

Corporate Criminal Liability: Model Penal Code Section 2.07 and the Development in Western Legal Systems

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I. INTRODUCTION

For a long time, criminal law and criminal procedure in continental Europe and the United States seemed to be irreconcilable. But in recent years, a significant convergence has occurred that has narrowed the gap between both systems. It involves not only marginal areas but also essential questions concerning criminal procedure and criminal law. For instance, conflict settlement by means of plea-bargaining is permanently embodied in the procedural law in the United States; in Germany, it has become common practice as well—but in the “shadow of the law.” That situation continues to prevail despite the German Federal Supreme Court’s (BGH) recent attempt to establish guidelines and limits regarding permissible deals. Firstly, plea-bargaining appears to be an essential contradiction to the objective of substantive truth that characterizes the German Criminal Procedural Code (StPO). Therefore, only the legislature could pass binding guidelines. Secondly, the practice regularly ignores the guidelines set out by the Federal Court, and therefore, the guidelines are at risk of becoming a mere farce. In the field of substantive law, the criminal liability of corporations is an interesting example of the current development.

Schünemann characterizes that phenomenon as follows:

Qualitatively as well as quantitatively, corporate delinquency is the most serious area of socially harmful

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actions offenses in society at all and therefore, I conclude, the core subject of criminal law.¹

In the United States, it has been acknowledged for a long time that corporations may be punished for offenses committed by individuals acting on their behalf. In contrast, there is still a widespread reluctance to accept this idea in continental Europe. In some countries (*e.g.*, France, Denmark, and Sweden) criminal responsibility for corporations has been established already. In Germany, an increasing number of commentators believe that administrative fine orders are no longer sufficient.

I want to explore the potential reasons for the actual convergence of the two jurisdictions with regard to the criminal responsibility of corporations. Moreover, I would like to point out some legal rights that inevitably will be ignored in the course of the current changes. In this context, a question that is perhaps typical of the entire enterprise of comparing North American and continental European legal cultures must be raised: How important to European systems and their lawyers are particular legal principles which function—at least partially—as obstacles to the introduction of a criminal liability of corporations? Are European lawyers inclined to overestimate their basic legal principles, or should American academics reconsider their positions?

Schünemann, for instance, believes that the continuing passivity of the German legislature will lead to an unjustifiable end in itself of dogmatic principles that were originally developed for crimes committed by individuals. These principles would not be adequate to address the issue of corporate delinquency because the interaction processes inherent in such cases are totally different than those which characterize the interactions of individuals. Hence, the prevention of corporate crimes also must be

1. Bernd Schünemann, Plädoyer zur Einführung einer Unternehmenskuratel, in III *Deutsche Wiedervereinigung, Unternehmenskriminalität* 129 (Bernd Schünemann ed., 1996).

handled by different rules.²

If, however, it turned out that at least some of the restrictive European or German principles might be useful in the field of corporate delinquency, one could consider introducing them into a new and modernized Model Penal Code (M.P.C.). Such a reform would, in turn, raise new questions—which are beyond the scope of this article—about the impact a modernized M.P.C. would have on criminal prosecutions of corporations that have already taken place.

I will not be able to give a complete account of the situation in continental Europe with regard to these issues. Concerning the academic discourse in the United States in particular, I would not dare to claim knowledge of all recent discussions. With these limitations in mind, Part II will give a brief account of the issue of criminal liability of corporations from the German and European points of view. Part III will discuss corporate criminal liability in the United States. In Part IV, I will discuss the relevant provision in the M.P.C., namely Article 2, Section 2.07. It is not my intention to deal exclusively with theoretical problems of the law; I will also address criminological issues and policy considerations. Both in Germany and in the United States, the question of the preventive effects of different legal concepts in the area of corporate delinquency has been raised. In the United States, law and economics scholars participated in the discussion and have noted that “perverse effects” would result from the introduction of a strict liability system, as opposed to a duty-based system of corporate criminal liability. This problem will lead us, in Part V, back to the starting point: the almost mysterious convergence of the approaches applied in the United States and Europe, despite the crucial differences in their legal systems. Part VI will address the question of when corporate liability is inevitable, how can it be legitimated.

2. See Bernd Schünemann, Die Strafbarkeit der juristischen Personen aus deutscher und europäischer Sicht, in *Bausteine des europäischen Wirtschaftsstrafrechts: Madrid-Symposium für Klaus Tiedemann* 267-73 (Bernd Schünemann & Carlos Suárez González eds., 1994).

II. CORPORATE CRIMINAL LIABILITY FROM THE GERMAN AND
EUROPEAN PERSPECTIVES*A. The Situation in Germany*

1. In Germany, liability is imposed on corporations by state authorities only for administrative offenses.³ There is much debate about whether such penalties should be considered criminal sanctions or morally neutral administrative penalties. The German law of *Ordnungswidrigkeiten* (administrative penalties) empowers administrative authorities as well as criminal courts to impose administrative fines (*Geldbußen*) on both natural persons and companies.⁴ These penalties are successors to the former sanctions for minor criminal offenses (*Übertretungen*) and are similar to regulatory offenses in the United Kingdom. Today, they are not perceived as criminal sanctions either by the public or by defendants, even when imposed by a criminal court.

In addition, the class of natural persons whose acts may make the corporation liable is very limited.⁵ In general, liability is restricted to instances in which the company's legal representatives or directors have acted improperly or failed to supervise their employees properly. So far, German policy toward corporate liability is very restrictive compared with that of other European nations. In Germany, penalties imposed on corporations may, at most, be regarded as "quasi-criminal" sanctions.

But what are the reasons for this restrictive policy? The discussion has not yet reached a clear consensus, but there appear to be two very important aspects: First, a corporation cannot act; second, it is not possible to speak of a corporation's criminal responsibility.

2. It would be beyond the scope of this article to discuss the different theories of acting and their

3. See Reinhard Maurach & Klaus Zipf, 1 *Strafrecht AT* § 15/8 (8th ed. 1992).

4. See *id.* at § 15/8.

5. See § 30 *OwiG* [Ordnungswidrigkeitengesetz].

advantages and disadvantages, but what a corporation does cannot be interpreted as an “act” in the sense in which the term is used by scholars of German Penal Law. Often people argue with the famous sentence by von Liszt: “That one who can make contracts also can make fraudulent . . . contracts.”⁶ But this is a *petitio principii*, because the term “act” does not necessarily mean the same thing in civil law and penal law.⁷ All modern definitions of acting have to connect the acting to an individual; otherwise an act is reduced simply to the causation of a result with importance within the context of the penal law. At this point, there is no difference between all the concepts of acting which are discussed in Germany. Therefore, corporations can only act because they have individuals who can act on their behalf. Moreover, culpability can only be attributed to a person who is responsible for the act, not to the members of a corporation who have not participated in the act or to the corporate entity itself.⁸

3. At first glance, this result seems to favor the current plain model in which corporations act through their agents and are liable because of the agents’ failures.⁹ However, such a simple imputation model is no more than a fiction: The attribution of someone else’s act to a corporation is not synonymous with an act of the corporation, nor is the attribution of someone else’s culpability to the corporation synonymous with a determination of a corporation’s culpability.¹⁰ The

6. Franz von Liszt, *Lehrbuch des Deutschen Strafrechts* § 28 I 2 (22d ed. 1919).

7. See Maurach & Zipf, *supra* note 3, § 15/8.

8. See Hans-Heinrich Jescheck & Thomas Weigend, *Lehrbuch des Strafrechts AT* 227 (5th ed. 1996).

9. See Hans Joachim Hirsch, *Die Frage der Straffähigkeit von Personenverbänden* (1993); Hans Joachim Hirsch, *Strafrechtliche Verantwortlichkeit von Unternehmen* 107 *ZStW* 288-91 (1995).

10. See Bernd Schünemann, *Leipziger Kommentar* § 14/78 (Burkhard Jähnke et al. eds., 11th ed. 1993) [hereinafter Schünemann, *Leipziger Kommentar*]; Bernd Schünemann, *Criticizing the Notion of a Genuine Criminal Law Against Legal Entities*, in *Criminal Responsibility of Legal and Collective Entities* 228-30 (Albin Eser et al. eds., 1999); Claus Roxin, *Strafrecht Allgemeiner Teil*, Band I, pt. 8 Rn. 62 (3d ed. 1997).

culpability analogy model developed by Tiedemann, an expert in the area of economic crimes, confronts the same challenge because, according to his theory, corporate culpability results from errors and omissions that occurred when the corporation was being organized.¹¹ After all, mistakes in the organization of a corporation are not made by the corporation itself but by its executives.¹²

B. Corporate Criminal Liability in Other Continental European Countries

As mentioned above, corporate criminal liability in continental European countries (other than Germany) seems to be much better developed.¹³ It is beyond the scope of this article to address the different national legal systems in detail. Three issues, however, deserve special attention: approaches similar to that of the United States, ongoing but as yet incomplete developments, and the problem of how to handle the criminal liability of a corporation.

1. The United States' rule of corporate liability is most similar to that of the Netherlands. According to Article 51 of the Dutch Criminal Code, charges may be brought against corporations for nearly any offense. Corporations are held liable as soon as they are able to determine whether an employee performed a particular act and when the corporation has accepted the act or its benefits. In the Netherlands, the corporation's executives and the directors can be punished as well. Because of these multiple possibilities for liability, the Dutch legislation imposes significant sanctioning pressures.

11. Klaus Tiedemann, Die "Bebußung" von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität, 1988 NJW 1172-73; Klaus Tiedemann, Strafbarkeit von juristischen Personen?—Eine rechtsvergleichende Bestandsaufnahme mit Ausblicken für das deutsche Recht—, in *Freiburger Begegnungen* 45-48 (Träger der Juristischen Studiengesellschaft ed., 1996).

12. See Schünemann, *supra* note 2, at 284-85; Roxin, *supra* note 10, § 8/62.

13. See John C. Coffee, Jr., Corporate Criminal Liability: An Introduction and Comparative Survey, in *Criminal Responsibility of Legal and Collective Entities* 21-24 (Albin Eser et. al. eds., 1999).

2. The French Nouveau Code Penal adopted in 1992 can be regarded as a turning point in criminal policy toward corporate liability in France. Ever since the Napoleonic Code, French law rejected the idea that companies may be held liable before criminal courts. Before the enactment of the Nouveau Code Penal—and typical of legal thinking in continental Europe—guilt was personal, not vicarious. Yet, it remains debatable whether the concept of personal guilt has been abandoned in practice. Under Article 121-2 of the Code,¹⁴ legal entities may be held liable for criminal offenses. Two important restrictions, however, must be observed: First, corporations are liable only when the particular provision that has been breached explicitly declares that the law applies to corporations. Second, according to Article 121-2, it is generally necessary that an employee or agent of the company acts on its behalf.¹⁵ Thus, it is still not clear how the new legislation will work in practice or over the long term. It will be interesting to observe how the French courts will resolve essential questions—such as the level of managerial involvement necessary to trigger liability or the importance of collective knowledge within the company.¹⁶

3. In other European countries, for example, Denmark, legal mechanisms to impose criminal liability on corporations and other legal persons—even communities and the state itself—have been in place for more than seventy years now. But it must be noted that in Scandinavia (with the exception of Norway), rules for corporate criminal liability are found only in specific law books and cannot be transferred to similar constellations.

III. CORPORATE CRIMINAL LIABILITY IN COMMON LAW JURISDICTIONS

Under current United States criminal law, the direct criminal liability of corporations is not regarded as a

14. Art. 121-2 C. Pr. Pén. (1992) [French Penal Code].

15. *Id.*

16. See also Schünemann, *Leipziger Kommentar*, supra note 10, § 14/76.

problem of legal construction. For policy considerations, any purpose of restriction has been rejected. In the majority of United States jurisdictions, criminal liability for corporations is predicated on the doctrine of respondeat superior, which originated in civil law. According to this theory, a corporation is liable for the criminal offenses of its employee if the employee commits the crime both within the scope of his employment and with the intention of benefiting the corporation. The doctrine should also apply to those crimes containing mens rea requirements. The United States Supreme Court has endorsed this solution primarily for reasons of policy:¹⁷ The legal system must take the rights of all—corporations as well as individuals—into consideration. But the law cannot turn a blind eye to the fact that most economic activities are carried out by corporations. If we were to exempt corporations from any punishment, we would lose the only device available to control this area effectively and to counteract abuses.¹⁸

There are only two situations in which corporate criminal liability cannot be imposed: when crimes cannot be punished by fines—since fines are the principle means for punishing a corporation—and when the crime, by its nature cannot be committed by a corporation (*e.g.* rape).¹⁹

IV. INTERPRETATION AND CRITICISM OF THE MODEL PENAL CODE REGULATION

A. The Model Penal Code, however, adopts an approach to corporate criminal liability that is more restrictive than that employed by the majority of jurisdictions in the United States. Corporate sanctions in cases of finable violations are only applied if the corporation violates a specific duty imposed by law or if the commission of the offense was at least recklessly tolerated

17. See *New York Cent. & Hudson R.R. Co.*, 212 U.S. 481, 495 (1909).

18. See Anne Ehrhardt, *Unternehmensdelinquenz und Unternehmensstrafe* 99 (1994).

19. See Bernd Schünemann, *Unternehmenskriminalität und Strafrecht* 194 (1979).

by a senior officer. In particular, the Model Penal Code creates three distinct types of corporate offenses.²⁰ For each offense type, another liability system is used.

1. To the *first group* belong the traditional common law offenses that require mens rea. These are typically individual offenses, for example, second-degree murder or fraud. The Model Penal Code characterizes such offenses as crimes for which “(no) legislative purpose to impose liability on corporations plainly appears.”²¹ With regard to such offenses, the Model Penal Code provides for the punishment of corporations *only* if “the commission of the offense was performed, or at least authorized, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”²² Under the Model Penal Code section 2.07(4)(c) “high managerial agent means an officer of a corporation . . . or any other agent of a corporation or association having duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the corporation or association.”²³

2. The *second group* represents those offenses containing mens rea requirements which, according to the recognizable intent of the legislature, can be committed by corporations (*e.g.*, collusive trading). In such cases, the authors of the M.P.C. believed that respondeat superior liability should apply: Corporations will be punished for such crimes, without regard for the offender’s position in the corporate hierarchy if the offender acted within the scope of his or her employment and with the intent to benefit the corporation. In contrast to the judiciary, the Model Penal Code creates an affirmative defense for the benefit of the corporation.²⁴ If the corporation can prove by a preponderance of evidence that a supervisor having

20. See Ehrhardt, *supra* note 18, at 111-13.

21. Model Penal Code § 2.07(1)(a) (Proposed Official Draft 1962).

22. *Id.* § 207(1)(c).

23. *Id.* § 207(4)(c).

24. See *id.* § 2.07(5).

responsibility over the subject matter of the offense employed due diligence to prevent its commission, the corporation may not be punished—unless this result would be inconsistent with the legislative purpose of the law violated.

3. The strict liability crimes form the *third group* of offenses. With respect to strict liability, the Model Penal Code presumes that the legislature intended to make corporations responsible for specific types of wrongdoing. Accordingly, on the basis of the respondeat superior rule, corporations may be held criminally responsible without proof of intent or other mental elements of an offense. Furthermore, consistent with strict liability principles, in such cases, it is not necessary to prove an intent to benefit the corporation. In contrast to offenses of the second type, a due diligence defense is not available.

B. A complete abolition of corporate criminal responsibility is out of the question because, up to now, concepts of corporate criminal liability are found in numerous enactments created at different times and for different reasons over the course of several decades. As a result, the consequences of a wholesale abolition of corporate criminal liability would be almost impossible to predict. That follows even from Tentative Draft Number 4 of the M.P.C., which notes that corporate liability results in vicarious liability for stockholders and therefore, that it affects a group of innocent persons. But after all, corporate liability depends on an assessment of the destructive effects of corporate policy as expressed through the conduct of high managerial agents. Hence, corporate liability is justified. The potential for individual illegal activity within the corporation is potentially greater than in other contexts because the relative anonymity of individuals within corporate structures makes it less likely that evidence will be found linking particular individuals to corporate offenses. For this reason, corporate punishment is necessary. However, because only high managerial agents are punished for a corporation's criminal acts, an excessive extension of criminal liability could be avoided.

C. Only some states codified the provisions on corporate criminal responsibility on the basis of the Model Penal Code. Instead, most states adopted the respondeat superior rule, which goes further than the Model Penal Code approach.²⁵

V. REASONS TO BRING DIFFERENT REGULATING SYSTEMS CLOSER

At first glance it seems to be curious: At present, there are attempts in Germany to establish a sanction system against corporations. In the United States, however, lawyers are considering which restrictive conditions should be necessary for a finding of corporate criminal liability.

A. 1. From the German point of view, Schünemann has already described why the collective act patterns of a business corporation are inconsistent with the individualistic attribution concept that implicitly underlies the classical criminal law:²⁶ Criminal law was originally aimed only against members of social fringe groups and subcultures that could not or did not want to work within the state system. The traditional understanding for the meaning of crime can be described as follows: An individual acts wrongfully—either habitually or in a specific situation. This model has been extended, without much thought, to the field of white-collar crime, although it is completely inadequate in most cases and it appears to be ineffective on the whole. This is because in an industrial society, the danger to legal rights protected by the criminal law increases in the field of corporations' acts. One could support the view that in spite of the importance of corporations, the individualistic attribution of socially harmful behavior should still remain possible. But in this case, one would misjudge the collective act patterns of a corporation mentioned above, while a criminal law system that is based solely on the punishment of individuals would

25. See Kathleen F. Brickey, *Corporate and White Collar Crime* 34 (1990).

26. Schünemann, *supra* note 2, at 267-71.

be impractical, or at least ineffective. Basically, such a system no longer depends on a single person in a corporation who is responsible for the socially harmful act. On the one hand this person shows a totally socially conformed behavior; on the other hand he has little value as an individual, as he can be easily replaced by another similarly qualified person. A *criminal corporation attitude* may be the right expression for this behavior. Specifically, in an association of individuals, and therefore, in a corporation, a team spirit is established by means of numerous learning processes. Then, a criminal corporate attitude would pervade the “team spirit” of the corporation and would be reflected in the harmful acts committed by members of the group. The Milgram experiment²⁷ has shown very clearly the extent to which hierarchical structures are able to exert pressure on individuals to inflict pain on others and to act in ways in which they never would in the private sphere. A general, as well as a specific preventive effect is extremely unlikely if the members of a corporation have adopted a criminal corporation attitude, particularly where those individuals’ general socialization appears to be unaffected.

A further question for the traditional attribution model in criminal law has also been raised as a result of the division of labor in political economy, the division of possession of information, and the power of decision-making. The phrase “organized irresponsibility of all”²⁸ vividly depicts how the attribution of criminal responsibility only to individuals blocks the solution of many practical problems.

2. We could try to eliminate the deficits described above through improvements to the doctrine of omissions and of vicarious liability. For example, in Germany, an individual can be punished for acts of omission, such as failing to provide necessary help, only if such help could have prevented—beyond a reasonable doubt—the result.

27. Stanley Milgram, *Das Milgram-Experiment* (1974).

28. Schünemann, *supra* note 19, at 30-40.

That is the reason why some German academics are trying to establish the “theory of raising the risk” in this field.²⁹ However, a significant increase of efficiency seems doubtful.³⁰ This might be the decisive reason why attribution of criminal responsibility to entities other than individuals ought to be considered.

B. But what is the reason in the United States for a possible revival of the Model Penal Code and for a tightening of the requirements for corporate criminal liability?

1. The decisive reason might be that the distinctions made in the Model Penal Code not only restrict corporate criminal liability; they make the provisions on corporate criminal responsibility work.

Section 30 of the German law of administrative penalties and the recommendations of the European Council are both concerned with the behavior of persons who have significant leadership responsibilities in corporations. Both, in any case, focus on persons who have a leading function in the corporation.

This restriction goes in the right direction: A corporation cannot be responsible for the wrongful act of every single one of its perhaps thousands of members if there is no mistake or negligence of management involved. Any other solution would create purely coincidental liability for which there would be no possible penal purpose.³¹ If there is, for example, an unavoidable incident in an optimally organized corporation with an optimally working board of directors, the problem concerns why exactly the shareholders (who are affected by penalties for corporations in the end) should be fined for something they had nothing to do with—and especially for something they could not have influenced at all. Such coincidental liability is not only unfair, it is also contraindicated since it leads nowhere, and, perhaps more seriously, undermines and

29. See Schünemann, *supra* note 1, at 156-59.

30. See Schünemann, *supra* note 2, at 274-77.

31. See Günter Stratenwerth, *Strafrechtliche Unternehmenshaftung?*, in *Festschrift für Rudolf Schmitt* 297-98 (Klaus Geppert et al. eds., 1992).

destroys the idea of a “prevention through control over an incident”³² through its hidden message of fatalism.³³ Any plausible distinction, and therefore any authorization, is lost completely under American law as well as incidentally under European Union law. All that would remain would be a very archaic and brutal law in which the question of legitimacy is not even asked.³⁴

2. This point of view has recently been adopted by the “law and economics” scholars.³⁵ They argue that the purpose of corporate criminal liability is to deter corporate misbehavior. By detecting and sanctioning an agent’s misconduct under a strict liability regime, the corporation makes itself vulnerable because the agent’s liability will almost invariably imply that the corporation is also liable. On the other hand, a duty-based system would make the corporation’s commitment to monitoring more credible because it would have to be able to convince the ultimate fact-finder that it diligently monitored corporate activities. Even criminal misconduct by a high-ranking senior executive would not result automatically in corporate liability, and therefore, would not chill the firm’s efforts to investigate misconduct by these executives.

But this practical policy approach must be supplemented by the German point of view described above: A strict liability system might reduce policing measures, but not necessarily the preventive actions designed to that deter misconduct by agents without increasing the probability that the firm will be sanctioned.³⁶

VI. LEGITIMATING CORPORATE LIABILITY

A. 1. In Germany, much attention has been focused on the

32. Dietrich Kratzsch, *Verhaltenssteuerung und Organisation im Strafrecht* 119 (1985).

33. See Schünemann, *supra* note 1, at 138.

34. See *id.*

35. See Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 692-700 (1997).

36. See Coffee, *supra* note 13, at 12, 28-30.

question of whether corporations should be held responsible under the civil or public law. In both cases, there would be no need for a justification of corporate criminal liability. Some academics, however, have pointed out that neither civil nor public law would be able to use coercive means to effect its objectives. Civil actions always depend on a private initiative, and the operation of public law is based on political and social opportunity and various processes of co-operation between the state and private enterprises.³⁷

2. a) In order to resolve this dilemma, some German commentators have suggested that the law of administrative offenses (*Ordnungswidrigkeiten*) may provide a useful tool for conceptualizing and addressing criminal acts within and by corporations. Administrative remedies, which consist primarily of the imposition of fines, do not aim to establish personal responsibility or guilt but to provide preventive—as well as repressive—means for controlling and regulating risks emerging from economic processes and decisions. The focus does not lie on the personal but on the instrumental aspect of a particular wrongdoing. Thus, the difference between the law of administrative offenses and the criminal law is not merely quantitative. If civil courts or economic control boards were limited to imposing future-oriented sanctions but could not sanction past acts, civil courts and economic control boards could not effectively control businesses. The purpose of administrative penalties is to fill in this gap.³⁸

b) Similarly, Schünemann has suggested a complete break with the principle of guilt in such cases.³⁹ According to him, sanctions imposed on corporations should be justified on the ground that risks for legal positions have been created. Furthermore, he identifies two preconditions for such a justification: (1) It cannot be established that a particular employee of a corporation committed the

37. See Günter Heine, 1996 ÖJZ 216.

38. See Harro Otto, 1998 Jura 417-18; Harro Otto, *Die Strafbarkeit von Unternehmen und Verbänden* (1993).

39. Schünemann, *supra* note 2, at 286.

harmful act, and (2) the harmful act was made easier or more difficult to detect because of an organizational failure of the corporation.

Hence, there is an important precondition for a law applicable to corporations: It should not focus on individual behavior but rather on collective mechanisms of control. Such an approach might be based on the idea that any corporation can be regarded as an autopoietic system. Corporations pursue certain aims that are, or might be, separate from their employees' aims. In order to create workable incentives for corporations to abide by the law, abiding by the law must be more beneficial for the company itself—not just for individual employees; in other words, the cost of breaking the law must exceed the benefits.

This argument leads us to the economic paradigm characteristic of some theories of general prevention. In many cases, a simple cost-benefit analysis may not be appropriate to describe symbolic processes of communicating moral values by means of the law. But the cost-benefit approach does describe adequately the economic orientation of business policies.

3. In the end, the cost-benefit model appears to be more similar to the law of corporate criminal liability in the Anglo-American legal system than to the doctrine of organizational negligence, the theoretical framework of the law in Germany.⁴⁰ With regard to one aspect, however, the German approach I just described is more restrictive than that of the United States: In order to establish criminal liability, German law requires both the commission of an offense in the interest of the corporation and an organizational failure on the part of the corporation. In the United States, however, criminal responsibility is more extensive because of the doctrine of respondeat superior, according to which the acts of *any* employee (even a low-level employee) may be attributed to the corporation. In my opinion, the approach I described, though not complete, is much more comprehensive than either the Anglo-

40. See *id.* at 288.

American theory and the German concept of attributing guilt and suffers from none of the faults of either model. That is because both of the latter concepts are in fact analogous to civil law concepts, and in order to address the problem of corporate criminal responsibility, these analogies would need to be better founded than they are at present.

B. In order to reach a conclusion on the subject, we must ask two additional questions: How should we judge (a) the current practices in the United States and (b) the provisions of the M.P.C.?

Surprisingly, American lawyers use the penal law quite extensively in a corporate context, despite the fact that there seems to be no lack of implementing or enforcing civil and public law in this area. First, class action is recognized in the United States. Second, powerful administrative agencies exist. These factors should provide pragmatic justifications for using the penal law less extensively. Furthermore, the warnings of perverse effects have turned out to be quite plausible. Imposition of "responsibility by accident" cannot be an incentive for anyone to protect legal positions very intensively.

The provisions of the Model Penal Code thus seem to be a promising approach. One precondition for criminal liability, however, should be added to all kinds of offenses: There should be an organizational failure on the corporation's part before a criminal sanction can be imposed. This approach raises the question of how we should restrict the number of individuals whose actions may trigger the corporation's liability. It has been argued that the determinative criterion should be whether someone acts *on behalf of* the corporation. But this criterion may not be appropriate for some cases. There might be, for example, many cases of rough carelessness that do not benefit to anyone.⁴¹

A more useful criterion might be to assess liability in terms of whether corporate agents were entitled to act for

41. See Stratenwerth, *supra* note 31, at 298-99.

the corporation in a particular area or matter.⁴² That seems to be more appropriate because the corporation should be held responsible for acts of its agents or boards only when they acted on behalf of the corporation and were, therefore, entitled to do so. Moreover, we should consider introducing the precondition that a risk typical for the particular field of activity was realized in the particular wrongdoing.⁴³ In the end, these criteria would be equivalent to general principles of attributing criminal responsibility. To this extent, the M.P.C.'s language "within the scope of his office of employment" is preferable.

VII. CONCLUSION

The analytical difficulties that confront continental European systems' attempts to create legal mechanisms to assess corporate criminal liability are similar to the concerns that would need to be addressed in the process of creating a modern and practicable Model Penal Code. Questions about the legitimation of corporate criminal liability give us a more principled approach to the limits of corporate liability and may focus attention on dividing lines between other areas of the law. It seems to me that in the United States, both of these questions are currently discussed in a rather pragmatic manner without paying much attention to the general theories underlying them. In the end, however, the proposals put forward in continental Europe and the provisions of the M.P.C. are, in many cases, quite similar.

42. See *id.* at 299.

43. See *id.*