

## Morality, Decision-making, and Judicial Ethics

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“Everything should be made as simple as possible, but not simpler.”

– Albert Einstein

“In the case of any person whose judgment is really deserving of confidence, how has it become so? Because he has kept his mind open to criticism of his opinions and conduct. Because it has been his practice to listen to all that could be said against him; to profit by as much of it as was just, and expound to himself . . . the fallacy of what was fallacious.”

– John Stuart Mill

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Domestic violence is a complex social issue that is often controversial and can be polarizing. It has made its way onto legislative agendas and also into the courts. As states have passed laws making domestic violence a specific criminal act and affording protection to litigants through pro se processes, judges have come face to face with the chaos and frustration of domestic violence.

The great thinkers of Western civilization have developed frameworks through time that maximize fairness and justice during decision-making. These frameworks, such as Common Law and the United States Constitution, influence how we view material and what we ignore. Judicial ethics are one of these frameworks.

An examination of the interplay of judicial ethics and domestic violence can inform decision makers about how ethics can and should be formulated to best achieve the societal goal of an independent judiciary with respect to complex social issues.

Issues are often polarizing because they are based on moral beliefs. Baron (2000) defines the most basic moral judgment as a statement regarding “what *decision* someone in a certain situation, or a certain kind of situation, should make.” Common moral judgments with regard to domestic violence involve judgments about the decision a victim should make after the first act of violence or the decision(s) a victim should make after entering the legal system.

Moral beliefs are typically learned in childhood and are particularly resistant to questioning (Baron, p. 382). Many decisions involve moral inferences that are not recognized by the decision maker. Historically, our society has made decisions based on moral beliefs that have since been found to be wrong. For example, slavery was once a controversial and polarizing topic involving moral positions. Today, this nation does not question the moral inference that slavery is wrong.

When there is uncertainty, we often rely on moral intuition to guide our decisions. While moral intuition works well in most instances, in the case of polarizing issues, special care should be taken to be aware of moral beliefs and to question them. When there is controversy in a subject involving morality, someone will be wrong (Baron has a good discussion of how relativistic arguments about morality do not follow logically). As a result, a framework that encourages active questioning of moral intuition and exposure to differing points of view will tend to produce more reliable decisions.

Domestic violence is a model of a current controversial topic and is used as an example throughout this document. However, ethics rules should not be constructed specifically for domestic violence, but for the controversial and polarizing issues that are sure to follow.

### The Role of Judges in Coalitions

Judicial involvement in domestic violence coalitions (or coordinating councils) has generated a significant amount of controversy. Some judges embrace the role as an opportunity to improve the system and to achieve personal and professional fulfillment. Others regard involvement in a coalition as inherently problematic believing that participation creates the appearance of impropriety, that the controversial and polarizing nature of the topic will taint the judge, that the judge may become biased, and that the judge will have to seek recusal from any future case involving domestic violence.

#### Costs and Benefits of Judicial Involvement in Domestic Violence Coalitions

Domestic violence is a complex social problem with legal, moral, psychological, spiritual, and social dimensions. As a result, efforts to combat domestic violence have increasingly attempted to involve multiple segments of the community in order to develop a comprehensive approach. Judges have been one part of the community urged to become involved in community groups to end domestic violence (Schechter & Edelson 1998; Edwards 1992).

Domestic violence coalitions often serve multiple purposes some of which may include improving the legal response; educating the public; recommending legislative changes; increasing community awareness of resources; securing funding for multi-disciplinary efforts; and contributing to public debate through the media. Some of these activities may be appropriate for judges and some are not. *See State v. Haskins*, 571 N.W.2d 39 (Iowa Ct. App. 1997) (participation by judge in domestic abuse coalition is not grounds for recusal).

### Advocacy

Advocacy is inherent in the debate of unresolved, complex social issues. Yet it does not follow that judges involved in community groups must adopt a particular advocacy position and it does not follow that judges will automatically appear to adopt an advocacy position. If a judge both participates in a community group and openly advocates for a position on which society has no consensus, the judge will cast doubt on the judge's ability to hear and decide cases fairly. Judges should be prohibited from advocating for an outcome. *See* ABA Model Code of Judicial Conduct, Canons 1 and 4.

However, if government has legislatively regulated an act to be criminal, the judge can be clear that *crime in general*, and that *specific types of crime*, are not appropriate. Judges should advocate for the efficient administration of justice.

The form of the coalition can make a difference regarding if and how the judge can participate. If judges can participate in a subgroup that only looks at the administration of justice, the judge could comfortably participate in meetings. *See* Canon 4(B). The meeting agendas would have to address patterns as they affect the administration of justice, not specific cases. Further, as behavior that at one point in time may be controversial becomes illegal through legislation, the system will experience several difficulties adapting to the new crime. Judges should play a part in responding to these difficulties early so that the administration of justice can proceed as smoothly as possible.

A collateral benefit of the judge's involvement is that a forum is created for the judge to educate community members about the legal system and the judicial role. Community groups organized around a controversial issue will tend to need accurate information about the legal response and will be motivated to learn. The absence of judges from these groups can create suspicion and perpetuate misunderstanding. Judges should take time to work as liaisons to community groups that are working on complex social issues to benefit the community and to improve the administration of justice.

In addition to educating community members about the role and function of the judiciary, judges should educate community groups about the special ethical issues that can limit judicial participation. Generally, these highly motivated groups will value the deepened understanding regarding the importance of judicial independence. Understanding the safeguards necessary to maintain judicial independence, community groups can create an appropriate forum for judicial participation. The most common example in domestic violence coalitions is a subcommittee that looks at issues specifically related to the administration of justice. The structure of the group should be balanced as far as legal advocacy is concerned. In the criminal context this would require both prosecution and defense attorneys. However, a judge should not take part in a community legal effort that seeks to improve only one advocacy position, for example, a group that specializes in increasing the number of successful prosecutions.

Educating a community group about judicial independence and the appearance of impropriety empowers that group to determine if judicial involvement is important to its mission. The group can evaluate the pros and cons of involving judges and judges can

avoid problematic features such as fundraising, legislative activities, and inappropriate advocacy positions. If upon being educated a group demonstrates no appreciation of judicial independence, the judge should not attend or participate in activities organized by that group.

### Bias

Again the form of the group in which a judge participates can affect both the appearance of bias and the actual encoding of bias. When judges participate in community groups, if the group addresses the administration of justice, appropriate attorney representatives from each side of the controversy should be included. The committee can ensure that such representatives are kept apprised of the committee's work by sending minutes to representatives who may choose not to attend or participate. When two groups exist that take opposing views of the same social issue (e.g. a domestic violence coalition and a fathers for equal rights group) the same judge should attend both groups. This not only reduces the appearance of bias but also reduces the likelihood of bias influencing decision-making. Selective exposure to one side of the debate can lead to self-deception (Baron, p. 211) that could further strengthen erroneous decision-making.

Bias is a naturally occurring function of brain processing. Philosophers and legal scholars have explored the topic of bias for centuries and have developed procedures to reduce the impact of bias in legal proceedings. One mechanism to reduce bias is creation of and adherence to judicial ethics that seek to reduce the impact of social relationships on judges and also seek to manage the public's perceptions of the impact of social relationships on judges. With respect to complex and controversial societal issues, avoidance and isolation may inadvertently create or reinforce bias.

Recent research in neurology, psychology and philosophy suggests that bias and impaired decision-making may result from

- limited personal references to understand complex behavior,
- extraordinary stress in decision-making without an apparent solution for improvement of the situation, and
- the development of groupthink within relatively isolated groups.

### *Limited experience and bias*

People tend to seek evidence, seek goals and make inferences in a way that favors possibilities that already appeal to them (Baron, p. 191). The legal system includes several mechanisms to diminish this tendency. Law school teaches students the ability to look at both sides of an argument, which has been scientifically proven to reduce bias (Baron, p14). The legal system generally requires that judges put decisions into writing, which increases accountability for the decision and thus reduces bias (Baron, p. 215). *See Kroblin v. RDR Motels, Inc.*, 347 N.W.2d 430 (Iowa 1984) (the written decision enhances the quality of judicial decision-making). Also, the legal process anticipates that an individual judge can make mistakes and so provides a process to appeal. *Id.* (a written judicial decision provides the appellate courts with the factual and legal basis for the decision). However, the appellate process typically gives deference to the trial judge to evaluate the evidence presented including credibility of witnesses. *See Claus v. Whyle*,

526 N.W.2d 519 (Iowa 1994) (appellate court will not weigh evidence or credibility of witnesses).

Judgments regarding the credibility of witnesses have a unique bearing in cases involving domestic violence. Since domestic violence involves complex emotional and psychological dynamics that can be displayed to differing degrees based upon the unique life experience of the person involved, judges need multiple models of victims, non-victims, abusers and non-abusers to correctly inform the decision-making process. If a judge has no previous personal experience with domestic violence, the judge will base decisions about a situation involving domestic violence upon what the judge has learned previously about domestic violence or will search personal memories to look for an analog to use for the purpose of inference (Barnes & Thagard, 1997).

Holyoak and Thagard (1995, in Barnes and Thagard, 1997) found that multiple source analogs are necessary to understand a complex situation. When the source analogs of the decision maker do not correspond well with the situation in question, the inference will be weak or even wrong. Barnes and Thagard (1997) provide an example from the Canadian election of 1992, in which Prime Minister Kim Campbell “gave a speech at a shelter in Vancouver’s Skid Row. She told the residents of the shelter that she too had known loss and disappointment, for she had once wanted to be a concert cellist.” They note that “from her perspective this was [most likely] the best source analog available.”

Similar to the example of Prime Minister Campbell, insufficient source analogs for complex and varied situations can result in a tendency to misunderstand and even blame victims for being victimized (Herman 1992). Understanding a complex situation does not require having personal experience. These analogs can be constructed and have been constructed by numerous individuals. Conversely, having a personal experience does not ensure an accurate understanding of complex issues when conclusions are drawn solely from that experience. Victims of domestic violence may make incorrect judgments regarding domestic violence in general when the victim does not employ multiple source analogs.

The potential for bias from limited life experience has a good chance of influencing judicial decisions that cannot be appealed. Therefore, the legal system should understand the importance of providing not only formal CLE programs, but involvement in community groups to increase the number of exposures of all judges to multiple analogs in order to better understand and make decisions in complex issues such as domestic violence. Education about domestic violence, like other complex social problems, is a process not an event; our “understanding [becomes] renewed as we become more sophisticated about arguments” (Baron, p. 29).

#### *Stress, decision-making, and bias*

Judges often report that domestic violence cases are some of the most stressful cases they hear. The subject matter alone can cause a stress response among judges (Jaffe et. al. 2003). Modern neuroscience using brain scanning techniques suggests that decisions cannot be made in the absence of emotion and that emotion at an unconscious level can

impact decision-making (Bechara, Damasio & Damasio, 2000). Baron (2000, p. 59) notes that “avoidance of certain unpleasant emotions can serve as goals of behavior and therefore goals of thinking.”

Research has documented a desire by people to believe the world is fair (Baron, p. 412). Experiments of the “just world” hypothesis have found that when we perceive unfairness, we attempt to restore a sense of justice. However, when our attempts fail “we become less concerned with victims of all sorts . . . [and] will try to deceive [ourselves] into thinking that things are fair” (Baron, p. 413).

Without an appreciation of the tremendous complexity of domestic violence, judges will fall into the trap of reinforcing the “just world” hypothesis and will tend to blame victims. With limited time due to the tremendous pressure of the court docket, a judge may not have time to do a fair search to consider all the factors that could contribute to behavior they see in the courtroom. After time, the initial perceptions can be held more strongly. All people share a natural inclination to avoid searching for information that contradicts a favored belief or to dismiss evidence that contradicts a favored belief (Baron, 2000, p. 195).

Recently a judge seeking information regarding a potential action asked why he could not sanction plaintiffs in domestic abuse cases for frivolous filings under the rules of civil procedure (Juhler, 2004 personal email). He stated he was aware that the Code of Iowa does not permit taxing costs to a plaintiff in such a proceeding. The reply reminded the judge of the legislative intent that values having an accessible legal system over collecting fees. The judge replied that he believed the practice of sanctioning plaintiffs would also meet with the legislative intent that the system should be used by “plaintiffs who really need protection.” The judge’s response seems to typify a decision maker dismissing evidence – intent of the Code – to support a favored belief – the importance of sanctioning victims who do not follow through with legal proceedings. Further, the belief seems to stem from a frustration with domestic abuse cases and the actions of plaintiffs in domestic abuse actions.

Baron (2000, p. 215) notes “that the quality of decision making is affected by ‘stress’ which occurs when it is difficult for the decision maker to see how to avoid extremely negative outcomes.” Ambivalence about the purpose and effect of domestic abuse policy can create stress for judges (Juhler 2004, focus group). In the area of domestic abuse, sometimes the “experts” do not agree on the best course of action in legal proceedings (Dalton, 1999) creating an atmosphere that is extremely emotional, confusing and frustrating.

Complex, polarizing issues are often divisive because they involve differing moral positions that people tend not to question (Baron p. 196). Baron points out that polarization is evidenced when bias against proffered counterevidence is extreme (p. 202). Judges should have opportunities to explore their moral judgments to understand how these beliefs influence them as decision makers. While community groups can provide material for contemplation, the process of judges examining moral beliefs should

not happen within community groups, but should be a regular part of judicial education courses. Involvement in community groups can be viewed like a field trip within the context of an educational process.

Another important aspect of judicial involvement in community groups is that judges can take the opportunity to reduce stress by working on proactive solutions that improve the administration of justice (Cady 1996; Juhler 1996). Tangible resources such as visitation exchange centers have come about due to judicial influence. Juhler (1996) recounts the development of a visitation exchange center in Iowa. A local judge was involved in the effort. As the project progressed, the judge considered the shifting landscape with regard to judicial ethics and stepped out of the process when the group decided to pursue funding for the project (Juhler 1996, personal communication).

#### *Groupthink, decision-making, and bias*

Controversy and complexity lead to emotional responses; these emotional responses will serve as markers in future decisions (Bechara, Damasio & Damasio 2000). Isolation imposed through a strict interpretation of judicial ethics limits the ability of judges to process emotional content and understand the complexities of domestic violence. In the absence of a complete picture, judges within their own community will develop explanations for what they experience (Baron, p. 216).

The professional community of judges tends to consist of other judges and attorneys. The legal community has several beliefs about domestic violence that are frequently repeated within the community and are understood to be true (Juhler 2004, focus group). Typically when these views are expressed they go unchallenged.

Two such beliefs are

- victims use/abuse the pro se civil process to “get a leg up” in divorce<sup>1</sup>, and
- plaintiffs do not understand the orders issued by the court.

These two propositions taken together suggest a savvy group of litigants, poised to exploit the system yet unable to comprehend the end result – the order.

Domestic abuse fatality review teams and victim advocates often have a vastly different experience of the system with regard to the prospect of victims “using” or “abusing” the system. Judges, attorneys and victim advocates could benefit from an open discourse that would reduce the persistence of inaccurate or incomplete beliefs (Baron, p. 216). Allowing and encouraging judges to be part of community efforts would reduce “groupthink” on all sides.

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<sup>1</sup> This belief is tempered by some judges who state that attorneys representing their clients act unethically by having the client appear pro se in court to “get a leg up” in a pending divorce.

### The Purpose of Participation in Community Groups

Judges should be allowed to participate in community groups that address complex social issues that come before the court. Judges have a unique perspective that will inform the work of the group. In addition, judges participating in community groups are likely to find outlets to help address the negative emotional states involved in judging and the stress of making decisions when there is no obvious “best” choice. The quality of justice will improve with judicial participation in community groups as judges gain more information to use in weighing and understanding evidence.

Since involvement in community groups is an extension of the education process, it should be integrated into the administrative structure of the court. The high court in each state should decide which types of groups judges should attend. The court should analyze the types of cases that are heard, paying attention to high volume cases, and cases that cause significant levels of stress. Cases that meet these criteria are most likely to create an environment that is likely to result in poor decision-making. Court administrators should schedule judicial time on a rotating basis, appointing a judge to be a liaison to a community group for a specified time period. Using the analogy of field trips, participation in community groups should not be haphazard but should also meet a specific educational purpose. Judicial educators should standardize time within formal education conferences for group reflection among the judge liaisons. Allowing the judges time to reflect will ensure that learning occurs and is distributed throughout the group.

CONCLUSION: “In good decision-making, questioning is always possible” (Baron, p. 217). We want judges to actively examine biases, particularly moral biases that may not otherwise be questioned, to ensure the best quality of justice available. We want judges to seek out information for and against a polarizing argument. Our processes should encourage education and self-reflection of moral beliefs through regular educational programs and through participation of judges in community groups working on complex social issues.

### The Role of Judges with Pro Se Litigants

Legislation throughout the country allows, and in some ways encourages, litigants to act pro se. In the case of domestic violence, judges are often put in the awkward role of entering stay away orders on the basis of a pro se, ex parte contact.

Judges have a duty to justice, a duty performed in the harbor created and maintained by judicial independence. When taking the oath of office, judges typically make a pledge or oath regarding justice, whether it is to “do justice,” to “seek justice,” or to “administer justice.”

The administration of justice “is a process designed to resolve human and societal problems in a rational, peaceful, and efficient manner” (American Bar Association 2004). At a minimum, pro se litigants are the embodiment of a human problem. With respect to

domestic violence, pro se litigants are the embodiment of both a human problem and a societal problem.

Judges commonly refer to the difficulties imposed by pro se litigants in domestic violence cases (Juhler 2004, focus group). The power imbalance between the parties creates a climate of fear that can impede a full, accurate disclosure of the facts (Bancroft 2003; Jacobson & Gottman, 1998; Herman, 1992). Further, victims experiencing traumatic reactions will frequently present fragmented and disorganized information (Herman, 1992). Decisions that can have life and death implications should be made with as much relevant information as possible.

In a domestic abuse case, when one or both parties are unrepresented, the judge should ensure that justice is done by eliciting information as necessary. When a judge questions a party or both parties, the judge will be fulfilling the purpose of the administration of justice by seeking information that is germane to decision-making.

Judges should ask questions of pro se litigants and, when fairness requires it, should ask questions of represented parties in addition the questions posed by the attorney. *See State v. Cuevas*, 288 N.W.2d 525 (Iowa 1980) (trial judge may ask questions of witnesses, but not assume the role of an advocate). *See generally* Kristine Cordier Karnezis, *Matter or Extent of Trial Judge's Examination of Witnesses in Civil Cases*, 6 A.L.R.3d 951 (1981).

**CONCLUSION:** The current judicial culture discourages judges from assisting pro se litigants. The administration of justice would benefit from limited assistance on the part of judges to elicit relevant information. Having sufficient information when domestic violence is alleged is particularly important since these decisions can readily take on life and death dimensions. Judges should be allowed to question pro se litigants to arrive at appropriate decisions that balance the need for protection with the rights of the alleged abuser. *See Marriage of Worthington*, 504 N.W.2d 147 (Iowa Ct. App. 1993) (judge may direct questions to witnesses as long as questioning is impartial and not prejudicial).

## RESOURCES

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## **Suggested Revisions to the American Bar Association Model Code of Judicial Conduct**

### **1.01 Observing Standards of Judicial Conduct.** (May 2004 draft of Canon 1)

Commentary:

[4] Deference to the judgments and rulings of courts depends upon public confidence in the integrity, independence, impartiality and accessibility of judges. The integrity, independence and impartiality of judges depends in turn upon their acting without fear or favor. A judiciary of integrity is one in which judges are known to the public and are known for their probity, fairness, honesty, uprightness, and soundness of character. The accessibility of judges depends upon their ability to interact with the general public without compromising judicial integrity, independence and impartiality. Public confidence in the impartiality, integrity and independence of the judiciary is maintained by judges who are seen acting in a manner free from favoritism, self-interest or bias. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

### **2.04 Impartiality and Fairness.** (May 2004 draft of Canon 2)

Commentary

[1] A judge must be objective and free of favoritism to ensure impartiality and fairness to all parties. While a judge's background and philosophy may influence the way in which the judge analyzes, interprets and applies the law, the judge's personal views, by themselves, should not be controlling. A judge must uphold the law without regard to whether the judge personally approves or disapproves of the law in question. Judges should set aside time to examine personal views and to uncover unconscious bias. Such activities will promote fairness and justice.

### **2.05 Bias and Discrimination.** (May 2004 draft of Canon 2)

Commentary

[4] A judge should take part in activities designed to uncover subconscious bias and to learn as much about how to understand the role of such bias in decision-making. Each judge must be diligent to a process of self-examination to minimize the impact of personal bias in the administration of justice.

### **Canon 4(C)(3).** (ABA Model Code of Judicial Conduct)

- c. A judge may serve as a liaison to a community group that is concerned with the administration of justice, even if members of the group appear regularly before the court so long as
  - i. The community group creates a forum for the administration of justice that is separate from other functional aspects of the group
  - ii. The community group solicits balanced representation from attorneys who represent advocacy positions
  - iii. The activities of the group look at trends with respect to the administration of justice and not at specific cases

- iv. The community group demonstrates an appreciation of the role and importance of judicial independence

#### Commentary

[1] When a judge acts as liaison to a community group to aid in the administration of justice, the judge should educate the community members about the role and function of the judiciary and special ethical issues that can limit judicial participation. Such efforts allow judges to be seen by the public and demonstrate the independence and integrity of the judiciary.

[2] A judge should not take part in a community group that seeks to improve only one advocacy position, for example a group that specializes in increasing the number of successful prosecutions.

[3] Lack of interest from attorney advocates does not have to limit judicial liaisons from participating in community groups. When a community group cannot engage balanced representation from attorneys, the group may set up a formal communication structure with appropriate attorney representatives and may send agendas and minutes in lieu of attendance and participation.

[4] If there are community groups that take opposing positions about the same legal issue, the judge liaison should attend both groups.