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PRIOR-FAULT BLAME IN ENGLAND AND WALES, GERMANY AND THE NETHERLANDS

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Abstract: This article explores the contested legal conceptualisation and application of "prior-fault" rules in England and Wales, Germany and the Netherlands. Prior-fault rules operate as an exception to the traditional application of criminal offences and defences, allowing a defendant's

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previous conduct outside of an offence or defence definition to directly affect his or her liability. The paradigm example of this is prior-fault intoxication, where an intoxicated defendant is found liable for an offence despite lacking mental fault at the time of causing harm; with the missing mental fault effectively substituted by their previous choice to become intoxicated. However, as we discuss, prior-fault is not necessarily limited to such examples and has the potential to operate across a broad range of criminal rules. Through the comparison of jurisdictions, each with varying doctrinal applications of prior-fault, the article seeks both to better understand the concept as well as to analyse the most effective and defensible methods for its application in practice.

Keywords: *prior-fault*; *intoxication*; *insanity*; *constructing offences*; *blocking defences*; *incapacity*; *actio libera in causa*; *culpa in causa*

I. Introduction

Where a defendant (D) is convicted of a criminal offence, they are judged on the basis of their specific conduct and mental state at a specific moment in time. D commits an offence, for example, when she takes property from a victim (V) without permission. We may have some sympathy for D where her history provides an explanation for her offence (eg circumstances of poverty or abuse), or we may be hardened in our perception of D who has previously offended or otherwise acted with bad character, but these previous circumstances are typically irrelevant to the core elements of substantive criminal liability.[1] The law's focus is narrow for normative reasons, looking to evaluate D's conduct rather than her broader character, as well as for practical reasons, providing manageable targets for the machinery of law (investigation, courts and so on). But the narrow temporal focus can also be problematic, and additional legal mechanisms are sometimes necessary to prevent apparently perverse outcomes.

An obvious *exculpatory* example can be found in certain criminal defences. Thus, where D takes V's property only because her life has been threatened by a third party (X) unless she does so, the defence of duress will allow the earlier conduct (X's threats) to qualify and/or excuse D's later offence (theft). This does not mean that previous conduct or motive will always be relevant

[1] Each may be separately relevant at sentencing or in demonstrating evidence of propensity.

to establishing liability, but it does recognise that an unqualified exclusion in all cases would not be appropriate.[2] Our focus in this article is on similar legal constructions, but this time working in the opposite direction: "prior-fault" rules of *inculpation*. Looking beyond the traditional narrow event focus of criminal evaluation, prior-fault rules exceptionally allow D's previous blameworthy conduct to qualify and construct substantive liability that would otherwise be absent.

Take the example of Nadruku, a high-profile rugby league player in Australia, who in 1997 became acutely intoxicated and severely assaulted two women in a Canberra bar.[3] Nadruku was charged with violence offences, but he was found by the court to have been so intoxicated that he was not capable of forming the intent required within the definition of the crime; Nadruku was therefore acquitted. This outcome was (and remains) highly controversial and prompted predictable public and political criticism of a legal system that allowed conduct described in the court as "drunken thuggery" to go unpunished. And yet the case demonstrates nothing more than a standard application of a fundamental legal principle: where vital elements of an offence are missing, people like D cannot be convicted of it.

In a minority of criminal jurisdictions, this is the end of the story; we may feel intuitively uncomfortable about Nadruku's acquittal, but such intuitions are not sufficient as reasons for deviating from the event-specific focus of criminal law.[4] In most jurisdictions, however, including those at issue in this article, various prior-fault rules have been developed to find liability in examples of this kind, recognising D's lack of capacity when causing harm at time 2 (T2) but blaming D for creating the circumstances of that incapacity when becoming intoxicated at time 1 (T1). Liability is established by widening the focus of the criminal law to include both T1 and T2 events.

Prior-fault rules have developed across the full structure of the criminal law, creating liability that could not otherwise be established. This includes offences, where prior-fault rules may

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[2] See William Wilson, "How Criminal Defences Work" in A Reed and M Bohlander (eds), *General Defences in Criminal Law* (Oxford: Routledge, 2014) p 7.

[3] *SC Small v Noa Kurimalawai*, Australian Capital Territory Magistrates' Court, Matter No CC97/01904, 22 October 1997.

[4] Discussed in Stephen Gough, "Surviving without Majewski?" [2000] *Crim LR* 719.

allow blameworthy conduct at T1 to substitute for missing offences elements at T2;[5] applicable not only to cases such as *Nadruku*, but also beyond voluntary intoxication in cases of negligent misuse of medication, for example.[6] Prior-fault rules may also qualify the application of criminal defences, where an otherwise available defence at T2 might be excluded due to D's conduct at T1, and applicable where the circumstances of a defence are contrived (eg where D provokes V to enable "self-defence"), or D acts on a mistaken intoxicated or delusional belief.[7] Likewise, when (in civil law jurisdictions) assessing unlawfulness and blameworthiness, D's ability to claim a lack of capacity at T2 will also be subject to her own potential fault at T1 in creating that state.[8]

But despite the potential reach of prior-fault rules, even within the most mature legal jurisdictions, the systematisation and detail of such rules have remained problematic, with ongoing uncertainties as to fundamental questions of scope and operation in practice. As we discuss throughout, this includes basic questions about what triggers the move to T1–T2 prior-fault analysis, what must D do and/or foresee at T1 to establish prior-fault, what causal or intentional links (if any) must exist between T1 and T2 events, how far back can we go to find T1 fault and so on. These are difficult questions for the law to answer, but, given the function of prior-fault rules in creating independent routes to criminal liability, a lack of clarity here is not acceptable. The questions are of course common across each of our focus jurisdictions, but the answers provided by each (however incomplete) are often quite different.

Within the present article, we critically explore the use and understanding of prior-fault rules across three criminal jurisdictions: England and Wales,[9] Germany and the Netherlands. English law maintains a classic common law approach to prior-fault, with relatively few developments since the seminal case of *Beard* in 1920.[10] Within this system, prior-fault rules act as powerful and blunt tools of inculpation, constructing routes to offence liability and blocking

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[5] Including certain *mens rea* elements and even a lack of voluntariness. Discussed in II. Blame across and between Events.

[6] Discussed in II. Blame across and between Events.

[7] Discussed in II. Blame across and between Events and III. Intoxication and Prior-Fault.

[8] Discussed across II. Blame across and between Events–IV. Prior-Fault and Mental Disorder.

[9] References to "England" hereafter should be read to include "England and Wales".

[10] [1920] AC 479 (HL).

otherwise available defences. Of particular note here has been a longstanding academic preference for the creation of a bespoke intoxication offence, presented as a viable model to replace current rules and to more accurately label and punish defendants.[11] Germany provides for such a prior-fault "dangerous intoxication" offence in § 323a of the Criminal Code. Yet, this separate criminalisation does not operate as a replacement for other prior-fault rules (as debated in England) but rather operates alongside other more general routes to prior-fault liability. The Netherlands provides an interesting perspective between both, modelled on the German civil law system, but approaching prior-fault blame without a bespoke prior-fault offence.

Our article is divided into four sections, exploring and comparing structures of prior-fault (Section II), the status of intoxication (Section III), the relationship with mental disorder (Section IV) and the role/potential for a bespoke prior-fault offence (Section V). There are obvious attractions to the comparison of these themes. Particularly where academic and reform literature has endorsed an approach that is practised within another jurisdiction, it is clearly useful to understand how that approach has functioned to take any lessons that may be learned from its design. Comparative learning of this kind is the central theme of the article. However, a comparison between civil and common law systems, particularly within such a complex area, is far from being straightforward, with structural and terminological mismatches providing for a great variety of traps for the unwary. It is for this reason that we take time to consider each jurisdiction separately within each Section, ensuring clarity within each as the comparative picture develops across the article. We contend not only that important comparative lessons can be learned from our analysis, but also that such lessons must be understood within each jurisdiction's unique criminal law context.

II. Blame across and between Events

Although prior-fault rules exist within each of our focus jurisdictions, the legal structures within which those rules operate are quite different. Before drilling down into particular debates and key areas of comparison, it is therefore necessary to introduce the context for the law in each system.

[11] Discussed in V. The Role of Bespoke Prior-Fault Offences.

In doing so, we will identify where and how prior-fault rules are applied as well as introduce the main areas of critical debate.

A. Prior-fault events in England and Wales

English criminal law employs a common law bipartite structure, recognising a firm division between the inculpatory role of offences (*actus reus* and *mens rea*) and the exculpatory role of defences (whether excusatory or justificatory). Prior-fault rules, although commonly (and mistakenly) presented as "defences", operate to qualify the application of *both* offences and defences: (i) constructing the elements of a criminal offence and (ii) blocking or adjusting the application of a defence.[12] In both, D's blameworthy conduct at T1 is used to find liability for an event at T2.

(i) Prior-fault in constructing offences

Prior-fault rules can be used to substitute for missing *mens rea* at T2, including absent voluntariness.[13] In practice, this is almost exclusive to cases of intoxication. As we discuss in Sections III and IV, offence construction of this kind can *exceptionally* apply to non-intoxication cases of prior-fault automatism but has not yet been applied in the context of insanity. In this section, therefore, we focus on the structure of the intoxication rules only.

The intoxication rules provide a powerful tool for inculpation. If the facts of *Nadruku* were to arise in England, D would be found guilty of an offence against the person.[14] Although D lacked *mens rea* at T2 when hitting both victims and perhaps even lacked control of ~~his~~ actions, his

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[12] See John Child, "Prior Fault: Blocking Defences or Constructing Crimes" in A Reed and M Bohlander (eds), *General Defences* (Oxford: Routledge, 2014) p 37.

[13] *R v Lipman* [1970] 1 QB 152 (CA).

[14] Most likely, in this case, an offence of Assault Occasioning Actual Bodily Harm (Offences Against the Person Act 1861 s.47).

voluntary consumption of a "dangerous drug"[15] at T1 would allow the court to find liability regardless. As the House of Lords made clear in the leading case of *Majewski*,[16] "If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition". Statements of this kind—intuitively plausible and policy-focused—are typical of cases discussing the application of prior-fault rules. But more is required to understand precisely when and how such rules will be employed to create liability.

To justify finding D liable for an offence *as if* he possessed *mens rea* that was in fact missing, it is logically necessary to require normative equivalence between D's prior-fault at T1 and those missing elements at T2. And something of this is identifiable in the jurisprudence. When locating prior-fault at T1, for example, it is clear that D must have acted voluntarily in taking the relevant risk (ie consuming the drug);[17] and D's choice must also be blameworthy in that the drug taken must be objectively "dangerous" (ie must be illegal and/or commonly associated with erratic or problem behaviours).[18] Following this, the fault constructed is not simply used to replace *any* missing *mens rea*, but rather a distinction is drawn between "specific intent offences" that cannot be constructed (typically intention-based offences) and "basic intent offences" where liability can be found (typically recklessness-based offences). The basic/specific intent offence distinction is not replicated in civil law jurisdictions, but it applies in England and other common law jurisdictions as a method of qualifying the fault generated at T1 for equivalence with missing T2 *mens rea*.[19]

Claims of equivalence, however, are not conceptually sustainable within the current law. This is apparent, for example, in the inconsistent categorisation of basic and specific intent offences in practice, where rules of thumb about prior-fault not replacing missing states of intention are not

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[15] Defined broadly to include alcohol and other drugs associated with uncontrolled and/or aggressive behaviour. See *Lipman* [1970] 1 QB 152 (CA).

[16] [1977] AC 443, 474 (HL).

[17] Discussed in *R v Kingston* [1994] 3 All ER 353 (HL).

[18] See *Lipman* [1970] 1 QB 152 (CA).

[19] Discussed in *R v Majewski* [1977] AC 443 (HL).

always followed.[20] More generally, any claim of equivalence between prior-fault intoxication (ie objective foresight of nonspecific future risks from T1) and missing states of recklessness (ie subjective foresight of specific risks in action at T2) ignores fundamental differences between the two.[21] Our claim here is that D's prior-fault intoxication may give rise to legitimate blame tokens, but these are not sufficiently comparable (let alone equivalent) to those missing at T2 to make a simple substitution appropriate. The legal fiction created by the intoxication rules, therefore, treating D *as if* he possesses the requisite *mens rea* at T2, is at best mislabelling D's conduct where it is deserving of liability and at worst over-criminalising that conduct where it is not.

Such criticisms have been inconsistently recognised by the courts but largely dismissed. In *Majewski*, for example, the court was satisfied that despite problems of logic, "this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic".[22] And more generally, the underlying challenges have been disguised by the inaccurate classification of intoxication as a form of defence (ie being allowed to undermine *mens rea* for specific intent offences). This is problematic because it wrongly implies that completing the *actus reus* of an offence is sufficient for inculpation and also because it obscures the role of intoxication in creating the basic ingredients of liability rather than operating as a tool of exculpation.[23] Within academic and policy writing, commentators have proposed to either remodel the current law to achieve a more plausible case for equivalence,[24] or contended that current rules should be abolished and replaced with a new intoxication offence to more accurately target and label offenders for the wrongs they *have* committed.[25]

(ii) Prior-fault in blocking defences

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[20] For example "intentional" sexual touching in *Heard* [2007] EWCA Crim 125 (CA).

[21] See, eg Rebecca Williams, "Voluntary Intoxication—A Lost Cause?" [2013] 129 *LQR* 264.

[22] [1977] AC 443, 482 (HL).

[23] See Andrew Simester, "Intoxication is Never a Defence" [2009] *Crim LR* 3.

[24] See Law Commission, *Intoxication and Criminal Liability* (No 314, 2009) (hereafter LC314); John Child, "Drink, Drugs and Law Reform" [2009] *Crim LR* 488.

[25] See Law Commission, *Intoxication and Criminal Liability* (Consultation 127, 1992) (hereafter LC127); R Williams, "Voluntary Intoxication" (n. 21).

Prior-fault rules also emerge to impact the application of criminal defences, blocking or amending the potential for defences at T2 based on D's previous conduct at T1. Such rules can be divided into two categories.

The first category of prior-fault rules relates to intoxicated mistakes and reflects many of the same policy intuitions discussed above. Essentially, in the context of defences such as self-defence, where D relies on a mistaken subjective belief for exculpation, D will not be able to rely on that mistaken belief if it was attributable to voluntary intoxication.[26] It is interesting that intoxication is singled out in this manner from other potentially blameworthy causes for an unreasonable mistaken belief (eg sleep deprivation), and the rule has not always been followed consistently.[27] However, the rule has remained relatively uncontroversial in its application.[28] The preponderance of objective elements within criminal defences (ie holding D to the standard of a reasonable sober person) also lessens the impact of the specific intoxication rule.

The other category of prior-fault rules relates to a collection of various excluding clauses, which operate to block D's defence where he has either consciously (or sometimes negligently) created the conditions of that defence. A narrow version of the exclusion applies to defences such as self-defence, which asks whether D has consciously manipulated the circumstances to engineer the "need" for defensive force.[29] There are conceptual challenges in defining an exclusion of this kind, but such "grand schemer" scenarios provide compelling case studies in favour of prior-fault rules. More controversial are negligence-based exclusions, such as those applied to the defence of duress (ie excluding D's defence if he voluntarily associated with individuals in circumstances where he *objectively* should have foreseen a risk of coercion).[30] Our main focus in this article is capacity-diminishing examples of prior-fault. However, the inconsistent approach taken between defences lacks justification.

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[26] See, Criminal Justice and Immigration Act 2008 s.76(5); *Hatton* [2005] EWCA Crim 2951 (CA).

[27] See *Jaggard v Dickinson* [1981] 3 All ER 716 (DC).

[28] See LC314.

[29] *R v Rashford* [2005] EWCA Crim 3377 (CA).

[30] *R v Hasan* [2005] UKHL 22, [38] (HL).

B. Prior-fault events in Germany

There are three distinct differences in the approach towards prior-fault events in Germany in comparison to England. First, voluntary intoxication is primarily considered under the element of blameworthiness rather than *mens rea*, which means that it can result in a (partial) excusatory defence. Second, to prevent impunity, Germany has developed a twofold mechanism to hold intoxicated offenders criminally liable ~~(1)~~ prior-fault rules and (2) a separate intoxication offence. Third, concerning contrived defences, different rules are applied for denying or limiting the defence.

(i) Prior-fault in the tripartite system: Voluntary intoxication as a (partial) excuse

The German way of addressing prior-fault events has to be understood within the civil law context of the tripartite structure of crime. For criminal liability, three consecutive elements have to be fulfilled: the statutory offence definition, consisting of objective and subjective elements (*actus reus* and *mens rea*); the wrongfulness of the conduct, which may be negated by a justification; and the blameworthiness or guilt of the actor, which may be denied by an excuse.[31] In principle, issues of prior-fault may play a role for each of these tiers of criminal liability.[32] For instance, as we will see later, cases of contrived self-defence or necessity are prior-fault events related to the wrongfulness of the conduct, while a constructed duress situation raises the question whether this can still be an excuse.

Regarding voluntary intoxication, whether caused by alcohol, drugs or medication, courts favour addressing this problem at the level of blameworthiness rather than *mens rea*.[33] This is because intoxication as such—and not the resulting mental condition such as a psychotic episode

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[31] Johannes Keiler and David Roef, *Comparative Concepts of Criminal Law* (Cambridge: Intersentia, 2019) pp 114–119.

[32] Walter Perron and Bettina Weisser in Schönke and Schröder, *Strafgezetsbuch* ("Criminal Code") (München: Beck, 2019) § 20, Mn. 34.

[33] Markus D Dubber and Tatjana Hörnle, *Criminal Law. A Comparative Approach* (Oxford: Oxford University Press, 2016) p 285.

alone—can be recognised as a temporary mental disorder falling under the excuse of incapacity of guilt, the German equivalent of the insanity defence (German Criminal Code (GCC) § 20 GCC). Less serious cases are considered a form of diminished capacity that could result in a mitigated punishment (§§ 21 and 49 GCC).[34] This is an important difference with England, where voluntary intoxication may negate *mens rea* but can never be an excuse. This does not mean that an intoxicated state may never negate *mens rea* in Germany. For example, due to a strict subjectivist approach to mistakes, a mistake caused by voluntary intoxication may also negate intent.[35] However, generally speaking, this only occurs when the intoxication is very severe.[36] Even when intent is considered absent, the offence usually is replaced by its negligent variant. For instance, in a case where D had killed the victim by hitting him on the head with a shovel, the Supreme Court upheld the mere conviction for negligent bodily harm resulting in death, pointing out that the high level of alcohol might negate intent.[37]

(ii) A twofold mechanism

To prevent possible exculpatory effects, Germany has developed two mechanisms to hold intoxicated offenders criminally liable. This way, German criminal law wants to reconcile doctrinal

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[34] Isabel Stassen-Rapp, *Die Behandlung von Selbstverschuldeten Rauschzuständen im Angloamerikanischen Strafrecht—Vorbild für eine Gesetzliche Regelung in Deutschland* ("The Handling of Self-intoxication in Anglo-American Criminal Law—A Model for Legal Regulation in Germany") (Baden-Baden: Tectum, 2011) pp 275–285.

[35] Jeroen Blomsma, *Mens Rea and Defences in European Criminal Law* (Cambridge: Intersentia, 2012) p 264.

[36] BGH, 24 February 2010, NStZ-RR 2010, 214. We should also note that in Germany, intent has already a much lower threshold in comparison with England, as it includes conditional intent, that is, which is the condition of being aware of a risk (foreseeability) and accepting it, which in common law would be covered by recklessness.

[37] BGH, 15 April 1997, NstZ-RR 1997, 233; J Keiler and D Roef, *Comparative Concepts* (n. 31), 247.

consistency with policy demands to not leave intoxicated crimes unpunished.[38] On one hand, D can be held criminally liable for the original offence under the rule of prior-fault called *actio libera in causa* (*alic*), literally "an act free in its causes", provided she intoxicated herself with the intent to commit that offence or when she could have foreseen such an offence.[39] On the other hand, where there is no *alic*, the intoxication will be recognised as an excuse, but D will alternatively be held liable for the separate offence of "dangerous intoxication", which punishes offenders who get senselessly intoxicated and while being in this state commit a wrongful act for which they lack the capacity of guilt (§ 323a GCC).[40] Thus, a clear normative distinction is made between D's who commit crimes that still have a culpable "instrumental" link with their prior intoxication and D's who simply become mindlessly intoxicated and commit wrongful acts for which they would otherwise be held liable.[41] But as we will see below, both the dogmatic grounding of *alic* and the separate criminalisation of dangerous intoxication are not without critique.

How would *Nadruku* be decided in the German system? D's serious intoxicated state would probably lead to a successful incapacity defence as his intoxicated state was neither "planned" nor (arguably) was there any foreseeability regarding the crimes he committed. However, this would not lead to an acquittal as Nadruku would still be convicted for the dangerous intoxication offence.

(iii) Prior-fault in blocking defences

Lastly, there is the problem of constructing one's defences in contrived and/or grand-schemer cases. In general, German criminal law either denies or limits a contrived defence depending on the nature of the prior-fault. Concerning self-defence (§ 32 GCC), if D has provoked the attack purposefully to rely on the justification, the defence will usually be rejected, as this could be

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[38] See MD Dubber and T Hörnle, *Criminal Law* (n. 33), 285.

[39] See III.B. Prior-fault intoxication in Germany.

[40] See V.B. Bespoke prior-fault offences in Germany.

[41] Benedikt Fischer and Jürgen Rehm, "Alcohol Consumption and the Liability of Offenders in the German Criminal System" [1996] *Contemporary Drug Problems* 707, 713–714.

considered an abuse of law.[42] However, courts do not easily accept that it was D's purpose to abuse the justification, and most commentators still acknowledge a right to self-defence as long as the provocation is not unlawful.[43] If D did not intend the attack but still foresaw the risk that the aggressor would be provoked, this will not preclude the self-defence, but its application will be limited.[44]

Because courts are quite reluctant in blocking self-defence, some scholars defend that the justification should not be denied at all but that the so-called doctrine of *actio illicita in causa* (*aiic*, an act originating from an illegal cause) should be applied. In this view, self-defence against a provoked attack remains justified, but D is nonetheless criminally liable based on the earlier provocative conduct.[45] Both courts and doctrine usually reject this unpopular approach, primarily because it leads to the contradictory outcome that the same act would be lawful and unlawful at the same time.[46]

The Criminal Code distinguishes justifying necessity (§ 34 GCC) from excusing necessity or duress (§ 35 GCC). Whereas justifying necessity constitutes the objective right to choose a lesser evil when confronted with a conflict of interests, excusing necessity denies the blameworthiness of the actor when she was under such a psychological pressure that she could not reasonably be

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[42] Claus Roxin and Luís Greco, *Strafrecht. Allgemeiner Teil* ("Criminal Law. General Part") (Beck, München, 2020) § 15, Mn. 65; J Blomsma, *Mens Rea and Defences* (n. 35), 357; Joachim Herrmann, "Causing the Conditions of One's Own Defense: The Multifaceted Approach of German Law" [1986] *BYU Law Rev* 747, 749–750.

[43] See C Roxin and L Greco, *Strafrecht* (n. 42), § 15, Mn. 65–67; MD Dubber and T Hörnle, *Criminal Law* (n. 33), 451.

[44] *Ibid*., § 15, Mn. 69–70; see J Blomsma, *Mens Rea and Defences* (n. 35), 356.

[45] See J Herrmann, "Causing the Conditions" (n. 42), 750–750; Moritz Breuer, "Die Actio Illicita in Causa. Darstellung und Meinungsstand" ("The Actio Illicita in Causa. Presentation and Opinion") [2008] *BRJ* 5, 6–7. This *aiic* doctrine resembles the general prior-fault theory defended by Robinson in his classical article "Causing the Conditions of One's Own Defence: A Study in the Limits of Theory in Criminal Doctrine" [1985] *VaLR* 1.

[46] See C Roxin and L Greco, *Strafrecht* (n. 42), § 15 Mn. 68.

expected to abide by the law.[47] This difference also explains the different value given to prior-fault. Regarding necessity, case law again makes a distinction between intentional versus negligently constructing the defence. If D created the emergency to abuse the defence, he is not justified in protecting his interests by violating those of someone else.[48] However, if he simply foresaw that his actions would create a dangerous situation, the justification will not be automatically denied, but the weight of his interests can be minimalised in the balancing exercise.[49] Just like in self-defence, a minority view wants to solve contrived necessity via *aiic*, arguing that the conduct constructing the necessity rather than the crime committed in necessity should be the basis of criminal liability.[50]

To conclude with duress, this is the only defence where the legislator can explicitly address prior-fault as the Criminal Code denies the excuse when D himself caused the danger and if he could be expected to cope with that danger.[51] For instance, if D causes a traffic accident while driving his injured partner to the hospital, he will not be able to invoke duress if he has somehow caused this emergency himself. However, § 35 GCC allows for considerable mitigation of punishment because D may still have been acting under extraordinary psychological pressure.[52]

C. Prior-fault events in the Netherlands

The criminal law system of the Netherlands employs a tripartite structure similar to that of Germany. To recapitulate, first the statutory offence description needs to be fulfilled, meaning that the objective elements of the crime (ie the behaviour that the criminal code prohibits, such as assaulting another person or destructing property) together with the subjective elements (ie the presence of negligence or intent) need to be proven. When these objective and subjective elements,

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[47] See J Keiler and D Roef, *Comparative Concepts* (n. 31), 226.

[48] See C Roxin and L Greco, *Strafrecht* (n. 42), § 16 Mn. 62; J Blomsma, *Mens Rea and Defences* (n. 35), 387.

[49] C Roxin and L Greco, *Strafrecht* (n. 42), § 16 Mn. 60–61.

[50] See J Blomsma, *Mens Rea and Defences* (n. 35), 388.

[51] See C Roxin and L Greco, *Strafrecht* (n. 42), § 22 Mn. 44–50.

[52] *Ibid.,* § 22 Mn. 57.

which together constitute the offence, are fulfilled, the court assesses whether the act might be lawful: in other words, whether there is an applicable justification. If not, the court addresses the element of blameworthiness by discussing any potential excuses. If an element of the tripartite structure cannot be fulfilled or is negated, D is not criminally responsible.[53]

(i) Prior-fault: blocking defences or constructing offences?

The Netherlands primarily employs prior-fault (referred to as *culpa in causa*, literally meaning "fault in its cause") to block justifications or excuses.[54] In other words, contra English law, prior-fault does not play a role in constructing missing elements in the offence definition requirements such as intent or negligence, and thus finding equivalence with such elements is a non-issue. This is easily explainable, as the Dutch concept of intent is almost entirely normative—it is a legal concept not a psychological one[55]—meaning that the potential negation of intent, based on impaired mental capacity, is extremely small. A mental disorder or incapacity can only negate intent when "the defendant has such a serious mental disturbance that we should assume that he had lost complete insight into the scope of his behaviour and its potential consequences".[56] As such, most

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[53] More specifically, if tier one cannot be fulfilled, D is acquitted. Yet, if the act is not unlawful or D is not considered blameworthy (ie there is an applicable justification or excuse), D is rather "dismissed of prosecution". See Erik Koopmans, *Het Beslissingsmodel van 348/350 Sv* ("the Decision-Making Model of Article 348/350 Code of Criminal Procedure") (Deventer: Wolters Kluwer, 2017) pp 105–106.

[54] As discussed more thoroughly later, the concept can be defined as finding culpability in creating the conditions of a justificatory or excusatory defence. See Jaap De Hullu, *Materieel Strafrecht: Over Algemene Leerstukken van Strafrechtelijke Aansprakelijkheid naar Nederlands Recht* ("Substantive Criminal Law: About the General Principles of Criminal Liability in Dutch Law") (Deventer: Wolters Kluwer, 7th ed., 2018) p 385.

[55] De Hullu, *Materieel Strafrecht* (n. 54).

[56] HR, 22 July 1963, ECLI:NL:HR:1963:AB5623, NJ 1968, 217 annot. Enschedé; HR, 9 June 1981, ECLI:NL:HR:1981:AC0902, NJ 1983, 412 annot. Van Veen; HR, 14 December 2014, ECLI:NL:HR:2004:AR3226, NJ 2006, 448.

individuals meet the cognitive capacity requirement for intent. Aside from the objective intent threshold, existing negligence-based offences also provide an alternative to liability for intentional crimes, similar to the German system. By requiring that D *could* and *should* have acted otherwise, the threshold is met simply by engaging in careless behaviour. Constructing negligent liability does not require prior-fault. With no need to construct an offence, the English distinction between the two types of prior-fault classifications (constructing/blocking) is not commonly discussed in the Netherlands.[57] As the focus lies on negating a defence, blocking rather than constructing seems to be the most accurate classification of the doctrine.

To apply the above to *Nadruku*, in the Netherlands, liability would be found straightforwardly. Intent can still be proven, as this is not something to be negated by mental incapacity (unless the court considers the mental incapacity to be extremely severe, which is something that cannot be achieved solely by intoxication). Thus, an intentional assault offence would most likely be proven, without the need of prior-fault rules. Prior-fault could play a role if Nadruku were to claim a defence, as his voluntary intoxication could block an otherwise successful defence. Yet as we discuss later, this means he would first need to prove a successful defence, which is not likely.

(ii) Prior-fault (*culpa in causa*) blocking defences

The concept of *culpa in causa* predominately blocks defences. By definition, it refers to a type of fault (*culpa*) regarding an offender who committed an illegal act under otherwise justificatory or excusatory conditions, having created those conditions himself.[58] The principle is not codified in the criminal code, and the general meaning and application of the principle arise from case law and

[57] An exception is Jansen's thorough discussion on prior fault. See Robert Jansen, "Drie Modellen voor Eigen Schuld bij Strafuitsluitingsgronden" ("Three Models for Prior-Fault in Defences") [2020] *Boom Strafblad* 209.

[58] Hans van Netburg, *Eigen schuld!? "Culpa in Causa" bij Wettelijke Strafuitsluitingsgronden* ("Own Fault?! 'Culpa in Causa' in Legal Defences") (WODC 1994).

critical reflection of legal scholars.[59] The concept can be considered a negative requirement for both justificatory as well as excusatory defences.[60] Grand schemer situations are, unlike the English doctrine, generally not considered part of *culpa in causa* but rather *dolus in causa* (ie intention as to arranging an exculpatory condition). Such situations are uncontroversially accepted reasons for denying a defence.

The focus of *culpa in causa* mainly is on the non-accountability excuse (Dutch Criminal Code (DCC) art.39), ~~the~~ Dutch insanity defence equivalent, predominantly for substance-induced psychoses. These circumstances and associated controversies are discussed further in Section III.C. Less controversial is the applicability of *culpa in causa* for defences such as necessity, duress and self-defence. Necessity and duress may be negated when D consciously manoeuvres herself into a dangerous situation, as the situation could have been avoided.[61] This seems to be alike the German situation in which foreseeability (conscious negligence) as to the circumstances is required. However, "avoidability" of a situation is never the sole criterion for a successful defence, and *culpa in causa* regarding the cause of the situation does not immediately deny the defence altogether.[62] Additionally, to determine whether D culpably caused the exculpatory circumstances, the concept of *Garantenstellung* plays a role.[63]

To negate self-defence, *culpa in causa* can be considered, although the courts are hesitant to do so.[64] The Supreme Court specified that in special circumstances such as when D intentionally provoked an attack from the victim or intentionally sought confrontation with the victim leading to

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[59] Johannes Nijboer and Leo Wemes, *Rechtspraak, Dogmatiek en Dogmatisme: de Analytische Waarde van het Onderscheid tussen Materieel en Formeel Strafrecht* ("Judiciary, Dogmatics and Dogmatism: the Analytical Value of the Distinction between Substantive and Procedural Criminal Law") (Arnhem: Gouda Quint, 1990) p 38.

[60] R Jansen, "Drie Modellen" (n. 57), 210.

[61] Tarquinius Noyon, Gerard Langemeijer and Jan Remmelink, *Het Wetboek van Strafrecht* ("the Criminal Code") (1982) 259–260.

[62] HR, 30 November 2004, ECLI:NL:HR:2004:AR2067, NJ 2005, 94 annot. Mevis.

[63] By virtue of certain professions, occupation or special qualities, a higher standard of care may be required of D.

[64] See De Hullu, *Materieel Strafrecht* (n. 54), 334–335

an attack, self-defence can be denied.[65] This requirement for prior-fault is not always separated from the general assessment of the defence and is discussed as part of the withdrawal requirement. Some argue that it is better suited to frame such arguments explicitly as *culpa in causa,* meaning that first all the requirements for self-defence ought to be fulfilled and only then to be assessed in light of prior-fault.[66] This would be comparable to the German approach.

III. Intoxication and Prior-Fault

This section discusses the role played by "intoxication" in the definition of prior-fault rules, as an example, a paradigm and even a proxy for prior-fault. Our aim here is to identify exactly what T1 conduct D is being blamed for within each jurisdiction.

A. Prior-fault intoxication in England and Wales

For English legal academics and practitioners, doctrines of prior-fault are effectively synonymous with intoxication rules. Where prior-fault is used to construct the missing elements of an offence,[67] there is a potential for prior-fault inculpation outside of intoxication, but this is limited to a small subset of automatism cases where D foresees at T1 the potential to lose control in dangerous circumstances at T2.[68] Despite some policy level interest,[69] there is currently no mechanism for prior-fault insanity: so mismanagement or failure to take medication at T1, for example, leading to

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[65] HR, 22 March 2016, ECLI:NL:HR:2016:456, NJ 2016, 316 annot. Rozemond (*Overzichtsarrest*); HR, 17 May 2016, ECLI:NL:HR:2016:864, NJ 2016, 461, annot. Rozemond.

[66] See R Jansen, "De Beoordeling van Noodweer bij een Gezochte Confrontatie" ("The Judgment of Self-defence in Cases of Sought Confrontation") [2017] *Delikt en Delinkwent* 669.

[67] See II.A. Prior-fault events in England and Wales.

[68] The classic example here is a diabetic person who fails to eat properly after an insulin injection, chooses to drive (T1) and then causes an accident after becoming unconscious at the wheel (T2) having fallen into a diabetic coma. John Rumbold and Martin Wasik, "Diabetic Drivers, Hypoglycaemic Unawareness and Automatism" [2011] *Crim LR* 863.

[69] See Law Commission, *Insanity and Automatism* (Discussion Paper, 2013) Ch 6.

insane delusions and harms at T2 will still result in the special verdict of "not guilty by reason of insanity" (as opposed to liability through prior-fault).[70] Where prior-fault operates to block a defence that would otherwise have been available,[71] again, outside of specific grand schemer or associative rules, the main general capacity-based prior-fault rules are specific to cases of intoxication.

In this manner, beyond simple example or paradigm, the status of intoxication has effectively become a proxy for findings of prior-fault.[72] There are advantages to this in terms of both perceived simplicity and approximate accuracy. Intuitions about prior-fault, as we have said, typically correlate with perceptions of voluntary intoxication: D may not have intended to cause criminal harms at T2, but he knew (or should have known) that taking dangerous drugs can lead to problem behaviour, and so his normative position is shifted by his choice to do so. But in focusing on the status of intoxication rather than identifying the detail of the wrongs that status is proxy for, various mismatch dangers arise. Indeed, where common law theorists have looked to identify core markers of prior-fault blame, these include D's foresight of eventual incapacity at T1, D's foresight at T1 of future harms at T2, causal routes between T1 conduct and T2 incapacity and harms and so on.[73] Such markers not only help us to explain criminal blame for T1 voluntary intoxication and T2 harms, but they also highlight challenges to the proxy: they challenge findings of prior-fault *within* intoxication where foresight of future harm is missing at T1 and/or causal routes to T2 harms are uncertain. Moreover, they challenge the failure to account for markers of prior-fault *outside* intoxication where D is reckless or negligent at T1 (eg voluntary sleep deprivation, negligent mismanagement of medication).

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[70] We discuss this further in IV.A. Prior-fault and mental disorders in England and Wales.

[71] See II.A. Prior-fault events in England and Wales.

[72] See Hans Crombag, John Child and Rudi Fortson QC, "Understanding the 'Fault' in Prior-Fault Intoxication: Insights from Behavioural Neuroscience" in A Reed and M Bohlander (eds), *Fault* (Oxford: Routledge, 2021).

[73] See, eg, Susan Dimock, "Actio Libera in Causa" [2013] *CrimL&P* 549; Paul Robinson, "Causing the Conditions of One's own Defence" [1985] *Vir L Rev* 1; Douglas Husak, "Intoxication and Culpability" [2012] *CrimL&P* 363.

Intoxication begins to look like a problematic proxy for prior-fault, which is itself a flawed proxy for absent subjective *mens rea* at T2 (discussed in Section II.A). This manifests in potential over-criminalisation where the proxy of intoxication is satisfied and in potential under-criminalisation where it is not. But beyond this, as the common law has developed, we also perceive an unhelpful misdirection of judicial focus, with courts looking to unpack complex (and scientifically/clinically uncertain) distinctions within the intoxication status rather than looking to understand the underlying markers of prior-fault blame. We see this in recent cases such as *Taj*,[74] for example, where D (a heavy and long-term drug user) experienced a psychotic episode and violently attacked his victim in mistaken/delusional self-defence. Whether Taj should be blamed for his psychotic episode is a difficult question to answer, but it is surely the right one to ask. For the courts, however, constrained within the current law, the question became whether psychosis potentially attributable to previous states of intoxication could be caught within that proxy. This is also a difficult question, but, it is contended, the answer is far less valuable as a normative basis for criminal blame.[75]

B. Prior-fault intoxication in Germany

We have seen that voluntary intoxication in Germany is not a separate defence but a subcategory under the general incapacity excuse. To be more precise, according to §§ 20–21 GCC, intoxication can be recognised as a temporary "pathological mental disorder" or a "profound consciousness disorder", covering both severe inebriation cases and substance-induced psychosis.[76] As mentioned, to prevent impunity in case of a complete defence, D will be criminally liable for the intoxication offence of § 323a GCC, but only if there is no *alic* in which event he is still punished for the original crime. To compensate for a partial defence, prior-fault will have its effect on the sentencing and prevent mitigation of punishment.

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[74] [2018] EWCA Crim 1743 (CA).

[75] See John Child, Hans Crombag and G.R. Sullivan, "Defending the Delusional, the Irrational, and the Dangerous" [2020] *Crim LR* 306; "Drunk, Dangerous and Delusional: How Legal Concept Creep Risks Overcriminalization" [2020] 115(12) *Addiction* 2200.

[76] See C Roxin and L Greco, *Strafrecht* (n. 42), § 20 Mn. 10–11.

(i) When can intoxication lead to a full (or partial) defence?

Extreme intoxication will only lead to a full incapacity if D is no longer capable of appreciating the wrongfulness of his conduct or of acting in accordance with this appreciation (§ 20 GCC). In less serious cases, a diminished capacity is accepted if the intoxication resulted in a limited but still substantial impairment of D's capacities (§ 21 GCC). The blood alcohol percentage (BAC) is the primary empirical factor to determine the degree of intoxication and thus the distinction between full incapacity and diminished capacity. As a general rule, courts will consider complete incapacity if the BAC is above 0.3 per cent, while a diminished capacity will be accepted if the BAC is above 0.2 per cent. However, these quantitative levels are not evaluated in isolation but within an overall assessment, taking into account D's behaviour before, during and after the crime and taking into other factors such as physical condition, alcohol tolerance and the type of offence.[77] Therefore, it is possible, in spite of substantial inebriation, to conclude from D's conduct that he has retained sufficient ability for control.[78] Arguably, for drugs and medication, no simple empirical measurement may exist, and courts will use all available psychodiagnostic and behavioural evidence to make decisions about D's incapacity.[79] For instance, it will be considered whether D committed the offence while he was on overdose or suffered from withdrawal symptoms.[80]

(ii) Basic rules of *alic*

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[77] *Ibid*., § 20 Mn. 10.

[78] BGH, 10 October 2020, NStZ-RR 2021, 40; MD Dubber and T Hörnle, *Criminal Law* (n. 33), 280–281.

[79] See W Perron and B Weisser, *Strafgezetsbuch* (n. 32), § 20 Mn. 16; Regarding the problem of evaluating the effect of medication, see F Pluisch, "Neuere Tendenzen der BGH-Rechtsprechung bei der Beurteilung der Erheblich Verminderten Schuldfähigkeit Gemäss § 21 StGB nach Medikamenteneinnahme" ("New Tendencies in the BGH-jurisprudence in the Assessment of the Strongly Diminished Capacity Defence in Cases of Medication Intake, as per Provision 21 Criminal Code") [1996] *NZV* 98.

[80] Michael Bohlander, *Principles of German Criminal Law* (Oxford: Hart, 2009) p 134.

The classical, textbook *alic* is the "Dutch courage" case where D intentionally intoxicates himself to facilitate the planned offence and then commits it in such a state that he falls under § 20 GCC. The essential requirement is double intent, both for the intoxication and the subsequent offence.[81] However, conditional intent (resembling English recklessness) may be sufficient in some (more common) scenarios, which holds D also criminally liable when he has foreseen and accepted the risk of committing the offence while becoming intoxicated.[82] For instance if an adult deliberately intoxicates himself to have sex with another person but ends up having sexual intercourse with a minor*, alic* is accepted although this offence was not planned.[83]

Next to its intentional form, German law also accepts negligent *alic*, provided D becomes intoxicated and foresees that this would lead to the (intentional or negligent) commission of the offence. However, it is doubtful whether an *alic* construct is really necessary for negligent offences because the "prior-fault" at hand will already constitute a violation of a duty of care (preceding the result).[84]

Obviously, *alic* is mostly used in the more common cases of § 21 GCC, where prior-fault will become part, at the sentencing stage, of an overall consideration of all relevant mitigating and aggravating circumstances. According to the Supreme Court, mitigation of punishment would be denied if D knew that the consumption of intoxicating substances would have an especially unfavourable effect on him and knew or should have known that he tended to commit acts of

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[81] See C Roxin and L Greco, *Strafrecht* (n. 42), § 20 Mn. 67; I Stassen-Rapp, *Die Behandlung* (n. 34), 285.

[82] C Roxin and L Greco, *ibid*., § 20 Mn. 60; BGH, 13 September 2001, 3 StR 331/01.

[83] Benedikt Fischer and Jürgen Rehm, "Intoxication, the Law and Criminal Responsibility—A Sparkling Cocktail at Times: The Case Studies of Canada and Germany" [1998] *European Addiction Research* 97.

[84] See C Roxin and L Greco, *Strafrecht* (n. 42), § 20 Mn. 59; I Stassen-Rapp, *Die Behandlung* (n. 34), 287.

violence or other crimes (based on prior experience with similar offences).[85] It is interesting to note that according to the Supreme Court, a higher threshold should be used for illegal drugs than for alcohol, as in the opinion of the Court the possible harmful effects of the latter are usually more foreseeable.[86]

(iii) Theoretical foundations for *alic*: Critiques

Although the Supreme Court accepts *alic*, German legal doctrine is divided on both its justification and theoretical grounding. Some scholars simply reject *alic* because it clashes with fundamental principles of criminal law, in particular the concurrence requirement and legality. The primary problem is that *alic* is an uncodified doctrine that creates conflict with § 20 GCC in light of the constitutionally guaranteed principle of legality (Basic Law art.103). As the wording of § 20 GCC stipulates that D ought to be excused when at "the time of the commission of the offence" he lacks the required mental capacities, an unwritten exception to this defence is to the offender's disadvantage, which is a violation of the legality principle. This is even more so when there is already a codified alternative for extreme intoxication in § 323a GCC.[87]

Other scholars try to ground criminal liability via *alic* by allowing an exception to the concurrence principle.[88] The offender should not have the advantage of successfully invoking an excuse by abusing the law, an argument that is also used, as we have seen, to deny contrived self-defence and necessity. Following the example of Switzerland, it is argued that the legislator should

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[85] Franz Streng, "Actio Libera in Causa und Verminderte Schuldfähigkeit—BHG, NStZ 2000, 584" ("Actio Libera in Causa and Diminished Responsibility") [2001] *JuS*, 540; MD Dubber and T Hörnle, *Criminal Law* (n. 33), 283.

[86] BGH, 17 August 2004, 5 StR 591/03; W Perron and B Weisser, *Strafgezetsbuch* (n. 32), § 21 Mn 20.

[87] Hans-Ulrich Paeffgen, "Actio Libera in Causa und 323a StGB" ("Actio Libera in Causa and provision 323a GCC") [1985] *ZStW* 513.

[88] Joachim Hruschka, "Die Actio Libera in Causa bei Vorsatztaten und bei Fahrlässigkeittäten" ("The Actio Libera in Causa Doctrine in Intentional and Negligent Offences") [1996] *JZ* 64; I Stassen-Rapp, *Die Behandlung* (n. 34), 308.

create a separate clause in § 20 GCC stipulating that the defence is denied "if the person could have avoided the state of mental incapacity or diminished incapacity and was, at that time, able to foresee the act he committed in that state" (§ 19 SCC).[89]

However, according to the majority view, a legislative change is not necessary as the *alic* doctrine is compatible with § 20 GCC and the principles of criminal law. The idea is that the words "at the time of the commission of the offence" in § 20 GCC have to be interpreted in such a way as if D already started to commit the offence before he became intoxicated. This so-called "elements of the offence theory" assumes that the causing of the defence can be seen as the beginning of the commission of the offence. As D is still sober at that moment and therefore acting in a blameworthy way, § 20 GCC is not available to him.[90]

Although the Supreme Court adopts this highly contested theory, it has also stipulated that *alic* is excluded for some conduct offences such as drunk driving and dangerous driving; becoming (intentionally) intoxicated can hardly be seen as the beginning of driving a vehicle.[91] Although this decision is restricted to traffic offences, it clearly illustrates a more general critique, that is the intoxicating act constitutes merely a preparatory act and not the beginning of the commission of the offence.[92] Importantly, this debate is not that relevant for the more widely used diminished capacity defence. As § 21 GCC is not an obligatory ground of exculpation but opens only the possibility of mitigated sentencing, there is less conflict with the principles of concurrence and legality.[93]

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[89] Wolfgang Wohlers, *Schweizerisches Strafgesetzbuch Handkommentar* ("Commentary of the Swiss Criminal Code") (Bern: Stämpfli, 2020) pp 73–74; Arlie Loughnan and Sabine Gless, "Understanding the Law on Intoxicated Offending: Principle, Pragmatism and Legal Culture" [2016] *Journal of International and Comparative Law* 345, 356–357.

[90] I Stassen-Rapp, *Die Behandlung* (n. 34), 304–307.

[91] BGH, 22 August 1996, 4 StR 217/96, BGHSt 42, 235; Kai Ambos, "Der Anfang vom Ende der Actio Libera in Causa?" ("The Beginning of the End of the Actio Libera in Causa Doctrine?") [1997] *NJW* 2296.

[92] See C Roxin and L Greco, *Strafrecht* (n. 42), § 20 Mn. 57–66.

[93] See MD Dubber and T Hörnle, *Criminal Law* (n. 33), 290.

C. Prior-fault intoxication in the Netherlands

Intoxication-related crimes in the Netherlands (as in Germany) focus on the element of blameworthiness. Severe intoxication engages the excuse of non-accountability, the Dutch insanity equivalent, as this defence deals with a wide range of mental incapacities and disorders.[94] The Dutch *culpa in causa* doctrine effectively blocks the intoxication-induced non-accountability defence by emphasising anterior culpability for creating these conditions.[95] In practice, this means that when the intoxication (be it alcohol or illicit substances) is voluntary, *culpa in causa* is almost always considered present and the defence is denied.

Despite their broad inculpatory effects, it is notable that these rules have not provoked the significant debate and criticism of equivalent rules in England and Germany, often presented in terms of necessary pragmatism. The Dutch, like the English, seem to be satisfied enough with using intoxication as a proxy for prior-fault and seem mostly concerned (if at all) with identifying concrete requirements to differentiate between types of intoxication. However, as we discuss here, similar concerns and criticisms should be highlighted as to the Dutch system.

(i) Intoxication and psychoses

Importantly, intoxication does not automatically lead to a defence. Due to the high threshold of the non-accountability defence,[96] it is exceptional that intoxication leads to such a mental incapacity

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[94] Which does not only require a mental disorder but also a causal connection between the disorder and the offence, as well as a lack of cognitive or volitional capacity: a diagnosis alone is not sufficient. See Johannes Bijlsma, *Stoornis en Strafuitsluiting: Op Zoek naar een Toetsingskader voor Ontoerekenbaarheid* ("Disorder and Defences: Finding an Assessment Framework for Non-accountability") (Nijmegen: Wolf Legal Publishers, 2016) pp 244–249.

[95] Gerardus Strijards, *Hoofdstukken van Materieel Strafrecht* ("Chapters of Substantive Criminal Law") (Utrecht: Lemma, 1992) pp 272–276.

[96] There needs to be an almost mono-causal connection between the disorder and the defence, as well as a very severe cognitive or volitional incapacity. See for instance the analysis of a recent case: Sjors Ligthart, Tijs Kooijmans and Gerben Meynen, "Een Juridisch Criterium voor de

that this defence is considered, let alone allowed. Intoxication without any further comorbidities or substance-induced disorders would likely not be considered a valid basis for non-accountability but would only be discussed when determining the most appropriate sentence or measure.[97] Practically, this means that most instances of intoxication and *culpa in causa* are substance-induced psychoses, as psychosis is generally a valid basis for the non-accountability excuse. As such, the discussion on *culpa in causa* for intoxication and *culpa in causa* for intoxication-induced disorders is, largely, one and the same. This means that *Taj* (discussed in Section III.A) would likely be judged as intentional assault in the Netherlands. His psychosis would *prima facie* be a valid reason for a non-accountability defence, only to be negated by *culpa in causa,* simply because the psychosis was substance induced. What is left for D is to request a mitigated sentence due to reduced accountability.

As this example shows, the underlying premise of the doctrine is that D has consumed the substance voluntarily and thus accepted the consequences thereof. This results in a wide scope in which *any* consequences of intoxication—also unforeseen ones—can be blamed on D by virtue of taking the substance.[98] Not unlike the English law, intoxication becomes a proxy for prior-fault, with similar associated problems. These are illustrated in two landmark cases.

(ii) Problems associated with *culpa in causa*

The first landmark case that outlines the requirements for *culpa in causa* is the so-called "culpa in causa case" in which the psychotic defendant caused his grandmother's death after using cocaine and heroin simultaneously. He was found responsible for the psychosis by voluntarily taking drugs,

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Ontoerekeningsvatbaarheid: Een Uitspraak van het Gerechtshof Den Haag Geanalyseerd" ("A Legal Criterion for the Non-accountability Defence: An Analysis of a Judgment of the Court of Appeal in the Hague") [2018] 1 *Delikt en Delinkwent* 101. See also J Bijlsma, *Stoornis en Strafuitsluiting* (n. 94).

[97] And is sometimes an aggravating rather than mitigating circumstance.

[98] Johannes Bijlsma, "Drank, Drugs en Culpa. Zelfintoxicatie en Culpa in Causa: Pleidooi voor een Voorzienbaarheidseis" ("Alcohol, Drugs and Culpa. Self-intoxication and Culpa in Causa: a Plei for a Foreseeability Requirement") [2011] 6 *Delikt en Delinkwent* 654.

and consequently the non-accountability excuse was denied.[99] The reason for this was the illegality of the substances, implying a generally excepted awareness that drugs are dangerous and harmful. Moreover, D had experienced these negative effects before, was already agitated, yet continued to inject a higher dose. The court emphasised these aspects, which were followed in later judgments as well.[100]

In a second landmark case, the "cannabis psychosis case",[101] D experienced a cannabis-induced psychosis and committed an attempted theft, destruction of property and assault. The court rejected a non-accountability plea. According to the defence, a psychosis stemming from cannabis is unlikely, and D had never experienced similar symptoms before, unlike the aforementioned case. Nonetheless, the court held that the specific awareness of the detrimental consequences of drugs is not necessary for *culpa in causa* to apply. A general danger to using drugs can be assumed.[102] This is a stretch from the previous case in which more concrete foreseeability of the negative effects was deemed key. The current judgment, on the other hand, seems to emphasise a more general endangerment in the use of substances.

These two cases illustrate that currently, as with English law, concrete foreseeability is no requirement for *culpa in causa*, although some have argued that it should be.[103] The law expects individuals to foresee unwanted consequences if a substance is unambiguously prohibited. Yet, other substances such as alcohol or marijuana can result in a *culpa in causa* application as well, begging the question whether differentiation between the type of substance is appropriate. What the cases also demonstrate is the shift from assessing responsibility at T1 versus T2. In the first case, these two points are normatively connected (to some extent) by D's foresight of future incapacity and harms at T1. In the more recent case, no such connection exists. The use of *culpa in causa* within the second case is, therefore, more problematic: focusing on T1 choices that were

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[99] HR, 9 June 1981, ECLI:NL:HR:1981:AC0902, NJ 1983, 412.

[100] For example HR, 14 December 2004, ECLI:NL:HR:2004:AR3226.

[101] HR, 12 February 2008, ECLI:NL:HR:2008:BC3797, NJ 2009, 157.

[102] "The defendant could have known that using cannabis is not entirely without risks". HR, 12 February 2008, ECLI:NL:HR:2008:BC3797, NJ 2009, 157.

[103] J Bijlsma, "Drank, Drugs en Culpa" (n. 98).

not straightforwardly culpable in the circumstances and allowing a tenuous T1–T2 link to establish blame at T2.

IV. Prior-Fault and Mental Disorder

This section explores the relationship between prior-fault and mental health disorders, both as a co-morbid factor (ie with a state of intoxication) and/or singularly. In doing so, some quite fundamental differences become apparent between the three jurisdictions.

A. Prior-fault and mental disorders in England and Wales

Mentally disordered defendants will always pose difficult questions for the criminal law. Where D causes harms in a delusional or otherwise disordered mental state, it will not always be clear to what extent he was responsible and/or culpable for that event (clinical and legal uncertainties), and findings that would usually indicate an unqualified acquittal must be cautioned by the prospect of future dangerousness. It is in this context that, although the legal headline position (as discussed later) regarding prior-fault appears relatively clear, several qualifications require unpacking.

(i) Mental disorders and prior-fault: Headline

The headline position regarding prior-fault in English law is easy to state: there are no prior-fault rules attached to conditions of mental disorder or legal insanity. Thus, even where D is reckless or negligent in his use of medication (eg a failure to take anti-psychotics) or precipitates a mental disorder (eg through the recreational use of psychoactive drugs), such failures at T1 will not be operative at T2 in replacing missing *mens rea* or blocking an otherwise available defence. As was made clear in *Beard* a century ago:

> The law takes no note of the cause of the insanity … drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness

> brings on a state of disease which causes such a degree of madness, […] then he would not be criminally responsible.[104]

This position has been questioned academically and in terms of potential reform[105] but remains a strong precedent at common law.[106] There are clear advantages to maintaining it. Most importantly, excluding considerations of prior-fault allows courts to focus on D's responsibility at T2 (which is already hard enough) without being dragged into a potential complex search for the causal origins of a mental health disorder. Further, because of the qualified nature of the special insanity verdict, allowing for compulsory hospitalisation and/or supervision,[107] setting aside potential issues of prior-fault does not necessarily put D outside the continued control and supervision of the state.

(ii) Mental disorder and prior-fault: Behind the headline

Despite the explicit exclusion of prior-fault rules in this area, it is possible to identify implicit prior-fault logic applying both in the construction and the interpretation of relevant legal provisions. Three examples will suffice for present purposes, the first two of which we have touched upon in previous sections.

The first example relates to uncertain boundaries between intoxication on one hand (prior-fault rules apply) and mental disorder on the other (prior-fault rules do not apply). Typically, the boundary of intoxication has been marked by D's clinical "drug-on-board" state at the time of offending, with questions then arising (within this boundary) whether a co-morbid state of insanity or disorder was the dominant cause of D's conduct.[108] This position has most recently been questioned in *Taj* however, where psychosis, arising after drugs were no longer proven to be in D's

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[104] [1920] AC 479, 500–501, (HL).

[105] See, eg, Law Commission, *Insanity and Automatism* (n. 68), Ch 6; Meron Wondemaghen, "Evaluating Predominant Causes of Insanity in Cases of Drug-induced Psychoses" [2015] *Int J Forensic Ment Health* 76.

[106] See, eg, *R v Taj* [2018] EWCA Crim 1743 (CA); *R v Harris* [2013] EWCA Crim 223 (CA).

[107] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s.5.

[108] On the latter, see *R v Dietschmann* [2003] 1 AC 1209 (HL) on diminished responsibility and *R v Oye* [2013] EWCA Crim 1725 (CA) on insanity.

system, was caught within the intoxication rules. Blurring the boundary between intoxication and mental disorder in this way risks significant expansion of prior-fault inculpation to conditions attributable to historical intoxication.[109]

The second example is more general and longstanding but often neglected in debate. This is the potential for the special verdict of "not guilty by reason of insanity" to be understood in inculpatory terms. The special verdict provides for a technical acquittal, and so where D has committed an offence it is clear that (despite the potential for compulsory treatment orders) the effect of the verdict is exculpatory. But this is less clear in cases where D has *not* completed an offence or satisfies the elements of an alternative defence. In such cases, D would normally expect an unqualified acquittal, and so the imposition of treatment or supervision at disposal creates new restrictions on D's freedom. And these are not civil measures; D need not meet the independent criteria for civil detention. Rather, D is effectively inculpated by his harmful (though not criminally blameworthy) conduct, with a view towards his potential future dangerousness.[110]

The final example relates to the exclusionary legal status of delusional or disordered beliefs. This entails the common law rule that D cannot rely on a delusional or disordered mistaken belief to deny *mens rea* or to establish a belief-based defence (eg mistaken self-defence) and that he must instead appeal to the insanity rules. Where insanity rules apply, the special verdict discussed above becomes the focus. But, crucially, even where the insanity rules are found not to apply (which is quite often with such a narrow set of rules, as in *Taj* discussed earlier), D's delusional or disordered beliefs may still prevent his access to other routes to acquittal. The position is less certain where D is denying *mens rea*, but may still be challenging for D.[111] Nonetheless, the exclusion is quite clear concerning the alternative defences such as self-defence: akin to intoxication, D will not be able to

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[109] Discussed in J Child, H Crombag and JR Sullivan, "Defending the Delusional" (n. 75).

[110] Discussed in John Child and GR Sullivan, "When Does the Insanity Defence Apply? Some Recent Cases" [2014] *Crim LR* 787.

[111] Timothy Jones, "Insanity, Automatism, and the Burden of Proof on the Accused" [1995] *LQR* 475.

rely on a delusional mistaken belief to establish self-defence and, without an alternative insanity verdict, will default to liability for the offence committed.[112]

These exceptions or qualifications to the headline position in English law require more scrutiny. Yet their cumulative effects call into question the accuracy of the headline position, and perhaps an explicit embracing of prior-fault logic in this area might better clarify the law and allow for more open debate on what we want the criminal law to do in this area.

B. Prior-fault and mental disorders in Germany

In England, prior-fault rules do not apply to legal insanity, even when this is caused by voluntary intoxication. This is different in Germany where severe intoxication is in itself already a temporary form of "insanity" and where *alic* is applicable on all culpable intoxications and also when these result in mental disorders such as drug-induced psychosis. Yet what about culpable causation of mental disorders outside of intoxication, or if the intoxication is (largely) caused by a mental disease, as in the case of addiction? And how do courts address cases where multiple (non)pathological factors have contributed to D's incapacity?

(i) *Alic* beyond intoxication

Although *alic* is often presented as a general prior-fault doctrine, it is largely restricted to voluntary intoxication.[113] Given the historical development of *alic*, inextricably connected with § 323a GCC, this is understandable. The only other profound consciousness disorder where *alic* is rather hesitantly applied is the so-called "affect".[114] An affect is "an explosive reaction based on an

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[112] See *R v Martin* [2001] EWCA Crim 2245 (CA) and *R v Canns* [2005] EWCA Crim 2264 (CA) resulting in a partial defence of diminished responsibility; and *Taj* [2018] EWCA Crim 1743 (CA) resulting in conviction and a 19-year term.

[113] But see Susanne Beck, "Neue Konstruktionsmöglichkeiten der Actio Libera in Causa" ("New Construction Possibilities of the Actio Libera in Causa Doctrine") [2018] *ZIS* 204.

[114] Both English and Dutch law exclude affects from their insanity defence. The impossibility of taking these into account under self-defence excess in German law in part explains why these may

extreme emotional state where no deliberate decision-making occurs anymore, for example, extreme rage, hate, shock, panic or fear".[115] Courts accept *alic* if there is a culpable link between D's prior conduct and the build-up of his emotional state resulting in the explosive reaction: that is he must have been capable to foresee and prevent the beginning of the affect.[116] The application of *alic* remains, however, controversial, as there is a risk that D is not blamed for a concrete prior-fault, but is blamed for some vague violation of an abstract duty of self-restraint, which may be more related to D's character or lifestyle than with culpable conduct.[117] It is a fundamental principle of German law that criminal liability cannot be based on the offender's character or way of life (the infamous *Lebensführungsschuld*). Hence, a correct use of *alic* implies that D's lack of blameworthiness at T2 should only be replaced by culpable conduct at T1 and not by general blameworthiness based on his lifestyle.[118]

Although there is hardly any debate on this matter, similar concerns may explain why prior-fault is not easily accepted when a mentally ill D contributes to his disorder through therapy resistance or medication non-compliance. In addition to complicating factors that make it hard to establish a mono-causal link, especially when there is substance abuse involved, German law may want to avoid the situation when the so-called prior-fault amounts to culpability based on D's character or lifestyle. In this regard, it is not surprising that the Supreme Court has stipulated that D's therapy resistance may not be used as an argument against mitigating punishment, without first carefully examining whether he can be blamed for it.[119] Courts must avoid the situation when D's

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be recognised as an incapacity defence. In practice, profound affects are usually only mitigated under § 21 GCC. See J Keiler and D Roef, *Comparative Concepts* (n. 31), 242.

[115] M Bohlander, *Principles of German Criminal Law* (n. 80), 133.

[116] BGH 15 December 1987—1 StR 498/87; See C Roxin and L Greco, *Strafrecht* (n. 36), § 20 Mn. 15–18.

[117] See W Perron and B Weisser, *Strafgezetsbuch* (n. 32), § 20 Mn. 15.

[118] On the rejection of blameworthiness based upon a person's way of living, see C Roxin and L Greco, *Strafrecht* (n. 42), § 19 Mn. 62.

[119] BGH, 15 June 1998, 3 StR 288. For instance, a possible cause of non-compliance could be the lack of insight that is often inherent in some mental illnesses: Zachary Torry and Kenneth Weiss,

conduct is not just ascribed to a *Lebensführungsschuld*. If the refusal to follow therapy is symptomatic of the underlying disease, then this can never be accepted as an aggravating circumstance.[120]

To be complete, some disease-related prior-faults can also be solved through the ordinary rules of negligence liability, but these instances seem largely unconnected with mental disorders and rather challenge the capacity to act than the capacity of guilt. For instance, an epileptic driver, who caused a lethal accident during one of his fits, was convicted for negligent killing, without reference to *alic* rules compensating for the absence of voluntary conduct, as the participation in traffic with this disease was considered a violation of a duty of care. Interestingly, however, the Supreme Court quashed his conviction because they had not sufficiently considered the subjective part of the foreseeability. They reasoned that this might be difficult to establish, as D possessed only a very limited degree of insight into his disease and its consequences. Moreover, his doctor had never warned him, and he had driven for many years without problems.[121]

(ii) Prior-fault and multiple contributing factors

In the complicated but not uncommon cases where (partial) incapacity is not caused by intoxication alone, the Supreme Court demands an overall assessment of the circumstances relevant to D's blameworthiness.[122] If a diminished capacity is also the result of a pathological disorder, this circumstance must be taken into account by reducing the sentence.[123] The decisive factor is the actual influence of the disorder, including the extent to which the intoxicated state may be traced back to it, but this will always be considered alongside other factors such as D's prior experiences and the nature of the crime. Illustrative is a case where D, who was suffering from dysthymia

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"Medication Noncompliance and Criminal Responsibility: Is the Insanity Defence Legitimate?" [2012] *J Psychiatry Law* 231.

[120] BGH, 22 July 2020, NStZ-RR 2020, 303.

[121] BGH, 17 November 1994, BGHSt 40, 341; J Blomsma, *Mens Rea and Defences* (n. 35), 193.

[122] BGH, 8 October 2020, NStZ-RR 2021, 40.

[123] Gerhard Altvater, "Rechtsprechung des BGH zu den Tötungsdelikten" ("Jurisprudence of the BGH Regarding Homicide Offences") [1999] *NStZ* 22.

(persistent depressive disorder), attempted to kill a person after a heated argument while being intoxicated. Although the court found that D habitually seeks refuge in alcohol when he has a depressive breakdown, especially in conflict situations, they considered these circumstances absent. But even if this were the case, the Court concluded that a disorder-associated impairment of the resistance to use alcohol is in itself not sufficient as a mitigating factor, especially not in case of foreseeable violent crimes.[124] This raises the more general question on how addiction-motivated offence is addressed in German criminal law.

(iii) The role of addiction

Addiction is usually considered a "pathological mental disorder" falling under §§ 20–21 GCC. In most cases, the addiction by itself will merely result in a diminished capacity defence. According to the Supreme Court, this will be the case if the long-term substance abuse has led to serious personality changes or when the offender was suffering from serious withdrawal symptoms that drove him to procure drugs through a criminal offence or when he commits the offence in a state of acute intoxication.[125] In exceptional circumstances, even the mere "fear" of serious withdrawal symptoms may diminish D's capacity.[126]

In what way can *alic* still play a role in cases of addicted offending? The Supreme Court clearly stipulates that when crimes are committed while being addicted, the addiction in itself is not considered prior-fault. Arguably, this would not only contradict the possible exculpatory and mitigating effect of the addiction, but it would also lead to the acceptance of the aforementioned *Lebensführungsschuld*.[127] However, this does not mean that when an addicted offender commits a

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[124] BGH, 16 June 1998, 1 StR 162-98; BGH, 24 September 1991, 1 StR 480-91.

[125] BHG, 28 October 1976, 2 StR 242/76; Anna Goldberg and David Roef, "Addiction, Capacities and Criminal Responsibility: A Comparative Approach" in J Hage, D Roef, A Waltermann and M Jelicic (eds), *Law, Science and Rationality* (Utrecht, Netherlands: Eleven International Publishing, 2020) 223.

[126] BGH, 2 November 2005, 2 StR 389/05; BGH, 17 April 2012, 1 StR 15/12.

[127] BGH, 23 June 2006, 2 StR 135/06; BGH, 12 June 2008, 3 StR 84/08; A Goldberg and D Roef, "Addiction, Capacities and Criminal Responsibility" (n. 125), 225.

crime in a substantially intoxicated state, this will necessarily have a mitigating effect. The role of the addiction and thus the risk of unjustifiably grounding D's blameworthiness upon his way of life are assessed in light of his personality and all the other circumstances of the situation. For instance, it is still possible to blame an alcohol-dependent offender, not for being intoxicated as such, but for engaging with a potentially violent situation, even though he knew or ought to have known that he would lose control as a result of his intoxication.[128]

C. Prior-fault and mental disorders in the Netherlands

In the Netherlands, when potentially criminal harms are caused because of a mental disorder, non-accountability can be argued, but courts may block this defence if the mental disorder was culpably caused. This is essentially the same mechanism as with intoxication and intoxication-induced disorders.

The fundamental critique arising here is that of coincidence: by establishing that there is no blameworthiness at the time of the offence (T2) and fulfilling all requirements for an excuse, D should be acquitted. After all, the *mens rea* and *actus reus* need to coexist for D to be held liable, rendering it dogmatically convoluted or even unjust to circumvent this issue by using circumstances prior (and potentially even unrelated) to the offence. This is a similar sentiment as the English hold by not allowing prior-fault to influence the insanity defence. However, this critique of coincidence is rarely addressed in Dutch literature.[129] Rather, the Dutch system reverts to "pragmatism" when it comes to evaluating defences, which may be the reason that it is generally accepted to use prior-fault to block the non-accountability excuse.[130] This perspective of the Dutch, however, seems to run into problems with fair labelling.[131]

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[128] BGH, 17 August 2004, 5 StR 93/04; see also MD Dubber and T Hörnle, *Criminal Law* (n. 33), 283.

[129] Except for R Jansen, "Drie Modellen" (n. 57), 215–217.

[130] See J Blomsma, *Mens Rea and Defences* (n. 35), 262–264.

[131] Although Jansen argues that fair labelling remains an issue in other jurisdictions as well. See R Jansen, "Drie Modellen" (n. 57), 217.

The criticism should, however, be set in perspective. Apart from substance-induced disorders, such as drug-induced psychoses discussed in Section III.C, cases of culpably caused mental disorders are rare. Even more uncommon are cases of medicine non-compliance. To address whether D acted culpably in her non-compliance, the criterion is foreseeability, as in Germany: was D aware of the negative side effects or should she have been aware? Importantly, disorders that are potentially induced by prescribed medication are not considered induced by voluntary intoxication and do not automatically warrant a *culpa in causa* reasoning.[132] This is not the case when D has knowingly consumed an incorrect dosage or has combined the medicine with alcohol: then, *culpa in causa* likely applies.[133] The problem of comorbidity[134] complicates the cases of medicine-induced offences, as does the lack of a mono-causal connection between the medicine and delinquent behaviour.[135] Judges often do not consider the use (or non-compliance) of medicine to be the only explanation for the offence, even though such a mono-causal connection is required for the non-accountability excuse. Invariably there are additional factors at play, and experts cannot possibly determine the exact causal impact of the medicine on the behaviour.[136]

Rare as they are, the discussion surrounding mental disorders and prior-fault is—again—dominated by intoxication. There are two distinct situations. The first are cases in which the mental disorder is culpably caused, for example, substance-induced psychoses as described in Section III.C. The second relates to mental disorders as a cause of intoxication, suggesting that the intoxication (and the consequent mental impairments) may not be culpably caused.

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[132] David Roef and Robert-Jan Verkes, "Medicijngebruik, Agressie en Strafrechtelijke Verantwoordelijkheid" ("Medication Use, Aggression and Criminal Responsibility") [2013] 88(45) *NJ* 3143.

[133] See for instance, HR, 14 December 2004, ECLI:NL:HR:2004:AR3226. D had consumed alcohol in combination with his medicine, which he knew should not have been used simultaneously.

[134] Other comorbid disorders may play an important role in the noncompliance with medication use (or this may even be a symptom of the disorder itself).

[135] D Roef and RJ Verkes, "Medicijngebruik" (n. 132).

[136] See for instance, GH, 3 March 2011, ECLI:NL:GHAMS:2011:BP6664 or GH, 11 December 2012, ECLI:NL:GHSGR:2012:CA2291.

(i) Causal paths between disorders and intoxication

The issue of sequential causal ordering has arisen in a recent case involving D with psychoses as well as cocaine dependency.[137] Despite the aggravating cocaine usage, the psychosis was considered crucial in negating D's responsibility because he had been psychotic in the past, and the court found him non-accountable on this basis. *Culpa in causa* did not apply. This case demonstrates an interesting point as courts seem to find it relevant to know what came first: the psychosis or the intoxication. Supposedly, this would demonstrate whether D was culpable in acquiring his mental incapacity.

However, it is usually not possible to identify the causal chain of a psychotic episode. Oftentimes, the individual has an underlying vulnerability, and the substance itself did not singularly produce a psychosis. Moreover, individuals with a predisposition for psychoses are four times more likely to abuse substances,[138] and before becoming psychotic, individuals experience preceding symptoms. For instance, the individual may have difficulty in sleeping, be irritable or feeling overloaded. Thus, it is understandable that there is a higher percentage of substance abuse among these groups.

Exactly this struggle and the difficulty (if not impossibility) of identifying the causal paths seem to be the reason that English law remains reluctant to apply prior-fault in such cases. It seems that the Dutch judges rather opt for the opposite and seem to apply *culpa in causa* rather indiscriminately. Interestingly, however, there is little academic discussion on the matter.

(ii) The problem of addiction

A distinct but related issue is that of addiction. Although it is unlikely that addiction in itself is a sufficient basis for a defence,[139] the presence of a substance-use disorder does complicate an

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[137] RB, 4 January 2018, ECLI:NL:RBOVE:2018:15.

[138] Mikkel Arendt et al., "Cannabis-induced Psychosis and Subsequent Schizophrenia-spectrum Disorders: Follow-up Study of 535 Incident Cases" [2005] 187(6) *Brit J Psychiatry* 510.

[139] D Roef and RJ Verkes, "Medicijngebruik" (n. 132).

otherwise straightforward intoxication scenario. Addiction, for instance, may give rise to questions about the amount of control D has over her substance use, disputing the voluntary nature of the intoxication. Yet at the same time, addiction may not greatly impair the cognitive capacities of the addict and will often result in sufficient insight and foreseeability into intoxicated behaviours to cross (rather minimal) legal thresholds for accountability.[140] Without going into further detail, it is clear that this is yet another complicating factor when applying *culpa in causa* doctrines to defendants with mental disorders.

V. The Role of Bespoke Prior-Fault Offences

In this final section, we discuss the potential for, and experience of, intoxication/prior-fault offences. How can/do such offences operate, either within or as a replacement for broader systems of prior-fault rules? And what are the challenges in their construction and operation, both theoretically and in practice?

A. Bespoke prior-fault offences in England and Wales

Debates about the potential for a bespoke intoxication/prior-fault offence in English law have been around for almost as long as the intoxication rules themselves.[141] However, as yet, no such offence has been created. To be clear, the potential for such an offence would be to replace the current intoxication rules as they apply to the construction of offences; meaning prior-fault rules relating to the blocking of defences are not at issue.

The potential benefits of such an offence are clear and compelling. On one hand, it would allow us to abandon the fictions of the current law: D would not be convicted of an existing offence *as if* he possessed in fact missing *mens rea*, and there would be no need to search for an equivalence thesis in an attempt to support such a fiction. While, on the other hand, cases such as Nadruku

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[140] Anna Goldberg, "The (In)significance of the Addiction Debate" [2020] 13 *Neuroethics* 311.

[141] Discussed, for example, in the Butler Committee, *Report on Mentally Abnormal Offenders* (Cmnd 6244, 1975) and a minority view within the Criminal Law Revision Committee, *Offences against the Person* (Cmnd 7844, 1980).

would not go unpunished: D may not be liable for a traditional offence against the person due to his lack of *mens rea*, but he could be liable for the new bespoke intoxication/prior-fault offence (as he would be within the German system). The design of a new offence would provide a unique opportunity to consider exactly what D has done wrong across T1–T2, to design appropriate doctrinal boundaries to target that wrong and to label and punish it appropriately.

However, the challenges in creating such an offence should not be underestimated. Where the current law disguises complexity within a legal fiction that can appear relatively simple in its application, the creation of a new offence forces us to consider and resolve a host of underlying issues. These issues include the precise targets of T1 blame to the causal connections between T1 and T2, as well as how such an offence will operate alongside other offences and defences in practice. Indeed, of the relatively few efforts we have seen attempting to set out the detail of such an offence, each has encountered fundamental criticism. The Law Commission's 1992 proposal,[142] for example, struggled to differentiate labels and punishments between different classes of intoxicated harm causers, included no specific approach to link T1 and T2 events and was criticised by practitioners as being unduly complex.[143] More recently, Williams has set out an alternative model linking intoxication with the *actus reus* of established offences, allowing labels and punishments to track those offences in a manner comparable to criminal attempts.[144] However, again, despite some notable merits to this approach, it may be criticised for choices made regarding both T1 (eg why focus on intoxicated fault alone) and T2 (eg tying the offence to existing *actus reus* elements risks overcriminalisation).[145]

Challenges here create an obvious incentive to look to other legal systems, such as Germany in particular, for inspiration and guidance.

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[142] LC127, Part IV.

[143] This led the Commission to reject this proposal in their subsequent report. See Law Commission, *Intoxication and Criminal Liability* (No 229, 1995); Jeremy Horder, "Sobering Up? The Law Commission on Criminal Intoxication" [1995] *MLR* 534.

[144] See R Williams, "Voluntary Intoxication" (n. 21).

[145] See J Child, "Prior Fault" (n. 12).

B. Bespoke prior-fault offences in Germany

As mentioned, if there is no *alic* situation, the excused offender can be held criminally liable for the offence of dangerous intoxication (§ 323a GCC). The provision reads as follows:

> (1) Whoever intentionally or negligently puts himself into a state of intoxication by consuming alcoholic drinks or other intoxicating substances incurs a penalty of imprisonment for a term not exceeding five years or a fine if they commit a wrongful act whilst in this state and cannot be punished on account thereof because he lacked criminal capacity of guilt due to the intoxication or if this cannot be ruled out.
>
> (2) The penalty may not be more severe than the penalty provided for the offence which was committed in a state of intoxication.

This offence was created as a legal "compensation device" to prevent impunity for cases of full intoxication, as these cases would otherwise be excused due to complete incapacity according to § 20 GCC.[146] The existence of this offence essentially admits that extremely intoxicated offenders cannot be held liable for their actions, but that there is still the perceived social need for punishment.[147] What is criminalised is not the serious intoxication itself—this can hardly be called a wrongful act—neither is D responsible for the harms caused (eg bodily assault or manslaughter): he is criminally liable for putting himself in a dangerous state of severe intoxication that has subsequently resulted into harmful consequences to others. As the offender is excused for the offence committed in the state of severe intoxication, the sentencing can never exceed the punishment that the offender would otherwise have received, if he were convicted using *alic* rules.

The major difference between § 323a GCC and the applied *alic* doctrine is that there is no longer any (culpable) instrumental link between becoming intoxicated and the crime committed.[148] While the *alic* offender foresees or should foresee the possibility of committing the offence, prior

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[146] Franz Streng, *Münchener Kommentar zum Strafgezetsbuch* ("Munich Commentary of the Criminal Code") (München: Beck, 2020), § 20 Mn. 151; B Fischer and J Rehm, "Alcohol Consumption" (n. 41), 719.

[147] A Loughnan and S Gless, "Understanding the Law on Intoxicated Offending" (n. 89), 362.

[148] See B Fischer and J Rehm, "Alcohol Consumption" (n. 41), 718.

to or during the act of becoming intoxicated, this is no longer necessary for § 323a GCC.[149] The only required *mens rea* element is intent or negligence to becoming senselessly intoxicated. This means that negligent intoxication is sufficient, even for crimes committed under severe intoxication that would otherwise demand intent.[150] A typical example would be a case where the offender intoxicates himself without any intent (or foreseeability) to harmful behaviour, but then in a state of "profound consciousness disorder" physically assaults his partner while being intoxicated.[151] In such a case, the offender would be excused for intentionally inflicting serious bodily harm and would subsequently be punished for § 323a GCC.

There seems to be a wide agreement that § 323a GCC can be categorised as an abstract endangerment offence, with wrongful consequences as an objective condition.[152] However, the theoretical foundation of the offence remains contested especially concerning its compatibility with the principle of guilt.[153] The maximum sentencing term seems to reflect anticipation of the kind of harm committed—serious bodily assault, for instance, also has a maximum of five years and destruction of property a maximum of two years—while D's culpability is established only regarding the intoxication. In other words, as there is no link anymore between the intoxicated state and the wrongful act, the offence embodies a kind of strict liability for any wrongful harm that may result from being mindlessly intoxicated.

Courts justify this with the policy argument that the wrongful act reflects (or materialises) the intrinsic "abstract" dangerousness of the intoxication. Some argue that this reasoning is incompatible with the wrongful act being a mere objective condition for liability and that the sentence must thus reflect the culpability of the intoxication alone.[154] Others criticise that the maximum punishment of five years may be too low if serious crimes (homicide offences) are

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[149] Ayşe Atalay, "The Formulation of Voluntary Intoxication in Continental Law" [2020] *Int J of Offender Therapy and Comp Crim* 10.

[150] See MD Dubber and T Hörnle, *Criminal Law* (n. 33), 286.

[151] *Cf* B Fischer and J Rehm, "Alcohol Consumption" (n. 41), 718–720.

[152] F Streng, "Actio Libera in Causa" (n. 85), 152.

[153] See C Roxin and L Greco, *Strafrecht* (n. 42), § 23 Mn. 8–11; MD Dubber and T Hörnle, *Criminal Law* (n. 33), 286.

[154] A Atalay, "The Formulation of Voluntary Intoxication" (n. 149), 10.

committed and have proposed a higher punishment. Still, others suggest a more systematic recodification of 323a GCC covering all possible intoxication cases, including different prior-fault scenarios, thereby also addressing the current problem of uncodified *alic* rules.[155]

C. Bespoke prior-fault offences in the Netherlands

The Netherlands does not have a bespoke prior-fault offence, and neither do we see an academic or political debate about its creation. The Dutch *culpa in causa* doctrine may be criticised for a lack of clear requirements, but there is little-to-no fundamental or structural criticism of the way the doctrine is used to solve cases of prior-fault.[156] Especially for cases other than intoxication, there is little dissatisfaction with the workings of the doctrine. The application of *culpa in causa* to complex intoxication cases is the most controversial and more elaborately discussed, but even then, the discussion centres on more practical concerns rather than fundamental ones.

An exception is an essay by Wemes, who pleads to introduce an *alic*-like structure with a focus on the nature of the offence (and the associated fault) rather than using *culpa in causa* as a negative requirement for a defence.[157] The debate here is whether such a scheme would introduce a "free pass" to delinquent behaviour,[158] or whether a narrowing of the current prior-fault rules is necessary for principled and fair doctrine. Such potential changes should not be overstated, however. The strictly legal definition of intention within the Dutch system means it is extremely unlikely to be negated by (disordered) mental states, and so an intentional offence will not be acquitted based on intoxication only. At most, a very severe and rare case of substance-induced psychoses may be excused (but even then, may be met with compulsory treatment and confinement).

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[155] See for a critical overview of these proposals: I Stassen-Rapp, *Die Behandlung* (n. 34), 299–302.

[156] See R Jansen, "Drie Modellen" (n. 57).

[157] Leo Wemes, "Strafbaarheid en Zelfintoxicatie: Actio Libera in Causa" ("Criminal Liability and Self-intoxcation: Actio Libera in Causa") in G Boek (ed), *Grensoverschrijdend strafrecht* (Arnhem: Gouda Quint, 1990) p 100.

[158] HR, 9 June 1981, ECLI:NL:HR:1981:AC0902, *NJ* 1983, 412 annot. Van Veen.

Still, even Wemes does not discuss a bespoke offence such as the German provision. Many practitioners are satisfied with the practicality of the doctrine while simultaneously agreeing that it is not perfect. In terms of improvement, the Dutch model could do with more clearly defined requirements, not necessarily for self-defence and necessity but rather for cases of intoxication. Especially regarding the nature and scope of foreseeability, the question remains: is intoxication a form of abstract endangerment in which any voluntary consumption of substances automatically leads to a responsibility for the consequences? Or if a more specific risk-awareness is required, awareness to what extent is needed? Is the foreseeability of aggressive/criminal (again: more abstract) behaviour sufficient, or should the awareness include the type of offence? It would be greatly beneficial if the Supreme Court would specify this in more detail; and, if nothing else, these are questions that Dutch lawyers and academics should be asking.

VI. Conclusions

The content and function of prior-fault criminalisation provide a challenging focus for comparative study. On the one hand, common features to the problem (eg linking T1 and T2 events) and the variety of approaches across jurisdictions rightly draw our comparative interest. However, the contingent nature of prior-fault rules, integrated into the application of offence and defence elements, makes any severing of such rules from their context (ie for more direct comparative purposes) difficult and apt to mislead. It is for this reason that we have structured our comparison by setting out the approaches of each jurisdiction in turn, allowing the comparative picture to develop. In these concluding remarks, we briefly highlight three themes we think are most interesting.

First, noticing the contingent nature of prior-fault rules, it is useful to reflect on how the legal structures of our three jurisdictions influenced the roles played by the rules themselves. For example using prior-fault to construct an offence, as we have seen for England, is not common in civil law jurisdictions, which favour the use of prior-fault for matters of unlawfulness or blameworthiness. In the Netherlands, prior-fault does not play a role in determining intent or negligence, whereas Germany does accept this to some extent in very severe circumstances. In fact, there is little discussion on the distinction between constructing and blocking or on how prior-fault rules ought to be labelled in the civil law systems, although the German debate on the theoretical

grounding of *alic* clearly reflects similar concerns. Arguably, the equivalence debates in English law (ie identifying equivalence between prior-fault and precise *mens rea* terms), arguably the core of academic disagreement in that jurisdiction, are almost entirely avoided in the Netherlands and Germany. Looser notions of equivalence with other markers of "blameworthiness" may still be required, in particular foreseeability, but they mostly avoid the conceptual and normative mismatches we see in England.

The second, and often the central focus of our comparison, has been the approach of each jurisdiction to understand prior-fault at T1. The English system is arguably the most rigid in this regard, explicit in its association of prior-fault with intoxication and explicit in its exclusion of prior-fault analysis from mental disorders. We (and others) have been critical of this, highlighting the lack of normative justification as well as the analytical (forensic) problems created through category-based exclusions in the context of often uncertain comorbidities. On the other end of this, we have highlighted the German and Dutch systems as theoretically open to prior-fault analysis outside of intoxication alone and thereby avoiding problematic categorical analysis. However, in each jurisdiction, in practice, we see the same concerns about (culpable) causal routes to mental disorder that (at least partially) justify the English exclusion, resulting in a clear reluctance for courts to engage with prior-fault analysis outside of intoxication cases. The point here is that, even if we are right to criticise category/proxy-based analysis, it is important to remain cognisant of the practical realities of looking beyond it.

Related to this is the function and content of the T1–T2 nexus. What markers are required for justified prior-fault reasoning? The best approach, it seems to us, is to focus on foreseeability. Consequently, there is a need to define *what* needs to be foreseen and what this entails. We have explained that, in the Netherlands, the current requirement is an abstract form of foreseeability; that is intoxication has almost become an abstract endangerment offence in which *any* intoxication of *any* substance leads to prior-fault. On the other hand, the German *alic* doctrine has specified a more concrete notion of foreseeability to mean an awareness of at least the type of crime committed. We favour this German approach as it allows for a more concrete culpable link between T1 and T2. Thus, there is a firmer normative basis to apply prior-fault rules and negate any mitigating or excusing effects of the intoxication. For England, this would also solve the problem of prior-fault insanity in which (culpable, ie foreseeable) non-compliance of medication could be used as an argument to block the insanity defence. For the Netherlands, this would result in a better

distinction between cases such as the aforementioned *culpa in causa* case and the *cannabis psychosis* case.

Third, we engaged in the important debate about a bespoke prior-fault offence. Is this necessary, and what would be the purpose of such an offence? Should this be in addition to or instead of prior-fault rules? What seems to matter is, first of all, whether there is the ambition to differentiate between a culpable and non-culpable creation of the conditions of a defence. If so, then a two-fold mechanism like in Germany is a viable solution, which allows for a distinction between these two types of situations. If one would not favour such a distinction, this results in simply substituting missing elements at T2 or denying a defence merely based on intoxication without a normative link. We find such outcomes undesirable, as discussed throughout. Thus, bespoke offences provide a unique opportunity to craft an approach to prior-fault that accurately labels and punishes what D has done, avoiding inculpatory legal fictions. Importantly, a bespoke offence seems to have a complementary role working alongside prior-fault rules to allow for the distinction between culpable and non-culpable prior-fault. The German intoxication offences combined with *alic* rules demonstrate that such bespoke offences need not *necessarily* represent the supplanting of other rules, often debated in common law jurisdictions. Equally, the continued use of *alic* and the apparent reluctance of prosecutors regarding the intoxication offence should encourage caution.