

## CRIMINOLOGY OF CRIME AVOIDANCE

Creative Compliance Delinquency in the Borderlands of Legality

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### ABSTRACT

This article outlines the research program of a “criminology of crime avoidance” using the example of the preemptive use of legal opinions by white-collar actors to shift the boundaries of the law in their own favor. For this purpose, the term creative compliance is introduced and explained with regard to the Cum-Ex scandal in Germany. Then, a look is taken at possible criminological explanations for the phenomenon. Finally, the hypothesis is developed that law enforcement personnel is deterred from investigations by the reputational capital of certain legal advisors.

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*White-collar advantage can be gained not only through the actions of those who construct and administer law, but through the actions of those subject to it.*  
McBarnet, 2006, 1091

## I. INTRODUCTION<sup>1</sup>

Criminology's focus traditionally falls on situations in which the borders of legality have already been left behind. In white-collar crime, however, the transition from the permissible to the criminally prohibited is not always clear; the boundaries merge fluidly in the "foggy field of white-collar criminal law".<sup>2</sup> This article addresses the "borderland" between profitable legal behavior and white-collar crime. It will examine how private actors attempt to shift the borders of legality in their favor utilizing lawyer expert opinions designed to attest to the legality of an endeavor - not only in the case of a criminal indictment, but already well in advance of it ("preemptive exoneration through legal opinions"<sup>3</sup>).

The article considers itself a contribution towards a future "criminology of crime avoidance", a new branch of white-collar criminology. The research branch is concerned with investigating the avoidance of crimes from the perspective of private actors. The goal is on the one hand to combine existing, multidisciplinary lines<sup>4</sup> of research on corporate criminal compliance under one heading and on the other hand newly capture avoidance strategies around compliance. In this contribution, the focus is particularly on the latter. As part of a criminology of crime avoidance, "creative compliance delinquency", i.e. "creative" circumvention strategies that turn criminal will be examined and illustrated with reference to the Cum-Ex tax scandal in Germany.

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<sup>1</sup> An extended version of this article has appeared in German in Lucia Sommerer, *Kriminologie der Straftatvermeidung – Creative-Compliance-Delinquenz im Grenzbereich der Legalität*, 34 *Neue Kriminalpolitik* 21 (2022).

<sup>2</sup> Thomas Rotsch, *Compliance und Strafrecht – Fragen, Bedeutung, Perspektiven. Vorbemerkungen zu einer Theorie der sog. „Criminal Compliance“*, 125 *Zeitschrift für die gesamte Strafrechtswissenschaft* 481 (2013); Thomas Rotsch, *Criminal Compliance*, 5 *Zeitschrift für Internationale Strafrechtsdogmatik* 614, 615 et seq. (2010); see also Kai-D. Bussmann, *Wirtschaftskriminologie I* mn. 14 (2016); Hauke Brettel & Hendrik Schneider, 3 *Wirtschaftsstrafrecht* 38, 66 (2021); Klaus Volk & Stephan Beukelmann, § 1 *Begriff und Entwicklung des Wirtschaftsstrafrechts*, in *Münchener Anwaltshandbuch: Verteidigung in Wirtschafts- und Steuerstrafsachen*, mn. 64 (Klaus Volk & Stephan Beukelmann eds., 2020); Alar Leitner, *Handeln nach falschem Rat. Zugleich ein Beitrag zum Schuld-begriff*, 166 *Goldammer's Archiv für Strafrecht* 554, 557 (2019).

<sup>3</sup> Hans Kudlich & Petra Wittig, *Strafrechtliche Enthftung durch juristische Präventionsberatung?*, Teil 1: *Allgemeine Irrtumslehren*, 3 *Zeitschrift für Wirtschaftsstrafrecht und Haftung im Unternehmen* 253 (2013); Hans Kudlich & Petra Wittig, *Strafrechtliche Enthftung durch juristische Präventionsberatung?*, Teil 2: *Präventivberatung, Compliance und gehörige Aufsicht*, 3 *Zeitschrift für Wirtschaftsstrafrecht und Haftung im Unternehmen* 303 (2013).

<sup>4</sup> Ralf Kölbel, *Kriminologisch-empirische Forschung zu Criminal Compliance*, in *Criminal Compliance - status quo und status futurus* 139 (Thomas Rotsch ed. 2021): *inter alia*, economics, management science, organizational psychology/sociology.

## II. TERMINOLOGY

First, two terms must be briefly contrasted: classic criminal compliance and creative compliance.

### A. Criminal Compliance

Criminal compliance - a concept that has gained increasing importance in the last decades<sup>5</sup> - is to be understood as a form of preventive self-monitoring by companies.<sup>6</sup> It involves internal corporate or organizational models with procedures designed to ensure compliance with criminal law.<sup>7</sup> This includes the systematic control and reduction of opportunities for crime within the company and a corresponding crime deterring corporate culture ("tone from the top"),<sup>8</sup> as well as employee training and whistle blowing hotlines, to name just a few. Depending on the type and size of a company and the crime risk profile of an industry, different compliance measures are called for.<sup>9</sup> Rotsch concisely describes criminal compliance as "the *how* and not merely the *whether* of rule compliance in the foggy field of white-collar criminal law".<sup>10</sup>

Such partial transfer of the original governmental tasks of crime control to companies is based on the criminological insight that government-led law enforcement has reached its limits in the area of white-collar crime (keywords: lack of social control and the associated lack of a social-ethical legal consciousness).<sup>11</sup>

<sup>5</sup> Cf. Claudia Nestler et al., *Wirtschaftskriminalität, Mehrwert von Compliance – forensische Erfahrungen* 24 (2018).

<sup>6</sup> Also referred to as "externally regulated self-regulation", Philipp Traudes, *Zertifizierung als Massnahme der (Criminal) Compliance* 384 (2017) and "negotiated governance", Kimberly D Krawiec, *Cosmetic compliance and the failure of negotiated governance*, 81 *Washington University Law Quarterly* 487 (2003); for a detailed discussion of the term see Dennis Bock, *Criminal Compliance* 19 et seq. (2011).

<sup>7</sup> Summarized under the umbrella term Compliance Management System (CMS).

<sup>8</sup> Kai-D. Bussmann, *Wirtschaftskriminalität*, in *Kriminalsoziologie* 337, 350 et seq. (Dieter Hermann & Andreas Pöge eds., 2018); Marshall Clinard & Peter Yeager, *Corporate Crime* 58 et seq. (2006); cf. also "culture of compliance" vs. "culture of resistance" in John Braithwaite, *Criminological theory and organizational crime*, 6 *Justice Quarterly* 333, 346 (1989); see for a "precursor" of the concept of corporate culture, Sutherland, who speaks of "definitions favorable to law violation" in companies, Sutherland quoted according to Robert Apel & Raymond Paternoster, *Understanding "criminogenic" corporate culture: What white-collar crime researchers can learn from studies of the adolescent employment-crime relationship*, in *The criminology of white-collar crime* 15, 29 (Sally S. Simpson & David Weisburd eds., 2009).

<sup>9</sup> For the basic structures of any compliance management system, cf. for example certifications IDW 980 and ISO 19600, for details see Traudes, 181 et seq. 2017.

<sup>10</sup> Rotsch, 125 *Zeitschrift für die gesamte Strafrechtswissenschaft* 481 (2013).

<sup>11</sup> Kai-D. Bussmann, *Das moderne Experiment Strafrecht - Vom Strafrecht der Lebenswelt zum Strafrecht sozialer Systeme*, 16 *Kriminalsoziologische Bibliographie* 1, 7 (1989); Kai-D. Bussmann, *Compliance in der Zeit nach Siemens*, 61 *Betriebswirtschaftliche Forschung und Praxis* 506, 518 (2009); see also Hendrik Schneider, *Generalprävention im Wirtschaftsstrafrecht - Voraussetzungen von Normanerkennung und Abschreckung*, in *Festschrift Heinz 663* (Eric Hilgendorf & Rudolf Rengier eds., 2012); Kölbl, 139, 141. 2021: "hardly any control effect [through criminal law]"; however, more optimistic Johannes Kaspar, *Die Möglichkeiten strafrechtlicher Prävention von Wirtschaftsdelinquenz aus kriminologischer Sicht*, in *Wirtschaftskriminalität* 135, 138 et seq. (Britta Bannenberg & Jörg-Martin Jehle eds., 2010).

Even if the adoption of a compliance management system is not mandatory by law in many countries, including Germany,<sup>12</sup> a number of legal incentives to do so exist.<sup>13</sup> These incentives include not only possible criminal liability of the management level of a company if employees commit criminal acts in the absence of compliance management systems,<sup>14</sup> but also the consideration of these systems in the assessment of a corporate fine.<sup>15</sup>

According to a survey of 500 German companies,  $\frac{3}{4}$  of companies already have their own compliance management system for self-monitoring, with the figure for large corporations being even as high as 97%.<sup>16</sup> In addition, 70% of companies also seek external legal advice from law firms on compliance issues.<sup>17</sup> In this respect, obtaining legal advice at the right time is also an important component of an effective compliance management system.

## B. Creative Compliance

The focus of this article, however, is on when efforts of such classic Criminal Compliance transition into creative compliance: on how private actors may not straight forwardly violate the law, but also do not simply follow it, but rather - as *McBarnet's* opening quote points out - utilize the law, i.e. "play" (with) the law<sup>18</sup> to isolate their behavior *ex ante* from being considered a violation.

The term creative compliance - while having already appeared in international literature<sup>19</sup> and occasionally having been picked up by German scholars<sup>20</sup> - has hardly ever been clearly delineated. *Kölbel* comes closest when he describes creative compliance as "behaviors that realize the same goals as

<sup>12</sup> See for international incentives for the expansion of compliance structures e.g. US Foreign Corrupt Practices Act (1977); Sarbanes Oxley Act (2002), US Federal Sentencing Guidelines (expanded to include compliance aspects in 1991 & 2004); see also UK Bribery Act (2010), EU Directive 2019/1937 (Whistleblower Directive); see also Thomas Rotsch, Teil 1 Kap. 4 Criminal Compliance, in Handbuch Wirtschaftsstrafrecht, mn. 18 et seq. (Hans Achenbach et al. eds., 2019); for USA see Todd Haugh, The Criminalization of Compliance, 92 Notre Dame Law Review 1215 (2016).

<sup>13</sup> Rotsch, Teil 1 Kap. 4 Criminal Compliance, mn. 18 et seq. (2019); on the civil law incentives in the context of a looming liability to pay damages on the part of the Board of Management, see the Siemens/Neubürger Judgment, LG München I, December 10, 2013 - 5 HKO 1387/10, ZIP 570 (2014).

<sup>14</sup> Bock, 350 et seq. (2011); Regina Michalke, *Untreue - neue Vermögensbetreuungspflichten durch Compliance-Regeln*, Der Strafverteidiger 245 (2011).

<sup>15</sup> In Germany pursuant to Section 30 OWiG in conjunction with Section 130 OWiG; cf. BGH NZWiSt 2018, 379, 387; Bock, 364 et seq. (2011).

<sup>16</sup> Nestler et al., 24 (2018).

<sup>17</sup> CMS, Compliance Barometer 2018 4 (2018).

<sup>18</sup> Cf. references to "game-playing" and "gaming the system" scholarly literature: Christine E Parker et al., *The two faces of lawyers: Professional ethics and business compliance with regulation*, 22 Georgetown Journal of Legal Ethics 201, 210 (2009); Sol Picciotto, *Constructing compliance: Game playing, tax law, and the regulatory state*, 29 Law & Policy 11 (2007); Doreen McBarnet, *After Enron will 'whiter than white collar crime' still wash?*, 46 British Journal of Criminology 1091, 1107 (2006).

<sup>19</sup> McBarnet, British Journal of Criminology, 1091 (2006); Doreen McBarnet, *Financial engineering or legal engineering? Legal work, legal integrity and the banking crisis*, University of Edinburgh, School of Law, Working Papers 1, 11 (2010); Picciotto, Law & Policy, 12 (2007); Justin O'Brien, *Engineering a financial bloodbath: how sub-prime securitization destroyed the legitimacy of financial capitalism* 45 (2009); Justin O'Brien, *Redesigning Financial Regulation: the Politics of Enforcement* 3 (2006).

<sup>20</sup> Kölbel, 139, 163 (2021); Ralf Kölbel, *Strafrecht, Compliance, Pharmamarketing. Kriminologische Beobachtungen anlässlich des Entwurfs zu §§ 299a ff. StGB nF*, in Zehn Jahre ZIS-Zeitschrift für Internationale Strafrechtsdogmatik 815, 837, Thomas Rotsch ed. (2018); Traudes, 385 (2017).

illegal conduct, but in a seemingly legal manners, by means of 'functional equivalents')".<sup>21</sup> Such behavior is also sometimes referred to as "(creative) legal engineering".<sup>22</sup> *Brettel & Schneider* use the term "gamester lawyer",<sup>23</sup> who seeks holes in the meshes of criminal law in order to enable entrepreneurial transactions in the gray area between legality and crime.<sup>24</sup>

Against this background, the working definition of creative compliance developed for this article is:

*Ex ante use of legal expertise (i.e. well before the actual commission of a crime), in order to be able to lay claim to lawfulness, or at least a lack of awareness of wrongdoing in the borderland of legality via a creative interpretation of the laws.*

Creative compliance understood in this way thus describes the use of legal expertise by private actors not so much to obtain genuine clarification as to protect and preemptively exonerate themselves. Such behavior is not about finding the boundaries between right and wrong, but about attempting to redraw the boundaries to one's own profit. The sociologist McBarnet aptly names this "using the letter of the law to defeat the spirit of the law".<sup>25</sup> It is the opposite of what Bussmann calls "integrity".<sup>26</sup> Inspired by the criminological labeling theory, one may even speak of an attempt of active self-labeling as law-abiding.<sup>27</sup>

However, it must be emphasized: Behavior in the sense of this working definition is by no means generally to be equated with crime. Everyone is allowed to seek their own advantage within the framework of the law, and to interpret the law up until its borders to illegality. This is clearly evident in the distinction between criminal tax evasion vs. legal tax avoidance and tax structuring: Not everyone who creatively avoids taxes is a criminal. On the contrary, entire (legitimate) economic sectors have established themselves around the phenomenon of legal tax avoidance. Despite this anchoring of creative compliance at a legal starting point, it is nevertheless undeniable: Creative compliance endeavors that seek to walk the thin line between legal and illegal always harbor a risk of being subsequently assigned by the courts to the illegal side, and thus becoming criminally delinquent after all.

<sup>21</sup> Kölbel, *Criminal Compliance* 139, 163 (2021).

<sup>22</sup> McBarnet, University of Edinburgh, School of Law, Working Papers, (2010); Kölbel, *Criminal Compliance* 139, 163 (2021); Ralf Kölbel, *Strafrecht, Compliance, Pharmamarketing. Kriminologische Beobachtungen anlässlich des Entwurfs zu §§ 299a ff. StGB nF*, 11 *Zeitschrift für Internationale Strafrechtsdogmatik* 452, 461 (2016); see related to this also the term „cosmetic compliance“ Krawiec, *Washington University Law Quarterly*, (2003); see also Jodi L Short & Michael W Toffel, *Making self-regulation more than merely symbolic: The critical role of the legal environment*, 55 *Administrative Science Quarterly*, 364 et seq., 387 (2010); Garry C Gray & Susan S Silbey, *Governing inside the organization: Interpreting regulation and compliance*, 120 *American Journal of Sociology* 96, 116 et seq. (2014).

<sup>23</sup> Parker et al., *Georgetown Journal of Legal Ethics*, 210 (2009): "Lawyers may function as 'gamesters,' expanding what constitutes 'legal' compliance so that their clients do not have to bring their activities into accord with what regulators and the community see as the 'purposes' of the law".

<sup>24</sup> Brettel & Schneider, *Wirtschaftsstrafrecht*, 62 (2021).

<sup>25</sup> McBarnet, *British Journal of Criminology*, 1091 (2006); see also Doreen McBarnet, *It's not what you do but the way that you do it: tax evasion, tax avoidance and the boundaries of deviance*, in *Unravelling Criminal Justice* 247, 264 (D. Downes ed. 1992): "[L]aw can be not just a mechanism of social control but a mechanism for escaping it. What is being used in the management of boundaries is the law, its rules, institutions and forms. Law can be used to construct techniques which escape tax but also provide immunity from control".

<sup>26</sup> Kai-D. Bussmann, *Integrität durch nachhaltiges Compliance Management - über Risiken, Werte und Unternehmenskultur*, 9 *Corporate Compliance Zeitschrift* 50 (2016).

<sup>27</sup> Doreen McBarnet, *Whiter than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma*, 42 *British Journal of Sociology* 323 (1991); for details see below IV. C.

It is this that the article wants to examine: Not the possible moral objectionability of legal creative compliance measures, but the moment of crossing the border into the illegal.

### III. CURRENT EXAMPLES AND RESEARCH INTEREST

Examples of creative compliance that have crossed the line into the criminal can be found, inter alia, in the aforementioned transition from tax avoidance to tax evasion,<sup>28</sup> as well as in the Enron accounting scandal in the USA,<sup>29</sup> and in corrupt pharma-marketing.<sup>30</sup> Further, a look at the behaviors in the current Cum-Ex tax scandal in Germany seems particularly suited to illustrate creative compliance via legal opinions.

#### A. Cum-Ex Tax Scandal

Behind the term Cum-Ex stand controversial share transaction patterns around the dividend record date, which will not be discussed in detail here.<sup>31</sup> It will suffice to note the following key points: Cum-Ex was a financial construct sold as a “tax-driven equity fund”. The return, however, stemmed - simply put - from the fact that shares were traded over the dividend record date in such a circular and confusing manner that the tax authorities lost track and refunded the capital gains tax not once but multiple times.<sup>32</sup> In other words, taxes were “refunded” that had never been paid. In March 2020, two stock traders were criminally convicted of tax evasion for the first time in this context in Germany.<sup>33</sup> In July 2021, the German Federal Supreme Court confirmed this ruling.<sup>34</sup> In addition, there are currently around 120 other criminal proceedings underway in Germany in the Cum-Ex complex involving more than 1,500 defendants.<sup>35</sup>

Of particular interest for the present article is that the legal advice given to private actors (e.g. banks) by third-party law firms played a very central role in the scandal. Prior to the execution of the crime-relevant Cum-Ex actions, renowned law firms offered expert opinions on the alleged permissibility of the actions (hereinafter referred to as “ex ante legal opinions”). Only based on these expert opinions, were the banks involved in the transactions able to make claims of legal compliance towards investors, the tax office and law enforcement agencies.

<sup>28</sup> McBarnet, It's not what you do but the way that you do it: tax evasion, tax avoidance and the boundaries of deviance 247 (1992).

<sup>29</sup> McBarnet, *British Journal of Criminology* (2006).

<sup>30</sup> Ralf Kölbel et al., Die institutionelle Form von Korruption und deren Implikationen, in *Institutionelle Korruption und Arzneimittelvertrieb* 341, 346 et seq. (Ralf Kölbel ed. 2019); Kölbel, *Zeitschrift für Internationale Strafrechtsdogmatik* 461 (2016).

<sup>31</sup> See for details Christoph Knauer & Soeren Schomburg, *Cum/Ex-Geschäfte – kommen Strafrechtsdogmatik und Strafrechtspraxis an ihre Grenzen?*, 39 *NStZ* 305 (2019); Richard S Collier, *Banking on Failure: Cum-ex and why and how Banks Game the System* (2020); Rau, „Cum/Ex“ und „Cum/Cum“ abgeschlossene Aktiengeschäfte über den Dividendenstichtag, 59 *Deutsches Steuerrecht* 6 (2021); instructive furthermore LG Bonn, judgement of 18.3.2020, Az. 62 KLs - 213 Js 41/19 - 1/19, mn. 20 et seq; Florstedt, *Alea iacta est: Cum/Ex-Geschäfte waren rechtswidrig und strafbar*, *NStZ* 129 (2022); BGH NZWiSt 425 (m. Anm. Ransiek, Heger, 2021).

<sup>32</sup> LG Bonn, judgement of 18.3.2020, Az. 62 KLs - 213 Js 41/19 - 1/19, mn. 43.

<sup>33</sup> *Ibid.*

<sup>34</sup> BGH NJW 90 (2022).

<sup>35</sup> Sönke Iwersen & Volker Votsmeier, *Cum-Ex-Steuerskandal - Deutlich mehr Banken involviert*, *Handelsblatt*, 19.1.2022, accessible at <https://perma.cc/9QUW-NTNJ>.

Notably, in December 2020, the first indictment against employees of one such law firm has been admitted in Germany. The former tax law partner Ulf Johannemann of the renowned law firm Freshfields Bruckhaus Deringer has been charged with aiding and abetting tax evasion by, as the prosecutor put it, “providing fig-leave expert opinions”.<sup>36</sup> The law firm Freshfields Bruckhaus Deringer as a whole was also investigated in this context. In January 2021, however, the law firm was able to avert a looming corporate fine by making a “voluntary payment” of €10 million to the tax authorities.<sup>37</sup>

## B. Research Interest

In view of the serious economic consequences of creative compliance delinquency - estimated losses in tax revenue of up to €31.8 billion in Cum-Ex<sup>38</sup> as well as liability risks,<sup>39</sup> reputational damage and even insolvencies<sup>40</sup> - a better understanding of the crime avoidance model of creative compliance is not only in the interest of the state, but of companies themselves.

However, so far, a precise criminological analysis of this borderland is missing. Kölbel points to its existence,<sup>41</sup> but in-depth studies of the phenomenon have not yet taken place. A future “criminology of crime avoidance” must fill this gap.

## IV. EXPLANATORY MODELS

How does creative compliance delinquency occur? In criminology, as is well known, a variety of theories are used to explain criminality. This article would like to pick out three which - without claiming exclusivity - appear to be particularly fruitful in the context of creative compliance delinquency: the subculture theory, the theory of neutralization supplemented by the concept of “moral disengagement” as well as the labeling theory.

### A. Subculture Theory

The subculture theory, according to which criminality is a consequence of membership in segregated social groups in which deviant values predominate (“society within society”<sup>42</sup>), originally developed for

<sup>36</sup> LG Frankfurt, Eröffnung des Hauptverfahrens wegen Steuerhinterziehung im Zusammenhang mit Aktiengeschäften um den Dividendenstichtag, Pressemitteilung, 14.12.2020, accessible at <https://perma.cc/YMQ2-D87D>.

<sup>37</sup> ah/LTO-Redaktion, *Verfahren gegen Freshfields ist eingestellt*, lto, accessible at <https://perma.cc/KV6W-M2XN>; pursuant to Section 47 OWiG.

<sup>38</sup> Lutz Ackermann et al., *Cum-Ex: Der größte Steuerraub in der deutschen Geschichte*, Zeit, 7.6.2017, accessible at <https://perma.cc/8DLB-WKTY>.

<sup>39</sup> Cf. Martin Ströder & Christiane Schiffer, *Vergleich: Freshfields zahlt Maple Bank-Verwalter 50 Millionen Euro*, juve, 29.08.2019, accessible at <https://perma.cc/ZL8T-QDSW>; in 2019, the law firm Freshfields Bruckhaus Deringer paid €50 million to the liquidator of Maple Bank, which it had advised on Cum-Ex transactions, after the firm was initially sued for €95 million.

<sup>40</sup> BaFin, BaFin stellt Entschädigungsfall für Maple Bank GmbH fest, Pressemitteilung, 12.2.2016, accessible at <https://perma.cc/TG77-XMD4>; insolvency of the Maple Bank in 2016, which was involved in Cum-Ex transactions.

<sup>41</sup> Kölbel, *Criminal Compliance* 139, 163 (2021); Kölbel, *Strafrecht, Compliance, Pharmamarketing. Kriminologische Beobachtungen anlässlich des Entwurfs zu §§ 299a ff. StGB nF 815, 837* (2018).

<sup>42</sup> Hartmut Lüdtke, *Jugend – Gesellschaft in der Gesellschaft: die These von der Subkultur*, in *Handbuch der Familien- und Jugendforschung* 113 (M. Markefka & R. Nave-Herz eds., 1989).



youth gangs in the USA,<sup>43</sup> can also be transferred to processes in a corporate environment.<sup>44</sup> Here, too, subcultures can be formed by “a temporal shift of the daily routine, in particular by [...] the merging of the professional and leisure spheres as well as by the selection and restriction of self-chosen contacts”<sup>45</sup> with the consequence that the “perception of the environment can take on features of a lack of reality control”.<sup>46</sup> Based on this, both Coleman<sup>47</sup> and Schneider<sup>48</sup> include subculture concepts in their multifactorial integrated explanation models for white-collar crime. Further, Bussmann speaks of “value subcultures”<sup>49</sup> and Kaiser sees a “particularly important condition of macrocrime in the collective change of moral value orientations”.<sup>50</sup>

A value orientation in a company, the so called “corporate culture”, may thus be the accumulation of financial gains at any cost, or the “tricking” of the government, rather than rule-compliant, ethical behavior. A witness statement from the first Cum-Ex trial in Germany points to such a subculture with deviant values. Those who questioned the Cum-Ex business model were met with answers such as: *“If anyone has a problem with the fact that because of our work fewer kindergartens are built ... there is the door!”*<sup>51</sup>

From this point of view, focusing on the subculture values in a company is one of the most important starting points for preventing creative compliance delinquency - even more so than is the case with white-collar crime in general. This follows from the fact that the line between unethically permitted and illegal behavior in Creative Compliance is extraordinarily thin. We are thus dealing with situations in which simply admonishing “You shall not violate criminal laws” will not get us anywhere, i.e., it will not reach the actors in their motivational situations. This is because, in the case of creative compliance, the actors often convince themselves that they are still acting on the side of legality or believe that they are protected by an ex ante legal opinion, or may not be exposed to a high probability of detection.<sup>52</sup>

This brings us to the second criminological theory to be examined: the theory of neutralization complemented by moral disengagement.

<sup>43</sup> Albert K Cohen, *Delinquent Boys. The Culture of the Gang* (1955); see also *Walter B Miller, Lower class culture as a generating milieu of gang delinquency*, 14 *Journal of Social Issues* 5 (1958); William Foote Whyte, *Street Corner Society: The Social Structure of an Italian Slum* (2012).

<sup>44</sup> In this vein already James William Coleman, *Toward an integrated theory of white-collar crime*, 93 *American Journal of Sociology* 406, 416 et seq. (1987): “deviant occupational subculture”; “work related subcultures”; see also Hendrik Schneider, *Das Leipziger Verlaufsmodell wirtschaftskriminellen Handelns*, 27 *NStZ* 555, 559 (2007); Kai-D. Bussmann, *Nationales Recht und Anti-Fraud-Management - US-amerikanische und deutsche Unternehmen im Vergleich*, in *Wirtschaftskriminalität und Ethik* 111, 124 (Albert Lohr & Eckhard Burkatzki eds., 2008).

<sup>45</sup> Schneider, *NStZ*, 559 (2007).

<sup>46</sup> Hendrik Schneider, *Person und Situation. Über die Bedeutung personaler und situativer Risikofaktoren bei wirtschaftskriminellem Handeln*, in *Wirtschaftskriminalität und Ethik* 135, 144, 147 (Albert Lohr & Eckhard Burkatzki eds., 2008).

<sup>47</sup> Coleman, *American Journal of Sociology*, 422 (1987).

<sup>48</sup> Schneider, *NStZ*, 559 (2007); Hendrik Schneider, § 25 *Wirtschaftskriminalität*, in *Kriminologie* 418, 429 (Hans Göppinger & M Bock eds., 2008).

<sup>49</sup> Bussmann, 111, 124 (2008).

<sup>50</sup> Günther Kaiser, *Kriminologie. Ein Lehrbuch* 432 (1996); see also Bernd Schünemann, *Unternehmenskriminalität und Strafrecht* 22 (1979).

<sup>51</sup> LG Bonn, judgment of 18.03.2020, Ref. 62 KLS - 213 Js 41/19 - 1/19, mn. 858.

<sup>52</sup> On the low probability of detection in white-collar criminal law in general, cf. Kaspar, 135, 146 et seq. (2010); especially for corruption Britta Bannenberg, *Korruption in Deutschland und ihre strafrechtliche Kontrolle* 347, 365, 370 (2002).

## B. Neutralization & Moral Disengagement

### 1. Displacement of Responsibility

An important addition to the well-known theory of neutralization techniques<sup>53</sup> is offered by Bandura's concept of "moral disengagement", i.e., the temporary disengagement of the self from one's own values.<sup>54</sup> The Stanford psychologist Bandura is known in criminology primarily for his social learning theory.<sup>55</sup> It is, however, his lesser-known concept of moral disengagement, which can be of particular use in analyzing the role of expert legal opinion for creative compliance delinquency. Interestingly, Bandura himself has already observed moral disengagement in white-collar criminals, in the context of the Enron scandal in the USA,<sup>56</sup> as well as the world financial crisis.<sup>57</sup>

While the theory of neutralization merely describes several internal mechanisms to persuade oneself of a clear conscience,<sup>58</sup> moral disengagement offers an approach to the question of why: Which are the conditions that particularly drive people to access neutralization mechanisms? Bandura emphasizes network-situations that allow for a *displacement of responsibility*.<sup>59</sup> These are situations that enable a shift of responsibility to external decision-making authorities (e.g., superiors or consultants). The shift psychologically frees oneself from personal responsibility and may cause anyone involved to cease their own critical thinking, to not ask questions, because they assume someone else in the network will have already undertaken this task of thoroughly "thinking it through".

### 2. Displacement of Responsibility via ex ante Legal Opinions

It is precisely in the use of legal opinions for Creative Compliance where we find such displacement of responsibility. If something goes "wrong", i.e., if the courts determine that a company's activities crossed the line into crime, those responsible in the company point toward an exonerating ex ante legal opinion by renowned law firms. The law firm, however, has placed a so-called disclaimer at the end of all their expert opinions, stating that it assumes no responsibility for decisions taken on the basis of its expert opinion. This means that the law firm, too, "disengages" itself of responsibility. In the end, everyone thinks that they bear no responsibility for decisions in the borderland of legality; everyone in the network is morally disengaged.

It can thus be seen that the fact that several parties act in a networked manner - company actor and legal advisors - is quite decisive in enabling this disengagement. In some cases, the network relationship may even be established precisely to increase the complexity of a situation thereby deliberately diffusing responsibility.

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<sup>53</sup> Gresham M Sykes & David Matza, *Techniques of neutralization: A theory of delinquency*, 22 *American Sociological Review* 664 (1957).

<sup>54</sup> Albert Bandura, *Moral Disengagement: How People Do Harm and Live with Themselves* (2016).

<sup>55</sup> Albert Bandura et al., *Transmission of aggression through imitation of aggressive models*, 63 *The Journal of Abnormal and Social Psychology* 575 (1961).

<sup>56</sup> Bandura, 213 et seq. (2016).

<sup>57</sup> *Id.* at, 208 et seq.

<sup>58</sup> Schneider, § 25 *Wirtschaftskriminalität* 418, 428 (2008).

<sup>59</sup> Bandura, 3, 62 (2016); see also Herbert Jäger, *Makrokriminalität: Studien zur Kriminologie kollektiver Gewalt* 200 (1989); for committee decisions Christoph Knauer, *Die Kollegialentscheidung im Strafrecht* 30 (2001); for large corporations Thomas Rotsch, *Individuelle Haftung in Grossunternehmen: Plädoyer für den Rückzug des Umweltstrafrechts* 37 (1998).

Complexity as a cause of white-collar crime has already been addressed *inter alia* by Schröder in the context of crimes in the capital market sector<sup>60</sup> as well as by Schünemann.<sup>61</sup> In the case of creative compliance delinquency, however, it is not just the inherent complexity of the “thick and unwieldy underbrush of laws” in the “ever expanding field of white-collar crime regulation”<sup>62</sup> that needs to be taken into account as criminogenic,<sup>63</sup> but rather the deliberate creation of additional complexity layers by private actors via responsibility displacing networks.

Such deliberate use of networks is also found in the third criminological theory to be examined.

### C. From Traditional Labeling Theory Towards a Theory of “Self-Labeling”

The labeling theory<sup>64</sup> assumes that crime is not something given or pre-existing, i.e., not a property inherent to people and their actions. Rather, according to the labeling theory:

1. crime is the result of social definition processes through norm setting and norm application.<sup>65</sup>
2. only certain groups in society have “definitional power”, i.e. the power to say what is a crime and what is not, and subsequently apply this definition to all members of society. Collectives of the political elite, for example, have this power.<sup>66</sup>

At this point, the labeling theory’s analysis on definitional power and the group of people being able to access this power usually ends.

In the field of white-collar crime, however, this article posits that the labeling theory must be extended to a third dimension, the dimension of “self-labeling”. It is not only powerful collectives at the political level that define what is crime and what is not. Corporations do not merely possess definitional power

<sup>60</sup> Christian Schröder, Die Finanzkrise und das Strafrecht, in Handbuch Kapitalmarktstrafrecht 504, 521 et seq. (Schröder ed. 2020).

<sup>61</sup> Bernd Schünemann, *Alternative Kontrolle der Wirtschaftskriminalität*, in GS Kaufmann 629 (Dornseifer ed. 1989).

<sup>62</sup> Bussmann, *Wirtschaftskriminologie I* preface, mn. 702 (2016).

<sup>63</sup> Brettel & Schneider, 66 (2021): “criminogenic laws”; see also *ibid.* p. 58: “increasing density of regulations [...] perverted criminal law”, *ibid.* p. 61: “substantive law hypertrophy”; Hendrik Schneider, Wachstumsbremse Wirtschaftsstrafrecht: Problematische Folgen überzogener Steuerungsansprüche und mangelnder Randschärfe in der wirtschaftsstrafrechtlichen Begriffsbildung, 24 *Neue Kriminalpolitik* 30 (2012); Bock, 136 et seq. (2011): “Criminal law mutates into a political sham weapon”; “Excessive threats of punishment only bring the mental balance of their advocates into line”, *ibid.* p. 157: “The legislator has extended punishability to such an extent that it can no longer be grasped with a normal sense of justice. But those who do not have an inner sense of forbiddleness have little inhibition about doing the deed.” John Braithwaite, Through the Eyes of the Advisers: A Fresh Look at High Wealth Individuals, in *Taxing Democracy* 245, 265 (Valerie Braithwaite ed. 2002): “Both conscience and fear of deterrence work better in the realm of black and white than in the realm of gray”; cf. also Volk & Beukelmann, mn. 64 et seq. (2020); for companies’ perspective cf. survey in Claudia Nestler et al., *Wirtschaftskriminalität und Unternehmenskultur* 2013 61 (2013): 16% of respondents see the main reasons for competition law offenses in a confusing network of applicable law.

<sup>64</sup> Howard S Becker, *Outsiders* (1973); see also Edwin M Lemert, *Social Pathology. A Systematic Approach to the Theory of Sociopathic Behavior* (1951); on the reception in Germany see Fritz Sack, Definition von Kriminalität als politisches Handeln: der labeling approach, 4 *KrimJ* 3 (1972).

<sup>65</sup> Becker, 8 et seq. (1973).

<sup>66</sup> *Id.* at, 17 et seq.

when they band together in lobbying governments for favorable laws<sup>67</sup> Rather, it is not least *individual* economic actors and their legal advisors, i.e., *small* networks of private actors, who demand this power of defining criminality for themselves.<sup>68</sup> Through creative legal advice when acting in the borderland of legality, a process of “self-labeling” or rather “self-*de*-labeling” from the label of the criminal can be observed.<sup>69</sup> Through the right, resourceful legal advice, private actors attempt to buy their way out of the criminal label.

## V. DETERRENCE THESIS

One research hypothesis that can be derived from these observations is one of deterrence: *law enforcement agencies are “deterred” from criminal investigations by the existence of an ex ante legal opinion.*

Public prosecutors work with limited resources. The time pressure as well as the financial and personnel constraints under which prosecuting authorities operate, especially in the area of the very extensive, complex investigations of white-collar crime, are well known. Work economy and limited judicial capacities often force the authorities to drop cases in preliminary proceedings.<sup>70</sup> It stands to reason that public prosecutors may “think twice” before investigating acts of companies supported by expert opinions of renowned law firms (armoring effect through reputational capital). From a prosecutorial perspective, *Güroff* also speaks generally in white-collar criminal proceedings of a deterrent “power of expert opinions”, which companies “like to use as further legal facades to document first their alleged integrity and later lack of *mens rea*”.<sup>71</sup>

If this deterrence hypothesis were true, one could speak of a de facto decriminalizing effect (since it de facto impedes criminal prosecution) of ex ante legal opinions. This would make it all the more important, in addition to raising awareness among law enforcement agencies, to start at the company level in order to prevent this type of delinquency.

## VI. CONCLUSION – CRIMINOLOGY OF CRIME AVOIDANCE

The increased “defense power” of private companies,<sup>72</sup> i.e., the legal expertise that is often available to them by virtue of their finances at the time when investigations against them are underway, is well known and researched. Less well known is the use of legal expertise well *in advance* of any crime-

<sup>67</sup> Klaus Boers, *Wirtschaftskriminalität: Begriffe, Methoden, empirische Erkenntnisse, Theorien und Forschungsziele. Einführung in die Untersuchung*, in *Wirtschaftskriminalität und die Privatisierung der DDR-Betriebe* 17, 47, see esp. in mn. 140 (Klaus Boers et al. eds., 2010); see also Bock, 207 et seq. (2011); cf. for lobbying in the context of Cum-Ex instructive also LG Bonn, judgment of 18.03.2020, Ref. 62 KLS - 213 Js 41/19 - 1/19, mn. 237.

<sup>68</sup> Pistor refers to this for the field of private law as “private coding strategies” Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* 43, 162 (2019).

<sup>69</sup> See also questions about the role of “individual companies themselves in these attribution processes” in Tobias Singelstein, *Wirtschaft und Unternehmen als kriminogene Strukturen? Vernachlässigte Aspekte einer theoretischen Perspektive auf Corporate Deviance*, 95 *Monatsschrift für Kriminologie und Strafrechtsreform* 52, 63 (2012).

<sup>70</sup> Klaus Boers, *Wirtschaftskriminalität und Strafverfahren*, 17 *Neue Kriminalpolitik* 136 (2005); *Eduard Güroff, Die Staatsanwaltschaft im Wirtschaftsstrafverfahren*, see id. at 137, 138.

<sup>71</sup> Güroff, *Neue Kriminalpolitik*, 138 (2005).

<sup>72</sup> Kai-D. Bussmann, *Business Ethics und Wirtschaftsstrafrecht. Zu einer Kriminologie des Managements*, 86 *Monatsschrift für Kriminologie und Strafrechtsreform* 89, 91 (2003).

related act. In a criminology of crime avoidance, however, classic criminal compliance measures come into focus naturally as do the related challenges of creative compliance outlined here.

A criminology of crime avoidance is not concerned with infinitely extending the gaze of criminology to any and all behavior somewhat ethically questionable. Rather, it is a matter of sharpening criminology's focus on actions in the borderland of legality and shifting the perspective to the networked diffusion of responsibility to be found here.