# UNDERSTANDING THE LAW ON INTOXICATED OFFENDING: PRINCIPLE, PRAGMATISM AND LEGAL CULTURE

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**Abstract:** The criminal law on intoxicated offending is notoriously complex and technical, featuring distinctive doctrinal constructs and exceptions to otherwise general rules. In order to contribute to scholarly understanding of the law on intoxicated offending, and with a focus on the law in Australia (Victoria and New South Wales), England and Wales, Germany and Switzerland, in this article, we present a two-part analysis of the law. First, we reveal the ways in which, in varying configurations, the legal rules on intoxicated offending in the civil and common law contexts are suspended across a tension between principle and pragmatism. Second, we explore the significance of legal culture — broadly, non-doctrinal components of the legal order including traditions, practices and institutions — making the case that dimensions of legal culture relating to intoxicated offending achieve a reconciliation of legal principles with pragmatic concerns to discourage drunken crime, thereby ameliorating the costs of honouring or attempting to honour legal principle when it comes to intoxicated offending.

**Keywords:** *criminal law; intoxication; criminal responsibility; guilt;* nulla poena sine culpa; *subjective fault*

## I. Introduction

Social and legal attitudes to intoxication are profoundly mixed. On the one hand, intoxication (at least by alcohol) is socially sanctioned and forms part of fabric of many cultural and other practices in different societies. Getting drunk is an acceptable way for individuals "to care a little less for a short time". But, on the other hand, when connected with crime, drinking — and the consumption of illicit drugs or the abuse of prescription medication — is condemned and may lead to criminal convictions and heavy penalties.

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These mixed attitudes have generated a complex and technical criminal law on intoxicated offending, marked by novel doctrinal constructs and exceptions to otherwise general rules. In common law jurisdictions like England and Wales, and some Australian jurisdictions, the law determining when intoxication is relevant to criminal liability rests on a legalistic distinction between "specific intent" and "basic intent" offences (discussed below). In civil law jurisdictions such as Switzerland, the construction of an extended timeframe which applies to intoxicated defendants means that if a person voluntary intoxicates himself, being aware that he might commit a crime while in that state, he is liable for the offence, because the *actio praecedens* (ie getting drunk) was free. This model opens the door to uphold the principle of free will and at the same time allows for exceptions. In addition, drunken individuals may be caught by an offence specifically aimed at drunken offending, even as they escape the web of generic offences informed by a philosophy of free will.

By way of contributing to scholarly understanding of the law on intoxicated offending, this article presents a two-part analysis of the law. Our analysis is based on an assessment of the law in England and Wales, the Australian state jurisdictions of Victoria and New South Wales (NSW)[1] and Germany and Switzerland. In the first part of our analysis, we reveal the ways in which, in both the common law and civil law traditions, the criminal law governing intoxicated offending is suspended across a tension between principle and pragmatism. As we discuss, this tension produces varying configurations of law in civil and common law systems. On the one hand, in the common law tradition, the principle of subjective liability has been "honoured in the breach", with the social problem of intoxicated offending forcing departure from criminal responsibility based on subjective fault. On the other hand, in the civil law tradition, the law operates to reduce guilt-based responsibility for offences committed while drunk, in order to preserve the overarching principle of appropriate punishment (*nulla poena sine culpa*), but pragmatic concerns are accommodated in the detail of the law: doctrinal constructions "time-frame" intoxicated offenders in a particular way, and statutory provisions criminalise offences committed "in a senselessly drunken state" and provide for a two-tier system of penalties and measures meaning that an intoxicated offender is unlikely to escape a criminal sanction.

The second part of our analysis relates to legal culture. The significance of legal culture is an element of the explanatory framework around intoxicated offending that is too often overlooked. Legal culture — which we define broadly, as non-doctrinal components of the legal order including legal traditions, practices and institutions[2] — is important for a nuanced understanding of the law on intoxication

1 There are nine criminal jurisdictions in Australia, including a Federal criminal jurisdiction (governed by a Commonwealth Criminal Code). Victoria and NSW are the two most populous states.

2 We are aware of the sizable literature, developed in legal sociology and anthropology, on legal culture (eg Roger Cotterrell, "Why Must Legal Ideas Be Interpreted Sociologically?" (1998) 25(2) Journal of

and its operation. For instance, as discussed further below, in the common law system, prosecutorial practice has a significant impact on the operation of the law. In the civil law context, dimensions of legal culture relating to intoxicated offending are equally significant for an understanding of the operation of the law. Since the Enlightenment, jurists have expressed a strong belief in the need for a strict approach to guilt[3] and adopted an exceptional imputation in cases of intoxicated offending.[4] As we discuss, parts of this legal tradition have acquired a life of their own, taking on an elevated significance as evidence of both professional competence and faithful adherence to doctrinal orthodoxy. We make the case that dimensions of legal culture achieve a de facto reconciliation of legal principles with pragmatic concerns about intoxicated offending (in the common law), and a specific principle-driven reconciliation of the same (in the civil law). This reconciliation has the effect of reducing or ameliorating the costs of honouring or attempting to honour legal principle when it comes to intoxicated offending.

It is worth clarifying a terminological issue at this point. Although sometimes called a "defence", the law on intoxicated offending is more accurately understood as a doctrine of imputation.[5] In the common law of crime, this means that intoxication is *evidence* that may be raised by the defence to cast doubt on whether the prosecution has proved the elements of the offence to the "beyond reasonable doubt" standard.[6] Similarly, in the civil law, intoxication is understood as imputation: even if the individual's will is impaired at the crucial moment of acting, imputation works if his act of getting drunk was free. Thus, for reasons of accuracy, this article refers to the law on intoxicated offending rather than to intoxication as a defence.

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Law and Society 171; Roger Cotterrell, "Law in Culture" (2004) 17(1) Ratio Juris 1). We do not seek to contribute to this literature here; rather we use the term legal culture in a broad way to denote non-doctrinal components of the legal order.

3 "Guilt" is used as term for the German assessment of *Schuld*, that is, in a three-step assessment of offence — unlawfulness — guilt; the latter describes the final evaluation of blameworthiness for a criminal act. For a more detailed explanation, see Markus D Dubber and Tatjana Hörnle, *Criminal Law. A Comparative Approach* (Oxford: Oxford University Press, 2014) pp.23–24, 111–112; Tatjana Hörnle, "Guilt and Choice in Criminal Law Theory — A Critical Assessment" (2016) 4 Bergen Journal of Criminal Law and Criminal Procedure 1, 1–4.

4 See Michael Hettinger, *Die "actio libera in causa": Strafbarkeit wegen Begehungstat trotz Schuldunfähigkeit?, Eine historisch-dogmatische Untersuchung* (Berlin: Duncker & Humblot, 1988) p.79; Kurt Seelmann, "Personalität und Zurechnung von der Aufklärung bis zur Philosophie des Idealismus" in Marianne Heer *et al.* (eds), *Toujours agité — jamais abattu, Festschrift für Hans Wiprächtig*er (Basel: Helbing Lichtenhahn Verlag, 2011) pp.575–585; Stephan Stübinger, "Der Stellenwert der Schuld im Rahmen der Geschichtsschreibung zur Entstehung des öffentlichen Strafrechts" in Klaus Lüdersen (ed), *Die Durchsetzung des öffentlichen Strafrechts. Systematisierung der Fragestellung* (Köln; Weimar; Wien: Böhlau Verlag, 2002) p.205; Felix Bommer and Volker Dittmann "Book One: General Provisions, Part One: Felonies and Misdemeanours" in Marcel Alexander Niggli and Hans Wiprächtiger (eds), *Basler Kommentar Strafrecht I* (Basel: Helbing Lichtenhahn Verlag, 2013), art.19, Nos 1–5.

5 As Paul Robinson argues in relation to doctrines of imputation more generally, there is no suggestion that an actor in fact satisfied the required offence element, but "the special conditions required by the doctrine of imputation are said to justify treating the actor as if he satisfies the imputed element"; see Paul H Robinson, *Structure and Function in Criminal Law* (Oxford: Clarendon Press, 1997) p.58.

6 See Andrew Simester, "Intoxication Is Never a Defence" [2009] Crim LR 3.

The two-part analysis offered in this article is presented across three subsections. In Sections II and III, we reveal the ways in which the law on intoxicated offending straddles a tension between principle and pragmatism in both common law systems (with a focus on England and Wales and within Australia, Victoria and NSW) and in civil law systems (with a focus on Germany and Switzerland). In Section IV, we turn to assess the role of legal culture in the legal approach to intoxicated offending, making a case for the role of dimensions of legal culture in achieving a reconciliation of principle and pragmatism.

## II. Intoxicated Offending in Common Law Systems

Common law systems have a reputation for being tough on intoxicated offenders. As discussed in this section, under the common law, offences have been divided into two categories — offences of "specific intent" and offences of "basic intent" — with evidence of voluntary intoxication inadmissible in relation to the latter category (which encompasses the majority of criminal offences). The effect of this division is that, while, in accordance with principles governing fault, voluntary intoxication may be taken into account in relation to some offences (of "specific intent"), in the majority of situations, an intoxicated defendant will be assessed as if he had been sober at the time of the alleged offence. This means that an individual may be convicted of an offence despite lacking subjective intent or foresight of the consequences of his actions. As we suggest, the law on intoxicated offending straddles a tension between principle (which dominates over pragmatism in relation to "specific intent" offences) and pragmatism (which dominates in relation to "basic intent" offences — the vast bulk of criminal offences).

### *A. England and Wales*

In England and Wales, the law on intoxicated offending is structured across two axes, which together determine when intoxication can be considered in relation to an individual's liability for crime. The first axis is the cause of the intoxication (voluntary or involuntary). If the intoxication is voluntary, or self-induced, the second axis is enlivened. The second axis is the type of offence with which the defendant is charged (either a "specific intent" or "basic intent" offence). In brief, and in advance of a full discussion below, the law provides that evidence of voluntary intoxication may only be raised when a defendant is alleged to have committed a "specific intent" offence; by contrast, if intoxication is involuntary, it may be adduced to cast doubt on whether the prosecution has proved that the defendant formed the *mens rea* or fault element required for *any* offence.[7] As this brief summary indicates, traditionally, there is no distinction between the types of

7 See *R v Kingston* [1995] 2 AC 355.

drugs that cause the intoxication[8] (although, as we discuss, this one-size-fits-all approach has broken down in recent years).

The law governing intoxicated offending is set down in the House of Lords decision of *Director of Public Prosecutions v Majewski*, handed down in 1977.[9] Majewski was involved in a bar brawl and was charged with three counts of assault occasioning actual bodily harm and three counts of assaulting a police officer in the execution of his duty. Majewski claimed he "completely blanked out" and was unaware of what he was doing because he had consumed alcohol and drugs (a mix of amphetamines and barbiturates).[10] Majewski was convicted on all counts and appealed. On appeal, the Law Lords unanimously upheld Majewski's convictions. The court held that voluntary intoxication is evidence that may be adduced at trial in support of a defence argument that the prosecution has not proved that the defendant formed the requisite *mens rea* in offences of "specific intent".[11] By contrast, in relation to the larger category of offences of "basic intent", such as assault, an individual's voluntary intoxication cannot be taken into account when determining whether he formed the *mens rea* required by the offence. As this indicates, the law operates to restrict the admissibility of evidence of voluntary intoxication for offences of "basic intent": the effect of *Majewski* is that voluntary intoxication will only be able to be adduced to prove that a defendant did not form the *mens rea* required for an offence if the offence is one of "specific intent".[12]

What are "specific intent" offences and how do they differ from "basic intent" offences? The distinction between "specific intent" and "basic intent" offences has not always been clear. While the terms "specific intent" and "basic intent" were in use prior to *Majewski*, in that decision, they were given particular content, and the distinction between them hardened.[13] In *Majewski*, the Law Lords seemed to use the terms "specific intent" and "basic intent" in three different ways.[14] In general terms, the approach that depicts "basic intent" offences as those where recklessness will suffice for liability has become the settled interpretation of *Majewski* and the

8 See *R v Lipman* [1970] 1 QB 152, 156.

9 [1977] AC 443. From 1875 to 2009, the appellate committee of the House of Lords was the highest court in England and Wales; the UK Supreme Court has since replaced it.

10 *Majewski* (n.9).

11 This rather complex statement of the law takes into account the procedural issue of the burden of proof: it is the prosecution that must prove all the elements of the offence (to the beyond reasonable doubt standard).

12 Noting the import of s.8 of the Criminal Justice Act 1967, the *Majewski* court interpreted this rule as a substantive rule of law (as opposed to a rule of evidence): see *Majewski* (n.9), 475 (Lord Elywn-Jones), 484 (Lord Salmon) and 497 (Lord Edmund Davies).

13 See, for example, *Director of Public Prosecutions v Beard* [1920] AC 479; on the history of the law of intoxication, see Philip Handler, "Intoxication and Criminal Responsibility in England, 1819-1920" (2003) 33 Oxford Journal of Legal Studies 243; see also Arlie Loughnan, "The Expertise of Non-Experts: Knowledges of Intoxication in Criminal Law" in Jonathan Herring *et al*. (eds), *Intoxication and Society: Problematic Pleasures of Drugs and Alcohol* (Basingstoke, UK: Palgrave Macmillan, 2013).

14 See further Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012) pp.187–188.

law on intoxicated offending.[15] Of the possible interpretations of *Majewski*, this interpretation does not involve an abrogation of the *mens rea* requirement of the offence. It does, however, significantly alter the context in which the defendant's state of mind is determined. This interpretation of *Majewski* means that, when considering the liability of a defendant charged with a "basic intent" offence, the jury is asked in effect whether he would have had the relevant *mens rea* if he had been sober;[16] put another way, in these cases, this means that the law of intoxicated offending contravenes the principle that the burden of proof of all elements of the offence is on the prosecution.[17]

Under the *Majewski* approach to intoxicated offending, the defendant's prior fault — for getting drunk (or taking drugs) — provides moral support for pragmatic policy concerns regarding drunken crime. The notion of prior fault conveys the idea that an individual should not be able to rely on a defence when he culpably brought about the condition that forms the basis of the defence.[18] As per *Majewski*, voluntarily intoxicated defendants are, either overtly or in effect, blamed for getting intoxicated in the first place, at a point in time before the offence is committed. The significance of prior fault in the current law has meant that the law on intoxicated offending has been narrowly constructed — restricting the contexts in which intoxication may be raised by the defendant to suggest that he did not form the requisite *mens rea* for the offence — but it has also limited the ways in which factual intoxication may supplement claims to exculpation advanced under other criminal law doctrines.[19] Prior fault provides a moral foundation for policy-based concerns about the "problem" of intoxicated offending. These concerns have given rise to a strict and condemnatory approach to intoxicated offending — according to which, policy, not principle, is driving the law in relation to "basic intent offences".

The role of policy and prior fault in the criminal law governing intoxicated offending has made it controversial: the law on intoxicated offending departs from

15 See for discussion Rebecca Williams, "Voluntary Intoxication — A Lost Cause?" [2013] LQR 264. A different approach to the distinction between "basic intent" and "specific intent" offences was adopted by the Court of Appeal in 2007 (*R v Heard* [2008] QB 43 (CA)), which permitted a finding that rape according to s.1 of the Sexual Offences Act 2003 was an offence of "basic intent".

16 See Jeremy Horder, "Sobering Up? The Law Commission on Criminal Intoxication" (1995) 58(4) Modern Law Review 534. If a defendant is charged with an offence with an objective *mens rea* (ie, negligence), voluntary intoxication will be disregarded — the reasonable person is always sober: see *R v Morhall* [1996] AC 90 (HL).

17 See *Woolmington v Director of Public Prosecutions* [1935] AC 462; for discussion of the issue of proof, see Paul Robinson, "Causing the Conditions of One's Own Defense: A Study of the Limits of Theory in Criminal Law Doctrine" (1985) 71(1) Virginia Law Review 1.

18 Law Commission for England and Wales, Criminal Liability: Insanity and Automatism — A Discussion Paper (23 July 2013), para.6.1.

19 On the relationship between intoxication and insanity, see further Arlie Loughnan and Nicola Wake, "Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication" in Alan Reed *et al*. (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Surrey: Ashgate Publishing, 2014).

the principle of subjectivism.[20] The principle of subjectivism — that the general principles of criminal responsibility cohere around the idea that "harmful wrongs or wrongful harms consist centrally in culpable conduct"[21] — has been the "most important intellectual influence" on modern criminal law scholars following the positivist tradition that is traced to Jeremy Bentham.[22] Subjective fault is seen as a means of respecting freedom of action and treating individuals as moral agents.[23] As such, it is held up as a constraint on criminalisation, placing a limit on permissible state action (although as Lindsay Farmer and Nicola Lacey have argued, the role of the principles of criminal responsibility in this respect is weaker than typically assumed).[24] Departing from this principle in the law on intoxication is seen as putting pragmatism — the need to condemn and discourage intoxicated offending — above concerns about fairness to the individual charged with an offence committed while voluntarily intoxicated.

There are limits to the condemnatory approach to intoxicated offending, however, and not all aspects of the law on intoxicated offending depart from principles of criminal responsibility. There are two kinds of intoxication: involuntary intoxication, which has been defined narrowly to encompass circumstances in which the individual is not at fault for the intoxication, because, for instance, he was tricked into getting intoxicated, and intoxication by non-dangerous or prescription drugs that mark the borderline where the condemnatory approach runs out and principle reappears.[25] In relation to involuntary intoxication, evidence of intoxication may be raised by the defence in relation to all offences (not just offences of "specific intent"), although such evidence will not necessarily assist the defendant in casting doubt on the prosecution case.[26] In relation to intoxication by substances falling into the novel and rather amorphous category of non-dangerous drugs, the approach is more generous. As mentioned above, traditionally, the law of intoxication applies to intoxication by all substances (drugs and alcohol). In recent years, however, the courts have concluded that intoxication by non-dangerous drugs will not be subject to the *Majewski* rules unless, in taking the drug, the defendant was reckless, that is,

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20 For a defence of *Majewski* with reference to criminal law principles, see John Gardner, "The Importance of *Majewski*" (1994) 14 Oxford Journal of Legal Studies 279.

21 Lindsay Farmer, *The Making of the Modern Criminal Law* (Oxford: Oxford University Press, 2016) p.164.

22 See Jeremy Horder, "Criminal Law" in Peter Cane and Mark Tushnet (eds), *Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) pp.226, 230.

23 See, for example, Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford: Oxford University Press, 2013), ch.2.

24 See generally Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford: Oxford University Press, 2016) and Farmer, *The Making of the Modern Criminal Law* (n.21).

25 This represents the moral limits of the *Majewski* rules: see further Loughnan, *Manifest Madness* (n.14) pp.192–195.

26 As the House of Lords indicated in the high-profile decision of *Kingston*, involuntary intoxication will only assist the defendant if he would not have formed the *mens rea* for the offence in any case: if a defendant would have formed the mental state required for the offence, evidence of involuntary intoxication is beside the point: see *Kingston* (n.7).

he was aware of the risk of aggressive or uncontrollable conduct but went ahead and took the substance in any case.[27]

## *B. Australia — Victoria and NSW*

As part of the British Empire, Australia inherited the common law of crime at the time of colonisation. In the period since the different colonies federated into one nation in 1901, Australia has developed a common law of its own. While there are strong similarities between the Australian common law and the common law of England and Wales, the two take different approaches to intoxicated offending, encoding a different balance between principle and pragmatism. This section examines two Australian jurisdictions: Victoria (in which the Australian common law position prevails) and NSW (where the law has been amended by statute).[28]

In 1980, the High Court of Australia had the opportunity to consider the House of Lords ruling in *Majewski* in the decision of *R v O'Connor*.[29] O'Connor was caught stealing from a policeman's car and, when interrupted by a police officer attempting to arrest him, stabbed the officer with a knife he had found in the car. O'Connor was originally charged with theft and wounding with intent to resist arrest and in accordance with the standard practice of including an alternative charge on the indictment (discussed in Section IV below), he was also charged with the less serious offence of unlawful wounding. O'Connor had been taking sleeping tablets and drinking alcohol for most of the day; he could not remember anything; expert medical evidence suggested that he might not have been able to reason or form intent to steal. Following *Majewski*, the trial judge directed the jury that self-induced intoxication was relevant to the offence of wounding with intent, but not the lesser offence of unlawful wounding, and O'Connor was convicted of the latter offence only.

On appeal, both the High Court of Australia and the Victorian Court of Criminal Appeal before it, rejected *Majewski* (and the Court of Appeal quashed O'Connor's conviction). By majority, the High Court held that intoxication can be used to cast doubt on whether the prosecution had proved that the defendant had the requisite *mens rea* for *any* offence.[30] The majority judges concluded that evidence of voluntary intoxication should be allowed to go to the jury as part of all the evidence on which they may make a finding of fact. In the minority

27 *R v Hardie* [1985] 1 WLR 64. The courts themselves have created the category of non-dangerous drugs (that is, it is not a scientific category): see Law Commission for England and Wales, Legislating the Criminal Code: Intoxication and Criminal Liability (Law Com No 229, 1995), para.1.38.

28 Reflecting the origins of the country as a set of independent colonies, most criminal law is state- and territory-based (although there is a growing Commonwealth criminal law), with some states enacting Criminal Codes and others relying on a mixture of statute and common law: see further Kylie Burns *et al*., "Australia: A Land of Plenty (of Legislative Regimes)" in Matthew Dyson (ed), *Comparing Tort and Crime: Learning from across and within Legal Systems* (Cambridge: Cambridge University Press, 2015) pp.367–415.

29 (1980) 146 CLR 64 (HC).

30 *Ibid*., 87–88 (Barwick CJ).

judgment, the judges elected to follow *Majewski* on the basis that a person should not escape responsibility for crime as a result of intoxication and because "society legitimately expects for its protection that the law will not allow to go unpunished an act which would be adjudged to be a serious criminal offence but for the fact that the perpetrator is grossly intoxicated".[31]

In their reasoning, the High Court judges forming the majority held that the distinction between "basic intent" and "specific intent" offences lacks logic.[32] The judges acknowledged that *Majewski* attempts to strike a balance between total exoneration of the defendant, on the one hand, and the total irrelevance of his intoxication, on the other hand, but concluded that the decision reflects a questionable policy rationale. The majority observed that the criminal law on intoxication neither encourages nor deters crime because crimes are not generally contemplated at the time when the drugs or drink are taken. The majority judges also observed that *Majewski* operates by uncertain criteria and in a manner that is not always rational (artificially restricting the inquiry into culpability).[33] In addition, the High Court majority noted that *Majewski* offends the principle of subjectivism and concluded that the social policy arguments in favour of the House of Lords approach did not provide a justification for an exception to fundamental common law principles.[34] Thus, the *O'Connor* majority elected to uphold the principles of criminal responsibility in relation to intoxicated offending, rather than to derogate from them in order to support policy-based concerns about intoxicated offending. But, even here, pragmatism played a role; the judges considered the effect of their determination on the operation of the law — but they were not convinced that the approach they adopted would open the "floodgates" to large numbers of intoxicated defendants.[35]

In accordance with the decision of *O'Connor*, the Australian state of Victoria permits evidence of voluntary intoxication to be adduced in relation to *all* criminal offences, that is, no distinction is drawn between offences of "specific intent" and offences of "basic intent". In addition, in a further departure from *Majewski*, but following *O'Connor*, evidence of voluntary intoxication may be adduced in relation to whether the defendant performed the *actus reus* of the offence, not just the *mens rea*.[36] While evidence of voluntary intoxication is most likely to assist a defendant

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31 *Ibid*., 110 (Mason J).

32 *Ibid*., 85 (Barwick CJ).

33 *Ibid*., 101 (Stephen J).

34 *Ibid*., 96 (Stephen J).

35 It is worth noting the *O'Connor* majority judges' lack of concern that the decision would open the "floodgates" to all intoxicated defendants has received support from empirical studies conducted in the years since the decision was handed down. For example, in 1986, the Victorian Law Reform Commission examined the operation of the law on intoxication and found that intoxication was not raised that often and was rarely successful in affecting a defendant's liability: see Victorian Law Reform Commission, Criminal Responsibility: Intention and Gross Intoxication (Report No 6, 1986); see for discussion Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Sydney, Australia: Thomson Reuters, 3rd ed., 2010) pp.274–276.

36 The majority in *O'Connor* held that voluntary intoxication may be adduced as evidence to raise doubt about the voluntariness of a defendant's conduct even where offence is one of strict liability: see *O'Connor* (n.29), 84–85 (Barwick CJ).

claiming that he did not form the fault element required by the offence, rather than the conduct element, in extreme cases, it may be grounds that the defendant acted involuntarily (or, put differently, did not really act at all). In *O'Connor*, the High Court did not find that the defendant had acted involuntarily but held that the issue should have been left to the jury for determination. One other Australian state — South Australia — has followed *O'Connor* and adopted the common law on intoxicated offending.[37]

*O'Connor* was controversial and the media, public and political outcry that followed application of *O'Connor* in jurisdictions such as NSW led to a backlash and the revitalisation of the *Majewski* rules, with several jurisdictions returning to the strict approach to intoxicated offending adopted in England and Wales. NSW now follows England and Wales in adopting the law on intoxication set out by the House of Lords in *Majewski* (albeit with some modifications of form rather than substance). After *O'Connor* was decided, and in the immediate aftermath of a high-profile decision in which an intoxicated defendant convicted of manslaughter received only three years imprisonment,[38] the NSW parliament amended the Crimes Act 1900 (NSW) to reject the *O'Connor* approach to intoxicated offending. In 1996, NSW inserted Pt.11A in Crimes Act 1900, amending the common law and resurrecting *Majewski* (but avoiding the term "basic intent").[39] As outlined above, *Majewski* provides that intoxication may only be adduced to prove that a defendant did not form the *mens rea* required in relation to "specific intent" offences. Thus, in NSW, if an individual is charged with a "specific intent" offence, and there is evidence that he was intoxicated at the time of the commission of the offence, the question for the jury is whether the prosecution has proved, beyond reasonable doubt, that the defendant formed the requisite intent for the offence.[40] As in England and Wales, involuntary intoxication may be adduced as evidence of lack of *mens rea* in response to a charge for any offence.

In NSW, parliament has moved beyond judge-led definitions of the category of "specific intent" to listing in the statute all those offences that will count as offences of "specific intent". In NSW, offences of "specific intent" are defined as those for which proof of intention to cause a specific result is required, and a list of qualifying offences is provided.[41] The codification of offences of "specific intent" has avoided uncertainty about the scope of this category of offences, but, arguably, such a formalistic approach has moved the distinction between "specific intent" and "basic intent" offences further away from a basis in logic. For instance, the table of offences of "specific intent" provided in the Crimes Act 1900 includes murder,

37 The Criminal Law Consolidation (Intoxication) Amendment Act 2004 (SA) provides that a defendant can raise voluntary intoxication when charged with an offence involving foresight of the consequences of conduct, or awareness of the circumstances surrounding the conduct (s.268).

38 See *R v Paxman*, 21 June 1995, NSW District Court.

39 See Crimes Act 1900 (NSW).

40 See *R v Makisi* (2004) 151 A Crim R 245 (NSWCCA).

41 See Crimes Act 1900 (NSW), s.428B.

although, in NSW, one of the fault elements of murder is reckless indifference to human life, which does not require proof of an intention to cause a specific result and thus, on the definition, is not a "specific intent" offence.[42] This formalistic approach abrogates the role of the courts in determining which offences are offences of "specific intent", a role that subsists in England and Wales. We return to this point in Section IV below.

Other Australian states have also enacted legislation to replace the common law on intoxication, electing to codify the *Majewski* approach to intoxicated offending as has occurred in NSW.[43] When the Model Criminal Code was drafted in the early 1990s, the drafters recommended that the Australian Commonwealth criminal jurisdiction adopt *O'Connor* on intoxicated offending. Reflecting a more general fidelity to principle over policy, the draft code provided that voluntary intoxication could be used to cast doubt on whether the accused had formed the requisite intent in relation to any offence.[44] The drafters of the Code defended their approach to intoxication on the basis that it was "rational and principled".[45] When it came to enacting the draft code, however, Federal parliament sought a more pragmatic approach, reversing the position recommended by the drafters of the Model Criminal Code and opting for the *Majewski* rules. Thus, the Commonwealth Criminal Code relies on the English category of "specific intent" offences to restrict the scope of intoxicated offending.[46] In explaining this departure from the draft code, in the first reading speech on the Bill in the House of Representatives, Duncan Kerr MP stated that legislating "to enable intoxication to be used as an excuse … is totally unacceptable at a time when alcohol and drug abuse are causing many social problems".[47]

## III. Intoxicated Offending in Civil Law Systems

Civil law systems have acquired a reputation for accepting self-induced impairment of an individual's mental state as an excuse of diminished responsibility. In general terms, in civil law jurisdictions, intoxication is considered a (temporary) mental

42 *R v Grant* (2002) 55 NSWLR 80 (CCA).

43 Queensland and Western Australia (where intoxication may be taken into account in relation to offences that have "an intention to cause a specific result" as an element of the offence) (Criminal Code (QLD), s.28(3) and Criminal Code (WA), s.28) and Tasmania (where intoxication may be considered if "specific intent" is "essential to constitute the offence") (Criminal Code (Tas), s.17(2)). In the Australian Capital Territory (ACT) and the Northern Territory (NT), voluntary intoxication cannot be taken into account in relation to crimes of "basic intent" (Criminal Code (ACT), s.31 and Criminal Code (NT), s.43AS).

44 Model Criminal Law Officers' Committee, Parliament of Australia, Chapter 2, Final Report: General Principles of Criminal Responsibility (1992) pp.49–51.

45 Michael Murray, "Summary of the Congress Report: Fourth International Criminal Law Congress" (1993) 17 Criminal Law Journal 189, 192.

46 See Criminal Code Act 1995 (Commonwealth) Sch.1, Div.8.

47 House of Representatives, 1 March 1995, Vol No 199, MC 1334 (Duncan Kerr).

disorder.[48] The idea of transient "exculpatory abnormality" acknowledges that a drunken person cannot act with what the law considers a (completely) free will. Therefore, criminal responsibility *must* be diminished; otherwise the overarching principle of appropriate punishment (*nulla poena sine culpa*) is violated. But drinking is no carte blanche for crime in continental Europe. On the contrary, alongside the option of imposing a "criminal measure", the civil law includes statutory provisions criminalising offences committed "in a senselessly drunken state".[49] But most interestingly, in civil law, appropriate doctrinal instruments "time-frame" intoxicated offenders in a way that simultaneously upholds the narrative of free will but holds the person who drinks responsible for an offence committed following voluntary intoxication.[50] Looking at Germany and Switzerland as examples, the rules on intoxicated offending reveal a complex legal approach that pays respect to the philosophy of personal autonomy and strives to catch the blameworthy drunken offender. Imputation of guilt is based on either the idea that (1) an *actus reus* follows from a free will decision or the idea that (2) a person knowingly suspends free will to commit a crime.

The doctrine underpinning this principle-driven approach to criminal liability, or, more precisely, imputation of guilt, dates back to a scholar of the early Enlightenment, Samuel Pufendorf (1632–1694).[51] This philosopher and jurist elaborated on an idea central to criminal law that takes humans as actors (or rather agents) who are to be held liable either (1) if their conduct ("physical action") causes damage (*ordentliche Zurechnung*)[52] or (2) if a situation they are responsible for in a specific way results in a crime (*ausserordentliche Zurechnung*).[53] This form of "exceptional imputation" creates a specific, normative time frame that scholars subsequently tightened as the idea of personal autonomy was influenced by philosophical models, religious beliefs and legal institutions during the Enlightenment. Thereafter, Immanuel Kant (1724–1804), putting free will at the centre of (criminal law) imputation[54]

48 See Dubber and Hörnle, *Criminal Law* (n.3) p.277; Anna Petrig and Nadine Zurkinden, *Swiss Criminal Law* (Zürich: Dike, 2015) pp.84–85. Courts may however order the defendant to submit to "measures", including alcohol withdrawal or psychotherapy.

49 See § 323a of the StGB-D for the text of the provision, available at https://www.gesetze-im-internet.de/englisch_stgb/; for information on the measures available in relation to intoxicated offending, see Christoph Safferling, "Insanity and Intoxication" in Markus Dubber and Tatjana Hörnle, *The Oxford Handbook on Criminal Law* (Oxford: Oxford University Press, 2015) pp.656, 657–8.

50 Joachim Hruschka, "Imputation" [1986] Brigham Young University Law Review 694.

51 Seelmann, "Personalität und Zurechnung von der Aufklärung bis zur Philosophie des Idealismus" (n.4) pp.581–582.

52 Hettinger, *Die "actio libera in causa"* (n.4) p.67; Hruschka, "Imputation" (n.50) p.672.

53 For further information on Pufendorf's influence, see for example, Hruschka, "Imputation" (n.50) p.670.

54 Basically the definition for imputation goes back to Immanuel Kant, "Zurechnung (imputatio) […] ist das Urtheil, wodurch jemand als Urheber (*causa libera*) einer Handlung, die alsdann That (*factum*) heißt und unter Gesetzen steht, angesehen wird; […]" *Metaphysische Anfangsgründe der Rechtslehre* (Königsberg: Preussische Akademie der Wissenschaften, 1797) in "6 Kant's gesammelte Schriften" (Preussische Akademie der Wissenschaften, 1907) p.227, available at https://korpora.zim.uni-duisburg-essen.de/kant/aa06/227.html. Translation: "Imputation […] is the judgment through which one is seen as the author

and establishing it as the prerequisite for any punishment,[55] set the course for Germanic legal thinking: imputation was only feasible where a person was capable of exercising the free will to either commit a crime or not.[56] The drunken individual, however, is not capable of exercising his mental capabilities in the same way as the sober person. In this mode of thinking, even if the will at the crucial moment of acting is impaired, imputation works if the *actio praecedens* (ie getting drunk) was free. This model of *actio libera in causa* opens the door to uphold the principle of free will; at the same time, it allows for exceptions. In combination this may lead to complete impunity for the defendant or either more lenient or harsher punishment for a crime committed while intoxicated. The underpinning theory splits the *actio praecedens* (ie getting drunk) and the act committed while intoxicated (*Rauschtat*) and thus broadens the relevant time frame, and in doing so implicates both the act and the actor.

## *A. Switzerland*

Swiss law stipulates that:

> "If [a defendant] was unable at the time of the act to appreciate that his act was wrong or to act in accordance with this appreciation of the act [because he is intoxicated], he is not liable… If the person concerned was only partially able at the time of the act to appreciate that his act was wrong or to act in accordance with this appreciation of the act [because he is intoxicated], *the court shall reduce the sentence*. Measures in accordance with Articles 59-61, 63, 64, 67, 67b and 67e may, however, be taken". (Emphasis added to the official translation.)[57]

The reference to a sentence reduction (in italics) has the effect that the court is not bound by a minimum sentence and may impose a different penalty or form of penalty from that which the offence carries, that is, in theory, a life imprisonment could be replaced by a fine.[58] But a penalty reduction is not granted automatically,[59]

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(free will) of an event, which is called a deed and subject to the law". Translation provided by Hruschka, "Imputation" (n.50) p.673.

55 See B Sharon Byrd, *Kant's Doctrine of Right — A Commentary* (Cambridge: Cambridge University Press, 2010) pp.261–278.

56 For further explanation, see S Dimock, "Actio Libera in Causa" (2013) 7 Criminal Law and Philosophy 549; Joachim Hruschka, "Ordentliche und ausserordentliche Zurechnung bei Pufendorf, Zur Geschichte und zur Bedeutung der Differenz von actio libera in se und actio libera in sua causa" (1984) 96 Zeitschrift für die gesamte Strafrechtswissenschaft 665.

57 Article 19, paras.1–3 of StGB-CH, available at https://www.admin.ch/opc/en/classified-compilation/19370083/index.html.

58 Bommer and Dittmann, "Book One: General Provisions, Part One: Felonies and Misdemeanours" (n.4); Michel Dupois, *Petit Commentaire Code Pénal* (Basel: Helbing Lichtenhahn Verlag, 2nd ed., 2012) art.48a, Nos 1–2.

59 Article 48 a of StGB-CH.

and the authorities may order a so-called "criminal measure", the second type of the Swiss criminal law sanction referred to above, including alcohol withdrawal. The courts must look at each case and evaluate the potentially mitigating and potentially aggravating circumstances of the specific situation. The obligation to respect the "fault principle", according to which only "responsible" actors face (full) punishment, requires individualised assessment[60] and thus allows for a pragmatic solution fitting the specific case.

Swiss law nevertheless does not give free rein to drinkers who commit crimes. The very same statutory provision that accepts intoxication as a form of insanity removes the exculpation if a defendant deliberately or negligently impaired his cognitive faculties. Article 19, para.4 of the Swiss Penal Code (StGB-CH)[61] reads:

> "Paragraphs 1-3 do not apply if the person could have avoided the state of mental incapacity or diminished responsibility and was, at that time, able to foresee the act he committed in that state".

This provision stipulates an extended time frame linking the intoxication with the *actus reus*, by looking at the situation of intoxication when harm results from the *actio praecedens*, that is, getting drunk.[62] When a person voluntary intoxicates himself although he is aware that he might commit a crime while in that state, the *actio libera in causa* principle imputes the intention to commit the offence from the intentional act of becoming intoxicated. Such intentional *actio libera in causa*, however, is difficult to establish, as the case law shows that proof of intent to cover the entire chain of events is required.[63] To fulfil these requirements, a defendant would have to either acknowledge that he drank in order to overcome an inhibition felt about committing a crime when sober or the court would have to establish in another way an instance of such "Dutch courage" drinking.[64]

In the more realistic scenario of negligent *actio libera in causa*, an individual is liable if — out of culpable carelessness — he does not foresee that he might commit an offence while in a state of self-inflicted mental incapacity and nevertheless commits

60 For an in-depth comparative approach, see Dubber and Hörnle, *Criminal Law* (n.3) pp.223–260.

61 Schweizerisches Strafgesetzbuch, SR 311.0, available at https://www.admin.ch/opc/de/classified-compilation/19370083/index.html.

62 Petrig and Zurkinden, *Swiss Criminal Law* (n.48) pp.85–86; Kurt Seelmann and Christopher Geth, *Strafrecht Allgemeiner Teil* (Basel: Helbing Lichtenhahn Verlag, 2016) pp.88–89; Günter Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat* (Bern: Stämpfli Verlag, 4th ed., 2011) pp.299–302.

63 Such requirement does not follow from the wording of art.19, para.4 (StGB-CH), but from the history of the statute. For guidance on how to find Swiss case law, see Petrig and Zurkinden, *Swiss Criminal Law* (n.48) pp.180–183.

64 Instances of "Dutch courage" drinking are also proscribed under the common law. If an individual gets drunk in order to commit an offence, he cannot rely on evidence of voluntary intoxication to disprove *mens rea* no matter what offence he is alleged to have committed: see *A-G for Northern Ireland v Gallagher* [1963] AC 349.

an offence in that state. If a person, however, is tricked into drinking alcohol or does not know about the effects of drinking (an instance of involuntary intoxication under the common law, as discussed above), no guilt can be established on the basis of an *actio libera in causa*.[65] Equally significantly, Swiss law criminalises "committing an offence while in the state of voluntarily induced mental incapacity". The relevant provision makes it a culpable act for the individual to make himself a risk to others or property by virtue of diminished mental capacity, but only *if* the drunk person "in this state commits an act punishable as a felony or misdemeanor".[66] Such an offence has been mooted but not introduced in England and Wales.[67]

This latter provision of the Swiss statute is controversial among legal scholars. Some see it as violation of the principle *nullum crimen, nulla poena sine culpa*.[68] Others value the provision's "catchall" element; a remainder from a time when the web of generic offences proved less effective in sanctioning intoxicated offending. The provision still functions to plug holes in the statutory framework provided by art.19 of the StGB-CH today: since current law is maximally effective only in the rather obvious cases of Dutch-courage drinking or negligent handling of alcohol by a person with a history of aggression when under influence, it leaves open mixed intoxication dilemmas. For instance, if someone voluntarily intoxicates himself, negligently not reflecting on the possibility that he might commit an intentional crime, when he "cares a little less" under the influence of alcohol, art.19 para.4 of the StGB-CH means that the intention to commit the offence will be attributed to him, fixing this imputation gap on its face. But this result appears inadequate. If the *actio libera in causa* assesses guilt according to the fault committed when still sober, the charge can only be negligence. The shortcoming of art.19 para.4 of the StGB-CH results from the fact that an individual incapable of appreciating the wrongfulness of the act committed under the influence of alcohol can only be liable for negligence.[69] If his responsibility is merely diminished (ie he is only partially able at the time of the act to appreciate that his act was wrong or to act in accordance with this appreciation of the act), then he is held to have acted with

65 Bommer and Dittmann, "Book One: General Provisions, Part One: Felonies and Misdemeanours" (n.4) art.19, No 86.

66 Article 263 of StGB-CH provides that any person who is incapable of forming criminal intent as a result of voluntarily induced intoxication through alcohol or drugs, and who, while in this state, commits an act punishable as a felony or misdemeanour, is liable to a monetary penalty not exceeding 180 daily penalty units. If the offender has, in this self-induced state, committed an act for which the only penalty is a custodial sentence, the penalty is a custodial sentence not exceeding three years or a monetary penalty.

67 Law reformers in England and Wales have repeatedly discussed the utility of creating of an offence of "dangerous intoxication" or "criminal intoxication" — where both intoxication and the conduct element of an offence such as assault are ingredients of the offence: see, for discussion, Loughnan, *Manifest Madness* (n.14) pp.200–201.

68 Bommer and Dittmann, "Book One: General Provisions, Part One: Felonies and Misdemeanours" (n.4) art.263, No 4.

69 Bundesgericht (Highest Swiss Federal Court), Urteil vom 22.8.1991, 117 IV 292, available at http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm.

intent and is thus liable for intentional homicide — however, the court is required to reduce the sentence imposed following conviction.[70] Not surprisingly, this result is highly controversial among academics.[71] One crucial question is how to balance the significance of the *actio praecedens* and the *actio libera*, and how to fit any solution into the notion of guilt as it is applied to other cases. Overall, and as has been the case in the past, assessing intoxicated offending continues to be subject to intense theoretical debate.[72] We pick up on this point again below.

In practice, Swiss legal authorities and courts rarely use the special path of *actio libera in causa*. Rather, for a long time they have tended to give an intoxicated actor an "insanity bonus",[73] seeking a conviction for the specific crime and thus avoiding the burden of proving that an act meets the requirements of art.19 para.4 of the StGB-CH,[74] and only in prominent or high-profile cases giving proper consideration to the aggravating facts of a case. As a consequence, intoxicated offenders in general have been rewarded with mitigated sentences.

## *B. Germany*

German legal doctrine has provided a blueprint for the laws of various civil law systems, including Switzerland, and therefore German provisions on intoxicated offending are similar to the Swiss law discussed above. This is the case for the deemed absence of guilt for offences committed when an individual is mentally unable to appreciate the unlawfulness of his actions, and also pertains to the effect of the individual's diminished responsibility on sentencing, and the option of a "measure of rehabilitation".[75] Section 20 of the German Criminal Code (StGB-D)[76] reads:

> "Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance

70 Bundesgericht, Urteil vom 17.6.1994, 120 IV 169, available at http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm.

71 See Bommer and Dittmann, "Book One: General Provisions, Part One: Felonies and Misdemeanours" (n.4) art.19, Nos 75–76.

72 Helmut Frister and Frank Schneider, *Alkohol und Schuldfähigkeit: Entscheidungshilfe für Ärzte und Juristen* (Berlin; Heidelberg: Springer Verlag, 2002); Christmuth M Flück, *Alkoholrausch und Zurechnungsfähigkeit* (Basel: Helbing Lichtenhahn Verlag, 1968); Rudolf Friedrich, *Der Streit um die Promille* (Bad Godesberg: Hohwacht Verlag, 1962).

73 Stratenwerth depicts it in his textbook as "alleged exception" ("*scheinbare*" *Ausnahme*), Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I* (n.62), p.299.

74 This statement, however, is only supported by anecdotal evidence; official statistics do not provide relevant empirical evidence.

75 Helmut Frister; *Strafrecht Allgemeiner Teil* (München: Beck, 7th ed., 2015) p.247; Gerhard Schäfer *et al*., *Praxis der Strafzumessung* (München: Beck, 5th ed., 2012), Nos 1008–1009; for more information on "measures of rehabilitation" see § 61 StGB-D (n.49).

76 Strafgesetzbuch (der Bundesrepublik Deutschland), see StGB-D (n.49).

> with any such appreciation due to a … mental disorder shall be deemed to act without guilt".

Section 21 of the StGB-D contains a similar rule for diminished responsibility, which reads as follows:

> "If the capacity of the offender to appreciate the unlawfulness of his actions or to act in accordance with any such appreciation is substantially diminished at the time of the commission … the sentence may be mitigated".

As drunkenness temporarily impairs a person's judgment, this rule generally earns intoxicated actors a reduced punishment because of a "mental disorder".[77] The underlying shift in the range of sentences (*Strafrahmenverschiebung*)[78] radically reduces the punishment, from imprisonment for life to imprisonment of not less than three years, from minimum terms of ten years to two years and minimum terms of three years to six months and so on. As in Switzerland, German courts must assess mitigating and aggravating factors on a case-by-case basis.[79]

In Germany, however, unlike in Switzerland, there is no law importing a broader time frame into the penal code.[80] The law stipulates an explicit rule for punishing intoxicated offending only in the relatively obscure provision of "committing offences in a senselessly drunken state". Section 323a of the StGB-D, provides:

> "(1) Whosoever intentionally or negligently puts himself into a drunken state by consuming alcoholic beverages or other intoxicants shall be liable to imprisonment not exceeding five years or a fine if he commits an unlawful act while in this state [*but*] may not be punished because of it because he was insane due to the intoxication or if this cannot be excluded. (2) The penalty must not be more severe than the penalty provided for the offence which was committed while he was in the drunken state".[81]

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77 For more information on the civil law approach to mental disorders see: Carl-Friedrich Stuckenberg, "Comparing Legal Approaches: Mental Disorders as Grounds for Excluding Criminal Responsibility" (2016) 4 Bergen Journal of Criminal Law and Criminal Procedure 48, 54–56.

78 Schäfer *et al*., *Praxis der Strafzumessung* (n.75), Nos 1010–1022.

79 See StGB-D, § 49.

80 This is not even the case for "Dutch courage" drinking.

81 The brackets mark a modification of the official translation (see StGB-D (n.49)), replacing a rather misleading "and" with a "but". The provision was adopted on 24 November 1933. Section 323a of the StGB-D dates back to the early days of the Nazi regime. Scholars nevertheless do not view the relevant statutes of the Code against Habitual Offenders (Gesetz gegen gefährliche Gewohnheitsverbrecher und über Massregeln der Sicherung und Besserung vom 24.11.1933, Reichsgesetzblatt I, p.995) as pure Nazism, because similar laws had been discussed in Germany for a long time prior to this date. For more detail, see Hans-Ullrich Paeffgen, "Actio libera in causa und § 323a StGB" (1985) 97 Zeitschrift für die gesamte Strafrechtswissenschaft 535.

As this indicates, the offence is committing an "unlawful act while in this [drunken] state" and the penalty that applies is capped at the level that would apply to conviction for the relevant "unlawful act".

Section 323a of the StGB-D is in conflict with the rule set out in § 20 of the StGB-D, extracted above, and the relationship between the two cannot be resolved in a systematic principled way. The inconsistency has been a thorn in the side of German doctrine from the moment of its adoption.[82] It is openly admitted that the rule is a pragmatic move against discontent with the criminal law's assessment of intoxicated offending. Over the twentieth century, several political campaigns denounced the limitations of a law that focuses on a defendant's capability to appreciate the unlawfulness of an action at the time of the *actus reus* and which takes his broader guilt for creating the situation into account only in the strict *actio libera in causa* framework. Initially the punishment for committing an offence in a senselessly drunken state was capped at two-year prison sentence, irrespective of the actual offence. This rather mild, generic penalty was seen to strike a balance between the modulation of the guilt principle and the need to punish an individual who committed an offence. Today committing an offence in a senselessly drunken state can earn a punishment of up to five years.[83]

Section 323a of the StGB-D has been the subject of manifold and interesting scholarly works. A solution seems out of reach, however, as the principle–pragmatism divide is wide, with German lawyers divided between utilitarian and dogmatic camps. Thus, instead of trying to bridge the positions German scholars have deepened the rift and cannot even reach an agreement on the requirements for the use of *actio libera in causa* imputation. As the *actio libera in causa* concept lacks a legal basis in German law (which is surprising, given Germany's positivist tradition), whether and under what circumstances, "exceptional imputation" is acceptable as one of the most controversial topics in the criminal legal academic domain.[84] The prevailing *Tatbestandstheorie*,[85] for instance, pushes the temporal reference point for establishing guilt back to the moment of intoxication. According to the *Tatbestandstheorie*, a person who deliberately drinks himself into a state of non-responsibility in order to commit a crime is held liable for that crime *because* — according to this view — the crucial "time of commission" is when the actor

82 See, for example, Bundesgerichtshof, Urteil vom 2.5.1961 — 1 StR 139/61; Paeffgen, "Actio libera in causa und § 323a StGB" (n.81) pp.535–538.

83 In Germany, felonies "are unlawful acts punishable by a minimum sentence of one year's imprisonment"; the minimum sentence for a murder *without aggravating circumstances* is five years (§ 212, para.1 of the StGB-D). Negligent manslaughter (§ 222 of the StGB-D) or abandonment of a person in a helpless state carries a maximum sentence of five years *without aggravating circumstances* (§ 221, para.1 of the StGB-D).

84 See, for example, Walter Perron and Bettina Weisser, Schönke/Schröder, *Strafgesetzbuch* (München: Beck, 29th ed., 2014), § 20 Nos 33–34; Kai Ambos, "Der Anfang vom Ende der actio libera in causa?" (1997) 49 Neue Juristische Wochenschrift 2297.

85 Kristian Kühl in Karl Lackner/Kristian Kühl, *Strafgesetzbuch* (München: Beck, 28th ed., 2014), § 20, No 25 with further references; Frister, *Strafrecht Allgemeiner Teil* (n.75) p.253.

gets drunk and, doing so, triggers the chain of events that lead to the criminal act.[86] An individual who drinks, forgetting about the possible effects of alcohol, such as the inability to function properly, acts negligently if he realises that in his specific situation intoxication increases the risk that a criminal act will take place. From this point of view, no explicit legal framework for assessing intoxicated offending is needed: one must only agree about the requirements for extending the time frame.[87]

In sum, Germany, like other civil law systems, strives to preserve the narrative of free will at the core of criminal law and punishment. To do so, it must either pay the price by handing out a mitigation or insanity bonus to intoxicated offenders or follow the path of an exceptional imputation based on an *actio libera in causa* approach. As a last resort, German prosecutors may invoke the statutory provision that criminalises drunken stupors where a crime is committed.

## IV. The Role of Legal Culture

The preceding sections revealed the ways in which, in varying configurations in the civil and common law contexts, the criminal law governing intoxicated offending is suspended across a tension between principle and pragmatism. This section turns to explore the role of legal culture — broadly, the non-doctrinal components of the legal order, including traditions, practices and institutions — in criminal legal approaches to intoxicated offending. We examine legal culture under three broad headings: modalities (the mode of expression of the criminal law), actors (the people involved in the criminal legal system) and technologies (devices through which the law operates). The issues considered under these headings are closely related, but we separate them for analytical purposes. We make a case that such dimensions of legal culture achieve a de facto reconciliation of legal principles with pragmatic concerns about intoxicated offending (in the common law), and a specific principle-driven reconciliation of the same (in the civil law), thereby ameliorating the costs of honouring or attempting to honour legal principle when it comes to intoxicated offending.

### *A. Modalities*

In relation to modalities — broadly, the mode or form of expression of the criminal law[88] — two factors are relevant: the code tradition in the civil law context, which

86 In Germany, however, by contrast with Switzerland, "conduct offences" (ie offences where the mere conduct is punishable such as drunk driving) are not within the scope of *actio libera in causa*, only "result offences" (ie offences where the prohibited conduct produces a harmful consequence such as homicide as a consequence of drunk driving — the offence requires that the victim has been killed), see (Swiss) Bundesgericht, Urteil vom 22.8.1991 (n.69).

87 See Hettinger, *Die "actio libera in causa"* (n.4) pp.92–99 and 179–198.

88 The use of this terminology follows in the critical scholarly tradition. This use of modality is adopted by several legal scholars; see, for example, Lacey, *In Search of Criminal Responsibility* (n.24) and Farmer, *The Making of the Modern Criminal Law* (n.21).

has the effect of scripting certain ideas in the law — and the common law tradition of judge-made law, which has fostered an approach, prevailing in England and Wales (although abrogated in Australia), in which it is possible to rely on ex post facto, case-by-case adjudication of whether an offence is one of "specific intent" or "basic intent".

The civil law code tradition assists in explaining the assessment of intoxicated offending in jurisdictions such as Switzerland and Germany. The early encoding of scholarly concepts of guilt in German written penal laws underscored the persistence of these approaches. As early as the famous *Constitutio Criminalis Carolina* (CCC or *Lex Carolina*), which was drafted in 1532, the problem of actors not in control of their mental faculties was addressed. In such cases the courts had to obtain legal advice that was provided by learned scholars.[89] Later penal codes' aspirations towards a coherent codification of the "fault principle" while addressing the problem of the intoxicated offender illustrates how scripting perpetuates ideas in law: starting with the General State Laws for the Prussian States (*Allgemeines Landrecht für die Preußischen Staaten*, ALR), promulgated in 1794, and codified by prominent scholars[90] under the orders of Frederick II, provisions for assessing intoxicated offending established a special path; individuals whose free will was impaired could not — legally — commit a crime and could thus not be subject to criminal punishment.[91] If a person voluntarily or negligently impaired his free will, however, liability for any crime committed in those circumstances revived.[92]

Often, penal codes reflected specific theoretical underpinnings — the approach to intoxicated offending is a good example of this. The famous Bavarian Criminal Code of 1813, for instance, drafted by Paul Johann Anselm Feuerbach, included a regulation that strictly translated his theoretical approach of *nullum crimen, nulla*

89 Article 179 of CCC ("Von übelthättern die jugent oder anderer sachen halb, jre sinn nit haben") read as follows:

> "Item wirt von jemandt, der jugent oder anderer gebrechlicheyt halben, wissentlich seiner synn nit hett, eyn übelthatt begangen, das soll mit allen umstenden, an die orten vnnd enden, wie zu ende diser vnser ordnung angezeygt gelangen, vnnd nach radt derselben vnd anderer verstendigen darinn gehandelt oder gestrafft werden".

90 For further information on Carl Gottlieb Svarez and Ernst Ferdinand Klein see Thomas Vornbaum and Michael Bohlander (ed), *A Modern History of German Criminal Law* (Berlin; Heidelberg: Springer, 2014) pp.20–21.

91 ALR 2. Theil 20. Titel § 16 "Wer frey zu handeln unvermögend ist, bey dem findet kein Verbrechen, also auch keine Strafe statt".

92 *Ibid*., Titel § 22 reads:

> "Wer sich selbst vorsätzlich, oder vermittels eines groben Versehens, es sey denn durch Trunk oder auf andere Art in Umstände versetzt hat, wo das Vermögen, frey zu handeln, aufgehoben oder eingeschränkt ist, dem wird das unter solchen Umständen begangene Verbrechen nach Verhältniß dieser seiner Verschuldung zugerechnet".

*poena sine praevia lege poenali* to intoxicated offending[93] — other particular laws took different routes.[94] The Prussian Penal Code of 1851, the blueprint for the first unified German penal code, however stayed mute on the matter. The *actio libera in cause* doctrine nevertheless remained in use, based on the conviction that imputation is an underpinning fundamental concept of criminal law. Germans continue to be faced with this statutory lacuna and its puzzles: as discussed above, no provision sets the rules for an *actio libera in causa* imputation, but the principle is applied nevertheless and conflicts with the provisions governing insanity (§ 20 of the StGB-D) and diminished responsibility (§ 21 of the StGB-D). Similarly, the punishment for offences committed in a drunken stupor (discussed above) awaits resolution. As we discuss in the next subsection, this leads to much debate among legal scholars.

Over the last few years, the (partial) excision of intoxicated offenders from criminal responsibility has created a certain uneasiness in the public as well as among German and Swiss law enforcement authorities and eventually the highest courts.[95] But, until very recently, such uneasiness seems to have been subordinated beneath adherence to the traditional principle-driven approach to intoxicated offending in criminal law that recognises the drunk as a temporarily mentally dysfunctional individual. Profound changes in attitudes to drinking and crime that have occurred over time, according to which social tolerance for intoxicated offending has declined, have made an impact only gradually. This change, however, may lead to civil law jurisdictions giving more weight to the fact that society no longer accepts that one can drink oneself out of responsibility.[96]

We turn now to the common law tradition, in which the modality is different. As a mode of expression of the legal order, common law rests on the case-by-case development by courts of rules that are to be applied to similar cases under a system of binding precedent. The ancient, unwritten and collective wisdom that was thought by seventeenth- and eighteenth-century commentators to provide the foundations of the common law was also thought to ensure that it was "unusually

93 Vornbaum and Bohlander, *A Modern History of German Criminal Law* (n.90) pp.37–42:

> "Wer mit rechtswidrigem Vorsatze ein Verbrechen beschlossen, und, um dasselbe auszuführen, sich in den Zustand von Geistesabwesenheit, durch Trunk oder andere Mittel, absichtlich versetzt, auch in diesem Zustande kein Verbrechen anderer Art, als das beabsichtigte, wirklich ausgeführt hat, soll als ein vorsätzlicher Verbrecher bestraft warden".

94 Hettinger, *Die "actio libera in causa"* (n.4) pp.117–164.

95 Bundesgerichtshof (Highest German Federal Court), Urteil vom 27.3.2003 — 3 StR 435/02, available at https://dejure.org/dienste/vernetzung/rechtsprechung?Text=3%20StR%20435/02; Bundesgericht (Highest Swiss Federal Court), Urteil vom 10.9.2012, 6B_58/2012, available at http://www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2012/Entscheide_6B_2012/6B.58__2012.html.

96 The third Criminal Division of the Highest German Federal Court (3. Strafsenat des Bundesgerichtshofs) fundamentally challenges the traditional approach to intoxicated offending and has formally asked the other Criminal Division for a change in case law (Beschluss vom 15.10.2015 3StR 63/15, available at http://www.hrr-strafrecht.de/hrr/3/15/3-63-15.php).

suited" to "efficacious, just and reasonable decision making about human affairs".[97] This idea of collective wisdom, a social idea of knowledge, has continued to be important to the perceived legitimacy of the common law. As Gerald Postema argues, the classical common law writers (such as Edmund Burke, Matthew Hale and William Blackstone) promoted an idea of the common law as common reason and as a way in which individuals participate in and feel part of the community.[98] Judges have been and continue to be central to the operation of the common law system and its legitimacy. For instance, as the Court of Appeal (England and Wales) stated recently:

> "[o]ne can trust the realism of trial judges, who direct juries, to guide juries to sensible verdicts and juries can in turn be relied on to apply robust common sense to the evaluation of ridiculous defences".[99]

As this suggests, judges are regarded as gatekeepers, exercising "realism" and guiding juries (who, incidentally, are required to reject "ridiculous defences").

In relation to the law on intoxicated offending, a system of case law and precedent means it is possible to rely on ex post facto, case-by-case adjudication of whether an offence is one of either "specific intent" or "basic intent". This is the situation in England and Wales (as mentioned above, in the NSW, this role of the courts has been eclipsed by reliance on statutory provisions). This system, and the passage of time since the *Majewski* rules were formulated, has fostered a situation in which the significance of the departure from principle in the law (in relation to offences of "basic intent") is sidelined by the familiar if potentially controversial common law practice of statutory interpretation. This process of judicial interpretation of laws passed by parliament means that the issues of principle raised by intoxication are largely left to academics and law reform agencies, "quarantined" in textbooks and law reform reports. In the last few years, however, the offence-by-offence approach has been criticised. In 2009, the Law Commission for England and Wales labelled the view that all offences can be classified as either "basic intent" or "specific intent" offences as "unhelpful", but the Commission reiterated the view that evidence of voluntary intoxication should only be able to be considered at trial in relation to a subset of criminal offences.[100]

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97 See Sophia Rosenfeld, *Common Sense: A Political History* (Cambridge, MA: Harvard University Press, 2011) p.34.

98 See Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford Clarendon Press, 1986) pp.66–77.

99 *R v G* [2004] 1 AC 1034, [39] (Lord Bingham) and [58] (Lord Steyn).

100 Law Commission for England and Wales, Intoxication and Criminal Liability (Law Com No 214, 2009), paras.1.28, 2.2 and 3.33–3.34, respectively.

## *B. Actors*

As the means by which legal rules are bought to life, it is not surprising that actors — the people involved in the criminal legal system — have a significant impact on the criminal legal approach to intoxicated offending. In relation to the law on intoxicated offending, the effect of the different types of actors involved, and the division of labour between them, is significant. In relation to the civil law, we suggest that the dominance of professionals — both judges and lawyers — has had the effect of fostering adherence to legal principles originally developed in preceding eras. By contrast, in the common law context, the role of the lay jury in criminal trials has influenced the law: as we discuss, the unpredictability of the jury in part explains the low empirical profile of the issue of intoxication at trial, while the fear that juries might treat intoxicated offenders leniently helps explain the strictness of the *Majewski* rules (which have the effect of withholding evidence of voluntary intoxication from the jury in the majority of instances).

In civil law jurisdictions, guilt is decided upon by the bench, not by a jury.[101] Although jury elements may be found in some criminal justice systems, they tend to be weaker or rather watered down compared to the degree of lay participation in the history of criminal justice systems in continental Europe.[102] This arrangement fosters the lead of learned judges and the perpetuation of certain legal concepts such as those relating to intoxicated offending. Germany is a classic example: from the Middle Ages, jurisprudence — that is, difficult questions of law or decisions on severe punishment — was in the hands of learned judges. In medieval times, the use of canon law (applied by clergymen or under supervision of the church) as well as the reception of Roman Law in the first law faculties produced a body of law striving for overall coherence and consistency with certain principles. Legal opinions provided for criminal trials by the newly established law faculties (the so-called Konsilien),[103] rationalised and humanised verdicts, as did the practice of asking a learned scholar from afar to give a legal opinion on challenging questions that the local court could not, or did not wish to, answer. Assessing the criminal culpability of a drunken defendant was a case for such a legal opinion, as the above-discussed rule in the

101 On criminal justice authorities and criminal proceedings in general, see Petrig and Zurkinden, *Swiss Criminal Law* (n.48) pp.32–36.

102 Civil law jurisdictions do have a lay element, even a jury trial. In Germany, for instance, trial by jury was introduced after the revolutionary events of 1848, but it remained a controversial issue. After its abolition, a mixed system including bench trials and lay judges (the so-called *Schöffengerichte*) or jury courts provide for lay participation. Switzerland had a patchwork of cantonal criminal procedural codes until 2011, when a common Swiss criminal procedural code entered into force. Divided by language and different legal traditions, some cantonal criminal justice systems provided for a jury trial, but most did not. The unified Swiss Code of Criminal Procedure does not provide for jury trials or special lay judges.

103 Stefan Suter, *Die Gutachten der Basler Juristenfakultät in Straffällen: Vom ausgehenden 16. bis zum Beginn des 19. Jahrhunderts* (Basel: Basler Studien zur Rechtswissenschaft, Helbing und Lichtenhahn, 1990).

CCC shows.[104] In this respect, the employment of professional judges in civil law jurisdictions clearly made it easier to set a standard that, at least as an ideal, applied to all intoxication cases.

Beyond the role and status of judges, other actors have contributed to the longevity of principles around intoxicated offending. Here, the role of legal scholars (and legal scholarship) in the civil law system is significant. Germany has an old and rich culture of scholarly debate on criminal justice topics. The debate includes philosophers, jurists and theologians discussing concepts of guilt and criminal liability, criteria for imputation and the justification of punishment. Law faculties were among the founding departments of the early university foundations in Europe, and became lively places for intellectual exchanges. In fact, university teaching and the early institutionalisation of legal training are likely to have helped to pass on the complex ideas of assessing intoxicated offending from generation to generation. The realignment of legal training during the eighteenth century[105] and the emergence of a student fraternity environment might have had an impact of their own. While university classes cultivated the philosophical tradition, law clerking probably strengthened pragmatic thinking.[106]

Scholarly debate about the predicament of intoxicated offending continues, as scholars challenge the *lex lata* and repeatedly develop concepts extending beyond statutory provisions.[107] Up until today *actio libera* remains a field for discussing ideas with impact beyond intoxicated offending. For instance, the *Ausnahmemodell* invented by Joachim Hruschka works with a model of a general obligation not to put oneself in a situation in which one may (have to) break the law. If an actor does place himself in such position, he is "estopped" from claiming insanity.[108] In comparison, the "perpetration-by-means" approach draws on an analogy to *Mittelbare Täterschaft* as a certain concept of agency by "indirect perpetration". This approach is emphasised in many German textbooks and presupposes that the person who gets himself intoxicated is an offender who — as a principal of a crime — uses his own future self as an accomplice to commit the crime (*ein Werkzeug*

104 Regular consummation of alcohol in medieval times was most likely a privilege of the nobility and the clergy.

105 The teaching and training of jurists began at the University of Bologna in the twelfth century. The Italian school taught legal sciences with glosses and commentaries on Roman law. The establishment of a two-stage legal training — academic education being followed by an unpaid traineeship at court — dates back to the Kingdom of Prussia.

106 See, for example, Martin Biastoch, *Tübinger Studenten im Kaiserreich: eine sozialgeschichtliche Untersuchung* (Sigmaringen: Jan Thorbecke Verlag, 1996) pp.129, 157. The long period of training before entering the labour market and university politics apparently accounted for a certain selectivity: rather well-to-do male students joined law faculties, who also had a reputation of engaging in fraternity's drinking sprees.

107 For a detailed discussion, see Hettinger, *Die "actio libera in causa"* (n.4) pp.240–434.

108 Joachim Hruschka, "'Actio libera in causa' und mittelbare Taeterschaft" in Dieter Dölling, Volker Erb (eds), *Festschrift für Karl Heinz Gössel zum 70. Geburtstag* (Heidelberg: CF Müller Verlag, 2002). For a critical assessment, see Ingeborg Puppe, *Strafrecht. Allgemeiner Teil* (Baden-Baden: Nomos, 3rd ed., 2016), § 16/3.

*seiner selbst*). But both approaches invite new problems. The latter, for instance, is criticised, because the division appears as an "artful" construction, and because a split between oneself and one's future drunken self does not fit into the general theories of two separate people conspiring in crime.[109]

In the common law context, the relevance of actors for an understanding of the law on intoxicated offending is quite different. While professionals such as judges, prosecution and defence counsel dominate legal processes, lay people also play a role in the form of the lay jury. As is well known, in common law systems, when an individual is charged with a serious offence, lay juries decide questions of fact. Jurors have a lay knowledge of intoxication and its effects, and this knowledge forms part of the epistemological context of jury trials in the common law system. Lay knowledge of intoxication, which may be defined as socially ratified attitudes and beliefs about intoxication, forms part of the "mixed" knowledge systems alongside expert knowledge relied on by the law.[110] Although the content of lay knowledge about intoxication is something of a black box, it is likely to encompass a range of beliefs, and thus, defence counsel may seek to avoid exposing their clients to the unpredictability of jury evaluations.

The unpredictability of jury evaluations of intoxicated defendants helps explain the low empirical profile of intoxication at trial. While police in jurisdictions such as NSW and Victoria deal with a large number of individuals who commit offences while intoxicated, this is not matched by the numbers of individuals who raise intoxication in defending themselves against a charge in court.[111] There is a dramatic gap between the factual profile of intoxicated offending and the legal profile of intoxication at trial. While it is likely that this gap reflects the availability of other defences, and the prevalence of guilty pleas (which we discuss below), it also points to the role of strategic decisions made by lawyers for intoxicated offenders about the risks and benefits of raising intoxication — decisions which are made in light of the prospect of trial by lay jurors (for a serious offence), who will have their own lay attitudes and beliefs about intoxication and its effects.

This concern about lay people has influenced the rules on intoxicated offending. On one reading, the *Majewski* rules (discussed above) may be explained as an attempt to keep evidence of voluntary intoxication from the jury in the majority of cases. In *Majewski*, Lord Elwyn-Jones stated:

> "Acceptance generally of intoxication as a defence (as distinct from the exceptional cases where some additional mental element above that of ordinary *mens rea* has to be proved) would in my view undermine the criminal law and I do not think that it is enough to say… that we can

109 Puppe, *Strafrecht. Allgemeiner Teil* (n.108), § 16/8-11.

110 See Mariana Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom* (Cambridge: Cambridge University Press, 1998); see also Loughnan, *Manifest Madness* (n.14) ch 7.

111 See for discussion Bronitt and McSherry, *Principles of Criminal Law* (n.35) pp.271–272.

> rely on the good sense of the jury or of magistrates to ensure that the guilty are convicted".[112]

As this suggests, in relation to intoxicated offending, concern about relying on the jury to convict where appropriate — other than in the "exceptional cases", involving offences of "specific intent" — lies behind the *Majewski* rules. The motivation for this strict approach is the perceived need to protect "the ordinary citizen", who, if "badly beaten up would rightly think little of the criminal law as an effective protection if, because his attacker had deprived himself of ability to know what he was doing by getting himself drunk or going on a trip with drugs, the attacker is to be held innocent of any crime in the assault".[113] As this suggests, this social protection aim of the law on intoxicated offending seems to extend to the "ordinary citizens" of the jury, who must be protected from being overly lenient when it comes to intoxicated individuals accused of crimes.

In this respect, there is a significant difference between the *Majewski* and *O'Connor* approaches to intoxicated offending. This difference relates to the faith placed in lay jurors to make appropriate determinations regarding intoxicated defendants, judging whether intoxication genuinely meant that the defendant did not form the *mens rea* required by the offence. As mentioned in Section II, under *O'Connor*, the Australian common law rejected a distinction between offences of "specific intent" and offences of "basic intent", allowing evidence of voluntary intoxication to be adduced in response to a charge of any criminal offence. The majority judges in *O'Connor* were not concerned about the consequences of that decision — on the basis that it is only when intoxication has truly deprived the defendant of the mental element of the offence that it will assist him — and their decision also reflects faith in the ability of lay people to evaluate claims about the effects of intoxication. It was not necessary to refuse to admit evidence of voluntary intoxication because it would not unduly influence the assessment of the individual's culpability and all the circumstances of the case. This approach stands in contrast to *Majewski*, in which the rules operate to remove evidence of voluntary intoxication from the factual matrix considered by the jury in the majority of cases in which it is present.

## *C. Technologies*

In this section, we discuss the part played by technologies in ameliorating the costs of adhering to principle in the law on intoxicated offending or realising a balance between principle and pragmatism. Here, the term "technologies" is used to refer to devices or tools available in legal processes. In both the common law and the civil

112 *Majewski* (n.9), 475 (Lord Elwyn-Jones LC).
113 *Ibid.*, 498 (Lord Russell of Killowen).

law contexts, we suggest that the principally mitigating effect of intoxication is a valuable device for both defence and prosecution.

Criminal proceedings in Germany and Switzerland are, of course, not conducted as adversarial trials. The officials in charge (judge, court, prosecution service) must look for incriminating and exculpating evidence.[114] Therefore, intoxication may provide a possible bargaining chip for the prosecution when negotiating the outcome of a matter. Intoxication, therefore, need not be raised by the defendant — at least in theory. In fact, prosecution authorities will test for intoxication when they suspect alcohol or drug consumption and include the finding in the case file. Based on the relevant information a court will — of its own motion — request an expert opinion about a defendant's criminal liability "if there are serious grounds" for doubts about criminal responsibility.[115] Thus, at least in theory, assessing intoxicated offending does not raise basic procedural questions.

The framework for assessing intoxicated offending in civil law criminal trials has changed over the last decades, however. Today, continental European jurisdictions practice various forms of negotiated justice. In Switzerland, approximately 95 per cent of all criminal trials end with a penalty order. The *Strafbefehl* is sent by the prosecution service to the alleged offender:[116] the letter contains an offer by the prosecution of what is perceived to be an adequate penalty.[117] In more than 90 per cent of cases the addressee apparently accepts the offer, thus terminating the criminal proceeding. Penalty orders following alleged intoxicated offending will in principle give an insanity bonus (as described above), including the abrogation of the minimum sentence.[118] Therefore, an intoxication defence provides substantial leeway for the prosecution to make what will (hopefully) be an acceptable offer to the defendant. Only if additional information indicates Dutch-courage drinking (see above), or other exceptional circumstances, will the case be prosecuted before a court.[119] In practice, negotiated justice in civil law systems thus has the advantage of providing an option of more lenient punishment in cases in which the offender's cognitive ability or the capability to act according to a rational judgment is hampered, since it offers a bargain (for both sides).

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114 See, for instance, art.6 of the StGB-CH:

> "(1) The criminal justice authorities shall investigate ex officio all the circumstances relevant to the assessment of the criminal act and the accused. (2) They shall investigate the incriminating and exculpating circumstances with equal care".

115 Article 20 of the StGB-CH.

116 See, for instance, Thomas Hansjakob, *Zahlen und Fakten zum Strafbefehlsverfahren* (2014) 7 forumpoenale 162; Marc Thommen, *Gerechtigkeit und Wahrheit im modernen Strafprozess* (2014) 32 recht 273. These, however, include traffic offences and other administrative offences that are all dealt with via criminal proceedings.

117 Petrig and Zurkinden, *Swiss Criminal Law* (n.48) p.33.

118 Article 48a of the StGB-CH.

119 The case will generally also be moved before a court if further measures, like alcohol withdrawal, are recommended by the prosecution service. In theory, however, such precautionary measures could also be dealt with in a penalty order.

In common law systems, the same issues of efficiency and the need to deal with large volumes of cases motivate a system of negotiated justice. Originally developed in the United States, the system of plea-bargaining — according to which the prosecutor may downgrade a charge in return for a guilty plea — is now entrenched in the criminal justice systems of the common law jurisdictions under discussion in this article.[120] As several commentators have suggested, given the massive expansion of the criminal law over recent decades and the overlap between offences (such that more than one charge is available in respect to a particular set of facts), significant power now resides with the prosecution in that decision-making.[121] In relation to the law on intoxicated offending in particular, the option of plea-bargaining presents a technology that permits a balance to be negotiated between principle and pragmatism. Negotiation concerning the effect of an offender's intoxication, which is likely to be undertaken by prosecutors in pre-trial practices that are "hidden" from public view, may see a defendant plead guilty to a lesser charge rather than risk a conviction (following a trial) on a more serious charge. Faced with a guilty plea, the judge or magistrate moves directly to decide sentence.

If an individual elects to go to trial, the option of charging individuals with alternative offences takes the sting out of the consequences of the rules on intoxicated offending. As a number of commentators point out, even if a defendant is charged with an offence of "specific intent", it is likely that another lesser offence of "basic intent" will be available as an alternative charge, and this may be included on the indictment.[122] For example, under NSW criminal law, if a defendant is charged with malicious wounding with intent to cause grievous bodily harm (for which self-induced intoxication can be adduced in relation to the "ulterior intent") the offence of malicious wounding (a "basic intent" offence) may be charged "in the alternative"; if the defendant is acquitted of the former, he may be convicted of the latter.[123] The option of relying on "basic intent" offences to "back up" "specific intent" offences minimises the consequences of faithfully honouring the principle of subjectivism in relation to serious offences. The technology of charging in the alternative contributes to a de facto reconciliation of the competing concerns of principle and pragmatism in the law on intoxicated offending.

120 See, for discussion of the situation in NSW, David Brown *et al*., *Criminal Laws* (Sydney, Australia: Federation Press, 6th ed., 2015), ch.4.

121 See, for example, William Stuntz, "The Pathological Politics of Criminal Law" (2001) 100(3) Michigan Law Review 578. Writing in the US context, Stuntz suggests that prosecutors are the "real lawmakers" as plea deals struck between prosecutors and accused people may be rubber-stamped by judges.

122 See, for example, Bronitt and McSherry, *Principles of Criminal Law* (n.35) pp.279–280.

123 See ss.33 and 35, respectively, of the Crimes Act 1900 (NSW).

## V. Conclusion

In this article, we presented an analysis of the ways in which, in different configurations, the legal rules on intoxicated offending in both the civil and common law contexts straddle a tension between principle and pragmatism. As we discussed, in common law jurisdictions, the law determining when intoxication can excuse crime departs from principles of criminal responsibility relating to subjective fault, instead reflecting policy rationales of discouraging intoxicated offending. In civil law jurisdictions, the law appears on its face to be more forgiving because it traditionally accepts self-induced impairment as an excuse of diminished responsibility, along the lines of temporary insanity, but it nonetheless provides paths to punish intoxicated individuals who commit crimes, having invented an extended doctrinal time frame of its own.

This article then examined the role of dimensions of legal culture implicated in the criminal legal approach to intoxicated offending, which we analysed under three broad headings — modalities, actors, and technologies. We made the case that such dimensions of legal culture achieve a de facto reconciliation of legal principles with pragmatic concerns about intoxicated offending (in the common law), and a specific principle-driven reconciliation of the same (in the civil law), ameliorating the costs of honouring or attempting to honour legal principle when it comes to intoxicated offending. These dimensions of criminal justice systems should constitute a significant component of comparative study of the criminal law on intoxication and in this way the study offered here may act as a corrective to the dominance, in extant comparative criminal law scholarship, of studies merely comparing the legal rules that apply in different jurisdictions without considering contextual factors such as legal culture.[124]

124 See Lacey, *In Search of Criminal Responsibility* (n.24) p.3.