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Date: February 2, 2005

Re: Constitutional Analysis of AB 1160: Validity of Due Process Challenges to Legislation Eliminating Gay and Trans Panic Defenses in California

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I. Question Presented

Would a statute that defined sufficient provocation for "sudden quarrel" or "heat of passion" to exclude gay and trans panic defenses violate defendants' due process rights?

II. Short Answer

No. In determining whether such a statute violated a defendants' due process rights, a court would follow the U.S. Supreme Court's reasoning in *Montana v. Egelhoff*, 518 U.S. 37 (1996), which upheld a Montana statute prohibiting consideration of a defendant's voluntary intoxication in determining the *mens rea* element of any criminal offense.

Generally, states are given great latitude in "preventing and dealing with crime" and defining the elements of state crimes. Id. at 50 n. 4. Criminal defendants do not have an unfettered right to present any relevant evidence in their defense. Id. at 42.

In determining whether a statute prohibiting certain evidence when considering the *mens rea* element of a criminal offense violates the Due Process Clause, a defendant bears the "heavy burden" of proving that the principle of justice violated by such a law is "so rooted in the conscience and traditions of our people as to be ranked as fundamental." Id. at 43 (q*uoting Patterson v. New York*, 432 U.S. 197, 201-02 (1977).

To determine whether the relevant principle of justice is fundamental the court looks at "historical practice," how **long-standing** the rule is and how **uniformly** it has been adopted, and 2) any **state policy justifications** which support the elimination of the rule or defense. Id. at 51.

A court would be extremely unlikely to determine that the gay and trans panic defenses are fundamental because:

1) historical practice:

a) longevity: the gay and trans panic defenses did not appear in any court decision until the late 1960s; and

b) uniformity: the gay and trans panic defenses still have not appeared in any court opinions in over two-thirds of the fifty states and no state legislature has codified the gay and trans panic defenses in a state penal code.

2) state policy justifications: elimination of these gay and trans panic defenses are supported by the legitimate California policy justifications of:

a) increasing punishment for criminal acts,

b) specifically deterring further criminal actions,

c) reinforcing society's moral conception of personal responsibility,

d) interrupting cultural norms validating violence against LGBT people,

e) furthering policies expressed in California's hate crimes statutes,

f) preventing defendants from exploiting biases among jury members, and

g) precluding invasive testimony about a victim's sexuality and gender.

This analysis is also supported by Calfornia case law that predates Montana v. Eglehoff. *See People v. Martin*, 78 Cal. App. 4th 1107 (Ca. Ct. App. 2000)("Several courts have addressed the constitutional validity of the legislative enactments abolishing the defense of diminished capacity (specifically, § 22, 28 and 29), and found no due process violation. *See, e.g.*, People v. Saille (1991) 54 Cal. 3d 1103, 1116 [2 Cal. Rptr. 2d 364, 820 P.2d 588]; People v. Whitler (1985) 171 Cal. App. 3d 337, 340-341 [214 Cal. Rptr. 610]; People v. Lynn (1984) 159 Cal. App. 3d 715, 732-733 [206 Cal. Rptr. 181]; People v. Jackson (1984) 152 Cal. App. 3d 961, 967-970 [199 Cal. Rptr. 848].).

III. Discussion

A court would be extremely unlikely to determine that a statute defining sufficient provocation for "sudden quarrel" or "heat of passion" to exclude facts usually alleged in gay and trans panic defenses violates the Due Process Clause because 1) states are given broad latitude in defining evidentiary rules in criminal trials and the elements of criminal offenses, 2) defendants do not have an absolute right to present relevant evidence in their defense, and 3) the gay and trans panic defenses have relatively recent origins in common law, have not been uniformly and consistently adopted by the fifty states, and their elimination is supported by considerable policy justifications by the state of California.

A. *Montana v. Egelhoff*

In *Montana v. Egelhoff*, the U.S. Supreme Court considered whether the Due Process Clause was violated by *Montana Code Annotated § 45-2-203*, which stated that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense." The defendant had been convicted of deliberate homicide after the police found him drunk in a vehicle next to his gun with two victims who had been shot in the head. At trial the jury was instructed, pursuant to *Mont. Code Ann. § 45-2-203*, that it could not consider voluntary intoxication in determining defendant's mental state at the moment of the crime. The Montana Supreme Court reversed the defendant's conviction, finding that the Montana statute violated due process because the State did not have to prove beyond a reasonable doubt every element of the crime where the jury could not consider evidence relevant to establishing *mens rea.*

In a plurality opinion writing by Justice Scalia, the Supreme Court reversed the decision of the Montana Supreme Court and found that the defendant did not meet the burden of showing that the rule allowing the defense to introduce evidence of intoxication embodied a fundamental principle of justice under the Fourteenth Amendment. The Court reasoned that this rule was too new, had not received sufficiently uniform and permanent allegiance, and displaced a lengthy common law tradition supported by legitimate policy justifications, all of which prevented it from meeting the standard of being a fundamental principle protected by the Due Process Clause. Id. at 51. Justice Ginsburg concurred, reasoning that the statute could be upheld as being within the traditional broad discretion given to state legislatures to define the elements of criminal defenses. Id. at 57.

The plurality opinion also rejected the Montana Supreme Court's reasoning that the statute was unconstitutional because it made it easier for the State to meet the requirement of proving *mens rea* beyond a reasonable doubt. The Court reasoned that *any* evidentiary rule can have that effect and that "reducing" the State's burden in this manner is not unconstitutional, unless the rule of evidence itself 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." Id. at 54.

B. Courts give states broad discretion in preventing and dealing with crime, including 1) excluding categories of evidence from being considered by juries in criminal cases and 2) defining the elements of crimes.

In *Montana v Egelhoff*, the Supreme Court reaffirmed the broad discretion of states to determine the evidentiary rules in criminal trials and define the elements of state crimes.

1. Limiting evidence at criminal trials

Justice Scalia's plurality opinion in *Montana v. Egelhoff* considered the Montana statute as an evidentiary rule, and affirmed states' discretion in determining evidentiary rules in criminal trials. "Preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out.'" Id. at 43 *(citing Patterson v. New York, 432 U.S. 197, 201-202, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977). See also Cooper v. Oklahoma, 517 U.S. 348, 355, 134 L. Ed. 2d 498, 116 S. Ct. 1373 (1996)* (applying *Patterson* test); *Marshall v. Lonberger, 459 U.S. 422, 438, n. 6, 74 L. Ed. 2d 646, 103 S. Ct. 843 (1983)* ("The Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules").

2. Defining elements of a criminal defense

In her concurrence in *Egelhoff*, Justice Ginsburg rejected categorization of the Montana statute as an evidentiary prescription based on the fact that the law appears in a chapter entitled "General Principles of Liability," rather than in a chapter regarding evidentiary rules. As such, Justice Ginsburg found that the statute "extract[s] the entire subject of voluntary intoxication from the *mens rea* inquiry," thereby rendering any such evidence irrelevant to proof of the requisite mental state. "Comprehended as a measure redefining *mens rea*, [the statute] encounters no constitutional shoal. 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." Id. at 58 *(citations omitted).*

Scalia's plurality opinion expresses its "complete agreement" with the rationale of Ginsburg's concurrence and finds that the Montana law can be supported either as an evidentiary rule or a modification of a definition of an element of a crime. Id. at 50 n.4. "In fact, it is for the states to make such adjustments: "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." Id. at 56, quoting *Powell v. Texas*, 392 U.S. 514, 535-36 (1968). The plurality's support of Ginsburg's concurring opinion arguably makes it the majority opinion and holding of the court. *See Marks v. United States*, 430 U.S. 188, 193 (1977)(when fragmented Court decides case by varying rationales, holding is "that position taken by those Members who concurred in the judgments on the narrowest grounds...").

Moreover, it appears that even the dissenters in *Montana v. Egelhoff* would have upheld the statute if they had reviewed it as redefining an element of a crime, a framing they felt prohibited from taking based on the framing of the statute as an evidentiary rule by the Montana Supreme Court. See Id. at 73 ("[A] State may so define the mental element of an offense that evidence of a defendant's voluntary intoxication at the time of commission does not have exculpatory relevance and, to that extent, may be excluded without raising any issue of due process") (Souter

dissenting) and Id. at 71 and 64 (due process concern "would not be at issue" for "[a] state legislature certainly has the authority to identify the elements of the offenses it wishes to punish") (O'Connor dissenting).

C. Defendants in criminal cases do not have a constitutional right to have a jury consider all relevant evidence in their defense

Consistent with its support of giving broad latitude to state legislatures in the area of criminal law, in *Montana v. Egelhoff* the Supreme Court explicitly rejected the principle that criminal defendants have a due process right to present and have considered by a jury all relevant evidence to rebut the State's evidence on all elements of the offense charged. Id. at 42. "The proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible. As we have said: 'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" Id. citing *Taylor v. Illinois, 484 U.S. 400, 410, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988).*

The Supreme Court reviewed a number of well-established evidentiary rules that either prohibited the introduction of relevant evidence based on a defendant's failure to comply with procedural requirements and rules which prohibited evidence for substantive reasons. Id. (e.g. "Evidence 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. Hearsay rules, see *Fed. Rule Evid. 802*, similarly prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable.'")

In addition the plurality opinion by Justice Scalia explicitly rejected an argument made by Justice O'Connor that these evidentiary rules were distinguishable from a rule that prohibited consideration of "a category of evidence tending to prove a particular fact" – so long as the category of excluded evidence is selected on a basis that has good and traditional policy support." Id. at 43 n. 1.

D. A criminal defendant could not show that the gay and trans panic defenses were fundamental principles of justice protected by the Due Process Clause because 1) these defenses are too recent in origin, 2) they have not been widely and uniformly adopted by the fifty states, and 3) considerable state policy justifications support their elimination.

In order for a defendant to challenge an evidentiary rule as violating the Due Process Clause, he or she must meet the heavy burden imposed under traditional due process analysis, that the proscription offend "some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental." To determine whether the relevant principle is fundamental the court looks at 1) "historical practice": how **long-standing** the rule is and how **uniformly** it has been adopted; and 2) any **state policy justifications** which support the elimination of the rule or defense. Id. at 51.

1. Historical Practice

The Court primarily looks to "historical practice" to help determine whether a particular rule represents a fundamental principle of justice. Id. at 43. To be fundamental, the principle must be "deeply rooted" at the time the Fourteenth Amendment, although the Court does indicate that a defendant can "perhaps" demonstrate that it has become so deeply rooted since. Id. at 48. The Court considers when the rule was first adopted in the United States and whether the rule has commanded "uniform and permanent allegiance" since its adoption. Id. at 48. A court determines where a rule has been uniformly followed by looking at the number of states and jurisdictions that have adopted it. Id. at 48-49.

In *Egelhoff*, the Court found that the common law tradition of considering voluntary intoxication when determining the requisite *mens rea* did not have sufficient longevity to make it fundamental. It noted that the emergence of this rule was traced to an 1819 English case but was "slow to take root" in the United States until the end of the 19th-century. However, by the end of the 19th century it could be considered in most American jurisdictions when determining whether a defendant had the specific intent necessary to commit a crime. Id. at 44.

In *Egelhoff*, the Court found that the defendant had not shown the uniform and continuing acceptance necessary for a rule to be fundamental because one-fifth of the states had never adopted or were no longer following the rule that voluntary intoxication should be considered when determining *mens rea*. Id. at 48. "Although the rule allowing a jury to consider evidence of a defendant's voluntary intoxication where relevant to *mens rea* has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental." Id at. 51.

If a rule applied by courts in the 19th century is "of too recent vintage" to be fundamental, Id. at 51, it is extremely unlikely that a court would find that the gay and trans panic defenses are fundamental. The first judicial mention of the homosexual panic defense in the United States was in a case before the California Court of Appeal in 1967, *People v. Rodriguez*, 64 Cal. Rptr. 253 (Cal. Ct. App. 1967). In addition, if the Supreme Court found that a rule adopted by 80% of the states in the United States is not sufficient to be fundamental, it is extremely unlikely to find that the gay and trans panic defenses have been so uniformly adopted. Only 14, or 28% of the fifty states,[1] have reported court opinions discussing gay or trans panic arguments. Moreover, no state has codified the gay and trans panic defenses in its penal code.

Thus, because the gay and trans panic defenses are such recent innovations of the common law and have only been adopted by less than one-third of the states, a court would not find them to be fundamental principles of justice protected by the Due Process Clause.

2. State Policy Justifications Supporting Elimination of the Rule or Defense

Finally, the Court looks to any state policy justifications for eliminating the rule in question when determining whether the rule is fundamental. Such justifications standing alone "casts doubt upon the proposition that the rule is a "fundamental principle." Id. at 49. The introduction of relevant evidence can be limited by the State for a "valid" reason. Id. at 53.

In *Egelhoff*, the court noted that exlcuding evidence of voluntary intoxication was supported by the following state policies 1) preventing a large number of violent crimes, 2) increasing the punishment for all unlawful acts committed in that state – thereby deterring irresponsible behavior while drunk, 3) serving as a specific deterrent by ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison, 4) implementing society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences, 5) interrupting the perpetuation of harmful cultural norms that validate drunken violence as a learned behavior ("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"), and therefore 6) excluding misleading evidence because juries "who possess the same learned belief …may be too quick to accept the claim that the defendant was biologically incapable of forming the requisite *mens rea.*" Id. at 51.

Elimination of the gay panic and trans panic defenses likewise serves multiple legitimate state policy justifications, some of which directly echo the policy considerations in *Egelhoff*. Elimination of these defenses are supported by the legitimate policy justifications of a) increasing punishment for acts made unlawful by the state of California, b) specifically deterring further criminal actions by those who kill due to alleged gay or trans panic, c) reinforcing society's moral conception of personal responsibility, d) interrupting the perpetuation of harmful cultural norms that validate violence against LGBT people, e) furthering the policies expressed in its California's hate crimes and anti-discrimination legislation, f) preventing defendants from exploiting any potential homophobic biases among the members of a jury, and g) precluding unnecessary and invasive testimony about a victim's sexuality, sex, and/or gender in California criminal trials.

[1] States with reported court decisions discussing the gay panic defense are Arizona (1998), California (1967, 1989), Illinois (1972, 1977, 1993, 2000), Indiana (2001), Massachusetts (1978, 1984), Michigan (1998), Missouri (1975, 1990), North Carolina (1978), Nebraska (1994), New Jersey (1988), Ohio (1987), Tennessee (1998), Wisconsin (2001), Wyoming (1979, 1999).

IV. California case law preceding *Egelhoff* supports this analysis

Using reasoning similar to that in *Eglehoff*, California courts have held that California Penal Code Section 28, which eliminated the diminished capacity defense, does not impose an unconstitutional limit on defendants' due process right to present a defense. *People v. Jackson*, 152 Cal. App. 3d 961 (Cal. Ct. App. 1984) and *People v. Saille*, 54 Cal. 3d 1103 (Cal. 1991).

The statute in question was amended in 1981 to read: "…(b) As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action." Penal Code § 28. In *Jackson*, the court considered the constitutionality of the revised Section 28 and found that "the restrictions are a legitimate legislative determination on the admissibility of a class of evidence" Id. at 967. The court asked whether the exclusion of capacity evidence prevented the defendant from disproving the mental state necessary to the charge. Considering whether the "restriction deprived [defendant] of his constitutional right to require the People to prove every fact necessary to constitute the crime beyond a reasonable doubt," the court held "that such exclusion is not of constitutional dimensions." Id. at 968. Rather, "[t]he restrictions of Penal Code section 28 are nothing more than a legislative determination that for reasons of reliability or public policy, 'capacity' evidence is inadmissible." Id.

In *Saille*, the court relied on *Patterson v. New York*, 432 U.S. 197 (1977) to hold that the "Legislature can limit the mental elements included in the statutory definition of a crime and thereby curtail use of mens rea defenses." Id. at 1116. In affirming that the abolition of the diminished capacity defense does not violate due process, the California Supreme Court also cited *People v. Lynn*, 159 Cal. App. 3d 715, 731-33 (Cal. Ct. App. 1984) and *People v. Whitler*, 171 Cal. App. 3d 337, 340-41 (Cal. Ct. App. 1985).

In *People v. Lynn*, the court observed that there is no due process impediment in a statutory definition of felony murder which omits malice as an element of that crime (citing *People v. Dillon*, 34 Cal. 3d 441, 472-76 (Cal. 1983) and "if the Legislature may constitutionally delete malice as an element of felony murder, it may also constitutionally delete diminished capacity as a defense to crimes requiring particular mental states" Id. at 732-33) The court reasoned that "[i]n both cases, we are dealing with a matter of substantive statutory definition…[and] [i]n neither case is there a presumption involved that must withstand constitutional due process scrutiny because of its burden shifting effect" Id. at 733.

In the California cases addressing the elimination of the diminished capacity defense, the main finding is that where the elimination of a defense represents a legislative determination that certain evidence is inadmissible on reliability or public policy grounds, there is no violation of defendants' due process rights. The elimination of the gay and trans panic defenses from the California statutes would likewise represent a legislative determination that serves legitimate public policy aims. Therefore, following the diminished capacity precedent, the court is likely to find "that such exclusion is not of constitutional dimensions."

V. Conclusion

Applying the principles established by the Supreme Court in *Egelhoff* to determine whether a rule violates a "fundamental principle of justice," a court will likely find that the trans and gay panic defenses are too recently developed and too inconsistently applied to be considered a fundamental principle of jusitice to the extent that restricting it would violate the Due Process Clause. Moreover, the existence of legitimate policy justifications for banning the defense independently supports that elimination of the gay and trans panic defenses.