STRICT LIABILITY AND THE PURPOSE OF PUNISHMENT

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The main argument of this article is that only a clear conception of the purpose of punishment can orient the debate about the positioning of the fault requirement and strict liability doctrine in criminal law. A categorization of the varieties of strict liability offenses, as well as an adequate model for normatively appraising the legitimacy of these deviations from the principle of culpability, should be based on a systematic analysis of criminal law's role and function in society. As is argued, the original purpose of criminal law consists in the stabilization of norms by means of punishment. Taking up that finding, this work provides a detailed view of the distinct mechanism of placing blame, allowing for the presentation of a clear scheme for categorizing and appraising the variety of strict liability offenses. It is stated that offenses substantively deviating from the standard mechanism of placing blame can potentially result in over-punishment, which is dysfunctional and not justifiable. Properly placing blame is essential for the appropriate fulfillment of criminal law's purpose in society. Therefore, the claim of the principle of culpability and critiques of strict

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liability doctrine find their basis not only in considerations of fairness, but also social necessity. By presenting a systematic categorization of strict liability offenses, this research offers a clear approach to a frequently discussed doctrine and establishes new arguments against its legitimacy.

Keywords: *criminal law, punishment, strict liability, culpability, fault requirement,* mens rea

INTRODUCTION

Arguments raised regarding criminal law's fault requirement reflect not only moral and political conflicts, they touch upon the very foundations of criminal law and its doctrines. All Western legal orders have something equivalent to the principle of culpability, and are all familiar with intense and passionate debates about offenses suspected of deviating from it. In legal orders bound to the tradition of Common Law, such differing constructions have special relevance and scope. They are called *strict liability offenses*.

The doctrine of strict liability is an ongoing issue of political and scholarly debate. The point of convergence is usually that there is an inevitable discrepancy between remaining true to the legislative intent and theoretically upholding the main principles of criminal law. The conflicts go beyond mere technical perspectives on the construction of offenses or pragmatic arguments. They begin with a persistent disagreement about the *real meaning* of strict liability and the doctrine's essence, as the (limited) consensus is only that such offenses are somehow *strict* regarding their subjective requirements. This disagreement is surely closely connected to the historically loaded debate surrounding *mens rea* and *culpability* in general. Therefore, strict liability offenses are not only of interest due to their high practical relevance to Anglo-Saxon legal orders, they concern the very touchstone of criminal law theory.

Although strict liability offenses have been discussed vigorously in a general manner, approaches that systematically and deeply capture the symptom are rare. To systematically investigate strict liability and present a solid ground for appraising its legitimacy, this research suggests returning to the fundamentals of criminal law and its position in our society. By identifying the core reason for the origin of criminal law and the role punishment plays in society, we are better able to capture the relevance of the fault

requirement. Why and when does our society make use of criminal law and its instrument of institutionalized punishment? Under what conditions do we call someone to account, and why should placing personal blame be a necessary condition for that? In other words, what *function* does the fault requirement serve? Only a clear understanding of these questions can penetrate to the core of strict liability doctrine. It presents a valid foundation for differentiating among varieties of strict liability and distinguishing them from other offenses. A manifest stand on the aforementioned fundamentals will also contribute to answering questions regarding which of the offense constructions allow the system to pursue its determined aim and which do not and, hence, have the potential to destabilize criminal law's orderly function.

Departing from criminal law's place in society, this work follows the conviction that agreement regarding the purpose of punishment and limits of criminal law is necessary in order to unambiguously determine the character of strict liability. Thus, after outlining the doctrine's prevailing understanding and its historical roots, and describing the few existing approaches to capturing it systematically, the article first lays the theoretical groundwork for the proposed approach. Although examined in summary, it still precisely outlines the sociologically informed comprehension of criminal law that manifests the categorization's theoretical point of departure.[1] This research establishes what criminal law socially provides and the principle of *mens rea* contributes, as well as the elements that construct the mechanism for imputing personal responsibility. This objective is ambitious. Therefore, the theoretical foundations of the main arguments are kept short, and readers are referred, where possible, to the valuable explanations of other writers, especially in the fields of legal and socio-legal theory in general, and criminal law and punishment in particular. In the sections that follow, a taxonomy of strict liability offenses is introduced and the different categories are discussed in detail. Revealing and implementing this method for clearly systematizing these offenses presents a compelling concept of how to normatively evaluate strict liability offenses.

1. This section of the the article relies relevantly on the author's previous work, published in German. *See* MONIKA SIMMLER, NORMSTABILISIERUNG UND SCHULDVORWURF [PLACING BLAME AND THE STABILIZATION OF NORMS] (2018).

I. STRICT LIABILITY AND ITS SHADES OF GRAY

A. History and Terminology

At first glance, it is impressive how much scholarly attention the phenomenon of strict liability has attracted. However, after having spent substantial time analyzing the debate, it is clear that its high practical relevance and surprisingly steady persistence, despite enormous academic resistance, deserves further analysis.[2] Such offenses are appropriately labelled as no "strange interlopers, but a large part of the fabric of criminal law."[3] As someone having originally studied law in a Civil Law country, I was introduced to the doctrine by hearing that strict liability is something "they have, and we do not." It was described as "liability without any guilt" and something "completely incompatible with the principle of culpability." We now know that the issue is not that black and white,[4] and these shades of gray require further investigation. First of all, what is and is not called "strict liability" should be clarified, as the latent imprecision in the terminology and the dozens of varieties the term is used for demand further specification.[5]

The roots of the doctrine of strict liability in US-American and English law are frequently located in the middle of the nineteenth century, where the

2. It is difficult to determine how widespread the doctrine really is. It is estimated that in English law, more than half of the offenses contain at least one element of strict liability. *See* Andrew Ashworth & Meredith Blake, *The Presumption of Innocence in English Criminal Law*, 1996 CRIM. L. REV. 306, 307; Jeroen Blomsma & David Roef, *Forms and Aspects of Mens Rea*, *in* COMPARATIVE CONCEPTS OF CRIMINAL LAW 127, 152–53 (Johannes Keiler & David Roef eds., 2d ed. 2016); ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW 127–28 (7th ed. 2013); H.M. KEATING, S.R. CUNNINGHAM, T. ELLIOTT, & M.A. WALTERS, CLARKSON AND KEATING CRIMINAL LAW: TEXT AND MATERIALS 227 n.1 (8th ed. 2014). US-American estimates are probably not substantially different, considering the relevance of the doctrine to the broad field of so-called public welfare offenses.

3. MICHAEL JEFFERSON, CRIMINAL LAW 122 (12th ed. 2015).

4. As Brown said, "The story is more complicated, of course." *See* Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS. 109, 109 (2012).

5. Consensus only exists about the fact that there is no consensus. So stated by Douglas Husak, *Varieties of Strict Liability*, 8 CAN. J. L. & JURISPRUDENCE 189, 189 (1995) [hereinafter Husak, *Varieties of Strict Liability*]; Laurie Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 417 (1993); ASHWORTH & HORDER, *supra* note 2, at 160.

decision of *Regina v. Woodrow*[6] is deemed a relevant turning point in England, while *Morissette v. United States*[7] is considered the American cornerstone.[8] However, this narrative is not unquestioned.[9] Although the exact turning point can be left to the historians, it is important to note that the main dissemination of this doctrine is related to the economic developments resulting from industrialization, as is the propagation of an increased risk orientation in criminal law in general.[10] Forms of strict liability, however, have also been established and persisted unrelated to these so-called *public welfare* or *regulatory offenses*. These constructions, particularly in the field of *moral offenses* or homicide, share the main feature of *strictness*, as they all contain a certain relaxation of the standard requirements of personal blameworthiness.

Strict liability can be defined either narrowly or broadly. The narrower definition most frequently identifies strict liability as where no full proof of *mens rea* is required for every element of the offense, that is, where there is no need for a corresponding *mens rea* element with regard to at least one element of the *actus reus*.[11] Sometimes an even narrower definition is given, wherein

6. Regina v. Woodrow, 15 M. & W. 404, 153 ER 907 (Exch.) (1846).

7. Morissette v. United States, 342 U.S. 246, 251 (1952).

8. Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 58–59 and 67 (1933); Joshua Greenberg & Ellen C. Brotman, *Strict Vicarious Liability for Corporations and Corporate Executives: Stretching the Boundaries of Criminalization*, 51 AM. CRIM. L. REV. 79, 79–80 (2014).

9. Some authors have located the turning point further back in history by describing earlier forms of strict liability (*see, e.g.*, G.R. Sullivan, *Strict Liability for Criminal Offences in England and Wales following Incorporation into English Law of the European Convention on Human Rights, in* APPRAISING STRICT LIABILITY 195, 196 (A.P. Simester ed., 2005)). Others have argued that the doctrine arose later, within the industrialization movement (*see, e.g.*, Solomon E. Salako, *Strict Liability: A Violation of the Convention?*, 70 J. CRIM. L. 531, 531 (2006); A.P. Simester, *Preface, in* APPRAISING STRICT LIABILITY vii, viii (A.P. Simester ed., 2005) [hereinafter Simester, *Preface*]).

10. *See cf.* Greenberg & Brotman, *supra* note 8, at 80; Sullivan, *supra* note 9, at 201; Sayre, *supra* note 8, at 67; Jerome Hall, *Interrelations of Criminal Law and Torts II*, 7 COLUM. L. REV. 967, 986 (1943).

11. A.P. Simester, *Is Strict Liability Always Wrong?*, *in* APPRAISING STRICT LIABILITY 21, 22 (A.P. Simester ed., 2005) [hereinafter Simester, *Strict Liability*]; Stuart Green, *Six Senses of Strict Liability: A Plea for Formalism*, *in* APPRAISING STRICT LIABILITY 1, 2 (A.P. Simester ed., 2005); R.A. Duff, *Strict Liability, Legal Presumptions, and the Presumption of Innocence*, *in* APPRAISING STRICT LIABILITY 125, 125 (A.P. Simester ed., 2005) [hereinafter Duff, *Strict Liability*]; R.A. DUFF, ANSWERING FOR CRIME 233 (2007) [hereinafter DUFF, ANSWERING FOR CRIME]; ASHWORTH & HORDER, *supra* note 2, at 160–61; A.P. John, R. Spencer, & Antje Pedain, *Approaches to Strict and Constructive Liability in Continental Criminal Law*, *in*

strict liability is considered to apply only to offenses that require *no* subjective elements.[12] This very narrow definition is not adopted here. "Strict liability," as the term is used in scholarship, not only marks cases in which personal responsibility is completely neglected. This rather theoretical definition does not lead anywhere and cannot capture the doctrine or its practical field of application.[13] If this truly restrictive definition is intended, the term *absolute liability* is used.[14]

In this examination of the different varieties of strict liability, neither of the narrow definitions is adopted; the goal is to capture the wide range of *strictness* regarding the fault requirement and variability by which that requirement is relaxed. Instead, Douglas Husak's main point of departure is adopted, accepting that there is no one form of strict liability. Rather, the doctrine should be seen as a phenomenon of different gradations in placing blame deviating from the standard mechanisms and requirements.[15] This is probably why there has never been a consensus among scholars regarding what the definition of strict liability should be. The difficulty in agreeing on a definition is due to the fact that strict liability marks not one offense construction, but rather a characteristic that many constructions share, a single phenomenon with a variety of faces. Therefore, the analysis undertaken here departs from a very common and broad understanding of *strictness* in liability.

APPRAISING STRICT LIABILITY 237, 238 (A.P. Simester ed., 2005); KEATING ET AL., *supra* note 2, at 227; JEFFERSON, *supra* note 3, at 122; Alan C. Michaels, *Constitutional Innocence*, 223 HARV. L. REV. 828, 830 (1999) [hereinafter Michaels, *Constitutional Innocence*]. The Model Penal Code also follows this understanding; *Model Penal Code* § 2.05 and commentary, 282–83.

12. *See, e.g.*, Paul J. Larkin Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishment Clause*, 37 HARV. J.L. & PUB. POL'Y 1065, 1067–68 (2014); Philip E. Johnson, *Strict Liability: The Prevalent View*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1518, 1518 (Sanford H. Kadish ed., 1983).

13. This opinion is shared by most commentators. *See, e.g.*, Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 732 (1960); Husak, *Varieties of Strict Liability*, *supra* note 5, at 195; HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 343 (1979); Duff, *Strict Liability*, *supra* note 11, at 125; DUFF, ANSWERING FOR CRIME, *supra* note 11, at 232.

14. This term probably goes back to Percy H. Winfield, *The Myth of Absolute Liability*, 42 LAW Q. REV. 37 (1926); *see also* Paul Roberts, *Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions*, *in* APPRAISING STRICT LIABILITY 151, 152 (A.P. Simester ed., 2005); MICHAEL ALLEN, TEXTBOOK ON CRIMINAL LAW 108 (12th ed. 2013); DUFF, ANSWERING FOR CRIME, *supra* note 11, at 232.

15. *See* Husak, *Varieties of Strict Liability*, *supra* note 5, at 189 ff.

B. Existing Models of Categorization

The persistence of the doctrine and the intense (mostly critical) attention strict liability has received has obviously led to different attempts at capturing and categorizing the doctrine.[16] A widely recognized differentiation concerns *formal* and *substantive* strict liability, based on the analogue distinction of different understandings of blameworthiness.[17] Focusing on a rather formal analysis of the dogmatic requirements of *mens rea* on one side and *personal fault* on the other—whose difference is, of course, undeniable—one can easily get lost in the attempt. The presence of strict liability in a formal sense can be tested *mechanically* by focusing on the narrow definition (i.e., primarily on the *mens rea* requirement and relaxation of it in the examined offense).[18] The substantive analysis this approach proposes additionally requires that the relationships among the different elements of the offense, blameworthiness, and harm in question are assessed normatively.[19] In this sense, evaluating the doctrine involves adopting R.A. Duff's statement that the nature of substantive strict liability consists of a liability without appropriate moral blameworthiness.[20] The analysis being conducted in this article does not follow this approach, as the goal is not a focus on morality or to classify with regard to a moral judgment. The classification presented is based on a description of strict liability in the service of a functional analysis of the criminal law system. Of course, this can and shall provide a basis for further normative (or moral) evaluation. The categorization itself, however, remains untouched by such concerns. Put differently, it is aimed at being substantive in a sociologically informed sense, and not in a moral philosophical one.

There have been a number of different attempts at establishing a taxonomy of strict liability offenses. Three are briefly outlined below. First, one presented by Solomon Salako distinguishes between: (1) *common law strict*

16. "Almost endless," as Salako describes it; *see* Salako, *supra* note 9, at 531.

17. *See, e.g.*, Douglas Husak, *Strict Liability, Justice and Proportionality*, *in* APPRAISING STRICT LIABILITY 81, 86 ff. (A.P. Simester ed., 2005) [hereinafter Husak, *Strict Liability, Justice and Proportionality*]; Duff, *Strict Liability*, *supra* note 11, at 126; DUFF, ANSWERING FOR CRIME, *supra* note 11, at 233. In a similar way, Simons distinguishes between *pure* and *impure* strict liability; *see* Kenneth W. Simons, *When is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1088 (1997).

18. Husak, *Strict Liability, Justice and Proportionality*, *supra* note 17, at 86.

19. Simons, *supra* note 17, at 1087.

20. Duff, *Strict Liability*, *supra* note 11, at 126.

liability, (2) *absolute liability*, (3) *public welfare offenses*, and (4) *offenses with a reverse burden of proof*.[21] This taxonomy is rather unsystematic, conflating the area of regulation with certain substantive and procedural questions. Furthermore, it does not significantly contribute to a clear analysis based on the function of criminal law, apart from emphasizing that there is a wide scope of application. Stuart Green delves more into the substance of the matter in his presentation of the "six senses of strict liability,"[22] describing: (1) *offenses omitting the requirement of* mens rea, (2) *schemes baring* mens rea–*negating defenses*, (3) *procedural devices requiring presumption of the defendant's intent*, (4) *offenses requiring a less serious form of* mens rea, (5) *offenses requiring less serious forms of harmfulness*, and (6) *offenses with lower levels of wrongfulness*, all while arguing that the term "strict liability" must only be used to describe the first variety and that a formal approach should be privileged.[23] In his article, he does outline an important range of varieties and introduces certain categories; we will return to these, though not to agree with his conclusion.

The most successful classification developed is the one presented by Husak more than twenty years ago.[24] This work does not follow his analysis in every respect, and the varieties presented are not always systematized according to a stringent scheme, but he introduced two main positions upon which we agree. First, we must note that there is not just one category of strict liability offenses, but rather a broad variety that share a main feature but not the details of construction.[25] Second, his view on the gradation of *strictness* is well supported. Husak departed from the notion of a *paradigm perpetrator* and standard level of culpability, from which there can be gradual deviations.[26] In so doing, he correctly argued that questions of whether a liability is strict and in line with the principle of culpability are in most cases not *all-or-nothing* questions, but rather matters of degree.[27]

Since we share this main point of view, it is not surprising that most of his seven categories are considered in the research presented here. His distinction consists of: (1) *strict procedural liability*, (2) *liability without* mens rea,

21. Salako, *supra* note 9, at 531 ff.
22. Green, *supra* note 11, at 1–20.
23. *Id*. at 2–10.
24. Husak, *Varieties of Strict Liability*, *supra* note 5, at 189 ff.
25. *Id.* at 189–90.
26. *Id* at 193–94.
27. *Id.* at 190.

(3) *liability that is not fully defensible by justifications* or (4) *excuses*, (5) *vicarious liability*, (6) *liability for non-voluntary conduct that includes a voluntary act*, and (7) *liability for innocent activity*.[28] In these seven categories, he outlined some important categories of strictness in liability, evaluating discrepancies in the standard requirements. As will be shown below, these are indeed mostly relaxations of the principle of culpability. This categorization does not, however, serve the purpose of assessing why these discrepancies matter for criminal law to function and punishment to be efficient and justified. A classification oriented toward the role of culpability within criminal law leads us there. Therefore, the goal is not to undo the important work contributed by Husak and other authors. Instead, their ideas are further developed here in the hope of adding another, very fundamental aspect.

After clarifying the prevailing use of the term and touching upon some existing scholarly attempts at categorizing such offenses, we proceed by laying the groundwork for a new categorization method based on the framework of a systematic analysis of criminal law's core and standard mechanism. Clarifying the main purpose of the criminal law system allows for an ordering of the offenses of strict liability in accordance with their dogmatic position regarding criminal law's *modi operandi* of imputing personal responsibility. Furthermore, it facilitates an assessment of the ways such offenses are strict, as well as how they do not align with the principle of culpability and its rationale. This functional categorization of the types of strict liability does not just clarify the doctrine, but also serves as a basis for a normative model for assessing the substance and legitimacy of every category.

II. FUNCTION OF CRIMINAL LAW AND PURPOSE OF PUNISHMENT

A. Stabilization of Norms in Society

Asking about a social system's *function* means shedding light on the very cause of a social institution's emergence.[29] This implies an understanding that society as an overall social system differentiates among specific

28. *Id.* at 199–223.

29. For such a functional and *system theoretical* approach in sociology in general and the sociology of law in particular, *see* NIKLAS LUHMANN, SOCIAL SYSTEMS (John Bednarz Jr. and Dirk Baecker trans., Stanford University Press 1995) (1984), and NIKLAS LUHMANN,

sub-systems that serve different purposes (i.e., for the fulfillment of a specific function).[30] This applies to the legal system, as well. Therefore, describing the function of the legal system requires an appraisal of the distinct role the law plays in society. Its presence is primarily assessed as a social factum, one that does not exist coincidently, but rather due to a specific purpose and need. The same applies to criminal law as a further legal sub-system, and the particular mechanisms serving its aims.[31] Social systems follow their functions in ways dictated by their own modalities, allowing for their differentiation, distinctiveness, and self-determined closure. This is also true for criminal law, in its characteristic mechanism of holding people accountable. Thus, analyzing criminal law *functionally* demands a systematic analysis of its institutions with regard to its *function*. Consequently, the first and most important question concerns what constitutes its function.

Talcott Parsons identified law as a means of *social control*. According to him, the main purpose of the law lies in *social integration*.[32] Building upon the systemic approach provided by Parsons, Niklas Luhmann meticulously detailed how the standardization of behavior and mutual orientation regarding norms are located at the center of the functional emergence of the legal system. He argued that the law's function finds its basis in the counterfactual stabilization of normative expectations, allowing for the emergence of social order in highly differentiated societies.[33] It is indeed convincing that the special nature of the law shares a close relationship with social order, allowing for behavioral coordination in the first place. Such behavioral coordination results from standardized mutual expectations. This standardization is necessary because every social encounter would otherwise be fully contingent and uncertain. However, as with other social

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LAW AS A SOCIAL SYSTEM (Fatima Kastner et al. eds., Klaus A. Ziegert trans., Oxford University Press 2004) (1993).

30. Generally, there is wide use of the term "function" in different fields of research. In the socio-legal context at hand, it describes the contribution of a certain social institution with regards to a particular societal need. Therefore, funcion is understood as a concept of social theory. About this use of the term as a matter of functional analysis, *see, e.g.*, ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (3rd rev. ed. 1957).

31. For an in-depth functional analysis of criminal law and its mechanisms, *see* SIMMLER, *supra* note 1.

32. Talcott Parsons, *The Law and Social Control*, *in* LAW AND SOCIOLOGY 56 (William M. Evan ed., 1962).

33. LUHMANN, LAW AS A SOCIAL SYSTEM, *supra* note 29, at 142–72.

norms, the law cannot guarantee compliance, though it offers special protection in the case of deviance.

This special protection, allowing for an institutionally backed *counterfactual* upholding of a norm, is a distinct feature of the law. In following its goal of determining if something is *legal* or *illegal*, it states formally and in an institutionalized fashion which expectations are in accordance with the law and which are not. In doing so, it organizes support for the norm, respective of the normative expectations in question. There are, however, two kinds of expectations. The disappointment of *cognitive* expectations cannot be ascribed to a specific faulty person or element of conduct. This results in the need for disappointed persons to relearn. Since the expectation cannot be upheld, it presents a miscalculation. It may provoke a *poena naturalis* and thus must be adjusted in the future.[34] The disappointment of *normative* expectations leads to another reaction.[35] These expectations are upheld even if they are not met, and this is possible because they find social support. Actors counterfactually cling to their expectations. They identify the disappointment as someone's mistake, and ascribe this mistake to another actor. In doing so, they rely on the support of the social system.[36] As society's "immune system," the law owes its relevance to this need to structure expectations.[37] It offers the strongest support in counterfactual continuation.[38] The legal system answers society's need for a social system with a potentially endless amount of alternative behaviors by requiring the reduction of contingency by means of the standardization of norms. Thus, it solves a problem that is necessary for the continuation of society (i.e., it serves a specific function).

It is this function that presents the basis for criminal law as a legal system's sub-system. The upholding of normative expectations and, with that, the stabilization of norms in general is what legal order represents. For a special set of norms, the law provides unique protection by means of *punishment* in the case of disappointment. Criminal law is used for these

34. Günther Jakobs, Strafrecht Allgemeiner Teil 6–8 (2d ed. 1993) [hereinafter Jakobs, Strafrecht AT].

35. On normative expectations, *see* Luhmann, Law as a Social System, *supra* note 29, at 94 and 149–53.

36. Jakobs, Strafrecht AT, *supra* note 34, at 7; Jakobs Günther, Schuld und Prävention 9–10 (1976).

37. Luhmann, Law as a Social System, *supra* note 29, at 48.

38. *Id.* at 142–72.

norms. According to Émile Durkheim, the punitive answer to criminal law consists not in restoring or re-establishing the previous state of affairs, as does the law of torts.[39] When an act would be considered criminal because it violates the "moral consciousness of nations," the legal answer relies on a harm, injury, or disadvantage imposed upon the perpetrator.[40] Stated in a more positivistic manner, the special character of the criminal legal norm lies in the characteristic threat of punishment. It is this specific prospect that serves as a means of support for the norm. This symbolic apparatus allows individuals to clearly recognize if they can expect to be in accordance with the law.[41] Hence, the function of criminal law can be regarded as the *stabilization of norms by means of punishment*.

B. Purpose of Punishment and the Fault Requirement

Punishment is the identity-creating element of the criminal law system. As has been introduced above, criminal law's overall function lies in the identification and response to cases of normative disappointment that demand punishment in order to stabilize the norm. Comparable to suggestions made by expressive punishment theory, a criminal offense can be understood as denial of the validity of a norm.[42] Punishment is the criminal law's answer, restating the meaning of the norm and marking the conduct as a mistake.[43] In so doing, it strengthens and reactivates the normative identity of society.[44] Remaining silent after the questioning of a norm would undermine the norm's validity.[45] Punishment negates the communication of the offense.[46] It is a way of coming to terms with the past to guarantee the continuation of the normative expectation. It can therefore be called "positive general prevention," as is often the case in

39. Émile Durkheim, The Division of Labor in Society 29 (W.D. Halls trans., Free Press ed. 1984) (1893).

40. *Id.* at 31–34.

41. Similarly, *see* Luhmann, Law as a Social System, *supra* note 29, at 150.

42. *See, e.g.*, R.A. Duff, Punishment, Communication, and Community 27–30 (2001) [hereinafter Duff, Punishment, Communication, and Community].

43 Jakobs, Strafrecht AT, *supra* note 34, at 6.

44. Popitz Heinrich, Die normative Konstruktion von Gesellschaft 90 ff. [The normative construction of society] (1980).

45. Duff, Punishment, Communication, and Community, *supra* note 42, at 28.

46. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 Harv. L. Rev. 1486, 1513 (2016).

German-speaking countries. Likewise, it can also be called "reconstructivism," as was suggested by Joshua Kleinfeld.[47] However, neither term is ideal. Positive general prevention can be misunderstood as consequentialist, neglecting the fact that punishment is determined by the past. Reconstructivism can mislead one into believing that a norm is destroyed. Certainly, wrong acts question—and hence, challenge—the validity of a norm. Answering with punishment, however, guarantees that the norm was not destroyed in the first place. The norm is preserved before reconstruction becomes necessary. Thus, in order to be more precise and follow the insights examined above, the purpose of punishment is (as is in line with the purpose of law generally, and criminal law in particular) more aptly termed the *stabilization of norms*.

Punishment as the output of the criminal law serves to stabilize norms. This means that the system's operations are guided mainly by the task of defining cases where a normative destabilization has taken place, and thus require punishment. To label an act a "breach," it is necessary to ascribe the opposition of an expectation to a particular actor. Only this imputation to an actor, holding someone to account, allows for the system to proceed with its stabilization. Conversely, and thus paradoxically, only the imputation of a normative disappointment to an actor and marking their action a mistake can make stabilization necessary. If the disappointment cannot be explained by the actor's mistake, it is perceived as a cognitive miscalculation or an accident. This need to mark deviation as someone's misconduct is the reason for the persistent importance of the *fault requirement* in criminal law.

The principle of culpability is at the core of criminal law. The ideal of *actus non facit reum nisi mens sit rea* or *nulla poena sine culpa* has guided the theory and doctrine of modern legal orders. In short, this principle states that there cannot be a criminal conviction without culpability. Although the principle's exact claims and mandatory nature are topics of ongoing debate, two substantial purposes of the principle can be identified, following a functional assessment. The *first* purpose, conformity to principle, allows for the definition of cases in which a norm has been destabilized. This requires determining if the destabilization can be identified as a mistake and imputed to a concrete actor. This first purpose of the principle offers an initial justification for punishment. Only if a norm is endangered

47. *Id.* at 1486–1565.

because a disappointment can be imputed to an offender (and cannot be explained otherwise) does punishment become necessary, and therefore legitimate. If no fault can be marked, no destabilization occurs and punishment is unnecessary. The *second* purpose of the principle offers further guidance once a case is identified as a relevant normative destabilization. It does so by asking for proportionality of the punishment with regard to the degree of destabilization.[48] Only a sentencing that is in line with the destabilization (i.e., that is actually required for re-stabilizing the norm) can be justified, following the principle of culpability. Outlining the essence of the fault requirement shows that it is *binary* at first. Moving on from there, it is *gradual*. As will become apparent in the upcoming sections, this gradation becomes highly relevant in the field of strict liability.

C. Mechanism of Placing Blame

Understanding the position of the fault requirement in criminal law's system of functioning requires further exploration of the mechanisms guiding the necessary process of imputation.[49] The capacity of the principle of culpability consists of the ability to identify if an actor has to be punished and how much punishment is necessary. This mechanism of imputation relies on interference with the validity of a norm that requires stabilization as an answer. As a result, the mechanisms of placing blame (i.e., the tools criminal legal dogmatics requires) allow for the determination of whether and the extent to which the norm has been destabilized. Within this mechanism, certain universal elements can be defined that form the ongoing premises and conditions of *functionally* placing blame.

Recognizing the purposes at work when imputing blameworthiness enables the marking of cases in which a relevant questioning of the norm has occurred. There are three significant elements that form this procedure. Although they are connected and together comprise a single process of imputation, they can be distinguished from one another. *First*, placing blame requires that the act qualify as a communication questioning the

48. This principle of proportionality is widely recognized as a touchstone of sentencing. *Cf.* Andrew Ashworth, *United Kingdom*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 531, 535 (Kevin J. Heller & Markus D. Dubber eds., 2011); Brown, *supra* note 4, at 109.

49. The elements of this mechanism can be outlined here only briefly. For a more detailed analysis, *see* SIMMLER, *supra* note 1.

validity of a norm—the *message element*. Within this category are the subjective conditions that mark the breach as wrongful and blameworthy. Whereas the objective elements of the offense serve to identify whether a normative expectation has been disappointed, the subjective ones (usually named *mens rea*) identify whether the disappointment actually qualifies as a questioning of the norm, due to the message sent by the offender's act. Only if a questioning of the norm has in fact been expressed is someone called to account. That is generally the case if the offender has acted knowingly and intentionally, assuming that no justifications exist. It is also the case if the offender has acted recklessly or negligently, communicating their insufficient respect for the norm. Regarding the classic distinction between *wrongfulness* and *blameworthiness*, it should be noted that this element is actually concerned with both. One component determines if the act is wrongful because only the *mens rea*–related elements constitute wrongfulness. This process defines if the act is potentially suited to expressing a questioning of the norm because only an act accompanied by the necessary mental state destabilizes norms. The second component consists of judging not only whether the act is potentially suited to questioning the norm, but also whether this was actually blamefully expressed by the offender. Thus, this judgement concerns the field of blameworthiness.

As a *second* element, the questioning must be ascribed to a person who is a capable addressee of normative communication and generally possesses the capacity to destabilize norms—the *personality element*. In criminal law, normative expectations are solely directed toward *persons*. Only suitable members of a normative interaction have the ability to effectively question criminal norms. Hence, this second element must precede the first. Actors serve as a reference point for imputation and can be held responsible.[50] A person is blamed only if he or she has the capacity to conform to the law's expectations. This requires the general ability to choose to act otherwise.[51] These capacities culminate in *personhood*, an indispensable and fundamental element of placing blame.

50. Tadros has described a similar fundamental element of criminal responsibility, naming it "status-responsibility." *See* VICTOR TADROS, CRIMINAL RESPONSIBILITY 21 (2005).

51. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY. ESSAYS IN THE PHILOSOPHY OF LAW 152 (2d ed. 2008); Mitchell Barry, *In Defence of a Principle of Correspondence*, 1999 CRIM. L. REV. 195, 197.

Third, to functionally place blame, the disappointment has to be explained by a personal mistake; that is, the actor had to be sufficiently competent to comply with the norm—the *competence element*. Only when this third element is present can someone be declared personally responsible for the breach. The *competence* element relies on the general accountability discussed above as personhood. It does, however, also contain an additional component because shifting a mistake to a sub-system requires ascription of the capacity to act differently not only generally, but in the very concrete situation.[52] If someone can refer to a situational excuse, they are not considered responsible for the act. The disappointment can be explained by something other than an individual fault, and the act does not communicate a negation of the norm.[53] The essence of this element lies in differentiating between cases in which a breach of the norm can be explained by situational circumstances, and cases where personal fault must be identified as the reason. It is important to note that whereas *personality* is something binary, *competence* can gradually emerge. It is this condition that makes this element especially relevant for the fault requirement's demand for proportionality.

D. Implications for Further Analysis

Before applying these findings to an analysis of the doctrine of strict liability and its various forms, it is important to summarize what has been stated thus far. The function of punishment was defined as the stabilization of norms in order to guarantee the continued existence of the social order. However, making use of this distinctive feature of criminal law requires the

52. Similarily argued by TADROS, *supra* note 50, at 124, when he explained the difference between "status-responsibility" and "attribution-responsibility." He argued that there may be agents lacking responsibility for their actions in general, while others are entitled only to situational excuses.

53. A multitude of criminal law doctrines are affected by the question of competence. Most of these topics fall into the category of *excuses*. These are unlike *justification* defenses, in which the act is wrongfully committed and in principle qualified to communicate a negation of the norm, but the communication can be processed because of the affected reasonableness or inevitability of acting in that way. They do present the wrongful act in a better light. On the difference between justifications and excuses, *see, e.g.*, Jeroen Blomsma & David Roef, *Justifications and Excuses*, *in* COMPARATIVE CONCEPTS OF CRIMINAL LAW 127, 158 (Johannes Keiler & David Roef eds., 2d ed. 2016); KATHERYN RUSSELL-BROWN & ANGELA J. DAVIS, CRIMINAL LAW 220 (2016); Simons, *supra* note 17, at 1097.

imputation of personal responsibility. Following this argument leads to the essential systematic paradox that lies at the core of criminal law: there is a destabilization of the norm only if there is personal fault, and there is no personal fault if no destabilization of the norm has occurred. Consequently, personal fault and normative destabilization have to be understood as a systemically interrelated phenomenon crucially characterizing this field of law. Only in combination does punishment gain its social aim and consequent strength. Placing blame and destabilization of a norm are inseparable touchstones of criminal law.

As has been outlined in detail, the *principle of culpability* obtains its relevance from the above-emphasized function. Substantively, this encompasses two main essences. *First*, only if there is a normative destabilization that can be attributed to a person within the social system, and due to his or her fault can we place blame: this is when punishment become necessary. *Second*, the degree of punishment must be proportional to the normative damage caused by the offender. A punishment harsher than is necessary to stabilize the normative expectation, or one that is not necessary at all, would not only be ineffective, but illegitimate. Therefore, liability is substantially *strict* if one of these two aspects is not upheld. Apart from that, there is a *third* claim implied by the principle of culpability, and therefore a third way in which *strictness* occurs. This is the procedural implication of the fault requirement, which states that not only must the substantial offense construction allow for determination of personal responsibility, the procedural setting must also enable this determination. The principle of culpability consists of the two substantial outflows named above, and is accompanied by this formal demand. From a functionalist perspective, it is clear that the system's functioning must not only theoretically, but actually be served. Therefore, it is important to include procedural requirements in appraising strict liability.

As has been outlined above, based on an analysis of the principle's conduct, the mechanism of placing blame includes three elements used to define *if* a punishment is needed to fulfill the system's main function and determine *what* punishment is required to prevent the destabilization. Placing blame follows a certain structure that serves the purpose of identifying the suitability of the sender of the message (*personality*), appropriateness of the situational circumstances around sending that message (*competence*), and aptness of the message's content (*message*). Usually, the function of identifying whether these elements are present is fulfilled with

the help of offense constructions and legal frameworks that allow for the determination of whether these conditions are present. However, there are constructions in the doctrine of criminal law within which the ability to make such an identification remains contested. Deviations from this standard mechanism involve the potential to disturb the system's functioning (i.e., jeopardize the fulfillment of its function). In such cases, there is an ongoing debate regarding the question of whether they can be justified because, in one way or another, they interfere with the basic operation of placing blame in response to the requirements of the principles at hand. These are the cases we term *strict liability*.

If an offense construction's compatibility with the process of normative de- and re-stabilization is not given, this raises the question of whether the construction should nevertheless survive within the system, how it may destabilize criminal law's functioning, and what would have to change so that it does not. Therefore, a functional assessment of the strict liability doctrine requires a specific analysis of these constructions through the lens of the *functional* mechanisms outlined above. This leads us to the categorization and discussion of the strict liability doctrine undertaken in the following sections.

III. APPRAISING STRICT LIABILITY

A. Systematically Categorizing Strict Liability Offenses

Evaluating the doctrine of strict liability offenses and judging if they are reasonable, useful, or just, cannot and should not be done without determining what is included in the doctrine and the categories and diversities that can be found in the different types of strictness. Their essence must be captured. Otherwise, we remain on the surface, relegated to shallow judgments. Unsurprisingly, the categorization presented here is not a simple one, but as Husak accurately stated, the high complexity of personal responsibility in criminal law denies a simplistic capturing of strict liability.[54] This work continues by presenting three main categories of strict liability, differentiated by means of the analytical results presented regarding the process of placing blame as well as its being embedded in criminal

54. Husak, *Varieties of Strict Liability*, *supra* note 5, at 198.

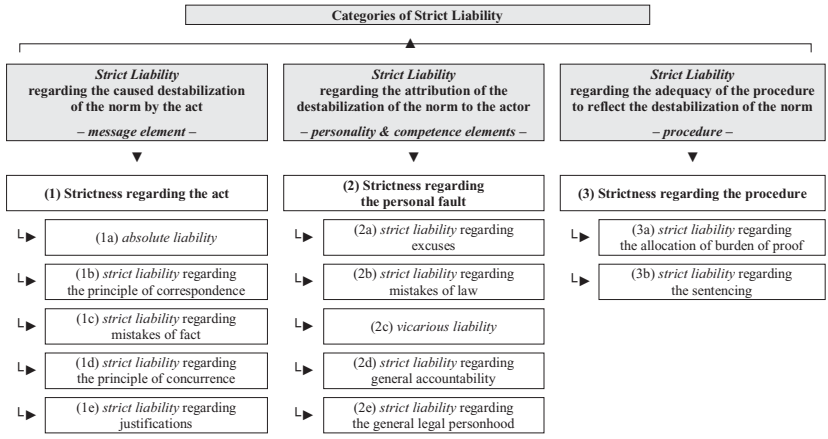
procedure. Each of these three categories consists of sub-categories that describe different aspects within the particular element of the process of placing blame.

To keep the following explanations reasonable in length, each sub-category is only briefly outlined and includes only a few examples. Rather, the focus is on pointing out the character of strictness as regards the stabilization of norms. This construction may not include every possible sub-category or all conceivable examples of strictness, but the examination below presumes that all examples would belong to one of the three main categories presented, and that strictness always concerns one of the elements of determining blameworthiness in the criminal law system.

Criminal law imputes individual responsibility in order to fulfill its functions of preserving normative expectations, minimizing mutual contingency, and reducing complexity in social interplay. It accomplishes these goals by determining if a normatively protected expectation has been disappointed and if that disappointment can be explained by an actor's fault; if so, punishment is necessary to balance the normative damage that occurred. The system pursues this aim by using the code of guilty/non-guilty and declaring a negation of the validity of the norm as an assault. But it also does more. The system's operations within the mechanism of placing blame reveal not only if there is any damage, but also how serious that damage is. If the system works in an ideal manner, the punishment is perfectly in line with the need for stabilization. *Under-punishing* would lead to insufficient stabilization, and the norm would continue to be at risk. *Over-punishing* would not only be an exaggerated mobilization of the offender (and therefore difficult to justify), but also sociologically unnecessary, potentially destabilizing the social system in the long run. Therefore, a social system will always try to optimize its operation and functioning.

Strict liability is clearly a deviation from this *ideal manner of operation*. While the highly unlikely *absolute liability* is indifferent to the basic code of guilty/non-guilty and therefore unresponsive to the question of whether a norm has been questioned, other cases include areas where the construction does not resemble a normative destabilization. As will be analyzed below, not all cases termed "strict liability" fulfill the definition and deserve the label. Three main categories of strict liability are defined below; that is, three ways in which personal responsibility for normative damage can be *misreflected* by the legal system. *First*, there are cases in which the threat of

Figure 1.



punishment does not fully reflect the destabilizing *message* communicated by the act in question. In a simplified manner, this category contains several types of *strictness regarding the act*. This is, as we will see, the category to which most strict liability offenses belong. This category and its sub-categories are, therefore, outlined first. The *second* category does not consider such strictness with respect to the substance of the destabilizing message. In such cases, the attribution to the actor of the destabilization is affected because this imputation does not adequately reflect personal fault regarding the questioning of the norm. These cases are strict with respect to the imputation of the act to the actor him/herself. They contain a *strictness regarding the personal fault* in a narrower sense, and address questions that have been labeled elements of personality and competence. The *third* category, *strictness regarding the procedure*, includes cases in which the existing system's procedural operations do not reflect the need for appropriate stabilization. In this category, the procedural settings foreseen interfere with the ideal manner of placing blame according to the normative damage caused, due to personal responsibility. This third category is often neglected, but contains a substantial variety of potentially dysfunctional constructions and is therefore included in the following discussion.

As Figure 1 points out, this categorization is based on the established functional mechanism of placing blame, and key claims regarding the principle of culpability. Although other arrangements are within the realm of possibility, a functional assessment of strict liability always requires

determining which element of the blame-placing process is concerned, and what component of the principle of culpability is potentially at risk of remaining unrealized. With this in mind, the specific type of deviation from the ideal manner of operation can be identified, and the offense functionally categorized.

B. Strict Liability Regarding the Act

1. Essence of the Category

In the process of placing blame, the *message element* is highly relevant because it determines if the originator's communication is qualified to destabilize the norm. In criminal law, the topic of *mens rea* is mainly concerned with this task of separating cases in which a questioning of the validity of the norm has or has not been expressed. As emphasized above, the simple statement that an act (i.e., a disappointment) has taken place is not sufficient for a destabilization to occur. Rather, the act must be accompanied by a *guilty mind*. Consequently, strict liability regarding this element involves cases in which there is a certain indifference toward these conditions. Usually, the offender is only punished according to the amount of normative destabilization they have caused by the message sent with their wrongful act. If an offender is punished for more than that, the construction is strict with regard to the act itself. As a result, there is an imbalance between the normative damage caused and punishment meted out, which reflects a deviation from the principle of culpability.

Strict liability with regard to the *mens rea* requirement is the most widely discussed variety in the practice of law. This is no coincidence. Determination of the actor's mental state is a nuanced process, and rarely is the answer binary. In most cases, we will see that there has been a destabilization of the normative expectation due to the message identified. It is significantly more difficult to determine the respective *amount* of destabilization and assess how this is adequately reflected in the punishment. Conclusions to this end can differ widely among scholars. For example, a topic that is often a point of disagreement is the relevance of *moral luck*.[55]

55. On this topic, *see* Simons, *supra* note 17, at 1105–20; Brown, *supra* note 4, at 128–29; Jeremy Horder, *A Critique of the Correspondence Principle in Criminal Law*, 1995 CRIM. L. REV. 759, 763; THOMAS NAGEL, MORTAL QUESTIONS 24 ff. (1979); BERNARD WILLIAMS, MORAL LUCK. PHILOSOPHICAL PAPERS 1973–1980, 20 ff. (1981).

2. Absolute Liability

Absolute liability serves as a starting point because it is probably the ideal type within this category. Sometimes, *absolute liability* refers to cases in which no *mens rea* is required to be proven at all.[56] However, liability can only be called "absolute" if all *fault* elements (including defenses) are irrelevant, rather than solely in situations in which *mens rea* need not be proven.[57] Only then is a liability considered absolute. It is often stated that there are no cases of absolute liability in living law.[58] There are good grounds for this. Cases of a *liability without any fault*, where personal responsibility does not matter at all, are most likely non-existent because they would not destabilize any normative expectation. Punishment without blame would be completely without purpose and interfere with the social system's basic functioning.

Thus, it is difficult to find examples that fall into this category. It is sometimes said that speeding is an absolute liability act because in certain situations the fact of driving above the limit alone leads to punishment, independent of *mens rea* regarding the speeding or any possible justifications.[59] In fact, if such an example did not actually leave any room for defense and not even negligence need be proven, it would instead be an absolute liability condition. In reality, examples of this type are often instances of strict liability regarding the procedure—in particular, the allocation of the burden of proof. However, if there is actually no proven form of subjective offense, the punishment will not adequately reflect the normative destabilization. Someone driving above the speed limit to save the life of another person, to give a dramatic example, does not question the validity of the norm at all. Someone polluting a river because they have a gun pointed at their head does not only not act negligently, but probably

56. Green, *supra* note 11, at 3. The same distinction is also made by other authors; *see, e.g.*, Simons, *supra* note 17, at 1081 (who calls such cases "pure strict liability"); Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 280 (1994).

57. KEATING ET AL., *supra* note 2, at 236; JEFFERSON, *supra* note 3, at 124; ASHWORTH & HORDER, *supra* note 2, at 161.

58. GROSS, *supra* note 13, at 343; Duff, *Strict Liability*, *supra* note 11, at 125; DUFF, ANSWERING FOR CRIME, *supra* note 11, at 232.

59. Johannes Keiler, *Actus Reus and Mens Rea: The Elements of Crime and the Framework of Criminal Liability*, *in* COMPARATIVE CONCEPTS OF CRIMINAL LAW 57, 61 (Johannes Keiler & David Roef eds., 2d ed. 2016).

very consciously does not want to communicate a negation of the norm. These cases are in great part fictional because a system completely indifferent to proving both *mens rea* and the contrary would not serve its function in society. Therefore, this train of thought serves mainly as a means of understanding the spirit of the category. Most such examples are more likely specimens of other sub-categories. This does not mean that they are not strict. However, they are not absolute.

3. Strict Liability Regarding the Principle of Correspondence

The criminal law system developed certain manners of operation to fulfill its function and determine responsibility accordingly. We often call these recurring manners of operation "principles" because they are supposed to guarantee adherence to certain standards when placing blame. One prominently discussed principle is the *principle of correspondence*. This principle asks for a complete coincidence of *actus reus* and *mens rea*.[60] This means that subjective elements must be present for every objective element. Limitations of this principle are classic examples of strict liability.[61] The correspondence principle asks for an examination of the mental state (or its absence, in cases of negligence) with regard to every material element of the *actus reus*.[62] Only a full correspondence between the two sides of the offense allows for a conviction.[63] The validity of this principle, however, is not undisputed.[64] Classic examples include *felony murder* and *misdemeanor manslaughter* rules where offenders are punished for unintended outcomes for which *mens rea* need not be proven. These cases are commonly called

60. *See generally*, ASHWORTH & HORDER, *supra* note 2, at 75 and 156–57; Andrew Ashworth, *A Change of Normative Position: Determining the Contours of Culpability in Criminal Law*, 11 NEW CRIM. L. REV. 232 (2008) [hereinafter Ashworth, *A Change of Normative Position*].

61. *See* Roberts, *supra* note 14, at 151–52; A.P. SIMESTER, J.R. SPENCER, G.R. SULLIVAN, & G.J. VIRGO, SIMESTER AND SULLIVAN'S CRIMINAL LAW: THEORY AND DOCTRINE 196 (5th ed. 2013).

62. Simons, *supra* note 17, at 1087.

63. *See* DUFF, ANSWERING FOR CRIME, *supra* note 11, at 230; Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407, 412 (2008) [hereinafter Ashworth, *Conceptions of Overcriminalization*]; Ashworth, *A Change of Normative Position*, *supra* note 60, at 236; ASHWORTH & HORDER, *supra* note 2, at 75.

64. *Cf. e.g.*, the debate in Horder, *supra* note 55, at 759 ff.; Barry, *supra* note 51, at 195 ff.; Jeremy Horder, *Questioning the Correspondence Principle—A Reply*, 1999 CRIM. L. REV. 206.

offenses of *constructive liability* because they impose liability for greater harm than what the defendant intended or knowingly risked.[65]

According to Kenneth Simons, this "atomic" evaluation of responsibility fails to capture the nuances of moral judgment.[66] Indeed, an atomic analysis alone is likely to be unhelpful in this debate, but examining the essence of strict liability might be. An offender whose intent is to commit robbery shows disrespect for the norm that people should not be robbed. Their intent changes the *normative significance* of the act.[67] Therefore, they would usually be punished for successfully questioning that norm. If the additional outcome of the crime is the unintended death of the victim, the perpetrator still intentionally questioned the robbery norm. Furthermore, their lack of mindfulness regarding the victim's life could be seen as a questioning of the norm that lives must be protected and not recklessly endangered. However, they certainly did not question this norm to the same degree as someone guilty of first-degree murder. The amount of normative damage is, therefore, not independent from the ascribed state of mind. Most *felony murder rules* and related constructions do not pay any attention to this circumstance and, furthermore, often fail to reflect these differences when sentencing.[68] Therefore, the so-called *change in normative position* argument does not fully capture the essence of strict liability.[69] Neither does the Latin claim of *versari in re illicita*.[70] Of course, a felony murderer is

65. Ashworth, *Conceptions of Overcriminalization*, *supra* note 63, at 411.

66. Simons, *supra* note 17, at 1134.

67. Horder, *supra* note 55, at 762.

68. For a discussion of these offenses, *see e.g.*, Simons, *supra* note 17, at 1077; Kevin Cole, *Killings during Crime: Toward a Discriminating Theory of Strict Liability*, 27 AM. CRIM. L. REV. 73, 74 (1990); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm under the Code and in the Common Law*, 19 RUTGERS L.J. 725, 764 ff. (1998). Because of the ongoing scholarly critique of this doctrine, the felony murder rule was abolished in England with the Homicide Act in 1957.

69. This rationale suggests moderate compliance with the correspondence principle, while allowing for some deviations, even though this is only true within certain restrictions. The offender can be held liable for further harm because they changed their normative position and passed over a relevant moral threshold. *See* John Gardner, *Rationality and the Rule of Law in Offences against the Person*, 53 CAMBRIDGE L.J. 502, 509 (1994); John Gardner, *On the General Part of the Criminal Law*, *in* PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE 205, 244 (R.A. Duff ed., 1998); *and critically*, Ashworth, *A Change of Normative Position*, *supra* note 60, at 232 ff.; Ashworth, *Conceptions of Overcriminalization*, *supra* note 63, at 412; ASHWORTH & HORDER, *supra* note 2, at 77.

70. ASHWORTH & HORDER, *supra* note 2, at 76.

not free of responsibility. The individual surely caused normative damage by crossing that line. This normative damage can also be explained by personal mistake. However, this offender did not cause the same normative damage as an intentional murderer (and not to the same degree). This must be considered in sentencing, as well as in any related social stigmatization. Apart from that, it does not seem functional or necessary to neglect the mental state of the offender with regard to the outcome. Therefore, personal responsibility with regard to both desired and undesired outcomes should be considered and should have an impact on sentencing, as it does in other legal orders[71] such as in so-called *intent and recklessness combinations*.[72]

The principle of correspondence matters when evaluating whether an offender's communication rises to normative destabilization. Defined offenses claim to protect a certain normative expectation. Offenders now are responsible for the disappointment of this particular expectation. The catalogue of offenses relies on this fact. We do not place blame randomly for bad character or actions in general. We place blame to guarantee the ongoing validity of a specific norm. *Constructive liability* often fails to be specific about that fact, and therefore is *strict*. This does not mean that the result cannot qualify as damage, but rather that these constructions are strict because they fail to reflect the exact responsibility for a certain damage and regularly lead to over-punishment.[73] *Versari in re illicita* is, therefore, dysfunctional. A wrongdoer should not be casually called to account for any result produced, but rather only for the specific normative destabilization they caused.[74] The latter is not indifferent with regard to *mens rea* and its correspondence with the *actus reus*.

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71. In the legal orders of German-speaking countries, these offenses are called "offenses qualified by result" (*erfolgsqualifizierte Delikte*), such as the offense of assault that causes the death of a person (*Körperverletzung mit Todesfolge*, *see* § 227 I of the German Penal Code). Therefore, a more severe outcome can (but does not automatically have to) qualify for harsher sentencing. However, recklessness must at least be present with regards to the outcome. The result only *qualifies* in this sense, and does not serve as a basis for the conviction itself. Furthermore, these offenses are named and labelled differently than, for example, intentional murder. *See* on these constructions Spencer & Pedain, *supra* note 11, at 242.

72. *Id.* at 242.

73. They can furthermore result in a *mislabeling* of the conduct, leading to an unjustified stigmatization; Ashworth, *A Change of Normative Position*, *supra* note 60, at 241–42, *and generally*, on the principle of fair labelling, ASHWORTH & HORDER, *supra* note 2, at 77–78.

74. Of course, the result can matter for the normative damage at risk. It is no coincidence that, *e.g.*, the US-American sentencing guidelines provide for differences depending

4. Strict Liability Regarding Mistakes of Fact

A further variety of this mismatch in correspondence is an indifference or ignorance of mistakes of fact regarding elements of the *actus reus*. Reasonable mistakes regarding a material element generally exclude the existence of intention or recklessness. If an actor is not aware of the facts, they cannot muster the intent to question the norm.[75] Disappointment of the norm can be explained by a simple mistake, and thus no damage occurs that would threaten the ongoing existence of the normative expectation. Certain strict liability offenses, however, define some (even reasonable) mistakes of fact as irrelevant for personal responsibility. It is questionable whether these offense constructions appropriately reflect the offender's fault. Common sense argues that in most cases the convicted person is not completely innocent, but that alone does not justify *every* punishment.

Most cases of this kind of strict liability belong to the category of offenses that somehow affect minors, as in the most obvious example of *statutory rape*. In this case, an offender who had intercourse with a minor cannot excuse themselves by saying they were mistaken about the age. *Mens rea* regarding the age element is irrelevant. Such cases and related legislation or jurisdiction are not outlined here in detail because they have already received sufficient attention.[76] If we set the moral charge of this discussion aside and focus solely on the construction's meaning to the principle of culpability, the outcome is clearer. An actor who knowingly

on the severity of the outcome. Among assaults, the sentencing is proportionate to the severity of the injury; drunk driving is punished more harshly if the ride results in harm to persons, etc. *See* Brown, *supra* note 4, at 128–29; *U.S. Sentencing Guidelines Manual* § 2A2.2(b)(3) and § 2D2.3 (2008); United States v. Dean, 129 S. Ct. 1849, 1855 (2009). These cases can but do not have to lead to over-punishment. It is relevant if the (additional) normative damage caused can reasonably be attributed to the offender's mistake. However, if *mens rea* does not matter at all, such as if the outcome could neither have been prevented nor foreseen, the sentencing does not adequately reflect the need for re-stabilization.

75. Still, only *reasonable* mistakes are accepted by the addressee. If the actor has recklessly mistaken the fact, their behavior counts as carelessness regarding the validity of the norm and will not (or not fully) serve as an excuse, even though the actor might in this case be less at fault than someone questioning the norm who is completely aware of all the facts.

76. *See, e.g.*, P.R. Glazebrook, *How Old Did You Think She Was?*, 60 CAMBRIDGE L.J. 26, 26 (2001); Sayre, *supra* note 8, at 74; Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 110–11 (1965); Husak, *Varieties of Strict Liability*, *supra* note 5, at 206; Hall, *supra* note 10, at 995; Simons, *supra* note 17, at 1081–82.

and willingly has intercourse with a 10-year-old obviously and effectively questions the norm set by the community that this behavior is neither expected nor tolerated. Of course, the actor cannot reasonably argue that they did not know the victim's age or at the very least were not recklessness regarding this material element. Even if sexual abuse of minors were an offense requiring *mens rea* (or at least recklessness) for every element, it is not evident why in these cases proof beyond a reasonable doubt of this state of mind should regularly cause so much trouble. The argument for this offense with regard to very young children does not seem promising as a justification for the strictness of the construction. It is simply not necessary due to procedural requirements and the need to stabilize the norm. However, it gets more complicated the more reasonable a mistake of age becomes.[77]

Let us now examine the other extreme. A 19-year-old who meets a 15-year-old at a party might reasonably be mistaken regarding his or her age. According to most statutory offense rules in the United States, the 19-year-old could be convicted as a statutory rapist. Let us set aside for now if this labelling is even close to accurate for this act. If this 19-year-old supposed offender asked the minor for an ID and the victim showed the 19-year-old a fake one, it is highly questionable whether they were questioning (and therefore destabilizing) the normative expectation that there should be no intercourse with minors under the age of consent. A reasonable mistake with regard to this element is not just irrelevant for the destabilizing effect on the norm. Ignorance regarding the mistake results in a misrepresentation of the normative damage, or to put it more clearly, there may not have been damage in the first place that demands and justifies punishment. These cases are ones of strictness regarding the judgement of the act and its communicative meaning.

There are other cases of ignorance toward mistakes of fact that are not any less strict, though they are rarely discussed with the same passionate arguments. Certain so-called possession offenses exclude the acceptance of mistakes of fact, especially in the field of drug prevention.[78] The same

77. This may be why the Model Penal Code differentiates among the age categories and only suggests strict liability with regards to children below the age of 10. For older children, a reasonable mistake is acceptable. It is unclear if this logic can be followed or if this differentiation is really necessary. Are mistakes regarding children below this age really ever possible to be proven *reasonable*?

78. *See generally* the discussion in ALLAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 90–91 (2d ed. 2001).

rationale applies. If an actor has mistaken elements of the *actus reus* (as, for example, if the substance acquired was an illegal drug[79]) due to understandable and excusable reasons, they did not question the norm in the way an intentional wrongdoer would have. The disappointment can be explained in other ways, and no (or a lesser) punishment is necessary for stabilization. The punishment is not a precise answer to a normative destabilization caused by the offender's fault. Therefore, every conviction that ignores a reasonable mistake is strict and does not comply with the principle of culpability, a state that usually leads to unnecessary overpunishment.

5. Strict Liability Regarding the Principle of Concurrence

Another principle that can be affected by strict liability offenses is the *principle of concurrence* or *contemporaneity*, according to which *actus reus* and *mens rea* must not only correspond but also be present at the same time.[80] This fault-act simultaneity is generally regarded as an important aspect of the principle of culpability.[81] However, its concrete relevance and meaning often remain unclear, and the principle has frequently been abandoned.[82] The question that commonly appears in this field regards the relevance of *prior fault* for blameworthiness, most intensely discussed in context with acts committed when one is voluntarily intoxicated.[83]

In Common Law countries, voluntary intoxication is usually not accepted as a defense and already counts as reckless conduct causing the offense in question.[84] In legal orders of German-speaking countries, where the principle of concurrence is upheld more strictly, constructions such as the *actio libera in causa* or specific offenses of intoxication penalizing the

79. *See, e.g.*, for England, Warner v. Metropolitan Police Commissioner, 2 AC 256 (1969).

80. SIMESTER ET AL., *supra* note 61, at 196; ASHWORTH & HORDER, *supra* note 2, at 80 and 157 ff.

81. *See, e.g.*, CHRISTINA JUHÁSZ, DIE STRAFRECHTLICHE SCHULDFÄHIGKEIT 76–77 [The Criminal Responsibility] (2013).

82. ASHWORTH & HORDER, *supra* note 2, at 157.

83. *Id.* at 80.

84. *See* Spencer & Pedain, *supra* note 11, at 244; Paul H. Robinson, *United States*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 563, 586 (Kevin J. Heller & Markus D. Dubber eds., 2011) [hereinafter Robinson, *United States*]; RUSSELL-BROWN & DAVIS, *supra* note 53, at 254.

intoxication itself are applied to deal with this problem.[85] These constructions became necessary because intoxication does generally exclude blameworthiness (due to a lack of situational competence), and the principle of culpability does not allow conviction of an offender who is not accountable at the time of the act. Constructions of *actio libera in causa* avoid this problem by stating that if someone caused their state of non-blameworthiness in a self-inflicted and voluntarily manner, they cannot rely on this defense, especially if they have already intended to commit the offense or must have foreseen the possibility of this outcome and recklessly accepted the inherent risk.[86] In cases where there was no recklessness or intention with regard to the latter before the process of intoxication, the principle of culpability does not allow for a conviction because there was no *mens rea* corresponding to the offense itself. In these cases, the offender can be punished only for the intoxication, and its normative significance is qualified by the harmful outcome. Therefore, an independent offense must be created, bringing arguments of social protection in line with the principle of culpability and guaranteeing a fair labelling of such offenders. Similar suggestions have been made and discussed in English literature, as well.[87] However, the doctrine of prior fault remains comparatively strict in US-American and Commonwealth jurisdictions, involving a wider tolerance regarding conflicts with the principle of concurrence.[88]

In fact, it is questionable how much the principle of simultaneity affects the process of normative destabilization. As a starting point, it can be stated that an offense committed in a state of incompetence has no destabilizing effect. The act can be explained by this state of unsound mind, and the disappointment of the expectation does not have to be explained by the actor's personal responsibility, as was discussed above with regard to the *competence element*. However, in cases where this state of mind is caused

85. *Cf. e.g.*, § 323a of the German Penal Code.

86. Following the rationale already offered in the title of Robinson's essay, *see* Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985); *cf.* ASHWORTH & HORDER, *supra* note 2, at 80.

87. ASHWORTH & HORDER, *supra* note 2, at 160 and 202.

88. One of the possible explanations for these differences is that in continental Europe the ideal of a purely *act-oriented* criminal law is upheld more strongly following the basic assumption that only the (guilty) act is to be punished, and not the actor, their general character, or lifestyle. Therefore, ideas of prior fault are rejected as often as possible.

by prior fault, this excuse does not work. We cannot process the normative disappointment by highlighting external circumstances. We call the offender "liable" if they have intentionally or recklessly caused the result. We furthermore do not call this liability "strict" because the punishment reflects the normative destabilization proportionately, due to the offender's mistake.[89] However, it is more complicated to assess cases where the offender had no *mens rea* with regard to the offense before the intoxication. Arguing that every intoxication counts as recklessness with regard to every offense is not just doubtful, it would make any intoxicant (e.g., every beer) a justification for punishment. Therefore, a general denial of the defense of intoxication and, consequently, ignoring any *mens rea* regarding the outcome can count as a variety of *strictness* with regard to the destabilization caused by the act. Prior fault and relaxation of the principle of concurrence are not generally incompatible with the principle of culpability, but some sorts are, especially in situations where there is not really a fault corresponding to the *actus reus* being punished. An intentional assault, as compared to an assault committed while drunk, does not resemble the same questioning of the validity of the norm, especially in cases where at the point of commencing drinking, the bad act was neither planned nor foreseen. This fact must be reflected not only in the sentencing, but also in the labelling of the offense. If it is not, it is strict liability.

6. Strict Liability Regarding Justifications

A further sub-category of strict liability regarding the act itself is comprised of offenses that deny or restrict the defendant's ability to justify their behavior.[90] An act that runs contrary to a normative expectation usually asks for corresponding stabilization, but a justified offense does not destabilize the norm. If the expectation is not fulfilled because, for example, the actor had no other choice or was trying to preserve a higher good, then the individual does not question the norm and does not even act contrary to the expectations set by the social order. A person who commits trespass in order to save a human being from a burning house, does not make a statement about the prohibition of trespassing. The expectation is upheld referring to the justification, securing the normative order without a need

89. *Cf.* Husak, *Varieties of Strict Liability*, *supra* note 5, at 219.
90. *Id.* at 207–08.

for punishment. Therefore, the criminal law system normally offers justifying defenses such as necessity, self-defense, and consent. Offenses not allowing for *any* justification are unknown, as Husak has stated. However, he identified some justifications that are not allowed for every offense and therefore can result in a strict(er) liability.[91] In cases in which these defenses are denied or restricted, punishment frequently indeed does not reflect the normative destabilization. It may not only be disproportionate, but also unjustified. The liability is strict because denying reasonable justification results in (or has the potential to result in) overpunishment.

C. Strict Liability Regarding Personal Fault

1. Essence of the Category

As we have seen, the elements *personality* and *competence* are highly relevant factors within the social mechanism of placing blame. Legal personality includes basic qualification of the originator of the act as an agent of normative destabilization. One must ask if the sender of the communication is generally capable of successfully questioning the norm, and therefore is a full member of the normative communication. If an originator does not possess this basic competence, the offense does not destabilize the norm because the actor is not a suitable addressee in the first place. The most obvious examples of this concept include infancy and the more pronounced levels of insanity; questions regarding this element may also emerge in the field of corporate liability. Furthermore, the qualification of an originator can be related to their awareness and knowledge of the law. As with the previous category, it is progressively more complicated to draw a clear line between strictness related to general personality and concrete competence. Therefore, these elements are considered together, with the understanding that there is a difference, but most of the sub-categories presented concern both elements.

As discussed above, only a *person* considered to have the competence to act differently in the moment of the act and the capacity to prevent the normative disappointment allows for explaining the disappointment by personal fault. If this attribution is not possible because the actor is incompetent, no destabilization arises and the social system does not require

91. *Id.* at 208–09.

punishment. To repeat this important point: punishment is only necessary if the norm would otherwise be destabilized. This destabilization is only menacing if non-compliance with the normative expectation must be explained by the actor's fault, which is regarded as a questioning of the validity of the norm. The punishment, however, must reflect these elements and attribution practices. Punishment in cases where the disappointment cannot be imputed to the offender (due to lack of personality or competence), as well as punishment in ignorance of a diminution of the extent of the destabilization, do not reflect this process accurately and are, hence, strict.

In this field, there are a number of challenges that reflect the high variability of social imputation procedures. What society regards as a plausible excuse, sufficient capacity, or adequate control can vary substantially over time and among different cultures. There is no such thing as a prelegal standard that can be applied. Responsibility is socially constructed. This becomes especially apparent within this particular category. Strictness regarding this element of personal fault involves several different aspects. As will be explained in more detail in the following sections, we deal with several potential excuses, questions regarding holding someone accountable for the acts of someone else, and topics of general accountability and personhood.

2. Strict Liability Regarding Excuses

Compared to the justifications addressed above, excuse defenses involve scenarios in which the offender did not comply with the law and their act had the potential to communicate a questioning of the norm, but where this communication can (fully or partly) be processed in ways other than by explaining it with personal blame. If there is an adequate excuse at hand, the social system struggles to attribute the normative breach to the actor because they are not regarded as having been capable of acting differently, or if they could have acted differently, we have some sympathy for why they did not. Excuses, therefore, portray offenses "in a more favorable light."[92] Normally, this is where the legal system offers excuse defenses, such as by considering entrapment, provocation, intoxication, or

92. Douglas Husak, Overcriminalization. The Limits of the Criminal Law 62 (2008).

diminished capacity. Excuses can also be distinguished from general exemptions in cases in which the lack of capacity leads to a denial of general personhood. Pertinent here is the categorization and underlying argument introduced by different authors not to distinguish only between justifications and excuses.[93] Analogously, exemptions refer to the *personality element*, whereas excuses refer to the *competence element* and justifications to the *message element* within the functionalism of placing blame. The possibility of strictness in context with exemptions will be explored below in a discussion of general accountability.

As outlined in the context of intoxication and prior fault, denying excuse defenses can in certain cases result in strict liability.[94] The liability is strict because the punishment does not appropriately reflect the procedure of placing blame. An offender acting with diminished capacity does not have the same potential to destabilize the norm as does a fully capable offender. If this is not mirrored in the legal system, the liability is strict and can lead to unnecessary and unjustified (over-)punishment. There is no general rule by which excuses are offered in strict liability offenses. Frequently, excuses are denied for these offenses because they are indifferent regarding *mens rea*, and therefore, it would be inconsistent to allow excuses.[95] However, denying defenses makes these strict liability offenses even stricter. Other offenses may be strict only because of the denial of a defense, as in refusing the defense of consent in certain sexual offenses.[96] Again, these examples do not lead to the punishment of a completely blameless person. Rather, they result in strict punishment because they do not appropriately reflect the normative damage.

93. *See, e.g.*, R. Jay Wallace, Responsibility and the Moral Sentiments (1994); R.A. Duff, *Law, Language and Community: Some Preconditions of Criminal Liability*, 18 Oxford J. Legal Stud. 189 (1998); John Gardner, *Justifications and Reasons*, *in* Harm and Culpability (A.P. Simester & A.T.H. Smith eds., 1996); Jeremy Horder, Excusing Crime 9–10 (2004); Tadros, *supra* note 50, at 115 ff. and 124 ff.

94. *Cf. also* Husak, *Varieties of Strict Liability*, *supra* note 5, at 210.

95. *See, e.g.*, Keating et al., *supra* note 2, at 237; Bob Sullivan, *Avoiding Criminal Liability and Excessive Punishment for Persons Who Lack Culpability: What Can and Should Be Done?*, *in* General Defences in Criminal Law: Domestic and Comparative Perspectives 25, 31 (Alan Reed & Michael Bohlander eds., 2015). *See for England, e.g.*, DPP v. Harper, 1 W.L.R. 1406 (1997), where the insanity defense was denied because it is not permitted if no proof of *mens rea* was required.

96. *See* Russell-Brown & Davis, *supra* note 53, at 68.

3. Strict Liability Regarding Mistakes of Law

Ignoratio juris non excusat is a basic rule in Common Law: lack of knowledge of the law does not excuse its violation.[97] This declaration is based on practical considerations, evidential difficulties, and a mostly fictional presumption that a citizen has to know the law.[98] This presumption has even been upheld in cases in which it was reasonably impossible for the accused to know the law.[99] Defenses of such mistakes are only accepted in very rare cases in Common Law legal orders, which are relatively strict regarding this subject.[100] It is obvious, however, that knowledge and awareness of the wrongfulness of an act can (and probably do, in most cases) have an impact on the amount of normative destabilization. If an offender intentionally and knowingly breaks a norm understanding not just all the relevant facts, but also that this act is not regarded as lawful by the community, the amount of culpability is significantly higher than if an offender acted not knowing that his act was regarded as wrongful. However, not all scenarios are as clear on this point. If someone simply did not care and was ignorant about the applicable norm, they are not necessarily less blameworthy. Yet if they did care but could not know that they acted wrongfully, that would be a relevant factor in determining the destabilization of the norm. This might be especially relevant in the field of regulatory law concerning specialized fields, where the applicable law can be difficult to understand. In summary, knowledge of the

97. Roberts, *supra* note 14, at 151; Robinson, *United States*, *supra* note 84, at 584.

98. Matthew Lippman, Contemporary Criminal Law. Concepts, Cases, and Controversies 293 (3d ed. 2013), pointing out that the expectation that individuals know the law "may have made sense in early England," while critics would contend that these days people cannot "realistically be expected to comprehend the vast number of laws that characterize modern society."

99. Allen, *supra* note 14, at 99. The Model Penal Code (§ 2.04(3)) suggests only two exemptions: a defense shall be available to a person whose mistake results from the fact that the law was not made sufficiently available, or if the accused relied on an official misstatement. The doctrine is different depending on the jurisdiction. A few do allow a more general defense for reasonable mistakes of law. *See* Robinson, *United States*, *supra* note 84, at 584; Lippman, *supra* note 98, at 294.

100. In German-speaking countries, mistakes of law do exclude culpability if they are inevitable. Evitable mistakes of law cannot exclude but do reduce culpability, which can result in less severe punishment. Therefore, the threshold is generally lower. *See, e.g.*, § 17 of the German Penal Code and Michael Bohlander, Principles of German Criminal Law 119 (2009).

wrongfulness of an act has a potential impact on the degree of personal fault and, as a result, on the degree of possible normative damage. If these nuances are not adequately reflected in liability constructions and sentencing, it can lead to strict responsibility.

4. Vicarious Liability

Vicarious liability, also called *respondeat superior*, is often mentioned in the same breath as strict liability.[101] As a special construction of liability, it allows for the objective attribution of one's actions to another person, as if the latter had conducted the act him or herself.[102] Mainly applied in the field of hierarchic division of labor, it allows one, for example, to call a superior to account for the acts of their subordinates. Furthermore, it often serves as a basis for corporate liability, although it remains unclear if this is truly a variety of strict liability.[103] It can be argued that even though the construction of vicarious liability is not necessarily a strict one, its regularly strict implementation frequently is.

We have seen that the process of placing blame consists of three elements. Within this attribution process, it is essential to hold an actor liable for their threat to the validity of the norm. It is not only a person committing an offense with their own hands who has the potential to disappoint a normative expectation. In doctrines of abetment and complicity in criminal law and in the entire field of corporate liability, the problematic nature of the imputation of actions is well known. In the doctrine of vicarious liability, one first assesses if the actor has fulfilled the elements of the offense. By attributing this destabilizing act to another person, however, one must hold the supervising position (or the company in charge) and their personal capacities and responsibilities liable for the destabilization. Only if this individual or entity's personal mistake offers a reasonable explanation for the destabilization can we reasonably place blame on the superior offender. If, for example, an officer did not accurately supervise or if the instructions given were faulty, no problem

101. On the parallels between these two doctrines, *see generally* L.H. Leigh, Strict and Vicarious Liability (1982).

102. George P. Fletcher, Basic Concepts of Criminal Law 190 (1998); David Roef, *Corporate Criminal Liability*, *in* Comparative Concepts of Criminal Law 281, 286 (Johannes Keiler & David Roef eds., 2d ed. 2016).

103. Husak, *Varieties of Strict Liability*, *supra* note 5, at 213–17.

occurs. The officer's personal mistake allows the act to be attributed to incapacity and serves as a justification for this imputation. In cases in which the superior has at least acted negligently, the punishment must represent their personal responsibility for the normative damage. The liability is not strict.

Consequently, vicarious liability does not automatically include strict liability, but sometimes it does. One of the leading US-American cases is *United States v. Dotterweich*.[104] A company's director was held criminally liable for shipping counterfeit products, even though he did not know anything about this shipment. The argument was that despite his innocence, he had a direct relationship with the damage occurred. Other examples are the strict liability of a vehicle owner, liquor license holder, or landlord.[105] Among these examples, there is no common detail wherein the person called to account has a particular relationship to the offense, or their position potentially allows them to prevent the act. Rather, the common element is a complete indifference to the question of whether they actually could prevent the offense (i.e., indifference regarding the actor's personal fault and responsibility for the normative damage). A punishment relying on this kind of vicarious liability, where no attention is paid to the question of whether the destabilization can be explained at least by an omission on the part of the competent offender, is strict regarding the capacity element.[106]

5. Strict Liability Regarding General Accountability

The personality element is essential for placing blame. Only a qualified agent is a capable addressee of normative expectations. Therefore, at least generally speaking, only a qualified agent is ever held responsible. If someone who is denied this status disappoints an expectation, it is handled in a way comparable to a cognitive disappointment, and explained in ways other than by the actor's mistake. In criminal law, we usually do not regard children below a certain age as sufficiently qualified agents, even though perceptions of childhood vary among different legal orders and have shifted

104. United States v. Dotterweich, 320 U.S. 277 (1943).

105. *See, e.g.*, the English Road Traffic Offenders Act 1988, § 64 (5). *Also see on this topic* Roef, *supra* note 102, at 286.

106. For an overview of the current critics of this doctrine, *see* JEFFERSON, *supra* note 3, at 201 ff., or the arguments in Greenberg & Brotman, *supra* note 8, at 85–86.

across the course of history.[107] Higher levels of insanity can also lead to a denial of this kind. Compared to the capacity to prevent the offense in a specific situation, or to have the chance to act otherwise in a particular moment, this condition is, respectively, more fundamental and more persistent. We generally communicate differently with children and people with mental disorders because we have different expectations. This fact finds its counterpart in the suspension of liability.

The burden of proof in the insanity defense is usually placed on the defendant, and excluded or diminished responsibility is only consequential in courtrooms if it is brought forward by the defendant.[108] Insanity is usually categorized as an excuse defense,[109] but regarded as an exemption in tripartite schemes.[110] Indeed, insanity does affect the general capacity and, therefore, the personality element. It is difficult to find explicit examples of strictness regarding this general imputability, because what we mark as a capable actor and therefore a sufficiently qualified addressee of norms can vary significantly, as does capacity in general. Perceptions of this kind depend on scientific findings regarding mental disorders or free will in general. Therefore, new neuroscientific findings may have a direct impact on who we regard as sufficiently competent. In children, it depends on the role they play in society and on how they are treated in a broader context. However, strictness of this variety is definitely conceivable.

Infancy is generally accepted as an exemption even to strict liability offenses where no *mens rea* has to be proven.[111] However, in certain cases, very low age requirements can affect the appropriateness of liability. A 10-year-old breaching a norm will very likely destabilize that norm to a lesser degree than an adult would, because the act can at least partially be explained by incapacity. Legal orders usually have special measures to reflect

107. *See on this topic, e.g.*, TREVOR BUCK, INTERNATIONAL CHILD LAW (3d ed. 2014); DON CIPRIANI, CHILDREN'S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY 97 ff. (2009), with an overview of the minimum age requirements for criminal responsibility in different legal orders; e.g., Sweden and Norway (15), and Germany, Austria, and Italy (14) have comparably high age requirements, whereas England and Wales (10) and most US states (generally between 7 and 10) have relatively low age requirements.

108. ASHWORTH & HORDER, *supra* note 2, at 142, who call it a "paradox" that the consequences of a successful defense may be other measures of social protection.

109. RUSSELL-BROWN & DAVIS, *supra* note 53, at 220.

110. TADROS, *supra* note 50, at 116.

111. JEFFERSON, *supra* note 3, at 124.

this fact. If they didn't, it would be a kind of strict liability regarding the personality element. Questioning insanity as a defense, something that is done from time to time, might be of more practical relevance.[112] Ignoring mental disorders and diminished capacity can also result in an unnecessary over-punishment, due to a non-reflection of their relevance for attribution capacity on the one hand, and responsibility in social interactions on the other.

6. Strict Liability Regarding Legal Personhood

Cases that in a broad sense affect legal personhood fall into the same category as those regarding general accountability. Indeed, the relevance of this sub-category to compliance with the principle of culpability has not gained the same attention in English-speaking countries as it has elsewhere, mainly because corporate liability was established earlier.[113] Still, it remains a contested doctrine.[114] Corporate liability does not automatically conflict with the principle of culpability or the mechanisms of placing blame described above. Human beings are not the only addressees of normative expectations. Therefore, not only human beings can disappoint them. As with vicarious liability, questions of causation and imputation processes among different executing actors are not a general barrier to the destabilization of norms. In this sense, punishment as an answer to questioning the norm can be adequate and necessary.

It is clear, however, that attributing liability to a corporation does in principle follow the same rationale as attributing it to a human offender. Therefore, most of the already described varieties of strictness can be found in the context of corporate liability as well, for example, if *mens rea* need not be proven for every material element, or if the acts are imputed to the company without paying any attention to negligence in supervision and control. These examples do not affect the personality element itself. As stated above, corporations can be participants in and addressees of normative communication. The doctrine of identification and original responsibility of corporations is not a strict liability doctrine as long as there is an act qualified for destabilization and a mistake to which the destabilization can

112. GROSS, *supra* note 13, at 343.

113. *See* Thomas Weigend, *Societas delinquere non potest? A German Perspective*, 6 J. INT. CRIMINAL JUSTICE 927, 928 (2008).

114. NORRIE, *supra* note 78, at 92.

reasonably be ascribed. Strictness, however, can be present if this procedure of attribution does not take place appropriately and if the punishment does not reflect the (legal) person's capacity. The corporation must, first of all, have the general competence to prevent the harm, due to its general structure. Not everything called a "corporation" automatically meets this criterion. Furthermore, and bringing about the most problems in practice, the offense must reasonably be attributed to a mistake of the company, which usually consists of a lack of organization or supervision. Automatically, attributing any destabilization to a company only because there is some context will not fulfill the standards of criminal responsibility. Therefore, punishment will not represent an adequate answer to the destabilization of a norm if the mechanisms and elements of blameworthiness are neglected in a strict liability offense.

Another question in this area of strict liability is the issue of double punishment. An offense committed by an employee within their own frame of responsibility might lead to a result where both the offender and company are called to account under certain (strict) constructions. This does not automatically have to lead to over-punishment, but it can have this effect if the company's responsibility does not represent normative disappointment. If the company's structure is sufficient to allow for the identification of the personal mistake leading to the offense, it might be—out of a demand for re-stabilization—sufficient (and more promising) to punish the offender. Punishing the company on top of that could be strict if there is no need for further stabilization.

D. Strict Liability Regarding the Procedure

1. Essence of the Category

The type of strictness can affect the substantive stages of the system's mechanisms for placing blame. As has been outlined for the other subcategories, restrictions to the principle of culpability can arise in diverse facets of this communicative social process. As a starting point, a liability is called "strict" if the outcome does not adequately reflect this process and its elements. Thus, it is strict regarding the determination of fault, and the punishment does not reflect the amount of normative damage that occurred. From another perspective, it is not only the material construction of the offense that can lead to such strictness; procedural provisions can lead to an insufficient reflection of the personal fault and therefore be strict.

These provisions do not necessarily lead to inadequate punishment, but they can. Thus, the construction is strict, but this may not be true for every conviction. Husak introduced this category as *strict procedural liability*.[115]

A number of examples of practical relevance are discussed in the following sections, though there may be other instances of this kind of strictness.[116] The first is the obvious variety of reverse onus clauses, a frequently discussed topic with regard not only to the presumption of innocence, but also, in a narrower sense, to the principle of culpability. The related topic of legal presumptions and relevance of the allocation of burdens to the procedural aspects of placing blame will then be addressed. As another variety of this kind of strict liability, strictness regarding the sentencing will be discussed in terms of cases in which strictness occurs at the sentencing stage. All of these examples have in common that they involve discrepancies with certain standards usually aimed at guaranteeing an accurate procedure to call someone to account.

2. Strict Liability Regarding Allocation of the Burden of Proof

The presumption of innocence is "one of the foundation pillars of any criminal justice system worthy of the name."[117] It is universally recognized and requires that the prosecution prove culpability to a high standard of certainty.[118] However, there are thousands of offenses in US-American and English law where the burden of proof is at least partially placed on the defendant.[119] Reverse onus clauses are a popular technique for US-American and English legislators to shift the burden of proof to the defendant regarding some elements that are often difficult to prove.[120] In such cases, the actor is generally held strictly responsible, but at least gets a chance to prove his or her innocence. This shifting of the burden of proof is generally regarded as a constraint of the presumption of innocence, but is also a strict liability with regard to the adequacy of the

115. Husak, *Varieties of Strict Liability*, *supra* note 5, at 199.

116. For example, lower standards of proof than *beyond a reasonable doubt*, as Husak pointed out, would be another sub-variety. *See id.* at 201.

117. MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL PROCEDURE 21 (2012).

118. ANDREW STUMER, THE PRESUMPTION of INNOCENCE xxxvii (2010).

119. Sullivan, *supra* note 95, at 25; ASHWORTH & HORDER, *supra* note 2, at 71–72; Ashworth & Blake, *supra* note 2, at 306.

120. For a critique of this development, see Roberts, *supra* note 14, at 153–54.

procedure to reflect the normative destabilization. This deviance from standard procedural requirements makes this type of liability a stricter one than others.

Within the same sub-category, constructions of legal presumptions are included if they are suited to changing the procedural burdens. In such cases, a presumption of *mens rea* mandatorily prevails as soon as some other specific circumstances are met.[121] Hence, the intent need not be proven, but only certain underlying factors. Of course, *mens rea* is always constructed and derived from other factors, but in some cases there is a strict legal presumption preventing judges from concluding otherwise. Legal presumptions may be regarded as a variety of reverse onus clauses, but they can go further. If the law prescribes, for example, that the possession of an object is sufficient for the conclusion that the defendant possessed the object willingly and knowingly, and this presumption is mandatory, procedural possibilities are restricted and less pronounced than a full presumption of innocence would require.[122] There are several degrees of procedural strictness, ranging from offenses where the prosecution must prove every element independently, to liabilities where the prosecution is exempt from almost every burden.[123] Therefore, the procedural setting can be more or less ideal for offering an adequate indication of the normative destabilization that occurred. These restrictions do not affect the mechanism of placing blame, but rather the mechanism of representing blame's relevant elements. Therefore, it is adequate to consider such constructions to be varieties of strict liability.

3. Strict Liability Regarding Sentencing

Husak pointed out that cases in which the sentencing does not reasonably reflect personal responsibility conflict with the principle of proportionality.[124] This has been discussed in the context of the principle of correspondence, such as when sentencing is oriented toward an unwanted or unforeseen outcome. However, this is not the only scenario where there is strictness regarding gradation. Probably the most obvious example are the so-called *three strikes laws*. Many US-American legal orders provide

121. This variety has already been discussed by Green, *supra* note 11, at 5–6.

122. STUMER, *supra* note 118, at 11.

123. *See* Duff, *Strict Liability*, *supra* note 11, at 132.

124. Husak, *Strict Liability, Justice and Proportionality*, *supra* note 17, at 93 ff.

a "three strikes and you're out" rule in their criminal law.[125] Such rules affect offenders who are convicted for the third time, when they are given 25 years of imprisonment, sometimes even more (often with no parole).[126] These third offenses regularly consist of simple drug or property crimes, where the usual sentencing would not even come close to this level of severity.[127] It may be that repeated offenses do more severely threaten the validity of norms, given that they can be seen as an increased questioning of the norm or a general indifference toward the embodied normative order.[128] However, these *three strikes laws* frequently—nearly always—result in an over-punishment not reflecting (and unconcerned with) personal responsibility for the normative damage that has occurred. Sentencing guidelines ignoring this aspect are strict. Although this example might be extreme, there are definitely other sentencing regulations that also provide strict and fixed penalty regimes. Such mandatory minimums do not allow courts or enforcement agencies to reinforce proportionality, and therefore can result in strictness regarding the sentencing.

E. Synthesis: The Dysfunctionality and (Il)Legitimacy of Strict Liability

1. Persistence of the Doctrine

The doctrine of strict liability has been criticized widely by scholars throughout history.[129] Although some authors have rejected the idea

125. *Cf.* the remarks of Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime?*, 29 HUMAN RIGHTS MAGAZINE 3, 3 (2002), about the emergence and wide spread of this doctrine. Furthermore, *see generally* Elsa Chen, *Three Strikes: Passage, Implementation, Evaluation, and Reform*, *in* CRIMINAL JUSTICE POLICY 261 (Stacy L. Mallicoat & Christine L. Gardiner eds., 2014); DAVID SHICHOR & DALE K. SECHREST (eds.), THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY (1996); FRANKLIN E. ZIMRING, GORDON HAWKINS, & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001).

126. *See, e.g.*, California Penal Code, § 667.

127. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 976 (2016) [hereinafter Kleinfeld, *Two Cultures of Punishment*].

128 *Id.* at 974–75.

129. *See, e.g.*, Michaels, *Constitutional Innocence*, *supra* note 11, at 831, with further references; Larkin, *supra* note 12, at 1079; Wasserstrom, *supra* note 13, at 731; Richard Singer, *The Resurgence of Mens Rea III—The Rise and Fall of Strict Criminal Liability*, 30 BOSTON COLL. L. REV. 337 (1989); ASHWORTH & HORDER, *supra* note 2, at 165; SIMESTER ET AL., *supra* note 61, at 192 ff.

generally, most have distinguished categories and considered some, at least sometimes, to be acceptable.[130] However, most agree that a conviction on the basis of a strict liability in a substantive sense is illegitimate, and principles of individual fairness should not be overridden by other considerations.[131] Another rationale for differentiating among cases is that strict liability offenses must be restricted to regulatory or public welfare offenses, and never tolerated in offenses involving higher penalties and greater stigmatization.[132] Others have rejected this proposition, claiming that regulatory offenses must be fully in line with the principle of culpability.[133]

This wide intolerance of the doctrine is no coincidence. In fact, most offenses we call "strict" inherently involve a deviation from the basic principles of criminal law, and furthermore conflict with the standard social mechanism of placing personal responsibility that is employed by this social system. However, the ongoing critique has not changed the fact that the doctrine still persists, and is spreading widely in a number of jurisdictions.[134] It is interesting that a doctrine not following the philosophical rationale of scholarship and often leading to unnecessary over-punishment—one that is dysfunctional regarding both the purposes of punishment and the act of placing blame—can for a variety of reasons continue to persist. A comparative view of other legal orders, as attempted herein, might help to formulate an explanation.

There are different levels of analysis that offer room to explain the relevance of this doctrine in legal orders coming from a Common Law tradition. It is impossible to discuss all of them in detail here, but some propositions can be highlighted. The US-American and English legal orders are well known for their pragmatic orientation. Whereas in legal orders with codifications, most scholarly energy has been invested in finding

130. *See., e.g.*, Simester, *Strict Liability*, *supra* note 11, at 21 ff., for differentiation between *formal* and *substantive* strict liability.

131. *See, e.g.*, Husak, *Strict Liability, Justice and Proportionality*, *supra* note 17, at 91.

132. *See, e.g.*, Simester, *Strict Liability*, *supra* note 11, at 21, according to whom *stigmatic crimes* can never be justified. *See also* Sayre, *supra* note 8, at 79, who criticized the adoption of arguments from the field of public welfare offenses by areas with more stigmatized crimes and higher penalties.

133. *See* Singer, *supra* note 129, at 405.

134. Alan C. Michaels, *Imposing Constitutional Limits on Strict Liability: Lessons from the American Experience*, *in* APPRAISING STRICT LIABILITY 219, 221 (A.P. Simester ed., 2005).

general rules and remaining true to them as precisely as possible, US-American and English law is shaped more by practical considerations, case law and its adversarial procedure, and answering current challenges.[135] Another explanation considers not only the procedural orientation, but characteristics of these legal orders. Due to being anchored in the principle of opportunity (and not the principle of legality),[136] criminal enforcement depends more on actual prosecution practices, which tempts legislators to keep statutes open and transfer their concrete handling to the enforcement authorities.[137] Consequently, legal enforcement can be more campaign-oriented. It is said that the practice of criminal law, especially in the United States, may indeed be more political in that sense, making prosecutors very powerful officials. General scholarly considerations tend to take a back seat.[138] Furthermore, one of the main arguments for strict liability—efficiency—goes hand-in-hand with requirements of proof, though the meaning of *proof*, as well as how high the standard is set with regard to *beyond a reasonable doubt*, can differ among legal orders.[139]

However, the most obvious explanation from a comparative perspective is the actual difference in the politics and culture of punishment.[140] *Over-criminalization* and *mass incarceration* are mainly non-issues in continental European jurisdictions.[141] This is not to say that strict liability offenses are

135. R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, & Victor Tadros, *Introduction: Towards a Theory of Criminalization?*, *in* CRIMINALIZATION 1, 3 (R.A. Duff et al. eds., 2014).

136. For a comparative view on mandatory and discretionary prosecution, *see* BOHLANDER, *supra* note 117, at 26 ff.

137. Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 64, 74 (Michael Klarman, David Skeel, & Carol Steiker eds., 2012).

138. *Cf. on this topic, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

139. Spencer & Pedain, *supra* note 11, at 269.

140. For a detailed discussion, *see* Kleinfeld, *Two Cultures of Punishment*, *supra* note 127, at 933–1037.

141. For incarceration rates, *see, e.g.*, Council of Europe Annual Penal Statistics: SPACE, Annual Report 2015, and U.S. Bureau of Justice Statistics, National Prisoner Statistics, 1978–2015. In 2015, the United States had an incarceration rate of 458 prisoners per 100,000 inhabitants, while, e.g., Germany had 77.4, Switzerland had 82.7, and Austria had 103.9; *see* Monika Simmler, *Zwischen Overcriminalization und Overpunishment* [Between Overcriminalization and Overpunishment], *in* STRAFRECHT UND POLITIK 51, 55–60 (Anna H. Albrecht et al. eds., 2018).

responsible for these differences, but some main arguments fall into this context. Firstly, regulatory offenses are not an American invention, but they are considerably widespread within this legal order. This can be explained by a lack of alternatives, due to the comparatively limited expansion of the welfare state.[142] Criminal law is often regarded as one of the first answers, while in other legal orders the rationale for criminal legislation as an *ultima ratio* finds greater support (though this is increasingly contested).[143] There are other explanations for the relatively lower standing of the principle of culpability and persistence of the doctrine, such as divergences in the perception of criminals and a more actor-oriented punishment culture than a (close to pure) act orientation.[144] However, apart from these possible explanations for its historical persistence, the principle of culpability still remains at the core of the criminal law system. It is of scholarly focus for a reason, and widely recognized by courts as a main principle of criminal law. This is not changed by the fact of existing strict liability offenses, but it is challenged. Therefore, it is legitimate to try to bring the current legal orders more in line with the basic functioning of the system.

2. Toward a Normative Model Based on Functional Grounds

As has been stated above, culpability and the communicative operation that provides the mechanism for placing blame consist of different elements, which guarantees that criminal law is neither arbitrary nor contingent. The function of placing blame follows a certain structure, which allows someone to be called to account only if it is necessary to fulfill the overall system's function: the stabilization of norms. This results in a sociological foundation for the principle of culpability, including its implications of inflicting punishment only when there is fault, and assigning punishment only proportionate to that fault. However, this description of the purpose of culpability does not necessarily result in an analogous normative evaluation. As we can see throughout the different varieties of strict liability, there are many dysfunctional constructions in the existing social system

142. *See* Richman, *supra* note 137, at 69 ff.

143. Of course, in English and US-American literature, it is also argued that criminal law should only be regarded as a "last resort" or "back-stop." *See, e.g.*, Ashworth, *Conceptions of Overcriminalization*, *supra* note 63, at 417.

144. Kleinfeld, *Two Cultures of Punishment*, *supra* note 127, at 940–41.

that persist despite that dysfunction. Mainly, this can be explained by the fact that the political system, following its own function, makes use of the criminal law system while neglecting its main purpose.

However, criminal law theory should not only describe what there is, it should also offer guidance on how to optimize the system by asking what it ought to be. The functional analysis provided here has led to a normative model for assessing the strict liability doctrine. The main argument that is followed here is that punishment can only be justified if it is necessary for the preservation of the normative (and therefore social) order, and only to the amount necessary for the stabilization of norms. Every other punishment and every other liability cannot be justified within and by the social functioning of criminal law. Therefore, other purposes can only be considered within these boundaries. Of course, this position is nothing spectacular. It basically upholds the principle of culpability. However, this approval is not supported solely on grounds of fairness or liberal considerations. Rather, it is the logical consequence of the social order, which asks for this kind of functional stabilization. Upholding this social order can serve as the basis for a normative justification of the principle of culpability. Punishment is justified not because it is a possible, but rather because it is a necessary method of "communicating the censure that offenders deserve."[145] The nature of crime is connected to this communicative enterprise, as we regard as criminal only that which asks for a public response; thus, only in these specific cases does this kind of response become appropriate and necessary.[146]

The above outline of the elements of fault and different types of strict liability show that the strictness of liability can be tested by asking if all of the elements of placing blame are met. For every offense, one can (and should) ask if it captures the general qualification of the originator as an agent of normative destabilization (*personality element*) and their situative competence for normative destabilization (*competence element*), as well as if it reflects the normative damage caused by the act (*message element*) and if the *procedure* provided is suited to adequately reflect those elements. If it does not, the liability is strict with regard to one of these elements. Strict liability leads to dysfunctional and therefore unjustified punishment. The

145. Duff, Punishment, Communication, and Community, *supra* note 42, at 29 and 80–89.

146. Tadros, *supra* note 50, at 75.

construction does not comport with the function of the system: the preservation of the social order. Thus, it is unnecessary and requires change.

3. Alternatives

As stated above, strict liability offenses that are substantively strict from this functionalist perspective should be adjusted. This has been argued by scholars who share this skepticism and follow this critique. The most frequent suggestions include introducing general defenses such as *due diligence*, *good faith*, or *non-negligence* to prevent at least some forms of absolute liability,[147] supporting a general presumption of *mens rea* to restrict the doctrine to cases where the legislator has explicitly stated it, or more far-reaching requests to clarify that for every offense, at least *negligence* must be proven by the state.[148] These suggestions may result in *less* strict liability and be supported by the normative model presented. However, they would remain strict with regard to one of the elements discussed, and therefore do not resolve the problem. Bringing offenses in line with the function of placing blame requires a full reconsideration of every element of the process of normative destabilization to assure that the construction leads to the necessary proportionate punishment and its determination. This assessment can only be done by asking what the concrete norm at risk is in each discrete case, how this norm is destabilized, what *mens rea* has to be proven, and what defenses are on hand to serve this purpose.

Authors have also argued for simply renaming or outsourcing certain regulatory offenses, making them their own field and separate from core criminal law, following the basic assumption that these penalties are *civil in nature* and therefore should be regarded as *civil sanctions*.[149] As we have seen in the categorization above, not all strict liability offenses are regulatory or public welfare crimes. However, that is not the only reason why such a re-labelling would fail to solve the problem, even though such action

147. Simons, *supra* note 17, at 1133; Levenson, *supra* note 5, at 435–69. Courts in some Commonwealth countries have already followed this approach by declaring that all strict liability offenses should at least presumptively allow a due diligence defense. *See* KEATING ET AL., *supra* note 2, at 230; SIMESTER ET AL., *supra* note 61, at 193.

148. For different suggestions, *see, e.g.*, JEFFERSON, *supra* note 3, at 144 ff.; Duff, *Strict Liability, supra* note 11, at 129.

149. R.V. Stephens, L.R.1.Q.B. 702, 708 (1866) with the formula "criminal in form, civil in nature"; SIMESTER ET AL., *supra* note 61, at 194; Duff et al., *supra* note 135, at 33–34.

might allow for some improvement and mitigate the most problematic aspects.[150] Many regulative problems could be resolved in ways other than criminal law. It is therefore reasonable to ask whether criminal law should be used as a last resort. However, this does not change the fact that strict liability offenses are criminal offenses and punishment includes stigmatization, which may not (or at least not to such a degree) be deserved.[151] The moment we use public sanctioning to assure compliance with a norm, we are in the field of criminal law (no matter what we label it). Punishment for destabilizing norms is at the core of criminal law, and the moment public punishment is regarded as the answer to a problem, it must follow the core function of placing responsibility and comport with the principle of culpability.

CONCLUSION

In different legal orders, the principle of culpability is followed to different degrees of strictness. It is, however, fundamental in all. This principle is usually seen as protecting individuals against the state abusing its power and generally justifying criminal punishment. As has been examined here, its potential does yet exceed this traditional argument. The principle of culpability means that punishment is only imposed where (and to the extent that) it is *necessary* for the protection of the validity of the norm in question. It therefore serves a specific purpose regarding the social order. To emphasize the importance of the principle of culpability and consequently criticize strict liability, one not only must rely on moral arguments of individual fairness, but also find support in the social functioning of our society and its criminal law.

The principle of culpability and the mechanism of placing blame mark the boundary between criminal and other fields of law, as well as between criminal law and other modes of social control. Permanently disrespecting criminal law's standard function results in a destabilization of the social system and impedes its strength. Analyzing strict liability offenses requires an assessment of the function of culpability in the stabilization of norms. As has been argued above, beginning with these very basic questions results in

150. *Cf.* Simester, *Preface*, *supra* note 9, at vii–viii.

151. TADROS, *supra* note 50, at 73.

a clear evaluative and normative model. Personal responsibility will probably always be politically contested and accompanied with scholarly debate. Academic models should, therefore, offer concrete guidance. Beginning at the very heart of the criminal law system, this analysis has demonstrated that a theoretical backdrop of functional analysis not only offers a better understanding of the doctrine and lays the foundation for a sociologically informed criminal law theory, it also offers a model for categorizing and appraising strict liability offenses. The approach must lead to the clear result that strict liability is legitimated neither by the functioning of criminal law nor by ideals of fairness. Due to its illegitimacy, it has to be abolished as much as possible.

This systematic exploration of strict liability has shown that the intense debate accompanying this doctrine is no coincidence. The procedure identified as regularly guiding the imputation of personal responsibility is the result of an historical differentiation following a clear social goal. Deviations from these mechanisms bring *strictness* to the attribution of responsibility. This strictness not only presents a shaky foundation for interfering with individual rights, it compromises criminal law's social effectiveness. For these reasons, upholding the principle of culpability becomes an ideal of social importance, or rather one of social necessity.