GOLDEN RULE REASONING, MORAL JUDGMENT, AND LAW

*Neil Duxbury**

This article examines "Golden Rule reasoning"—reasoning according to the principle that we should treat others as we would have them treat us—as a basis for moral action and as a criterion for assessing the moral quality and implications of judicial decisions, legal rules, and proposals for legal reform. After distinguishing the Golden Rule from other ideas and principles with which it is sometimes associated, I embark upon a defense of the Golden Rule as a principle of fairness. The main approach to defending this principle has been to detach Golden Rule–based behavior from the desires of agents and recipients. The purpose of adopting this approach is to avoid reducing the Golden Rule to the proposition that we are entitled to impose on others preferences that we would happily have imposed on us. I examine various attempts to show that the Golden Rule requires that agents do not simply project their values and desires onto others and I argue that the most successful of these is R.M. Hare's explanation of Golden Rule reasoning in universal prescriptivist terms. Although the universal prescriptivist explanation is open to various criticisms—as becomes obvious when it is applied to particular moral problems such as euthanasia and abortion—it nevertheless provides a strong philosophical basis for claiming not only that Golden Rule reasoning need not be connected to particular tastes and preferences but also that, as a matter of moral principle, we should never tolerate double standards where cases are relevantly similar. While I accept and try to demonstrate the merits of interpreting the Golden Rule in universal prescriptivist terms, however, I conclude that a more robust interpretation of the Rule is one which is advanced by some natural law philosophers and which offers a philosophical justification for the proposition that doing to others as one would have done to oneself is necessarily a case of doing good towards others. The article ends with some reflections on the implications

* Professor of Law, Law Department, London School of Economics and Political Science.

of this version of Golden Rule reasoning for legal policymaking, and in particular for the abortion debate.

INTRODUCTION

Sometimes, we try to transmit wisdom by formulating simple "rules" which we think others will do well to heed. These rules we occasionally refer to as "golden," to emphasize that if we start with these rules and abide by them in some particular activity, what we desire should be attained and what we do not desire avoided. Books abound offering "golden rules" of self-improvement—how to thrive at myriad tasks, pastimes, projects, and so on—and at one time or another most of us will either give or receive golden rule advice. My own favorite examples, *qua* recipient, are supposed golden rules of wallpaper-hanging (less paste, more speed) and freestyle swimming (choose the path of most resistance).

Such examples typify golden rules: they are efforts to provide general guidance, efforts which are often lacking in subtlety and easily contradicted, rules only insofar as they are rules of thumb. Whether formulating or being told of golden rules, we usually recognize them, or are foolish if we do not recognize them, for what they are: pieces of advice which, though very likely memorable and possibly valuable, are not indispensable or capable of taking the place of endeavor and engagement. To apply this characterization to the golden rule most familiar to lawyers would be somewhat uncharitable. That ordinary words in statutes should be given their ordinary meanings (and technical words their technical meanings) unless absurdity would result is not described as a "golden rule" for nothing: if it were unreasonable to presume that courts will take words to have the meanings attributed to them in normal usage, it would be impossible for lawyers and others confidently to advise and act on the statutes that concern them. Yet, as every lawyer knows, this golden rule is not the only legitimate criterion for interpreting statutes and, in any event, where serious doubt as to the appropriate construction of a statute exists, courts are in effect making a judgment rather than determining which rule, or combination of rules, does the legislation the most justice.[1] Law's golden rule, like other purported golden rules, has value; that a rule's value makes its designation as "golden" comprehensible, however,

1 Metro. Props. Co. v. Purdy, (1940) 1 All E.R. 188, 191 (A.C.) ("Under the Courts (Emergency Powers) Act 1939, the court, be it the master or the judge, is really put very much in the position of a Cadi under the palm tree. There are no principles on which he is directed to act. He has to do the best he can in the circumstances, having no rules of law to guide him . . . .").

does not mean that the designation must be accurate. Golden rules are invariably fakes.

But there is one Golden Rule, complete with capital letters, which is commonly considered the genuine article. This is the prescription—sometimes phrased as a proscription—to do unto others as we would have them do unto us. Just when this stipulation was first described as a Golden Rule is unclear,[2] though references to the basic moral sentiment can be traced back long before Christianity.[3] It is perhaps rash to claim that the Rule is "[t]he only standard of duty common to all people."[4] But it is certainly recognized in all cultures, and numerous studies show that it has been endorsed in all of the major and most minor religions.[5] Although there will be reason in this study to refer occasionally to particular religious formulations of the Golden Rule, there is no need (and anyway I lack the competence) to examine it as a feature of different traditions and faiths.

Nor is there much to be gained from simply identifying instances where the Rule features in law. Dig deep enough, and such instances can certainly be found. Courts have appealed to the Golden Rule, among other things, as a benchmark of good advocacy and legal probity,[6] a principle of judicial (and interjurisdictional) as comity,[7] a means of determining whether a claimant deserves an equitable rem-

2 Edward Gibbon's casual use of the designation in 10 EDWARD GIBBONS, THE DECLINE AND FALL OF THE ROMAN EMPIRE 23 n.43 (J.B. Bury ed., F. de Fau & Co. 1907) (1776)—"Calvin violated the golden rule of doing as he would be done by"—suggests that it was in common use by the mid-eighteenth century. The earliest example I know of its use in English is in BENJAMIN CAMFIELD, A PROFITABLE ENQUIRY INTO THAT COMPREHENSIVE RULE OF RIGHTEOUSNESS 212–13 (1679). Philippidis shows that in Germany the equivalent "Goledene Regel" was in use by the end of the sixteenth century. LEONIDAS JOH. PHILIPPIDIS, DIE "GOLDENE REGEL" 11–15 (1933). John Mayo observed that the principle was one of the "golden decrees" of twelfth-century ecclesiastical law. John Mayo, Sermon at the Assises in Dorchester (July 23, 1629), *in* THE UNIVERSAL PRINCIPLE (London, John Smithwike 1630).

3 *See* J.O. Hertzler, *On Golden Rules*, 44 INT'L J. ETHICS 418, 419–23 (1934).

4 JOHN BIGELOW, TOLERATION AND OTHER ESSAYS AND STUDIES 72 (1927).

5 The most detailed of these studies are PHILIPPIDIS, *supra* note 2; H.T.D. ROST, THE GOLDEN RULE 15 (1986); and JEFFREY WATTLES, THE GOLDEN RULE 15–67 (1996).

6 *See, e.g.*, Acushnet Co. v. Birdie Golf Ball Co., 166 F.R.D. 42, 43 (S.D. Fla. 1996); Williams v. Lane, 96 F.R.D. 383, 388 (N.D. Ill. 1982); Barnard v. Yates, 10 S.C.L. (1 Nott. & McC.) 142, 145 (S.C. Const. Ct. 1818); *see also* John Finnis, *Commensuration and Public Reason*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 215, 229–30 (Ruth Chang ed., 1997) ("Judges . . . have (relatively determinate) authority not only to find, declare, and enforce the existing rules but also (relatively indeterminate) authority to reshape them and/or make new rules. . . . So there emerge the two dimensions on which to compare and evaluate the rival interpretations of a particular part of the law in dispute between the parties before a court: the dimension of fit with the legal materials and the dimension of moral soundness.").

edy,[8] as a rationale for limiting certain forms of speech and expression,[9] for the judicial review of legislative action,[10] and as the basis for principles of equitable fair dealing,[11] restitution for unjust enrichment,[12] general trusteeship,[13] proprietary estoppel,[14] specific performance (compelling the defendant to do to the claimant as he would have had the claimant do to him had their positions been reversed),[15] and the duty of care in negligence.[16] Various writers have

7 *See, e.g.*, Lord v. Cannon, 75 Ga. 300, 306 (1885) ("Some comity is doubtless due to the decisions of other courts, and some presumptions must be made in favor of their correctness. We should dislike to have any other rule applied to the jurisdiction of our own courts, and should feel bound to resist encroachments upon it, come from what quarter they might, and, therefore, we should be careful to do unto others what we would have them to do unto us."); *In re* Westinghouse, [1978] A.C. 547, 560 (H.L.) (appeal taken from Eng.) ("Such is the request made by the United States Federal Court. It is our duty and our pleasure to do all we can to assist that court just as we would expect the United States court to help us in like circumstances. 'Do unto others as you would be done by.'").

8 *See, e.g.*, City of Tampa v. Colgan, 149 So. 587, 589 (Fla. 1933) ("[I]n equity the defendant must do unto others even as he would have others do unto him, and it is no more equitable that he should escape the entire burden than it is that he should be made to bear more than his proportion of the burden. When one prays relief in equity, whether as complainant or defendant, he must do as well as demand equity.").

9 *See, e.g.*, Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 191 (D. Conn. 2001).

10 *See, e.g.*, State *ex rel.* Hodde v. Superior Court, 244 P.2d 668, 672 (Wash. 1952); *see also* Mosqueda v. Cheyenne-Arapaho Election Bd., 5 Okla. Trib. 12, 15 (Cheyenne-Arap. D. Ct. 1996) ("Civil rights are limitations on government action, designed to compel governments (federal, state or tribal) to adhere to the Golden Rule: Do unto others as you would have them do unto you.").

11 *See, e.g.*, Urie v. Johnston, 3 Pen. & W. 212, 218 (Pa. 1831).

12 *See, e.g.*, Smith v. Mitchell, 6 Ga. 458, 478–79 (1849); Minter v. Dent, 37 S.C.L. (3 Rich.) 205, 212 (1832); *see also* Sumter Bldg. & Loan Ass'n v. Winn, 23 S.E. 29, 30 (S.C. 1895) (Pope, J., dissenting) ("[Defendant in equity] should be required to do unto others as he now claims this association should do to him . . . ."); *cf.* Cook & Nichol, Inc. v. Plimsoll Club, 451 F.2d 505, 509 n.12 (5th Cir. 1971) (citing the statutory principle of equity which is rooted in both the Golden Rule and principles of unjust enrichment).

13 *See, e.g.*, Finley v. Exch. Trust Co., 80 P.2d 296, 303 (Okla. 1938).

14 *See, e.g.*, Sugg v. N.C. Agric. Credit Corp., 144 S.E. 554, 555 (N.C. 1928); Kunick v. Trout, 85 N.W.2d 438, 448 n.19 (N.D. 1957).

15 *See, e.g.*, Mack v. Shafer, 67 P. 40, 41 (Cal. 1901).

16 *See, e.g.*, Cent. of Ga. Ry. Co. v. Steverson, 57 So. 494, 495 (Ala. Ct. App. 1911); Kindt v. Kauffman, 129 Cal. Rptr. 603, 619 (Ct. App. 1976); Hornthal v. Norfolk S. R.R. Co., 82 S.E. 830, 831 (N.C. 1914); *see also* Hunter v. Ward, 476 F. Supp. 913, 918 n.3 (E.D. Ark. 1979) (utilizing the Golden Rule to dismiss arguments that a potential employer's failure to help a candidate meet lunch appointments amounted to employment discrimination); CHESAPEAKE & O. RY. CO. v. PARIS' ADM'R, 68 S.E. 398, 401 (Va. 1910) ("[I]t is the duty of the party injured by reasonable care to diminish the consequences of the wrong he has suffered, in the interest of the wrongdoer.

argued that the Rule provides a rationale not only for laws of armed conflict (such as those concerning the treatment of prisoners of war) and for nations respecting mutual treaty agreements and one another's rights to independence, but also for humanitarian intervention and other forms of rescue.[17] Some judges have likened the Rule to an equitable principle,[18] and for a while it was a key part of the definition of contractual good faith in the Louisiana Civil Code.[19]

But the significance of these manifestations of the Golden Rule in law is easily overestimated. Few of the arguments add up to very much, which may be why we find hardly any of them advanced in superior courts or by eminent judges. Perhaps the most obvious deduction to be made from these various pronouncements is that, with a little imagination, most legal rules and doctrines can be connected to the Golden Rule. The main study to date of the Golden Rule as a legal principle hardly considers instances where the Rule has explicitly been adopted as such; rather, it follows in the path of many other analyses of the Rule and examines it primarily as a principle of moral action.[20] This makes perfect sense, because the significance of

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This is not merely good law but good morals, and flows from that rule which has the highest possible sanction, that we should do unto others as we would have others do unto us."); *cf.* Trianon Park Condo. Ass'n v. City of Hialeah, 468 So. 2d 912, 927 (Fla. 1985) (Shaw, J., dissenting) ("Violation of the general duty to do unto others as you would have them do unto you, without more, is not actionable negligence . . . ."). For a note on the Hand formula in U.S. negligence law as a variant on the Golden Rule, see Samson Vermont, *The Golden Hand Formula*, 11 GREEN BAG 2d 203, 204–05 (2008).

17 *See* ERIK H. ERIKSON, INSIGHT and RESPONSIBILITY 242 (1964); 2 GERMAIN GRISEZ, THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE 869, 898, 909 (1993); Ernest D. Burton, *Is the Golden Rule Workable Between Nations?*, 51 BIBLICAL WORLD 131, 136–37 (1918); John Finnis, *Natural Law and the Re-making of Boundaries*, *in* STATES, NATIONS, AND BORDERS 171, 176 (Allen Buchanan & Margaret Moore eds., 2003).

18 *See, e.g.*, *In re* Curtis, 30 A. 769, 770 (Conn. 1894); Troll v. City of St. Louis, 168 S.W. 167, 176 (Mo. 1914). *But cf.* Williams v. Concord Congregational Church, 44 A. 272, 274 (Pa. 1899) (observing equity and the Golden Rule as distinct doctrines leading to the same conclusion).

19 *See* LA. CIV. CODE ANN. art. 1965 (1977) ("The equity intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others should do unto us."); *see also* Nat'l Safe Corp. v. Benedict & Myrick, Inc., 371 So. 2d 792, 795 (La. 1979) (explaining that under the Louisiana Code the type of equity intended is defined by the Golden Rule). In 1987, the Louisiana legislature dropped the reference to the Golden Rule. *See* Am. Bank & Trust of Coushatta v. FDIC, 49 F.3d 1064, 1067 (5th Cir. 1995).

20 *See* Günter Spendel, *Die Goldene Regel als Rechtsprinzip*, *in* FESTSCHRIFT FÜR FRITZ VON HIPPEL 491, 491–516 (Joseph Esser & Hans Thieme eds., 1967). Insofar as Spendel does examine the Golden Rule as a "valid legal principle," he argues primarily that it is the negative version of the Rule—which he identifies with the German folk-proverb: "Was du nicht willst daß man dir tu', das füg auch keinem andern zu"

Golden Rule reasoning to law rests not so much in how the Rule has been used, but in some of the conclusions lawyers and judges would have to contend with were they to take the Rule seriously as a moral principle providing reasons for action.

After offering some preliminary remarks about and setting aside some potential misinterpretations of the Golden Rule, I shall show how moral and political philosophers have recognized that basic formulations of it need to be qualified or elaborated if those formulations are to make moral sense. Although different philosophers provide different qualifications and elaborations, and although their various attempts at refinement are inevitably subject to criticisms, some of the resulting arguments in support of the Golden Rule as a moral principle are remarkably robust. Only when we have considered these arguments will it make any sense to consider some legal implications of Golden Rule reasoning. What we will discover—this is no doubt predictable—is that positions taken in law and positions supported by Golden Rule reasoning sometimes oppose one another. We would expect, in such instances, that if the Golden Rule is rationally defensible, then the legal positions which it opposes are unsupportable. To reach this conclusion would, I think, be simplistic. The fact that Golden Rule reasoning demonstrates certain actions to be morally objectionable or unobjectionable is not in itself a sufficient reason for criminalizing or legalizing those actions. In due course we will see, for example, that such reasoning has been employed in an effort to demonstrate that euthanasia is sometimes morally permissible. But even if Golden Rule reasoning does demonstrate as much, it does not

(translated as, "What you don't want others to do to you, that to others you should not do")—that has especial legal significance, because it provides the rationale for legal prohibitions, and particularly for the criminal law. *Id.* at 492. The argument is echoed in modern Confucian scholarship, where it is sometimes claimed that Confucius deliberately formulated the Golden Rule negatively so as to discourage harmful behavior. *See, e.g.*, Robert E. Allinson, *The Confucian Golden Rule: A Negative Formulation*, 12 J. CHINESE PHIL. 305, 305–11 (1985). There is certainly no reason to believe that positive formulations of the Golden Rule are somehow morally superior to negative ones. *See* George Brockwell King, *The "Negative" Golden Rule*, 8 J. RELIGION 268, 275–79 (1928). But equally, there is no reason to accept that the negative version is more relevant to law than the positive version. Negative Golden Rule injunctions seem generally less susceptible to being turned into absurdities than do positive ones and may be more relevant to various types of conciliatory initiatives (such as the drafting of interstate peace agreements) than are positive ones. Nonetheless, positive injunctions, such as that one should respect property or that one should tell the truth (just as one would expect the same from others), are no less reasons for legal rules than are negative injunctions, such as that one should not steal or tell lies (just as one would not want to have one's property stolen or be told lies).

necessarily follow that euthanasia should be legalized, for there may be prudential reasons against legalization—fears, for example, about how decriminalizing the practice might increase the likelihood of abuse or mistakes, or how it might alter our principles concerning how to treat the aged and the seriously ill.[21] My argument is not that the Golden Rule is an unassailable moral principle which the law ought always to follow—a law which we cannot defend by Golden Rule reasoning is not necessarily something that ought not to be law—but that, appropriately interpreted, the Rule provides us with a standard according to which we might usefully test our intuitions regarding the moral quality and implications of particular legal principles and initiatives.

I. The Golden Rule: Some Preliminary Observations

The Golden Rule is a routine principle of action. There are occasions when, wishing to do the right thing but being unsure of the right thing to do, we might usefully ask what we would think of our contemplated action if someone else were to act in the same way toward us. In such instances the Golden Rule usefully serves as an interruptive tactic, like counting to ten to avoid losing our temper, or as a way of checking our standards (just as sometimes, we might, before acting, ask ourselves how we think somebody whose temperament and judgment we admire and respect would act in the same situation). But most of the time the Golden Rule is practiced unreflectively—the spontaneity of so much social action makes this inevitable—and when we speak of it, it is because we think it has been breached. When we do reflect on the Golden Rule, it becomes clear very quickly that it can be formulated, and therefore understood, in many different ways.[22] The interpretive difficulties surrounding the Rule are evident even if we stick with our formulation of it as "do unto others as we would have them do unto us." Does "do unto" mean "do *good* unto"? Does "others" mean all others? (And what are "others"?) Are we doing unto others as they would do unto us *if we were them*, or *if we were us in their shoes*? These difficulties will have to be addressed.

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21 *See* Philippa Foot, Virtues and Vices and Other Essays in Moral Philosophy 44 (2002).

22 One philosopher tried to show in his doctoral dissertation that there are "4608 . . . correct forms of the golden rule." Harry J. Gensler, The Golden Rule 83 (Sept. 1977) (unpublished Ph.D. dissertation, University of Michigan, on file with author). Nearly two decades later he revised this figure, concluding that there are 6480 good forms of the Rule (as contrasted with a significantly higher number of "bad forms . . . having absurd implications"). Harry J. Gensler, Formal Ethics 104 (1996).

Before tackling these difficulties, however, we should address a more basic problem. Those who analyze the Golden Rule now and again try to explain the concept by showing it to be an instance of some other phenomenon. Sometimes these efforts are patently unconvincing. The interest of American sociologists in the Golden Rule, J.O. Hertzler observed in the mid-1930s, "rest[ed] primarily upon its efficacy as an agent in social control, and upon the sociological and social psychological principles involved in its operation."[23] He may well have been right: theories of social control (as anyone familiar with the history of sociological jurisprudence and legal realism in the United States knows) were all the rage around this time, and exceptional would have been those mechanisms, institutions, systems, conventions, and the like which were not, somewhere in the already vast and fast-growing social-scientific literature, described as instruments of social control.[24] If any of Hertzler's contemporaries were inclined to describe the Golden Rule thus, however, they would have been making a mistake. For while choosing to follow the Golden Rule may require self-discipline—making a conscious effort to be concerned for others—the Rule itself exerts no social control whatsoever; indeed, as Hertzler remarks, it "operates from within the individual, and results in the voluntary limitation of behavior."[25]

The argument that the Golden Rule is an agent of social control concerns not what the Rule is, but how it functions in social contexts. But how the Rule functions in social contexts depends upon how the agents using the Rule interpret it, and so efforts to explain it by reference to usage turn out to be inconclusive. A survey of a class of sixth-graders in an American public school revealed that most thought it would "probably" be easier consistently to follow a negatively formulated Golden Rule as opposed to a positively formulated one.[26] Some thought that "others" in the proposition "do not do unto others what you would not want them to do unto you" does not include enemies. Some thought that it does include animals.[27] There are strong rea-

23 Hertzler, *supra* note 3, at 427.

24 *See generally* DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 219–56, 303–89 (1991) (describing the emergence of a social control sociology in American social science).

25 Hertzler, *supra* note 3, at 428. However, later in the article he appears to contradict this position: "[T]he positive statement [of the Golden Rule] . . . develops socialized attitudes and behavior patterns . . . . The negative statement leads to a functional equilibrium and maintains existing social control." *Id.* at 432.

26 *See* Ron B. Rembert, *The Golden Rule: Two Versions and Two Views*, 12 J. MORAL EDUC. 100, 101 (1983).

27 *See id.* at 100–02.

sons, we will see, for concluding that others must include enemies and cannot include animals. But these reasons are beside the point, which is that seeking opinions about how to follow the Golden Rule reveals only that the Rule means different things to different people. Some argue that living by the Golden Rule is inconsistent with economic competition because practitioners of the Rule who want to outwit their business competitors cannot equally want their business competitors to outwit them.[28] Others argue that following the Golden Rule is perfectly consistent with economic competition because by so doing one fosters good relations both inside and outside one's business, thereby increasing the likelihood of ensuring customer and employee loyalty and long-term profitability.[29] These and other differences of opinion over the Golden Rule are interesting, but, beyond telling us that the Rule is subject to various interpretations, they do not help us to make sense of it as a moral principle.

The Golden Rule is often described as a principle of reciprocity.[30] Not all behavior motivated by the Golden Rule need entail the ethic of reciprocity. Conserving resources for future generations is an instance of treating others as we would have them treat us, notwith-

28 *See, e.g.*, Douglas Firth Anderson, *Presbyterians and the Golden Rule: The Christian Socialism of J.E. Scott*, 67 AM. PRESBYTERIANS 231, 234 (1989); Bruno Brülisauer, *Die Goldene Regel; Analyse einer dem Kategorischen Imperativ verwandten Grundnorm*, 71 KANT-STUDIEN 325, 331 (1980) (arguing that the Golden Rule is hostile to competition [*wettbewerbsfeindlichen*]); Alice S. Cary, *Economic Freedom and the Golden Rule*, 13 CHRISTIANITY & CRISIS 84, 84–86 (1953). The argument is wrongheaded: the correct deduction from the Golden Rule is not that because I like winning I must let my economic adversaries win, but that I will compete against them just as I would have them compete against me.

29 *See, e.g.*, ARTHUR NASH, THE GOLDEN RULE IN BUSINESS 71–81, 138–60 (2d ed. 1930); J.C. PENNEY, FIFTY YEARS WITH THE GOLDEN RULE (1950); Leo L. Clarke et al., *The Practical Soul of Business Ethics: The Corporate Manager's Dilemma and the Social Teaching of the Catholic Church*, 29 SEATTLE U. L. REV. 139, 164 (2005) ("There are few moral principles more fundamental to American notions of fair play than the Golden Rule: 'Do unto others as you would have them do unto you.' Application of this rule . . . to typical business situations may readily lead to behavioral decisions impinging on long-term profit-maximization. Many managers in the 1950s and 1960s, for example, would not have considered internalizing the cost of water or air pollution because to do so would have lowered profits. If, however, they had followed the Golden Rule in their relations with downstream and downwind neighbors, they would have reduced pollution or compensated those neighbors despite the fact that compensation was not legally required."); William N. Evans & Ioannis N. Kessides, *Living by the "Golden Rule": Multimarket Contact in the U.S. Airline Industry*, 109 Q.J. ECON. 341, 365 (1994) (claiming that airlines that follow the Golden Rule reduce the likelihood of their competitors engaging in aggressive pricing action); Wilfred Currier Keirstead, *The Golden Rule in Business*, 3 J. RELIGION 141, 152–53 (1923).

30 *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 20 (rev. ed. 1969).

standing that it might be impossible for those others to act reciprocally (though they may follow our example). It is certainly correct, however, to say that such behavior can *usually* be explained in terms of reciprocity.

Yet not all behavior motivated by reciprocity will be explicable in terms of, or consistent with, the Golden Rule. "Treat others as you would have them treat you" is a different proposition from "treat others well so that you might expect the same in return"—even though a side-effect of treating others as we would have them treat us may be that they treat us as (favorably as) we treated them in the event that our roles are reversed. By acting according to the Golden Rule we will sometimes achieve the same ends as when we agree to repay favors or engage in other forms of strategically reciprocal action. But treating others as you would have them treat you is primarily moral rather than strategic action, a choice to do what seems right rather than what is likely to prove profitable; indeed, by following the Golden Rule we will sometimes act against the interests of others who would repay our support because, were the tables turned, we would want to be treated with the same integrity.

Other efforts to explain the Golden Rule by associating it with particular concepts need to be treated with similar caution. Although resolving to follow the Golden Rule can create obligations to assist others, not all Golden Rule based behavior can be equated with Good Samaritanism, because our treatment of others in accordance with how we would have them treat us often has nothing to do with the question whether those others are in some way in need or distress. Much of our treatment of others—the courtesies we extend, the pleasantries we use, much of the advice we give—is based on how we would have others treat us irrespective of whether they need, or whether we think they need, this treatment. Action motivated by the Golden Rule need not be charitable, for if our resolve is to treat others with the honesty that we would have them show toward us, then our honest opinion might be that others are seeking help unnecessarily, or are seeking more help than they need and that, were we in their position, we would not consider ourselves deserving of their charity. Following the Golden Rule does not compel altruistic behavior, for in fair competition we consider it reasonable that others do not look out for us or take care of our interests. Nor is it correct to equate the Golden Rule with the principle that one should love one's neighbor as oneself. The proposition that I should care for others as I would care for myself is distinguishable from the proposition that I should care for others as I would have them care for me. The two principles are very closely connected and it would be an inadequate

examination of the Golden Rule that did not take account of this connection. But while it is difficult to envisage instances in which, by following the Golden Rule, we do not uphold the neighbor-as-oneself principle as well, it should be kept in mind from the outset that these two principles are distinct.

Albrecht Dihle has argued—unconvincingly—that this distinction is especially evident if we test each principle against the claim that one should love one's enemies. According to Dihle, the Golden Rule is a species of "repayment thinking" (*Vergeltungsdenken*) that evolved out of the principle of *lex talionis*—that any action, good or bad, necessarily calls forth an equivalent reaction—as formulated and practiced in ancient Mediterranean cultures.[31] The two principles certainly need not be inconsistent. Soldiers might justify retaliation against the military actions of their opponents for the reason that they would expect from their opponents nothing different. But Dihle argues that it is impossible to incorporate the requirement that one love one's enemy into the Golden Rule without contradicting the principle of *lex talionis*. The requirement can be incorporated into the neighbor principle, however, by extending the definition of neighbor—as it is extended in, for example, the parable of the Good Samaritan[32]—beyond the immediate community to humanity in general (the defense of which will sometimes require retaliatory action).[33]

Dihle's effort to distinguish the neighbor principle from the Golden Rule is unconvincing because it requires that one accept his basic thesis: that the Golden Rule is connected to *lex talionis*. The historical soundness of that thesis has been widely disputed,[34] and it is obvious that the two concepts are analytically distinct. Dihle himself notes some distinctions, such as that following the Golden Rule involves taking account of the perspectives of at least two parties whereas *lex talionis* is purely agent-centered, and that Golden Rule reasoning takes place before rather than after the fact.[35] But the distinctions go deeper than Dihle concedes—so deep, in fact, that it is difficult to see how treating the Golden Rule and *lex talionis* as related concepts helps us to understand either. "Hit him back as he hit you"

31 *See* ALBRECHT DIHLE, DIE GOLDENE REGEL 80–127 (1962).

32 *See Luke* 10:30–37 (New English Bible).

33 *See* DIHLE, *supra* note 31, at 109–27.

34 *See, e.g.*, VICTOR PAUL FURNISH, THE LOVE COMMAND IN THE NEW TESTAMENT 57 n.107 (1972); Peder Borgen, *Den såkalte gyldne regel (Matt. 7:12, Luk. 6:31)*, 9 NORSK TEOLOGISK TIDSSKRIFT 129, 141–42 (1966); Adolf Lutz, *Die Goldene Regel*, 18 ZEITSCHRIFT FÜR PHILOSOPHISCHE FORSCHUNG 467 (1964); James M. Robinson, Book Review, 4 J. HIST. PHIL. 84, 86–87 (1966) (reviewing DIHLE, *supra* note 31).

35 *See* DIHLE, *supra* note 31, at 80–82.

might sound like the Golden Rule—developmental psychologists have claimed that in early-stage moral development, children often mistake it for such[36]—but hitting back as he hit you is responsive behavior, whereas treating others not as they treated you but as you would have them treat you is reflective and nonretaliatory. Indeed, behavior motivated by the Golden Rule might be considered opposed to *lex talionis*: you should not strike him because you would not have him strike you.[37]

Perhaps Dihle's principal error is to think of the relationship between those who act and those who are treated according to the Golden Rule as equivalent or symmetrical. According to Paul Ricoeur, between agent and recipient there will, from the outset, be an imbalance of power, which Golden Rule–motivated action might or might not even out.[38] Ricoeur's own depiction of this relationship is dramatic. Other-directed action involving "disesteem" makes the other into a "victim" or "patient" of his or her action.[39] In such "dissymmetric situation[s]," the Golden Rule stands as a corrective, for it "establishes the other in the position of someone to whom an obligation is owed, someone who is counting on me and making self-constancy a response to this expectation."[40] But how does the Golden Rule counter disesteem? Why should I act according to the Rule, thereby considering myself obliged in the way that Ricoeur describes, if the recipient of my action is my enemy?

Ricoeur offers three answers. First, Golden Rule reasoning entails "reversibility of the roles,"[41] and so agents who imagine themselves as their recipients might discover a capacity for solicitude that would in all probability have eluded them had the effort to imagine oneself as another not been made.[42] There are two objections to this answer. The first is the obvious point that reversibility cuts both ways: if I say to my son that were he to imagine himself as the sunbathers on

36 *See, e.g.*, JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 322–24 (Marjorie Gabain trans., Free Press 1965) (1948); T.J. Bachmeyer, *The Golden Rule and Developing Moral Judgment*, 68 RELIGIOUS EDUC. 348, 348–49 (1973); Lawrence Kohlberg, *Justice as Reversibility*, *in* 5 PHILOSOPHY, POLITICS, AND SOCIETY 257, 265 (Peter Laslett & James Fishkin eds., 1979).

37 See Werner Wolbert, *Die Goldene Regel und das ius talionis*, 95 TRIERER THEOLOGISCHE ZEITSCHRIFT 169 (1986), for a general exploration of the differences between the concepts.

38 *See* PAUL RICOEUR, ONESELF AS ANOTHER 223 (Kathleen Blamey trans., Univ. Chicago Press 1992) (1990).

39 *See id.* at 320.

40 *Id.* at 268.

41 *Id.* at 330.

42 *See id.* at 191–92.

the beach at whom he keeps shooting his water-pistol then he would know not to do it, he might reply that were the sunbathers to imagine themselves as him then they would know the opportunity really is too good to resist.[43] If we rein in reversibility, as Kurt Baier does,[44] limiting it to the proposition that it is wrong to do to others those things which it would be contrary to reason to want done to us, we sidestep this reply but at the price of committing ourselves to an unconvincing moral criterion: after all, there are forms of behavior which some people find acceptable either as agent or as recipient but which they should still not be entitled to inflict on others. Furthermore, if we make the imaginative leap that reversibility requires—leave aside, for now, the question of just what this might entail—we might not feel any more disposed toward our recipients than we already do; indeed, imagining our roles reversed might make us look unfavorably on them ("were I them, I would *never* have behaved that way"), as the stork does after her dinner-date with the fox.[45]

Ricoeur's second answer to the question why following the Golden Rule should militate against the impulse to harm enemies stems from the familiar argument that genuine respect for oneself demands respect for others and their rights, even when those others are one's enemies. The choice to withhold such respect, or act with positive disrespect, affects one's own self-understanding: my action, whatever impulse it might satisfy, reveals—and reveals to me—my weakness. "I cannot myself have self-esteem unless I esteem others *as* myself."[46] Golden Rule reasoning is one of the ways in which we confront this weakness. But it provides no guarantee that we will not succumb to it. We might conclude not only that the harm we contemplate inflicting on our enemies is probably much the same as that which they would inflict upon us but also that they, having inflicted that harm, would have little trouble living with whatever weakness this caused them to see in themselves.

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43 This argument—that "other-regarding" behavior might still be self-centered—is developed specifically as a critique of Ricoeur's conception of the Golden Rule in Mark Hunyadi, *La Règle D'Or: L'Effet-Radar*, 126 REVUE DE THÉOLOGIE ET DE PHILOSOPHIE 215, 215–22 (1994).

44 *See* KURT BAIER, THE MORAL POINT OF VIEW 202–23 (1958).

45 *See* JEAN DE LA FONTAINE, FABLES: LIVRES I–VI, at 94–95 (1995).

46 RICOEUR, *supra* note 38, at 193; *cf.* OLIVIER DU ROY, LA RÉCIPROCITÉ 44 (1970) ("[I]t is necessary that happiness consists in happiness willed for others as oneself, in reciprocity itself. . . . One cannot will it for oneself without willing it for another; this would be literally contradictory. This reciprocity of love, which is the ultimate requirement and the highest human aspiration, includes infinite demands of truth, self-giving, receptiveness and openness to others." (translated by author)).

To reach this conclusion, Ricoeur thinks, is to take a position similar to that taken by Dihle when he argues that *lex talionis* and the Golden Rule—an eye for an eye and do as you would be done by—are alike insofar as they are principles of equivalence.[47] His third answer is that the Golden Rule as it appears in the New Testament entails not the "logic of equivalence" but the "logic of superabundance."[48] Crucial to this answer are the words attributed to Jesus at Luke 6:32–35:

> [I]f you love only those who love you . . . . [I]f you do good only to those who do good to you . . . . And if you lend only where you expect to be repaid, what credit is that to you? Even sinners [do these things] . . . . [Y]ou must love your enemies and do good; and lend, without expecting any return . . . .[49]

These words should be read not as a rejection of the Golden Rule, Ricoeur argues, but as an effort to emphasize that the Rule is founded on "the economy of the gift."[50] I give to (do unto) others not "for the sake of self-interest"[51] (that they would do the same for me), but because I am moved by the generosity of others—by their example I come to understand the Golden Rule as: "Because it has been given to you, go and do likewise" (*parce qu'il t'a été donné, donne aussi à son tour*[52]). On this reading of the Golden Rule, we should be solicitous to enemies not because of the fulfilment or self-integrity that comes from such behavior but because to treat others as we would have them treat us is to treat them with no expectation of receiving any benefit, with no expectation of anything at all, in return.

It might be objected that Ricoeur's Golden Rule demands quixotic behavior. But the real problem with his version of the Rule is that it does not allow for legitimate discrimination. Respecting enemies as if they were me—"esteeming others as myself"—may mean treating them with more respect than they deserve, which is not only a moral mistake but also likely to encourage more of the behavior that made them my enemy in the first place.[53] In one of his later works, Ricoeur suggested that deliberators in John Rawls' so-called original position

47 *See* Paul Ricoeur, *The Golden Rule: Exegetical and Theological Perplexities*, 36 NEW TESTAMENT STUD. 392, 393–94 (1990).

48 *Id.* at 394–95.

49 *Luke* 6:32–35 (New England Bible).

50 Ricoeur, *supra* note 47, at 396. A similar line of argument is developed in Alan Kirk, *"Love Your Enemies," the Golden Rule, and Ancient Reciprocity (Luke 6:27–35)*, 122 J. BIBLICAL LITERATURE 667, 673–86 (2003).

51 Ricoeur, *supra* note 47, at 395.

52 Paul Ricoeur, *Entre Philosophie et Théologie: la Règle d'or en Question*, 69 REVUE D'HISTOIRE ET DE PHILOSOPHIE RELIGIEUSES 3, 7 (1989).

53 *See* RUDOLF VON JHERING, Der Kampf um's Recht (Wien, 10th ed. 1891).

engage in reasoning akin to that required by the Golden Rule,[54] and it is easy to see why he should have reached this conclusion, for agents who follow Ricoeur's version of the Golden Rule act as if behind a veil of ignorance as to their recipients' qualities, history, motivations, and so on. Rawls' notion of justice as fairness can certainly be formulated in terms of the Golden Rule, as we will see later;[55] nonetheless, the Golden Rule is better described as a principle of fairness rather than as a principle of justice. The Golden Rule requires fairness to others—treatment of others modeled on how one would have them treat oneself. But treatment which is fair in this sense will not always be sufficient to achieve justice which embraces other forms of moral action besides the Golden Rule.[56] Nor will such treatment necessarily be equal treatment—though, insofar as the Golden Rule does permit treating different persons differently, it requires that such treatment be justified.[57] For example, a mother apportioning her estate among her three children might decide that the fairest way to apportion it is unequally, taking account of, say, desert. The beneficiary who is to receive a lesser share of the estate might complain that this in fact is not fair, and might well ask how she would have felt were she a recipient in this precise position. But her justification might be that her decision entails no inconsistency with the Golden Rule—that she would expect (which, of course, is not to say that she would appreciate receiving) the same treatment were she in the position of the child deserving less than his siblings.[58]

That the Golden Rule is a principle of fairness might not seem obvious. After all, treating others as we would have them treat us—my removing one of the dentist's teeth, for example, just as I had her remove one of mine—does not necessarily mean treating them fairly. But it is implicit in the Golden Rule that we should treat others as we would have them treat us *in like cases*. The dentist's case and mine are not alike: the dentist has no need for dental treatment, and I am no dentist. Of course, no two cases are ever exactly alike, but this does not normally stop us from discerning what the relevant similarities and differences between cases are (that the dentist is, unlike me, qual-

54 *See* PAUL RICOEUR, THE JUST 53–54 (David Pellauer trans., Univ. of Chicago Press 2000) (1995).

55 *See infra* notes 215–19 and accompanying text.

56 *See* 1 GERMAIN GRISEZ, THE WAY OF THE LORD JESUS: CHRISTIAN MORAL PRINCIPLES 212 (1983); 2 GRISEZ, *supra* note 17, at 327–29.

57 *See* John Finnis, *Natural Law and Legal Reasoning*, *in* NATURAL LAW THEORY 134, 137–38, 148–49 (Robert P. George ed., 1992).

58 The example is taken from Garth Hallett, *The 'Incommensurability' of Values*, 28 HEYTHROP J. 373, 379 (1987).

ified to provide and in no need of dental treatment is obviously relevant; that the dentist is, unlike me, female, is obviously not). Determining criteria of relevant likeness and difference in any particular instance is certainly essential if the proposition that we treat like cases alike is not to be an empty one.[59] And even settling on criteria, it has been argued, does not make the problem of emptiness (or circularity) go away, because all we are saying is that like cases are those cases which our criteria tell us should be treated alike—that one case is to be treated like another because, whatever the differences between them, the features they share are rendered significant by the criteria we have selected.[60]

For at least two reasons, however, we should be wary of concerns about emptiness. First, the principle of like treatment can come into play before standards of treatment have been determined: our sense that, say, two or more persons do or do not differ in any relevant respect often precedes any consideration of what treatment they should receive.[61] Secondly, appropriate criteria of relevant likeness and difference are often easy to settle on and, even when they are not, we work out methods by which to create and revise them. Lawmaking is an obvious method.[62] Law enables the creation of rules and standards which stipulate how particular classes of persons, property, and activities should be treated in particular instances—rules and standards which, by one or another technique (distinguishing precedents

59 *See* H.L.A. HART, THE CONCEPT OF LAW 159–60 (2d ed. 1994). It is often assumed that Hart himself makes the assumption—that treating different cases differently must be a logical correlate of treating like cases alike. *See id.* at 159. But it is possible: (1) that two cases of a certain type, although different, are nonetheless alike in enough relevant ways to require their being treated similarly; and (2) that two cases of a certain type, although different, are nonetheless alike in enough relevant ways to permit but not require their being treated similarly. Consider an example offered in TONY HONORÉ, MAKING LAW BIND 201 (1987). A rule stating that women are allowed to join a club implies that men are entitled to join it as of right. *See id.* It does not follow that men must be treated differently from women and so not allowed to join. The club's rule may differentiate between men and women, but the club might still, for example, want to secure a good mixture of male and female members. Because of the rule, male applicants and female applicants to the club cannot demand to be treated as if they are alike. But the rule leaves it open to the club to treat them thus if it so wishes. *See id.*

60 *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543–78 (1982).

61 *See* Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1170–71 (1983).

62 *See* John Finnis, *Natural Law: The Classical Tradition*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 10–11 (Jules Coleman & Scott Shapiro eds., 2002).

being the most obvious), can be modified so that previously submerged or unrecognized differences between instances are given relevance. The Golden Rule certainly entails the proposition that like cases should be treated alike and different cases differently, and this proposition is certainly incomplete until supplemented by criteria of relevant likeness and difference, but it would be a mistake, I think, to conclude that providing the necessary supplementation must be an indefensibly circular exercise.

II. Tastes and Oppression

The main two arguments I have advanced so far are that it is not a good idea to try to explain the Golden Rule by reference to concepts with which it shares characteristics (in particular: reciprocity, altruism, and repayment thinking), and that the Rule is a sound principle of fairness, defensible against the claim that the notion of treating like cases alike is tautological. One might still be inclined to reject the Golden Rule as a principle of fairness even if one accepts that it can be defended thus. The reason one might still reject it was well summarized by Bernard Shaw: "Do not do unto others as you would have that they should do unto you. Their tastes may not be the same."[63] There are things that, because of my likes and dislikes, I would happily have you do to me which you will probably not want done to you. But if that is so, it would seem odd to describe as fair a principle which warrants the imposition of our tastes on others.

Various seventeenth-century writers saw the problem clearly. If the Golden Rule were simply a matter of acting according to one's tastes *qua* recipient, John Goodman observed:

> [A] common Drunkard might justifie his indeavour of debauching other Men into that beastly Vice, under this pretence, That he doth nothing in that case, but what he is content should be done to himself. And the Lascivious person, so he might be allowed to defile his Neighbours Bed, would perhaps be content another should do as much for him.[64]

Why would we assume that the Golden Rule does not permit such actions? For Goodman, "my Obligation from this Rule" is "that I both do . . . towards him, all that which . . . I should think that Neighbour of mine *bound* to do . . . towards me in the like Case,"[65] and "that is to

63 Bernard Shaw, *Maxims for Revolutionists*, *in* Man and Superman 227, 227 (1903).

64 John Goodman, The Golden Rule, or, the Royal Law of Equity Explained 22 (London, Samuel Roycroft 1688).

65 *Id.* at 26.

be the Measure of my Expectations from him."[66] But introducing the concept of obligation in this way does not free us from the problem of tastes: in a specific instance I might think that if my role and the recipient's were reversed, then I would consider the recipient bound to act in a particular way, and so take that action myself; but the recipient still might not consider that action fair or appropriate.

Other writers of the period offered a different answer: that we are disinclined to impose our tastes on others because we know that it could just as easily be others imposing their tastes on us. "[W]ith what imaginable justice can I do that to him," Matthew Hale asked, "that I judge unfit or unjust for him to do to me; or with what pretence of justice, or congruity, can I judge that which is fit for him to do to me, to be unfit for me to do for him?"[67] The point is echoed by Benjamin Camfield: Golden Rule reasoning demands that we "think of our selves in other men, and of others in our selves, a due respect being had to the several circumstances and distinctions of our qualities and conditions"[68] (what Hale calls a "transposing of the persons by way of fiction or supposition"[69]). "[E]very one is governed by his own Reason," Hobbes declared, and so "[i]t followeth, that in such a condition, every man has a Right to every thing; even to one anothers

66 *Id.* at 30.

67 MATTHEW HALE, *Of Doing as We Would Be Done Unto*, *in* 1 The WORKS, MORAL AND RELIGIOUS 377, 381–82 (Thomas Thirlwall ed., London, R. Wilks 1805). The essay appears not to have been published before 1805. *See* EDMUND HEWARD, MATTHEW HALE 129 (1972).

68 CAMFIELD, *supra* note 2, at 62. Jeffrey Wattles claims that Camfield's book was "discovered too late" to be included in Wattles' own study. WATTLES, *supra* note 5, at 211 n.2. Wattles does, however, discuss a "treatise" entitled "*The Comprehensive Rule of Righteousness, Do as You Would Be Done By*," by "the Reverend Father in God William Lord Bishop of St. David's," which Wattles states was published by William Leach in 1679. *Id.* at 247. The quotations that Wattles attributes to Bishop William are in fact quotations from Camfield's treatise, which, on the unnumbered page preceding page one, carries an advertisement for a text entitled "*An Apology for the Church of England in Point of Seperation from It*," published by William Leach in 1679, the work of "the Lord Father in God William Lord Bishop of St. David." CAMFIELD, *supra* note 2. Wattles did not discover Camfield's treatise too late to include it in his own study—he was working from it all along, but took the name on the advertisement page to be the name of the author.

69 HALE, *supra* note 67, at 386; *see also id.* at 405–06 ("Unless in the transposing of persons, in order to make my judgment of what I would or would not that another should do to me, and consequently to make up thereby what I do to him; I say, unless in such a case, I should use that judgment which I have at the time of such deliberation and conclusions, there will follow uncertainty and deception in the application of this rule . . . .").

body."[70] But "[f]or as long as every man holdeth this Right . . . are all men in the condition of Warre," for "if other men will not lay down their Right, as well as he . . . there is no Reason for any one, to devest himselfe of his."[71] And so, "to dipose himselfe to Peace" rather than "to expose himselfe to Prey," it is important that "a man . . . be contented with so much liberty against other men, as he would allow other men against himselfe," that he accept the "Law of the Gospell; Whatsoever you require that others should do to you, that do ye to them."[72]

This argument—that Golden Rule reasoning urges moderation, because "actions are not so prone to bring about evils when performed in the light of what we would like to have others do for us"[73]—should not be dismissed summarily. The Rule is easily grasped, easily formulated, and requires no special learning or intelligence.[74] It helps us, when determining our actions, to see beyond our own impulses and interests, for it involves not mere imposition of desire—what I want to do to another—but ascertainment of desire by reference to what I would have another do in light of my imagining myself as that other.

> The result is that the desire at the satisfaction of which my action aims is neither my desire nor [the other's], as it existed prior to the application of the Rule, but my desire as seen through, and modified by, something that unites us, directing my action towards him and projecting my desires into him.[75]

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70 THOMAS HOBBES, LEVIATHAN 189–90 (C.B. Macpherson ed., Penguin Books 1968) (1651).

71 *Id.* at 190.

72 *Id.* (emphasis omitted). See Adalbert Langer, *Die Goldene Regel—ein Schlüssel zum Frieden*, *in* KIRCHE, RECHT UND LAND 67, 67–74 (F. Lorenz ed., 1969), for a somewhat superficial attempt to lend support to this thesis and show that throughout history the Golden Rule has been called upon to maintain peace.

73 PAUL WEISS, MAN'S FREEDOM 139 (1950); *cf.* Paul Weiss, *The Golden Rule*, 38 J. PHIL. 421, 422 (1941) ("The Golden Rule . . . incorporates the observation that deeds are more likely to be just when performed by individuals who assume the standpoint of their patients.").

74 *See, e.g.*, GEORGE BORASTON, THE ROYAL LAW, OR, THE GOLDEN RULE OF JUSTICE AND CHARITY 10 (London, Walter Kettilby 1684); HOBBES, *supra* note 70, at 214 ("[L]awes of nature . . . contracted into one easie sum, intelligible, even to the meanest capacity . . . .").

75 A.T. Cadoux, *The Implications of the Golden Rule*, 22 INT'L J. ETHICS 272, 277 (1912). The argument is rehearsed at length by Philipp Schmitz, *Die Goldene Regel—Schüssel zum ethischen Kontext*, *in* CHRISTLICH GLAUBEN UND HANDELN 208, 208–22 (Klaus Demmer & Bruno Schuller eds., 1977). See also MICHAEL SHERMER, THE SCIENCE OF GOOD AND EVIL 185–86 (2004), for the argument that the moderating capacity of Golden Rule reasoning is especially evident if we imagine asking recipients if

But even though the argument should not be dismissed summarily, it is not surprising that some contemporaries and near-contemporaries of Hobbes thought the Golden Rule in need of justification. The claim that the agent's and the recipient's desires are somehow united in the process of Golden Rule reasoning makes light of possible conflict between the two sets of desires. If I were in your situation, I know how I would treat someone who is in my current situation. But I also know, and bemoan the fact, that since it is not me but you in your situation, someone in my situation will be treated very differently from how I would treat them. How, then, am I to follow the Golden Rule? Am I supposed to imagine myself as me in your situation? As you in your situation? As an amalgamation of me and you? If it is the latter, how do I follow the Golden Rule if our desires cannot be reconciled? And even if our desires can be reconciled—this is a problem we must return to—how am I to act if fulfilling them requires morally condemnable or legally impermissible behavior? Though the Golden Rule might commonly be regarded as "that most unshaken Rule of Morality, and Foundation of all social Virtue," Locke observed, one might "without absurdity" ask that its "Truth and Reasonableness" be "deduced" rather than assumed.[76] Leibniz went further: the Rule "requires not only proof but also elucidation."[77] If we are inclined to make excessive demands of others, for example, "do we also owe to others more than their share?"[78] When we apply the Golden Rule, it does not serve as, but rather we supplement it with, a "standard" according to which we judge what should be owed to and expected from others.[79]

During the eighteenth and nineteenth centuries, the claim that the Golden Rule is unsatisfactory as a principle of fairness because it cannot be disconnected from the particular desires of agents and recipients was bolstered by two arguments from unexpected quarters. First, there is Kant's critique of the Golden Rule. At first glance, Kant

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they would mind our treating them in a particular way; merely to envisage posing the question will sometimes clarify for us the incompatibility between our contemplated action and how we would have them treat us in the same circumstances.

76 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 68 (Peter H. Nidditch ed., Clarendon Press 1975) (1689).

77 *See* G.W. LEIBNIZ, NEW ESSAYS ON HUMAN UNDERSTANDING 91 (Peter Remnant & Jonathan Bennett eds. & trans., Cambridge Univ. Press 1981) (1765).

78 *Id.*

79 *See id.* at 92. The proper standard is, Leibniz continues, "the point of view of other people." *Id.* In a similar skeptical vein, see ROBERT SHARROCK, YPOTHESIS ETHIKE DE OFFICIIS SECUNDUM NATURAE JUS ch. 2 n.11 (1660). *But see* 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 205 (C.H. Oldfather & W.A. Oldfather trans., Oxford Univ. Press 1934) (1688) (opposing Sharrock's skepticism).

is an unlikely opponent of the Golden Rule. "Do to others as you would have them do to you," it has been argued, is consistent with the first element of the categorical imperative[80]: that one should act only according to principles that one can rationally will everyone to act on (that one would "will that it become a universal law"[81]). The more common (and correct) philosophical argument, however, is that the categorical imperative and the Golden Rule differ significantly, primarily because the former enjoins everyone to submit to universal standards whereas the latter requires that we set our standards of action according to how we would have others act toward us.[82] Kant himself clearly regarded the Golden Rule to be a somewhat feeble principle of moral action:

> Let one not think that the trivial *quod tibi non vis fieri, etc.* [What you do not want to be done to yourself do not do to another] could serve here as a standard or principle. For it is only derived from that principle [that one should act only according to that which one can will to "become a universal law"], though with various limitations; it cannot be a universal law, for it does not contain the ground of duties toward oneself, nor that of duties of love toward others (for many would gladly acquiesce that others should not be beneficent to him, if only he might be relieved from showing beneficence to them), or finally of owed duties to one another, for the criminal would argue on this ground against the judge who punishes him, etc.[83]

In the twentieth century, Golden Rule reasoning underwent something of a philosophical revival. The philosophy that came out of this revival we will consider in due course. All that need be noted now is that those primarily responsible for the revival were significantly inspired by Kant. That this should be so might seem odd, considering what Kant thought of the Golden Rule as a moral principle. But although Kant was correct to insist that the Golden Rule and the categorical imperative are not the same, it would be a mistake to think that the Golden Rule cannot be universalized. Objections might be raised, furthermore, to all of the three criticisms he advances to show that the Golden Rule cannot be a universal law. His first criticism,

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80 *See, e.g.*, S.B. Thomas, *Jesus and Kant: A Problem in Reconciling Two Different Points of View*, 79 MIND 188 (1970).

81 IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 37 (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785) (emphasis omitted).

82 *See, e.g.*, Peter A. Carmichael, *Kant and Jesus*, 33 PHIL. & PHENOMENOLOGICAL RES. 412, 412 (1973); E.W. Hirst, *The Categorical Imperative and the Golden Rule*, 9 PHILOSOPHY 328, 329–31 (1934).

83 KANT, *supra* note 81, at 48 n.* (first alteration in original).

that the Rule cannot incorporate duties to oneself, is valid only so long as one assumes that the Rule exclusively concerns agents' actions only as actions having an effect on recipients. But as we will see when we consider how the Golden Rule has been understood by natural lawyers—we have already encountered the point in relation to Ricoeur's work[84]—the choice to follow or ignore the Golden Rule is one that has an impact on the agent, on his or her self-esteem or character, as well as on the recipient. To adopt language typical of Golden Rule theorists in the natural law tradition: when I refuse to do the good to others that I would have them do to me in like instances, I fail and disappoint myself as well as my recipients.

Kant's second and third criticisms merge insofar as they concern tastes: using Golden Rule reasoning I might opt out of particular duties, Kant thinks, by acquiescing to your not owing those duties to me, or by observing that although my office (as a judge, for example) obliges me to dispense a particular treatment—sentencing criminals to imprisonment—I can escape that obligation by reasoning that I would not welcome receiving that treatment.[85] The first of these two arguments involves imagining oneself not as another but another as oneself: I don't understand why you're upset that I didn't buy you a present, because I wouldn't have minded *if it were me* who wasn't bought a present. The second is possibly a more serious distortion in that it entails the assumption that Golden Rule reasoning is straightforwardly bilateral when in fact it will often be multilateral: keeping with Kant's example, the judge who sentences a criminal to imprisonment is making a decision not only about how the criminal should be treated but about how the wider community should be treated as well; the judge who refuses to imprison the criminal because he would not want to be imprisoned were he in the criminal's shoes could be accused of treating others—probably many others—in a way that he would not want to be treated were he one of them.[86] In such a scenario, the nineteenth-century moralist Richard Whately observes, it is

84 *See supra* notes 38–58 and accompanying text.

85 This last line of reasoning is also adopted by Hans Kelsen. "It is quite evident," according to Kelsen, "that the golden rule, if applied to cases of its violation, must lead to absurd consequences; for nobody wants to be punished, even if he has committed a crime." HANS KELSEN, *What Is Justice*, *in* WHAT IS JUSTICE? 1, 17 (1957). Kelsen probably did not appreciate that Kant had criticized the Golden Rule in the same way, for he asserts that "[i]t was evidently the golden rule . . . which inspired . . . Kant to his formulation of," indeed which provided the "model" for, "the categorical imperative." *Id.* at 17–18.

86 *See* R.M. HARE, FREEDOM AND REASON 115–16 (1963).

unlikely that even the criminal will fail to see what the judge applying the Golden Rule is bound by reason to do:

> [I]f you had a cause to be tried, though of course you would *wish* the decision be in your favor, you would be sensible that all you could *reasonably expect* of the judge would be that he should lay aside all prejudice, and attend impartially and carefully to the evidence, and decide according to the best of his ability. And this . . . is what an upright judge will do.[87]

Although the Golden Rule might be defended against Kant's criticisms, to mount the defense is to risk overlooking the most important point: that these criticisms struck a nerve. Various twentieth-century German philosophers have argued that insofar as the Golden Rule has been discredited as a philosophical concept, principal responsibility for the achievement must go to Kant.[88] Nonetheless, the defense against the third of Kant's criticisms of the Golden Rule—that the judge's decision not to send a criminal to prison constitutes treatment of others besides the criminal himself—is worth lingering over, because it illustrates the second unexpected line of argument that I want to examine: that the Golden Rule is defensible as a utilitarian principle. Note that this is not Whately's defense: for him, the judge sentences the criminal to a term in prison, even though he would not wish to endure this sentence himself, because he understands that his obligation is to do "not what [he] might *wish* in each case, but what [he] would regard as *fair*, *right*, *just*, *reasonable*, if [he] were in another person's place."[89] The utilitarian argument, by contrast, is that if the preference of *Y* (for example, the community's preference for law and order) counts for more than that of *X* (for example, the criminal's preference that he walk free from court) then the judge's decision for *Y* is defensible on the basis of interpersonal utility comparison.

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87 RICHARD WHATELY, INTRODUCTORY LESSONS ON MORALS, AND CHRISTIAN EVIDENCES 27 (Cambridge, John Bartlett 1857).

88 *See, e.g.*, HANS REINER, DUTY AND INCLINATION 274–75 (Mark Santos trans., 1983); Hans-Ulrich Hoche, *Die Goldene Regel: Neue Aspekte eines alten Moralprinzips* [*The Golden Rule: New Aspects of an Old Moral Principle*], 32 ZEITSCHRIFT FÜR PHILOSOPHISCHE FORSCHUNG 355, 355–56 (1978); Hans Reiner, *Die "Goldene Regel": Die Bedeutung einer sittlichen Grundformel der Menscheit* [*The Golden Rule: The Importance of a Basic Formula of the Moral Humanity*], 3 ZEITSCHRIFT FÜR PHILOSOPHISCHE FORSCHUNG 74, 79–81 (1948); Hans Reiner, *Die Goldene Regel und das Naturrecht: Zugleich Antwort auf die Frage: Gibt es ein Naturrecht?* [*The Golden Rule and Natural Law: Or an Answer to the Question: Is There a Natural Law?*], 9 STUDIA LEIBNITIANA 231, 233 (1977) [hereinafter Reiner, *Die Goldene Regel und das Naturrecht*].

89 WHATELY, *supra* note 87, at 26.

What, however, if the choice between the preferences of *X* and *Y* is not clear, so that my asking what I would want if I were *X* or a member of *Y* gives me not an obvious answer but conflicting prescriptions regarding the right course of action? Golden Rule reasoning is still defensible, John Harsanyi argues, so long as I make "the fictitious assumption" that "I would not know in advance what my actual social position would be in" a society that accepted the preferences of *X* or one that favored those of *Y* and so long as there would be "the same probability of [my] occupying any possible social position" in either system.[90] Given this "equiprobability postulate,"[91] and given that my imagined choice—which Harsanyi envisages as a choice between large-scale systems (such as between capitalism and socialism)[92] rather than a preference between particular mundane options—requires me to consider what I am willing to risk, I will do what any "rational individual" would do and choose the "social system that would maximize [my] expected utility."[93] As a defense of Golden Rule reasoning, Harsanyi's argument is open to criticism primarily because of a second postulate that he advances, the similarity postulate, discussion of which is deferred until we turn to the problem of the imaginative leap.[94] This is not, however, to imply that we ought to endorse the equiprobability postulate. It is unclear not only why I must postulate equiprobability of possible social positions when evaluating my prospects under, say, two different systems, but also, given that I have no knowledge of what my social position would be under either system, why I must choose the one which would maximize my expected utility.[95]

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90 John C. Harsanyi, *Morality and the Theory of Rational Behavior*, 44 SOC. RES. 623, 631–32, 634 (1977); *see id.* at 624 (endorsing specifically the Golden Rule as a moral principle).

91 *Id.* at 632 (emphasis omitted).

92 *See id.* at 631–32.

93 *Id.* at 632.

94 *See infra* text accompanying notes 217–19.

95 *See* David Gauthier, *On the Refutation of Utilitarianism*, *in* THE LIMITS OF UTILITARIANISM 144, 155–60 (Harlan B. Miller & William H. Williams eds., 1982). "In the kind of choice required by Harsanyi's argument," Gauthier concludes,

> the chooser does not know who he is, and so cannot express a single set of preferences, to be represented by a single utility function. Not only do the prospects among which he expresses preferences involve his coming to possess different personal characteristics; he is required to express each preference from the standpoint of the person with those characteristics. He does not have a single, unified standpoint from which to establish a preference ordering. The ordering that can be derived from calculating the average expected utility for each prospect is not the preference ordering of any indi-

The conventional utilitarian defense of Golden Rule reasoning says nothing about multilateralism or the possibility of an agent's action affecting different recipients with conflicting utility functions. Rather it is based on the conviction, vividly articulated by Seneca, that there are gains to be had from treating those subject to our power with kindness.[96] Those whom we treat as we would like to be treated are likely to appreciate and, in one way or another, reward our behavior. "In the golden rule of Jesus of Nazareth," Mill wrote, "we read the complete spirit of the ethics of utility. To do as you would be done by, and to love your neighbour as yourself, constitute the ideal perfection of utilitarian morality."[97] Since treating others as you would have them treat you usually means treating others benevolently, and since benevolence normally begets benevolence, following the Golden Rule is likely to increase aggregate utility.[98]

This conventional utilitarian defense is remarkably weak. It commits us to a means-end explanation of treating others as we would have them treat us, which, as we have seen, is actually contrary to the Golden Rule, respect for which requires that we sometimes act against those who would reward us were we to support their interests. Doing as you would be done by hardly constitutes "the ideal *perfection* of utilitarian morality," furthermore, if an increase in aggregate utility is only the *probable* consequence of such action, if it is possible that Golden Rule–motivated action could, say, generate disutility (because, for example, a recipient considers, and tells the agent that she considers, the action patronizing). Mill seems to have in mind, when he writes of "ideal perfection," a universalized neighbor principle: to generate the greatest happiness for the greatest number we should love our neighbor—interpreting this word to mean anyone else—as ourselves. It is certainly Mill's version of "the doctrine of neighbourly love" that John Mackie has in mind when he dismisses it as evidently "impracticable," given that "[p]eople simply are not going to put the interests of all their 'neighbours' on an equal footing with their own interests

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vidual chooser. The existence of a single interpersonal utility measure does not entail the existence of a single preference ordering.

Id. at 159.

96 *See* SENECA, *Epistle xlvii: On Man and Slave* ¶ 11 (c. 63–65 AD), *reprinted in* EPISTLES 301, 307 (Richard M. Gummere trans., 1917); *see also* ARISTEAS TO PHILOCRATES (LETTER OF ARISTEAS) 185 (Moses Hadas ed. & trans., Ktav Publ'g 1973) (1951) (expressing the overriding theme of the letter's narrative: "God . . . always promises the greatest blessings to the just").

97 JOHN STUART MILL, UTILITARIANISM 268 (Mary Warnock ed., Meridian 1962) (1861).

98 *See* Cadoux, *supra* note 75, at 280–83.

and specific purposes and with the interests of those who are literally near to them."[99] But the conception of the neighbor principle which Mill upholds and Mackie dismisses is vacuous. If the principle really did make no distinction between personal interests (including the interests of those near to us) and everyone else's interests, then it would provide no reason for us not to act selfishly, for—as with the "very simple idea" of Dostoyevky's Luzhin[100]—selfish behavior would be on an equal footing with, no less benevolent than, any other form of behavior.

Love-of-neighbor permits of a variety of plausible interpretations even if one confines oneself to the principle as it appears in the New Testament.[101] But of course not all interpretations of the principle are plausible. Just as it would be a mistake to interpret "love" in this context to mean idealized or romantic love—as opposed to readiness and willingness to benefit or promote the well-being of others[102]—so too it is a mistake to think that "neighbor" is so indiscriminate as to require undifferentiated treatment as between, say, the interests and needs of strangers on the one hand and those of oneself, one's family, and one's friends on the other. Certainly loving one's neighbor as oneself means treating all others as persons with value and dignity equal to one's own. But to love one's neighbor as oneself in the sense of being indiscriminately concerned with the welfare and interests of everybody and anybody is to make a choice contrary to practical intelligence and reasonableness, for one could not be genuinely and indiscriminately concerned in this way and also lead one's own life: self-abnegation on such a scale would suffocate personhood. A rational approach to life can embrace the doctrine of neighborly love only so long as the doctrine is understood to demand reasonable discrimination in favor of one's own interests and those of one's family, friends, and particular groups.[103]

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99 J.L. MACKIE, ETHICS 130–31 (1990).

100 *See* FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT 167 (David Magarshack trans., Penguin 1966) (1866) ("[T]he more successfully private business is run, . . . the more solid are the foundations of our social life and the greater is the general well-being of the people. Which means that by acquiring wealth exclusively and only for myself, I'm by that very fact acquiring it, as it were, for everybody and helping to bring about a state of affairs in which my neighbour will get something better . . . as a result of the higher standard of living for all. It's really a very simple idea, but unfortunately it hasn't been generally accepted for a long time . . . .").

101 *See* Donald Clark Hodges, *The Golden Rule and Its Deformations*, 38 PERSONALIST 130, 132 (1957).

102 *See* 2 GRISEZ, *supra* note 17, at 307–09.

103 *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 107–09 (1980); *see also* Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859, 1868–69

For our purposes, the most significant problem with the conventional utilitarian defense is that it actually highlights how the Golden Rule, explained in terms of the desires of agents and recipients, fares poorly as a principle of fairness. Since the Golden Rule requires us to act only as we ourselves would consider acceptable were we the recipient rather than the agent, Ricoeur argues, it opposes the utilitarian "logic of the scapegoat," whereby sacrificing the interests "of some unfavored individuals or groups" is permissible "if that is required by the good of the greatest number."[104] But the conventional utilitarian conception of the Golden Rule does not exclude the possibility of such logic. Two parties might collude so that *A* treats *B* as he would have *B* treat him and *B* treats *A* as he would have *A* treat him so that *A* and *B* gain to the disadvantage of *C*.[105] Some utilitarians acknowledge the difficulty. Collusion of this nature might be deemed antisocial action—this would appear to be the conclusion favored by Harsanyi—which, because it is essentially action against "members of the same moral community," must have "no claim for a hearing when it comes to our concept of social utility."[106] To exclude antisocial preferences from the social utility function, however, is not to refine utilitarian ethical theory but to concede (as not all utilitarians would concede[107]) that its moral reach must be limited in a particular way. Moreover, if collusive action lacks a third-party victim, if it affects nobody but the parties who consent to it, then it might be argued that it is not self-evidently a case of *anti*social preference satisfaction (that is, behavior directed against members of the same moral community). Yet such action might still be morally questionable.

(2000) ("'To do as you would be done by, and to love your neighbor as yourself, constitute the ideal perfection of utilitarian morality.'" (quoting JOHN STUART MILL, UTILITARIANISM, *in* 10 COLLECTED WORKS OF JOHN STUART MILL 218 (J.M. Robson ed., Univ. of Toronto Press 1963) (1861))).

104 RICOEUR, *supra* note 54, at 52–53.

105 This is exactly what happened at the end of the 1977 English football league season: two teams facing each other on the final match day, Bristol City and Coventry City, needed only to draw with one another to avoid relegation so long as a third relegation-threatened team, Sunderland, lost its match. In the final minutes of the Bristol-Coventry match, news flashed up on the message board that Sunderland had lost. The score at that point between Bristol and Coventry was 2-2. A zero sum game immediately became a non-zero one: the teams stopped competing and spent the remainder of the match running down the clock to ensure a draw and Sunderland's relegation. *See* RICHARD DAWKINS, THE SELFISH GENE 222–24 (2d ed. 1989).

106 Harsanyi, *supra* note 90, at 647.

107 *Cf.* J.J.C. Smart, *An Outline of a Utilitarian System of Ethics*, *in* UTILITARIANISM: FOR AND AGAINST 3, 25–26 (1973) (arguing that pleasure derived from antisocial preferences can, under unique circumstances, maximize utility).

Another utilitarian saw the problem clearly and indeed, espied a route to solving it. The traditional formulation of the Golden Rule, "do to others as you would have them do to you," "is obviously unprecise," Henry Sidgwick observed, "for one might wish for another's co-operation in sin, and be willing to reciprocate it."[108] If we try to make the Rule more precise by saying "that we ought to do to others only what we think it right for them to do to us" our difficulties persist, for the "differences in the circumstances—and even in the natures—of two individuals, *A* and *B*" (*A*, for example, being a child and *B* his parent), may "make it wrong for *A* to treat *B* in the way in which it is right for *B* to treat *A*."[109] For an illustration of "the 'Golden Rule' precisely stated"[110] we do well, Sidgwick thought, to look to Samuel Clarke's Rule of Equity: "[w]hatever I judge reasonable or unreasonable, that *Another* should do for *Me*, that by the same judgment I declare reasonable or unreasonable, that *I* in the like case should do for *Him*."[111] Clarke's formulation is important not only because it makes explicit something that we have observed as implicit in the Golden Rule—that we are to treat others as we would have them treat us in similar instances (instances that, though they may differ on their facts, demand from the agent a similar attitude or disposition)—but also because it suggests that the Rule requires us to do to others the *good* that we would have them do to us (and to avoid doing to them the harm that we would have them avoid doing to us). That this is what Clarke understands reasonableness to mean is absolutely clear: "that which is Good is fit and reasonable, and that which is Evil is unreasonable to be done."[112]

Sidgwick, for his own part, recasts the Rule in a "negative form": "it cannot be right" for me to do to you what it would be wrong for you to do to me "without there being any difference between [our] natures or circumstances . . . which can be stated as a reasonable ground for difference of treatment."[113] I may well—to recall and reply to Bernard Shaw's quip—do to others what I would not have them do to me precisely because I recognize the distinctness of our circumstances: the dentist's treatment of me, it will be recalled, is not treatment she would want to receive from me. The "practical impor-

108 HENRY SIDGWICK, THE METHODS OF ETHICS 380 (7th ed., Hackett 1981) (1907).

109 *Id.*

110 *Id.* at 385.

111 SAMUEL CLARKE, A DISCOURSE CONCERNING THE UNCHANGEABLE OBLIGATIONS OF NATURAL RELIGION 86–87 (Stuttgart-Bad Cannstatt 1964) (1706); *see also* SIDGWICK, *supra* note 108, at 384–85 (discussing Clarke's "rules of righteousness").

112 CLARKE, *supra* note 111, at 92.

113 SIDGWICK, *supra* note 108, at 380.

tance" of this insight, "and its truth, so far as it goes, appear[s] to me self-evident," Sidgwick concludes.[114]

He also observes, however, that it "manifestly does not give complete guidance."[115] The "natures or circumstances" of *A* and *B* may be the same insofar as both "wish for" and are "willing to reciprocate" the other's "co-operation in sin." One early critic of Sidgwick, John Bigelow, flatly denied this possibility: "[N]o one is willing to cooperate with another in sinning against himself . . . . It is impossible to conceive of a person wronging another if he knew that he himself was to be wronged and to suffer simultaneously and to precisely the same extent."[116] No doubt Bigelow, clearly aghast that anyone could interpret the principle that we should do to others as we would have them do to us in the same circumstances as a potential endorsement of cooperation in sin, would have concurred with Mill when he observed that "[t]here is no difficulty in proving any ethical standard whatever to work ill, if we suppose universal idiocy to be conjoined with it."[117]

But the interpretation is not foolish. In *R v. Brown*[118]—as even the most unreceptive students of English law never seem to forget—the appellants admitted to having engaged in private, consensual, homosexual sadomasochistic acts but were unaware that in doing so they were committing a criminal offence. The activities which were the subject matter of the prosecution—"violence to the buttocks, anus, penis, testicles and nipples"[119]—would probably lead anyone not inclined to participate in them to react with "horror, amazement or incomprehension, perhaps sadness";[120] even the activities which were not the subject of any charge on the indictment, Lord Mustill envisaged, "very few could read . . . a summary of . . . without disgust."[121] Yet as Lord Slynn remarked,

> Astonishing though it may seem the persons involved positively wanted, asked for, the acts to be done to them, acts which it seems from the evidence some of them also did to themselves . . . . The matter came to the attention of the police 'coincidentally' . . . . The acts did not result in any permanent or serious injury or disability or

114 *Id.*
115 *Id.*
116 BIGELOW, *supra* note 4, at 87–88.
117 MILL, *supra* note 97, at 275.
118 (1994) 1 A.C. 212 (H.L.).
119 *Id.* at 236 (per Lord Templeman).
120 *Id.* at 257 (per Lord Mustill).
121 *Id.*

> any infection and no medical assistance was required even though there may have been some risk of infection, even injury.[122]

The acts took place in private, did not involve children or drugs, and were self-regulated in the sense that participants used code words when they could not bear further infliction of pain.

Counsel for the appellants in *Brown* could have argued—there is no evidence that they did argue—that their actions were defensible on the basis of the conventional utilitarian conception of the Golden Rule: agents treated recipients essentially as they would have recipients treat them (as the recipients, *qua* agents, generally did treat them), recipients were not coerced, and the utility gains of those involved were not negated by costs to third parties. The majority of the House of Lords dismissed the appeal, finding the appellants guilty of various counts of assault contrary to the Offences of the Person Act of 1861, primarily because consent cannot be a defense to any act which one person does to another. The appellants themselves "recognised . . . that there must be some limitation upon the harm which an individual could consent to receive at the hand of another."[123] The physical danger to those engaging in homosexual sadomasochistic activity will often be serious and unregulated—"good luck rather than good judgment"[124] appeared to explain why no grave injury had been suffered by the appellants in *Brown*—and so limiting "the extent to which an individual may consent to infliction [of bodily harm] upon himself by another"[125] is necessarily "in the public interest."[126]

This public interest argument was not only framed in terms of there having to be some violent actions which cannot be defended by pointing to the victim's consent. More than once their Lordships, echoing Clarke, contended that the reciprocated action of the appellants could not be legally condoned if it was intrinsically evil (unreasonable). "Pleasure derived from the infliction of pain is an evil thing," Lord Templeman observed.[127] "[T]he practices of the appellants were . . . degrading to body and mind and were developed with increasing barbarity" and "[c]ruelty to human beings."[128] Nothing about the practices, Lord Lowry insisted, could "be regarded as conducive to the enhancement or enjoyment of family life or conducive

122 *Id.* at 281.
123 *Id.* at 238 (per Lord Jauncey).
124 *Id.* at 246.
125 *Id.* at 241.
126 *Id.* at 246.
127 *Id.* at 237 (per Lord Templeman).
128 *Id.* at 235–36.

to the welfare of society."[129] It is difficult to imagine that even those attracted to these practices would describe them otherwise. To argue that these practices might be legally condoned on the basis that *A* is simply doing to *B* what *B* would have *A* do to him is to make the mistake—a mistake often attributable to utilitarian *defenders* of the Golden Rule—of thinking that the nature or quality of the Golden Rule follower's action is irrelevant, that the justification for the action is the apparent fact that the mutual satisfaction of preferences increases average utility.

I have emphasized this mistake, but I have also referred to a natural law conception of the Golden Rule which does not treat the nature or quality of the Rule follower's action as irrelevant. The Golden Rule as a feature of natural law theory is a theme that needs our attention, though for the moment it remains some way in the distance. Let me conclude this Part as I began it, with a summary of the argument so far. The Golden Rule is, I claim, defensible as a principle of fairness. I have tried to show, however, that this defense cannot be mounted successfully if the Golden Rule is not detached from the desires of agents and recipients, that the Rule cannot be entertained seriously as a principle of fairness if it amounts to the proposition that we are entitled to impose upon others the preferences that we would happily have imposed on us. But what reasons might there be for concluding that the Golden Rule amounts to anything more than this? It is to this question that we turn next.

III. Remedial Work

"Reflective people want to satisfy themselves" that their judgments and decisions will withstand serious scrutiny.[130]

> They also want to satisfy other people, whose interests are affected by what they do, that they are acting out of tested conviction and with integrity. So they try to explain their convictions in a way that displays reflection, sincerity, and coherence, even when they have no hope of converting others to those convictions.[131]

This argument—voiced by Ronald Dworkin in this instance—is reminiscent of that of the first great American votary of principled judicial decisionmaking, Herbert Wechsler, who, in his famous article of 1959, suggested that "the judicial process . . . must be genuinely principled, resting . . . on analysis and reasons quite transcending the immediate result that is achieved," meaning that "courts . . . should decide . . . on

129 *Id.* at 255 (per Lord Lowry).

130 Ronald Dworkin, Justice in Robes 80 (2006).

131 *Id.*

grounds of adequate neutrality and generality"—grounds, that is, which ought to be intelligible to those with "an opposing interest" as well as to those whose interests they support.[132]

Wechsler was notoriously diffident when it came to accepting the "challenge" of specifying a "neutral" principle to apply to the school-segregation cases,[133] and he certainly did not explicitly entertain the possibility that the Golden Rule could fit the bill. That it could might seem remote: the racist confronted with the proposition that segregation means treating others in a way that he would not have them treat him might reply that he would be perfectly happy for those others to insist on at least keeping their lives separate from his, that support for segregation, so far as he is concerned, does not offend against the Golden Rule. John F. Kennedy saw the matter differently. Speaking in 1963, in the wake of Governor George Wallace's stand against desegregation at the University of Alabama, he observed that American citizens were

> confronted primarily with a moral issue. It is as old as the Scriptures and is as clear as the American Constitution. The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities; whether we are going to treat our fellow Americans as we want to be treated.[134]

Robert M. MacIver, President of New York's New School of Social Research at the time that Kennedy spoke, had a decade earlier proclaimed the Golden Rule "a principle in the name of which we can appeal to all men, one to which their reason can respond in spite of their differences . . . . [It is] the only universal of ethics that does not take sides."[135] Kennedy and MacIver—like Sidgwick and Clarke[136]—were making a connection between the Golden Rule and universalized moral judgments: if, say, according equal rights and opportunities is a form of treatment which is considered unqualifiedly good, then it must be a good for all people, irrespective of their identity. The Golden Rule, understood thus, is a neutral (impartial) principle.[137]

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132 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

133 *See id.* at 34.

134 President John F. Kennedy, Televised Address (June 11, 1963) (transcript available at *Transcript of the President's Address*, N.Y. TIMES, June 12, 1963, at A20).

135 Robert M. MacIver, *The Deep Beauty of the Golden Rule*, *in* MORAL PRINCIPLES OF ACTION 39, 41–42 (Ruth Nanda Anshen ed., 1952).

136 *See* CLARKE, *supra* note 111, at 86; SIDGWICK, *supra* note 108, at 379.

137 *Cf.* Martha C. Nussbaum, *Golden Rule Arguments: A Missing Thought?*, *in* THE MORAL CIRCLE AND THE SELF 3, 3–16 (Kim-chong Chong et al. eds., 2003). Nussbaum

It is important to be careful with this argument. Although "the meaning of 'good' and 'right' . . . are left undefined by the Golden Rule," Gould claims, "society . . . supplies the definition"[138] and "content"[139] for both notions through "[c]ustom"[140] and the "orthodox beliefs"[141] of "the ordinary person."[142] So long as a community has worked out where it stands on "good" and "right," in other words, we have everything we need to supply content to the Golden Rule. Yet Gould concedes that, on "the ethical problem of segregation," mid-twentieth-century America appeared not to have worked out where it stood.[143] Various twentieth-century moral philosophers believed that the Golden Rule is indeed an impartial principle of moral action. But

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argues, *pace* DAVID S. NIVISON, THE WAYS OF CONFUCIANISM 59–76 (Brian W. Van Norden ed., 1996), that it is difficult to see why ancient Chinese philosophers would not, just like their ancient Greek counterparts, have recognized that all human beings are equally vulnerable to chance and that one's fortunes are not fixed, and why recognition of this fact—that chance is a great leveler—should not have made its way into Chinese Golden Rule reasoning: we should not assume, in other words, that for the ancient Chinese philosophers our concern for others less advantaged is largely motivated by the fact that we, but for the grace of God (as it were), could have been them. That Golden Rule reasoning should be understood as tempered by a recognition of the equality of fortune Nussbaum thinks exemplified by a comment of President Bill Clinton's in his First Inaugural Address: "'[B]ut for fate, we—the fortunate and the unfortunate—might have been each other.'" Nussbaum, *supra*, at 12 (quoting President Bill Clinton, First Inaugural Address (Jan. 21, 1993), *available at* http://www.bartleby.com/124/pres64.html). This is, Nussbaum says, "the standard combination of a golden rule appeal to imagination with the missing thought about the vicissitudes of fortune," *id.* at 12, the thought which is possibly missing, that is, from Nivison's account of Chinese Golden Rule reasoning.

Like Nussbaum, I am "a complete amateur in matters Chinese," *id.* at 3, and so I do not know if this thought is missing from, in the sense that it ought to have been present in, Nivison's account. But I think that if the ancient Chinese did make this combination, then they, like Nussbaum, would have been making a mistake. For if the Golden Rule is linked to the vicissitudes of fortune—if we are supposed to treat the less advantaged as we would want to be treated were we them—then we have to explain how the unfortunate are supposed to treat the fortunate: why, that is, should they treat the more fortunate as they would want to be treated themselves? The Nussbaum-Clinton interpretation of the Golden Rule leaves this question unanswered. While it requires that the more advantaged show concern for the less advantaged, because the more advantaged could have been (could imagine themselves to be) the less advantaged, it appears to require no such concern, and offers no similar logic to show why there should be such concern, in the opposite direction.

138 James Gould, *The Golden Rule*, 4 AM. J. THEOLOGY & PHIL. 73, 76 (1983).

139 *Id.* at 78.

140 *Id.*

141 *Id.* at 75.

142 *Id.* at 74.

143 *See* James A. Gould, *The Not-So-Golden Rule*, 1 S.J. PHIL. 10, 12 (1963).

they were also generally of the view that it is impossible to demonstrate this impartiality so long as Golden Rule reasoning is understood to be inherently bound up with particular human desires. How might we disconnect the two things? The answer cannot be simply to recast the Golden Rule as a principle of moral action the impartiality of which is assumed by virtue of the fact that it requires us, in our treatment of others, to do good (and avoid bad) in accordance with our own reading of a community's moral compass. Making such a reading, even if we feel capable of doing such a thing, leaves the Golden Rule grounded in particular preferences and desires. Nor can we answer the question satisfactorily by arguing, as Blackstone does, that "[*i*]*f* one interprets the . . . Golden Rule . . . as excluding . . . egoism or prudential concern,"[144] then it must be understood to be "a metamoral rule"[145] which, though "itself morally . . . neutral," operates "as a guide to one's conduct" insofar as "[c]onformity to [it] constitutes a necessary condition for a judgment's being a moral judgment."[146] To argue thus is to neglect the fact that, sometimes, the judgments we make are considered morally bad precisely because they do not conform to the Golden Rule.

The case for a Golden Rule which is not connected to particular desires has attracted at least three strong philosophical defenses. Consider, first of all, the defense mounted by Marcus Singer. The Golden Rule, according to Singer, *can* be interpreted as connected to particular desires—what he indeed refers to as "the *particular* interpretation" of the Rule.[147] On this interpretation, the Rule reads: "Do unto others *what* you would have them do unto you."[148] The particular interpretation, as we know already, is open to the objection that it is essentially an excuse for imposing our tastes (our enjoyment of a good argument, of having smoke blown in our faces, of the sound of late-night street parties, and so on) on others. Fortunately, Singer continues, the Golden Rule does not have to be interpreted thus. It is also amenable to a "*general* interpretation" which might be phrased: "Do unto others *as* you would have them do unto you."[149] On this interpretation, recipients are entitled to expect agents to take account of their interests, desires, needs, and wishes—which may well differ from the agent's—and either satisfy those interests or else not willfully

144 W.T. Blackstone, *The Golden Rule: A Defense*, 3 S.J. PHIL. 172, 175 (1965) (emphasis added).

145 *Id.* at 172.

146 *Id.* at 173.

147 Marcus G. Singer, *The Golden Rule*, 38 PHILOSOPHY 293, 299 (1963).

148 *Id.*

149 *Id.*

frustrate them.[150] While treating others as you would have them treat you does not mean having to treat them as if they shared your own tastes, interests, and desires, in other words, it does mean treating them according to "the same principle or standard" as you would have them apply in their treatment of you.[151] The Golden Rule, on the general interpretation, "requires *A* to act towards *B* on the same standard or principle that he would have *B* apply in his treatment of him."[152] Although "the Golden Rule by itself does not unambiguously and definitely determine just what these 'standards or principles' should be, . . . it does *something* towards determining this"[153] because it serves as "an instrument of moral education,"[154] requiring the agent not to "imagine [himself] to *be* another"[155]—this "'if I were he' sort of thinking," Singer insists, "is not called for in the application of the Golden Rule"[156]—but to think about what standard of treatment he would want applied if he were the recipient.

Singer's claim that the general interpretation of the Golden Rule does not require the agent to engage in "'if I were he' sort of thinking" seems wrong. In thinking about what standard of treatment I would want applied if I were the recipient, I imagine myself in the recipient's situation. When Singer himself tries to illustrate his argument—using the example of a judge sentencing a prisoner—he makes the very maneuver he purports to eschew:

> [T]he jailer, after thinking of himself in the position of the prisoner, should then apply the Rule to himself in this position, and reflect that he, if he were the prisoner, should not try to escape, because if he were the jailer he would not want the prisoner to escape.[157]

Singer's objective is to distinguish his position from that held by Whately, discussed earlier,[158] who insists that application of the Golden Rule presupposes on the part of the agent some understanding, derived from imagining oneself in the recipient's situation, of

150 *See id.* at 300.

151 *Id.*

152 *Id.* at 310.

153 *Id.* at 313.

154 *Id.* at 310.

155 *Id.*

156 *Id.* at 311.

157 *Id.* at 312.

158 *See supra* notes 87–89 and accompanying text.

what is "fair, right, just, reasonable" treatment.[159] But the distinction is not successfully made. Singer's general interpretation of the Golden Rule requires agents to supply standards and principles of treatment by imagining themselves as their recipients.

To distinguish the general and the particular interpretations of the Golden Rule, Singer makes the words "what" and "as" do a considerable amount of work. It seems unlikely that many people would derive such a crucial distinction from these two words—it is certainly possible, for example, to find writers on the Golden Rule using "as" when they clearly have in mind the particular interpretation.[160] But if one accepts that the distinction between the two interpretations is genuine and important, it matters little, if at all, that its formulation is made to turn merely on the replacement of one word with another. I believe that the distinction is important. But I also think that the general interpretation of the Golden Rule is not as robust as Singer believes it to be. We know that the particular interpretation authorizes someone who, for example, likes to argue and be argued with to be quarrelsome towards others: I am permitted to do to you what I would like you to do to me. But this cannot be the case, Singer insists, on the general interpretation. On this interpretation the quarrelsome person, "if he is to do as he would be done by, he must take account of and (not ignore but) respect the wishes of people who do not like to be provoked or to engage in quarrels, and restrict his quarrels to those who, like him, enjoy them."[161]

I do not see why, on the general interpretation, this has to be the case. Singer's quarrelsome person might claim that in quarreling with another he is treating them as he would expect to be treated—according to the same standard he would expect to be applied to himself—in the same situation. So it is that *X* might mercilessly criticize the scholarship of *Y* not because of a love of quarreling or animosity towards *Y* but because *X* is applying a principle or standard—that scholarship is a matter of seeking truth and exposing untruth, with no regard for politics, personalities, fashion, and so on—and believes that not to apply this principle or standard, to pull one's punches or look the other way when there is committed an error such as that which has been committed by *Y*, is to demean *Y* in particular (since his work is treated superficially and dishonestly) and to do a disservice to scholar-

159 WHATELY, *supra* note 87, at 26 (emphases omitted); *cf.* Singer, *supra* note 147, at 309 ("[T]he Golden Rule is the source or at the basis of the Principle of Justice . . . .").

160 *See, e.g.*, WEISS, *supra* note 73, at 139 (formulating the rule "as we would be willing").

161 Singer, *supra* note 147, at 300.

ship generally. When we treat others according to the same principles or standards as we would have them apply in their treatment of us, our treatment might well strike them as an oppressive imposition of our tastes. But this does not mean that they should be shielded from such treatment. The Golden Rule, as I tried to show in the first Part of this Article, cannot be straightforwardly equated with charity, benevolence, or Good Samaritanism. Treating our recipients according to the principles and standards we would have applied to us in the same circumstances may occasionally require something akin to being cruel to be kind (as might be the motive of, say, the parents who worked their way through college and now refuse to pay off a child's debt). Applying to our recipients standards of treatment lower than those we would have applied to ourselves in the same circumstances, no matter that our recipients might welcome such an application, may be to treat them, and others, unfairly.

Alan Gewirth, the author of the second significant philosophical defense of the Golden Rule that I want to consider, approves of Singer's distinction between particular and general interpretations of the Golden Rule. But Gewirth recognizes that the recipient faced with the agent who claims to be following the Rule on its general interpretation—who claims that his treatment of the recipient accords with some standard or principle that, were he in the recipient's position, he would want applied to himself—might consider the agent's treatment oppressive because the agent's principles and standards are different from his own.[162] A possible way around this difficulty is to interpret the Golden Rule according to its "spirit or intention," which, Gewirth thinks, seems to be "mutualist or egalitarian" in that its application should dissatisfy neither the agent nor the recipient.[163] This interpretation of the Golden Rule—act in accordance with your recipient's desires as well as your own—Gewirth terms "the Generic interpretation."[164]

The Generic interpretation is beset by two difficulties. First, in instances where the agent's and the recipient's desires conflict, it "provides no guidance concerning how . . . accommodation or compromise is to proceed."[165] Secondly, even when an agent does act in accordance with his own desires as well as the recipient's, the resulting action could still—as it was in *R v. Brown*[166]—be contrary to legal

162 *See* Alan Gewirth, *The Golden Rule Rationalized*, 3 MIDWEST STUD. PHIL. 133, 134–45 (1978).

163 *Id.* at 136.

164 *Id.* (emphasis omitted).

165 *Id.* at 137.

166 *See supra* notes 118–29 and accompanying text.

rules. But can we not accept that there are "certain standard desires which all persons are normally thought to have for themselves,"[167] such as the desire not to have one's property stolen, the desire not to be physically harmed, the desire not to be deceived, and so on? The Golden Rule might be successfully defended against the accusation that it allows us to impose our desires on others, in other words, if we can demonstrate a distinction between specific desires of agents and recipients and "standard" desires that are the basis for determining the moral rightness of actions.

Gewirth thinks this is possible. The "difficulties of the Golden Rule are to be resolved," he argues, "by adding the requirement that the desires in question must be *rational*."[168] Thus amended, the Golden Rule would read: "Do unto others as you would rationally want them to do unto you."[169] It would be a serious error, he insists, to interpret the term "rational" in a "normatively moral sense," as Samuel Clarke does, and assume that the Golden Rule presupposes some criterion of intrinsic reasonableness (or goodness) which enables us to distinguish between legitimate and illegitimate efforts to follow it.[170] For "[i]f criteria of reasonableness vary from one person to another, then the problem of divergent 'tastes' is not resolved."[171] Clarke, as we have seen, does not argue from the premise that reasonableness might vary thus; reasonableness he equates not with tastes but with the pursuit of good and avoidance of evil.[172] For Gewirth—at this point he claims that much the same criticism he is leveling at Clarke can be leveled also at Augustine and Thomas Aquinas[173]—such a strategy fares no better than one which relativizes reasonableness, for if "reasonable" is taken to have "some definite normative moral sense,"[174] we must already know what constitutes morally right action before we follow the Golden Rule, and so "the Rule would no longer be a first moral principle determining what are moral goods and evils."[175] There is no need to dwell on this criticism—that writers in the natural law tradition cannot successfully defend the Golden Rule as a first moral principle—since it is not essential to Gewirth's argument; he is simply trying to show the reader that his argument is dis-

167 Gewirth, *supra* note 162, at 137.
168 *Id.* at 137–38.
169 *Id.* at 138.
170 *Id.*
171 *Id.*
172 *See supra* notes 111–12 and accompanying text.
173 *See* Gewirth, *supra* note 162, at 138–39.
174 *Id.* at 138.
175 *Id.* at 139.

tinguishable from that of Clarke and others. But it should at least be noted that his criticism is not so much wide of the mark as a shot at a nonexistent target: within the natural law tradition, the Golden Rule is generally understood to provide a degree of specificity to a first moral principle—for Aquinas, the principle that one should love one's neighbor as oneself[176]—rather than to be a first principle in its own right.

Instead of interpreting the word "rational" in a normatively moral sense, we do better, Gewirth argues, to interpret it "in a morally neutral sense."[177] Such an interpretation, "which directly takes no sides on the moral issue of how persons ought to treat one another,"[178] requires, in place of the particular wants and desires of agents and recipients, a principle which will be intelligible and will appeal to both recipient and agent equally. What could this principle be? A principle, Gewirth answers, which recognizes agents' and recipients' generic rights—rights to freedom and well-being (such as the protection of "life and physical integrity," prohibitions on "killing and physical assault (except in self-defense) . . . lying, stealing, and promise-breaking," and children's need for "parental care").[179] Formulated in terms of the Golden Rule, the principle will read: "Do unto others as you have a right that they do unto you. Or, to put it in its Generic formulation: Act in accord with the generic rights of your recipients as well as of yourself."[180]

The limitation of the Golden Rule to generic rights–based action allows us to opt out of certain forms of virtuous behavior—charitable giving, for example, or Good Samaritanism—because we have no *right* to the same treatment from strangers. Although it is a mistake, as I have already argued, to make no distinction between following the Golden Rule and other forms of other-regarding benevolent action, it will nevertheless be the case that such action is sometimes motivated by Golden Rule reasoning: I did that for them (rescued them, made a donation, etc.), even though I had no duty to do that for them, because if I were in their situation I hope or expect someone would do the same for me. Gewirth's formulation of the Golden Rule does not accommodate those instances where an agent acts for the recipient not because he has a right to expect, but because he would appreciate, the same action from the recipient in similar circumstances.

176 *See* JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 126–28 (1998).

177 Gewirth, *supra* note 162, at 138.

178 *Id.* at 139.

179 *Id.* at 144.

180 *Id.* at 139.

Gewirth answers this objection by arguing that if the Golden Rule is not restricted to claims regarding generic rights, "[i]f the agent were to claim rights to whatever he might want . . . then not only would there be a tremendous proliferation of right-claims, but the agent would also be aware that he would be subject to an unmanageable barrage of right-claims from other persons."[181]

For at least three reasons, this answer fails to meet the objection. First, the objection is not based on Gewirth's assumption that the recipient must have rights; rather, it is assumed—Gewirth has given us no reason not to assume—that Golden Rule–motivated action may have nothing whatsoever to do with what a recipient is entitled to as a matter of right, generic or otherwise. Secondly, Gewirth makes no philosophical case when he claims that "the agent must limit his claims to . . . the generic rights."[182] Rather, he makes a prudential argument: an agent is well advised to do this so as "to avoid burdening himself"[183] with excessive duties to others. To argue that agents must limit their Golden Rule following to generic rights–based actions because otherwise they will have too much to do is to make no case at all for limiting such Rule-following to these actions in particular. Finally, note the scenario Gewirth envisages if the Golden Rule is not restricted thus: the agent will be able "to claim rights to whatever he might want."[184] Abandoning the restriction of the Golden Rule to generic rights–based actions does not mean that there cannot be any other forms of restriction on the types of action that can qualify as action suitable to following the Golden Rule. And even if it is accepted that an agent's claims should not be unrestricted, this is not in itself a reason for saying that such claims should be restricted to those involving generic rights.[185]

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181 *Id.* at 143.

182 *Id.*

183 *Id.*

184 *Id.*

185 If it is accepted that such claims should be so restricted, there arises the problem of how the Golden Rule ought to operate in those instances where there are "conflicts between the generic rights of the agent and of his recipients." *Id.* at 144. Again, Gewirth's principal response is not philosophical argument but a prudential assertion about quantity—"such conflicts are far fewer than the conflicts among desires taken indiscriminately," *id.*—as if we might dispense with the problem simply by observing that it does not arise very often. Insofar as Gewirth does try to tackle the problem philosophically, his answer is that claims regarding generic rights—rights which, "[i]f some agent were to deny that he has [them], he would contradict himself," *id.* at 139—might be ranked in terms of their relative necessity for action:

> [T]he fact that the generic rights are derived from the necessary conditions of agency provides a rational basis for resolving conflicts among specific

The last of the philosophical defenses of the Golden Rule that I want to consider at this point is, I think, the most subtle and intriguing. The defense is, in this instance, bound up with a broader argument: Richard Hare's thesis—a logical rather than a moral thesis—that moral judgments are universalizable prescriptive judgments.[186] Consider, first of all, the notion of prescriptivity. For Hare, it is in the character of a moral principle that we would prescribe it for ourselves (even if we were, or if we imagine ourselves, in someone else's shoes). But if moral judgments are prescriptive, how can one accept any such judgment *and* act contrary to it? Prescriptivism has to contend with weakness of the will—with the fact, as Hare memorably puts it, that we are wont to take moral holidays.[187] I know I ought to (and could) be more charitable, and spend more time with my children, but I don't; I know I ought not (and need not) take a shortcut across the grass, but now and again I do. "[O]ught" seems to be a "Janus-word" which "can . . . look in the direction that suits its user's interests, and bury its other face in the sand."[188] Sometimes, having said "that we ought to be doing" something (and having intended to do that thing) but having failed to do it owing to weakness of will (a failure of "moral strength," as Hare puts it), we "still go on saying that we thought that we ought" to do whatever it is we failed to do without changing the meaning of "ought" as we have been using it all along.[189]

How can prescriptivism rise to this problem? When we say (with sincerity) that we ought to act in a particular way and then fail to carry out the act, Hare answers, the problem is not that we will not but that "[i]n a deeper sense" we "cannot do the act."[190] Obsessive-compulsive behavior—where one recognizes that one ought to be relaxed, but cannot be relaxed, about, say, stepping on cracks in pavements or touching door handles—seems to be what Hare principally has in mind.[191] It seems odd to characterize such behavior as weakness of the will or failure of moral strength. Likewise it seems strange to con-

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rights. For, other things being equal, one right takes precedence over another to the degree to which the former is more necessary for action than is the latter. For example, A's right not to be killed takes precedence over B's right to be told the truth when the two are in conflict . . . ."

Id. at 144–45.

186 *See* HARE, *supra* note 86, at 30, 35, 192.

187 *See* R.M. HARE, MORAL THINKING 57–60 (1981) (discussing the problem of "weakness of will").

188 HARE, *supra* note 86, at 75–76.

189 *Id.* at 76.

190 *Id.* at 82.

191 *See id.* (discussing "compulsive neuroses").

clude that when we, for example, say that we ought, but we nevertheless fail, not to walk across the grass, then we must *always* be engaging in "purposive backsliding, or hypocrisy," that this cannot ever be a case of weakness of the will because the requisite will—the genuine intention to do what we say we ought to do or have done—is not actually present.[192] Such a conclusion seems to require conjecture regarding our capacity for self-deception. We might easily and reasonably speculate that in such an instance genuine intention could sometimes be present, that I might say, sincerely, that I ought not to cut across the grass, and I could intend not to do so, right up to the point when some other moral requirement (I ought to—anyone in my position ought to—get to this meeting on time) eclipsed it.

Hare's argument regarding the universalizability of moral judgments matters more for our purposes than does his claim that such judgments are prescriptive. Of "any singular descriptive judgement" we might say—Hare considers the proposition "unobjectionable"—that it is "universalizable" in the sense that "anything exactly like the subject of the . . . judgement, or like it in the relevant respects," must be judged in the same way.[193] My description of the tomato as red commits me to describing all other tomatoes that are like it, or like it in relevant respects, as red; that there may be tomatoes that I describe as, say, green is attributable to the fact that these (unripe) tomatoes are recognizably different from the red ones. Formulated in terms of descriptive judgments, the thesis—we describe the things that appear alike as alike and things that appear different as different—is, Hare concedes, "quite trivial."[194]

The thesis becomes more interesting and powerful, however, when we employ it in moral argument. A "moral principle," according to Hare, "has got to be universal."[195] Anyone who considers a certain action morally right or wrong is thereby committed to taking the same view of any other relevantly similar action: "to make different moral judgements about actions which we admit to be exactly or relevantly similar" is to be self-contradictory.[196] If it is wrong for me to act in a certain way in particular circumstances, then in those circumstances, or relevantly similar ones, it should be wrong for anyone else to act in that way. It is in the nature of moral prescriptions, in other words, that they are universalizable.

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192 *Id.* at 82–83.
193 *Id.* at 12.
194 *Id.*
195 *Id.* at 46–47.
196 *Id.* at 33.

Universalizability is the test for whether any proposed action is morally acceptable to us.[197] "[I]n facing moral questions . . . as questions of moral principle" we must ask ourselves: "'[t]o what action can I commit myself in this situation, realizing that, in committing myself to it, I am also (because the judgment is a universalizable one) prescribing to *anyone* in a like situation to do the same'"?[198] The Golden Rule, though it is not to "be confused with the thesis of universalizability,"[199] can be interpreted as a universalized prescription: to prescribe "treat others as you would have them treat you" is to say that we should only act as we would have others act in essentially the same situation. Note that Hare's version of the Golden Rule is necessarily couched in the imperative.[200] A conditionally formulated Golden Rule—treat others as we *would like* them to treat us—would require that we treat others as we would like to be treated in situations where we are in another's position *with* that other's likes and dislikes: the

197 *See id.* at 90. The action does not have to be taken. The test, rather, is whether the action is acceptable to us *ex hypothesi*. *See id.* at 93–94.

198 *Id.* at 47–48; *accord id.* at 199. Note that this does not mean that we must always be passing judgment on others. Leaving aside the fact that it is normally tactful to keep one's opinions to oneself, it is also the case that "we cannot know everything about another actual person's concrete situation" and so cannot presume that their situation is similar to ours. *Id.* at 49. A similar argument is advanced by John Finnis when he observes that it is transparent to any particular person how his or her choices impact his or her character, but it is not transparent to that person how other people's choices relate to their characters. I may dislike what someone chooses to do, but since the grounds for the choice(s) are unclear to me, this is no reason to condemn (the character of) that person. *See* JOHN FINNIS, FUNDAMENTALS OF ETHICS 140–42 (1983); J.M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 438 n.21 (1987). The problem of transparency becomes obvious when we consider the case of treating someone harshly because we believe that this is what they deserve. We might try to justify such behavior on the basis of the Golden Rule: such treatment is deserved because, were it us in their position, it is essentially the treatment that we think we would deserve. But of course it is not us but them in their position, and without insight into what has motivated their action we cannot truly make a judgment of them or their character. All we can do is judge their action. This insight is crucial, I think, to understanding why liberalism does not require a commitment to neutrality as between conceptions of the good (a point to which I return later). *See infra* notes 326–35 and accompanying text.

199 HARE, *supra* note 86, at 34.

200 A case has to be made for couching the Golden Rule in the imperative, Hare appreciates, and he tries to show that, in the biblical context, the case can be made. *See* R.M. Hare, *Euthanasia: A Christian View*, PHILOSOPHIC EXCHANGE, Summer 1975, at 43, 44. The case that he makes receives some exegetical support in Georg Strecker, *Compliance—Love of One's Enemy—The Golden Rule*, 29 AUSTL. BIBLICAL REV. 38, 44 (1981).

prescription could only be accepted for universal application if everybody had the same preferences.

Since we differ in our preferences, what can it mean to say that we should treat others as we would have them treat us? If "others" is taken to mean "others as imagined with our preferences," then the Golden Rule is: "treat others as we would want to be treated." The poverty of Golden Rule reasoning understood as an imaginative act performed from our own perspective is obvious if we consider such reasoning in the context of jury instruction. Isocrates, in one his forensic speeches, pleads for the jury "to give a just verdict, and prove yourselves to be for me such judges as you would want to have for yourselves."[201] But if a jury was able to place itself in my, or my client's, shoes and ask what it would then want, its answer would not necessarily make for a just verdict. Many an instance can be found in U.S. federal case law of courts, particularly in cases where jurors determine the levels of damages awards, ruling it improper for counsel to ask jurors to try to imagine what they would want were they, or one of their loved ones, in their client's (usually the plaintiff's) shoes.[202] Golden Rule reasoning is not completely ruled out in such instances. Such reasoning is often considered permissible, for example, where counsel's question to the jury is framed not in terms of desire ("How much would you want awarded if this had happened to you, or someone close to you?") but in terms of reasonable action ("Had you been in the plaintiff's position, knowing the floor was still wet, would you have run across it?"),[203] and even if it is considered improper, it might still not be declared a reversible error necessitating a retrial if the jury receives clear instruction from the judge that the argument must be disregarded,[204] if the argument is withdrawn by counsel,[205] if it is clear from the modesty or reasonableness of the damages award that the

201 ISOCRATES, *Aegineticus*, at verses 50–51 (c. 394 BC), *reprinted in* 3 ISOCRATES 297, 329 (LaRue Van Hook trans., 1945).

202 *See generally* Kevin W. Brown, Annotation, *Propriety and Prejudicial Effect of Attorney's "Golden Rule" Argument to Jury in Federal Civil Case*, 68 A.L.R. FED. 333 (1984 & 2006 supp.) (discussing the use of "Golden rule" arguments in federal civil cases); L.S. Tellier, Annotation, *Taking Position of Litigant*, 70 A.L.R.2d 935 (1960) (discussing varying rules concerning "Golden Rule" arguments in state and federal courts).

203 *See, e.g.*, Johnson v. Celotex Corp., 899 F.2d 1281, 1289 (2d Cir. 1990) (agreeing with the court below that a "Golden Rule argument related to liability only" was not improper); Stokes v. Delcambre, 710 F.2d 1120, 1128 (5th Cir. 1983) (same); Duerden v. PBR Offshore Marine Corp., 471 So. 2d 1111, 1114 (La. Ct. App. 1985) (same).

204 *See, e.g.*, Young v. Armadores de Cabotaje, S.A., 617 So. 2d 517, 535 (La. Ct. App. 1993) (considering, as evidence against assignment of error, the judge's instruction that Golden Rule statements of counsel were not evidence).

jury was not moved by the argument,[206] or if a court decides that it can offset the prejudicial effect of the argument by reducing the amount of damages awarded by the jury.[207] But in U.S. civil litigation, Golden Rule reasoning more often than not is considered prejudicial, primarily because the imaginative leap that jurors are being asked to make compromises their impartiality—they are trying to put themselves in the position of one party and not the other—and has them focus on their emotions rather than on the trial evidence.[208] Following the Golden Rule is likely to militate against, rather than facilitate, the achievement of fairness, so the argument goes, if "treat others" is interpreted to mean "treat others as imagined with our preferences."

So, how else might we interpret "others"? The obvious answer is: "others as imagined with their own preferences." While I might be able to imagine what *I* would feel were I you in these circumstances, and even, recalling my own reactions in a similar situation, what you must feel, I cannot know what *you* feel, for I cannot be you.[209] There will be instances, furthermore, when I think I know how I would want to be treated were I in your circumstances but, having never exper-

205 *See, e.g.*, Tex. & N.O. Ry. Co. v. New, 95 S.W.2d 170, 176 (Tex. Civ. App. 1936) (holding that counsel for defendant had a "duty" to ask for withdrawal of the Golden Rule argument); Duchaine v. Ray, 6 A.2d 28, 32 (Vt. 1939) (ruling that withdrawal and charge were "sufficient to cure whatever mischief" lay in the Golden Rule argument by plaintiff).

206 *See, e.g.*, Bates v. Kitchel, 132 N.W. 459, 461 (Mich. 1911) (refusing to set aside judgment because it was plainly not the result of prejudice, despite the Golden Rule argument); Crosswhite v. Barnes, 124 S.E. 242, 247 (Va. 1924) (same).

207 *Cf.* Johnson v. Stotts, 101 N.E.2d 880, 883 (Ill. App. Ct. 1951) (reducing damages to offset other types of prejudicial remarks).

208 *See, e.g.*, Ivy v. Sec. Barge Lines, Inc., 585 F.2d 732, 741 (5th Cir. 1978) ("[The Golden Rule] argument is . . . improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias . . . ." (footnote omitted)); Johnson v. Colglazier, 348 F.2d 420, 424–25 (5th Cir. 1965) (objecting to the "illusion of certainty" the Golden Rule arguments create); Klotz v. Sears, Roebuck & Co., 267 F.2d 53, 54–55 (7th Cir. 1959) (characterizing the Golden Rule argument as an illegitimate "appeal to sympathy"); Chi. & N.W. Ry. Co. v. Kelly, 84 F.2d 569, 576 (8th Cir. 1936) (placing jurors in the position of plaintiff's family "disqualifie[s] them as jurors").

209 *See* C.C.W. Taylor, Book Review, 74 MIND 280, 288–90 (1965) (reviewing HARE, *supra* note 86) ("[I]magining that one is some person other than the person one in fact is . . . . is logically impossible for anyone not suffering from delusions about his identity . . . . [Yet the whole point of] Hare's insistence that his opponent must be made to pronounce *in propria persona* an imperative with respect to a hypothetical situation in which he is himself the victim . . . is to ensure that the person issuing the imperative and the victim of the action enjoined by the imperative are the same person, since only thus can we conclude that the opponent has a reason for desisting from his proposed action.").

ienced or even thought about similar circumstances, would be rash to purport to know how you will want to be treated. Singer, we saw, made light of this difficulty, insisting that Golden Rule reasoning does not require "if I were he" thinking. But we also saw that Singer could not avoid formulating such reasoning in terms of the agent having to think of himself as if he were the recipient.[210] For Hare, the Golden Rule, understood as a universalized prescription, requires the agent to ask himself not "how would you like it if this was done to you?" but "[w]hat *do* you say . . . about a hypothetical case in which you are in your victim's position?"[211] The common philosophical objection to this formulation is that the person in the hypothesized position (the victim) and the person legislating for it (you) are different people with different, possibly radically different, values and preferences, and so, if it is possible for you to make the imaginative leap, to put yourself in your victim's shoes, it is not clear what, if anything, of *you* will be retained once you have put yourself there.[212] A particularly clear illustration of the problem can be found in Harsanyi's attempt, considered earlier,[213] to show how following the Golden Rule in such a way as to maximize average utility requires that I make "interpersonal" comparisons by imagining myself as different people living in societies with different policies:

> Simple reflection will show that the basic intellectual operation in such interpersonal comparisons is imaginative empathy. We imagine ourselves to be in the shoes of another person, and ask ourselves the question, "If I were now really in *his* position, and had *his* taste, *his* education, *his* social background, *his* cultural values, and *his* psychological make-up, then what would now be *my* preferences between various alternatives, and how much satisfaction or dissatisfaction would *I* derive from any given alternative?"[214]

210 *See supra* notes 147–57 and accompanying text.

211 HARE, *supra* note 86, at 108.

212 *See, e.g.*, MACKIE, *supra* note 99, at 92–93 (describing how, if one tries to put oneself "into the other person's place, . . . hardly any of oneself is retained"); Taylor, *supra* note 209, at 286–88 ("[The argument that a person] should be obliged to assent *in propia persona* to an imperative prescribing that a certain action be done to *him*, given that he is in the same position as the victim of the action . . . depend[s] on the assumption that the person in the hypothetical situation [and the victim] should be *the same* person, in order that that person should find himself obliged to prescribe *for himself* something which he does not want."); *cf.* HARE, *supra* note 187, at 119–21 (offering a brief defense of his position to the effect that putting yourself in someone else's shoes requires only the supposition that you lose your set of properties and acquire another's).

213 *See supra* notes 90–94 and accompanying text.

214 Harsanyi, *supra* note 90, at 638.

All I can do is imagine satisfying these conditions. I cannot satisfy them.[215] Asking myself what my preferences would be if I had somebody else's ideals, properties, tastes, and so on is rather like hoping to discover how weightlessness feels by imagining myself as an astronaut in space. The main problem with interpreting "others" to mean "others with our preferences" is that it excuses our imposing our tastes on others in the name of following the Golden Rule. The main problem with interpreting "others" to mean "others with their preferences" is that it is not clear how we might speak meaningfully of our putting ourselves in the position of others with their preferences. But what other plausible interpretations might there be?

One possibility is to negate, or at least minimize the significance of, preferences. Rawls' original position provides perhaps the most obvious example of negation: deciding on principles of justice behind a veil of ignorance requires that we act without knowing our social status and position, our natural assets and abilities, and our conceptions of the good or psychological propensities, the assumption being that ignorance of these details about ourselves will lead us to treat others as we would want to be treated were we to discover, on the veil's being lifted, that we were among the least well-off in society.[216] But all this amounts to is a formulation of the Golden Rule in Rawlsian terms—treat others as you would have them treat you if it transpired that you were among the least advantaged. Reasoning from a hypothetical original position provides us with no insight into Golden Rule following as an actual human activity because when we do apply the Golden Rule we are not unaware of our preferences. Harsanyi, in his attempt to show not how parties without advance knowledge of their social position will settle on principles of justice but how they will seek to maximize average utility, minimizes the significance of preferences—not by trying to assume them away but by postulating that base preferences do not differ very much from one person to the next: "[O]nce proper allowances have been made for . . . empirically given differences in taste, education, etc., between me and another person, then it is reasonable for me to assume that our basic, psychological reactions to any given alternative will be . . . much the same."[217] This "similarity postulate"[218] makes "treating others as I imagine them with my preferences" and "treating others as I imagine them with their own

215 *See* Alfred F. MacKay, *Extended Sympathy and Interpersonal Utility Comparisons*, 83 J. PHIL. 305, 318–19 (1986).

216 *See* JOHN RAWLS, A THEORY OF JUSTICE 102–60 (rev. ed. 1999).

217 Harsanyi, *supra* note 90, at 639.

218 *Id.*

preferences" barely distinguishable propositions, for it requires me to suppose that recipients of my treatment have "much the same" reaction-relevant characteristics as I do. If I do suppose this, I may as well follow the Golden Rule on the basis of my own "psychological reactions" to given alternatives. The similarity postulate provides us with a reason for assuming imaginative empathy to be of no great importance.[219]

We would do better, I think, not to negate or minimize the significance of preferences, nor to try to follow the Golden Rule only by reference to what we would want or by reference to what we imagine the recipient would want, but rather to try to discover reasons for action by considering both our own *and* what we imagine to be the recipient's perspective. When Golden Rule reasoning amounts to a sincere effort to consider matters from both these perspectives, Hobbes believed, the possibility of agents acting selfishly is banished: "when weighing the actions of other men with his own," that is, the follower of the Golden Rule discovers "that his own passions, and selfe-love may adde nothing to the weight."[220] This argument—essentially an extension of Hobbes' claim (considered earlier)[221] that the Golden Rule inclines us to behave moderately rather than oppressively—is simplistic. And of course trying to imagine our recipient's perspective does not mean that we can know that perspective. I do not think we should conclude from either of these observations, however, that empathetic identification must always be either impossible or pointless. Although we cannot be our recipients, and although we cannot know just how much of ourselves we would have to put into our recipient's shoes in order to identify with them, we may be able to imagine and identify with some of their experiences or predicaments (just as we are able to do with fictional characters). And while the effort at imagination will not be actual experience, it will sometimes enable us to make a reasonable guess at what a recipient would consider appropriate treatment in particular situations.

We know, of course, that the human capacity for considering all manners of treatment, even inhuman treatment, to be appropriate can sometimes make Golden Rule reasoning seem perverse. Hare asks us to consider the "fanatic[]" who is willing to endure the displeasure he is keen to impose.[222] For most people, universal prescriptivism will reveal the intolerability of fanaticism, for it shows that we

219 *See* MacKay, *supra* note 215, at 322.

220 HOBBES, *supra* note 70, at 215.

221 *See supra* notes 70–79 and accompanying text.

222 HARE, *supra* note 86, at 112.

should not pursue actions which we would have others, in like instances, desist from pursuing. We have to ask ourselves, that is, whether we would be prepared to prescribe that our own inclinations be disregarded in the way that we are disregarding our neighbor's. That we might be so prepared, even when the consequences are the worst imaginable, is not inconceivable. The Nazi who desires that all Jews be exterminated might just discover that he is a Jew. By universalizing his moral judgment in this instance, he reveals his extreme fanaticism: as Hare puts it, "nobody but a madman would hold" that, on this discovery, they too should be sent to the gas chambers.[223] Yet, Hare concedes such fanatics may well exist, and "golden-rule arguments seem powerless"[224] against them insofar as they can provide, say, the Nazi who discovers he is a Jew with no reason not—we might, indeed, say that they provide him with the reason—"to immolate himself at the service of his ideal."[225]

Hare's universal-prescriptivist defense of Golden Rule reasoning is, he readily concedes, "of a more or less Kantian sort."[226] The defense requires us to recognize that such reasoning will often be multilateral (we are, after all, universalizing our judgments with respect to all others affected by them), and that in the multilateral scenario the agent will have to decide to which "other" his duty is owed. The decision demands of us, Hare thinks, a mixture of imagination and (preference) utilitarianism.[227] It is hardly surprising that a moral philosophy that embraces elements of Kantianism *and* utilitarianism *and* defends Golden Rule reasoning (which, remember, Kant dismissed as trivial) should have been the subject of an immense amount of philosophical debate.[228] The general debate—whether universalizability is a very different concept in Hare's philosophy than it is in Kant's, whether Hare successfully demonstrates the compatibility of universal prescriptivism and utilitarianism, and so on—has to be left to one side. Suffice it to say for our purposes that Hare wants us to consider the type of moral reasoning that he recommends as an exercise in moral exploration.[229] Most people—leave aside the genuine fanatic—are prevented from accepting certain moral judgments because those judgments entail logical consequences which they can-

223 *Id.* at 172; *accord id.* at 220–21.

224 *Id.* at 175.

225 *Id.* at 192.

226 R.M. Hare, *A Kantian Approach to Abortion*, 15 SOC. THEORY & PRAC. 1, 5 (1989).

227 *See* HARE, *supra* note 86, at 123.

228 *See, e.g.*, HARE AND CRITICS: ESSAYS ON MORAL THINKING 3–8 (Douglas Seanor & N. Fotion eds., 1988).

229 *See* HARE, *supra* note 86, at 193.

not accept. Unless we are prepared to disregard anyone's desires, even our own, we are compelled to give weight to the desires of our neighbors. So it is, for Hare, that toleration "is the logical consequence of universalizability, when coupled with prescriptivity."[230] Our capacity to imagine the predicament of another "*as if* it were going really to happen to us" means that we can think about pains, injuries, deprivations, and so on in terms of what they would mean for us in a "hypothetical similar situation."[231] It is precisely this capacity that stops most of us from becoming fanatics.

IV. FOLLOWING THE GOLDEN RULE: ASSISTANCE AND ABORTION

The Golden Rule could never successfully be put to the service of all moral theorizing. There are, as Hare observes, some moral questions—questions that, though they might involve consideration of others, are essentially about ourselves and what sort of people we want to be—to which Golden Rule reasoning cannot supply answers.[232] What should be clear, nevertheless, is that universal prescriptivism makes it reasonable to conclude that the Golden Rule is a principle of moral action which requires that agents do more than merely project their own values and desires onto others. This is neither to claim that the principle nor the moral reasoning in which it is being grounded is unassailable: I hope that my outline of universal prescriptivism has been sufficiently detailed to show that it is not an easy philosophy to defend, and that even Hare recognizes that it does not explain the moral wrongness of genuine and consistent fanaticism.[233] It is to claim, however, that universal prescriptivism has provided us with a conception of the Golden Rule sufficiently robust to be worth putting to the test. Let us consider the Golden Rule interpreted as a universal prescription in relation to two ethical problems.

A. Assistance

I have argued already that following the Golden Rule is distinguishable from Good Samaritanism. A separate question is whether the Golden Rule compels Good Samaritanism when a potential recipi-

230 *Id.* at 195; *accord id.* at 198.

231 *Id.* at 197.

232 *See id.* at 138–50.

233 Hare came to argue that only a "pure" fanatic who is able consistently to hold his position even after reflecting critically on it and recognizing its inconsistency with rational choice presents a difficulty for universal prescriptivism, and that such a fanatic, though logically conceivable, never exists in reality. *See* HARE, *supra* note 187, at 169–87.

ent is in need. Academic lawyers sometimes express dismay over the absence from the common law of a general duty to rescue.[234] In civilian systems, such a duty is often set down in the national penal code. But the common law limits the duty to special relationships (parents to children, police officers to the public, and so on). It is difficult to say why this should be the case. Possibly the need to establish a general duty to rescue has been somewhat diminished given that the range of special duties has been regularly extended and that courts and (particularly) legislatures have been effective in encouraging various forms of supererogatory action.[235]

Does Golden Rule reasoning support the creation of a general duty to rescue? If we try to imagine ourselves in the position of the person needing to be assisted or rescued in a situation in which his well-being or life is under threat and ask ourselves what we would want done for us in that position, our answer will probably be that we would want somebody to step in and help. But this should not lead us to deduce that there must be a duty for somebody to step in and help. Sometimes we will contemplate the suffering of others and conclude that, were our positions reversed, we would not consider them obliged to try to alleviate our suffering—because, for example, of the very strong likelihood that their intervention would result in their death—notwithstanding our aversion to suffering thus. It is tempting to think also that our decision as to how to treat the imperiled depends on whether they are physically remote.[236] The distance between potential rescuers and imperiled strangers is morally significant: faced with a choice between intervening in two cases which are identical on the facts apart from that in the first case imperilment is physically close

234 The literature is vast. *See, e.g.*, Charles O. Gregory, *The Good Samaritan and the Bad: The Anglo-American Law*, *in* THE GOOD SAMARITAN AND THE LAW 23, 23–41 (James M. Ratcliffe ed., 1966); Kathleen M. Ridolfi, *Law, Ethics, and the Good Samaritan: Should There Be a Duty to Rescue?*, 40 SANTA CLARA L. REV. 957, 959–60 (2000) (concerning questions central to the duty to rescue debate); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 249–51 (1980) (sketching and responding to criticisms of the duty to rescue principle).

235 On encouragement, see for example, Hanoch Dagan, *In Defense of the Good Samaritan*, 97 MICH. L. REV. 1152 (1999) (arguing that the law should "relinquish the traditional reluctance that typifies the law's treatment of good samaritan claims"); Antony M. Honoré, *Law, Morals and Rescue*, *in* THE GOOD SAMARITAN AND THE LAW, *supra* note 234, at 225, 232–45.

236 *See* Thomas L. Haskell, *Capitalism and the Origins of the Humanitarian Sensibility, Part 1*, 90 AM. HIST. REV. 339, 354–59 (1985) (arguing that the breaking down of distances—owing to the emergence, for example, of a new technology that makes what was once remote part of our everyday realm—will alter an individual's sense of responsibility to others).

and in the second it is not, people are likely to feel a greater responsibility to intervene in the first case rather than the second.[237] But in the case of Golden Rule reasoning and the notion of a general duty to rescue, our failure to assist the imperiled but remote will usually be attributable not to our greater sense of responsibility to someone or some group imperiled but closer to home, but to our understanding that, irrespective of proximity, we cannot be held responsible for all of the consequences which we foresee will result from the choices we make. I may well know the likely consequences of choices I make, but it is "characteristic of very bad degenerations of thought," as Elizabeth Anscombe put it, to say that because I foresee those consequences I must therefore intend and be responsible for all of them.[238] When I follow the Golden Rule close to home I may be rescuing nobody: it has certainly not escaped my attention that all that time refereeing manuscripts, writing references, looking after the neighbor's cats, and so on could have been spent working for the Samaritans, trying to save Brazilian street children, distributing food parcels in Ethiopia, or on many other rescue projects near and far. But I think it would be wrong to conclude (though it seems some moral philosophers would conclude)[239] that my choosing to follow the Golden Rule in the ways that I do makes me responsible for the suffering and deaths of many people both at home and abroad.

It is quite often assumed that the principal reason there is no general duty to rescue at common law is that it is difficult to specify the circumstances in which such a duty should arise. "It is . . . difficult to find the boundaries of the duty," one civil lawyer has observed, "and therefore it is difficult for potential rescuers to know whether they have to intervene and if so, when their duty to assist ends."[240] This problem is no doubt real. However, if the fact that a legal principle is vague were a sufficient ground for repudiating it, there would—certainly in the common law—be very few principles. The more serious problem, according to Ernest Weinrib, is whether the indetermi-

237 *See* F.M. Kamm, *Does Distance Matter Morally to the Duty to Rescue?*, 19 L. & PHIL. 655, 656 (2000).

238 G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHILOSOPHY 1, 11 (1958).

239 *See, e.g.*, John Harris, *The Philosophical Case Against the Philosophical Case Against Euthanasia*, *in* EUTHANASIA EXAMINED 36, 40 (John Keown ed., 1995) ("For me the agent chooses the world which she voluntarily creates, the world which she could have chosen not to create or to create differently, the world which results from her actions (or conscious omissions). I believe that we are responsible for the whole package of consequences which we know will result from the choices we make.").

240 JAN M. SMITS, THE GOOD SAMARITAN IN EUROPEAN PRIVATE LAW 30 (2000).

nacy of a rescue principle is legally manageable.[241] But manageability may be a problem even in what seem to be the most uncontroversial rescue cases. Consider a principle—one which Weinrib favors[242]—which only obliges potential rescuers to come to the aid of the imperiled when it is easy for them to do so. "It would be unreasonable to reject a principle," Scanlon argues, which holds that "if you are presented with a situation in which you can prevent something very bad from happening, or alleviate someone's dire plight, by making a slight (or even moderate) sacrifice, then it would be wrong not to do so."[243] The difficulty with this principle of "easy rescue" conceived as a legal principle is not so much its vagueness as its enforceability. The strongest swimmers at the beach are the ones who should be able to save the plight of the drowning child by making only a slight or moderate sacrifice. But if, for whatever reason, the strongest swimmers do not reveal their hands, it will probably be impossible to show that anyone is in breach of their legal duty.

In some circumstances we take the view that although it would be wrong never to provide assistance, it would be unreasonable to say that we are morally bound always to provide assistance: I would have felt bad had I not put money in one of the various charity collector's boxes as I walked down the high street, but I did not feel bad for not putting money in all of them, notwithstanding that I considered all of the charities equally deserving. To say that if I ought to assist in case *A* then I ought to assist in all cases that I consider materially similar to case *A* as well is to cast the moral net too wide. Jeremy Waldron puts the point in Kantian terms: a general duty to rescue cannot be a perfect duty.[244] For our purposes, the point worth emphasizing is at the heart of John Mackie's critique of Hare: that even when universal prescriptivism does require a particular action, it will not be "the logic of 'ought' alone" but also the many subjective elements in our reasoning that determine what we do.[245] The point can be formulated in terms of the Golden Rule: in many instances—giving to beggars, giving way to other drivers trying to get onto busy roads, and so on—we may be able to help and may appreciate that, were we in the recipient's shoes, we would appreciate the help, yet, having universalized the moral judgment, we still might feel no compulsion to help in every such instance we encounter.

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241 *See* Weinrib, *supra* note 234, at 275.

242 *See id.* at 268–92.

243 T.M. Scanlon, What We Owe to Each Other 224 (1998).

244 *See* Jeremy Waldron, *On the Road: Good Samaritans and Compelling Duties*, 40 Santa Clara L. Rev. 1053, 1071–72 (2000).

245 *See* Mackie, *supra* note 99, at 99–102.

Hare himself offers a characteristically unique perspective on the duty to assist ("rescue" would be the wrong word to use in relation to the problem with which he presents us). In a short essay written in the early 1970s, he offers the "unusual case . . . which did actually happen some time ago and was reported in the press" of a "driver of a petrol lorry" whose "tanker overturned and immediately caught fire."[246] The driver "was trapped in the cab and could not be freed. He therefore besought the bystanders to kill him by hitting him on the head, so that he would not roast to death."[247] ("I think that somebody did this," Hare adds, "but I do not know what happened in court afterwards.")[248] If you accept that you should do to others what you wish that they should do to you, and if you "ask yourselves . . . what you [would] wish that men should do to you if you were in the situation of that driver," Hare conjectures, "I cannot believe that anybody who considered the matter seriously . . . would say that the rule should be one ruling out euthanasia absolutely."[249] Application of the Golden Rule (conceived as a universal prescription) will not, in other words, lead us to the conclusion "that euthanasia is always and absolutely wrong."[250]

The incident which Hare had in mind took place in September 1959, more than a decade before he wrote about it, so it is understandable that he should have been unsure as to the facts and what was decided in court. Yet the facts provide us with reason to be somewhat skeptical about Hare's argument. According to the report in *The Times*, when the lorry's engine caught fire and its cabin was engulfed with flames and fumes, the driver—who, it is reported, despite the extremity of the situation "remained very calm"—asked bystanders not to kill him but to render him unconscious. The coroner concluded not only that the blow delivered to the driver could not have caused death in a man of the driver's build, but that the bystander who delivered it only intended the driver to lose consciousness. Notwithstanding that the intervention was risky and dangerous, undertaken "in the stress of the moment and on . . . impulse," it seemed to be motivated by a desire "to cause unconsciousness [in the driver] at the very last moment when it was felt that there was nothing further

246 Hare, *supra* note 200, at 45.
247 *Id.*
248 *Id.*
249 *Id.*
250 *Id.*

that could be done." The jury returned a verdict of accidental death.[251]

Hare's conception of euthanasia—deliberately killing a person out of kindness—is perfectly valid.[252] But note that it is not the nowadays more common understanding of the term, according to which it is presumed that the killer has some special responsibility to the person (or animal) to be killed.[253] Since, both in Hare's and in the reported version of events, the bystander appears not to have been a doctor and did not know the sufferer, any conclusion drawn from either version is best treated as a conclusion about the morality of mercy killing simpliciter rather than mercy killing as, say, a medical intervention. The newspaper report of the event is, I think, morally more interesting than is Hare's example and his interpretation of it. If we ask ourselves what we would wish that someone would do to us if we found ourselves in the situation of the driver, we would no doubt wish, as the driver did wish, for an end to our suffering. No doubt we would want a bystander to try to take action which might alleviate our suffering rather than just leave us to die. But this does not mean that we would wish, indeed it seems unlikely that we would wish, for a bystander to end our life. The point is not so much that we might hope for some sort of last-minute reprieve—the arrival of the emergency services, the sudden unwedging of a door, or whatever—as that we recognize, whatever our particular values and preferences, the unreasonableness of asking a bystander to make this choice. It is precisely by applying the Golden Rule here that we come to grasp that it is *not* a basic moral principle: to ask what we would wish that another would do to us if we found ourselves in a similar situation is to ask what we could and could not reasonably request another person to do in such a situation. Hare applied the Golden Rule to the lorry driver's plight to demonstrate "a very limited and negative conclusion"—that euthanasia cannot always be wrong.[254] I cannot see that he succeeded.

B. Abortion

Assistance-based arguments sometimes find their way into debates about abortion. Linda McClain has argued, for example, that

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251 For all of this information and all the quotations, see *Trapped Driver "Knocked Out": Dying Appeal to Rescuers*, TIMES (London), Sept. 15, 1959, at 7.

252 For an elaboration of this basic conception, see FOOT, *supra* note 21, at 33–61.

253 *See* BLACK'S LAW DICTIONARY 594 (8th ed. 2004) (describing "active euthanasia" as "performed by a facilitator").

254 Hare, *supra* note 200, at 45.

although embryos, if they are to become babies, need the help of the women who carry them, to say that pregnant women are obliged to provide this help is discriminatorily to deny those women their "personal self-government"[255]—to deny them a right, that is, to determine if they are "capable of . . . nurturing a fetus and, ultimately, mothering a child."[256] Placing on fertile women a duty of assistance by denying them a right to an abortion creates, Emily Jackson elaborates, "an extraordinary exception to the established principle that no individual can be compelled to use their body in order to save another's life."[257] Indeed, she adds, compelling a woman to save the life of something that has not achieved legal personhood might be considered "especially bizarre" if the law does not force individuals to act against their wishes to save those who have achieved legal personhood.[258] This last point seems especially important: if the fetus is not legally recognized as a person, it is difficult to know how there could be established a general legal duty—one not specific to any person, role, or institution—to provide it with assistance. It is important also to bear in mind, nonetheless, that the character of the relationship between the pregnant woman and her fetus is unique; that "[h]er fetus is not merely 'in her' . . . [but] 'of her and . . . hers more than anyone's' because it is, more than anyone else's, her creation and her responsibility."[259] If one accepts this proposition, and if one believes that the fetus should be regarded as having legal personhood, it seems to follow that the question of whether it should be assisted is answered by reference to the fact that the relationship between the fetus and the woman who carries it is special rather than general. According to this reasoning, in other words, the case for fetal protection ought to be treated not as an exception to the rule that there is no general duty to assist but as an instance raising a prima facie reason for imposing a special duty to assist, given the nature of the relationship between the pregnant woman and her fetus.

The claim that the fetus is, "more than anyone else's, [a woman's] creation and her responsibility" speaks uneasily to the case of the woman who is forced into sexual intercourse. Is the fetus that she carries really best described as her creation? And does not holding her to be under a duty to assist her fetus essentially force her to

255 LINDA C. MCCLAIN, THE PLACE OF FAMILIES 228 (2006).

256 *Id.* at 230.

257 EMILY JACKSON, REGULATING REPRODUCTION 74 (2001).

258 *Id.*

259 RONALD DWORKIN, LIFE'S DOMINION 55 (1993); *see also* JACKSON, *supra* note 257, at 144 (discussing "the unique biological relationship between a pregnant woman and her fetus").

shoulder a burden which most people will never have to take on, which she never wished to assume, and which might well terrify and repulse her?[260] One Golden Rule–based answer to this last question might be that allowing women to abort unwanted pregnancies, even pregnancies attributable to rape, is to remedy one injustice with a different one: the asymmetric burden is dispensed with, but at the cost of subjecting an "other"—the fetus—to treatment which we would not have wanted to be subjected to ourselves. The answer is hardly the most convincing. Even though I might be glad that my mother did not have the pregnancy which led to my birth being terminated, I might still—were she to reveal that the pregnancy was the result of rape—take the view that she should not have been denied that option had she sought it.

Later in this Article,[261] I shall consider the argument that the second injustice to which I refer in the last paragraph is not merely different but is in fact greater than the first one—that neither the burden borne by nor the right to self-government denied to women faced with unwanted pregnancy can be considered a wrong equal to that of deliberately killing the unborn. But first I want to examine Hare's universal-prescriptivist approach to the problem. We head up a blind alley, Hare begins, if we frame the abortion debate in terms of whether the fetus is a person. Settling that debate one way or another is impossible, for "person" can have several different meanings. But what we do know is that, whether or not we consider the fetus a person, it has the potential to become a person.[262] Golden Rule reasoning shows us "why the potentiality of the fetus for becoming a person raises a moral problem,"[263] for if we modify the wording of the Golden Rule and say that "we should do to others what *we are glad was* done to us" then, "[i]f we are glad that nobody terminated the pregnancy that resulted in *our* birth, then we are enjoined not, *ceteris paribus*, to terminate any pregnancy which will result in the birth of a person having a life like ours."[264] Such reasoning "has a secure logical foundation"[265]—universal prescriptivism—since it "requires us to make the same moral judgment about . . . cases which are *relevantly*

260 *See* J.J. Thomson, *A Defence of Abortion*, *in* THE PHILOSOPHY OF LAW 112, 122–24 (R.M. Dworkin ed., 1977).

261 *See infra* notes 343–52 and accompanying text.

262 *See* R.M. Hare, *Abortion and the Golden Rule*, 4 PHIL. & PUB. AFF. 201, 207 (1975); Hare, *supra* note 226, at 1.

263 Hare, *supra* note 262, at 207.

264 *Id.* at 208.

265 *Id.* at 211.

similar."[266] It is difficult, though perhaps not impossible, to imagine a woman genuinely and consistently wishing that she herself had never been born and citing this as a reason for being entitled to seek an abortion.[267] Even those who do feel this way do not have a reason supporting abortion, Hare argues, because they will "wish that, if they had been *going to be* glad that they were born"—if they would have been glad to have been born *but for* the way life has worked out for them—"nobody should have aborted them."[268] Golden Rule reasoning, it seems, should "give cheer to the antiabortionists."[269]

But such reasoning, Hare thinks, does not only support the position of the antiabortionist. A woman might make "a choice between having this child now and having another child later."[270] Her carrying to term now means that there are other, possibly conceivable, chil-

266 *Id.* at 208–09. It is worth noting here the question of whether the Golden Rule extends to animals. For a very well-formulated, prescriptivist-based argument that it must do so, see TOM REGAN, THE CASE FOR ANIMAL RIGHTS 232–65 (1983). I am not convinced. To say that we should treat animals as we would have them treat us is an unintelligible moral requirement. But one has to be careful not to reduce this argument to the claim that animals cannot be entitled to treatment according to the Golden Rule because they cannot themselves follow the Golden Rule. The reason, I think, that the Golden Rule does not extend to animals is that we cannot say in the case of animals in the same way as we can say of other human beings (including nonsentient human beings) what it is that we would want were we in their position. The problem is not that of lacking the capacity to imagine an experience or specific animal desires—I agree with HARE, *supra* note 86, at 222–23, that we can imagine, in particular, the pain that animals can suffer (so it is that we enact laws proscribing animal cruelty)—but that we cannot understand animal selfhood as we understand human selfhood.

267 The case of Nicolas Perruche, the French boy born with congenital rubella who was in effect compensated for wrongful birth, is sometimes presented—probably because the Cour de Cassation ruled that he had a right to sue his mother's physicians—as if he himself brought an action against the medical authorities for unhappiness at being born. But Perruche was neither able to sue because of, nor to express happiness or unhappiness about, the fact that he was born. It was his parents who sued (and who also were compensated), claiming both that their son had suffered harm by the very fact of his birth and that they had suffered harm because, had the laboratory not botched the test for rubella while Nicolas was still in the womb, his mother would have sought—during her pregnancy, she had said that in the event of a positive test she would seek—an abortion. *See* AXEL GOSSERIES, PENSER LA JUSTICE ENTRE LES GÉNÉRATIONS: DE L'AFFAIRE PERRUCHE À LA RÉFORME DES RETRAITES 43–80 (2004).

268 Hare, *supra* note 262, at 209 (emphasis added).

269 *Id.* at 206. For a similar argument, see also Harry J. Gensler, *A Kantian Argument Against Abortion*, 49 PHIL. STUD. 83, 89–94 (1986) (arguing that since we would not consent to injury or death to our persons while in the womb, logical consistency requires that we do not injure or kill others while they are in the womb).

270 Hare, *supra* note 262, at 211.

dren that she will not have, children who either cannot be conceived because the woman is pregnant or who will not be conceived because the parents may, after the birth of this child, decide to use contraception. Hare finds it strange that antiabortionists oppose stopping the birth of the child conceived now "but say nothing"[271] about stopping the birth of the child that might be conceived later. If a child has not been conceived, it seems a mistake to talk of stopping its *birth*. Of course, its *conception* might be stopped—but this cannot be what Hare has in mind, for contraception is hardly a topic about which antiabortionists have "nothing" to say. However, let us work through his argument. *S* is glad that she was born, and if she is glad that she was born, she must be glad that her parents procreated. This means, applying Golden Rule reasoning, that *S* has a duty neither to abort nor to abstain from procreation. But *S* cannot fulfill this duty both to the unborn child currently in her womb *and* to any other children that her current pregnancy stops her from conceiving: for *S*, "it is either this child or the next one but not both."[272]

Where this clash of duties arises and *S* knows that the present fetus will be born "miserably handicapped" but has "every reason to suppose that the next child will be completely normal and as happy as most people," she will have a "reason to abort this fetus and proceed to bring to birth the next child, in that the next child will be much gladder to be alive than will this one."[273] In such a situation there will still be a defeasible presumption against abortion, because with the termination of the present fetus the probability of the woman conceiving another child reduces (because parents separate, die, become sterile, and so on).[274] But the argument shows us, Hare believes, that the presumption against abortion is not as strong as antiabortionists maintain.

If we are glad to be born, then "not to produce any single child whom one might have produced lays one open to the charge that one is not doing to that child as one is glad has been done to oneself (*viz.* causing him to be born)."[275] So does Hare's basic Golden Rule argument—leaving aside, that is, the predicament faced by *S*—establish a case for unlimited procreation? Hare himself thinks not: genuinely unlimited procreation would lead to an overpopulated world, and there would come a point at which new births would impose "burdens

271 *Id.* at 212.
272 *Id.*
273 *Id.*
274 *See id.* at 214.
275 *Id.* at 218.

on the other members [of society] great enough in sum to outweigh the advantage gained by the additional member."[276] Even if the others to whom we should do what we are glad was done to us include potential as well as actual people, in other words, the good that they might derive from our action (procreation) "may be outweighed by harm done to other actual or potential people."[277] One of Hare's students has famously pointed out that, even for a utilitarian, the determination of what is an optimum population is far from straightforward: we could mean the population size at which the average level of welfare will be as high as possible, or the population size at which the total amount of welfare, that is, the average multiplied by the number of people, is as great as possible.[278] Assuming, however, that we do know how to determine when that optimum is reached, there is, until we have reached it, no reason on Hare's analysis (again, leaving aside the predicament faced by *S*) for limiting procreation.

By formulating Golden Rule reasoning as he does, Hare avoids committing himself one way or the other on the question of whether the fetus is a person. We will see soon that the more obvious way of applying such reasoning to the abortion debate, what we might broadly call a natural law perspective, must answer this question. Anyone who does adopt this perspective might wonder whether Hare is engaging in Golden Rule reasoning at all: his emphasis on "gladness" as a criterion requires us to ask, in the case of the severely impaired fetus, not "how we would want to be treated were we in that position," but "how we should treat the fetus given that the child, if born, will probably not be glad to be alive and given the chances of our having another child who probably will be much gladder to be alive" Both questions return us to the philosophical difficulty of imagining ourselves occupying a position radically different from our own.[279] The second question, furthermore, raises at least two difficulties which do not arise with the first question. From the fact that we are glad that something was done (or not done) to us, first of all, it does not necessarily follow that we must consider it impermissible to have done (or not to have done) that thing. To expand slightly on a point raised earlier: a person who was conceived owing to rape, or whose mother died giving birth having known that her pregnancy was life-threatening, may be glad not to have been aborted as a fetus yet might still

276 *Id.*

277 *Id.*

278 *See* DEREK PARFIT, REASONS AND PERSONS 381–90 (1984).

279 *See* Leslie A. Mulholland, *Autonomy, Extended Sympathy and the Golden Rule*, *in* INQUIRIES INTO VALUES 89, 96 (Sander H. Lee ed., 1988); George Sher, *Hare, Abortion and the Golden Rule*, 6 PHIL. & PUB. AFF. 185, 188 (1977).

maintain that his mother should have been allowed the option to seek an abortion.[280] Secondly, the second question seems to demand less an exercise in Golden Rule reasoning than in act-utilitarianism.[281] Ricoeur, it will be recalled, claimed that Golden Rule reasoning demands that we reject the utilitarian's logic of the scapegoat. Yet Hare's version of the Golden Rule makes no such demand: a current pregnancy which will result in the birth of a severely handicapped child might be terminated "if the termination . . . facilitates or renders possible or probable the beginning of another more propitious one."[282] Following this version of the Golden Rule would require a woman to compare terminating what exists with allowing that existence to continue in the knowledge that doing so might prevent another child coming into being, as if there is moral equivalence between (1) a woman intentionally aborting and (2) a woman not conceiving other children owing to the fact that she has decided to take her current pregnancy to term. But the two instances are different, primarily because (1) refers to something actual (the fetus in the woman's womb) and (2) does not (it refers to what might be the case because of the woman not aborting the fetus in her womb).[283] Hare recognizes the distinction but attaches no significance to it. We should "doubt . . . the assumption . . . that one cannot harm a person by preventing him coming into existence" because, though we cannot say that that person has his existence taken away from him, "he is *denied*" existence and therefore the enjoyments that come with being alive.[284] The person to whom Hare is referring is denied, however, not existence but rather the *chance* to exist; it is not that "[w]e do not know who he will be,"[285] but that we do not know whether he will be.

280 *See* David Boonin-Vail, *Against the Golden Rule Argument Against Abortion*, 14 J. APPLIED PHIL. 187, 190 (1997).

281 *See* Antonella Corradini, *Goldene Regel, Abtreibung und Pflichten gegenüber möglichen Individuen*, 48 ZEITSCHRIFT FÜR PHILOSOPHISCHE FORSCHUNG 21 (1994).

282 Hare, *supra* note 262, at 221.

283 For Hare's own attempt to play down the distinction between actual and logically possible instances, see HARE, *supra* note 187, at 113–16.

284 Hare, *supra* note 262, at 221; *see also* R.M. Hare, *Abortion: Reply to Brandt*, 15 SOC. THEORY & PRAC. 25, 30 (1989) (defending primarily the proposition that nonidentifiable people can be harmed rather than the proposition that terminating an actual pregnancy might be justified on the basis that not to do so denies possible future ones).

285 Hare, *supra* note 262, at 220.

V. NATURAL LAW REASONING

Hare, we saw earlier, is not the only philosopher to have tried to salvage the Golden Rule both from the type of criticism that was directed at it by Kant and from the counterproductive utilitarian defense that we examined. I have criticized Hare's philosophy, particularly his attempts to apply the Golden Rule to assistance and abortion problems; I hope, nevertheless, that these criticisms do not detract from the fact that universal prescriptivism is a powerful philosophical argument, not only because it makes us question why, as a matter of moral principle, we should ever tolerate double standards where cases are relevantly similar, but also because it shows that Golden Rule reasoning need not be connected to particular tastes and preferences. Before concluding I want to consider, if only sketchily, the treatment of this type of reasoning within another philosophical tradition, the natural law tradition. I have intimated already that this tradition defends the Golden Rule. But I also indicated that I want to consider natural law reasoning not alongside other defenses of the Golden Rule but as a discrete topic. There are various reasons for considering it thus. Whereas the philosophers we have considered so far who defend the Golden Rule as a principle of moral action are essentially responding to criticisms that came to the fore during the Enlightenment, natural law arguments in favor of the Golden Rule are longstanding and tend to be not merely defenses of the principle but also efforts to provide practical guidance concerning how we can live according to it. Natural lawyers, furthermore, sometimes develop arguments in defense of the Golden Rule that other defenders of the Rule would reject.

Natural lawyers do not always defend the Golden Rule in the same way. Indeed, sometimes their positions differ radically. Consider, for example, the argument that the Golden Rule is itself proof that there are universally valid natural laws because it is by following the Rule that we grasp that justice requires: (1) respect for fellow citizens and their property; (2) "treatment of equals equally and unequals unequally;"[286] and (3) "[a] shared language" which, "combined with the gift of imagination [*Vorstellungsgabe*]," enables us "to put ourselves in another's place."[287] The problem with this argument is that,

286 Reiner, *Die Goldene Regel und das Naturrecht*, *supra* note 88, at 242. For the same general argument, see Werner Maihofer, *Die Natur der Sache*, 44 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 145, 167–68 (1948).

287 Reiner, *Die Goldene Regel und das Naturrecht*, *supra* note 88, at 246. Whatever putting ourselves in the place of another requires, it does not require that we share a language.

as we know from the ground covered already in this Article, "treat others as you would have them treat you" does not—certainly absent serious philosophical elaboration—serve as a principle for distinguishing between morally right and wrong action.

Augustine showed himself to be wise to this problem in his interpretation of *Matthew* 7:12 ("Always treat others as you would like them to treat you: that is the Law and the prophets.").[288] The train of thought behind this passage would seem (particularly in light of what Matthew has to say in the immediately preceding verse)[289] to be that, as God gives good gifts to those who ask Him, so Christians ought to render to others the service, the good things, that they would want others to render to them. It seems reasonable to infer that early translators of the Bible may have detected this train of thought in *Matthew* 7:12, for most of the early Latin versions (although not the Vulgate itself) render the passage: "All *good* things therefore whatsoever you would that men should do unto you . . . ."[290] Augustine believed that Latin translators added "good" to *Matthew* 7:12 because it was necessary "to clarify the meaning."[291] For, without such clarification, "the thought suggested itself that if someone wished something wicked done to him . . . and first practiced this [wicked action] upon the person by whom he wished it to be performed upon himself," there could arise a "ridiculous" situation in which an agent would "allege this text"—whatever things you would have others do to you, so you should do unto them—as justification for wicked action, as if his action "lived up to this prescription" (that is, as if the prescription condoned his behaving in the same wicked way toward others as he would have them behave toward him).[292] The possibility of a person oppressing others in the name of the Golden Rule was certainly not lost on Augustine in the late fourth century.

Note that the addition of "good" *clarifies* the meaning of *Matthew* 7:12. It does not change it. "[T]he statement is complete and quite perfect even without the addition of this word," Augustine continues,

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288 *Matthew* 7:12 (New English Bible).

289 *See Matthew* 7:11 (New English Bible) ("If you then, bad as you are, know how to give your children what is good for them, how much more will your heavenly Father give good things to those who ask him!").

290 *See* ST. AUGUSTINE, THE LORD'S SERMON ON THE MOUNT 161 (John J. Jepson trans., 1948) (c. 393).

291 *Id.*

292 *Id.* For an interpretation of *Matthew* 7:12 (and of *Luke* 6:31) which does not invoke Augustine but which reaches the same conclusion—that the New Testament Golden Rule cannot be read as an endorsement of oppressive behavior towards others—see Martin Behnisch, *The Golden Rule as an Expression of Jesus' Preaching*, 17 BANGALORE THEOLOGICAL F. 83, 83–84 (1985).

"[f]or the expression used, 'whatsoever you would,' should not be taken as spoken in a broad, general sense, but with a restricted application: that is to say, the will is present only in the good; in evil and wicked actions cupidity is the word, not will."[293] Whereas post-Kantian defenders of the Golden Rule have generally tried to show that there is no necessary connection between our following the Rule and our particular tastes and preferences, Augustine was of the view that there is a connection, but that we must distinguish the will, that is, the open-ended (never fully realized) pursuit of the good,[294] from cupidity, that is, inordinate and unreasonable desire. Following this distinction we might say that the appellants in *R v. Brown* acted on their desires—they had the desire to participate in harmful and degrading acts—but not according to will: their actions could not be described, even the appellants (to echo a point made earlier) could not intelligibly have described those actions, as good.[295]

In the thirteenth century, Aquinas interpreted the Golden Rule using Augustine's distinction.[296] But Aquinas also elaborated the notion of human willing. Emphasizing the relationship between treating others as you wish them to treat you and the neighbor principle, he recalls Aristotle's observation that "[o]ur [dispositions, feelings, and *actions*] which are directed towards our friends and by which friendships are defined seem to have originated from those of a man in relation to himself."[297] We have encountered already Ricoeur's version of this claim: esteem for others, for Ricoeur, is necessary to genuine self-esteem.[298] For Aquinas, similarly, to love one's neighbor—to direct our will to the good of others—is to act consistently with one's

293 AUGUSTINE, *supra* note 290, at 162. Compare with, for a modern variant on the argument, SIEGFRIED ALFONS LESNIK, DIE GOLDENE REGEL: PRINZIP DER NEUEN MENSCHLICHKEIT IN NATURRECHTLICHER UND BIBLISCHER AUFFASSUNG 55 (1975) (arguing that within the natural law tradition the Golden Rule is connected with the principle, "do good and avoid evil" ["Tue das Gute und meide das Böse"]).

294 *See* AUGUSTINE, *supra* note 290, at 163–64. The follower of the Golden Rule,

> in order that his works may be truly good, does not seek the pleasure of his fellow men as the purpose of his good works . . . . [W]hatever service he renders to another he renders it with the intention he would like manifested towards himself, that is, of not expecting any temporal favor from him.

Id.

295 *See supra* notes 118–29 and accompanying text.

296 *See* ST. THOMAS AQUINAS, SUPER EVANGELIUM S. MATTHAEI LECTURA ¶ 648, at 102 (P. Raphaelis Cai, Marietti, 5th ed. 1951) (remarking on *Matthew* 7:12 and *Matthew* 6:12).

297 ARISTOTLE, THE NICOMACHEAN ETHICS 166–67 (Hippocrates G. Apostle trans., D. Reidel Publ'g 1975) (c. 350 BC) (second alteration in original).

298 *See supra* notes 38–51 and accompanying text.

own good.[299] The Golden Rule as found in *Matthew* 7:12 (even shorn of the word "good") "represents a certain rule for loving one's neighbour" and so "[i]t is, in a certain sense, an explanation of th[e] commandment" to love one's neighbor as oneself.[300] So it is—to recall our critique of Gewirth on this point—that the Golden Rule is not itself what Aquinas understands to be the master principle of morality (love of neighbor as oneself) but rather a means by which we can bring specificity to that principle.[301]

On this interpretation of the Golden Rule, then, to do (good) to others *is* to do (good) to oneself. The general point is one of the most important to be drawn from the natural law tradition: that our choices are constitutive of ourselves, they pertain to our *reason*.[302] The reason the bystander cannot reasonably be asked to end the life of the lorry driver—to recall Hare's striking euthanasia dilemma[303]—is that to do so would be to ask him to make a choice which would radically alter, almost certainly for the worse, his understanding of his self. The choices we freely make have an impact on and (unless or until we make an incompatible choice) persist in our character. The choice to harm others—this must be one of the most enduring themes of literature and art—is, even when made with good intentions, a self-disintegrative choice, a choice that tends to eat at us, to lessen us in our own eyes (let alone the eyes of others), to make us, as Socrates put it, miserable as well as pitiable.[304] Aquinas fully understood that this argument raises the problem of indiscriminate regard: if the Golden Rule is a standard which enables us to instantiate the general notion of loving our neighbors as ourselves, what room is

299 *See* FINNIS, *supra* note 176, 127–28.

300 ST. THOMAS AQUINAS, 29 SUMMA THEOLOGIÆ: THE OLD LAW, at q.99, art. I, at 33 (R.J. Batten trans., McGraw Hill 1969) (1271).

301 *See supra* note 176 and accompanying text.

302 Here is not the place to differentiate choice from preference and to explain how both choices and preferences can be decisions. Crudely speaking, the point is that whereas to *prefer* is to opt for that which has the greatest utilitarian appeal, to *choose* is to opt for that which is consistent with one's will but not necessarily or convincingly supported by utilitarian reasoning. A fundamental fault with, say, neoclassical economics as applied to law is that it makes no distinction between those instances in which we can identify one option as the correct option and more open-ended instances—whether or not to marry or have children are obvious examples—where we know that the choice that we make could bring heartbreak as well as happiness but is nonetheless not meaningfully reducible to any sort of cost-benefit calculation simply because the choice we make seems, at the time that we make it, to be the right choice *for us*.

303 *See supra* note 246 and accompanying text.

304 *See* PLATO, GORGIAS 53 (Walter Hamilton trans., Penguin Books 1960) (c. 405 BC).

there, if indeed there is any room, for preferring to do good for some and not for others? The physical remoteness of some "neighbors"—obviously more of a problem in the thirteenth century than it is today—means that there is nothing one can do (beyond prayer) to seek to benefit them.[305] And so while every human being, for Aquinas, is our neighbor, we have to be realistic about the limits of our capacity to make an impact on the lives of others.

Of course we should also be realistic—leaving aside the issue of physical remoteness—about our general willingness to prefer to attend to the welfare of ourselves, our families, and our friends over and above others. Does it make sense to speak of Golden Rule reasoning as *impartial* if treating others as we would have them treat us—that is, bringing specificity to the neighbor principle—can involve preferring to treat some but not others as we would be treated? Modern natural lawyers building on Aquinas' philosophy have not shied away from this problem, although it is impossible here to do anything more than sketch what I think is the most convincing treatment of it.[306] The beginning of the sketch will be recognizable to almost anyone who has studied legal philosophy. Moral norms—prohibitions on killing, theft, acts of dishonesty and deception, requirements that promises be kept, and other similar negative and positive precepts the capricious contravention of which anyone would consider immoral—identify and render intelligible certain basic (self-evident, irreducible) goods which we instantiate (make actual), through intelligent choice and action.[307] These goods—the goods of human life itself, truth, aes-

305 *See* FINNIS, *supra* note 176, at 126 n.112; Finnis, *supra* note 17, at 174, 177 n.4.

306 For an account of the modern history and development of the natural law with which I am concerned here, see NICHOLAS C. BAMFORTH & DAVID A.J. RICHARDS, PATRIARCHAL RELIGION, SEXUALITY, AND GENDER 56–92 (2008). Bamforth and Richards offer this account by way of prelude to a detailed critique of modern natural law, their principal complaint being that modern natural lawyers, contrary to their own claims, advance arguments which are essentially religious in character and which presuppose a commitment to particular religious beliefs and teachings. An assessment of this critique is beyond the scope of this Article, though I would say at the very least that the authors might have done more justice to the ways in which modern natural lawyers have sought to uncover, revise, and replace indefensible natural law and religious claims. *See, e.g.*, FINNIS, *supra* note 103, at 48 ("[T]he argument . . . that human faculties are never to be diverted ('perverted') from their natural ends . . . is ridiculous.").

307 *See* JOHN FINNIS, MORAL ABSOLUTES 41–42 (1991); *see also* John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1065 (1994) (describing "judgments . . . by decent people who cannot articulate explanatory premises for those judgments, which they reach rather by an insight into what is and is not *consistent with* realities whose goodness they experience and understand at least sufficiently to will and choose"); John Finnis, *Natural Law and Unnatural Acts*, 11 HEYTHROP J. 365,

thetic experience, friendship, skillful work and play, religion (agnostically defined), and practical reasonableness[308]—are basic in the sense that, unlike many goods, they are reasons for acting which require no further reason.[309] They need no demonstration, are desirable for their own sake—are intrinsically rather than instrumentally good—

366 (1970) ("Natural law . . . is one's permanent dynamic orientation towards an understanding grasp of the goods that can be realized by free choice, together with a bias . . . towards actually making choices that are intelligibly (because intelligently) related to the goods which are understood to be attainable, or at stake, in one's situation. Now the jargon-laden sentence just uttered is a piece of speculation, theorizing, doctrine about natural law. But the point of all such theorizing can be little more than to uncover what is already available to everyone, submerged and confused, perhaps, but shaping everyone's practical attitudes and choices of what to do, what to love and what to respect.").

308 Being practically reasonable means adopting a coherent plan of life, having no arbitrary preferences among values and persons, maintaining detachment from projects, not abandoning commitments lightly, eschewing inefficient methods, not making choices which serve only to damage the realization of other basic goods, fostering "the common good" of one's community, and acting according to one's conscience. *See* FINNIS, *supra* note 103, at 100–26. There is no exhaustive list of, or definitive terminology for, the basic goods. The best-known modern effort at articulation—certainly the one best known to lawyers—is Finnis. *See id.* at 85–90. The list omits (though hints at the possibility of) marriage as a basic good. *See id.* at 86–87. In later works, Finnis has added it. *See, e.g.*, John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, *in* NATURAL LAW, LIBERALISM AND MORALITY 1, 4 (R. P. George ed., 1996) [hereinafter Finnis, *Limited Government*]; John Finnis, *Observations for the Austral Conference to Mark the 25th Anniversary of* Natural Law and Natural Rights, 13 CUADERNOS DE EXTENSIÓN JURÍDICA 27, 28 (2006). Although, as will become clear in due course, I am largely sympathetic towards Finnis' argument concerning basic human goods, I am not convinced that marriage belongs on the list. While basic goods are in principle open to pursuit by all, marriage, for Finnis, is by definition heterosexual: a same-sex partnership "may, in some circumstances, be a praiseworthy commitment," but it "has nothing to do with marriage." John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97, 132 (1997). Finnis acknowledges that some people are "exclusively and irreversibly homosexual," *id.* at 123, and argues it is not the natural inclinations of these people that is contrary to the good of marriage, but their choice to act on these inclinations. *See, e.g.*, John Finnis, *An Intrinsically Disordered Inclination*, *in* SAME-SEX ATTRACTION: A PARENTS' GUIDE 89, 90–91 (John F. Harvey & Gerald V. Bradley eds., 2003). These inclinations, however, deny them both the faculty and the competence (in contrast to those, such as children, who have the faculty but lack the competence) to be committed to marriage as a basic good. In short, I cannot see how marriage can be a basic good meant for everyone.

309 For example: a hungry person eats to avoid starvation. The good here (not starving) is the reason for the action (eating). But there is a reason that explains our interest in that good: that is, we want to avoid starving because we want to live—we value life (self-preservation) as a basic good.

and presuppose no moral judgments.[310] But they "are not mere abstractions"; rather, "they are aspects of the real well-being of flesh-and-blood individuals."[311] By examining human volition—our choices to act, or not to act, according to moral norms—we come to understand these basic goods as integral to human fulfillment. Indeed, it is by making choices compatible with these basic goods, by being practically reasonable, that we contribute to "[t]he ideal of integral human fulfillment"—that is, to "the realization, so far as possible, of all the basic goods in all persons, living together in complete harmony."[312] And it is by making choices incompatible with these goods—by failing to use reason to fetter our urges and impulses—that we do the opposite.[313]

Although it is in the character of basic goods that they are integral to human fulfillment, they are not integral to the fulfillment of the needs and interests of *particular* persons. "[T]he basic goods are human goods, and can in principle be pursued, realized, and participated in by any human being."[314] The Golden Rule can therefore be understood to be impartial in the sense that the basic human goods which provide reasons for action, including following the Golden Rule, are agent-neutral: there is "fundamental impartiality among the human subjects who are or may be partakers of those goods."[315] There is no incompatibility between speaking of the Golden Rule as impartial in this sense, modern natural lawyers argue, and treating different people differently. All that the Golden Rule requires is that "differential treatment be justified [because of] inevitable limits on one's action"[316]—that my failure to treat another as I would have him treat me is explicable by the fact that circumstances make it impossible for me to treat him thus—or because failing to treat different people differently would mean acting contrary to the requirements of the basic goods themselves: because it would mean acting dishonestly, for

310 *See, e.g.*, FINNIS, *supra* note 103, at 59, 73.

311 *Id.* at 225.

312 Germain Grisez et al., *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 99, 131 (1987).

313 *See* FINNIS, *supra* note 307, at 41–44.

314 *Id.* at 106.

315 *Id.* at 107; *see also* MARK C. MURPHY, NATURAL LAW AND PRACTICAL RATIONALITY 201–04 (2001) ("On Finnis's view, all of the fundamental reasons for action are agent-neutral . . . ."); Mark C. Murphy, *Natural Law, Impartialism, and Others' Good*, 60 THOMIST 53, 56 (1996) (stating that the Grisez, Boyle, and Finnis view "embraces impartialism by holding that while the character of something as a good does depend on its being fulfilling of human interests, its character as a good does not depend on the *identity* of the person whose interests that good fulfills").

316 Finnis, *supra* note 57, at 137.

example, or neglecting the needs of one's dependents.[317] Since the basic goods are agent-neutral, since my good is no better or worse than yours, such differentiation by reference to basic human goods is not the same as applying the Golden Rule by reference to one's tastes or preferences: "we are showing no improper favour to individuals as such . . . no egoistic or group bias, no partiality."[318] Applying the Golden Rule does not mean ignoring one's feelings. Quite the opposite: it requires the discernment of one's feelings—in determining whether to act in any particular instance, one relies on intuitions regarding how great a burden one can accept and what benefits one thinks one's actions will bring (what modern natural lawyers sometimes refer to as "pre-moral commensuration"[319]). These intuitive feelings are the feelings of "the mature person of fully reasonable character"[320] whose "deliberation and action is open to and in line with integral human fulfillment,"[321] and so genuinely to apply the Golden Rule must also mean assessing, sometimes instantaneously, our feelings about our options—about what we can do—in accordance with "a rational and objective standard of inter-personal impartiality,"[322] that is, in accordance with the requirements of the basic goods which provide reasons for action. The standards of fully reasonable conduct, we might say, are to be measured by "[t]he ideal of integral human fulfillment."[323]

This natural law defense of the Golden Rule differs radically from the other defenses that we have encountered. It candidly acknowledges that when we follow the Golden Rule, what we *feel* cannot be

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317 *See, e.g.*, 1 GRISEZ, *supra* note 56, at 211–12; Finnis, *supra* note 57, at 137–38; *see also* Finnis, *supra* note 6, at 227 (explaining that the Golden Rule only excludes preferences "that do not correspond to intelligible aspects of the *real reasons* for action"); Finnis, *supra* note 62, at 29–30 (same).

318 FINNIS, *supra* note 103, at 109.

> One has no general responsibility to give the well-being of other people as much care and concern as one gives one's own; the good of others is as really good as one's own good, but is not one's primary responsibility, and to give one's own good priority is not, as such, to violate the requirement of impartiality.

Id. at 304.

319 *See, e.g.*, JOHN FINNIS ET AL., NUCLEAR DETERRENCE, MORALITY AND REALISM 265–66 (1987); Finnis, *supra* note 57, at 149; *see also* John Finnis, *Allocating Risks and Suffering: Some Hidden Traps*, 38 CLEV. ST. L. REV. 193, 206 (1990) ("The Golden Rule in its application involves a discernment of feelings and then a dispassionate rational adherence to the standard of care established by one's feelings.").

320 Finnis, *supra* note 6, at 228.

321 *Id.* at 227.

322 Finnis, *supra* note 57, at 149.

323 Finnis, *supra* note 6, at 233.

insignificant. The natural law account shows that feelings have a legitimate part to play in our efforts to accord fair treatment, that our preliminary intuitions concerning how to treat others must—since we are trying to be fair—be measured by the requirements of the basic goods which delimit the range of reasonable action. I have—and I expect this will confirm most readers' suspicions—presented various accounts of Golden Rule reasoning in what I consider to be an ascending order of credibility. This particular natural law defense of the Golden Rule is the most cogent of the various defenses considered here, I think, not only because of the intelligibility of the premise (the self-evidence of basic goods) and the reasoning, but also because it eschews the artificial assumption either that the Golden Rule can somehow be divorced from the feelings of agents and recipients or that any such feeling, if it must be taken into account (recall Hare's formulation of the Golden Rule as "we should do to others what we are *glad* was done to us"),[324] can be satisfactorily subjected to some sort of proportionalist—typically, utilitarian—rationalization.

CONCLUSION

There is something to be said for ending this essay here—on a somewhat bullish note. But to do so would, I think, be to sidestep some difficult questions. I want to conclude by considering perhaps the most obvious of them. Midway through this Article I briefly entertained the notion of the Golden Rule as a "neutral principle,"[325] a notion which some lawyers might argue I should have dwelt on for longer, not only because it might have put this entire inquiry on firmer ground but also because it would most likely lead to an examination of what it could ever mean to speak of the Golden Rule as a *legal* standard. To put the question in a leading way: if Golden Rule reasoning—informed by goods which are essential to human fulfillment and flourishing—essentially requires that we do good to, and avoid actions which offend against the good of, others, how can it make for anything other than legal norms which are morally uncontroversial but wholly vacuous?

The first, minor, point to make in response to such a question is that law often facilitates Golden Rule reasoning. Determining the relevantly similar instances in which I would want others to treat me as I propose to treat them may require that I consider current legal rules and precedents. Law understood thus is essentially an exercise in purposive or technical rather than moral reasoning, a means for agreeing

324 *See supra* text accompanying note 264.

325 *See supra* notes 133–46 and accompanying text.

or resolving our disputes over what we can do in our interactions with others.[326] The second, far more important, point to make stems from Michael Sandel's observation (Sandel himself is following Aquinas) that liberal justice does not demand neutrality as between conceptions of what makes for a good life or a refusal to pass judgment on the moral worth of particular human activities.[327] None of us can completely separate our deliberations about political morality from our personal convictions, and so when we support particular public decisions and policies we are (unless we are being hypocritical) supporting decisions and policies that are consistent with our private values and ideals.[328] Certainly liberalism entails public justification—constructive negotiation among people who share a basic commitment to particular values and ideals, and the filtering out or domestication of values and ideals which are not shared—but public justification does not require that equal moral weight be accorded to everybody's values and ideals.[329] Likewise, following the Golden Rule, understood as a choice based on reasons for action which ought to be accepted because of their intrinsic goodness—because their soundness or validity as reasons for action cannot be explained by appealing to other reasons—requires that we judge some actions and ways of life, though not people,[330] to be morally preferable to others. And so when natural lawyers refer to the Golden Rule, their point usually[331] is that to follow the Rule is to choose—or that to violate the Rule is to impede—a course of action compatible with the realization of basic human good(s). Examples would be arguments to the effect that treating others as we would have them treat us requires us to be truthful to others (though not necessarily that we divulge secrets),[332] to be

326 *See* Finnis, *supra* note 62, at 10; Finnis, *supra* note 57, at 142.

327 *See* Michael J. Sandel, *Judgemental Toleration*, *in* NATURAL LAW, LIBERALISM AND MORALITY, *supra* note 308, at 107–12.

328 *See* STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 59–64 (1991).

329 *See id.* at 261–62.

330 *See supra* note 198.

331 Though not always: a moral right derived from Golden Rule reasoning might sometimes be matched or eclipsed by some other moral consideration. So, for example, following the Golden Rule requires us not to exchange money for friendship (by stealing, say, or borrowing without repaying)—we wouldn't want our friends to do this to us—yet there might be a countervailing moral responsibility to take and use our friends' money for good purposes (for example, the student who takes money out of a collective housefund to pay an engineer to repair the central heating, even though the rest of his flatmates had wanted to spend the money on nights out). *See* Finnis, *supra* note 6, at 232.

332 *See* 2 GRISEZ, *supra* note 17, at 410–11, 417.

mindful of the needs of others when we use resources,[333] and to be willing, having benefited from our predecessors' shouldering of burdens, to shoulder those burdens for the benefit of those who will succeed us when the time comes for us to do so;[334] the same can be said of arguments to the effect that the Golden Rule can justify conscientious objection, whistleblowing, breaking from a prior undertaking, and refusing to locate one's business (even though it may be legally permissible to locate one's business) in a country where, say, employees are paid below the minimum wage guaranteed in one's own country.[335] Many legal norms will be supported by the natural law version of the Golden Rule, but many will not be; indeed, to reiterate the more general point made in the introduction to this essay, many accepted legal positions will not be supported by Golden Rule reasoning.

There is, of course, no reason to think that all legal norms supported by the Golden Rule—certainly the natural law version of the Golden Rule as outlined here—will be uncontroversial. As an illustration of the point, and by way of conclusion, consider again the subject of abortion. The natural law application of the Golden Rule to the abortion problem is much more straightforward than the argument advanced by Hare. But because the natural law version of the Rule is more straightforward—the conventional "do to others as we would have them do to us" rather than Hare's unconventional "do to others what we are glad was done to us"—the resulting argument cannot be framed, as Hare's is framed, as if it were essentially about what we are glad we became. The argument has to address what Hare was at pains to sidestep: the status of the fetus. If we apply the Golden Rule to this problem, the answer it yields is obvious enough: we should treat others as we would have others treat us, and so if we would have others abstain from actions intended to end our lives (as distinct from instances of double effect where death is a foreseen side-effect of an action intended to serve human good), we should not perform such actions on others. But how are we to interpret "others"? The answer is obviously crucial, because as soon as we are dealing with "others" we are, according to the Golden Rule, dealing with entities to be subjected to the same standards and principles of treatment as we would have applied to us. John Rawls, in his last works on public reason,

333 *See* 3 GERMAIN GRISEZ, THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS 438 (1997).

334 *See* Finnis, *supra* note 6, at 228; *see also* Finnis, *supra* note 62, at 51–52 (explaining that natural law property theory seeks to encourage the "dynamic and forward-looking" use of resources).

335 *See* 2 GRISEZ, *supra* note 17, at 760–61; 3 GRISEZ, *supra* note 333, at 559.

argues that justifying political decisions in a way that is reasonably acceptable to everyone essentially means demonstrating ourselves to be sincere practitioners of the Golden Rule: being prepared, that is, not only to offer fair standards of treatment to others but also agreeing to act according to those standards even when doing so would be contrary to our own interests.[336] This system of citizenship, he continues, is one "we enter only by birth and exit only by death."[337] It would be easier to dismiss this last remark as casual were Rawls not reiterating it.[338] Committed will theorists argue that claims must be enforceable (or waivable) by claimholders themselves if the claims are to count as rights. But Rawls' remark provides a vivid illustration of why we do better to speak of rights protecting interests, including interests ascribed to those who, for whatever reason, cannot make a case for themselves. If there could be no right to be treated according to the Golden Rule *until birth*, no reasonably minded supporter, let alone opponents, of a right to abortion would consider the range of protections guaranteed to the unborn to be sufficient.[339]

Of course, accepting that it is not the fact of birth that makes us persons does not answer but simply returns us to the question of what it means to refer to "others" in this context. The argument I want to consider proceeds from the premise that life begins at conception because the conceptus (the fertilized human egg) marks the beginning of our selves—because my personal genetic constitution, the integral organism that I am (and will be until I die), can be traced to that point[340]—and so we are all "others," entitled to the same moral consideration, from that point onward. Ronald Dworkin is dismissive of the premise; it appears to inform "the scalding rhetoric of the pro-

336 *See* JOHN RAWLS, POLITICAL LIBERALISM, at xlii, xliv (1996); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 770 (1997).

337 RAWLS, *supra* note 336, at xliii.

338 *See id.* at 12 ("[T]he basic structure is that of a closed society . . . . Its members enter it only by birth and leave it only by death.").

339 *See* John Finnis, *Public Reason, Abortion, and Cloning*, 32 VAL. U. L. REV. 361, 372–73 (1998).

> [T]he question arises why Rawls draws the boundary of justice, fairness and reciprocity at *birth*. This question does not seek to settle the rights of the mother over and against the unborn child. It is just the question of how it could be rational to think that the child just before birth has no rights (no status in justice, fairness, reciprocity) while the child just after birth has the rights of a citizen free and equal to other citizens.

Id.

340 *See* J. Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thompson*, *in* THE PHILOSOPHY OF LAW, *supra* note 260, at 129, 151–52; John Finnis, *"The Thing I Am": Personal Identity in Aquinas and Shakespeare*, 22 SOC. PHIL. & POL. 250, 253 (2005).

life movement," he observes, "[b]ut very few people—even those who belong to the most vehemently anti-abortion groups—actually believe [in it], whatever they say."[341] I suspect the primary reason many people balk at the premise is that accepting it would commit them to treating as murder certain actions which they do not regard as murder, and which they think only the most callous legal system could classify as murder. We might reasonably ask, nevertheless, if the premise is as little supported as Dworkin thinks: in some conservative states in the United States, for example, political mileage has occasionally been gained from supporting a complete ban on abortion.[342]

A former colleague of Dworkin's is very clearly committed to the premise. If one accepts that abortion is deliberately killing the unborn, John Finnis argues, and that deliberate killing is wrong, then abortion is a denial of the unborn's right to the equal protection of the laws against homicide.[343] The unborn are others, and since the Golden Rule requires that we treat others as we would have them treat us, the unborn should have the same right not to be intentionally and unjustly killed as the rest of us. Just how far the unborn is from birth is irrelevant: we might deny that the early human embryo has the status of an other, a person,

> [b]ut the denial is quite vain. You only have to scrutinise the language, the thoughts, the awareness and the decisions of those who want their baby to survive and flourish, and of those who use their skills for that objective, to see that when people's interests do not conflict with the interests of the embryo, they are perfectly well aware that they are dealing with an individual human being, a him or a her, a subject, a who not a what, as irreplaceable as a baby immediately before or after birth.[344]

Even if we acknowledge the legitimacy of this argument, Judith Jarvis Thomson argues—even if, that is, we concede that there is no way of refuting once and for all the claim that fertilized eggs have a right to life—this does not mean we must accept the argument that there is a "conclusive reason for asserting that they do have a right to

341 DWORKIN, *supra* note 259, at 13.

342 *See* JACKSON, *supra* note 257, at 73 (noting that George W. Bush made support for a complete ban on abortion part of his successful campaign for the Republican nomination in 2000 (though it ought to be pointed out that Jackson's position is, on this issue, much the same as Dworkin's: that "very few people" believe that a fetus is a life from the moment of conception)).

343 *See* Finnis, *Limited Government*, *supra* note 308, at 17–18.

344 John Finnis, *Some Fundamental Evils in Generating Human Embryos by Cloning*, *in* ETHICS AND LAW IN BIOLOGICAL RESEARCH 99, 102 (Cosimo Marco Mazzoni ed., 2002).

life."[345] If we are open-minded and accept that it is reasonable to argue either that the fetus does or that it does not have a right to life from the moment of conception, we ought to concede the permissibility of abortion, because "if abortion rights are denied," then this constraint is imposed on a ground that those who favor abortion rights—the constrained, as it were—"are not in the least unreasonable in rejecting outright."[346] If the reasons for the constraint against abortion are no more compelling than the reasons against such constraint, so that the case against abortion is not one that the constrained are unreasonable in rejecting, constraining abortion would be wrong since it would mean that anti-abortionists had got their way for no other reason than that they had asserted that they are right.[347]

But why, if this argument reaches stalemate, should the law take the side of those who deny that the fetus has a right to life from the moment of conception: "why should the deniers win?"[348] Because, Thomson responds, "the situation is not symmetrical."[349] The justificatory burden should always fall on those who wish to see the law changed so that it interferes with personal choice. There is no reason to think this justificatory burden will never be met: there was a time when a primary reason for outlawing abortions was that the procedure could not be performed without serious risk to a woman's health. There is also no reason to think that those who seek legal change will always be those who oppose a right to abortion. Within a jurisdiction the established position in law might be that abortion is not permitted: this was essentially the case in the United States until the Supreme Court overturned prior state and federal laws barring abortion by deciding that a woman's choice to seek a termination is (until the point of viability) constitutionally protected.[350] And it is difficult to imagine any opponent of abortion *not* pointing out that the freedom they wish to see curtailed is the freedom to commit a grave harm, to kill the unborn. Thomson herself seems to concede the point when she observes that there is no conclusive reason for denying that fertilized eggs have a right to life—that it makes "perfectly good sense," to use her phrase, to speak of the unborn having a right, in the same way that we all have a right, not to be intentionally and unjustly killed.[351] Since it cannot be demonstrated that the unborn have a

345 Judith Jarvis Thomson, *Abortion*, Boston Rev., Summer 1995, at 11, 13.
346 *Id.* at 14.
347 *See id.*
348 *Id.*
349 *Id.* at 15.
350 *See* Roe v. Wade, 410 U.S. 113, 164–66 (1973).
351 Thomson, *supra* note 345, at 13.

right to life, Thomson argues, those who object to abortion must meet the burden of showing why outlawing abortion is not objectionable. But those who consider abortion objectionable will in all likelihood claim that the burden is dispensed with by virtue of the fact that Thomson leaves their central claim—that abortion is murder—uncontested.

"On many topics the views of reasonable men are poles apart," Lord Reid once observed, yet "[w]hen we come to how a man should behave towards his neighbour there are no such deep cleavages," even if "there is room for some difference of opinion."[352] With the topic of abortion, the possibility of deep cleavages, of finding one another poles apart, is obvious and real. Golden Rule reasoning, as I have explained it in this essay, is exemplified neither by arguments which treat the Rule as connected to the desires of specific agents and recipients nor by arguments which fail to disprove this connection, but rather by universal prescriptivism and, especially, by natural law philosophy. There is certainly no reason to think that the perspective on Golden Rule reasoning advanced here will bring opponents over abortion closer together. The simple fact is that on the topic of abortion, as we have seen, such reasoning draws us to some stark, some might say unpalatable, conclusions.

But Golden Rule reasoning, as I explain it, does require that we decide who our neighbors are and how to accord them reasonable and impartial—fair—treatment. Even if it demands conclusions which we do not consider our own, furthermore, it requires us to think again about the reasonableness of the positions that we do hold, and about our grounds for dismissing some of the positions we reject. This is not to claim that those holding views out of line with Golden Rule reasoning will, on being presented with such reasoning, abandon their intuitions or change their views; it is certainly worth bearing in mind the maxim (of unknown provenance, though regularly misattributed to Jonathan Swift) that it is futile to try to reason people out of positions they were never reasoned into. But it is to claim that there is good sense in trying to examine the convictions motivating particular legal decisions, rules, and reform proposals in the light of a robust principle of fairness such as the Golden Rule, and considering whether the convictions and the principle lead us to similar conclusions. Moral philosophy, applied to legal problems, has the capacity to make those who must reflect and decide on those problems (and

352 Lord Reid, *The Law and the Reasonable Man*, 54 PROC. BRIT. ACAD. 189, 201 (1968).

those who, eventually, will revisit or study them) question themselves, pause and think about the legal positions they are minded to take. Jurisprudence does best when it nags.