The State of Justice

All lawyers know that you can't make the "Golden Rule" argument to jurors—you know, any form of "Put yourself in the place of the plaintiff (or the defendant for that matter) when coming to your verdict in this matter."

I always thought the prohibition odd, particularly since the "Golden Rule" has been considered a universal ethical precept for thousands of years, and not just by Westerners, Confucianism, Buddhism, Jainism, Zoroastrianism, Classical Paganism, Hinduism, Judaism, Christianity and Sikhism, with minor difference, all subscribe to a form of "do unto others as you would have them do unto you."

Is our law incompatible with universal ethical precepts? You might think so, given the nature of legal education, and the insistence of modern legal educators to emphasize that they are there to teach "law," not any kind of ethical philosophy. But is not law based on philosophy? Someone or some group's philosophy? Some culture's idea of justice? After all, we also instruct jurors that they need not leave their every day experience and common sense aside in coming to a verdict. Are not rational moral precepts part of their cultural experience, part of their common sense?

Historically, The Golden Rule prohibition has been explained as a plea to the jurors for sympathy, or a pleas for them to be "partial" (by putting themselves in the shoes of a party), or "subjective" (rather than considering the objective evidence and the law).

See in this connection the WV cases of *Keathley v. Chesapeake & Ohio Railway,* 85 W.Va. 173, 102 S.E. 244, 249 (1919); *State v. Clements*, 175 W.Va. 463, 334 S.E.2d 600 (1985); *Ellison v. Wood & Bush Co.,* 153 W.Va. 506, 513-14, 170 S.E.2d 321, 327 (1969) and *Leathers v. General Motors Corp.,* 546 F.2s 1083 (4th Cir. 1976) (Virginia law); the Ohio cases of *Al McCullough Transfer Co. v. Pizzulo*, 53 Ohio App. 470, 5 N.E.2d 796 (7th Dist. 1936); *Underwood v. Thompson*, 1979 WL 209337 (Ohio Ct. App. 10th Dist. 1979); *Yerrick v. East Ohio Gas Co.,* 119 Ohio App. 220, 198 N.E.2d 472 (9th Dist. 1964); *Boop v. Baltimore & Ohio Railroad*, 118 Ohio App. 171, 193 N.E.2d 714 (3d Dist. 1963); *In re Appropriation of Easement for Highway Purposes*, 8 Ohio App. 2d 252, 221 N.E.2d 476 (3d Dist. 1966); *Lykins v. Miami Valley Hospital*, 157 Ohio App. 3d 291, 811 N.E.2d 124 (2d Dist. 2004); *Dillon v. Bundy*, 72 Ohio App. 3d 767, 596 N.E.2d 500 (10th Dist. 1991); *Sinea v. Denman Tire Corp.,* 135 Ohio App. 3d44, 732 N.E.2d 1033 (11th Dist. 1999) and the following two annotations: *Propriety and Prejudicial Effect of Attorney's "Golden Rule" Arguments to Jury in Federal Civil Case*, 68 A.L.R. Fed. 333; *Prejudicial Effect of Counsel's Argument, in Civil Case, Urging Jurors to Place Themselves in the Position of Litigant or to Allow Such Recovery as They Would Wish if in the Same Position*, 70 A.L.R.2d 935.

> "Is our law incompatible with universal ethical precepts?

Interestingly, the original ethical proposition was not a plea to sympathy, partiality or subjectivity, but considered a very reasonable, logical, ethical norm—that if you wanted to be treated one way, you should reciprocate and treat your neighbors accordingly. How did it occur that we lost faith in the ability for jurors to distinguish the former from the latter?

Is there some connection between the loss of faith in our civil justice system and the fact, noted by Jonathan Turley, Shapiro Professor of Public Interest Law at George Washington University (USA Today, March 27th, 2007) , that legislatures on every level are in a frenzy to criminalize what has heretofore been considered "negligent" acts ?

Is this frenzy part of an unarticulated realization that courts and jurors don't appreciate so much a need as they may have in former times to hold others responsible for "negligent" acts in a society where everyone wants to shed, rather than accept, responsibility, and which has in any event a plentiful share of downright malicious and criminal acts with which to occupy its judicial resources?.
And speaking of the plethora of criminal acts - is there some connection between seemingly random acts of violence and the frustrations of at-risk individuals who apparently don't believe

Continued on Page 6

Ask Bartleby

Dear Reader,

Kudos to member Judge Patrick Flatley for his excellent work in bringing the C.A.R.E. educational program to West Virginia's young adults. Ask him about it!

In the absence of a query this issue, I leave you with some choice thoughts on the law, lawyers and issues near or dear to them from Les Miserables, by Victor Hugo, with which to impress your spouse (or Justice Bullingham) at the appropriate time.

On a gathering of lawyers:

"The sight of these groups of black-robed gentlemen murmuring together on the threshold of a court of law is always a chilling one… they are like clusters of buzzing insects absorbed in the construction of dark edifices of their own."

On the death penalty:

"What right have men to lay hands on a thing so unknown?"

On ignorance and dens of iniquity:

"The real threat to society is darkness…What is needed to exorcize these evil spirits? Light, and still more light. No bat can face the dawn. We must flood the underworld with light."

On partisans:

"Factions are blind men with true aim."

Yours Sincerely,
Bartleby, the Scrivener.

The State of Justice -

there are just and peaceful means (i.e. the civil justice system) for seeking redress for perceived or real harms suffered at the hands of others?

Does our system, in fact, lack social empathy, as opposed to sympathy?

Isn't it about time we did at least re-consider the prohibition? Would it be so hard to instruct a jury that sure they had to follow the law, and sure they had to base their verdict on the evidence, and not on sympathy, but that they nevertheless could use universal ethical precepts or the Golden Rule to the extent they are NOT in conflict with the law and evidence, and not based on sympathy?

If a juror were told that in distributing justice, whether for the plaintiff or the defendant, that they would want their decision to be an ethical norm applicable to their own future case, would that be so harmful to the civil justice system? Wouldn't it rather make it more empathetic, less impersonal, more worthy of trust? Perhaps give the community more of a vested interest in it?

We know the law can change tomorrow. But "do unto others..." has stood the test of time—more than two thousand years.

So just maybe it's time to let jurors consider "within the confines of the law" to do unto others as they would have done to themselves. Maybe it's a way to return social empathy to their deliberations.

But then again, I could be wrong. I do take the occasional drink, and my thinking may be fuzzy on this issue. I do humbly submit, however, the issue worthy of discussion, and soon, while some civil trials by jury still remain.