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Stuart Green



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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: 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. (p.314)

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 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.” (p.327)

Having spent a good part of my own scholarly career writing about the criminal law's special part,¹ 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 ethics; and that, for similar reasons, a Golden Rule-like special part would provide a poor proxy for a more detailed code of crimes.

* Professor of Law and Justice Nathan L. Jacobs Scholar, Rutgers School of Law-Newark. For comments and discussion, I am grateful to Vera Bergelson, Rabbi David Greenstein, Adil Haque, and Ken Levy.

¹ See, e.g., R.A. Duff & Stuart P. Green, “Introduction: the Special Part and its Problems,” in *Defining Crimes: Essays on the Special Part of the Criminal Law*, eds. R.A. Duff & Stuart P. Green (Oxford: OUP, 2005) 1; Stuart P. Green, “Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part,” 4 *Buffalo Crim. L. Rev.* 301 (2000).

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. (p.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. (p.24) Under this approach, familiar forms of culpability like purpose and knowledge are "folded" into recklessness. (p.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. (Chapter 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. (Chapter 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. (Chapter 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. (Chapter 6). The penultimate chapter then offers an analysis of how to individuate culpable acts, criminalize omissions, deal with rapidly repeated acts, and the like. (Chapter 8.)

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,² I will confine my critique here to the notion that the criminal law's special part as we now know it should be abandoned.

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). (p.263)

² See, e.g., articles in forthcoming symposium issue of *Law and Philosophy*.

There is, however, a certain lack of clarity about exactly how this approach is meant to be implemented. As best I understand it, the instruction given to the general public about what conduct is and is not permitted is no more or less than 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.” (p. 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.” (p.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. (p.282) The jury, in determining liability and the appropriate punishment, would also take into account the duration of risk as the actor perceived it (p.283), the quality of the actor’s deliberation (p.284), and his reasons for acting (p.285). The legislature would also help by placing “commentaries” within the criminal code which would allow for elaboration on matters such as when a harm should be regarded as “serious.” (p.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 argue that:

[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. (p.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 supposedly 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. They suggest that the Rule is “clear, concise, and easy to memorize,” and therefore, they imply, offers a good model for criminal law rulemaking. (p.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, found in a wide range of religious and ethical traditions, to choose from. 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."³ 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."⁴ 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."⁵ 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 towards 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").⁶

An even more challenging set of substantive questions concerns the precise meaning of the 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, Paul Ricœur, Richard Hare, Thomas Scanlon, Bernard Gert, Alan Gewirth, Martha Nussbaum, and Jeffrey Wattles, have all struggled to interpret, defend, or criticize the Golden Rule.⁷ Among the numerous issues they

³ *Leviticus* XIX, verse 18. The term "neighbor" appears in the Revised Standard (Christian) translation. *The New Oxford Annotated Bible with the Apocrypha*, eds. Herbert G. May & Bruce M. Metzger (Oxford: OUP, 1973). The Jewish Publication Society 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,'" 69 *The Expository Times* 304 (1958).

⁴ 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 to 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," 33 *J. Religious Ethics* 357 (2005).

⁵ *Babylonian Talmud*, tractate Shabbat 31a.

⁶ Mark A. Csikszentmihalyi, "The Golden Rule in Confucianism," in *The Golden Rule: The Ethics of Reciprocity in World Religions*, eds. Jacob Neusner & Bruce Chilton (London: Continuum, 2008) 99, 102; Kristin Scheible, "The Formulation and Significance of the Golden Rule in Buddhism [I]," in id at 116, 117; Richard H. Davis, "A Hindu Golden Rule, in Context," in id. at 146, 146; Emil Homerin, "The Golden Rule in Islam," in. For a useful attempt at synthesis, see Jeffrey Wattles, *The Golden Rule* (New York: OUP, 1996) 157, 160.

⁷ St. Augustine, *The Lord's Sermon on the Mount*, vol. 2, 2 (sec. 74) (Mahwah, NJ: Paulist Press, 1978); Maimonides, *A Maimonides Reader*, ed. Isadore Twersky (Springfield, NJ: Berhman House, 1972) 214; Thomas Hobbes, *Leviathan* (1651, Penguin ed. 1985) 190, 214; Spinoza, *Ethics* (1667) 4; John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Clarendon Press, 1975) (1689) 68; Immanuel Kant, *Groundwork for the Metaphysics of Morals*, trans. & ed. Allen W. Wood (New Haven: Yale U Press, 2002) (1785) 37; John Stuart Mill, *Utilitarianism* (Indianapolis: Hackett, 2002) __; Henry Sidgwick, *The Methods of Ethics*

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.⁸

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 the rule 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 graders⁹ 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’ 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

(Indianapolis: Hackett, 7th ed, 1981) (1907); Paul Ricœur, *Oneself as Another*, trans. Kathleen Blamey (Chicago: University of Chicago Press, 1992) (1990); R.M. Hare, *Freedom and Reason* (Oxford: OUP, 1963) 108; Thomas Scanlon, *What We Owe to Each Other* (Cambridge, Mass: HUP, 1998) 170; 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,” 3 *Midwest Studies in Philosophy* 133 (1978); Martha Nussbaum, “Golden Rule Arguments: A Missing Thought?,” in *The Moral Circle and the Self*, eds. Kim-chong Chong, et al. (Chicago: Open Court, 2003) 3; Wattles, above note __. For a recent exploration of the relationship between the Golden Rule and law, see Neil Duxbury, “Golden Rule Reasoning, Moral Judgment, and Law,” 84 *Notre Dame L. Rev.* 1529 (2009).

⁸ As 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.” George Bernard Shaw, “Maxims for Revolutionists,” in *Man and Superman* 227, 227 (1903).

⁹ 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,” 12 *J. Moral Education* 100 (1983).

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.¹⁰

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 typically 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."¹¹ While it may be useful in deciding which conduct is right in circumstances where no more specific norm exists, or where specific norms are in conflict,¹² 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' Difference Principle.

The Golden Rule and the Criminal Law

The discussion in the previous section suggested that the generalized Golden Rule, while hardly without value in our moral lives, provides a poor proxy for a more detailed ethical code. In this section, I want to suggest 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

¹⁰ *Maimonides Reader*, above note __, at 214 (quoting *Mishneh Torah* Book XIV, Mourning, Chpt. 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.

¹¹ For a similar view, see William Blackstone, "The Golden Rule: A Defense," 3 *Southern J. Philosophy* 172, 173 (1965); Jouni Reinikainen, "The Golden Rule and the Requirement of Universalizability," 39 *J. Value Inquiry* 155 (2006); Marcus Singer, "The Golden Rule," 24 *Philosophy* 293 (1963).

¹² 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 where 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 (2d ed. London: Soncino, 1965), Commentary at 564 (paraphrasing Akiba).

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 sell it? Is it a crime to fail to return lost property? To have sex without revealing that one is HIV positive? That one has Hepatitis C?

The authors offer several 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 underinclusive and overinclusive; it tends to “obscure rather than to clarify the underlying normative justifications for punishing these different types of culpable riskings.” (p.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).” (pp. 265-66)

I have no problem with this point. Rape simpliciter *is* an overly broad offense label.¹³ But a better solution to the problem of imprecise offense definitions is not, as the authors would have it, to do away with the category of rape 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, sexual assault, 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.” (p.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 a depraved heart, 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” (p.267).

I have no quarrel with this point either. Murder and manslaughter do overlap in ways that can at times be confusing. But here again the solution is not 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).

¹³ 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 & Matthew B. Kugler, “Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation,” 8 *J. Empirical Legal Studies* __ (forthcoming, 2010), and at greater length in my forthcoming book, tentatively titled *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age*.

Third, 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.” (p.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 the decisions they make? 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. (pp. 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 useful, if incomplete, tool for assessing the appropriateness of various instances of criminalization.¹⁴ (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 intellectually stimulating and a pleasure to read.

¹⁴ I say incomplete because there are many factors other than mere 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: OUP, 2008).