requirement of the *mens rea* became increasingly important.¹¹⁸ Several English scholars resuscitated the classic Roman and Greek view of personal fault, *mea culpa*, as the standard for culpability.¹¹⁹ Ecclesiastic power matured and clerics instructed that the mental element of sin equaled the physical act.¹²⁰ "Whosoever looketh

114. See, e.g., ALASKA STAT. § 11.81.630 (Michie 1996) (providing intoxication "is relevant to negate an element of the offense that requires that the defendant intentionally cause a result"); CAL. PENAL CODE § 22(b) (West 1999) ("[I]ntoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent . . ."); *Colorado v. Low*, 732 P.2d 622 (Colo. 1987) ("Evidence of voluntary intoxication constitutes a defense to specific intent crimes, but is incompetent as a defense to general intent crimes.") (interpreting COLO. REV. STAT. § 18-1-804 (1998)); *Idaho v. Hall*, 727 P.2d 1255 (Idaho Ct. App. 1986) (interpreting IDAHO CODE § 18-116 (1997)); *Michigan v. Langworthy*, 331 N.W.2d 171, 173 (Mich. 1982) ("Almost every state, by statute or by common law, has adopted the exculpatory rule."); *New Jersey v. Cameron*, 514 A.2d 1302 (N.J. 1986).

115. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF COMMON LAW* 463 (5th ed. 1956); Sayre, *supra* note 94, at 976-77 ("[T]here was no distinction in those [early] days between crime and tort . . . [P]rimitive English law started from a basis bordering on absolute liability. [I]n the recorded law prior to the twelfth century, a criminal intent was not recognized as an indispensable requisite for criminality.").

116. Sayre, *supra* note 94, at 977 (stating classical "English law started from a basis bordering on absolute liability").

117. PLUCKNETT, *supra* note 115, at 421.

In the words of Sir James Fitz James Stephen: Fines were paid on every imaginable occasion . . . at every stage of every sort of legal proceeding, and for every description of official default, irregularity, or impropriety. In short, the practice of fining was so prevalent that if punishment is taken as a test of a criminal offence, and fines are regarded as a form of punishment, it is almost impossible to say where the criminal law in early times began or ended . . . It is impossible practically to draw the line between what was paid by way of fees and what was paid by way of penal fines.

PLUCKNETT, *supra* note 115, at 421.

118. PAUL H. ROBINSON, *FUNDAMENTALS OF CRIMINAL LAW* 184 (2d ed. 1995).

119. Sayre, *supra*, note 94, at 982-83.

120. "The canonists had long insisted that the mental element was the real criterion of guilt and under their influence the conception of subjective blameworthiness as the foundation of legal guilt was making itself strongly felt." Sayre, *supra* note 94, at 980.

on a woman to lust after her hath committed adultery with her already in his heart."¹²¹ Penance rested significantly on the accused's state of mind.¹²² The early felonies, *malum in se crimes*, were the "external manifestations of the heinous sins of the day."¹²³

The appreciation for criminal defenses and excuses derived from the English *Law of Pardons*, wherein the King gradually freed from criminal responsibility those who killed without guilty intent.¹²⁴ The *Law of Pardons*, adopted by the English courts, divided homicides into various degrees depending upon the mental element. "The ancient concept of malice aforethought was an early attempt to focus on the mental state in order to distinguish those who deserved death from those who through 'Benefit of Clergy' would be spared."¹²⁵ As judicial decisionmaking carefully discriminated each case, precise mental elements became clearer for various crimes.¹²⁶ Each felony involved different social interests, and consequently, divergent mental states.¹²⁷

The growing influence of the Renaissance period also conceptualized personal fault and tragedy as a solution to violent murderous deeds: "O that this too too sullied flesh would melt . . ." ¹²⁸ William Shakespeare's Hamlet was the epitome of the beguiled Renaissance man:

I have heard that guilty creatures sitting at a play
Have by the very cunning of the scene
Been struck so to the soul that presently
They have proclaimed their malefactions.

...

More relative than this. The play's the thing

121. Sayre, *supra* note 94, at 983 (quoting JOSEPH CULLEN AYER, JR., A SOURCE BOOK FOR ANCIENT CHURCH HISTORY 626 (1913)).

122. Sayre, *supra* note 94, at 983 ("If he has thought on a sin and determines to commit it, but is prevented in the execution so is the sin the same, but not the penance.") (citing AYER, *supra* note 121, at 626).

123. Sayre, *supra* note 94, at 989.

124. Sayre, *supra* note 94, at 994-95.

125. Tison v. Arizona, 481 U.S. 137, 156 (1987). See also A.K.R. KIRALFY, PITTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 361 (1962).

126. KIRALFY, *supra* note 125, at 355-56. Kiralfy commented:

In the reign of Edward III we also see emerging very clearly the notion that the wrong will be felonious or not according to the intention of the party to do something essentially wrong It is suggested that it was the growth of mens rea, or intention, in felony that caused the gap between crime and tort that appears in the fifteenth century.

KIRALFY, *supra* note 125, at 355-56.

127. Sayre, *supra* note 94, at 994.

128. WILLIAM SHAKESPEARE, HAMLET act 1, sc. 2, at 39 (Wilard Farnham ed., 1985).

Wherein I'll catch the conscience of the king.¹²⁹

The culmination of the legal, religious, and cultural forces moved the criminal law of England to require a greater sense of moral blameworthiness.¹³⁰ "Early law was indifferent to the defence of drunkenness because the theory of criminal liability was too crude and too undeveloped to admit of exceptions . . . But with the refinement in the theory of criminal liability . . . a modification of the rigid old rule on the defence of drunkenness was to be expected."¹³¹

All crimes now originate with a general intent, the basic *mens rea*, consisting of various layers of criminal negligence, or recklessness, or intent to commit a criminal act.¹³² For a general intent crime, the prosecution must prove that the defendant voluntarily performed the wrongful act.¹³³ Criminal negligence and recklessness form the category of general intent because these culpable mental states identify a gross deviation from the standard of care that a reasonable person should exercise.¹³⁴ Recklessness also contemplates a subjective awareness of a high degree of risk, short of actual intent.¹³⁵

The specific-general intent bifurcation depends on whether "intent" is specifically itemized as a distinct element of an offense.¹³⁶ "Specific intent" means that the prosecution must prove not only that the accused did certain acts, but that the accused accomplished the acts with the intent to cause a particular result. Whether an offense is a specific intent crime depends initially on legislative intent.¹³⁷ Frequently, the offense contains identifiable words in the name of the statute or in the statutory definition that indicate a heightened intent prerequisite. In determining legislative intent, courts focus on expressive terms

129. *Id.* at 86.

130. ROBINSON, *supra* note 118, at 185; Sayre, *supra* note 94, at 994.

131. Singh, *supra* note 1, at 537.

132. *Id.* See also *Lambert v. California*, 355 U.S. 225, 228 (1957) ("We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime, for conduct alone without regard to the intent of the doer is often sufficient."); *Michigan v. Langworthy*, 331 N.W.2d 171, 174 (Mich. 1982); *Washington v. Coates*, 735 P.2d 64, 69 (Wash. 1987).

133. *Michigan v. Lardie*, 551 N.W.2d 656, 661 (Mich. 1996); *Langworthy*, 331 N.W.2d at 173.

134. See *New York v. Register*, 457 N.E.2d 704 (N.Y. 1983), *cert. denied*, 466 U.S. 953 (1984) (holding that a person acts recklessly when he/she consciously disregards a substantial or unjustifiable risk that circumstances exist or that a prohibited result will follow, and this disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation); Paulsen, *supra* note 13, at 13; see also *New Jersey v. Cameron*, 514 A.2d 1302, 1307 (N.J. 1986) ("A 'general intent' can be equated with that which the Code defines as 'recklessness' or criminal 'negligence.'").

135. *California v. Whitfield*, 868 P.2d 272, 275 n.2 (Cal. 1994).

136. *Langworthy*, 331 N.W.2d at 182.

137. *Id.*

such as “wilfulness,”¹³⁸ purposely,¹³⁹ “knowingly,”¹⁴⁰ or “intent to.”¹⁴¹ If the matter is still unclear, the courts employ a myriad of judicial exercises to determine legislative intent.¹⁴²

English jurisdictions refer to the specific intent formula as “ulterior intent.”¹⁴³ “Ulterior intent” is an added element beyond the basic act itself.¹⁴⁴ When the definition of a crime describes a particular act and identifies an intent to do a further act or achieve a future consequence, this crime is deemed to have an ulterior intent.¹⁴⁵ Assault with intent to kill, for instance, requires proof of an assault and equal proof of the future intent to murder.¹⁴⁶

138. *Id.* at 179. See *Michigan v. Beaudin*, 339 N.W.2d 461, 463 (Mich. 1983) (holding “willful” endangerment statute required specific intent instruction); *Michigan v. Garcia*, 247 N.W.2d 547, 550 (Mich. 1976) (holding that “wilful” killing means the “intent to accomplish the result of death”); see also WILLIAM LAWRENCE CLARK & WILLIAM L. MARSHALL, *A TREATISE ON THE LAW OF CRIMES* 72 (5th ed. 1952).

139. See *New Jersey v. Cameron*, 514 A.2d 1302, 1307 (N.J. 1986).

140. See *New Jersey v. Ghaul*, 334 A.2d 65, 67 (N.J. 1975).

141. See *California v. Hood*, 462 P.2d 370 (Cal. 1969); *Terry v. Indiana*, 465 N.E.2d 1085, 1088 (Ind. 1984); Note, *Intoxication as a Criminal Defense*, *supra* note 6, at 1212 n.13.

142. See *Michigan v. Lardie*, 551 N.W.2d 656 (Mich. 1996); *Michigan v. Langworthy*, 331 N.W.2d 171, 176 (Mich. 1982) (reviewing legislative intent in new criminal sexual conduct statute); see also CLARK & MARSHALL, *supra* note 138, at 46. There are many ways a court can unravel legislative intent. First, the courts give ordinary meaning to the language of the statute if that meaning can be clearly ascertained. Second, the courts look into the reason and purpose of the statute. Pre-existing laws are “useful guides in the interpretation of a doubtful statute.” CLARK & MARSHALL, *supra* note 138, at 47. Third, “[i]t is a well-settled principle . . . that the preamble and the title, though they are no part of an act, may be resorted to as an aid in ascertaining the intention of the legislature.” CLARK & MARSHALL, *supra* note 138, at 48. Fourth, “[w]hen a statute uses other terms, which have a settled meaning in the common law, this meaning is to be given them, unless there is something to show that the legislature intended otherwise.” CLARK & MARSHALL, *supra* note 138, at 48-49. Fifth, “[w]hen the legislature enacts a statute which is substantially the same as one which has already received a judicial construction, it will be presumed to have known that construction, and to have intended to adopt it, even though such knowledge be contrary to the facts.” CLARK & MARSHALL, *supra* note 138, at 49-50. Sixth, “[i]n ascertaining the meaning of a particular statute, all statutes on the same subject . . . are to be taken together as one law.” CLARK & MARSHALL, *supra* note 138, at 50.

143. *Director of Public Prosecutions v. Majewski*, House of Lords, 2 All E.R. 142 (1976).

144. *Roberts v. Michigan*, 19 Mich. 401, 414 (1870).

145. See *Lardie*, 551 N.W.2d at 660; see also *Langworthy*, 331 N.W.2d at 174; *Pennsylvania v. Graves*, 334 A.2d 661, 663 (Pa. 1975), *superceded by statute as recognized in Pennsylvania v. Garcia*, 479 A.2d 473 (Pa. 1984); CLARK & MARSHALL, *supra* note 137, at 78; Note, *Alcohol Abuse and the Law*, *supra* note 10, at 1683.

146. See *supra* note 142. Theft requires the intent to steal and equal proof of intent <https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

Some American jurisdictions refer to the specific intent formula as the exculpatory rule.¹⁴⁷ These jurisdictions believe that evidence of intoxication excuses the heightened intent element. If the offense requires a specific goal directed mentality, like first degree premeditated murder, then there is a heightened intent requirement:

While it is true that drunkenness cannot excuse crime, it is equally true that when a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist.¹⁴⁸

The specific intent formula derived principally from murder offenses where the courts acknowledged the fundamental incongruity of a premeditated intent requirement on the one hand, and the exclusion of evidence that might defeat a cool, calm, premeditated murder on the other.¹⁴⁹ In *Pennsylvania v. McFall*,¹⁵⁰ for instance, the court held that drunkenness does not incapacitate an individual, but frequently mitigates a heightened intent. The court determined that drunkenness clouds the understanding and excites the passions.¹⁵¹ If a person was grossly intoxicated, the court reasoned, then that person could not form the requisite specific intent to plot murder.¹⁵²

to permanently deprive. *Michigan v. Walker*, 38 Mich. 156, 158 (1878).

147. *Michigan v. Langworthy*, 331 N.W. 2d 171, 173 (Mich. 1982).

148. *Id.*

149. In *Pigman v. Ohio*, 14 Ohio 555 (1846), the court stated: "Drunkenness is no excuse for crime; yet, in that class of crimes and offenses which depend upon guilty knowledge, or the coolness and deliberation with which they shall have been perpetrated, to constitute their commission . . . [drunkenness] should be submitted to the consideration of the jury" for, where the crime required a particular mental state, "it is proper to show any state or condition of the person that is adverse to the proper exercise of the mind" in order "to rebut that knowledge, or to enable the jury to judge rightly of the matter . . ." *Id.* at 556-57. See also *Mooney v. Alabama*, 33 Ala. 419, 420 (1859); *Aszman v. Indiana*, 24 N.E. 123 (Ind. 1890); *Iowa v. Donovan*, 16 N.W. 206, 207 (Iowa 1883); *Cline v. Ohio*, 1 N.E. 22, 23 (Ohio 1885); *Swan v. Tennessee*, 23 Tenn. 136, 141-42 (1843).

150. 1 Pa. Rep. (Addison) 255, 257 (1794) ("Drunkenness does not incapacitate a man for forming a premeditated design of murder, but frequently suggests it. A drunk man may certainly be guilty of murder. But as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design.").

151. *Id.*

152. *Id.* See also *United States v. Roudenbush*, 27 Fed. Cas. 902 (1832) (No. 16,198) (holding that intoxication evidence could be a defense in a counterfeiting case, which requires specific intent); *California v. Whitfield*, 868 P.2d 272, 290-93 (Cal. 1994) (Mosk, J., dissenting) (discussing the history of intoxication); *McIntyre v. Illinois*, 38 Ill. 514, 520 (1865) (holding that intoxication could be a defense to premeditated murder).

Once murder offenses identified a specific intent pattern, other felonies followed a similar logical course.¹⁵³ If an offense explicitly requires a specific intent on its face, then it requires heightened mental sophistication.¹⁵⁴ “Some intent . . . would naturally involve a greater number of ideas, and require a more complicated mental process.”¹⁵⁵

It seemed inequitable to some courts to punish a person for a result that was unintended by intoxication, so the common law began to recognize several exculpatory concepts, such as insanity, compulsion, intoxication, and specific intent. “As the concept of moral blameworthiness grew in importance in American criminal law, courts for the first time were forced to grapple with instances in which harm was caused by a person with a diminished mental capacity.”¹⁵⁶ Adoption of the specific intent principle reflected changing societal perceptions regarding the intent and immorality of abusive alcohol use.¹⁵⁷ There grew an affinity for the alcoholic since many judges, attorneys, and jurors shared society’s indulgence for abusive drinking. Many courts orchestrated a compromise between the feelings of sympathy versus the feelings of reprobation for the intoxicated offender.¹⁵⁸

That is the quality of a demon; whilst that which is done on great excitement, as when the mind is broken up by poison or intoxication, although, to be punished, may, to some extent, be softened and set down to the infirmities of human nature.¹⁵⁹

153. See David McCord, *The English and American History of Voluntary Intoxication to Negate Mens Rea*, 11 J. LEGAL HIST. 372, 380-84 (1990); see also Hassman, *Voluntary Drug Intoxication*, *supra* note 21, at 144.

154. *Pigman v. Ohio*, 14 Ohio 555 (1846) (holding that intoxication is a defense to counterfeiting).

155. *Roberts v. Michigan*, 19 Mich. 401, 418 (1870). Many offenses required a “peculiar knowledge, nice discrimination and judgment, deliberation and premeditation.” *Id.* at 418.

156. See Sayre, *supra* note 94, at 1004.

157. *Pigman*, 14 Ohio at 555.

158. *California v. Hood*, 462 P.2d 370, 377 (Cal. 1969); see also K. AUSTIN KERR, ORGANIZED FOR PROHIBITION ch. 1, at 12-14 (1985) (contending that the profit motive encouraged excessive drinking).

159. *Pigman v. Ohio*, 14 Ohio 555, 556 (1846).

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Early statutes also imposed a specific intent requirement.¹⁶⁰ The language of California Penal Code Section 22, drafted in 1872, when “specific” and “general” intent were not yet terms of art, stated:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But *whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.*¹⁶¹

The specific intent doctrine reversed the assumptions that intoxicated persons were as physiologically culpable as sober persons.¹⁶² Intoxicated persons with directionless intent were less culpable than sober persons with evil design.¹⁶³ According to many courts, intoxication did not excuse what a defendant did; rather, intoxication excused what the defendant did not do—form the intent to kill.¹⁶⁴

160. In 1876, Utah law provided as follows:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

Cited in Hopt v. People, 104 U.S. 631, 634 (1881). KAN. STAT. ANN. § 21-3208(2) (Supp. 1972), provided:

An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

KAN. STAT. ANN. § 21-3208(2) (Supp. 1972).

161. CAL. PEN. CODE § 22 (1872).

162. McCord, *supra* note 153, at 380-85.

163. *Pigman*, 14 Ohio at 555. In *Pigman*, the court stated:

[I]t seems strange that any one should ever have imagined that a person who committed an act from the effect of drink, which he would have done if sober, is worse than the man who commits it from sober and deliberate intent. The law regards an act done in sudden heat, in a moment of frenzy, when passion has dethroned reason, as less criminal than the same act when performed in the cool and undisturbed possession of all the faculties.

Id. at 556. See also McCord, *supra* note 153, at 380-84.

164. *Roberts v. Michigan*, 19 Mich. 385, 393 (1870) (Appellant’s brief).

A. An Added Incapacity Standard

Many courts refused to accept such a benighted attitude towards intoxicated intent. As Judge Burger noted, “[d]runkness, while efficient to reduce or remove inhibitions, does not readily negate intent.”¹⁶⁵ A grossly intoxicated person commits the very harm he or she intends; “typically what is lacking is control and ethical sensitivity.”¹⁶⁶ As stated in *Washington v. Coates*,

A person can be intoxicated yet still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious It is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant’s ability to formulate the requisite mental state.¹⁶⁷

Nearly all courts require an *incapacity standard* in determining whether to admit intoxication evidence.¹⁶⁸ The amount of intoxication must be extremely high to negate specific intent or premeditation, requiring in some instances, prostration of the faculties.¹⁶⁹ If the accused’s mental faculties were so far

165. *Heideman v. United States*, 259 F.2d 943, 946 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 959 (1959). *See also* *New Jersey v. Stasio*, 396 A.2d 1129 (N.J. 1979), *superceded by statute as recognized in* *New Jersey v. Cameron*, 514 A.2d 1302 (N.J. 1986). In *Stasio*, the court stated:

Until a stuporous condition is reached or the entire motor area of the brain is profoundly affected, the probability of the existence of intent remains. The initial effect of alcohol is the reduction or removal of inhibitions or restraints. But that does not vitiate intent. The loosening of the tongue has been said to disclose a person’s true sentiments *in vino veritas*.

Id. at 1134.

166. Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1065 (1944). *See also* *Stasio*, 396 A.2d at 1134.

167. 735 P.2d 64, 69 (Wash. 1987).

168. *Michigan v. Mills*, 537 N.W.2d 909, 920 (Mich. 1995) (holding that “there was some evidence that the defendants appeared intoxicated, but there was no testimony that the defendant actually was intoxicated, or was intoxicated to a point at which he was incapable of forming the intent to commit the charged crime”).

169. *See* *Connecticut v. Johnson*, 40 Conn. 136, 143 (1873) (holding that intoxication must be “of such a degree as to impair the capacity of the prisoner to form a deliberate premeditated purpose to take life”); *Keenan v. Commonwealth*, 44 Pa. 56, 57 (1862) (holding that intoxication is no excuse, “unless it was so great as to render him ‘unable to form a wilful, deliberate, and premeditated design to kill’”); *see also* *Shepherd v. Welborn*, 848 F. Supp. 1379 (N.D. Ill 1994); *Latimore v. Alabama*, 534 So. 2d 665, 667-68 (Ala. Crim. App. 1988); *Weaver v. Indiana*, 643 N.E.2d 342 (Ind. 1994); *Nebraska v. Lesiak*, 449 N.W.2d 550 (Neb. 1989); *New Jersey v. Cameron*, 514 A.2d 1302, 1309-10 (N.J. 1986); *New York v. Rodriguez*, 564 N.E.2d 658 (N.Y. 1990); *New York v. Collins*, 507 N.Y.S.2d 252 (1986); *North Carolina v. Brown*, 439 S.E.2d 589 (N.C. 1994); *Pennsylvania v. Cessna*, 537 A.2d 834 (Pa. 1988); CLARK & MARSHALL, <https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

overcome by the intoxication that the accused was not conscious of the accused's criminal acts or why the accused committed the acts, then the accused lacked the requisite specific intent.¹⁷⁰

While several states still adhere to the incapacity standard in determining the admissibility of intoxication, many courts allow intoxication as a defense if there is *any* evidence in support of the claimed intoxication. The incapacity standard inadvertently encourages a peculiar paradox. Once an intoxicated offender is on the slippery slope of abusive drinking, the offender might as well thoroughly indulge in order to be exculpated.

B. Criticisms of the Specific-General Intent Test

Many jurists and legal commentators criticize the specific intent formula because the formula is frequently illogical, inconsistent, and inequitable. The specific-general intent test is notoriously difficult to define and apply.¹⁷¹ The specific intent principle at times produces unusual results in that often lesser included offenses are specific intent crimes, where intoxication is a defense, while the major offenses are general intent crimes, where intoxication is no defense.¹⁷² Jurors are given confusing instructions that allow for the intoxication defense for some lesser included offenses, yet disallow it for other offenses in the same category.¹⁷³ For instance, the offense of assault with intent to commit rape is considered a specific intent offense, where intoxication may be a defense, yet the greater offense of rape is a general intent offense, where intoxication is no defense.¹⁷⁴ Some jurists respond that the requirement of a specific intent for lesser crimes exists because of a desire to protect the individual against conviction on slight evidence.¹⁷⁵ Nevertheless, Professor Joshua Dressler notes that "nothing commends this dual approach towards the general versus specific intent principle. The accused's [motives], intent, and culpability are the same in both cases of rape and assault with intent to rape. The accused is equally dangerous and principles of general deterrence demand equal treatment."¹⁷⁶ The

supra note 138, at 96.

170. *Roberts v. Michigan*, 19 Mich. 385, 418 (1870).

171. *California v. Hood*, 462 P.2d 370 (Cal. 1969).

172. *See New Jersey v. Stasio*, 396 A.2d 1129, 1133 (N.J. 1979) (holding that the general-specific intent test gives rise to "incongruous results by irrationally allowing intoxication to excuse some crimes but not others"), *superseded by statute as recognized in New Jersey v. Cameron*, 514 A.2d 1302 (N.J. 1986); *see also Michigan v. Langworthy*, 331 N.W.2d 171, 174 (Mich. 1982).

173. *See supra* note 160.

174. DRESSLER, *supra* note 22, at 299; *United States v. Thorton*, 498 F.2d 749, 752-53 (D.C. Cir. 1974); *Langworthy*, 331 N.W.2d at 175-77.

175. *Thorton*, 498 F.2d at 752-53.

176. DRESSLER, *supra* note 22, at 299.

question, notes Dressler, “should be simply whether the defendant did or did not form the state of mind required in the definition of the offense.”¹⁷⁷

Additionally, it is illogical to allow a *necessarily* lesser included offense to have a higher mental state than the greater crime. A greater offense includes all elements of the lesser offense. If the greater offense is a general intent crime, the lesser offense must have no greater mental element. Conversely, if the *lesser* offense is interpreted to have specific intent elements, then the *greater* offense must likewise have specific intent elements.

In *United States v. Thorton*, the court rejected this logical assertion by explaining that “the requirement of a specific intent for lesser crimes exists because of a desire to protect the individual against conviction on slight evidence.”¹⁷⁸ Attempt crimes, for instance, have little *actus reus*, so it must be accompanied by a specific intent to accurately ensure the charge. But the court’s explanation nevertheless fails because most lesser included crimes have substantial overt acts where a specific intent is superfluous.¹⁷⁹ Without much mental agility, one can ascertain that assault with intent to rape embodies an abusive encounter where the accused intended some type of sexual penetration. The accused’s physical acts and declarations go a long way towards manifesting the intent, which is no more sophisticated than the greater crime of rape.

A second problem associated with the specific intent formula is that of conflicting interpretations. Some offenses are designated as specific intent crimes, yet other jurisdictions call the same offenses general intent crimes.¹⁸⁰ Several courts, for example, disagree on whether second degree murder is a general or specific intent offense.¹⁸¹ Second degree murder arguably is a specific

177. DRESSLER, *supra* note 22, at 300.

178. *Thorton*, 498 F.2d at 753.

179. One way around this logical dispute would be to recognize assault with intent to commit rape as a *cognate*, or related, lesser. Cognate lessers may have additional elements that do not exist in the greater offense. Whereas *necessarily included offenses* must include only those elements existing in the greater offense. See *Michigan v. Heflin*, 456 N.W.2d 10 (Mich. 1990); *Michigan v. Jones*, 236 N.W.2d 461 (Mich. 1975).

180. See *McCord*, *supra* note 153, at 380-84. Compare *Minnesota v. Garvey*, 11 Minn. 154 (1865) (holding that assault with a deadly weapon is a specific intent crime), with *California v. Hood*, 462 P.2d 370, 378 (Cal. 1969), and *Connecticut v. Carter*, 458 A.2d 369 (Conn. 1983) (holding that the offense is a general intent crime).

181. See *California v. Whitfield*, 868 P.2d 272, 275-76 (Cal. 1994) (holding that intoxication could be a defense to second degree murder, a general intent offense, because the statute’s reference to malice aforethought was intended to encompass both the mental states of express malice and implied malice); *Michigan v. Langworthy*, 331 N.W.2d 171, 181 (Mich. 1982) (holding that intoxication is no defense to second degree murder); *New York v. Register*, 457 N.E.2d 704, 709-14 (N.Y. 1983) (holding that intoxication is no defense to second degree murder), *cert. denied*, 466 U.S. 953 (1984). *But see Langworthy*, 331 N.W.2d at 182 (Levin, J., dissenting) (“[I]t is hypertechnical to classify second degree murder, which has ‘intent to’ elements, as a general intent crime.”); *Register*, 457 N.E.2d at 709 (Jasen, J., dissenting).

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intent crime when the prosecution proceeds upon a theory of expressed malice—a spontaneous intent to kill. Conversely, second degree murder is a general intent crime when the prosecution proceeds on a theory of implied malice—where one’s conscious disregard endangers the life of another. Conflicting judicial interpretations on major issues like homicide cause untold confusion.

Professor Jerome Hall notes that another problem with the specific intent doctrine is that it lacks psychological proof.¹⁸² There is no scientific evidence presented to confirm the intuitive assumption that alcohol obliterates specific intent thoughts, but not general intent thoughts.¹⁸³ Professor Hall, in 1948, noted that the intention to perform a bodily movement is usually inseparable from the reason why the movement is performed.¹⁸⁴ He adds: “[T]he distinction between ‘specific’ and ‘general’ intent is a legal fiction, not psychological fact; the paramount fact is that neither common experience nor psychology knows any such actual phenomenon as ‘general intent’ which is distinguishable from ‘specific intent.’”¹⁸⁵

Under the specific intent theory, for example, intoxication may be a defense to first degree murder because it can dilute the sophisticated intent element of premeditation and deliberation. Yet, intoxication can equally dilute the mental element in rape offenses, a general intent crime, especially on the complicated elements of consent or force. Intoxication clouds one’s perceptions of consent, especially in “date-rape” situations, where the accused and the victim have been drinking.¹⁸⁶ Intoxication, for both the accuser and the accused, embellishes and

182. See McCord, *supra* note 153, at 378-82 (citing to J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 450 (1948)); see also Hood, 462 P.2d at 378 (holding “there is no real difference [between a general intent and a specific intent], . . . only a linguistic one, between an intent to do an act already performed and an intent to do same act in the future”).

183. See McCord, *supra* note 153, at 378-82 (citing HALL, *supra* note 182, at 450).

184. See McCord, *supra* note 153, at 378-82 (citing HALL, *supra* note 182, at 450).

185. California v. Hood, 462 P.2d 370, 378 (Cal. 1969). See also Note, *Alcohol Abuse and the Law*, *supra* note 10, at 1684 (“Use of the specific/general intent approach to determine an offender’s criminal responsibility is unsound. Both general and specific intent crimes require a particular intent.”).

186. See CAROLINE KNAPP, DRINKING: A LOVE STORY 79 (1996) (contending that the problems in current date rape situations are due, not as much to male-female debates on sexual independence versus victimization, but to “booze”). Drinking is more than a complicating factor in this issue, drinking interferes yet embellishes the “larger, murkier business of identity, of forming a sense of the self as strong and capable and aware.” *Id.* at 80.

In response to the date rape scenario and binge drinking deaths, many universities have passed anti-drinking rules on campus. Reports of date rape crimes have dropped dramatically, but alcoholic deaths continues to haunt the college campuses. See Mary Beth Marklein, *Lifting an Alcoholic Fog, Colleges Hope Frank Talk Will Change Attitudes About Drinking*, USA TODAY, Nov. 16, 1998, at 1-D.

interferes with the larger, murkier business of identity, inhibitions, confidence, and perceptions.

The commission of a general intent offense requires a culpable mental state on several levels. The inherent variety of elements, even to general intent crimes, requires mental sophistication to perform integrated tasks.¹⁸⁷ Every offense conceives of an act performed voluntarily with a culpable mental state for each element of the offense. Hall continued:

Each crime . . . has its distinctive mens rea, e.g., intending to have forced intercourse, intending to break and enter a dwelling house and to commit a crime, intending to inflict a battery, and so on. It is evident that there must be as many mens rea as there are crimes. And whatever else may be said about an intention, an essential characteristic of it is that it is directed towards a definite end. To assert therefore that an intention is "specific" is to employ a superfluous term¹⁸⁸

A fourth problem with the specific intent formula is that it fails to meet explicit public policy objectives. In *New Jersey v. Stasio*,¹⁸⁹ the court reasoned that dogmatic adherence to the artificial and strict distinctions between general and specific intent crimes "undermines the criminal law's primary function of protecting society from the results of behavior that endangers the public safety."¹⁹⁰ The court explained that the protection of society "should be our

187. MODEL PENAL CODE § 2.02 (1962), sets forth its general requirements of culpability as follows: "(1) Minimum Requirements of Culpability. Except as provided in Section 2.05 [absolute liability offenses], a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." (emphasis added). See also *In re Winship*, 397 U.S. 358 (1970) (holding that the State must prove every element of the offense beyond a reasonable doubt).

188. McCord, *supra* note 153, at 385 (citing HALL, *supra* note 182, at 450). See also Sayre, *supra* note 94, at 1020. Sayre states:

The slow progression of the criminal law from motive to intent has constituted . . . a healthy growth; but one must guard against a too minute particularization which runs counter to the modern movement for generalizing and grouping together crimes of the same general nature [C]rimes involving a specific intent vary as widely with regard to the requisite intent as with the requisite act A study of the specific intent required for one such crime is of but little assistance in determining the precise mental element necessary for another.

Sayre, *supra* note 94, at 1020.

189. 396 A.2d 1129 (N.J. 1979) (holding that assault with intent to commit armed robbery is a specific intent crime, but disallowed intoxication as a defense), *superceded by statute as recognized in* *New Jersey v. Cameron*, 514 A.2d 1302 (N.J. 1986).

190. *Id.* at 1134. See also *New York v. Rogers*, 18 N.Y. 2 (1858). In *Rogers*, <https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

guide rather than concern with logical consistency in terms of any single theory of culpability, particularly in view of the fact that alcohol is significantly involved in a substantial number of offenses. The demands of public safety and the harm done are identical irrespective of the offender's reduced ability to restrain himself due to his drinking."¹⁹¹ The court concluded that the specific intent principle encourages incongruous results by irrationally allowing intoxication to excuse some crimes but not others.¹⁹² Moreover, a large number of assaults, which are commonly caused by intoxication, would go unpunished if intoxication evidence could defeat the intent requirement.¹⁹³

In *United States v. Nix*,¹⁹⁴ the Seventh Circuit Court of Appeals agreed:

Categorizing all crimes as either having "general" or "specific" intent seems too mechanical and often forecloses evaluation by the court of the important consideration involved, *i.e.*, what elements are involved in the crime and whether the prosecution has satisfactorily established them.¹⁹⁵

Despite the growing dissatisfaction with the specific intent formula, specific intent crimes are highly popular, matching the number of general intent

Judge Denio stated:

[T]here is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order than to an accurate discrimination as to the moral qualities of individual conduct. *But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which everyone owes to his [her] fellow [person] and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his [or her] own power, the inestimable gift of reason. If it is perverted or destroyed . . . on by [ones] own vices, the law holds [that person] not accountable. But if, by voluntary act, [one] temporarily casts off the restraints of reason and conscience, no wrong is done if [one] is considered answerable for any injury which, in that state, [one] may do to others or to society.*

Id. at 9 (emphasis added).

191. *Stasio*, 396 A.2d at 1134.

192. *See id.* at 1133; *see also* *California v. Rocha*, 479 P.2d 372, 375-76 (Cal. 1971); *California v. Hood*, 462 P.2d 370, 377-79 (Cal. 1969); *McDaniel v. Mississippi*, 356 So. 2d 1151 (Miss. 1978).

193. *Rocha*, 479 P.2d at 372; *Hood*, 462 P.2d at 370.

194. 501 F.2d 516 (7th Cir. 1974).

195. *Id.* at 518 (quoting Note, *Intoxication as a Criminal Defense*, *supra* note 6, at 1218).

offenses.¹⁹⁶ Many judges criticize the specific intent formula as “an unsatisfactory concept in the law,” but believe it is the province of the legislature to change.¹⁹⁷ States that apply the specific intent approach effectively subsidize intoxication to the extent they allow it to exculpate conduct in a large number of crimes.¹⁹⁸ It is a perverse twist of justice to allow one to impair one’s own mental state in order to excuse future acts. The offender, secure in the knowledge that intoxication will mitigate an offense, enjoys the benefits of alcoholic consumption while the victims and society absorb the harm.¹⁹⁹ The *Egelhoff* approach restrains this anomaly.²⁰⁰

IV. CAUSATION

The principles of causation, which determine the persons responsible for intoxicated killings, signify the successes of recent murder convictions in various states. The intoxicated offender’s culpability lies in recklessly incurring the risk of dangerous conduct by drinking to excess and then operating on deformed instincts. The inebriated person is the actual, proximate, or substantial cause in killings and injurious conduct.²⁰¹ “But for” the inebriation, the injurious conduct

196. A slew of offenses require specific intent: kidnapping, arson, burglary, larceny, robbery, attempt crimes, conspiracy crimes, perjury, bribery, forgery, assault with intent to commit great bodily harm, assault with intent to murder, assault with intent to rape, counterfeiting, possession with intent to delivery drugs. See CLARK & MARSHALL, *supra* note 138, at 148.

197. *Michigan v. Langworthy*, 331 N.W.2d 171, 180 (Mich. 1982).

198. Keiter, *supra* note 69, at 510.

199. Keiter, *supra* note 69, at 510.

200. A Florida senate bill’s Statement of Legislative Intent, quoting Justice Scalia nearly verbatim, demonstrates *Egelhoff*’s influence: A prohibition on intoxication defenses “comports with and implements society’s moral perception that those who are voluntarily impaired shall be responsible for the consequences.” Gibeaut, *supra* note 15, at 59. Indiana prosecutors agreed: “When we read *Montana v. Egelhoff* this summer, we saw an opportunity to make a change in Indiana law.” Gibeaut, *supra* note 15, at 59 (quoting Marion county prosecutor Mark Massa).

201. A California Joint Legislative Committee for Revision of the Penal Code drafted a proposed causation statute in 1968 perfectly applicable to intoxication. The draft stated:

Sec. 408. Causation: Responsibility for Causing a Result.

(1) An element of an offense which requires that the defendant have caused a particular result is established when his conduct is an antecedent but for which the result would not have occurred, and,

(a) if the offense requires that the defendant intentionally or knowingly cause the result that the actual result, as it occurred,

(1) is within the purpose or contemplation of the defendant, whether the purpose or contemplation extends to natural events or to the conduct of another, or, if not,

would not have occurred.²⁰² Intoxication foreseeably endangers the drinker as well as the public.²⁰³ Physical harm is the natural and ordinary consequence of intoxication.²⁰⁴ Any variation between the harm foreseen and the reckless result is not so extraordinary that it would be unfair to hold the intoxicated individual responsible for the actual injury.²⁰⁵ Causation appears particularly prophetic with repeated inebriated offenders who assault freely and drive recklessly.²⁰⁶

A. *Intoxication as an Inchoate Act*

Formerly, courts narrowly restricted the time-frame in which to view the causation issue to the accused's state of mind at the sole moment the crime is committed.²⁰⁷ The courts frequently ignored the inchoate mental phase of the preparatory intoxicated conduct before the criminal act. Yet, gross intoxication assures tragedy long before the inebriate returns home to assault the spouse or children and long before the inebriate turns the ignition key. The *mens rea* time-

(2) involves the same kind of injury or harm as that designed or contemplated and is not too remote, accidental in its occurrence or dependent on another's volitional act to have a just bearing on the defendant's liability or on the gravity of his offense;

(b) if the offense requires that the defendant recklessly or negligently cause the result, that the actual result, as it occurred,

(1) is within the risk of which the defendant was or should have been aware, whether that risk extends to natural events or to the conduct of another, or, if not,

(2) involves the same kind of injury or harm as that recklessly or negligently risked and is not too remote, accidental in its occurrence or dependent on another's volitional act to have a just bearing on the defendant's liability or on the gravity of his offense;

(c) if the offense imposes strict liability, that the actual result, as it occurred, is a probable consequence of the actor's conduct.

Quoted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 580 (6th ed. 1995).

202. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 278 (2d ed. 1986).

203. *Id.*

204. *See* Hall, *supra* note 166, at 1067.

205. *See* Hall, *supra* note 166, at 1067.

206. *Seattle v. Hill*, 435 P.2d 692 (Wash. 1967) ("Despite [the defendant's] claimed addiction, he had the power to make a choice. When one chooses to drink, he must in law be deemed to have voluntarily invited the consequences of that drinking.") (citing R.W. Gascoyne, Annotation, *Modern State of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*, 8 A.L.R.3d 1236 (1967)).

207. DRESSLER, *supra* note 22, at 78.

frame must be broadened to include the inchoate or preparatory act of abusive drinking.²⁰⁸

Intoxication may, in part, satisfy *mens rea* because the culpable state of mind may be a product of imperfectly formed intent or recklessness.²⁰⁹ Drunkenness itself is not a crime, but drunkenness is an integral act that merges with unlawful conduct into a complex act of criminal recklessness. By creating the condition of one's own intoxication, and thereby putting oneself in such a condition as to be no longer amendable to the law's command, the inebriate shows such recklessness that amounts to *mens rea* for the purpose of all crimes.²¹⁰

The reckless indifference of abusive drinking is every bit as shocking to the victims as an intent to kill. It is for this very reason that the common law and modern criminal codes alike have classified reckless indifferent behavior as tantamount to intentional conduct.²¹¹

The concept of holding a person responsible for one harm because he committed another causally connected wrong is not new to the law; indeed, it is the foundation underlying the doctrine of felony-murder, conspiracy, and imputed liability.²¹² The underlying rationale is that an actor's blameworthy conduct in committing a lesser harm is sufficient to import the requisite element of moral blame for the more serious offense.

208. Inchoate means "being only partly in existence; especially imperfectly formed or formulated;" "inchoate" also denotes the "beginning of an action, state, or occurrence." WEBSTER'S NEW COLLEGIATE DICTIONARY 580 (1975); see also DRESSLER, *supra* note 22, at 77-79 ("The Issue of Time-Framing").

209. See Note, *Constructive Murder — Drunkenness in Relation to Mens Rea*, 34 HARV. L. REV. 78 (1920).

210. *California v. Whitfield*, 868 P.2d 272, 279 (Cal. 1994); *Taylor v. Superior Court*, 598 P.2d 854, 859 (Cal. 1979) ("One who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle demonstrates . . . such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.") (internal quotations omitted).

211. *Tison v. Arizona*, 481 U.S. 137, 157 (1987) ("In the common law, intentional killing is not the only basis for establishing the most egregious form of criminal homicide For example, the Model Penal Code treats reckless killing, manifesting extreme indifference to the value of human life, as equivalent to purposeful and knowing killing.") (internal quotations omitted); *Taylor*, 598 P.2d at 859.

212. The felony murder doctrine permits an offender's legal responsibility to exceed one's intended result. Due to the increased danger posed by the dangerous felony, the law holds a killer liable for the actual, rather than the intended crime, committed on the policy that those who engage in dangerous felonious conduct should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion. See Hall, *supra* note 166, at 1067.

B. Intoxication as Malice Aforethought

Justice O'Connor noted during oral arguments in *Egelhoff* that "the legislature perhaps could have written a [causation] law to say that a person who acts while voluntarily intoxicated has the mental state required for a conviction of a certain offense."²¹³ Similarly, another Justice noted during oral arguments that "the State [could have] simply passed a statute saying, anybody who is intoxicated and who kills another human being is guilty of first degree murder," or "[the state] could have made intoxication plus causing a death a crime."²¹⁴

Such policies would comport with recognized principles of causation and criminal liability, but would pose other problems. The problem with assigning intoxication as an *aggravating* feature to crimes is the added burden it places on the prosecution to prove yet another element beyond a reasonable doubt. Jurors would debate the meaning, degree, and moral value of intoxication.²¹⁵ Intoxication, in and of itself, is not a crime and should have no moral stigma.²¹⁶ One may be intoxicated and commit a justifiable killing based on self-defense or accident. Intoxication must not be a strict liability feature that automatically aggravates an offense.²¹⁷ Intoxication evidence, however, may approximate malice.²¹⁸

Malice "comprehends not only a particular ill-will, but every case where there is . . . cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured."²¹⁹ "Intoxication . . . so far from disproving malice, is itself a circumstance from which malice may be implied."²²⁰

213. Oral arg. at 4, *Montana v. Egelhoff*, 518 U.S. 37 (1996) (No. 95-566), available in 1996 WL 134508.

214. Oral arg. at 6, *Montana v. Egelhoff*, 518 U.S. 37 (1996) (No. 95-566), available in 1996 WL 134508.

215. Paulsen, *supra* note 13, at 13.

216. During the Prohibition era, intoxication was part of a social gospel wherein private behaviors had to conform to the social good. Many reformers argued that "the public interest required the legal extinction of the venal industries that plied citizens with intoxicating drink." KERR, *supra* note 158, at xii.

217. *Michigan v. Lardie*, 551 N.W.2d 656, 667 (Mich. 1996) (holding that an involuntary manslaughter statute which reduces the *mens rea* requirement is not a strict liability offense).

218. See *United States v. Fleming*, 739 F.2d 945, 949 (4th Cir. 1984) (suggesting that evidence of intoxication satisfied extreme recklessness and consequent malice), *cert. denied*, 469 U.S. 1193 (1985)

219. *Pennsylvania v. Drum*, 58 Pa. 9, 15 (1868).

220. *Wood v. Arkansas*, 34 Ark. 341, 343 (1879) ("The intention to drink may fully supply the place of malice aforethought."); *Connecticut v. Johnson*, 41 Conn. 584, 588 (1874).

Abusive drinking varies in degree with each individual. It may be accidental, or addictive, or short of full-blown mental impairment necessary for the insanity defense. Causation statutes that treat intoxication as an aggravating feature must reflect the varieties, degrees, and nuances of inebriation.²²¹ These evidentiary hazards would be paramount if intoxication is treated as an *aggravating* factor in the determination of guilt.

Montana's statute, in eliminating intoxication as an excuse, recognizes that intoxication has no superseding role in the determination of culpable guilt. There is no collateral moral judgment regarding the status of inebriation. Montana's statute expresses a clear and understandable principle that the abuse of alcohol will no longer be defensible.

V. ALTERNATIVE APPROACHES TO INTOXICATION EVIDENCE

Justice Ginsburg, in a concurring opinion in *Egelhoff*, noted that the unique formation of Montana's deliberate murder statute permitted the elimination of the intoxication defense.²²² "[T]he applicability of the reasonable doubt standard . . . has always been dependent on how a State defines the offense that is charged."²²³ Justice Ginsburg noted that if one understands Montana's intoxication statute as redefining *mens rea*, then the statute suffers no constitutional impediment.²²⁴ "States enjoy wide latitude in defining the elements of criminal offenses, particularly when determining 'the extent to which moral culpability should be a prerequisite to conviction of a crime.'"²²⁵

221. *Washington v. Coates*, 735 P.2d 64 (Wash. 1987). In *Coates*, the court stated: A person can be intoxicated and yet still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Under RCW 9A.16.090, it is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state. Thus, an instruction which requires one party or the other to prove or disprove the fact of intoxication would be incomplete at best.

Id. at 69.

222. 518 U.S. 37, 58-59 (Ginsburg, J., concurring). See also *Hopt v. People*, 104 U.S. 631 (1881). In *Hopt*, the Court stated:

[W]hen a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury.

Id. at 634.

223. *Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring) (quoting *Patterson v. New York*, 432 U.S. 197 (1977)).

224. *Id.*

225. *Id.* See also *Lambert v. California*, 355 U.S. 225, 228 (1957) ("There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and

Montana's statute on deliberate murder, which requires reasonable awareness, dilutes the heightened mental element of premeditation and deliberation.

Several other states have eliminated the intoxication defense by rescinding the specific-general intent formula. In Arizona, for instance, the terms "general" and "specific" intent were replaced by the concept of "culpable mental state" which is comprised of intentionally, knowingly, recklessly, and with criminal negligence.²²⁶ States such as Arkansas, Delaware, Georgia, and Hawaii have also abandoned the specific intent distinction.²²⁷

But a state need not renunciate its specific intent formula or revise its homicide structure in order to eliminate intoxication as a defense. Intoxication may be eliminated in specific intent states that require first degree premeditated murder based on historic causation and public policy theories.²²⁸ In *Missouri v. Cross*,²²⁹ for instance, the Missouri Supreme Court held that intoxication is no defense to first degree premeditated murder:

To look for deliberation and forethought in a man maddened by intoxication is vain, for drunkenness has deprived him of the deliberating faculties to a greater or less extent; and if this deprivation is to relieve him of all responsibility or to diminish it, the great majority of crimes committed will go unpunished

If a man can thus divest himself of his responsibilities as a rational creature and then perpetuate deeds of violence with a consciousness that his actions are to be judged by the irrational

diligence from its definition."); *Chicago, Burlington, & Quincy Ry. Co. v. United States*, 220 U.S. 559, 578 (1911) ("The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned.").

226. *Arizona v. Ramos*, 648 P.2d 119, 121 (Ariz. 1982) (holding that intoxication could be a defense only if the crime charged requires the culpable mental state of intentionally).

227. See *White v. Arkansas*, 717 S.W.2d 784, 786 (Ark. 1986) (holding that voluntary intoxication is not a defense to criminal prosecutions); *Wyant v. Delaware*, 519 A.2d 649 (Del. 1986) (interpreting DEL. CODE ANN. tit. 11, § 421 (1995)); *Foster v. Georgia*, 374 S.E.2d 188, 194-95, 196 (Ga. 1988), cert. denied, 490 U.S. 1085 (1989) ("[T]he law . . . excuses the young and the insane, out of tenderness towards an infirmity which is involuntary . . . [but] the law takes special care to exclude drunken men from the excuse, because their infirmity is voluntary") (interpreting GA. CODE ANN. § 16-3-4 (1998)); *Hawaii v. Souza*, 813 P.2d 1384, 1386 (Haw. 1991) (stating that the "legislature was entitled to redefine the mens rea element of crimes and to exclude evidence of voluntary intoxication to negate state of mind") (interpreting HAW. REV. STAT. § 702-230 (1993)); see also Gibeaut, *supra* note 15, at 62 (noting that the California General Assembly is also considering a bill that would abandon the general-specific intent distinction).

228. See *supra* notes 201-06 and accompanying text.

229. 27 Mo. 332, 338 (1858).

condition to which he has voluntarily reduced himself, society would not be safe.²³⁰

Intoxication is relevant to *mens rea*, but *voluntary* intoxication is *self-induced* madness, satisfying causation analysis. "So long as the offender is capable of conceiving a design, he will be presumed, in the absence of contrary proof, to have intended the natural consequences of his own acts."²³¹

Several prosecutors have explored criminal liability based on the unique statutory scheme of their state's respective homicide statutes. Intoxicated killings in some states may constitute first or second degree murder—without eliminating the intoxication defense.

A. *Intoxicated Homicide as First Degree Murder*

Recently, prosecutors in North Carolina and Washington successfully prosecuted intoxicated offenders for first degree murder offenses. In North Carolina, Thomas Jones was convicted of first degree felony-murder for causing a fatal automobile accident, killing two persons.²³² North Carolina's unique homicide statute permits first degree felony-murder for a killing during the commission of a felony (felonious and intoxicated driving) with the use of a deadly weapon (the automobile).²³³ Intoxication evidence aggravates, rather than mitigates, killings. The North Carolina jury found Jones guilty of first degree murder. The prosecutor unsuccessfully sought the death penalty against Jones, who had a long history of intoxicated driving. The North Carolina jury instead imposed a life sentence without parole.

230. *Id.* See also *Kenny v. New York*, 31 N.Y. 330, 337-38 (1865) (holding that voluntary intoxication is no defense to first degree murder).

231. *Kenny*, 31 N.Y. at 330 ("[I]f by a voluntary act the party temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society.") (quoting *New York v. Rodgers*, 18 N.Y. 9, 18 (1858)).

232. Richard Willing & Carol J. Castaneda, *A Message to Impaired Drivers, A North Carolina Case Is A Sign of Stricter Times*, USA TODAY, May 7, 1997, at 1-A.

233. The North Carolina felony murder statute, Section 14-17, provides:
A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine

N.C. GEN. STAT. § 14-17 (1993) (emphasis added).

In the State of Washington, an intoxicated offender was convicted of first degree murder based on the state's unique statutory scheme which punishes an individual for recklessly exhibiting an extreme indifference to human life.²³⁴ The intoxicated offender received fifty years in prison for an automobile killing. Washington law punishes unintentional homicides that manifest a depraved indifference to human life the same as first degree murder, but otherwise requires an intent to kill for a second degree murder conviction.²³⁵

B. Intoxicated Homicide as Second Degree Murder

Several prosecutors charge intoxicated offenders with second degree murder, based on reckless indifference to an unjustifiably high risk to human life.²³⁶ Malice, a prerequisite for second degree murder, may be established by evidence of conduct that is "reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm."²³⁷ In upholding a second degree murder conviction for intoxicated driving, the court in *United States v. Fleming*²³⁸ recognized that the Government

need only have proved that defendant intended to operate his car in the manner in which he did with a heart that was without regard for the life and safety of others In addition to being intoxicated while driving, defendant drove in a manner that could be taken to indicate depraved disregard of human life, particularly in light of the fact that because he was drunk his reckless behavior was all the more dangerous.²³⁹

Second degree murder based on implied malice requires that the accused act deliberately, that the accused act with knowledge of the danger to human life, and that the accused act in conscious disregard for human life.²⁴⁰

234. See Carol J. Castaneda & Paul Hoversten, *War of Attrition on Drunken Driving*, USA TODAY, May 23, 1997, at 4A.

235. See WASH. REV. CODE ANN. §§ 9A.32.030(1)(a), .050(1)(b) (West 1988); *Washington v. Bowerman*, 802 P.2d 116, 123 (Wash. 1990); see also ALA. CODE § 13A-6-2 (1994) (stating that an individual is guilty of murder if he intends another person's death, or if he recklessly exhibits an extreme indifference to human life generally).

236. See *United States v. Fleming*, 739 F.2d 945, 947 (4th. Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985).

237. *Id.* at 947-48 (quoting *United States v. Black Elk*, 579 F.2d 49, 51 (8th Cir. 1978)).

238. 739 F.2d at 945.

239. *Id.* at 948. See also *California v. Watson*, 637 P.2d 279, 283 (Cal. 1981).

240. *California v. Whitfield*, 868 P.2d 272, 278 (Cal. 1994) (affirming a second degree murder conviction for an intoxicated driving killing).

Moreover, in most states, second degree murder is a general intent crime to which intoxication is no defense. As stated in *New York v. Register*:

*[T]he only intended purpose in permitting the jury to consider intoxication in a reckless crime is to negate defendant's awareness and disregard of the risk. It is precisely that point—the inconsistency of permitting reckless and otherwise aggravating conduct to negate an aspect of the offense—that persuades us that intoxication evidence should be excluded whenever recklessness is an element of the offense In utilitarian terms, the risk of excessive drinking should be added to and not subtracted from the risks created by the conduct of the drunken defendant for there is no social or pedagogical purpose to be served by a rule that permits one who voluntarily drinks to be exonerated from failing to foresee the results of his conduct if he is successful at getting drunk.*²⁴¹

Many prosecutors are eager to charge intoxicated killings as homicides when there is prior evidence of the accused's intoxicated offenses. Prior intoxicated acts signify subjective awareness of one's propensities to cause harm.

C. Intoxicated Homicide Under the Model Penal Code

Some states have adopted the Model Penal Code's formula under which intoxication is a defense to purposeful and knowing crimes, but inadmissible to lesser reckless offenses. The drafters of the Model Penal Code replaced the "general-specific intent" formula with a "purposeful-reckless" formula to determine the admissibility of intoxication.²⁴² While some states have aligned

241. *New York v. Register*, 457 N.E.2d 704, 709 (N.Y. 1983), *cert. denied*, 766 U.S. 953 (1984) (emphasis added).

242. MODEL PENAL CODE § 2.08.(1962), dealing with intoxication, provides:

(1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negates an element of the offense.

(2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

(3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.

(4) Intoxication that (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality (wrongfulness) or to conform his conduct to the requirements of law.

(5) *Definitions.* In this Section unless a different meaning plainly is required:

(a) "intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(b) "self-induced intoxication" means intoxication caused by substances

with the Model Penal Code, holding that intoxication can negate purpose (sometimes called intention) and knowledge but not recklessness,²⁴³ several states have explicitly rejected the Model Penal Code as unworkable and contrary to public policy. Two state jurisdictions are more restrictive than the Code, permitting intoxication to negate a purposeful killing, but not a knowing killing.²⁴⁴ One jurisdiction allows intoxication to negate recklessness.²⁴⁵ Other jurisdictions allow intoxication as a defense only to first degree murder.²⁴⁶

Under the Code, intoxication would have been a defense in the *Egelhoff* case because the Montana murder statute, like the Code, requires a purposeful and knowing killing. To a significant extent, the Code suffers from the same frailties as previously discussed with the specific-general intent formula.

The added problem with the Model Penal Code is that the vague line of bifurcation between general and specific intent offenses is nearly unidentifiable with purposeful and knowing crimes, which are lesser mental states than specific intent. "Purposely" requires a *conscious object* to engage in criminal conduct.²⁴⁷ "Knowingly" requires an *awareness that it is highly probable* that a result will be caused by a person's conduct.²⁴⁸ Awareness and conscious design include a broader array of offenses than the already overbloated specific intent category.

D. Intoxicated Killing as a Distinct Offense

Nearly every state has some form of manslaughter offense known as intoxicated homicide. These offenses are frequently too lenient. Justice [then Judge] Levin, of the Michigan Supreme Court, in *Michigan v. Kelley*,²⁴⁹ recommended legislation defining a new crime of committing crimes under the influence of drugs or liquor. This new crime could be graded, "depending on the

which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

(c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

MODEL PENAL CODE § 2.08 (1962).

243. See, e.g., *New Jersey v. Cameron*, 514 A.2d 1302, 1307 (N.J. 1986).

244. See ALASKA STAT. § 11.81.630 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-503 (West 1989).

245. See HAW. REV. STAT. § 702-230 (1993).

246. *New Jersey v. Stasio*, 396 A.2d 1129, 1136 (N.J. 1979), *superceded by statute as recognized in New Jersey v. Cameron*, 514 A.2d 1302 (N.J. 1986); *Pennsylvania v. Tarver*, 284 A.2d 759, 762 (Pa. 1971).

247. See MODEL PENAL CODE § 2.01(2)(a) (1962).

248. See MODEL PENAL CODE § 2.01(2)(b) (1962).

249. 176 N.W.2d 435 (Mich. Ct. App. 1970).

extent and the gravity of antisocial acts previously committed in a comatose condition, and on the antisocial conduct immediately involved."²⁵⁰ Similarly, Professor Jerome Hall has proposed a statutory distinction of the experienced inebriate from the inexperienced inebriate.²⁵¹

E. Strategies for the Defense

In jurisdictions that eliminate the intoxication defense, evidence of unconsciousness produced by voluntary intoxication may be introduced when the defense claims the accused was physically unable to accomplish the criminal act (formerly called "prostration of the faculties").²⁵² The defendant may use his intoxication-induced unconsciousness to prove that he could not commit the criminal act—the *actus reus*, but not to show that he committed it involuntarily—the *mens rea*. James Egelhoff, for instance, argued a form of "prostration of the faculties," but he was unsuccessful based on the evidence, which displayed his coordinated and aggressive behavior.²⁵³

Intoxication may be a form of temporary insanity if it becomes pathological, meaning "intoxication grossly excessive in degree, given the amount of the intoxicant to which the person is susceptible," or "long-term intoxication that causes permanent mental disfunction."²⁵⁴ Habitual use of intoxicants can result

250. *Id.* at 444. See also Robert A. Moore, *Legal Responsibility and Chronic Alcoholism*, 122 AM. J. PSYCHIATRY 748, 754 (1966) (noting that Prof. Glanville Williams "suggests a new offense of being 'drunk and dangerous' which would result in enforced treatment" and incarceration).

251. HALL, *supra* note 182, at 554 n.2. See also *Michigan v. Langworthy*, 331 N.W.2d 171 (Mich. 1982). Judge Levin noted in dissent:

Assuming that there is justification for a defense of voluntary intoxication, a rational legal system would allow a person who has no prior criminal history, but loses control while intoxicated, to raise the defense, at least in mitigation, if it allows a person who has a history of predatory behavior to do so.

Id. at 184 (Levin, J., dissenting).

252. See, e.g., *New Jersey v. Cameron*, 514 A.2d 1302, 1309 (N.J. 1986) (noting some of the factors that determine prostration, including: "the quantity of intoxicant consumed, the period of time involved, the actor's conduct as perceived by others . . . any odor of alcohol or other intoxicating substance, the results of any tests to determine blood-alcohol content, and the actor's ability to recall significant events"); see also *Lineham v. Florida*, 442 So. 2d 244, 250 (Fla. 1983).

253. See *supra* notes 18-25 and accompanying text. Deliberate efforts to cover up a crime or to eliminate evidence that identifies the accused, or deliberate actions to avoid apprehension are evidence of a reasoning mind. See, e.g., *Arizona v. Meredith*, 469 P.2d 820, 823 (Ariz. 1970); *Pennsylvania v. Brooks*, 50 A.2d 325, 327 (Pa. 1947).

254. DRESSLER, *supra* note 22, at 283-84. Several cases recognize the rule that temporary insanity caused by voluntary drug intoxication may, in particular circumstances, constitute a valid defense. See, e.g., *Twentieth Judicial Circuit v. McNally*, 336 So. 2d 713, 715-16 (Fla. Dist. Ct. App. 1976); *Illinois v. Kyse*, 581 N.E.2d 44
<https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

in permanent mental disorder even when a person is not under the immediate influence of intoxicants.²⁵⁵ If the unsoundness of mind produced by long-term alcohol or drug abuse has become fixed or settled, the nearly universal rule is that the defendant may assert a traditional insanity defense.²⁵⁶

To succeed in an alcohol-insanity claim, the intoxication must have caused the defendant to lack substantial capacity to appreciate the criminality of his or her conduct at the time of the act or to conform his or her conduct to the requirements of the law.²⁵⁷ The accused cannot claim pathological intoxication simply because he or she is intoxicated or is even an alcoholic.²⁵⁸ This form of insanity requires a "disease of the mind" that mere drunkenness cannot satisfy.²⁵⁹

285, 287-88 (Ill. App. Ct. 1991); *Jackson v. Indiana*, 402 N.E.2d 947, 949 (Ind. 1980); *Porreca v. Maryland*, 433 A.2d 1204, 1207 (Md. Ct. Spec. App. 1981); *Michigan v. Chapman*, 418 N.W.2d 658, 659 (Mich. 1987); *Michigan v. Conrad*, 385 N.W.2d 277, 279 (Mich. Ct. App. 1986); *Minneapolis v. Altimus*, 238 N.W.2d 851, 854-55 (Minn. 1976); *New Hampshire v. Sadvari*, 462 A.2d 102, 104 (N.H. 1983); *North Carolina v. Brown*, 439 S.E.2d 589, 598 (N.C. 1994); *Ohio v. Solomon* 570 N.E.2d 1118, 1120 (Ohio 1991).

255. DRESSLER, *supra* note 22, at 245.

256. See *California v. Kelly*, 516 P.2d 875, 882 (Cal. 1973); *Jones v. Oklahoma*, 648 P.2d 1251, 1255 (Okla. Crim. App. 1982); *Washington v. Wicks*, 657 P.2d 781, 782 (Wash. 1983). One court has rejected the defense, stating:

There is no principle basis to distinguish between the short-term and long-term effects of voluntary intoxication by punishing the first and excusing the second. If anything, the moral blameworthiness would seem to be even greater with respect to the long-term effects of many, repeated instances of voluntary intoxication occurring over an extended period of time.

Bieber v. Colorado, 856 P.2d 811, 817 (Colo. 1993); see also *Rucker v. Ohio*, 162 N.E.2d 802, 805 (Ohio 1928) ("To constitute insanity, caused by intoxication . . . it must be insanity caused by chronic alcoholism, and not a mere temporary mental condition.").

257. See Phillip B. Hassman, Annotation, *When Intoxication Deemed Involuntary So As to Constitute a Defense to a Criminal Charge*, 73 A.L.R.3d 195, 203 (1977 & Supp. 1996) [hereinafter Hassman, *When Intoxication Deemed Involuntary*].

258. See *Hindman v. Missouri*, 597 S.W.2d 264, 268 (Mo. Ct. App. 1980) (holding that terms mental disease or defect within meaning of concept of diminished responsibility did not include alcoholism or drug abuse without psychosis); see also Hassman, *When Intoxication Deemed Involuntary*, *supra* note 257, at 219.

259. LAFAVE & SCOTT, *supra* note 201, at 395. See also *Kansas v. Seeley*, 510 P.2d 115, 120 (Kan. 1973) (holding that an alcoholic cannot argue an involuntary intoxication defense, stating that "[t]here was no evidence to show that appellant was, on the morning in question or at any other time, irresistibly driven to take the first drink").

In *Powell v. Texas*, 392 U.S. 514 (1968), Justice Marshall quoted E.M. Jellinek, a noted authority on intoxication, as follows: "Jellinek insists that conceptual clarity can only be achieved by distinguishing carefully between 'loss of control' once an individual has commenced to drink and 'inability to abstain' from drinking in the first place." *Id.* at 524-25. Alcoholics have a compulsion to drink, but, according to all the experts, the compulsion to take the first drink is "not completely overpowering." *Id.* at 525.

In *Kansas v. Seeley*,²⁶⁰ for instance, the accused claimed that his basic personality was altered by alcohol to such an uncontrollable extent that he became extremely hostile and destructive.²⁶¹ Defense experts testified that Seeley could not control his behavior once he started drinking. Yet, the court rejected the intoxication-insanity claim because the experts agreed that Seeley elected, without compulsion, to take that first drink.²⁶²

Nonetheless, as more states recognize alcoholism as a disease, courts might eventually focus on the addictive compulsion to take the first drink.²⁶³ The First Step in *Alcoholics Anonymous*, regarding the foundation of recovery, requires the alcoholic to admit and accept that he or she is powerless over *the first drink*: "We [must] admit we are powerless over alcohol and that our lives have become unmanageable."²⁶⁴

A defense strategy must concentrate on the initial involuntariness of intoxication, depending how involuntariness is defined. In Georgia, for example, involuntary intoxication means "intoxication caused by (a) *consumption of a substance through excusable ignorance*, or (b) the coercion, fraud, artifice, or contrivance of another person."²⁶⁵ The definition of "excusable ignorance" allows one to argue that unfamiliarity with the drink or its consequences is tantamount to involuntary intoxication. The consequences of one's unusual susceptibility to intoxication will not be a sufficient defense in most jurisdictions, but there are rare successful cases.²⁶⁶

Evidence of intoxication is part of the *res gestae* of the offense and is consequently admissible at trial, even in jurisdictions which ban the intoxication excuse.²⁶⁷ The accused and lay witnesses may testify to the accused's intoxicated behavior, but the accused may not present any expert witnesses as to the consequences of intoxication.²⁶⁸ Moreover, the court will instruct the jury

Even if one could claim that taking the first drink was extremely compulsive, public policy dictates the rejection of that excuse. "A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease." *Seeley*, 510 P.2d at 121. "[B]efore intoxication may be said to be 'involuntary' a defendant must show an irresistible force, which is something more than a strong urge or 'compulsion' to drink." *Id.*

260. 510 P.2d 115 (Kan. 1973).

261. *Id.* at 118-19.

262. *Id.* at 120.

263. See *supra* note 257 and accompanying text; see also Hassman, *Voluntary Drug Intoxication*, *supra* note 21, at 130.

264. See *infra* note 284 and accompanying text.

265. GA. CODE ANN. § 16-3-4 (1996) (emphasis added).

266. See Hassman, *Voluntary Drug Intoxication*, *supra* note 21, at 128.

267. If the accused would testify about the accused's own intoxication, the court would probably issue a cautionary instruction that intoxication is no excuse or no defense. See *Montana v. Egelhoff*, 518 U.S. 37 (1996).

268. See, e.g., *Wyant v. Delaware*, 519 A.2d 649, 658 (Del. 1986).

that intoxication is no defense and no excuse for the crime. A defense attorney might employ subtle strategies of jury nullification²⁶⁹ or mistake of fact (in cases of provocation).²⁷⁰ A crafty defense attorney might juxtapose a “prostration of the faculties” theory with a bona fide claim of mistake of fact. Physical incapacitation affects the perception of reality.²⁷¹

When the excuse of intoxication is excised from a case, the defense may nevertheless employ the underlying defense or justification for the harm caused, such as self-defense, accident, necessity, or provocation. If, for instance, an intoxicated person passes counterfeit money, he or she can defend the claim based on accident or mistake.

Finally, the defense attorney might propose that intoxication should mitigate the sentence, especially with first time offenders.²⁷² Many jurisdictions have

269. For example, blaming society or others for entrapping one into drinking. The defense might entertain an excuse that the accused is morally blameless because the accused possessed substantially less free choice than the normal person under the circumstances. Under jury nullification, the jury has the power to enter an acquittal contrary to the law and to the court’s instructions. *See United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972). While the jury is not instructed on this power and is specifically told that the case must be based, not on sympathy, but on the evidence and the court’s instructions, the jury can simply refuse to enforce a law of which it disapproves.

270. Dressler describes the mistake of fact defense as follows:

A person’s misperception of reality, even when not caused by insanity, intoxication, or some other special factor, sometimes exculpates him for the harm that he causes. Perhaps a better way to understand why a mistake of fact may exculpate an actor is to observe that what makes a person’s mistaken action “involuntary” has more to do with his cognition (what he is aware of) than with his volition (his capacity to control his conduct). From this realization, as one scholar has observed, “the trail leads plainly to mens rea.”

DRESSLER, *supra* note 22, at 128.

271. *See Gibeaut, supra* note 15, at 60 (arguing a hybrid defense incorporating elements of voluntary and involuntary intoxication in Arizona, which prohibits acute intoxication as a defense).

272. Under one sentencing proposal by an English legislative committee, anyone who causes the harm proscribed by a “listed offense” while deliberately intoxicated should be guilty of criminal intoxication. The listed offenses are those which cause substantial harm to person, public order, or the physical safety of property. To be culpable, the defendant must have voluntarily taken a substance, knowing that the quantity taken might substantially impair one’s awareness, understanding, or control. The suggested punishment for criminal intoxication is based on the underlying offense: two-thirds of the possible sentence, with a maximum of ten years imprisonment for nonhomicide offenses. Linking the punishment to the harm caused makes sense given that defendant’s culpability is based on self-induced intoxication. KADISH & SCHULHOFER, *supra* note 201, at 928-29. *See also* St. Pe v. Texas, 495 S.W.2d 224 (Tex. Crim. App. 1973); Kelly v. Texas, 442 S.W.2d 756 (Tex. Crim. App. 1969).

adopted deferment programs for drug offenders, and some jurisdictions have adopted unique rehabilitation opportunities for offenders in less severe cases.

VI. CONCLUSION

Drinking transcends responsibilities, provides an escape from everyday pressures, and relieves social constraints and personal inhibitions.²⁷³ "In small amounts, alcohol induces feelings of happiness and lightness, depending on the personality, mood, and expectations of the drinker. As the drinking continues, drowsiness, belligerence, extreme boisterousness, or depression may occur along with physiological discomfort."²⁷⁴ Excessive drinking may trigger a coma and death.²⁷⁵ For many persons, drinking becomes an obsession that slices through life's affectations and reduces everything to basic naked aggression.

Yet despite its dangers, alcohol use is an historical phenomenon dating back to the Stone Age.²⁷⁶ The first known brewery appeared about 3700 B.C. in Egypt.²⁷⁷ In Greek civilization, wine was a custom. Greek social gatherings were called *symposia*—"drinking together."²⁷⁸ In the seventeenth century, Europeans introduced alcohol to the North American Indians. The borough of

273. According to historian Dr. Joel Fort, the Arabs introduced distilled forms of alcohol into Europe around the tenth century as a medicine until it became plentiful and inexpensive and its use was extended. The Arabs are responsible for the name "alcohol." The European alchemists used distilled alcohol as an antidote for senility and called it *Aqua Vitae*, the water of life. In many societies a drop of whiskey or wine is occasionally recommended for older people to mildly stimulate their hearts. FORT, *supra* note 4, at 44-50.

274. FORT, *supra* note 4, at 24.

275. In Orland Park, Illinois, 16 year-old Elizabeth Wakulich died after drinking a quart of 107 proof schnapps. She had a blood-alcohol level of .38, nearly four times the legal limit, some 12 hours after drinking the liquor. See Tamara Kerrill, *Girl Dies Over Drinking Bet*, CHI. SUN-TIMES, June 18, 1997, at A9. Recently, several college students have died from alcoholic binge drinking. 375 people ages 15 to 24 died from alcohol poisoning in 1994, according to the National Center for Health Statistics. See Martha T. Moore, *Binge Drinking Stalks Campuses, The Death of An 18 Year Old MIT Student is a Somber Reminder to Colleges: The 'Culture of Drinking' is a Formidable Enemy in the War Against Alcohol Abuse*, USA TODAY, Oct. 1, 1997, at 3A. In August, 1997, student Benjamin Wynne from Louisiana State University, died of alcohol binge drinking. *Id.* In September, 1997, student Scott Krueger died from alcoholic binge drinking at Massachusetts Institute of Technology. *Id.*

276. FORT, *supra* note 4, at 44 (noting that beer jugs were found dating to the Stone Age).

277. The Egyptians attributed intoxicants to Osiris, their Creator. They also promulgated the first known temperance tract some 3,000 years ago. See FORT, *supra* note 4, at 44.

278. FORT, *supra* note 4, at 44.

Manhattan originated from an Indian name Manahachtanienk, which means "place where we all got drunk."²⁷⁹

Resoundingly, Americans have rejected complete prohibition of alcohol. The "Wets," pro-drinkers, and "Drys," anti-drinkers, debated alcohol prohibition with several states' admission into the Union.²⁸⁰ The Prohibition era created racketeers and revealed the societal hazards of overstrict laws barring alcohol, culminating in the 21st Amendment.²⁸¹

Nearly every culture has sanctioned some alcohol use for social, religious, or political occasions.²⁸² There is growing evidence that moderate drinking is beneficial to one's health, protecting against coronary diseases.²⁸³ Additionally, the alcohol industry employs a wide segment of American citizens with considerable political clout: grain farmers, vineyard owners, glass blowers, truck drivers, bartenders, waitresses, warehousemen, salespeople, advertising agencies, brewers, lobbyists, politicians, businessmen, restaurant owners, and consumers. Since alcohol permeates American society so seductively, abusive drinking is inevitable.

Nonetheless, there are a variety of health measures, employment benefits, and preventative programs to stem the tide of abuses.²⁸⁴ Many states are

279. FORT, *supra* note 4, at 49.

280. KERR, *supra* note 158, at 160-84.

281. See KERR, *supra* note 158, at 185-210. The 21st Amendment states: "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. CONST. amend. XXI. The 18th Amendment states: "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII.

282. See FORT, *supra* note 4, at 43-63.

283. Few doctors recommend one drink as medicinal because of alcohol's addictive qualities. Moreover, this statement facilitates a persons's addictive response.

284. See Note, *Alcohol Abuse and the Law*, *supra* note 10, at 1696 ("Congress should adopt broader policies promoting rapid establishment of occupational alcoholism programs in private workplaces."). For serious addictive alcoholics, as well as other general addictions, Alcoholics Anonymous is famous for its recovery plan with the 12 Step approach. Unlike most self-help programs, the 12 Steps provide an unusual course for addictive recovery. See HAZELDEN FOUNDATION, *THE TWELVE STEPS OF ALCOHOLICS ANONYMOUS* (1993). The first step begins with an awkward admission of "powerlessness" over one's compulsive addictions. The 12 Steps hurt . . . and heal:

Step One: "[We] admitted we were powerless over alcohol—that our lives had become unmanageable."

This is the foundation of the Steps and perhaps the most difficult. Admitting powerlessness. Yet, understanding powerlessness is essential in helping us overcome the moral implications and social stigma that alcoholics are bad people. We are powerless over alcohol as we are with any disease.

Step Two: "[We] Came to believe that a Power greater than ourselves could restore us to sanity."

There is a promise of hope. Because there are no cures for alcoholism, only ongoing recovery one day at a time will work. Irrespective of length of sobriety . . . The "Power" referred to in Step two is not necessarily God. "There is hope for us if we come to believe that the source of power we need in our recovery lies outside ourselves." *Id.* at 19. Many would say it is God, others would say it is "the Program." (the 12 Steps, the Big Book, and meeting attendance and fellowship.)

Step three: "[We] made a decision to turn our will and our lives over to the care of God as we understood Him."

This step "simply assumes there is a God to understand and that we each have a God of our own understanding." *Id.* at 23. "Until now, we have allowed fears of failure, of honest expression, and of rejection to govern and direct our lives." *Id.* at 24. Total abstinence comes first. *Id.* at 27. Then salvation.

Step four: "[We] made a searching and fearless moral inventory of ourselves."

"It takes courage to face yourself and what has really been going on in your life." *Id.* at 28. We must admit our mistakes. We are evolving towards a state of self-awareness and self-acceptance. "Those of us taking the Fourth Step for the first time will perhaps want to go as far back as early childhood to uncover resentful feelings and the persons and events associated with them." *Id.* at 61. One must look at specific instances. "Thoroughness demands a willingness to get specific, to name concretely what happened. . ." *Id.* at 62. One must focus not only on one's liabilities and defects, but also on one's assets.

Step five: "[We] admitted to God, to ourselves, and to another human being, the exact nature of our wrongs."

Admitting to another the exact nature of one's wrongs leads some into a new harmony and release from feelings of guilt. Others have experienced dejection, disappointment, and exhaustion. This is an important step towards spiritual progress, not spiritual perfection. The listener must share in their own defect and engage in a dialogue, especially in matters that we would consciously prefer not to share. People must tell the stories of their lives. Many employ a "sponsor."

Steps Six and Seven: "[We] were entirely ready to have God remove all these defects of character. Humbly asked Him to remove our shortcomings."

Recovery is a spiritual, physical, and mental process. We can identify our character defects, accept them, and gain some measure of strength to manage them. We can use time for quiet contemplation and internalize the knowledge and certainty that we are not alone anymore.

Step Eight: "[We] made a list of all persons we had harmed, and became willing to make amends to them all."

This is an inventory step. The most effective means of overcoming resentment is forgiveness, of ourselves and of others.

Step Nine: "[We] made direct amends to such people wherever possible, except when to do so would injure them or others."

This is an action step. We have to reconstruct some of the damaged relationships.

Step Ten: "[We] continued to take personal inventory and when we were wrong promptly admitted it."

There are times when we all need another person in order to take a good inventory. This Step strengthens and protects one's sobriety.

Step Eleven: "[We] sought prayer and meditation to improve our conscious contact with God as we understood Him, praying only for knowledge of His will for us

considering suing the alcohol industry for health benefits. "First, the states sued the tobacco companies and recovered hundreds of billions of dollars in smoking related Medicaid costs."²⁸⁵ Now, cities and states are preparing a number of suits against the gun industry and even the alcohol industry.²⁸⁶

For the most part, people who drink are not alcoholics and are able to exercise self-restraint.²⁸⁷ A large proportion of alcoholics conceal their drinking

and the power to carry that out."

This is really Steps Two and Three practiced on a daily basis.

Step Twelve: "Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics and to practice these principles in all our affairs."

"Carrying the message" means that we reach out to other alcoholics or chemically dependent people and share with them the "language of our hearts." Step Twelve requires visiting other individuals who are perceived as needing help.

285. Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1998, at A1. As with the tobacco litigation, the entire public is burdened by the costs resulting from use of a dangerous product.

286. Fox Butterfield, *To Rejuvenate Gun Sales, Critics Say, Industry Started Making More Powerful Pistols*, N.Y. TIMES, Feb. 14, 1999, at 16. Cities have sued gun manufacturers on two unique theories: First, enhancing the lethality of guns without incorporating sound safety devices; second, negligent distribution by "oversupplying stores in southern states that have lax gun laws, knowing that some of the guns would be bought by people in New York City who would resell them to criminals and juveniles." *Id.*

287. See Sally L. Satel, *Don't Forget the Addict's Role in Addiction*, N.Y. TIMES, April 4, 1998, at A23. In countering the assertion that addiction is a brain disease, Ms. Satel, a psychiatrist at a methadone clinic, writes:

What is really misleading about the . . . assertion that "addiction is primarily a brain disease"—*it omits the voluntary aspects of an addicts's behavior.*

Addicts' brains are not always in a state of siege. Many addicts have episodes of clean time that last for weeks, months or years. During these periods it is the individuals's responsibility to make himself less vulnerable to drug craving and relapse.

Treatment can help the addict learn how to fight urges and find alternative ways to meet emotional and spiritual needs. But will he take the advice? Maybe. More likely, he will begin a revolving-door dance with the treatment system.

Drug addicts and alcoholics respond to rewards and consequences, not just to physiology. Relapse should not be regarded as an inevitable, involuntary product of a diseased brain . . . Turning addiction into a medical problem serves a purpose, of course. The idea is to reduce stigma and get better financing and more insurance coverage for treatment But when the National Institute [on Drug Abuse] says that addiction is just like diabetes or asthma, it has the equation backward. A diabetic or asthmatic who relapses because he ignores his doctor's advice is more like an addict, as his relapses result from forsaking the behavioral regimens that he knows can keep him clean.

problem, and their intricate acts of concealment indicate personal choice.²⁸⁸ The psychological studies on the effect of alcohol on an individual's personality suggest that the drinker usually intends his or her actions just as purposely as those of a sober person. "To be sure, the inebriate may not 'intend' his [or her] actions in the sense that he [or she] is not in full control of himself. Yet such a notion of intent would sweep too far, for a person who is fatigued, emotionally upset, or simply short-tempered is also not in full control of himself."²⁸⁹

According to many reports, the abusive drinker maintains intent, but lacks ethical sensitivity. Alcohol must be treated as a dangerous instrument, requiring a heightened state of awareness. "Inebriates are as responsible for subsequent harm as if they unleashed a dangerous animal upon defenseless victims. One who releases a pit bull into a room of helpless infants is responsible not because he controlled the animal's actions in killing a child, but because he voluntarily forfeited his control over the dog. A similar rationale applies to inebriates."²⁹⁰

When a person voluntarily arouses the drunkenness to which he or she is predisposed and commits a crime, then that person has blinded their moral perceptions to release their individual demons.²⁹¹ The Montana legislature

The message that addiction is chronic and relapse inevitable is demoralizing to patients and gives the treatment system an excuse if it doesn't serve them well. *Calling addiction a behavioral condition . . .* emphasizes that the person, not his autonomous brain, is the instigator of his relapse and the agent of his recovery. This [position] does not deny the existence of vulnerabilities, biological or otherwise. Instead it makes the struggle to relinquish drugs all the more ennobling.

Id.

288. *Powell v. Texas*, 392 U.S. 514, 530 (1968) (noting that there are an estimated 4,000,000 alcoholics in America, and this figure is considerably higher when the closet alcoholics are considered). See also *Arizona v. Meredith*, 469 P.2d 820 (Ariz. 1970); *Pennsylvania v. Brooks*, 50 A.2d 325 (Pa. 1947).

289. Note, *Intoxication as a Criminal Defense*, *supra* note 6, at 1217. See also *Arizona v. Ramos*, 648 P.2d 119, 122 (Ariz. 1982) ("If one trusts in the adage *in vino veritas* the law allows conviction of those whose acts while intoxicated have exposed their true nature."); Note, *Alcohol Abuse and the Law*, *supra* note 10, at 1686 ("Alcohol dampens inhibitions, but it does not generally impair the ability to act purposely.").

290. *Keiter*, *supra* note 69, at 499. See also *Roberts v. Michigan*, 19 Mich. 385 (1870). In *Roberts*, the court stated:

He must be held to have purposely blinded his moral perceptions, and set his will free from the control of reasons—to have suppressed the guards and invited the mutiny; and should therefore be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting.

Id. at 418. See also *Paulsen*, *supra* note 13, at 5 ("Through a choice, of the sort normally operative in the law, the inebriate has increased the risk of harm to others by reducing his own capacity for taking dangers into account and for controlling himself. It would be incongruous if an election of that sort would exculpate.").

291. See *New York v. Register*, 457 N.E.2d 704 (N.Y. 1983), *cert. denied*, 466 <https://scholarship.law.missouri.edu/mlr/vol64/iss2/3>

declared that it is fundamentally fair to hold people criminally liable for the harm they cause while in a drunken stupor. Studies reveal that nondrinkers are seventy percent more likely to be killed or harmed in households where alcoholism exists.²⁹² Self-contracted madness induced by alcohol prophetically results in crime. Since early American law, the general public has been aware that intoxication and criminal misconduct are inextricably related.

There is a principle that nothing in common law is ever lost—that every precedent exists somewhere in space and time to be resurrected. By stating that “an intoxicated condition may not be taken into consideration in determining the existence of a mental state which is an element of the offense,” the Montana legislature effectively resurrected a fundamental principle of yesteryear. By means of this provision, the Montana legislature excised the entire subject of self-induced intoxication from the *mens rea* inquiry, based on the legislature’s empirical view that criminal responsibility is not lessened by self-induced intoxication. The doctrine of *mens rea* has “historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.”²⁹³ *Egelhoff* reconfirmed that the states are free to alter the substantive definitions of crimes, defenses, and relevancy, even if by doing so they make prosecution easier.

U.S. 953 (1984). In *Register*, the court stated:

The common law courts viewed the decision to drink to excess, with its attendant risks to self and others, as an independent culpable act In utilitarian terms, the risk of excessive drinking should be added to and not subtracted from the risks created by the conduct of the drunken defendant for there is no social or penological purpose to be served by a rule that permits one who voluntarily drinks to be exonerated from failing to foresee the results of his conduct if he is successful at getting drunk.

Id. at 709. See also *Keenan v. Commonwealth*, 44 Pa. 56, 58 (1862) (“No one pretends that intoxication is, of itself, an excuse or palliation of a crime. If it were, all crimes would, in a great measure, depend for the criminality on the pleasure of their perpetrators, since they may pass into that state when they will.”).

As an analogy, when one knows one is subject to epileptic seizures while driving, then that person may be held criminally liable. See *New York v. Decina*, 138 N.E.2d 799 (N.Y. 1956).

292. The entire alcoholic and drug climate increases the risk of harm and death to third persons. The link between violence and drug and alcohol abuse may result from the drug seeking activities, such as interaction with drug dealers and theft to obtain resources for drug purchases. See *Saying ‘No’ to Drugs But Dying in Violence, Substance Abuse in Home is a Risk Factor*, WALL ST. J., Aug. 20, 1997, at A11 (reporting on a study published in the *Journal of the American Medical Association* released on August 20, 1997).

293. *Powell v. Texas*, 392 U.S. 514, 536 (1968).

The pronounced difference between Montana's approach and the intemperance movement of the earlier Prohibition era is that Montana places no moral judgment on drinking. Under Montana's approach, intoxication is not an *aggravating* factor with collateral moral consequences; intoxication is simply eliminated from the *mens rea* equation. "The law's sympathy belongs not with an individual who consumes a stupefying amount of intoxicants and shoots two innocent people in the head, but with the victims of such slaughter."²⁹⁴ Despite the historical concessions to alcohol within the American way of life, there must be personal accountability. Few can stand against Montana's simple imperative that self-induced intoxication offers no excuse to destroy life.

294. Keiter, *supra* note 69, at 517. See also *Keenan v. Commonwealth*, 44 Pa. 56, 59 (1862). In *Keenan*, the court stated:

Men [and women] who degrade themselves below the ordinary level of social morality, by bad conduct or habits, do not thereby relieve themselves from having their acts and duties judged by the ordinary rules of social action. They cannot set up their own vices as a reason for being set into a special class that is to be judged more favorably than other persons.

Id. at 59.