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Stuart P. Green^a

^a Rutgers School of Law-Newark,

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REVIEW ESSAY

Golden Rule Ethics and the Death of the Criminal Law's Special Part

Larry Alexander and Kimberly Kessler Ferzan, with Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009), xi + 358 pp.

STUART P. GREEN*

In the final chapter of *Crime and Culpability*, the fascinating and provocative new book by Larry Alexander and Kimberly Ferzan, with Stephen Morse, the authors offer the following intriguing anecdote:

One of us (and you can likely guess which one) was visiting a pre-K to fifth-grade school to decide whether her son should attend. In the fourth-grade classroom, she saw a poster board that listed the rules of the classroom. There was no rule forbidding hitting; there was no rule forbidding kicking; there was no rule forbidding biting. There was, in fact, only one rule—the Golden Rule. It was clear, concise, and easy to memorize.¹

The authors then argue that, as in the realm of ethics, a system of criminal

law that used a single, broad standard of behavior would be preferable to one that relied on a long list of specific types of prohibited conduct—"don't murder," "don't rape," "don't commit theft," and the like. The special part of the criminal law should thus be radically stripped down, "done away with," as the authors put it, and in its place there should be, with a few narrow exceptions, a single "general rule," to the effect that "[i]t is criminal for an actor to take an unjustified risk of causing harm to a legally protected interest or to take an unjustified risk that his conduct constitutes prohibited behavior" [327].

Having spent a good part of my own scholarly career writing about the criminal law's special part,² I confess to a certain uneasiness about this proposal. No, let me rephrase that: it scares me silly. In this brief review, I argue that, in fact, the Golden Rule provides an inadequate substitute for a more detailed code of

*Stuart P. Green, author of *Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime* (2006), is Professor of Law and Justice Nathan L. Jacobs Scholar, Rutgers School of Law-Newark. Email: sgreen@kinoy.rutgers.edu

ethics; and that, for similar reasons, a Golden Rule-like special part would provide a poor replacement for a more detailed code of crimes.

A Brief Overview

Before we consider the authors' argument for a "Golden Rule"-like special part, it will be helpful to orient the argument within their broader theory. The book begins with a unifying claim, from which the rest of the argument follows. According to the authors, the essence of culpability in the criminal law consists of acts manifesting insufficient concern for the legally protected interests of others [23]. Such insufficient concern, they say, should be understood solely in terms of recklessness, which in turn reflects the degree of risk the actor believes he is imposing on others' interests and his reasons for doing so [24]. Under this approach, familiar forms of culpability like purpose and knowledge are "folded" into recklessness [31]. As for negligence, the authors would eliminate it entirely as a basis for criminal liability, arguing that people should not be viewed as morally culpable for taking risks of which they are unaware [chap. 3].

The next part of the book consists of a lengthy discussion of defenses, conceived of as justifications and excuses that nullify or reduce the culpability of what would otherwise be viewed as culpable acts [chap. 4]. This

is followed by an argument that criminal desert should be based solely on the harm that the offender risks, not the harm that he actually causes [chap. 5]. The authors then argue for a radically contracted actus reus of attempt. Rather than the familiar dangerous proximity, unequivocal, or substantial step tests, they offer an argument in favor of the "last act" test, according to which the actor becomes liable only at the time he engages in an act that unleashes a risk of harm that he believes he can no longer control [chap. 6]. The penultimate chapter then offers an analysis of how to individuate culpable acts, criminalize omissions, deal with rapidly repeated acts, and the like [chap. 7].

There is much to admire here, in the forcefulness and ingenuity of the authors' arguments, but also much to disagree with. Given limitations on space and the fact that much of the argument in the earlier chapters has been commented on elsewhere,³ I will focus my critique here on the notion [contained in chap. 8] that the criminal law's special part as we now know it should be replaced with a radically simplified scheme.

Doing Away with the Special Part

As noted, the authors propose that the list of specific offenses contained in the special part, the wrongs of

murder, rape, and the like, should be replaced with the following single rule of criminal culpability:

Choose only those acts for which the risks to others' interests—as you estimate those risks—are sufficiently low to be outweighed by the interests, to yourself and others, that you are attempting to advance (discounted by the probability of advancing those interests) [263].

There is, however, a certain lack of clarity about exactly how this approach is meant to be implemented, particularly with respect to the question of which actors within the system are told what. As best I understand it, the instructions given to the general public about what conduct is and is not permitted is, with several exceptions,⁴ essentially the above quoted rule. Criminal law adjudicators, including juries, on the other hand, receive more detail. Someone, presumably the legislature, is to predetermine both exactly what should count as a harm to legally protected interests and the relative value that should be placed on such interests. For example, the legislatively-enacted code would identify and rank harms such as: “death, fear of death, serious bodily injury, less serious bodily injury, etc.” [327]. Similarly, “questions about how serious unconsented-to intercourse is, or the killing of a fetus, or littering on a public highway, are all decisions that would be made *ex ante*” [281]. It would then be the job of the jury to determine which harms the actor’s conduct actually risked, and to discount the interests harmed by the actor’s belief as to the magnitude of the various risks he was imposing [282]. The jury, in determining liability and the appropriate punishment, would also take into account the duration of risk as the actor perceived it [283], the quality of the actor’s deliberation [284], and his reasons for acting [285].

The legislature would also help by placing “commentaries” within the criminal code that would allow for elaboration on matters such as when a harm should be regarded as “serious” [307].

The authors then address the concern that a single generalized rule of culpability, even when “unpacked” into more specific harms, would fail to give adequate notice as to what conduct will be regarded as criminal. It is at this point that the authors relate the story of how one of them observed the Golden Rule poster on her son’s prospective classroom wall. They then state:

[T]he Golden Rule is arguably more understandable than the indefinitely many narrow conduct rules that it potentially instantiates. For even if it were possible to write down every potential risk and every potential justifying reason, such a set of classroom rules would be so expansive that no student could hope to have notice of what the school requires. Moreover, any attempt to narrow the coverage to fewer rules creates gaps. The set of articulated rules would then be woefully underinclusive.

Standards can give us as much notice as rules in cases such as this. It seems to us that there is little doubt that these nine-year-olds understand that the Golden Rule applies to hitting, kicking, and biting [314].

Although the analogy is never made completely explicit, its import is clear: just as a system of ethics based on a single standard of what is permissible is said to be preferable to a system that relies on a long list of ethical DOs and DON’Ts, a criminal code based on a single standard of culpability is said to be preferable to one based on a detailed list of specific offenses.

The Golden Rule of Ethics

The authors' discussion of the Golden Rule is brief and uncharacteristically casual. By focusing on it here, I do not mean to overstate its importance within the overall scheme of their theory as they present it. I nevertheless do believe that it is worthy of our attention, since the suggestion that the Golden Rule could provide an adequate model for a system of law or morality is both interesting in its own right and symptomatic of a more general flaw in their view of the special part.

The authors suggest that the Golden Rule is "clear, concise, and easy to memorize," and therefore, they imply, offers a good model for criminal law rulemaking [314]. In fact, however, the proper formulation, meaning, and function of the Golden Rule are anything but clear. There are substantial controversies about the rule's almost every aspect, which can be divided roughly into two general categories: controversies about substance and controversies about procedure.

In terms of substance, the first question concerns the correct formulation of the rule itself. Interestingly, the authors never say which of the many statements of the Golden Rule actually appeared on the poster that was observed in the fourth-grade classroom. There are in fact numerous versions of the rule to choose from, found in a wide range of religious and ethical traditions. One of the most familiar formulations appears in the Book of Leviticus, which states the rule in its positive form: "you shall love your neighbor [or fellow] as

yourself."⁵ Jesus, in the Gospel of Luke, is quoted as stating the rule, also positively, in terms of simply "doing" rather than "loving": "As you wish that men would do to you, do so to them."⁶ Hillel, the great Jewish sage and older contemporary of Jesus, famously stated the rule in its negative form: "That which is hateful to you, do not do to your fellow."⁷ Other formulations of the Golden Rule appear in Confucianism ("do not impose upon others those things that you yourself do not desire"), Buddhism ("one who loves himself should not harm another"), Hinduism ("One should not behave toward others in a way which is disagreeable to oneself"), and Islam ("None of you believes until he loves for his brother what he loves for himself").⁸

An even more challenging set of substantive questions concerns the precise meaning of the Golden Rule, and whether it provides an adequate basis for deciding what conduct should be regarded as ethical. A long line of thinkers, including St. Augustine, Maimonides, Hobbes, Spinoza, Locke, Kant, Mill, and Sidgwick, and, more recently, Bernard Gert, Alan Gewirth, Richard Hare, Martha Nussbaum, Paul Ricoeur, Thomas Scanlon, and Jeffrey Wattles, all have struggled to interpret, defend, or criticize the Golden Rule.⁹ Among the numerous issues they have dealt with are: (1) who should count as a "neighbor" or "fellow" or "other" within the meaning of the rule, and under what circumstances; (2) whether the positive and negative formulations of the rule are

equivalent in terms of the normative conclusions to which they lead; and (3) whether the conduct the rule permits, or requires, varies depending on the contingent wants and desires of the actor, or the recipient, or whether the rule can somehow be abstracted away from such contingencies.¹⁰

For present purposes, we need not resolve any of these issues. My point is simply that, in terms of its substance, the rule is far from simple or clear.

There are also significant questions about what we might call the procedural aspects of the Golden Rule—that is, about who is supposed to apply the rule and in what circumstances. For example, is it a rule that ordinary people are meant to apply on a case-by-case basis in their daily lives? Is the rule meant to be applied only when there exists no more specific rule on point, or where specific rules conflict? Or is it meant to be used, primarily by theorists, as a general justifying principle that explains or justifies more specific ethical rules?

In my view, and in the view of many other scholars, the main point of the Golden Rule is not to provide direction to individuals whenever they have to decide how to act in a given circumstance. Such a procedure would be unwieldy and impractical. In deciding how to act morally, people—whether they are fourth graders¹¹ or morally mature adults—normally tend to think not in terms of loving (or doing unto) others as they love (or would wish to have done to) themselves, but rather in terms of complying with a long list of specific moral norms, whether they are fairly

general, thick norms such as don't be selfish, dishonest, greedy, or disloyal; or more specific, thinner norms such as don't kill, steal, lie, or cheat. Indeed, if Maimonides's approach is to be followed, we should understand the Golden Rule in terms of moral norms of even greater specificity, such as the obligation to visit the sick, comfort mourners, rejoice with the bride and bridegroom, ensure that the dead are properly attended to, act hospitably to guests, be careful with other people's money, give charity to the poor, and so forth.¹²

All of these norms, at some level of abstraction, may well be consistent with one or another formulation of the Golden Rule, and in some sense reducible to it. But my sense is that, as a matter of moral psychology, people are usually more likely to think about what is right and wrong, and how they should act in a given case, on the basis of numerous specific rules than they are on the basis of a single general rule. If I am right about this, then the Golden Rule is probably best understood as a "meta-moral" rule, a defining characteristic of what has been called "the moral point of view."¹³ Although it may be useful in deciding which conduct is right in circumstances in which no more specific norm exists, or in which specific norms are in conflict,¹⁴ the rule's main function is to provide a unifying principle that explains how these various forms of ethical behavior are linked. In that sense, the Golden Rule of the Bible plays a role that is functionally similar to generalized moral standards such as Mill's Principle of Utility, Kant's Categorical Imperative, and Rawls's Difference Principle.

The Golden Rule and the Criminal Law

The discussion in the previous section suggested that the generalized Golden Rule, though hardly without value in our moral lives, provides a poor proxy for a more detailed ethical code. In this section, I intend to argue that the authors' general "insufficient concern" rule approach to defining crimes suffers from similar limitations.

The first point is simply that the meaning of the authors' insufficient concern principle, like the meaning of the Golden Rule itself, is far from clear. How exactly is an ordinary citizen supposed to make sense of the rule that he should "choose only those acts for which the risks to others' interests . . . are sufficiently low to be outweighed by the interests . . . [he is] attempting to advance (discounted by the probability of advancing those interests)"? Under this rule, is it a crime to spread a false rumor about another person? What about a true, but nevertheless embarrassing, rumor? Is it a crime to make a literally true, but misleading, statement under oath? To write a check on insufficient funds? What if one knew the funds were insufficient at the time he wrote the check? Is it a crime to use methamphetamine? To manufacture or sell it? Is it a crime to fail to return lost property? To have sex without revealing that one is HIV positive, or that one has Hepatitis C?

The authors offer a number of arguments as to why they think their proposed general rule approach is preferable to current law. First, they argue that some offense categories are

too broad to make the kind of moral distinctions they say need to be made. The category of rape, for example, is both under- and overinclusive; it tends to "obscure rather than to clarify the underlying normative justifications for punishing these different types of culpable riskings" [266]. A rape in which the victim is "brutally beaten" is obviously worse than a rape in which the "victim found the rape pleasurable (as might happen in a case of deception)" [265–66]. Even the term "forcible rape" is inadequate, they say, as it fails to distinguish between "[a]n actor who suffocates his victim," "an actor who punches his victim," and "an actor who uses force only to hold down his victim" [247].

I have no problem with these points. "Rape" simpliciter is an overly broad offense label.¹⁵ So too, I would say, is "forcible rape." But a better solution to the problem of imprecise offense definitions is not, as the authors would have it, to do away with traditional categories entirely and resort to a general offense of risk creation, but rather to distinguish among different forms of rape, such as first-, second-, and third-degree rape, aggravated rape, rape by deception, statutory rape, rape of a child, and so forth (as, in fact, most state criminal codes already do).

Second, the authors contend that some crime categories tend to create "false distinctions between types of offenses, potentially allowing similarly culpable actors to receive significantly different penalties" [266].

Here they offer the example of murder and manslaughter. Under the Model Penal Code, murder may be committed purposefully, knowingly, or recklessly if such recklessness manifests extreme indifference to the value of human life, while involuntary manslaughter may be committed recklessly or negligently. The distinction between murder and manslaughter, they say, is therefore a “fine one—a jury decision along a continuum. At some point, a homicide becomes so reckless that the jury thinks it warrants more punishment (murder) than does another, slightly less reckless, homicide (manslaughter)—they are different in degree but not in kind” [267].

I have no quarrel with this point either. Murder and manslaughter overlap in ways that can be confusing. But here again the solution should not be to do away with these labels entirely, but instead to refine the terms so that they are more precise and meaningful. For example, we could limit use of the term *murder* to unjustified killings that are purposeful or intentional, and use the term *involuntary manslaughter* exclusively for killings that are reckless (putting aside for the moment the fact that the authors themselves reject the use of mens rea concepts such as purposeful and intentional).

Third, while acknowledging that narrow rule-based criminal offense definitions offer some benefits (such as solving coordination problems and reducing decision-making costs), the authors contend that they are too often overinclusive; they apply even when their underlying justification does not, and thus have the effect of punishing morally innocent people [297–99]. They offer an interesting

example of cases in which even speed limits (which would seem to be the paradigmatic case of a necessarily narrow rule-based criminal offense) seem overinclusive [302–306].

Surely, the authors are correct that there is an unavoidable gap between the rules that legislatures enact and how citizens should behave in specific cases. But the way to bridge this gap, it seems to me, is not to eliminate the rules, but instead to give to the various actors in our criminal justice system—the police, prosecutors, judges, and juries—appropriate discretion to enforce the rules, as in fact we already do. Thus, if a driver is driving only slightly over the speed limit and doing so in a way that does not seriously endanger anyone, then we count on the police to exercise their discretion to refrain from giving him a ticket. And if the police fail to properly exercise their discretion, then the prosecutor should exercise her discretion not to pursue the charge. And if the prosecutor improperly decides to pursue the charge, then the court should decline to convict. And so on. Resorting to a system which “deleted speed limits and just required actors not to take unjustifiable risks,” as the authors suggest [303], would seem to me a mistake. It would give citizens too little guidance about exactly what conduct is prohibited.

Fourth, the authors claim that current law does a poor job of dealing with offenses that involve multiple actions, continuous courses of conduct, repeated events, and the like. They offer as examples cases in which an offender (1) sets fire to a building, and the fire subsequently spreads to a second building, (2) carjacks a car in the possession of

both a driver and a passenger, (3) fondles the breasts of an underage victim while driving, stops the car, and then resumes his fondling, or (4) is ordered to stop by the police, refuses to do so, has his arm grabbed by the officers, breaks away, is tackled by police, struggles with them, again breaks away, and is ultimately subdued and placed in custody [254–55]. They also contend that current law deals inadequately with cases in which an actor imposes a single risk for a long period of time, as where a speeder speeds for 20 minutes, a fire fighter fails to put out a fire for an hour, or a rapist subjects a victim to an hours-long course of sexual assault [243, 257].

Here, the authors do a nice job of bringing out some intriguing puzzles and practical uncertainties in our current system of criminal law, and they make a persuasive point that the duration of a crime is a significant and underappreciated factor in assessing its culpability. Nevertheless, my sense is that here again problems of this sort could be dealt with effectively on an offense-by-offense basis, by means of more precise offense definitions. For example, statutes could specify that the number of counts charged will depend on the number of buildings burned (for arson), the number of cars carjacked (for carjacking), and the number of times that a victim is penetrated (in the case of rape). I agree that determining the appropriate number of counts in cases of ongoing sexual contact with a minor or resisting arrest may not be the sort of thing that can be determined by definite *ex ante* mechanical rules, but that hardly seems like a basis for throw-

ing out the underlying traditional offense categories themselves.

Finally, they say, the current system often “declare[s] an act criminal and hence punishable without any thought to the interest that is being protected.” The example they give here is of drug possession, for which they say one would be “hard-pressed to articulate [an] underlying rationale” [266].

Once again, I do not disagree with their critique of current criminal law. It seems beyond dispute that our legislatures have declared certain forms of conduct criminal without carefully considering the harms they cause or the interests at stake. But why should anyone think that adopting the authors’ approach to defining criminality would suddenly make our law-making bodies any more thoughtful or wise in their decisions? No doubt many legislators would be happy to argue that drug possession is just the sort of conduct that involves imposing unjustified risks on others.

In short, I have no problem with the authors’ contention that our system of law is overcriminalized (in the sense that some prohibited conduct is overinclusive and bears only an attenuated connection to the interests protected), and that our criminal codes contain many vague, duplicative, unintelligible, and ad hoc provisions [290–91]. The question, of course, is how to fix them. Should we endeavor to refine the criminal codes we already have so that they are more carefully formulated and more respectful of the harm principle, or should we do away with centuries of common law and legislative development and essentially start over? To ask the question is to answer it. To discard all of the morally meaningful and

culturally rich concepts and categories that exist within the special part simply because the special part happens at times to be imprecise and overreaching would constitute a clear case of throwing out the baby with the bathwater.

This is not to say that there is no legitimate role within the process of criminal law-making for the authors' insufficient concern principle. Like the Golden Rule of ethics, which provides a general principle that is useful both for assessing the validity

of more specific moral norms and providing direction where no such norms exist, the authors' general principle of culpability can provide a helpful, if incomplete, tool for assessing the appropriateness of various instances of criminalization.¹⁶

(The insufficient concern principle, like the Golden Rule, could also conceivably play a role as gap-filler, though the criminal law, by virtue of the principle of legality, requires that rules be made *ex ante* in a way that our system of ethics does not.)

Conclusion

Alexander, Ferzan, and Morse have teamed up to produce a bracing and iconoclastic book, one that should be on the required reading list of anyone with a serious interest in criminal law theory. Over and over, they defy conventional wisdom and scholarly consensus to propose a novel and

thought-provoking approach to one or another central problem in the field. I assume that many will read the book and, like me, disagree with much of what the authors have to say. But I assume as well that, like me, those same readers will find the book both stimulating and pleasurable to read.

Notes

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1 Larry Alexander and Kimberly Kessler Ferzan, with Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009), 314. [Bracketed page numbers in the text refer to this volume.]

2 See, for example, R. A. Duff and Stuart P. Green, "Introduction: The Special Part and its Problems," in *Defining Crimes: Essays on the Special Part of the Criminal Law*, ed. R. A. Duff and Stuart P. Green (Oxford, UK: Oxford University Press, 2005), 1–20; and Stuart P. Green, "Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach

to the Special Part," *Buffalo Criminal Law Review* 4 (2000): 301–39.

3 See, for example, the articles in a forthcoming symposium issue of *Law and Philosophy* 29 (2010).

4 I count three possible exceptions. First, the authors suggest that legislatures could require that offenders have a mental state of at least recklessness with respect to protected interests [307–308]. Second, legislatures could employ certain presumptions, such as that driving with blood alcohol content above a certain percentage constitutes driving recklessly (as opposed to making such driving *per se* criminal) [309]. Finally, they recognize the advantages, in certain limited circumstances, of what have been called "proxy crimes" [309]. Proxy crimes involve conduct that, though it risks harming a legally protected interest, is not dangerous

in itself and would thus seem inconsistent with their general “insufficient concern” approach. The authors consider the proxy crime of statutory rape, which makes it a crime for a defendant to have sex with an underage youth regardless of whether she or he is in fact mature enough to consent. They argue that such an offense, despite the fact that it does not necessarily involve subjecting a victim to an unjustified risk, is nevertheless defensible because it gives “epistemic guidance” to actors “on both sides of the equation” (potential defendants and victims) who are likely to make mistakes about whether a young person is mature enough to have sex [311]. At the same time, they argue that a defendant who makes a reasonable mistake regarding the victim’s age should be entitled to a defense [311]. They would also reject certain other common proxy crimes, such as possessing burglary tools, on the grounds that such crimes are too far attenuated from the actual harm sought to be prevented [310].

5 Leviticus 19:18. The term “neighbor” appears in the Revised Standard Version, *The New Oxford Annotated Bible with the Apocrypha*, ed. Herbert G. May and Bruce M. Metzger (Oxford, UK: Oxford University Press, 1973). The Jewish Publication Society’s translation uses the term “fellow,” *Tanakh: A New Translation of the Holy Scriptures* (Philadelphia: Jewish Publication Society, 1985). The term “Golden Rule” itself does not seem to have appeared until the eighteenth century. See Bruce M. Metzger, “The Designation ‘The Golden Rule,’” *The Expository Times* 69 (1958): 304.

6 Luke 6:31; see also Matthew 7:12 (“whatever you wish that men do to you, do so to them”). For an argument that “doing unto others” and “loving one’s neighbor” should be regarded as distinct rules, see Keith D. Stanglin, “The Historical Connection between the Golden Rule and the Second Greatest Love Command,” *Journal of Religious Ethics* 33 (2005): 357.

7 *Babylonian Talmud*, tractate Shabbat 31a.

8 Mark A. Csikszentmihalyi, “The Golden Rule in Confucianism,” in *The Golden Rule: The Ethics of Reciprocity in World Religions*, ed. Jacob Neusner and Bruce Chilton (London: Continuum, 2008), 99, 102; Kristin Scheible, “The Formulation and Significance of the Golden Rule in Buddhism [I],” in *The Golden*

Rule: The Ethics of Reciprocity in World Religions, 116, 117; Richard H. Davis, “A Hindu Golden Rule, in Context,” in *The Golden Rule: The Ethics of Reciprocity in World Religions*, 146; Emil Homerin, “The Golden Rule in Islam,” in *The Golden Rule: The Ethics of Reciprocity in World Religions*, 102. For a useful attempt at synthesis, see Jeffrey Wattles, *The Golden Rule* (New York: Oxford University Press, 1996), 157, 160.

9 St. Augustine, “The Lord’s Sermon on the Mount,” in *Ancient Christian Writers: The Works of the Fathers in Translation*, ed. Johannes Quasten and Joseph C. Plumpe (Westminster, MD: The Newman Press, 1948), 161–64; Moses Maimonides, *A Maimonides Reader*, ed. Isadore Twersky (Springfield, NJ: Berhman House, 1972), 214; Thomas Hobbes, *Leviathan* (1651; New York: Penguin, 1985), 190, 214; Benedict de Spinoza, *A Theologico-Political Treatise and a Political Treatise*, trans. R.H.M. Elwes trans. (1670; New York: Dover Press, 1951), 206–07; John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (1689; Oxford, UK: Clarendon Press, 1975), 68; Immanuel Kant, *Groundwork for the Metaphysics of Morals*, trans. and ed. Allen W. Wood (1785; New Haven: Yale University Press, 2002), 37; John Stuart Mill, *Utilitarianism* (1863; Indianapolis: Hackett, 2002), chap. 2; Henry Sidgwick, *The Methods of Ethics*, 7th ed. (1907; Chicago: University of Chicago Press, 1962), 379–80; Bernard Gert, “Morality Versus Slogans,” in *Morality in Criminal Justice*, ed. Daryl Close and Nicholas Meier (Belmont, CA: Wadsworth, 1995), 51–60; Alan Gewirth, “The Golden Rule Rationalized,” *Midwest Studies in Philosophy* 3 (1978): 133; R. M. Hare, *Freedom and Reason* (Oxford, UK: Oxford University Press, 1963), 108; Martha Nussbaum, “Golden Rule Arguments: A Missing Thought?,” in *The Moral Circle and the Self*, ed. Kim-Chong Chong, Sor-Hoon Tan, and C. L. Ten (Chicago, IL: Open Court, 2003), 3; Paul Ricœur, “The Golden Rule: Exegetical and Theological Perspectives,” *New Testament Studies* 36 (1990): 392; Thomas Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), 170; and Wattles, *The Golden Rule*. For a recent exploration of the relationship between the Golden Rule and law, see Neil Duxbury, “Golden Rule Reasoning, Moral Judgment,

and Law," *Notre Dame Law Review* 84 (2009): 1529–1605.

10 As George Bernard Shaw famously put it, "Do not do unto others as you would that they should do unto you. Their tastes may not be the same." Shaw, "Maxims for Revolutionists," in *Man and Superman* (New York: Brentano's, 1903), 227.

11 Apropos to Ferzan's experience in her son's prospective classroom, one scholar conducted an experiment with American sixth graders designed to test their understanding of the Golden Rule, which was formulated in both positive and negative versions. The students came up with a wide range of behaviors that should be prohibited (hitting, stealing, snubbing, cheating), a wide range of behaviors that should be required (loving, respecting, helping), and a wide range of views about who should count as the "other" (family, friends, strangers, enemies, even animals). Ron R. Rembert, "The Golden Rule: Two Versions and Two Views," *Journal of Moral Education* 12 (1983): 100–103.

12 Maimonides, *Maimonides Reader*, 214 (quoting *Mishneh Torah*, Book XIV, Mourning, chap. 14). Maimonides argues that all of these specific obligations, which are contained not in Torah but are instead articulated by the rabbis of the Talmud, are "implied" in the Golden Rule, which is found in Torah. See also Joseph Telushkin, *A Code of Jewish Ethics*, vol. 2, *Love Your Neighbor as Yourself* (New York: Bell Tower, 2009), 11–12.

13 For a similar view, see William Blackstone, "The Golden Rule: A Defense," *Southern Journal of Philosophy* 3 (1965): 172, 173; Jouni Reinikainen, "The Golden Rule and the Requirement of Universalizability," *Journal of Value Inquiry* 39 (2006): 155–168; Marcus Singer, "The Golden Rule," *Philosophy* 24 (1963): 293–314.

14 For an interesting example, again from Jewish law, of how the Golden Rule can be used as a means to decide what conduct is proper in circumstances in which no more

specific rule applies, consider the famous passage in the Midrash *Siphra*, the oldest rabbinical commentary on Leviticus, in which the following hypothetical case is given: two men are in the desert and one of them has a pitcher of water. If both drink, they will die, but if only one drinks he will survive and find rescue. What should they do? The commentators differ. Ben Petura argued that it was better that both should drink and die, rather than that one should behold his companion's death. The view that has prevailed, however, is that of Rabbi Akiba, who argued that it is better that only one drink the water, reasoning that "if the Torah had meant that a man must love his neighbor to the extent of sacrificing his life for him in all circumstances, it would have said: 'Thou shalt love thy neighbor more than thyself.'" See *The Pentateuch and Haftorahs*, ed. J. H. Hertz, 2nd ed. (London: Soncino, 1965), commentary at 564 (paraphrasing Akiba).

15 An even more egregious example of overbreadth in offense definitions is the Model Penal Code's offense of "Theft," which combines the formerly distinct common law offenses of larceny, embezzlement, false pretenses, extortion, receiving stolen property, and failing to return lost property into a single consolidated offense. Problems with this offense category are discussed in Stuart P. Green and Matthew B. Kugler, "Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation," *Journal of Empirical Legal Studies* 7 (2010): 511–37, and at greater length in my forthcoming book, tentatively titled *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age*.

16 I say incomplete because there are various factors other than harm to victims that should be taken into account in determining whether a particular form of conduct should be criminalized. See generally Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008).