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Regulating Violence on Television

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On the Moral Structure of White Collar Crime

Mitchell N. Berman*

STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME (Oxford University Press 2006)

White collar crime has long presented a puzzle for, or a challenge to, theorists of the criminal law. Indeed, it might be more accurate to say that it presents at least two sorts of puzzles, or is puzzling in at least two places. Some white collar offenses are puzzling through and through; we cannot agree—each of us might even be thoroughly perplexed about—why the conduct at the core of the offense is criminalized in the first place. Insider trading is like this, as is (assuming that it counts as white collar crime) blackmail. With respect to other offenses, our puzzlement attends only to the contours. We have no difficulty understanding why fraud, for example, is criminalized but we have the dickens of a time settling on how the criminal offense of fraud ought to be formulated—what forms of arguably deceptive practices should fall within the criminal ban, what should lie outside, and how much vagueness we should tolerate in the articulation of the border. Naturally, there may be some offenses whose classification in one or the other categories of this simplified dichotomy is controversial.

Lying, Cheating, and Stealing, Stuart Green's intricately crafted, learned, and frequently illuminating book, aims to solve these puzzles. Its central thesis, as I read it, is that the contours of white collar criminal offenses (and possibly, of criminal offenses more generally) ordinarily do, and ought to, closely track the judgments of common-sense morality. Insider trading should be criminalized because it instantiates the underlying moral wrong of cheating. Receiving or soliciting a bribe should be criminalized because it instantiates the moral wrong of disloyalty. Fraud and perjury should have the particular fine-grained contours they do to reflect the fine-grained distinctions recognized by our moral norms against deception and lying. And so on. I will call this account "comprehensive wrongfulness."

What makes "comprehensive wrongfulness" a provocative theory is that it contrasts with at least two other possible theories of the actual or desirable moral structure of white collar crime. On one competing account—let's call it "modified wrongfulness"—the creation of an offense can be justified only as a means to prohibit a moral wrong, but once we have decided to create an offense of a general sort, we can draw its precise contours with an eye toward meeting the prudential needs of the criminal justice system. Given such systemic desiderata as promoting efficient judicial administration, reducing the false positives that epistemically limited agents

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inescapably produce, and minimizing socially costly over-deterrence, modified wrongfulness would permit the contours of the criminal offense to depart, perhaps significantly, from those of the underlying moral norm that the offense is designed in the first instance to cover. A second account would permit even the core of an offense to be justified by reference to consequentialist concerns, namely the wish to prevent social *harms* that need not be moral *wrongs*. Call this theory, accordingly, “harm-prevention.” Insofar as he endorses comprehensive wrongfulness as his “moral theory of white collar crime,” Green is implicitly rejecting both modified wrongfulness and harm-prevention, not only as themselves complete theories of white collar crime, but seemingly as even components of the correct complete theory.

Green’s thoughtful elaboration of comprehensive wrongfulness as the preferred moral theory of white collar crime rewards careful study. At bottom, though, I suspect that the account is too partial. Whether intended descriptively or normatively, a satisfactory full account of the moral structure of white collar criminal law must, I think, be more sensitive to the respects in which the law departs from morality to accommodate its different needs and constraints.

I. OVERVIEW

Lying, Cheating, and Stealing proceeds in three parts. Part I, aptly captioned “Getting Started,” lays the groundwork by defining white collar crime, by articulating the problem or challenge that Green aims to meet, and by sketching his plan of attack.

Let us start, then, by considering Green’s subject: What is “white collar crime”? Although the term is in wide use today, sixty-five years after its coinage, Green details broad disagreement and uncertainty among sociologists, criminologists, judges, prosecutors, defense attorneys, legal academics, and journalists regarding just what it means. As Green presents it, the definitional debate is framed by three questions: first, whether the term should be limited to crime only, or include as well forms of non-criminal deviance; second, whether it should be defined by reference to characteristics of defendants, or of the acts they commit; and third, if the latter, what factors determine which criminal acts qualify. (Green, p. 10.)

Consciously reflecting the bias of lawyers, as against that of sociologists, Green endorses a definition that is limited to actual crimes, excluding other forms of deviance. He also rejects a definition that would be keyed to characteristics of the offender (usually some combination of wealth, occupation, and social status), partly because he thinks such an approach would run afoul of “[d]eeply rooted equal protection-type norms,” and partly because it would not adequately match strong intuitions regarding which offenses do, and do not, count. (Green, pp. 13–14.) After determining to “use ‘white collar crime’ to refer exclusively to a category of criminal offenses that reflects some particular group of legal and moral characteristics,” (Green, p. 15.) he proceeds to consider various crime-limited, act-centered definitions that have already been proposed, such as the FBI’s 1989 proposal to define white collar crime as “[t]hose illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of

physical force or violence,” and which are committed “to obtain money, property, or services . . . or to secure personal or business advantage.”¹ But this and similar definitions are criticized as vague and underinclusive. Instead, Green concludes, “the most sensible way to characterize the concept of white collar crime is in terms of a loose collection of family resemblances relevant to the task at hand.” (Green, p. 21.)

Having settled on a family-resemblance approach to his subject, Green is perhaps not as explicit as one might wish concerning the particular qualities or characteristics that together comprise the family. Nowhere, for example, does he offer a concise list of the relevant features. Still, at least one of the characteristics that help mark the category of white collar crime does emerge with great clarity—namely, doubt as to the moral character of the conduct criminalized and concomitant uncertainty as to whether criminalization is appropriate. “What is interesting and distinctive about [white collar crime],” Green announces at the outset, “is that, in a surprisingly large number of cases, there is genuine doubt as to whether what the defendant was alleged to have done was in fact morally wrong.” (Green, p. 1.) Put another way, there is “a widely felt sense—expressed by judges, jurors, scholars, journalists, and the average citizen—that the law in this area involves a kind of moral uncertainty that distinguishes it from that which governs more familiar ‘core’ cases of crime.” (Green, p. 1.)

It is, in fact, precisely this feature of white collar crime that first drew Green’s attention to the subject—his attention and his worry, for the growing gap between law and norms made “[t]he moral foundations on which the criminal law is supposed to rest seem[] increasingly shaky.” (Green, p. xii.) More particularly, Green explains that public uncertainty regarding whether white collar crime is in fact morally wrong threatens “the law’s legitimacy, coherence, and authority” for two reasons. (Green, p. 1.) First, and consistent with the negative or limiting thrust of retributivism, “[a] system of law that imposed punishment on people who were not at fault, or did so in a way that was disproportionate to their fault, would be unjust.” (Green, p. 22.) Second, and turning now to consequentialist reasoning, “without an adequate grounding in widely held moral values, the criminal law loses its legitimacy. If the criminal sanction is overused, or misused, its potency is diluted, its sting is lost, and it is ultimately rendered ineffective.” (Green, p. 22.) “[W]hen there is a gap between what the law regards as morally wrongful and what a significant segment of society views as such, moral conflict and ambiguity are likely to be the result,” thus frustrating the law’s educative function. (Green, p. 46.)

Given this widespread uncertainty regarding the relationship between white collar crime and morality, Green deems it “evident that we need some more precise method for assessing the moral content of white collar offenses than we currently have.” (Green, p. 30.) The more precise method Green proposes is a three-part framework consisting of *mens rea* (in the narrow, elemental sense that corresponds to Model Penal Code culpability levels, not in the broad sense of blameworthiness or

¹ Green, at p. 15 (quoting U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, *WHITE-COLLAR CRIME: A REPORT TO THE PUBLIC* 3 (1989)).

Blackstonian “vicious will”), harmfulness, and moral wrongfulness. (Green, p. 30.) While Green stops short of insisting that every offense, or even every white collar offense, must contain each of these three components, he claims for the three at least a strong presumption. In any event, he proposes “to use this three-part framework as an analytical framework for describing white collar crime’s moral complexity.” (Green, p. 30.)

With this framework in hand, Part II aims “to develop a detailed account of the notion of moral wrongfulness, which is described in terms of a range of everyday, but nevertheless powerful, moral norms that inform and shape the leading white collar criminal offenses.” (Green, p. 4.) To my mind, Green’s analysis of selected wrongs of commonsense morality—cheating, deception, stealing, coercion, exploitation, disloyalty, promise-breaking, and disobedience—is a mixed bag. With respect to some, Green’s discussion is genuinely informative. In the case of cheating, for example, he helpfully defines the wrong as requiring that an actor “(1) violate a fair and fairly enforced rule, (2) with the intent to obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship.” (Green, p. 57.) He then elaborates on each of these requirements and also persuasively challenges a commonly expressed view that cheating requires, in addition, deception or covertness. In a chapter on deception, he argues, soundly I think, that commonsense morality recognizes four distinct wrongs: lying, merely misleading, falsely exculpating, and falsely inculcating. (Green, pp. 76–87.)

In other cases, however, Green’s promise to elucidate our existing moral concepts remains frustratingly unfulfilled. For example, whereas Green devotes over twenty pages to his examination of cheating, he treats the two moral wrongs of coercion and exploitation in a single chapter that runs a mere five pages. Coercion, he tells us, “is usually carried out by means of a threat,” rather than an offer, which distinction, he recognizes, may or may not be valid. (Green, p. 94.) Following Nozick,² he then observes that whether a threat is coercive depends on whether it promises to put the victim worse off relative to the “normal or natural or expected course of events.” (Green, p. 94.) But scholars disagree, Green observes, about whether the proper baseline is moralized or purely empirical, and he is content to leave matters there.

Green’s discussion of exploitation is perhaps even less illuminating, relying as it does wholeheartedly on Feinberg’s argument that the moralized concept consists of three elements: that X “uses” V in the sense of “playing on” him in some way, as by offering inducements, employing flattery, appealing to duty, friendship, or greed; that what X is exploiting is either a trait of V’s (permanent or transitory) or a circumstance in which V is found; and that X must intend to benefit from the exploitation.³ But this analysis is strikingly incomplete because it offers no help in elucidating what Feinberg

² ROBERT NOZICK, *Coercion*, in *SOCRATIC PUZZLES* 15 (1997).

³ Green, p. 95 (citing JOEL FEINBERG, *HARMLESS WRONGDOING* chs. 31–32 (New York: Oxford University Press 1988)).

himself recognized is the additional criterion necessary to constitute exploitation in the pejorative or wrongful sense—namely that it is *unfair*.⁴

In any event, Part III then scrutinizes ten (presumptively) white collar offenses—perjury, fraud, false statements, obstruction of justice, bribery, extortion, blackmail, insider trading, tax evasion, and certain “failure to comply” regulatory offenses—with a focus on examining the extent to which they instantiate various of the moral wrongs elucidated in Part II. As a respected scholar of the criminal law, Green is most in his element here, and this part of the book is, in my estimation, the richest and most satisfying. Not only does Green exhibit a thorough command of the relevant statutory frameworks—mostly in U.S. federal law, but also in state law and some foreign jurisdictions, especially Great Britain—he details relevant historical and judicial developments, and adds texture to his account with lucid explanations of a slew of high-profile cases, from Bill Clinton’s impeachment for perjury and obstruction of justice, to fraud charges arising from the Enron scandal, to Martha Stewart’s conviction for obstruction of justice and making false statements. The lesson Green draws, in a nutshell,

is that certain fine-grained distinctions in our criminal law are a reflection of equally fine-grained distinctions in our moral thinking, and vice versa. Thus, white collar crime doctrine that may at first glance seem puzzling and internally inconsistent can often be explained through reflection on the moral concepts that underlie it. And, by the same token, ostensibly baffling distinctions we make in our everyday moral lives can in some cases be traced to distinctions that first appeared, or are most clearly articulated, in the criminal law. (Green, p. 5.)

The force and value of Green’s approach is illustrated by his analysis of the crimes of fraud and perjury. Green’s principal example in this section concerns whether President Clinton committed perjury during his deposition in the Paula Jones case. The allegations of perjury concerned several discrete statements, but the most notorious concerned Clinton’s answer to the question: “Have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?” Clinton’s answer was unequivocal: “I have never had sexual relations with Monica Lewinsky.” (Green, p. 142.)

In his subsequent impeachment for perjury, Clinton’s lawyers conceded that Lewinsky had performed fellatio on the President. (Green, p. 143 n.56.) But this, they said, did not make his response perjurious. Exhibit 1 specified that “a person engages in ‘sexual relations’ when the person knowingly engages or causes (1) contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person.” (Green, p. 142.) Assuming that fellatio is the only sex act that Lewinsky and Clinton had engaged in,⁵

⁴ FEINBERG, *supra* note 3, at 179.

⁵ As Green notes, this is a big assumption, for Lewinsky had testified that Clinton had touched

then Clinton had not engaged in “sexual relations” with Lewinsky (as the term was defined, by reference, in the deposition question) even though she had engaged in “sexual relations” with him. As Green explains, under contemporary American law (largely in accord with the law of Australia and England, but not of Canada), a statement cannot be perjurious unless literally false.⁶ On our assumption that Clinton’s statement was literally true, he did not perjure himself.

Plainly, Clinton’s response was misleading, and intentionally so. Accordingly, his impeachment raised the question in many quarters of whether the law’s insistence on literal falsity can be defended. And, if so, why. One possibility is that intentionally misleading somebody with literal truths is morally unproblematic. Another, though, would appeal to particular imperatives that the law faces as a fallible human institution that exerts coercive power against individuals. One might suppose, for example, that knowing falsity is both less common and easier to prove than intentional deception; and that, partly as a consequence, criminalizing intentional deception could result in an excessively large number of failed prosecutions and false convictions, as well as costly over-deterrence, as by discouraging witnesses—most troublingly, criminal defendants—from testifying for fear of wrongly being prosecuted for perjury.

Green’s response is to strenuously defend the literal falsity rule. More significantly, he denies that it is a legal technicality or an artifact of the law’s own needs and constraints. Rather, he views it as a product of the fact that our underlying moral norms distinguish lying from mere deception. (Green, p. 76.) As he explains,

[O]ther things being equal, merely misleading is less wrongful than lying because what I call the principle of *caveat auditor*, or “listener beware,” applies to cases of merely misleading but does not apply to lying. Like the principle of *caveat emptor*, which says that a buyer is responsible for assessing the quality of a purchase before buying, the principle of *caveat auditor* says that, in certain circumstances, a listener is responsible, or partly responsible, for ascertaining that a statement is true before believing it.

. . . The underlying idea . . . is that “each individual is a rational, autonomous being and so fully responsible for the inferences he draws, just as he is for his acts. It is deception, but not lies, that requires mistaken inferences and so the hearer’s responsibility.”⁷

and kissed her breasts and had also engaged in “four incidents involving contacts with her genitalia.” (Green, p. 143 n.56.) If Lewinsky’s testimony is to be credited, then Clinton’s deposition testimony was clearly perjurious (assuming that Clinton had not honestly forgotten those contacts). But Clinton’s critics objected that Clinton had perjured himself *even if* the only sexual contact between Clinton and Lewinsky had been fellatio.

⁶ This is not clearly required by the federal perjury statute, 18 U.S.C. § 1621 (1994), or earlier common law, but traces to well-settled case law implementing the statute. *See, e.g.*, *Bronston v. United States*, 409 U.S. 352 (1973).

⁷ Green, pp. 78–79 (some citations omitted; quoting Jonathan E. Adler, *Lying, Deceiving, or Falsely Implicating*, 94 J. PHIL. 435, 444 (1997)).

Green mounts a convincing case that commonsense morality treats lying as worse than deception. But, of course, this fact alone does not entail that the law of perjury must embody the former rather than the latter (note that Green repeatedly describes deception as less wrongful than lying but not as non-wrongful), and he never makes entirely clear why it should. As I read it, though, the crux of Green's argument is that it is socially valuable for the law to ensure that its distinct doctrines correspond to distinct moral norms. In summarizing several deception-related offenses, Green concludes that "perjury, like lying, requires a literal falsehood; fraud is satisfied by merely misleading; obstruction of justice frequently involves a form of false exculpation or inculpation; and the offense of false statements involves a complex hybrid of all four concepts." (Green, p. 87.) For these different offenses to reflect different moral content, he opines, "may well have the effect of reinforcing such distinctions in the moral sphere." (Green, p. 87.) Thus does perjury's literal falsity rule promote Andrew Ashworth's "principle of fair labeling," by ensuring "that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signaled by the law, and that offences should be divided and labeled so as to represent fairly the nature and magnitude of the law-breaking."⁸

Green is no Pollyanna. He does not deny that various aspects of white collar crime should be revised to better track popular moral judgments. But the central strain of his book is optimistic; popular worries that white collar crime might be morally bankrupt or empty are largely misplaced. Once we pay closer attention to the precise content and contours of our extant moral norms, we can see that white collar crime corresponds rather well to the demands of everyday morality.

II. THREE WORRIES

As the foregoing brief summary should suggest, Green presents a thoughtful argument, full of insights and rich case studies. Unfortunately, I doubt that it is fully successful. My principal worry is that Green mistakes a part for the whole. Some white collar offenses might be best explained and justified as efforts to mirror or replicate underlying moral norms. But I am skeptical that all white collar offenses are best accounted for in this way—or that Green presents a compelling reason why they should be. As a *complete* "moral theory of white collar crime," then, the account that emerges from *Lying, Cheating, and Stealing* strikes me as unpersuasive. I will explain the bases for my skepticism in the next part. Before reaching that discussion, however, I here raise a few questions or concerns, not about the completeness of Green's argument, but about its structure.

My concerns can be grouped into three sets. First, Green is more persuasive in arguing that white collar crime should be viewed as a family resemblance category than in articulating the elements that together define the family. Second, his embrace of everyday norms of wrongdoing seems to sit uncomfortably with his embrace of

⁸ Green, p. 42 (quoting ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 89–90 (4th ed., Oxford University Press 2003)).

retributivism as a justification for criminal punishment, and threatens to make some of the uncertainties Green highlights hard to explain. Third, the utility of, and justification for, his three-part framework of mens rea, harmfulness and wrongdoing are not as fully defended as one might hope.

A. All in the Family

I noted above that Green eschews a classical definition of “white collar crime” in terms of genus and differentia or necessary and sufficient conditions, favoring instead a Wittgensteinian family resemblance definition pursuant to which the category refers to a group of crimes loosely united by shared characteristics. But I did not then list the characteristics Green highlights beyond noting what seemed to be the most important. That, of course, was not the only one, and a catalogue of features that he claims to define the family emerges over the course of Part I. As best I can tell, the characteristics include the following:

- (1) they engender controversy over whether peripheral cases ought to be criminalized;
- (2) they engender controversy over whether core cases ought to be criminalized;
- (3) they describe conduct that is subject to either civil or criminal penalties, at the prosecutor’s discretion;
- (4) they require a significantly lower level of mens rea than is traditionally required, sometimes permitting strict liability;
- (5) they sometimes treat mens rea as so important “that conduct performed without it either fails to expose the actor to criminal (as opposed to civil) liability, or is not even regarded as unlawful in the first place”;
- (6) they can be committed by corporate entities, and thus implicate distinct and difficult questions of assignment of culpability;
- (7) they involve unusual kinds of harms—incorporeal, nonspecific in location and time, “indirect, diffuse, and aggregative”;
- (8) they often produce harm “through non-violent means”;
- (9) they can affect victims who are hard to identify;
- (10) they often conflate choate and inchoate liability, by criminalizing conduct that involves nothing more than the creation of a risk of harm and by punishing attempts as severely as completed harms;
- (11) they involve cases in which any harm caused “is often mitigated by the value of surrounding legitimate conduct”;
- (12) they produce harms that “are often indistinguishable from harms caused by conduct that is lawful”;
- (13) they often appear in separate regulatory portions of state and federal law, not in the general criminal code;
- (14) they provoke an inversion of usual attitudes toward criminal wrongdoing, whereby “conservatives” who are generally hard on

- crime tend to be more lenient toward offenders than “liberals” who are generally more defendant-friendly;
- (15) they involve defendants who are unusually likely to have money to hire lawyers and experts; and
- (16) they tend to carry less severe penalties than street crimes.⁹

Most of the items on this list strike me as basically sound. But let me just raise a few questions or worries (“objections” would be too strong). First, one might quibble with some individual factors. Take, to start, factors (4) and (5)—a pair that reminds one of the much-ridiculed testimony of DEA agents who found aspects of the drug courier profile satisfied by a passenger’s disembarkation from a plane at the beginning, at the end, or in the middle. Admittedly, Green does acknowledge that a low level of mens rea and an unusual importance given mens rea “are almost direct opposites.” (Green, p. 31.) But that does not cause him to question their utility as traits of the white collar crime family.¹⁰ I would have appreciated a few more words about (5), for I confess not to understand it: don’t all crimes treat mens rea as so important that conduct performed without it is not criminal, or (often) even unlawful? If you cause someone’s death non-negligently, for example, you have not committed homicide. If you take property not knowing it belongs to another, you have not committed theft. And so on.¹¹

Factor (11), while perhaps apt, points toward a related factor that Green seems not to mention but strikes me as even more significant—namely, that because white collar crime is often embedded within socially valuable conduct, criminalization implicates an unusually great risk of over-deterrence. Factor (8) seems clearly right, though I’m amused that Green would present it without any apparent sense of irony after he objected to the FBI definition, quoted earlier, on the ground, among others, that it is not “even clear what it means for a crime to be ‘nonviolent.’” (Green, p. 15.) In a similar vein, I can’t disagree with factor (15), but think its appearance modestly odd after Green took pains to champion a view that is defined in terms of characteristics of the act, not of the offender.

⁹ I have culled this list from Green, pp. 21–47, but make no claims for its completeness. The specific passages quoted are found at pp. 32, 34, 35, and 40.

¹⁰ For another recent view about how mens rea might play a unique role in white collar crime (or in some white collar crimes), see Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971 (2006).

¹¹ Green illustrates his point about the (occasional) importance of mens rea to white collar crimes with two examples: first, obstruction of justice by document destruction requires intent to impede a pending investigation or court proceeding; second, bribery requires intent to influence an official act. (Green, p. 33.) These illustrations suggest that the distinctive pattern of mens rea that he views as close to the converse of the pattern of reduced culpability might be, not that mens rea is often more important for white collar crimes than it is for other crimes, but that it is often of a heightened sort—namely, intent rather than recklessness or even knowledge. To employ one of those notoriously ambiguous common law terms, Green’s point might be that many white collar crimes are specific intent offenses. Well, some are, but many are not, and many ordinary crimes (burglary, possession with intent to distribute, etc.) are.

Second and more significantly, I question whether a list so long (and that requires so much effort by the reader to unearth) will be particularly useful. It seems that jurists and scholars of white collar crime (of whom, perhaps I ought to announce, I am not one) want for a clearer understanding of the scope of their field. But I doubt that many will conclude that Green's contribution—which lists more than a dozen characteristics, distributed across twice as many pages—satisfies this need.

Third, I am skeptical that some of his paradigmatic white collar offenses—perjury, extortion, and blackmail, most notably—fall within the white collar family, defined as it is. To be sure, Green does acknowledge that “there may be some offenses that are on my list that some readers would not consider to be white collar crimes,” but dismisses this worry by contending that “not much ultimately depends on such a label; my analysis of any given offense should work or not, regardless of whether such labeling is proper.” (Green, p. 19.) Well, yes and no. If his analysis of, say, perjury is illuminating, that illumination does not dissipate just because we might conclude that the offense does not qualify as a white collar crime consistent with Green's own criteria. But it is, after all, white collar crime that the book promises to be all about. So while Green is no doubt right that the value of his analyses should not be held hostage to possibly idiosyncratic judgments of readers (even of reviewers) regarding what should be in and what should be out, he seems oddly cavalier about how well the white collar crimes he has selected for analysis fit his own criteria. If many readers share the view that one or another crime he has chosen in Part III does not seem white collarish by Green's criteria, that might be a signal that the criteria need refinement. Yet more interestingly, it might signal that Green's own focus on white collar crime is, in a sense, too narrow. At one point, Green maintains that his three-part framework “was designed specifically with the white collar offenses in mind,” cautioning that its applicability to other kinds of criminal offenses is uncertain.¹² Perhaps, in this regard, he is too modest.

B. *Two Types of Retributivism, Two Types of Morality*

A second set of questions concerns precisely how the moral concepts Green elucidates in Part II, and deploys in Part III, fit into the theory of criminal law he sketches, very briefly, in Part I. As already noted, Green ends up concluding that white collar criminal offenses actually correspond rather well to underlying moral norms. The underlying norms in question, however, are of commonsense or “everyday” morality. As Green makes clear, Part II of *Lying, Cheating, and Stealing* is an “exercise in descriptive moral theory,” (Green, p. 4.) and Green approaches it more as an anthropologist than as a moral philosopher. His conclusion is that ordinary members of society have a strikingly sure command of the subtleties and nuances of our commonsense moral norms. This judgment is reflected, for example,

¹² This is how he puts things in his introduction (Green, p. 4.). But when he later introduces his three-part framework in the final chapter of Part I, he says that “we should expect to find [these three elements] in any criminal offense.” (Green, p. 30.)

in his conclusion about perjury and fraud: “[T]he divergent ways in which the offenses of perjury and fraud treat the requirement of deception . . . reflect deep-seated and fine-grained distinctions concerning the concept of deception that we make in our everyday moral lives.” (Green, p. 42.)

But if this is so, two puzzles arise. First, insofar as Green suggests that there exists wide-agreement on the details of our conventional moral norms, it is not clear why people’s moral (as opposed to legal) evaluations of specific act tokens would vary as wildly as Green claims they do. Indeed, one of the things that intrigues him about the white collar cases that hit the news—those of Bill Clinton and Tom DeLay, Martha Stewart and Andrew Fastow—“is how dramatically people’s moral and legal judgments of them vary.” (Green, p. 3.) Of course, the variance could be largely attributable to differences in whether we happen to like or trust or feel sympathy for the particular defendant. But Green himself thinks that differences in our non-moral evaluations constitute only a small part of the story. Nor does he seem to attribute variance in case-specific judgments to difficulties in *applying* shared moral norms to complex fact patterns. “[T]he strikingly broad range of moral judgments that surrounds such cases has less to do with the identity of individual defendants,” he concludes, “than with deeper moral ambiguities, confusions, and uncertainties that pervade our understanding of white collar crime more generally.” (Green, p. 3.) But it is not clear to me just what these moral ambiguities, confusions and uncertainties *are*. More to the point, it appears that Green is claiming both that the fine-grained moral distinctions he describes are part of everyday morality, and that we don’t really own or grasp them—we don’t grasp their *content*, not just their *grounding*.

The second and related puzzle arises only in light of Green’s conclusion that our white collar offenses do in fact track our everyday moral norms rather well. If this is so, then the question is not why citizens disagree so much about the proper moral evaluations of particular defendants, but why they so often believe that white collar criminal law departs from morality. In Green’s view, the norms he discusses—of cheating, deception, coercion, disloyalty, and the rest—

are fairly concrete. Although there will be significant disagreement over the precise content and application of such norms, almost every civilized person will have some rudimentary understanding that it is morally wrong, at least in certain core cases, to lie, cheat, steal, [etc.] . . . Moreover, such an approach is more suggestive of the richly nuanced way people actually think about the content of their moral lives. Even people who have never had occasion to read a single page of moral philosophy are capable of making remarkably fine-grained distinctions about, say, what properly constitutes cheating or stealing. (Green, p. 45.)

I find this passage uncharacteristically confusing. At one point the suggestion is that people have a rudimentary understanding of our everyday moral norms; at another, it is that they (or most of them) have a sophisticated grasp. If people’s understanding of our everyday moral norms is only rudimentary, by what token can

we conclude that these norms are as fine-grained as Green repeatedly contends? But if the understanding is rich and nuanced—and if these “familiar concepts, properly understood and clearly articulated, [do] inform and help shape a collection of key white collar crimes,” (Green, p. 45.)—why is the principal feature of white collar crimes the fact that their correspondence to moral norms is so controversial?

To summarize, I read Green to make the following five claims (among, of course, innumerable others):

- (1) Everyday moral norms are remarkably fine-grained;
- (2) By and large, people grasp the fine-grainedness of our moral norms (If they did not, it would not be clear how the norms *qua* the norms of everyday or commonsense morality, as opposed to critical morality, could have the nuanced texture Green claims for them);
- (3) People’s judgments about the moral character of the conduct of particular white collar defendants varies greatly;
- (4) White collar criminal law tracks the nuances of our everyday norms very well; and
- (5) Many people believe that large swaths of conduct that falls within the ambit of white collar criminal offenses are not morally wrongful.

My questions, then, are these: First, what explains fact (3), if not that people have difficulty applying the norms to particular cases? Might it be that our moral norms are fuzzier than Green allows? Alternatively, perhaps there are many fewer everyday moral norms that are properly described as *ours*. Instead, there may be a large number of fine-grained moral norms that vary across individuals or groups.

Second, how can we reconcile claim (5) with claims (1), (2), and (4)? Green concludes that “[i]t is precisely because white collar criminal law is informed by everyday moral concepts such as cheating, deceiving, coercing, and the like that its moral character can seem so ambiguous.” (Green, p. 255.) But why does that follow? If white collar crime closely tracks our fine-grained moral norms, then I’d expect its moral character to seem to us subtle or nuanced. But why ambiguous?

However Green might be able to address these questions (and I should emphasize that I do not mean to contend that these twin puzzles cannot be resolved, or that anything Green says on this score is, strictly speaking, contradictory), that he chooses to focus at all on conventional or everyday moral norms raises a different sort of worry, this one about the role that retributivism plays in his theory of criminal law. Early on, Green announces that he will “simply assume that retribution, in one form or another, is a necessary, if not sufficient, goal of the criminal law.” (Green, p. 21.) Now, I doubt very much that such an assumption is warranted without argument. Green seems to justify this assumption on the ground that “most criminal law scholars subscribe to a theory that mixes retributive and preventative . . . goals.” (Green, p. 21 n.1.) But I think this is mistaken, as Green’s citation to H.L.A. Hart—who famously endorsed a consequentialist general aim or goal of the criminal law—might suggest. (Green, p. 21 n.1.) It may well be true—indeed I think it is true—that most theorists

(not, in my view, including Hart) believe that punishment ought not to be imposed in the absence, or in excess of, an offender's moral desert. But that position does not yet amount to the view that retribution is an appropriate "goal" of the criminal justice system. The claim "that punishment is justified when it is deserved, and that criminals deserve punishment when they are morally at fault," (Green, pp. 21–22.) is not something that can be blithely assumed, nor attributed without very substantial argument to the majority of criminal law scholars—even though it is a view with which I have some sympathy.¹³

Fortunately for Green, it is not clear that he really needs the claim that retribution is a goal of the criminal law. The principle that he really relies upon is that

[a] system of law that imposed punishment on people who were not at fault, or did so in a way that was disproportionate to their fault, would be unjust. Thus, determining whether, and to what extent, the commission of a given crime entails moral fault is crucial to determining whether, and how much, punishment should be imposed. (Green, p. 22.)

To establish this, all he needs is the claim that retribution serves as a *constraint* on the pursuit of the consequentialist goals of the criminal law. So while he is too quick to help himself to positive retributivism, all he seems to need for his argument is what John Mackie famously dubbed negative retributivism,¹⁴ but might more aptly be termed side-constrained consequentialism.¹⁵ And *that*, I think, Green *can* ask us to accept as the dominant principle of Anglo-American criminal law.

Unfortunately (and this returns us to our thread), I suppose that retributivists, of either a positive or negative variant, want to focus on whether a defendant really *is* blameworthy, or whether he really *does* deserve punishment (or deserve to suffer), not on whether he runs afoul of conventional, but perhaps misguided, moral norms. In the penultimate paragraph of Part I, Green acknowledges "that there is a significant difference between 'critical' and 'conventional' (or 'intuitive') morality." (Green, p. 47.) But he does not proceed to explore that difference or to question whether it ought to temper his embrace of the latter. Insofar as Green wants to ground the law in contemporary social values for the consequentialist reasons of ensuring widespread acceptance—insofar, that is, that he is moved by what Robinson and Darley have called "the utility of desert"¹⁶—then his appeal to conventional morality seems entirely appropriate. But insofar as he views negative retributivism as a matter of justice—which is strongly suggested by the quotation presented above, and arguably reinforced by his claimed embrace of a deontological approach to wrongfulness

¹³ See Mitchell N. Berman, *Punishment and Justification*, ETHICS (forthcoming 2007-2008).

¹⁴ J.L. Mackie, *Morality and the Retributive Emotions*, CRIM. JUST. ETHICS 1, 3 (1982).

¹⁵ See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 11 (Oxford University Press 2001).

¹⁶ Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

(Green, p. 39.)—then there remains a deep question, I think, about his willingness to evaluate white collar crime by taking conventional morality as he finds it.

C. A Three-Part Invention

My final question or worry can be put briefly, and in the form of a confession. Very simply, I don't quite understand Green's three-part framework. I hesitate to mention this, for I fear that it must be more useful to our understanding of white collar crime, and must be doing more work in Green's own analysis, than I have yet been able to grasp. Be that as it may, I am not sure why mens rea (in, recall, the elemental sense) and moral wrongfulness ought to be conceived as separate elements given that, on Green's own telling, the conventional norms of moral wrongfulness themselves contain detailed specifications of the mental states that must be present for the norms to be violated. Cheating, for example, requires the knowing violation of a rule with the intent to obtain an advantage,¹⁷ and deception requires an intent that the listener come to believe something untrue. (Green, p. 76.) This being so, it would seem that mens rea is built into moral wrongfulness and therefore should not be an independent requirement.

To be sure, Green does observe that the distinction between wrongfulness and mens rea is less clear than are the distinctions that obtain between either one and harmfulness. (Green, p. 40.) But he provides an illustration involving promise-breaking designed to show that mens rea is not in fact subsumed within wrongfulness. Unlike the case for cheating and deception, he says,

one can certainly break a promise even if one does not intend to do so. Imagine a case in which I have promised to arrive in time to see the beginning of my son's track meet, and then turn up 20 minutes late because I was caught in traffic along the way. Assuming that I was at least negligent in failing to anticipate the traffic jam that caused me to be late, we would probably say that I had broken my promise. (Green, p. 41.)

But, as written, this example does not establish that we can have wrongfulness without mens rea and that, therefore, mens rea is usefully thought of as a distinct component of a framework for analysis of the moral content of criminal offenses. To the contrary, the last sentence suggests that the mens rea required for the moral wrong of promise-breaking is negligence. Therefore, if a statute were to criminalize, as a strict liability offense, some types of nonconformity with a promise, then not only would mens rea be absent, but so too would be the element of moral wrongfulness.

Now, were Green to provide an example of a conventional moral wrong that does not require any degree of culpability with respect to its violation, then requiring mens rea for the corresponding criminal offense would be to require something of

¹⁷ Green, pp. 57, 64. Although Green actually says that the rule-breaking itself must be intentional, his example makes clear (appropriately) that knowledge suffices.

independence beyond wrongfulness. But I am skeptical that our everyday norms of moral wrongdoing look like that.¹⁸ Moreover, even if one did, it would still be unclear whether the mens rea part of Green's three-part framework would be adding any real value given that he refrains from insisting that mens rea is or ought to be a strictly necessary condition for criminalization. (Green, p. 30.) If strict liability moral norms are very rare, and if Green would tolerate some strict liability criminal offenses, then it remains somewhat obscure how the three-part framework of mens rea, harmfulness and wrongfulness improves upon a two-part framework of harmfulness and wrongfulness.

My guess is that Green can do just fine with such a two-part framework. Consider the common notion that the elemental sense of mens rea is best understood as a way to operationalize mens rea in its sense of moral blameworthiness, so that the state can be freed from having to prove out the latter directly. Such a view suggests (but does not establish) that the elemental sense of mens rea is likely to be redundant if we separately require that the offense capture moral wrongfulness. Possibly, Green added the third part (mens rea) out of a concern that he would not otherwise be putting forth an interestingly new framework for analysis. After all, theorists routinely analyze criminal offenses in terms of harm and wrongdoing. In fact, though, I believe that Green's approach would remain both original and provocative even were he to espouse a two-part analytic framework, for its novelty is supplied not by the fact that, described very generally, it focuses on harm and moral wrongfulness, but by the way that it gives content or substance to moral wrongfulness. Whereas most theorists think about moral wrongfulness in terms of very abstract considerations like the violation of victims' rights, Green views wrongfulness, in a broadly Rossian spirit, as the violation of fairly concrete norms that might not be reducible to more fundamental moral principles. Such a perspective is very probably Green's greatest contribution. We can reap its benefits without the "three-part framework" in which it is embedded.

III. TWO COMPETITORS

To some extent, *Lying, Cheating, and Stealing* can be viewed, even profitably, as an assemblage of independent arguments—arguments about the content of various of our everyday moral norms, arguments about the best way to make sense of individual white collar offenses. But if the book contains a central unifying thesis, it is, I believe, that (at least in the white collar crime context) the law should only criminalize conduct that is wrongful,¹⁹ and that the contours of the crime should track moral wrongfulness as closely as possible.²⁰ Although Green argues "that without a clearer

¹⁸ For an argument partially to the contrary, however, see John Gardner, *Wrongs and Faults*, in *APPRAISING STRICT LIABILITY* 51 (A.P. Simester ed., 2005).

¹⁹ See, e.g., Green, p. 23 ("Before we can determine which conduct should be criminalized, and what punishment should be applied, we need to have a clear idea of the degree to which such conduct entails moral fault.")

²⁰ See, e.g., Green, p. 42 ("We need to refer to the idea of [moral] wrongdoing not only in distinguishing among various offenses but also in deciding which conduct to criminalize in the first place,

understanding of the relationship between morality and white collar criminal law, the retributive principles on which the criminal law is founded are placed in serious jeopardy,” (Green, p. 4.) this passage captures his point imprecisely. Nothing in his book suggests that he believes that the retributive principles of the criminal law are adequately served so long as we achieve a clear understanding of the relationship between morality and law, no matter what the nature of the relationship turns out to be. That would be a most peculiar claim. Rather, for Green, jeopardy to our retributive principles is averted only if the relationship turns out to be of the right type. Put another way, insofar as the book makes good on the promise of its subtitle, the “moral theory of white collar crime” seems to be the theory that I have dubbed “comprehensive wrongfulness.”

As I noted at the outset, we can distinguish this thesis from at least two alternatives. One (“harm-prevention”) holds that it is permissible to criminalize white collar conduct that is harmful even if it is not wrongful. This view, it must be emphasized, need not be indifferent to whether a particular offender deserves to be punished. To the contrary, the view is fully compatible with negative retributivism so long as it locates the offender’s blameworthiness in his knowing violation of the criminal ban. What distinguishes this account of the permissible structure of white collar crime from comprehensive wrongfulness is that it does not insist that a criminal offense be targeted at an antecedent moral wrong. A second view (“modified wrongfulness”) observes that, even insofar as the criminal law should focus on wrongful conduct, we should be much more tolerant of the respects in which the contours of our criminal bans depart, for reasons particular to the nature of law and the operation of a legal system, from the contours of the moral wrongs it seeks, in some sense, to capture.

I cannot hope to present anything approximating a full argument in support of either of these alternative accounts (or components) of the moral structure of white collar crime in what is already a lengthy review. Rather, I will offer brief critiques of Green’s analyses of the most intellectually challenging of the offenses in the book—insider trading and blackmail—in the hopes that such discussions will bolster the plausibility of the competing views.²¹

how offense elements should be defined, and what defenses should be available.”); *id.* at 147 (concluding that resolution of difficult legal questions about perjury “does, and ought to, closely track our understanding of what it means to lie”); *id.* at 255 (concluding “that many of the puzzling fine-grained distinctions we see in the law of white collar crime are in fact a reflection of equally fine-grained distinctions in our moral thinking . . . [and] that our understanding of various key concepts in morality can in turn be sharpened through a careful consideration of the white collar crimes”) (emphasis omitted).

²¹ After reading a draft of this review, Green has informed me that he did not intend to espouse comprehensive wrongfulness as a theory of white collar crime, and more particularly, that he does not mean to deny either that the law may permissibly criminalize conduct that is not morally wrongful or that, insofar as it does aim to criminalize morally wrongful conduct, the law might sensibly and permissibly draw the bounds of a criminal ban in a fashion that departs substantially from the bounds of the moral wrong it seeks to enforce. I am pleased to learn that. But, of course, this review is an effort to understand what Green has written, not to catalogue what Green believes, and it is a commonplace that what an author believes and what his text communicates might differ.

A. Harmfulness Without Wrongfulness: From Regulatory Offenses to Insider Trading

In the book's final chapter, entitled "Regulatory Offenses," Green turns his attention to "those penal statutes that make it a crime to engage in prohibited conduct, subject to regulation, that would not be viewed as entailing significant moral wrongfulness independent of its prohibition." (Green, p. 249.) One might suppose that such offenses are inconsistent with Green's general theory and his three-part framework. But that would be too quick, for nothing in his argument denies that law can contribute to making morally wrongful what was not morally wrongful absent the law. To take a stock example, there is nothing in the pre-legal nature of things that makes it morally wrongful to drive north on Manhattan's Fifth Avenue. But once the law declares that this road shall be reserved for south-bound traffic only, it produces expectations and patterns of behavior in the face of which driving north risks harms to persons and property, and is, for this reason (if perhaps for others as well), uncontroversially wrongful.

Green adduces two ways in which regulatory offenses properly characterized as *mala prohibita* criminalize moral wrongdoing and thus are morally permissible. First, "if violating such a regulatory statute constitutes rule-breaking intended to obtain an unfair advantage over another with whom one is in a cooperative, rule-bound relationship," then the violation constitutes the moral wrong of cheating and can be criminally punished. (Green, p. 250.) Green's example concerns the violation, by one participant in a competitive industry, of costly anti-pollution regulations. Second, in some cases a regulated entity promises to be bound by statutes and regulations, especially as a condition to receive a permit or other governmental benefit. Although some of these promises may have been extracted in ways that throw doubt on their moral bindingness, presumably this is not always the case, in which event breach of the promise constitutes the moral wrong of promise-breaking. In short, then, Green concludes that some "failure-to-comply"-type violations of regulatory law might entail moral wrongfulness insofar as they involve cheating or promise-breaking." (Green, p. 253.) But, he also observes, many such violations, if not most, will not involve either of these wrongs. (Green, pp. 253–54.) The question is whether their criminalization is morally permissible.

In substantiating my interpretation of *Lying, Cheating, and Stealing*, I rely, to some extent, on passages of the sort already quoted. But, as arguments are more revealing than passages (we sometimes describe the latter, but rarely the former, as "stray"), I place greater reliance on the analyses contained in this part. My fundamental point is that it is exceedingly hard to make sense of the way Green analyzes insider trading and blackmail without concluding that he was operating, even if not fully consciously, under the influence of comprehensive wrongfulness or—what, I think, amounts to much the same thing—that he was ignoring the significance of harm-prevention and modified wrongfulness. To put my claims in a way that more clearly avoids any hint of an *ad hominem* character: We will be led to a better understanding of insider trading than appears in this book if we recognize that the law does and may criminalize conduct that is harmful even if not morally wrongful; we will be led to a better understanding of blackmail if we recognize that, because the law need *not* "closely track" the moral wrongs that it aims to prohibit and punish, a sound grasp of the considerations that render some conduct morally wrongful need not by itself provide a clear or practical standard for determining the proper scope of the law.

Green's answer is no. While recognizing that "there is some significant circumstantial evidence to suggest that courts and prosecutors, and perhaps the man in the street, do regard lawbreaking per se as morally wrongful," Green resists this judgment on the grounds that "it is nevertheless difficult to articulate a theory as to exactly why this should be so." (Green, p. 254.) He does not gainsay, of course, that violation of regulatory offenses might be harmful. "But harmfulness without wrongfulness," he reminds us, "is not supposed to be enough to satisfy the retributive demands of the criminal law. In the absence of a persuasive argument that lawbreaking per se entails some independent form of moral wrongfulness," Green is "skeptical that its criminalization can be justified." (Green, p. 254.)

This is not the place to articulate a defense of a general duty to obey the law. Indeed, I do not believe that a persuasive theoretical defense exists. But nor would I have expected the ability of moral and legal theorists to persuasively advance such an account to matter much to Green, given his own methodology of taking our moral norms pretty much as he finds them.²² If it is true—and Green seems to think it might be—that most ordinary citizens believe that it is morally wrongful to break the law, then I am unsure why he ought not conclude that our everyday moral norms treat lawbreaking as morally wrongful. Moreover, our conventional norm might be a little more nuanced—not that "lawbreaking per se" is morally wrongful, but, say, that it is morally wrongful to break a law that serves a valid state purpose, as in preventing harm. If conventional morality looks something like this, then it would seem that criminalization of the failure to comply with regulatory prohibitions designed to prevent harm would be consistent with Green's three-part framework, hence morally justified. But the requirement of moral wrongfulness would be automatically satisfied by satisfaction of the requirement of harmfulness, making the former otiose. In short, if there exists a conventional moral norm against the violation of laws designed to prevent harm, then I am unsure what resources Green has to reject "harm-prevention" as a component of the best moral theory of white collar crime, as he appears to do.

This view, if correct, also sheds light on the nettlesome problem of insider trading. The basic rule on insider trading, as formulated by the SEC nearly half a century ago, is that certain classes of traders (paradigmatically, but not limited to, corporate insiders) who possess non-public information that bears materially on a given securities transaction must either disclose the information or abstain from trading. It is a famously controversial rule, as many scholars of a law and economics bent—starting with Henry Manne's influential 1966 book on the subject²³—have argued that insider trading improves market efficiency by causing share prices to reflect more complete information.

In Green's estimation, "the question whether insider trading is harmful" reflects the wrong focus. (Green, p. 236.) The more interesting question, he thinks, "is

²² Moreover, Green himself has interesting things to say in Part II that tend to make more plausible than many theorists have thus far supposed that disobedience to law is in fact a moral wrong. (Green, pp. 117–26.)

²³ HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (The Free Press 1966).

exactly why insider trading is morally wrongful.” (Green, p. 237, emphasis omitted.) The dominant answers to that question, he explains, are that insider trading is wrongful because it involves breach of a fiduciary duty to the source of the information or to the shareholder from whom the security in question was purchased, or because it constitutes a form of fraud. (Green, p. 237.) After criticizing each theory (on grounds that need not detain us for present purposes), Green agrees with those who have argued that insider trading is wrongful because it instantiates the moral wrong of cheating. It is cheating, Green explains, because the trader: “(1) violates the SEC rule that one must either disclose material non-public information or abstain from trading; and does so (2) with the intent to obtain an advantage over a second party with whom she is in a cooperative, rule-governed relationship.” (Green, p. 240.)

This could be right. It is not obvious to me, though, that insider trading does constitute cheating as Green himself elucidates that concept in Part II. There, he explains that,

[n]ot only must *X* and *Y* be in a cooperative relationship with each other, *X* must also intend to gain some advantage over *Y*. . . . When *X* cheats, she seeks an advantage by violating a rule that *Y* is believed to be obeying. Typically, *X* and *Y* will be competing over a limited resource, and *X*'s gain will be *Y*'s loss. (Green, p. 66.)

But if *X* and *Y* both have inside information, and *X* trades on it while *Y* complies with the rule, *X*'s gain comes at the expense of some third party, *Z*, not at the expense of *Y*. If, as Green proposes, “our moral discourse would be more precise if we reserved the term *cheating* for rule-breaking between rivals,” (Green, p. 68.) then the insider trader might be breaking a rule, and might be doing so to gain an advantage, all without engaging in *cheating*.

Much more significant is that Green's account invokes the wrong of cheating to justify criminalization of the violation of the disclose-or-abstain rule, but not to justify promulgation of the rule itself. That rule is justified on what appears to be harm-prevention grounds alone: that confidence in the market depends on investors' perception that the game is being played fairly; that investors believe that it is unfair for some traders to act on information to which they have privileged access; and that a reduction in market confidence is harmful to the economy. This justification for the disclose-or-abstain rule does not affirm that trading on privileged access *is* unfair; instead, it accepts as an essentially brute fact that investors believe it to be unfair. But what if this perception is wrong—or, perhaps more to the point, what if it could be changed? Surely we should not simply assume that investors' views about the unfairness of insider trading are impervious to analysis that might show the practice to serve their economic interests, which is why the economics-influenced inquiries into the harmfulness of insider trading should not be dismissed too quickly.

In sidestepping the question of whether insider trading is in fact harmful, and therefore whether it makes any sense for investors to condition their confidence in the market on the belief that insider trading has been substantially curtailed, Green's

argument has something of a turnabout-is-fair-play flavor: we can reasonably ignore the question of harmfulness, much as the law and economics scholars have ignored the question of wrongfulness. As Green explains,

the most interesting thing to note about the law and economics literature on insider trading is the way in which it consistently ignores or trivializes the question of moral wrongfulness. For example, . . . Henry Manne patronizingly reports the outraged reaction of “an anonymous lady law student who in a classroom discussion of the subject, stamped her foot and angrily declaimed, ‘I don’t care; it’s just not right.’” In relating this incident, Manne’s purpose is to belittle the idea that insider trading might be understood as involving morally wrongful behavior. For Manne, the only relevant question is whether insider trading is harmful. (Green, p. 236.)

I cannot speak to the body of law and economics scholarship on the issue. But I think that Green gets Manne wrong. Manne does not contend that harmfulness is all and that, if insider trading is harmful, then it can be unproblematically criminalized without regard for whether it is also wrongful. Far from being dismissive of moral argument, Manne acknowledges “that moral standards . . . play an important role in the business community,” and that “unless there is broad-based agreement on various standards of ethical conduct, free markets do not seem to function very effectively.”²⁴ Indeed, he observes that previous literature “has been socially valuable in establishing a moral standard and a set of attitudes about corporate executives’ conduct,” and he lectures that “the importance of this contribution should certainly not be ignored or belittled.”²⁵ What Manne objects to, quite plainly, is moral exhortation that substitutes for argument or analysis. The point of his story about the “lady law student” was not (as Green would have it) to belittle “the idea that insider trading might be understood as involving morally wrongful behavior.” (Green, p. 236.) It was to belittle efforts to advance that idea by the mere repetition “of ‘it’s just not right’ propositions.”²⁶ Manne did not view an inquiry into the harmfulness *vel non* of insider trading as a substitute for reasoned analysis about its moral wrongfulness, but as a precondition for it. “If we can understand the institutions, practices and consequences of insider trading,” he concluded, “we may then make more appropriate moral judgments.”²⁷

I emphasize this not to defend Henry Manne. I emphasize it to make clear that one need not think that the criminal law must be unconcerned with questions of moral wrongfulness to conclude that the critical inquiry, with respect to insider trading, concerns the justifiability of the disclose-or-abstain rule itself, and that an answer to *that* question should turn on a careful analysis of its likely consequences. If our

²⁴ MANNE, *supra* note 23, at 15 n.22.

²⁵ *Id.* at v.

²⁶ *Id.* at 15.

²⁷ *Id.*

theory of the moral content of white collar crime were broad enough to include what I have called “harm-prevention” (the position that white collar criminal laws can bar conduct merely because it’s harmful, with punishment for violation of the law being justified, consistent with negative retributivism, by the offender’s knowing violation of the law),²⁸ then we’d be less likely, I think, to fall into the surprising view that we can profitably analyze the moral content or permissibility of the crime of insider trading without attending to the question of whether it’s harmful. That is not a side show, that’s the game.

B. *Modified Wrongfulness: Distinguishing Blackmail from Extortion*

Whether or not Green’s investigation of insider trading brackets the core question, as I have claimed, he candidly admits that his discussion of extortion and blackmail does so. There is no puzzle regarding why it is (at least presumptively) morally wrongful, and criminalizable, to threaten what it would be illegal to do. When such a threat is conjoined to a demand for money or property, it generally constitutes the crime of extortion. But what about threats to do what is lawful? Generally, this is unproblematically lawful too. Sometimes, however, it constitutes the crime of blackmail. A longstanding challenge for criminal theorists, along with moral philosophers and economists, has been to explain why and under what circumstances threats to do something lawful should be viewed as morally wrongful and possibly criminalizable. Recognizing the difficulty of the challenge (he likens what is often called “the paradox of blackmail” to Fermat’s Last Theorem), Green forswears any attempt to solve it. (Green, p. 216.) The principal, admittedly modest (Green, p. 236.) conclusion of his chapter is only that “we should understand extortion to be limited to those threats to engage in conduct that is in fact unlawful.” (Green, p. 226.)

As for whether some threats to engage in conduct that is in fact unlawful should also be criminalized—though not under the “extortion” label—Green remains agnostic. (Green, pp. 93–97.) In a spare five pages, Green concludes that none of the many existing theories designed to explain blackmail’s wrongfulness is successful. (Green, pp. 93–97.) Nonetheless, he allows that “threats to expose embarrassing true information are an obvious candidate for criminalization, if only because of the cultural understanding traditionally associated with the offense of informational blackmail.” Moreover, he leaves open the possibility that future scholarship might yet provide adequate justification to criminalize other forms of blackmail, perhaps as a form of “stealing,” or perhaps on the model of other regulatory crimes. In my view, Green’s failure to make greater headway on the blackmail paradox, including his failure to appreciate merit in existing theories, might be attributable, in part, to excessive embrace of the model of comprehensive wrongfulness and his concomitant failure to give a satisfactory hearing to modified wrongfulness.

²⁸ I put aside the question whether, in such cases, we ought to insist that the law extend greater recognition to the defense of reasonable ignorance or mistake of law.

Green begins his discussion of blackmail by asking “whether it is possible to draw any conceptually clear distinction between those threats to do what is putatively lawful that should be treated as a crime . . . and those threats to do what is putatively lawful that should be treated as mere hard bargaining.” (Green, p. 216.) In pursuing that question, he divides the arguments in favor of blackmail’s criminalization into two categories: those that aim solely to justify criminalization of informational blackmail; and those that aim to justify criminalization of a broader class of threats to engage in lawful conduct. (Green, pp. 216–17.) The former, he concludes, “are too narrow to be of much help in identifying threats to do other kinds of putatively lawful conduct, if any, that should be criminalized.” (Green, p. 216.) The latter “ultimately offer no satisfactory criteria for making a practical distinction between those threats that should be criminalized and those that should not.” (Green, p. 217.)

Insofar as we are trying to understand and to assess Green’s moral theory of white collar crime, the most noteworthy thing about Green’s argument regarding blackmail is his quick and unremarked shift from searching for a *conceptual* distinction to a *practical* one. Although I am not entirely sure precisely what Green means by “conceptual” and “practical,” the plain import seems to be that the features in virtue of which a conditional threat to do something lawful is morally wrongful (hence criminalizable) should be, as well, the features that can work into a satisfactory definition of the criminal offense as a matter of positive law. In other words, Green’s approach seems to assume that a conceptual theory that explains the moral wrong of blackmail should also be able to tell us what the criminal ban should look like.

I believe that this assumption is mistaken. In an effort to show that Green’s position regarding the relationship between the conceptual and the practical is not well supported, I will concentrate on his treatment of the theory of blackmail I put forth a decade ago.²⁹ Now, I admit to continuing to believe that my account is basically correct.³⁰ But I focus on my theory not to reargue it, so much as to illustrate my broader claim that Green demands too much from a theory of wrongfulness—in particular, that he demands, inappropriately, that it should have the resources to drive the shape of criminal law notwithstanding the respects in which the enterprise of criminal law differs from that of morality. Thus, I hope that a careful appreciation of his critique of my theory of why blackmail is wrongful and reasonably criminalized will shed light on a respect in which Green’s general approach to the moral content of white collar criminal law is unsatisfactory even if my theory of blackmail is incomplete or wrongheaded.

Green thinks blackmail might be a form of theft. (Green, p. 234.) He also thinks it might constitute the wrong of coercion. (Green, p. 221.) I agree on both counts. My theory claims that blackmail (when it includes a demand for money or property) is theft by coercion. Its key insight, or at least its most novel contention, is two-fold:

²⁹ Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998).

³⁰ See Mitchell N. Berman, *Meta-Blackmail and the Evidentiary Theory: Still Taking Motives Seriously*, 94 GEO. L.J. 787 (2006).

first, that whether the act threatened is morally wrongful can depend not only on what we might loosely call “objective” facts about the external world, but also on the motives that the threatener would in fact have when engaging in that act; and second, that the conditional offer to remain silent can have evidential bearing on what the threatener’s motives would be were he to carry out the threat on failure of the condition—and therefore on whether the act he threatens would be wrongful. I’ll elaborate.

Although Green is not attracted to my account, it is worth noting that it starts in the same way as his enterprise does—by trying to carefully analyze the underlying moral wrong. Recall that Green is agnostic regarding whether coercion should be measured in empirical or moralized terms. I argue, in accord with what I take to be the more common view, that coercion is the wrong of conditionally threatening to commit a wrong.³¹ This understanding of coercion holds true in any normative system. That is to say: (1) it is presumptively morally wrong to conditionally threaten what it is presumptively morally wrong to do; (2) it is presumptively criminally wrong to conditionally threaten what it is presumptively criminally wrong to do; (3) it is presumptively unconstitutional to conditionally threaten what it would be presumptively unconstitutional to do; etc. Because the act a blackmailer threatens is, by definition, lawful, it follows that blackmail cannot constitute the *legal* wrong of coercion. But that does not resolve whether blackmail constitutes the *moral* wrong of coercion. I argue that it does (at least in its paradigmatic instances). I also argue that blackmail’s status as a form of (morally wrongful) coercion can explain and justify its criminalization. Of these two steps, the former is both more interesting and more difficult, and the only one I shall discuss here.

If a given act of blackmail constitutes the moral wrong of coercion, it follows that the act the blackmailer threatens must be morally wrongful. This is the difficulty for my account, for the acts customarily leveraged into blackmail proposals are generally thought morally permissible. This is true not just at the periphery of the offense but at its core. Consider what is likely the modal case of blackmail: a conditional threat to reveal that the recipient of the threat has committed adultery. We do not say that the disclosure is morally wrongful. To the contrary, some might think that it is morally preferable to remaining silent. The superficial implausibility of contending flatly that a third-party’s disclosure of one spouse’s infidelity to the other would be morally wrongful has led many theorists to locate the moral wrongfulness of a blackmail proposition predicated on the threat of such a disclosure in the threat itself, as opposed to the act threatened. The evidentiary theory contends otherwise. Very roughly, it is morally wrongful to knowingly cause harm without justification. And whether one acts with justification depends, I contend, not only on whether certain facts obtain, but on whether the putatively justifying facts feature among the

³¹ It might be more precise to say that coercion is the wrong of conditionally threatening to wrong the recipient of the threat, or someone with whom the recipient stands in a special relationship, but I will ignore that greater specificity. For my thoughts about coercion, see Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *LEGAL THEORY* 45 (2002).

reasons for which the actor does in fact act. That is, one is not justified for causing harm unless one's motives are good.

While the contours of what counts as harm are far from self-defining, the disclosure to one spouse of the other's infidelity affects the latter reputationally and psychologically in ways that our society has no trouble in classifying as harmful. Finally, then, I argue that the fact of a prior conditional offer of silence is evidence (not conclusive) that the blackmailer would not in fact be motivated by right reasons were he to do as he threatens. If a third party would be acting on good reasons when disclosing the adultery—to advance the truth, for example, or to somehow assist what she views as the wronged spouse—she would be unlikely to have offered the adulterer silence for a fee. The conditional threat does not, accordingly, *make* the proposal wrongful. Rather, it tends to *reveal* the wrongfulness of the act threatened. And if the act threatened would be wrongful, because not well motivated, then the wrongfulness of the conditional threat follows unproblematically from the logic of coercion.

In summary, and generalizing from the case of adultery-blackmail to conditional threats to disclose embarrassing information, the evidentiary explanation for the criminalization of blackmail rests on the following eight steps:

- (1) It is morally coercive to conditionally threaten what it would be morally wrong to do;
- (2) It is morally wrong to knowingly cause (or risk) harm without justification;
- (3) It is a necessary condition for the realization of a justification that the facts that could support the justification be among (or prominent among) the explanatory reasons for which an actor acts;
- (4) The sense of harm at work here is moralized (or at least evaluative);
- (5) Absent unusual circumstances, disclosing an embarrassing secret about an individual causes what our culture recognizes as harm (in the morally relevant sense);
- (6) The fact that, *prior* to making such a harm-causing disclosure, the actor had conditionally offered his silence for a fee is ordinarily evidence of nontrivial probative value that, when subsequently making the disclosure, the reasons that could supply justification were not among the actor's explanatory reasons;
- (7) Therefore, blackmail proposals predicated on a threat to reveal embarrassing secrets are ordinarily (or frequently) morally coercive; and
- (8) Because blackmail proposals predicated on such threats are ordinarily (or frequently) efforts to obtain property belonging to another by morally coercive means, society has *prima facie* reason to criminalize them (even though the criminal ban would cover instances of conduct that are not morally coercive).³²

³² This summary appears in Berman, *supra* note 30, at 795. In the margin of that page I also

That is the abridged version of my theory of blackmail. Green concedes, at least *arguendo*, that it might “provide an adequate justification for criminalizing the core case of informational blackmail.” (Green, p. 220.) But he objects to it on the grounds that it is “incapable of providing a clear test for distinguishing between other kinds of threats that should be criminalized and mere hard bargaining.” (Green, p. 220.) This is for two reasons. “First, it is hard to see why the notoriously slippery requirement of ‘harm’ could not be met every time *X* threatens *Y* with a lawsuit, a strike, a tender offer, or the like.” (Green, p. 220.) Second, while my account of motives “seems on its face unobjectionable, . . . in application it is likely to be, at best, subjective, and, at worst, to apply to so broad a range of hard-bargaining-type conduct that it would have the effect of putting undue additional weight on the already problematic requirement of harm.” (Green, p. 220.)

I find Green’s first objection little short of extraordinary given the objector. Of course harm is a notoriously slippery concept. Who thinks otherwise? Indeed, I think it possible that the difference between the moralized conception of harm and a nonmoralized one that can be used to encompass any sort of setback to interests or frustration of preferences might best be understood functionally or dialectically. On this view, we call a setback to interests a “harm” (in the moralized sense) if and only if one who knowingly risks causing that setback must give reasons for his action. That is, instead of concluding that one must give a reason for causing state of affairs *X* because *X* is a harm, we should conclude that state of affairs *X* is a harm just because our existing norms of social intercourse provide that one who brings *X* about is obligated to provide reasons. Regardless of whether this view of harms is correct (and I am not wedded to it), Green does not find the concept of harm too slippery to serve as one of three planks for his framework for analyzing all white collar crimes—and perhaps all crimes of any sort. Though I do not rule out the possibility that the concept might be too slippery or elusive for my purposes but not for his,³³ Green conspicuously fails to favor us with so much as a word about why that would be.³⁴

I also do not understand why the subjective nature of an inquiry into an actor’s motives is a significant mark against it. Perhaps it is useful to reiterate that, in my view, whether it is true of some conditional threats that carrying out the threat (a) causes what our society deems a harm, and (b) is sufficiently likely to be undertaken without justifying motives, are questions more appropriate for determination by the

explain how this account differs marginally from the account I had put forth in my earlier article, Berman, *supra* note 29.

³³ In an example of mine on which Green focuses (*see* Green, p. 220.), I observed that a seller’s refusal to sell an item unless the buyer paid an exorbitant price does not threaten the would-be buyer with legally cognizable harm precisely because he lacks any legally protected interest in the item. Therefore, I concluded, the threat should be viewed as a noncriminalizable “hard bargain,” rather than as blackmail. On reflection, I believe that I should not have grounded my analysis of this case on the proposition that the buyer lacks a legally protected interest in the item. I should have said merely that the seller’s withholding of the item from the customer does not inflict what society (and the law) deems a “harm.”

³⁴ I am reminded of Green’s objection to the FBI definition of white collar crime for relying on a slippery concept of nonviolence, even while turning around to employ the same concept 20 pages later.

legislature with respect to classes of threats than by judges or juries with regard to individual cases. That is, the questions whether a class of conditional threats threaten *harm* and whether those who make such threats are likely to be motivated by justificatory reasons are subjects for decisions about what to criminalize, not for decisions about which defendants to punish. (The defendants to punish are those who engage in conduct that the criminal offense—which might not be drafted in terms that make reference to harm or motives—proscribes.) And while this fact does not diminish the subjectivity of answers to these questions, it should, I think, cause us to doubt that this subjectivity is a reason for great worry. After all, subjective legislative judgments underpin all manner of criminal legislation.³⁵ Again, Green doesn't explain why the subjectivity necessary to implement my proposal differs in degree or kind from the norm.

In any event, the more fundamental problem with Green's critique is not that it is too critical of my theory. The problem is that, in demanding that a satisfactory solution to the blackmail paradox "provid[e] a clear test for distinguishing" what should be criminalized from what shouldn't be, he fails adequately to appreciate, I think, that the construction of criminal laws might sensibly proceed in two distinct steps. We first seek to isolate the core wrong we wish to prohibit and punish. And then, unless that wrong has hard edges that make for an easily administered legal rule, the legislature tries to write a law that, while centering on the wrong, strikes a balance between allowing too much of the wrong to go uncriminalized and drawing too much that is not wrongful within the criminal ban.³⁶ A large number of incommensurable considerations inform the execution of this latter task. That would not be so if, as Green seems to believe, a theory of the underlying wrong should always, by itself, supply a "clear test" for separating what should be made criminal, all things considered, from what should not be.

The distinction I offer between blackmail and other conditional threats to do lawful things—roughly, that blackmail, as a moral wrong, should refer to those threats

³⁵ For example, is sentence S disproportionate to the seriousness of crime C? Is the optimal balance between protecting possible victims from harm and protecting possible defendants against unjust punishment better served by requiring negligence or recklessness or knowledge with respect to some material element? Is some proposed statutory definition of an offense unacceptably vague, or would a more specific formulation unduly narrow—or unduly broaden—the scope of the prohibition?

³⁶ As I have remarked before:

Whether the evidentiary analysis likewise justifies the criminalization of *other* conditional threats (involving conditional demands other than the payment of money and/or involving threats to engage in lawful activities other than the disclosure of a person's infidelity) depends, in the first instance, both on whether the conduct threatened would cause harm (in the morally relevant sense) and on the strength of the evidentiary inference captured by proposition (6). Some conditional threats that are candidates to be labeled blackmail will thus appear to be morally coercive, some will not. How, finally, the law ought to respond is yet a further question. Because of concerns of a practical or administrative nature, we should expect that the optimal legal solution would likely involve both the criminalization of some conditional threats that are not morally coercive and the non-criminalization of some conditional threats that are.

Berman, *supra* note 30, at 796.

in which the action threatened would be harmful and in which the conditional threat itself permits an inference that the threatener would lack good motives for doing as he threatens—strikes me (biased though I am) as “conceptually clear.” If law reformers who accept this account then find that they are unable to isolate classes of conditional threats outside the informational context in which the twin requirements of harm and absence of good motives are sufficiently common to justify a criminal ban, so be it.

Green intimates that, in such event, the account is not of any “practical” use. Yet that does not follow, for Green errs in treating the category of informational blackmail as monolithic. In fact, commentators have identified a variety of describable subclasses of informational blackmail—such as “market-price blackmail” (the conditional threat to sell embarrassing information to media outlets unless the target of the threat pay what those outlets would pay), or “crime-exposure blackmail” (the conditional threat to tell the authorities that the target has committed a crime), or “victim-blackmail” (the conditional threat of the victim of tortious or disreputable conduct to reveal that conduct unless paid a price that might cause the target to internalize the costs).³⁷ A satisfactory theory of blackmail’s wrongfulness can tell us a lot about how the law should treat these and other subcategories of informational blackmail.

But the far more significant point is that a conclusion that conduct in one or another of these subclasses tends not to be wrongful would not entail that the law of blackmail must exempt that subclass from the blackmail prohibition. Green seems to think that the right standard for assessing theories of blackmail’s moral wrongfulness (i.e., conceptual accounts of the moral wrong of blackmail) is whether such a theory supplies a practical test for sorting the should-be-criminal (all things considered) from the should-be-lawful. Yet that is wrong if modified wrongfulness rightly describes part of the moral content of the criminal law. In sum, then, one lesson to learn from Green’s somewhat unsatisfying analysis of the blackmail puzzle is that theorists of white collar crime—Green himself, as well as those who come to stand on his shoulders—will see farther if they more fully appreciate the extent to which the problem of legal drafting departs from the problem of identifying the underlying moral wrong that the law might be intended in the first instance to capture.

IV. CONCLUSION

Lying, Cheating, and Stealing is a wide-ranging and ambitious book. I have concluded that it falls short of the ambitions it sets for itself. But even if my criticisms hit their mark, there remains a great deal in this original and engaging volume that is smart and illuminating. It is well worth reading by anyone interested in white collar crime, or in the relationship between conventional morality and crime more generally.

³⁷ These and other subclasses of blackmail are discussed in Berman, *supra* note 29, at 855–70.