

BOOK REVIEW*

Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime
by STUART P GREEN

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‘White-collar crime’ is a broad and loose description of a wide variety of crimes and activities. One of the key difficulties in attempting to analyse crimes in this area has been a lack of theoretical models with which to evaluate offences. A further criticism that has been made about these crimes has been the variety of mental elements needed to prove the offences, and, at times, an underlying moral ambivalence about the very criminality of the prohibited conduct. Green argues that this ambivalence manifests itself in three ways: the same conduct may often be prosecuted criminally or civilly, depending on the prosecutor’s discretion; actions that fall within the centre of the prescribed scope of conduct may be clearly criminal, while other actions that fall at the edges of the scope of the conduct as defined may well be considered legal; and, in some cases, even activities that constitute the core behaviour prohibited may be criminalised, despite a lack of a community consensus that the activity is wrong or a belief that it is not seriously wrong enough to amount to a crime.¹

It is this ambivalence that Green sees as making the area an important one for legal theory, particularly because of what it may be able to tell us about the appropriate boundaries for the criminal law. As white-collar crime inhabits the edges of what is seen to be criminal, Green attempts to develop a moral theory that can serve to describe which activities in this area should, and should not be, visited with criminal sanctions in Part I of his book. Admitting that the meaning of ‘white-collar crime’ has been from its inception uncertain and contested, Green limits his use of the term to activities that are prohibited by the criminal law.² He admits that if the area of law had not already been so strongly embedded with the term, he would have preferred a more precise moniker. However, he draws on Wittgenstein’s idea of family resemblances to suggest that much of what is described as white-collar crime as a group shares a set of common characteristics, though each characteristic might not be found in each offence.³ Consequently, this allows him to describe these crimes in terms of characteristics they predominantly share, but allows him to use the variable appearance of the characteristics in each offence as a way of further examining the moral bases of the offences. Green sees these shared characteristics as: a reduced role for mens rea; a more abstract and diffuse form of harm caused by

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1 Stuart Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (2006) 24.

2 Ibid 17 ff.

3 Ibid 18.

the activity; and a wrongfulness that consists in a breaching of everyday norms that are generally accepted by society.

In much of white-collar crime, particularly regulatory offences, Green sees a trend towards reductions in requisite mens rea from intention down to lesser fault elements of recklessness or negligence, and in many instances strict liability.⁴

The harms caused by white-collar crime are seen to affect broad sections of the community rather than specific individuals. They can consist of financial or environmental harms rather than clear corporeal injuries, and the effects of the offences can often only be fully appreciated over time. Indeed, he points out that much criminal regulatory law aims to prevent harms occurring and the very inchoate nature of the offences thus tends to downplay the harm that the activity causes.⁵

These first two characteristics serve to separate out white-collar crime from traditional 'core' offences such as murder and assault. They also tend to draw distinctions between more regulatory and corporate misdeeds and traditional property offences, such as robbery and theft that have clear and specific victims. However, it must be said that the reliance on the concept of family resemblance is somewhat stretched in the sense that Green relies on these broad characteristics to differentiate white-collar offences from other crimes. This means that he is able to include, as white-collar, offences with only one shared characteristic. Thus, he admits that crimes he sees as key white-collar offences – bribery, false statements to government officials and obstruction of justice offences – all fail the reduced mens rea test, but yet should be included.⁶ On the other hand, offences such as stealing and false pretences are excluded by Green on the basis that the harm they cause is not diffuse – and they have specific victims in the same way that murder does.⁷ This aspect of the argument seems underdeveloped, and seems to be an attempt to find a category that will contain all of the forms of moral wrongdoing Green wishes to discuss. It may have been better to have dispensed with the notion of white-collar crime altogether, and instead used a term that was more attuned to the underlying project.⁸

The final characteristic of white-collar crime, as defined by Green, is moral wrongdoing. This is the key to Green's argument. He sees this as the limiting concept that can be used to maintain a principled boundary to criminalisation in this area.⁹ For the purposes of the book, Green examines moral wrongdoing as a norm-based concept rather than a rights-based one. Thus, his analysis of the content of moral wrongdoing is descriptive of what he sees societal attitudes to be, not what they should be, though at times he offers suggestions on law reform that critique the norms he finds.

4 Ibid 31 ff.

5 Ibid 34.

6 Ibid 32.

7 Ibid 152.

8 For example, fraud or dishonesty, rather than being misused terms in legislation could be used as a general descriptor of the various underlying forms of wrongdoing. Compare this with Green's critique of the use of fraud: *ibid* 151.

9 Green suggests that activities should only be criminalised if they cause wrongful harms: *ibid* 44.

Green argues that moral wrongdoing is a critical element of justifying offences because harm alone is not a sufficient basis for criminality.¹⁰ He argues that wrongfulness is distinct from *mens rea*, in that for something to be wrongful it usually requires that the person acted intentionally. Thus, one may be held liable for negligent acts, but one only is seen to individually act wrongfully if one means to do the act or cause the outcome. What is important about this approach appears to be that it allows an examination of the reason for prohibiting non-manifestly criminal activities with a range of culpability factors that are broader than the traditional forms of *mens rea*.¹¹ For example, when discussing the offence of receiving a bribe, the *mens rea* required is that the bribee intended to be influenced by the payment, but the moral wrongfulness is one of acting disloyally to the bribee's institution.¹²

In Part II of the book, Green defines a number of these moral wrongs in white-collar crime. Cheating, deception, stealing, coercion and exploitation, disloyalty, promise-breaking, and disobedience are all examined as distinct forms of moral wrongdoing. In individual chapters, he examines and defines each of these concepts attempting to show how each form of wrongdoing is distinct from the others. To do so he draws on work in moral philosophy, psychology and legal theory, and this part of the book is an excellent resource on the major ideas in this area. What is most distinctive about the analysis is the emphasis that Green places on clearly separating the concepts in a way that others have not. Green is critical of others for both over-inclusive and under-inclusive use of terms such as fraud, theft and lying. To him, such terms describe morally different issues, or a combination of issues, and he argues that we react in different ways to such activities. Green's project is thus to attempt to create a taxonomy of moral faults in this area, with which he can then assess specific offences. This is in many ways the most important part of the book. It provides both a detailed and nuanced unpacking of the different moral concepts that are lazily described by lawyers as fraudulence or dishonesty.¹³ Of course, in so doing, Green makes a large number of propositions with which others may disagree, but he makes a compelling case for the recognition of these forms of wrongdoing as discrete concepts.

Thus, he conceives of cheating as a specific form of wrongdoing which he defines as the violation of a fair and fairly enforced rule with intent to gain an advantage over another with whom one is in a cooperative, rule-bound relationship.¹⁴ By contrast, stealing is the violation in some fundamental way of

10 Harms can be caused by natural disasters or non-culpable mistake, or occur with consent or justification: *ibid* 39–40.

11 If the book was not a norm-based analysis these forms of wrongdoing could be seen as proposals for more specific forms of *mens rea*.

12 Green, above n 1, 201, 203. What remains unclear, however, is the role of *mens rea* if moral wrongfulness is the key determinant of criminality. If moral wrongfulness generally requires a form of intentional conduct, but the requisite *mens rea* is one of recklessness or negligence, does this mean that the *mens rea* is inappropriate?

13 Green suggests that dishonesty is an alternative word for deceit. But, at least in Anglo-Australian law, dishonesty is instead a synonym for fraud.

14 Green, above n 1, 57.

another's morally legitimate rights to a commodifiable thing.¹⁵ Deception consists of four distinct moral wrongs: lying, merely misleading, falsely exculpating and falsely inculpating. The attempt to provide definitions and boundaries to these concepts is illuminating. Green's analysis has the effect of demonstrating not only the differences between the concepts, but also the difficulties of attempting to over-zealously define them. He seems at times caught between merely describing the existence of a community understanding and an attempt to develop a theoretical position. Thus, while he devotes some considerable analysis to the proper meaning of cheating and deception, by critiquing the views of other theorists and by examining a number of hypotheticals, his argument that disobedience constitutes a moral wrong is focused more on a justification that such a wrong is seen to exist rather than on analysis of exactly what it might amount to. This may in part be due to the degree of consideration that has been previously given by others, and by Green, to the concepts. Given that Green has only set himself the task of describing existing community senses of such wrongs, it is unfair to expect any detailed elaboration of how these forms of wrongdoing could be further defined for legal purposes. It is clear, however, that the process of such elaboration will continue as a result of this book, and the analytical framework Green provides in Part II is likely to be widely cited as a foundational study.

The strengths and weaknesses of the theoretical taxonomy of moral wrongs are highlighted in Part III, where Green uses these concepts to explore the appropriate boundaries of a number of offences. In this Part, Green examines the offences of perjury, fraud, false statements, obstruction of justice, bribery, extortion and blackmail and insider trading, and also provides some comment on tax evasion and regulatory offences generally. As with Part II, the level of analysis varies considerably with obstruction of justice (discussed over 20 pages), and insider trading (over eight pages).

As the book is written from a United States ('US') perspective, it is strikingly obvious that the way in which these offences are conceived in Australia is at times different. This renders much of Green's analysis of the detailed elements of the offences of only indirect relevance to Australian criminal law. But, the very fact that such differences exist tends to reinforce the underlying ambiguity as to what a number of these offences are prohibiting, and gives weight to Green's search for underlying moral principles.

For example, in his discussion of insider trading, Green criticises the dominant US approach of seeing the offence in terms of a breach of fiduciary duty. Instead he argues that insider trading is a paradigmatic offence of cheating. The market is a highly rule-bound endeavour that requires that all participants act according to the rules and with confidence that the others are acting fairly. Participants who trade on the basis of information that they do not make available to others breach these rules and thus cheat. In some ways this resonates with the approach taken under Australian insider trading laws which prohibits any trading on the basis of information that is not generally available and which the person ought reasonably

15 Ibid 89 ff.

to know would affect prices if it was available.¹⁶ Analysing the offence in terms of cheating may help to provide some clarity to the underlying rationale for the offence that has been difficult to find.¹⁷ Seeing offences of this type as cheating rather than lying or deceiving may also provide a basis for justification of the availability of civil penalty regimes rather than criminal burdens of proof. It also explains the moral ambivalence of the offence, as few forms of cheating are criminal.

What is very interesting in this Part is the way in which Green justifies the different constituent elements of the offences as based on the fact that they are aimed at preventing different moral wrongs. Green sees perjury as a crime based on the making of a positive lie, but in circumstances where short of deliberate lies, otherwise misleading conduct is lawful because of the adversarial nature of the context in which such statements are made.¹⁸ By contrast, deceit offences prohibit any form of deceptive conduct, including merely misleading conduct. Green's analysis of obstruction of justice offences reveals a number of underlying moral wrongs: failure to take responsibility for one's actions; lying; coercion; disloyalty; disobedience and cheating. But it also reveals countervailing moral rights, such as self-preservation and preservation of relationships of trust with others. Green sees this complexity of the wrongs involved as explaining the differences in scope of the various offences.

One difficulty of assessing the value of the moral concepts that Green proposes in Part II is the failure in Part III to assess the chosen offences against a consistent matrix. Thus, for some offences, the mens rea is set out and compared to the moral wrongdoing,¹⁹ whereas for some offences the mens rea is not discussed at all. For some offences, the appropriate moral content of the offence is proposed, whereas for others a series of propositions are made without any overall conclusion.²⁰ This appears to be because Green uses the offences as examples of the various issues he has discussed in Parts I and II rather than attempting an encyclopaedic analysis of each offence.

The result is that Part III tends to be less propositional than Parts I and II and instead reads more as a collection of preliminary thoughts on how the moral wrongdoing approach might work through. The lack of any significant conclusion to the book also tends to leave the reader unsure of the point that has been made in Part III. This is not so much a criticism of the book, as an indication that the book is one that aims to raise issues rather than resolve them. In fact, the book is in many ways a catherine-wheel of ideas on how to theorise these offences and their moral content. It is a rich source of ideas for further discussion, and is likely to be a much-cited book, providing a collection of

16 See *Corporations Act 2001* (Cth) s 1042 ff.

17 See, eg, *R v Firns* (2001) 51 NSWLR 548 (Mason P).

18 Offences of making false statements to government departments are also discussed. What is interesting in these offences is that while liability was also based on the making of a positive lie, until recently, it was not an offence to falsely reply 'no' to a question. Green sees this as a recognition that it is not morally wrong to refuse to admit guilt.

19 This is most clear in relation to bribery.

20 Most disconcertingly in relation to obstruction of justice offences.

provocative perspectives with which to interrogate the boundaries of criminal law in general and to justify individual offences.

In Australia, we have had an increasing emphasis placed on dishonesty as the fundamental basis for many crimes. Green demonstrates that the category of dishonesty may be misleadingly broad; instead, it contains within it a number of distinct forms of moral wrongdoing. There is much to be said for attempting to unpack those particular moral wrongs that form the basis of these offences and reformulating them in more specific ways. Green's book provides an important first step in that direction. As Green notes:

If fraud encompassed all these forms of wrongdoing, then it would be virtually impossible to distinguish it from other forms of criminality.

Moreover, such variation in meaning would pose real impediments to the principles of fair labelling and legality. If fraud were really to encompass not just stealing by deceit, but also deceptive and non-deceptive breaches of trust, unfair advantage, non-performance of contractual obligations, and misuse of corporate assets, it would be virtually impossible to distinguish between different offences in terms of their seriousness, and even to know whether and when one had committed a crime. Under such an approach ... there is no reason why the perjurer, the bribee, the tax cheat, and the extortioner could not all be convicted of fraud.

Unfortunately, I have no immediate solution to this conceptual morass.²¹

Despite the lack of enthusiasm of legislators to formulate more specific offences (often because of a misplaced fear of appearing to be soft on crime) *Lying, Cheating and Stealing*²² provides a compelling case for beginning the search for a way out of this morass, and Green's framework of moral wrongdoing provides a thought-provoking manner with which to begin the search.

21 Green, above n 1, 151.

22 Stuart P Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (2006).