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RESEARCH ARTICLE

Speaking for Others from the Bench

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Abstract

In this article, I introduce and examine the novel concept of *bench representation*. Jurists and scholars have extensively examined whether judges are or ought to be considered symbolic representatives of abstract concepts (for instance, the law, equality, or justice), representatives of society as a whole, or descriptive representatives of the social groups from which they hail. However, little attention has been paid to the question whether judges act as representatives for the parties before them through their everyday work on the bench. This article examines that question. Bench representation occurs when a judge, through statements or actions undertaken during the performance of official duties, speaks or acts for a party to the proceeding before them. I argue that serving as a bench representative is a common and valuable feature of what it is to be a judge and, despite appearances, usually undermines neither impartiality nor fairness.

> Judges wield an awesome and final power over the liberty and property of their fellow citizens. . . . This power is tolerable in a democracy because judges speak only for reason and the law.
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> —*Matter of Brown*, 427 Mass. 146, 148–149 (1998)

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I give everybody a voice. I give defendants a voice, their families when they're here, I give victims a voice.
—Judge Rosemarie Aquilina, 30th Judicial Circuit Court, Ingham County, Michigan

I. Introduction

Bench representation has been in the spotlight in recent years. One judge, in particular, has been in the center of that spotlight: Judge Rosemarie Aquilina, who presided over Larry Nassar's sentencing hearing after he was convicted of sexually assaulting hundreds of young women athletes.[1] Throughout the course of the hearing, Judge Aquilina clearly, unambiguously, and intentionally aligned herself with Nassar's victims.[2] More than that, however, Judge Aquilina spoke for Nassar's victims from the bench. She regarded herself as both telling and enabling the telling of victims' stories.[3] By so doing, Judge Aquilina served as a bench representative for Nassar's many victims—giving voice from the bench to their pain and their anger on their behalves.

Many, particularly the media and a quickly built fan base, say that Judge Aquilina "reinvented what it is to be a judge."[4] But did she? The public attention drawn to this sentencing hearing makes bench representation seem like an outlier phenomenon, a radical departure from past practice. On closer examination, however, it does not seem to be.

[1]John Barr & Dan Murphy, *Larry Nassar Thinks Sentence for Sexual Abuse Too Harsh*, ESPN (Jun. 25, 2018), https://www.espn.com/olympics/story/_/id/24190850/larry-nassar-seeks-new-judge-new-sentencing-hearing; *Larry Nassar Case: USA Gymnastics Doctor 'Abused 265 Girls'*, BBC (Jan. 31, 2018), https://www.bbc.com/news/world-us-canada-42894833.

[2]Rachel Marshall, *The Moment the Judge in the Larry Nassar Case Crossed a Line*, Vox (Jan. 25, 2018), https://www.vox.com/the-big-idea/2018/1/25/16932656/judge-aquilina-larry-nassar-line-between-judge-advocate-sentencing ("'The monster who took advantage of you is going to wither, much like the scene in *The Wizard of Oz* where the water gets poured on the witch and the witch withers away.'"); *Larry Nassar Trial: Highlights from Judge Rosemarie Aquilina's Sentencing of Ex-USA Gymnastics Doctor*, NBC (Jan. 24, 2018), https://www.nbcnews.com/news/us-news/larry-nassar-trial-highlights-judgerosemarie-aquilina-s-sentencing-ex-n840726 ("'I wish my robe came with a magic wand so I can wave it over you and heal you . . . [b]ut that's fairy tales.'"); *id.* ("'And sir, the media has asked me to release your letter. I'm not going to do that. Counsel may object, the media may object. There is some information in this letter that troubles me in regard to the victims and I don't want them re-victimized by the words that you have in here, but I do want to read some of your letter and reason is because I considered it in sentencing as an extension of your apology and whether I believe it or not. So, I want you to hear your words.'").

[3]*Larry Nassar Trial: Highlights*, *supra* note 2 ("This story is not about me. It never was about me. . . . I'm not going to talk with any media person until after the appeal period. And even then, if you talk with me about this case, I will have survivor [sic] with me because it is their story. . . . thank you all for being here because it's an important story for the survivors.").

[4]Bonnie D. Ford, *Judgment Call*, ESPN (Jul. 12, 2019), http://www.espn.com/espn/feature/story/_/id/27156746/journey-judge-rosemarie-aquilina ("As she descended from the stage, Minnesota freshman Benjamin Scheffler, an aspiring law student and sexual abuse survivor, was waiting to introduce himself and have his picture taken with her. He had watched the broadcast of victim impact statements in Aquilina's courtroom, riveted by the survivors' bravery and the judge's message. 'For me, Judge Aquilina reinvented what it is to be a judge,' Scheffler says in a later phone interview. 'She didn't shy away from what needed to be said. I'm appalled at what people said about her overstepping her bounds. She was doing her job, and doing a pretty kick-ass job of it.'").

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Look in any courthouse and you will find a judge who, in their role as judge, represents one or another party to the adversarial proceedings before them. These judges speak or act for, instead of, or on behalf of the party—sometimes intentionally, although that need not be so for it to count as bench representation.

If you find yourself concerned at the suggestion that judges are (and, in some cases, are meant to be) representatives of the parties before them, you are not alone: "The importance of detachment, disinterest and impartiality to good judging is so deeply imbedded in our legal mythology that acknowledging judges as representatives can be perceived as a threat to the judicial function."[5] How, after all, could a judge both represent a party to the proceeding before them and remain an impartial arbiter of that same proceeding? How could bench representation be compatible with the fairness of legal proceedings? On first glance, bench representation has the appearance of partiality and seems to show unfair favor to one party or the other, rendering the practice antithetical to the core function of the judiciary. However, bench representation usually undermines neither impartiality nor the fairness of a proceeding. In fact, it can redound to the values the judiciary is meant to further.

That we can properly think of judges as representatives of one or another party to the proceeding before them does not, however, mean that all exercises of this practice are permissible. But the impermissibility of the representative practices in which judges commonly engage cannot be explained simply by pointing out that the practices are representative in nature. As I will show, some representative activities are part and parcel of what it is to fulfill the role of judge.

Developing a clear understanding of bench representation matters for at least three reasons. First, doing so sheds new light on an old question that arises for jurists and scholars alike: "Are judges representatives?" Second, doing so helps reframe the terms of an ongoing debate in judicial ethics concerning what judges may do to "ensure pro se litigants the opportunity to have their matters fairly heard"[6] by situating that debate in a more general juridical practice that is, by many accounts, unobjectionable. Third, we have an interest, generally, in coming to better understand the nature of the relationships in which we stand to people in positions of authority with respect to us, who wield state-sanctioned or other forms of power over us. These relationships often have untold complexities, one of which I explore in this article. Better understanding these relationships, in turn, helps us better understand ourselves as democratic citizens.[7]

In Section II, I discuss ways that courts and scholars have historically thought of judges as representatives. In Section III, I introduce and explain the concept of bench representation. In Section IV, I explore some novel normative considerations that emerge from looking at this underexplored but ubiquitous judicial practice. Section V concludes.

[5]Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. Rev. 95, 97 (1997).

[6]Model Code of Jud. Conduct r. 2.2 cmt. 4 (Am. Bar Ass'n 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/commentonrule2_2/.

[7]*See generally* Seana Valentine Shiffrin, Democratic Law (Hannah Ginsborg ed., 2021), https://doi.org/10.1093/oso/9780190084486.003.0002.

II. Judicial Representation, Generally

Whether, in what capacities, and by virtue of what judges are representatives are not new questions. In this section, I provide a brief overview of the different ways that courts and scholars have already conceived of judges as representatives. Of course, the concept of representation itself is not monolithic, and so it is no surprise that those who have given answers to the question "Are judges representatives?" make recourse to many different concepts of representation. To bring some order to courts' and scholars' many extant accounts of judicial representation and to provide a framework for thinking about bench representation, in particular, I draw on Hanna Pitkin's analysis of the concept of representation. Pitkin characterizes representation, generally, this way: "representation, taken generally, means the making present *in some sense* of something which is nevertheless *not* present literally or in fact."[8] Within this quite general characterization are more particular characterizations of what it means for one person, group, or thing to represent another person, group, or thing. Pitkin distinguishes symbolic representation, descriptive representation, substantive representation, and formalistic representation. To her schema, I add substitutive representation. I introduce characterizations of each of these forms of representation in this section. It is worth noting that, although these varieties of representation are conceptually distinct, they are not mutually exclusive. Often, several concepts of representation will apply to the same case.

A. Symbolic Representation

One symbolically represents another by standing in for that other in some way. So, for instance, "a flag represent[s] a nation" by making that nation present in some nonliteral sense.[9] Although "symbols do sometimes seem to share some characteristics with the things for which they stand. . . . [for instance,] the United States flag has fifty stars to correspond to the fifty states of the nation," symbolic representatives need not share characteristics with the thing, person, or group being represented—they may instead be arbitrary conventional symbols.[10]

It is common to think of the judge as a symbolic representative of various abstract concepts. Judges are characterized as representatives of the law,[11] justice,[12] "the majesty and the sanctity of the law. . . . the first line of defense locally of organized society

[8]Hanna Fenichel Pitkin, The Concept of Representation (1967), at 8–9.

[9]*Id.* at 92.

[10]*Id.* at 94–96.

[11]Chisom v. Roemer, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting) ("the judge represents the Law—which often requires him to rule against the People"); Smith v. Boyle, 959 F. Supp. 982, 988 (C.D. Ill. 1997) ("judges represent and uphold the law").

[12]*See, e.g.*, Marsha S. Stern, *Courting Justice: Addressing Gender Bias in the Judicial System*, 1996 Ann. Surv. Am. L. 1, 57 n.62 (1996) ("judges represent justice"); Jeffrey Jenkins, The American Courts: A Procedural Approach (2011), https://www.google.com/books/edition/The_American_Courts/_kxSS7_mQrcC?hl=en&gbpv=1, at 142 ("To most people, judges represent justice."); Prosecutor v. Ayyash, Merhi, Oneissi, and Sabra, Case No. STL-11-01, Public Transcript of Hearing, Closing Submissions by the Merhi Defence (Open Session), p. 104 (Sept. 18, 2019), https://www.stl-tsl.org/crs/assets/Uploads/20180918-STL-11-01-T-T441-OFF-PUB-EN-CT1-1-121.pdf ("The Chamber, the Judges represent justice.").

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against vice, corruption and crime, and the sinister machinations of the underworld,"[13] or, simply, "'nothing except the abstract ideas of equity and justice.'"[14] Sometimes, they are thought to be synecdochic for the state or judicial branch of government as a whole.[15]

But what, in fact, does it mean to say that a judge symbolically represents an abstraction? For a judge to represent in this sense is to "embody[ ] the values of a society"[16] and embodying values, in turn, means acting in accordance with those values and being free from any restraints that would prohibit so doing.[17] Whether a given entity or person symbolically represents is determined by "beliefs and attitudes . . . of an audience, or a group which either believes or does not believe in the symbolic representation enacted before it."[18]

B. Descriptive Representation

A person, group, or thing may instead represent another by resembling that other—by being like them in some respect that is relevant to the context of the representation.[19] The question whether and to what extent judges should be descriptive representatives of various subgroups within a given society so that the judiciary as a whole reflects the diverse identities and lived experiences of that society is widely discussed.[20] (It has also been pointed out that judges are, inescapably, descriptive

[13]Pennekamp v. State of Fla., 328 U.S. 331, 339 (1946) (quoting *Editorial*, Miami Herald (Nov. 2, 1944) ("Courts are Established—For the People").

[14]Republican Party of Minn. v. Kelly, 247 F.3d 854, 888 (8th Cir. 2001) (Beam, J., dissenting) (quoting Mr. Setzer, *Debates & Proceedings of the Constitutional Convention for the Territory of Minn.* (1858) (hereinafter "*Republican Debates & Proceedings*"), at 495–496).

[15]*See, e.g.*, ODonnell v. Harris Cty., Texas, 227 F. Supp. 3d 706, 747 (S.D. Tex. 2016) ("In this case, under the facts that the plaintiffs plausibly alleged, the Harris County Criminal Courts at Law Judges represent the State of Texas in enforcing article 17.15 of the Texas Code of Criminal Procedure, and they represent Harris County in making rules for, and in enforcing customs or practices on, bail procedures in the Harris County Courts."); Mori v. E. Side Lenders, LLC, No. 11 C 01324, 2015 WL 13654184, at *4 (N.D. Ill. Mar. 24, 2015) ("Judges represent the judicial branch of government and are sworn to uphold the constitution and laws of the forum.").

[16]Pitkin, *supra* note 8, at 117.

[17]*Id.* at 118.

[18]*Id.* at 105.

[19]*Id.* at 60–91.

[20]*See, e.g.*, League of United Latin American Citizens v. Clements, 902 F.2d 293, 307 (5th Cir. 1990) (hereinafter "*LULAC I*") ("There is a conceptual problem with viewing district judges as members of a multi-member body. Before any suits are filed, before any cases are assigned, there is a group of judges with concurrent jurisdiction, and plaintiffs maintain that this group should have minority members, so that minorities' views and concerns are considered by the judges who decide important issues in their lives. The problem is that once a case is assigned, it is decided by only one judge. The other judges have absolutely no say over the disposition of that case, and no influence over the deciding judge. One commentator has described the Texas system as a 'one-judge, one court organization at the trial level, with rigid jurisdictional lines and with each judge largely independent of any supervisory control, except by way of appellate review.'") (citing Clarence A. Guittard, *Court Reform Texas Style,* 21 Sw. L.J. 451, 455 (1967)); Ming W. Chin, John Charles Daly (moderator), Griffin Bell, Walter Berns, Sheldon Goldman & Orrin G. Hatch, Whom Do Judges Represent?, AEI Forums (1981); *Keynote Address: "Fairness or Bias?: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary"*, 4 Asian L.J. 181, 181 (1997); Suzanne Dovi & Francy Luna, *Women "Doing" the Judiciary: Rethinking the Justice Argument*

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representatives of at least one sector of any society—namely, the educated elite.[21]) However, one may be a descriptive representative by virtue not only of one's group membership or characteristic similarity to some members of one's society. Descriptive representation, in its broadest meaning, is simply "a giving of information about."[22] So, we may also think of those who serve as mouthpieces or spokespersons for others as descriptive representatives of those others.[23] This broader sort of descriptive representation—being a conduit of information about another—will be important to our discussion of bench representation in the next section.

C. Formalistic Representation

Representation is also sometimes thought of not in terms of what the representative is (a symbol, say) nor in terms of what a representative does (gives information, say), but instead in terms of how a party comes into the position. These formalistic accounts of representation answer the question whether a party is a representative affirmatively when that party "has been authorized to act"[24] for another, "will have to answer to another for what he does,"[25] or both. For the authorization theorist, one becomes a representative when and because they are granted authority—for instance, "a man represents because he has been elected at the outset of his term of office."[26] For the accountability theorist, "a representative is someone who is to be held to account, who will have to answer to another for what he does."[27] Pitkin herself identifies judges as representatives in this sense: "From a formalistic

for Descriptive Representation, 8 Pol., Grps., & Identities 790 (2020); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405 (2000); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. Rev. 95, 99 (1997); Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 Md. L. Rev. 150 (1999); Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 Mich. J. Race & L. 101 (2004); Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. Rev. 1206, 1247 (2006); Sandra Day O'Connor, *Thurgood Marshall: The Influence of A Raconteur*, 44 Stan. L. Rev. 1217 (1992); Wendy Salkin, *Judicial Representation: Speaking for Others from the Bench*, *in* Disability, Health, Law, and Bioethics 211–220 (I. Glenn Cohen, Carmel Shachar, Anita Silvers & Michael Ashley Stein eds., 2020), https://doi.org/10.1017/9781108622851.023; Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 Stan. L. Rev. 1215, 1215–1216 (1992) ("While every new Justice makes the Court a somewhat different institution, [Justice Thurgood Marshall] brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. [Justice Marshall] could tell us the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past. He characteristically would tell us things that we knew but would rather forget; and he told us that we did not know due to the limitations of our own experience.").

[21]Seltzer v. Foley, 502 F. Supp. 600, 604 (S.D.N.Y. 1980) ("lawyers, expert witnesses and judges represent groups of professionals who have had at least 15 to 20 years of formal classroom education").

[22]Pitkin, *supra* note 8, at 84.

[23]*Id.* at 82–84.

[24]*Id.* at 38.

[25]*Id.* at 55.

[26]*Id.* at 56.

[27]*Id.* at 55.

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standpoint, a judge is an agent of the state like all government officials. His pronouncements are not private expressions of opinion, but official utterances of the state. Hence he represents the state. In a democracy where all agencies of the government are servants of the sovereign people, the judge might be said to represent the people."[28]

United States courts have faced more difficulty dispositively answering the question whether judges are representatives in this formalistic sense. In recent American jurisprudence, the general question "Are judges representatives?" has been treated as elliptical for the narrower question, "Are judges representatives in the way that legislators are representatives?" To answer this narrower question, some courts, looking at the formal elements of the judicial office, suggest that judges are representatives in the way legislators are insofar as judges are authorized directly by voters or mediately by their democratically authorized appointers,[29] or instead insofar as they are accountable to their electors.[30]

Others draw a line between judges and legislators: "Manifestly, judges . . . are not representatives in the same sense as are legislators or the executive."[31] Explaining this difference, courts point to various considerations, including the sui generis role of the judge as "an essential bulwark of constitutional government, a constant guardian of the rule of law,"[32] their independence from the pressures of the popular

[28]*Id.* at 116–117.

[29]The *LULAC I* court stated:

> [A]t one level of generality judges are representatives. The history of electing judges and the political impulses behind that choice are powerful evidence of considered decisions to keep judges sensitive to the concerns of the people and responsive to their changing will, an endeavor hardly antithetical to common law courts. . . . [T]his reality belies the bold assertion that judges are in no sense representatives. . . . It is contended that judges are oath bound to obey the law and fairly decide in an impartial manner, and thus are not representatives. Yet, executive officials, who are considered representatives, are bound by the same oath. While judges are indeed far removed from the logrolling give and take of the legislative and even executive processes, the effort to assure "sensitivity" and "accountability" through elections is no more than an insistence that the judges represent the people in their task of deciding cases and expounding the law. State judges, wearing their common law hats, face decisions such as whether to adopt a comparative fault standard, and in doing so represent the people in a very real sense. At least at this level of generality judges are indisputably representatives of voters. Saying so in no way steps on the equally indisputable difference between judges and other representatives—that judges do not represent a specific constituency. . . . [A]lthough the office is certainly not representative in every sense, elected judges nonetheless reflect the views of the electors choosing them to be responsible for administering the law.
>
> *LULAC I*, 902 F.2d 293, 295–299 (5th Cir. 1990).

[30]*Id.* at 308 ("elected judges are representatives in that they are accountable to a constituency of electors").

[31]Stokes v. Fortson, 234 F. Supp. 575, 577 (N.D. Ga. 1964); *see also* Republican Party of Minn. v. Kelly, 247 F.3d 854, 897 (8th Cir. 2001) (Beam, J., dissenting) ("Many courts have noted, and I agree, that judges differ from other officials."); Siefert v. Alexander, 608 F.3d 974, 993 (7th Cir. 2010) ("It would be folly, of course, to ignore the reality that elected judges are different from elected legislators and executives.").

[32]Republican Party of Minn. v. White, 536 U.S. 765, 804 (2002) (Ginsburg, J., dissenting); *see also id.* at 803 (Ginsburg, J., dissenting) (distinguishing judges from other elected representatives) ("judges perform a function fundamentally different from that of the people's elected representatives"); *id.* at 807 (Ginsburg, J., dissenting) (describing "the magisterial role judges must fill in a system of justice, a role that removes them from the partisan fray").

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will,[33] the fact that some judges are appointed rather than elected,[34] and the ordinary meaning of the term "representative."[35]

D. Substantive Representation

A person or group may substantively represent a person, group, or entity. Substantive representation occurs when (i) the representative party acts "in the interest of the represented, in a manner responsive to them," (ii) the representative party acts independently, using their own "discretion and judgment," (iii) the representative party acts

[33]*Id.* at 804 (Ginsburg, J., dissenting) ("owing fidelity to no person or party"); *see also id.* at 803–806 (Ginsburg, J., dissenting) ("Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. . . . A judiciary capable of performing this function, owing fidelity to no person or party, is a 'longstanding Anglo–American tradition' . . . . They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. . . . judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public."); Republican Party of Minn. v. Kelly, 247 F.3d at 897 (Beam, J., dissenting) (quoting Mr. Setzer, *Republican Debates & Proceedings*, at 495–496) ("'The great object of an appointed Judiciary, is to secure stability upon the part of the government, by having a power within the State conservative enough to restrain the waves of popular excitement, when they sweep over us as they have done in different States for years past. . . . Judges represent no constituency and are elected by no constituency.'"); League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620, 622 (5th Cir. 1990) (hereinafter "*LULAC II*") ("characterizing the functions of the judicial office as representative ones is factually false—public opinion being irrelevant to the judge's role, and the judge's task being, as often as not, to disregard or even to defy that opinion, rather than to represent or carry it out"); Mallory v. Ohio, 38 F. Supp. 2d 525, 534 (S.D. Ohio 1997) ("Judges are not 'representatives' in the sense that they will represent the will of the electors. Judges cannot and should not cater to a particular 'constituency.'"); Milwaukee Branch of N.A.A.C.P. v. Thompson, 935 F. Supp. 1419, 1430 (E.D. Wis. 1996) ("Trial and appellate court judges are not elected to be responsive to their voters nor are they expected to advance the agenda of any particular interest group."); Bradley v. Work, 916 F. Supp. 1446, 1467 (S.D. Ind. 1996) ("judges are not elected to be responsive to constituents, nor are they expected to pursue an agenda on behalf of a particular group"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989) ("Judges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will.") (quoted in *White*, 536 U.S. at 804 (Ginsburg, J., dissenting)).

[34]*LULAC II*, 914 F.2d at 631 ("the state processes for filling [judicial offices] need not even be elective, as those for all representative offices presumably must be").

Others have instead preferred to conclude from the fact that *some* judges are elected that *at least those judges* are representatives. *See* Chisom v. Roemer, 501 U.S. 380, 399–401 (1991) ("We think, however, that the better reading of the word 'representatives' describes the winners of representative, popular elections. If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered 'representatives' simply because they are chosen by popular election, then the same reasoning should apply to elected judges. . . . The word 'representative' refers to someone who has prevailed in a popular election, whereas the word 'candidate' refers to someone who is seeking an office. . . . Indeed, at one time the Louisiana Bar Association characterized the members of the Louisiana Supreme Court as representatives for that reason: 'Each justice and judge now in office shall be considered as a representative of the judicial district within which is situated the parish of his residence at the time of his election.'"); Bradley v. Work, 916 F. Supp. at 1454 ("A representative has been defined as anyone selected or chosen by popular election from among a field of candidates to fill an office, including judges.").

[35]Chisom v. Roemer, 501 U.S. at 410 (Scalia, J., dissenting) ("There is little doubt that the ordinary meaning of 'representatives' does not include judges, see Webster's Second New International Dictionary 2114 (1950)."); *contra LULAC I*, 902 F.2d at 299 ("the term 'representatives' . . . does not unambiguously exclude judges").

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in a manner that does not normally conflict "with the wishes of the represented" (and when there is conflict, there must be "good explanation of why their wishes are not in accord with their interest"), and (iv) the represented are themselves "capable of independent action and judgment," and are "not merely being taken care of" by the representative party.[36] Responsiveness is explained in terms of what guides the actions of the representative party: "one represents whatever guides one's actions."[37] So, part of what it is to substantively represent is to be bound by the action-guiding features of whatever it is that one represents—that is, the represented's reasons and whatever else might inform these (including the represented's values, interests, and preferences as well as any commitments between the representative and the represented).

Judges are often conceived as representatives in this sense: "judges . . . represent interests other than their own."[38] Invoking a tone of political realism, courts and scholars alike have thought that judges, and elected judges in particular, are substantive representatives of the popular will precisely because they are, it is said, beholden to act in a manner responsive to group pressures: "so far from being a sort of legal machine, they are a functioning part of this government, responsive to group pressures within it, representative of all sorts of pressures, and using their representative judgement to bring these pressures to balance, not indeed in just the same way, but on just the same basis, that any other agency of government does."[39] Some pair this observation with a prescription, claiming that judges are not just in fact responsive to the popular will, but should be.[40]

But a judge may also be a substantive representative by virtue of being independent of the popular will: "A judge who represents justice is one whose actions are governed by or in accord with justice (which requires that he be free from other restraints)."[41]

E. Substitutive Representation

We may also think of representation as acting for another in the sense of being a substitute for them. However, there is a distinction between mere substitution and substitutive representation. In mere substitution, "the one replaced is not held responsible for the conduct of his substitute."[42] By contrast, substitutive

[36]Pitkin, *supra* note 8, at 209–210.

[37]*Id.* at 117.

[38]Robert E. Keeton, Keeton on Judging in the American Legal System (1999), at 5; *see also* Philip Pettit, *Varieties of Public Representation*, *in* Political Representation 61, 69–70, 77 (Ian Shapiro et al. eds., 2010).

[39]Arthur F. Bentley, The Process of Government (1949), at 393 (quoted in Pitkin, *supra* note 8, at 117); *see also* Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("This complete separation of the judiciary from the enterprise of 'representative government' might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well."); Chisom v. Roemer, 501 U.S. at 400–401 ("The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.").

[40]*See LULAC I*, 902 F.2d, at 295–299.

[41]Pitkin, *supra* note 8, at 118.

[42]Pitkin, *supra* note 8, at 132.

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representation requires not merely that one person acts in place of another, but also that the substituted party will still be responsible for the conduct of the substituting party.[43]

At least two varieties of substitutive representation are relevant here. In some cases, the substitution is of one party for another (*role substitution*). In other cases, what is substituted is not one party for another but the judgment of one party for the judgment of another (*judgment substitution*).[44] Judges are commonly thought to be role substitutive representatives of others—the judge stands in for the state and, in democracies, for the people, too.[45] As to the second sense of substitutive representation—judges are commonly characterized as substituting their judgment for ours: "U.S. Supreme Court Justice Harlan F. Stone once wrote that the considered decisions of judges 'represent the sober second thought of the community, which is the firm base upon which all law must ultimately rest.'"[46]

F. Taking Stock

For all the many ways that judges are considered representatives—those discussed here as well as those I have surely forgotten—a judicial representative role has been

[43]Bernard Diggs articulates the distinction between mere substitution and substitutive representation (as I call it) this way: "Most commonly a substitute takes another's place in such a way as to exclude the other, at least temporarily; the job is now the substitute's job, not the regular's job. A representative, on the other hand, if he is not a representative in name only, acts in place of another without excluding him; although he is not the principal, he 'stands for' the principal; the principal is 'present through him.'" Bernard J. Diggs, *Practical Representation*, *in* Representation 28, 35 (Roland Pennock & John Chapman eds., 1968), https://doi.org/10.4324/9781315128450. Although Pitkin does not explicitly identify a category of representation as "substitutive representation," she discusses various relationships between representation and substitution. Pitkin, supra note 8, at 119–121, 124, 126–127, 131–135, 139–141, 143, 146, 191, 207, 212, 241, 243, 247–248, 250.

[44]Judgment substitution is core to the trusteeship conception of representation often associated with Edmund Burke, who described the role of the representative this way: "[H]is unbiassed opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. . . . Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion." Edmund Burke, *Speech to the Electors of Bristol*, *in* The Founders' Constitution ch. 13, doc. 7 (Philip B. Kurland & Ralph Lerner eds., 1987), http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html.

It may also be helpful to think of judgment substitutive representation as a form of gyroscopic representation, according to which "the representative looks within, for guidance in taking action, to a contextually derived understanding of interests, interpretive schemes ('common sense'), conscience, and principles. . . . In this form of representation, the representative does not have to conceive of him or herself . . . as 'acting for' [the represented]. . . . Gyroscopic representation stresses the representative's own principles and beliefs." Jane Mansbridge, *Rethinking Representation*, 97 Am. Pol. Sci. Rev. 515, 520–522 (2003). Categorizing judgment substitutive representation as a form of gyroscopic representation concords with the claim that judgment substitution is core to the Burkean trustee conception of representation because, as Mansbridge states, "Burke's 'trustee' conception . . . comprises one subset within the larger concept of gyroscopic representation." *Id.* at 522.

On judicial representation and judgment substitution, see also Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 Ann. Rev. Pol. Sci. 387, 398 (2008).

[45]Pitkin, *supra* note 8, at 117.

[46]State v. Azevedo, No. FBTCR13270435T, 2015 WL 5626280, at *11 (Conn. Super. Ct. Aug. 21, 2015) (quoting Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 25 (1936)).

left out. It is a role more immediate and quotidian than any of those so far considered. And, to see it, we need not pore over obscure legislative histories found in the annals of the Minnesota State House.[47] We need only reflect on the everyday work of the judiciary. It is my aim in the rest of this article to provide a characterization of that role—*bench representative*—and to motivate why we should care about it.

III. Bench Representation

Bench representation occurs when a judge, through statements or actions undertaken during the performance of their official duties (for instance, in an opinion, at a hearing, or during oral argument), speaks or acts on behalf of a particular individual or group who is party to the proceeding before them. Occasionally, the practice will evoke shock and concern, seeming to violate fundamental canons of judicial ethics —considerations to which I return in the next section. More often, however, the judge speaks or acts for the parties before them in routine, workaday contexts so subtle they elude notice. Bench representation is among the most obvious yet least recognized ways that judges represent us.

Perhaps it is unsurprising that bench representation has been overlooked. In fact, I suspect that the proposal that judges represent the parties before them in a proceeding will strike representation theorists and jurists alike as heterodox. A cursory look at the index of Pitkin's seminal work, *The Concept of Representation*, reveals her skepticism: "Judge as representative . . . not of parties before him, 52-53."[48] Yet, closer examination of these pages shows that Pitkin does not wholly rule out the possibility that a judge might represent one or more of the parties before them. Instead, she merely places a constraint on what may count as bench representation: "Not every ascription of the normative consequences of A's actions to B is an occasion for saying that A represents B."[49] For it to be the case that A represents B, not only must the normative consequences of A's actions be ascribed to B, the actions that brought about those normative consequences themselves must be ascribed to B as though B had performed them.[50] To illustrate this point, Pitkin contrasts a judge who issues an injunction that binds a union with a union negotiator who agrees to a contract that binds the union. Although both actions (enjoining; agreeing) will have normative consequences for the union, the latter but not the former is representative in nature. The normative consequences of the judge's injunction are ascribed to the union, but the issuance of the injunction itself is not. By contrast, both the normative consequences of the negotiator's agreement to the contract and the agreement to the contract itself are ascribed to the union.[51] "[T]he ascription of the action is what is fundamental here; the ascription of consequences is but one kind of occasion or reason for ascribing an action whose consequences normally would fall on the actor himself."[52]

[47]Republican Party of Minn. v. Kelly, 247 F.3d 854, 888 (8th Cir. 2001) (Beam, J., dissenting) (quoting Mr. Setzer, *Republican Debates & Proceedings*, 495–496).

[48]Pitkin, *supra* note 8, at 318.

[49]*Id.* at 51.

[50]*Id.* at 52.

[51]*Id.* at 52.

[52]*Id.* at 52.

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We can easily accommodate Pitkin's constraint and still reach the conclusion that, in the course of their everyday undertakings, judges represent the parties before them from the bench.

A. Key Components of Bench Representation

What does it mean to say that a judge represents at least one of the parties before them during adversarial proceedings? All instances of representation have at least these components: (1) a representative, (2) a represented party, (3) the context in which the representation takes place, (4) an audience before which the representation takes place, and (5) the content of the representation.[53]

Bench representation has a few starting points that are fixed simply by stipulation. (1) The judge is the representative. (2) The represented party is a party to the adversarial proceeding. (3) The immediate context in which the representation takes place is the court proceeding within which the judge and adversaries find themselves. However, there will often be further contexts that are extensions of this immediate context—namely, the elements of the court record generated by the court itself during or subsequent to the proceeding, which can include, for example, transcripts, notices, orders, judgments, decrees, decisions, rulings, opinions, memoranda, warrants, writs, and subpoenas. (4) Bench representation can take place before a wide variety of audiences. Audiences who will be common across cases of bench representation include the adversaries, their lawyers, and the court itself (an entity distinct from the particular individual judge who presides in that court). Other common audiences include jurors, clerks, witnesses, victims, and members of the media. When the court proceedings are televised or otherwise publicly transmitted, audiences may also include anyone who has tuned in. (5) The content is that which the judge says or does on behalf of the party to the court proceeding.

But, what are the activities in which judges engage such that it is apt to say that they represent a party to the proceeding before them? Like representation generally, bench representation is not a monolithic category. There are a variety of activities in which judges routinely engage in the course of their everyday work that are aptly characterized as representative. Here, I apply several of the concepts of representation introduced in the previous section.

B. Descriptive Representation

There is, first, a rather uninteresting way that all judges represent all parties who come before them in a proceeding—at least when those proceedings eventuate in the issuance of a court opinion. On one way of conceiving of representation, representation occurs when some party (the representative) conveys information from another party (the represented) to a third party (the audience). On this view,

[53]I have adapted and modified this list from Suzanne Dovi's helpful enumeration of the "Key Components of Political Representation." Suzanne Dovi, *Political Representation*, *in* Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2018), https://plato.stanford.edu/entries/political-representation.

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"[r]epresenting means giving information about the represented; being a good representative means giving accurate information."[54] Judges engage in this sort of *mouthpiece representation* when they recapitulate or abridge parties' arguments in their written opinions. Here, the judge simply transmits information from the party—their arguments—to any audience who reads or otherwise encounters the court's opinion. Key features of this sort of bench representation are these: First, the standard for the success of such representation is its accuracy. Second, while this may be an uninteresting and relatively straightforward sort of representation, it plays a role in one of the most important judicial functions—the writing and (in some cases) publication of opinions, which "memorialize judicial decisions so they can function as authoritative statements of law governing the resolution of future cases."[55]

In other cases, judges do not merely report or recapitulate the words a party has in fact said, but engage instead in an interpretation or translation—what a party would have said (if they could) or should have said (were they trained in the law). Below, I discuss paradigmatic examples of this sort of bench representation: entering pleas on behalf of nonpleading or creatively pleading defendants and liberally construing the pleadings of pro se litigants.

In both cases—*mouthpiece representation* and *interpretive representation*—the judge is a conduit of information between the represented party and the court (along with any further audiences).

1. Entering Pleas on Behalf of Defendants

In trial-level criminal proceedings in the United States, judges are legally required to enter a plea of "not guilty" on behalf of a defendant who either refuses to enter a plea or fails to appear in court.[56] Similarly, judges tend to interpret and enter creative pleas as pleas of "not guilty."[57] As with *mouthpiece representation*, the judge who enters the plea of "not guilty" on behalf of the nonpleading or creatively pleading defendant provides information from the defendant to the court record and, so, to any audiences who will read that court record in the future. By contrast with *mouthpiece representation*, the judge has clearly not served as a mere mouthpiece. Rather, the judge has formulated the defendant's plea (in the case of a nonpleading defendant) or reformulated the defendant's plea (in the case of a creatively pleading defendant) so that it conforms to the permissible pleading standards of the court.

One may be tempted to say that this is not really representation. Rather, the law requires and expects judges to preserve the accused's presumption of innocence.

[54]Pitkin, *supra* note 8, at 83.

[55]Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 Geo. L.J. 1283, 1317 (2008).

[56]Fed. R. Crim. P. 11 ("If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty."). This is surely preferable to the prior practice of subjecting uncooperative defendants to *peine forte et dure* until they entered a plea or were pressed to death while refusing to do so. *peine, n.*, Oxford English Dictionary (September 2022), OED Online, https://www.oed.com/view/Entry/139782.

[57]*Questions and Answers about Civil Disobedience and the Legal Process*, NLG-LA, https://web.archive.org/web/20110727003254/http://www.nlg-la.org/index_files/cd_questions.pdf.

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Judges do so in such cases by entering a "not guilty" plea on the defendant's behalf. But the judge is just following the law.

Although it is true that the judge in such cases is just following the law, that does not mean that what the law requires of them is not a form of representation—representation of an admittedly limited and nondiscretionary sort but representation, nonetheless.

2. Liberally Construing the Pleadings of Pro Se Litigants

In Haines v. Kerner, the United States Supreme Court guaranteed pro se litigants (those proceeding without counsel) "the right to have courts liberally construe their pleadings."[58] While "a court is not required to divine every conceivable interpretation of a motion,"[59] it is "instructed to look to the substance rather than the label of a pro se pleading in order to determine if the petitioner may be entitled to relief,"[60] must give the pleading "every reasonable intendment,"[61] and must view the pleading in a manner "favorabl[e] to the pleader."[62] The judge's aim is to search the pleading for "a justiciable claim for relief."[63] As Rule 8I of the Federal Rules of Civil Procedure requires, "[p]leadings must be construed so as to do justice."[64] Liberal construction of pleadings is not optional: "A court abuses its discretion if it construes a filing by a pro se litigant in a manner that prevents the litigant from proceeding, when a reasonable, liberal construction of the document would permit the litigant to do so."[65] When the judge construes the pro se litigant's pleading liberally, they apply their legal expertise, experience, and acumen to the pleading on behalf of the pro se litigant—in effect representing the pro se litigant (represented party) to the court and any future parties who will consult the court's record of the case (audiences).

[58]Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. Chi. L. Rev. 659, 671 (1988); *see* Haines v. Kerner, 404 U.S. 519, 520–521 (1972) ("[A]llegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"); *see also* Erickson v. Pardus, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed . . . and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. Cf. Fed. Rule Civ. Proc. 8(f) ('All pleadings shall be so construed as to do substantial justice').") (internal citations omitted); Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("The handwritten pro se document is to be liberally construed. As the Court unanimously held in Haines v. Kerner . . . a pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears '"beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."'") (internal citations omitted).

[59]State v. Redding, 310 Kan. 15, 444 P.3d 989 (2019).

[60]Mikrut v. State, 569 N.W.2d 765, 768 (Ct. App. 1997).

[61]Brandon v. Humana Hosp.-Huntsville, 598 So. 2d 950, 951 (Ala. Civ. App. 1992).

[62]Bishop v. Cir. Ct. of Cole Cty., 702 S.W.2d 554, 556 (Mo. Ct. App. 1985).

[63]Tyler v. Whitehead, 583 S.W.2d 240, 242 (Mo. Ct. App. 1979).

[64]Fed. R. Civ. P. 8.

[65]61A Am. Jur. 2d *Pleading* §86 (2023).

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One may be tempted to say that this is a real stretch: thinking of a judge as a representative of a pro se litigant when they construe the litigant's pleadings liberally is to entertain a deceptive fiction that the court, conceived as an audience, is something other than the judge themself.

However, there is no reason to think that a representative party and an audience have to be different individuals, so long as they are performing two different functions when inhabiting the two different roles. The same judge can simultaneously be the representative of the pro se litigant when they liberally construe the litigant's pleadings and the audience insofar as the judge is the party presiding in the court. In fact, it is dangerous and in any case incorrect to think of the judge as themself the court rather than the party who fulfills the institutional role of the court in a given instance—to confuse the individual judge and the court they oversee is to suggest that judges engage in personal rule rather than serving as facilitators of the rule of law.

Even so, one may then raise a similar question to the one raised above about the entry of "not guilty" pleas: Is the judge in this case, too, not simply following the law when they give the pleading every reasonable intendment?

Again, the fact that the judge is following the law does not preclude the possibility that what the law requires of them is precisely to represent the litigant to the court. Here, we may employ the substantive sense of representation: part of what it is to substantively represent is to be responsive to (and so bound by) whomever or whatever it is one represents. So, (i) the judge descriptively represents the pro se litigant by interpreting the litigant's statements and accurately expressing those statements as interests that are cognizable as legal claims to the court and (ii) the reason the judge does so is that they substantively represent the law—the judge "is bound to apply the law; hence it is the law he represents."[66]

However, even granting that the entry of "not guilty" pleas and the liberal construction of pro se litigants' pleadings are both forms of representation, they are admittedly forms of bench representation of not very interesting sorts. They are non-discretionary and limited in their scopes. However, it is important to have them in view in order to have a complete sense of all the judicial activities that fall within the ambit of the concept *bench representation*. (And, even if we ultimately decide that they are not themselves properly conceived as forms of representation, both share features in common with other, central cases of bench representation, and so deserve consideration by virtue of their family resemblance to these.) To bring out the relationships between these less interesting examples and those that are more interesting, consider next some discretionary judicial activities that seem much more straightforwardly to be instances of representation.

C. Substantive Representation

Judges sometimes serve as substantive representatives of one or more of the parties to a proceeding. This means at least that (i) the judge acts in the interest of the party to the proceeding, (ii) the judge acts in a manner that is responsive to the party, (iii) the judge acts in accordance with their own discretion or judgment (not as a mere

[66]Pitkin, *supra* note 8, at 117.

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mouthpiece for the party), and (iv) the party must be conceived as capable of independent action and judgment—they are not a mere charge or ward of the judge.

One form of judicial activity, in particular, is a paradigmatic example of substantive bench representation: judges' assistance to pro se litigants. Although proceedings involving pro se litigants will strike some as exceptional, they are in fact very (and increasingly) common, both because hiring a lawyer can be prohibitively expensive and because "[t]he majority of prisoner petitions are filed pro se."[67]

Although judges are required to construe the pleadings of pro se litigants liberally, they are permitted to do much more: they may, for instance, question pro se litigants to help those litigants "present the evidence necessary for the court to make a decision,"[68] explain points of procedure, allow amendments to filings so that the filings conform to the court's requirements. Some judges "assist pro se litigants with the presentation of their claim or defense, and 'protect' the pro se litigant who is being taken advantage of by an attorney."[69] Two pro se assistance activities, in particular, fall squarely within the ambit of substantive representation. First, "[t]o take testimony, some judges ask questions of the witnesses themselves"[70]—an activity that would otherwise be performed by the pro se litigant themself or, had the litigant counsel, their lawyer. Second, some judges assist pro se litigants in the presentation of evidence by raising objections on behalf of those litigants.[71]

Some judges are not especially keen to regard their activities as representation. According to one judge surveyed on the matter: "'Attorneys get impatient and act as if the court is trying to represent the pro se—which I am not trying to do.'"[72] However, when judges question witnesses or raise objections on behalf of pro se

[67]*Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. Courts (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019. On the significant increase in pro se litigation, *see also* Beth Henschen, *Judging in a Mismatch: The Ethical Challenges of Pro Se Litigation*, 20 Pub. Integrity 34, 34 (2018); Marla N. Greenstein, *Judges' Responsibilities to Pro Se Litigants*, 47 Judges' J. 46, 46 (2008) ("[T]oday's economic realities for the average party to a divorce, minor civil suit, or small business dispute do not easily allow for paid professional counsel.").

[68]Lara Czajkowski Higgins, *On Pro Se Litigants: Three Judges' Views*, 90 Wis. Law. 40, 42 (Mar. 2017); In Turner v. Rogers, the United States Supreme Court stated that "an opportunity at the hearing for [the defendant] to respond to statements and questions about his financial status" was among procedural safeguards that could "significantly reduce the risk of an erroneous deprivation of liberty."[68] 564 U.S. 431, 447 (2011). Scholars have interpreted this to mean that the *Turner* Court "holds that judicial intervention is appropriate and sometimes necessary to ensure due process in self-represented cases" (Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of* Turner v. Rogers, 50 Judges' J. 16, 21 (2011)) and that "*Turner* requires judges to actively question and assist self-represented litigants in child support cases in which the defendant faces imprisonment for civil contempt" (Daniel Curry, *The March Toward Justice: Assessing the Impact of* Turner v. Rogers *on Civil Access-to-Justice Reforms*, 25 Geo. J. Legal Ethics 487, 498 (2012)).

[69]Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 Judicature 13, 19 (1998).

[70]*Id.*

[71]*Id.* ("As to handling pro se litigants during trial, many judges said they briefly explain trial procedures to self-represented litigants before the hearing, including the manner of presentation of evidence, the hearsay rule, marking exhibits, and other procedural matters. Some provide this explanation a week or more before trial. Other judges' policy is to presumptively admit all evidence, subject to stated objections. Judges themselves sometimes raise objections.").

[72]*Id.* at 18.

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litigants, they are clearly serving as substantive representatives of those litigants: (i) The judge acts in the interest of the litigant by soliciting evidence that will help further the litigants' case (witness questioning) or by protecting the litigant from the introduction of evidence by the opponent that would not otherwise be permitted (raising objections). (ii) The judge acts in a manner responsive to the pro se litigant: the judge questions witnesses in order to advance the proceedings that the litigant either themself initiated or was hauled into court to address; the judge raises objections to ensure that the litigant is not specially disfavored in the proceeding by virtue of their lack of legal training—said the same surveyed judge, "'I want the pro se to feel they got a fair trial.'"[73] (iii) The judge clearly acts in accordance with their own discretion or judgment—precisely what the pro se litigant lacks in these cases is knowledge of how to present their case so as to conform to the standards required by law, so the judge must be able to act in accordance with their own discretion or judgment to advance the litigant's interest (in having their case heard) in a manner that conforms to the court's standards. And (iv) the pro se litigant is conceived as capable of independent action and judgment: they are no mere charge or ward of the judge, but are instead someone who has everything they need to bring their own case except the legal expertise that would help them navigate the byzantine channels of legal procedure.[74]

D. Substitutive Representation

Judges have considerable discretion to insert themselves into the roles of the parties before them (*role substitution*) or, in some cases, to substitute the judgment of the parties with their own judgment (*judgment substitution*). The cases considered here are instances of substitutive representation and not mere substitution because the party whose person or judgment has been substituted will still be responsible for the conduct of the substituting party.[75] Here, I consider both varieties of substitutive representation in which judges routinely engage.

[73] *Id.* at 18.

[74] Another interesting and complex example of substantive representation is, of course, Judge Aquilina's representation of the victims in the sentencing hearing of Larry Nassar. This is, however, an unusual case, as it is not traditionally thought that victims are parties to criminal proceedings, although in many jurisdictions, victims have the right to be heard at public proceedings related to the criminal case and to confer with the attorney for the government in the case. *See, e.g.*, 18 U.S.C. §3771; *Victim Rights*, The United States Attorney's Office for the Eastern District of California, https://www.justice.gov/usao-edca/victim-witness-assistance/rights#participants; 2 Model Codes for Post-Conflict Criminal Justice (2008), https://www.usip.org/sites/default/files/MC2/MC2-8-Ch5.pdf, at 131–137; United Nations Office on Drugs and Crime, *Victims and Their Participation in the Criminal Justice Process*, E4J University Module Series: Crime Prevention and Criminal Justice, https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-11/key-issues/5--victims-and-their-participation-in-the-criminal-justice-process.html.

[75] Here, I apply the distinction between mere substitution and substitutive representation discussed in Section II.E: in cases of mere substitution, one party may replace another or may substitute their judgment for another, but "the one replaced is not held responsible for the conduct of his substitute." Pitkin, *supra* note 8, at 132. By contrast, substitutive representation requires not merely that one person acts in place of another (in role or in judgment), but also that the substituted party will be responsible for the conduct of the substituting party. Diggs, *supra* note 43.

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1. Judgment Substitution

Judges commonly substitute their own judgment for the judgment of the parties. Indeed, we may think that this is one of the most obvious and common ways that judges represent the parties before them from the bench.

A particularly salient (and controversial) example of this sort of substitutive representation occurs when courts raise issues sua sponte—considering issues the parties themselves did not raise and sometimes even deciding cases on these bases.[76] This

[76]*See, e.g.*, Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (pts I–III), 7 WIS. L. REV. 91, 160 (1932), 8 WIS. L. REV. 147 (1933); Rosemary Krimbel, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919 (1989); Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987); Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253 (2002); Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 499–503 (1958).

Consider two recent appellate court cases where judges have brought considerations of race and racism into opinions in ways not raised by the parties.

In Center for Community Action & Environmental Justice v. Federal Aviation Administration, Ninth Circuit Judge Bumatay stated in his concurring opinion:

> [R]ather than simply addressing the issues presented here, the dissent injects the case with accusations of "environmental racism." Such accusations are a serious matter. If the government acted with any racial motivation, this court has an obligation under the Constitution and the laws to stop it. The majority did not address such accusations—not because they are unimportant—*but because no party raised them.* No party asserted that "environmental racism" had anything to do with the government's actions here. No party asked us to consider whether the government violated equal protection or anti-discrimination laws. Neither the petitioners nor the State of California allege that the lack of an environmental impact statement here was driven by racial animus. There is also no briefing on the subject. The words "discrimination," "disparate impact," and "racism" appear nowhere in the parties' briefing. Instead, our dissenting colleague alone raises the claim of "environmental racism."
>
> Of course, every judge is entitled to his or her views, but the dissent's assertions are unfair to the employees of the FAA and the Department of Justice who stand accused of condoning racist actions without a chance to defend themselves. Now, in the pages of the federal reporters, these government employees will forever be marked with advancing what our dissenting colleague calls "environmental racism"—with no opportunity to respond. If our dissenting colleague believes "environmental racism" infected the FAA's decision-making process, the proper course would have been to order supplemental briefing on the subject and to allow both sides to make their case through the crucible of the adversarial process. But without fair notice to the parties or suitable briefing, it was inappropriate for the dissent to reach such a highly charged conclusion sua sponte.
>
> Make no mistake—racism is real, it's immoral, and it should be condemned at every turn. Had the parties alleged that "environmental racism" led to the decisions made here, this court would have had a legal and moral duty to fairly adjudicate that claim. But leveling accusations of racism with no chance of rebuttal is fundamentally unfair and not how the judicial process should work.

Ctr. for Cmty. Action & Env't Just. v. Fed. Aviation Admin., 18 F.4th 592, 613–614 (9th Cir. 2021) (Bumatay, J., concurring). In B.B. v. County of Los Angeles, California Supreme Court Justice Liu stated in his concurring opinion:

> Today's opinion holds that Civil Code section 1431.2 does not permit an intentional tortfeasor to offset liability for noneconomic damages based on the negligence of other actors. . . . Thus, Burley's family may recover the full amount of their noneconomic damages. But even as the wrongful death judgment here affords a measure of monetary relief to Burley's family, it does not acknowledge the troubling racial

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is substitutive representation and not mere substitution because the represented party—the party whose stated position has been augmented by issues they did not themselves raise—will be responsible for the conduct of the substituting party.

One may question whether a judge's raising issues sua sponte is properly conceived of as representation at all. Above, I discussed one of Pitkin's constraints on what counts as representation: for it to be the case that A represents B, not only must the normative consequences of A's actions be ascribed to B, the actions that brought about those normative consequences themselves must be ascribed to B as though B had performed them.[77] When a judge raises an issue sua sponte, it is certainly the case that the normative consequences of the judge's so doing will be ascribed to the parties—the issue will play a role in judicial decision-making about the case, the normative consequences of which will be ascribed to the parties to that case. But is the judge's action of issue-raising itself thereby ascribed to the parties as though the parties had raised the issues themselves? On first glance, this does not seem to be the case: that the judge has raised the issue sua sponte means precisely that it was not raised by either of the parties. However, there is a different way of understanding sua sponte issue-raising that suggests that the action itself is ascribed to the parties: when a judge raises an issue sua sponte, they substitute the judgment of the parties with their own judgment concerning what issues should be considered in adjudicating the case. This is, on the views of many, not the role that the judge is meant to play in adversarial proceedings.[78] Rather, in an adversarial system,

> dynamics that have resulted in state-sanctioned violence, including lethal violence, against Black people throughout our history to this very day. . . . A wrongful death judgment with substantial damages is one way of affirming the worth and dignity of Darren Burley's life, and I join today's opinion. But the racial dimensions of this case should not escape our notice. How are we to ensure that "the promise of equal justice under law is, for all our people, a living truth"? . . . Whatever the answer, it must involve acknowledging that Darren Burley's death at the hands of law enforcement is not a singular incident unmoored from our racial history. With that acknowledgment must come a serious effort to rethink what racial discrimination is, how it manifests in law enforcement and the justice system, and how the law can provide effective safeguards and redress for our neighbors, friends, and citizens who continue to bear the cruel weight of racism's stubborn legacy.

B.B. v. Cty. of Los Angeles, 10 Cal. 5th 1, 35 (2020) (Liu, J., concurring). However, Justice Chin, writing for the Court, stated:

> Burley was African American. We are cognizant that the facts of this case bear similarities to well-publicized incidents in which African Americans have died during encounters with police. These incidents raise deeply troubling and difficult issues involving race and the use of police force. But the question plaintiffs raise in this case—whether and how section 1431.2 applies to intentional tortfeasors—does not turn upon either the decedent's race or the fact that a law enforcement officer, rather than a civilian, committed the intentional tort.

Id. at 5 (Chin, J., writing for the Court).

[77] PITKIN, *supra* note 8, at 52.

[78] New Jersey v. T.L.O., 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting) ("I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review."); Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J., writing for the Court) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

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"the judge looks to the parties to frame the issues for trial and judgment."[79] So, by raising an issue sua sponte, the judge represents the parties' case to the court in a manner different from the manner the parties themselves had chosen. To raise an issue sua sponte, then, is not merely to ascribe the normative consequences of the court's eventual decision to the parties; it is also to commit the parties to a substantively different input into the court's decision-making process than the parties had antecedently chosen for themselves—it is to decide for the parties what issues will feature in the court's determination (a decision normally left to the parties in adversarial proceedings), which is, in effect, to ascribe those issues to the parties as though the parties had raised the issues themselves.

Judgment substitution also occurs in the course of the proceedings themselves. For instance, in Commonwealth v. Colon, the violation of probation (VOP) court compelled the District Attorney to hold a violation hearing over the shared and repeated objections of all three parties to the proceeding—the Probation Department, the District Attorney, and defense counsel.[80] The Court further substituted the Probation Department's judgment with its own, revoking Mr. Colon's probation over the Probation Department's recommendation to the contrary. Although the Superior Court of Pennsylvania found "that the VOP court did not err in holding the violation hearing or in ruling that Colon's possession of a controlled substance warranted revocation,"[81] the Superior Court's fifth footnote is telling: "As to the VOP court's attempt to dictate to the District Attorney how to proceed against Colon at the violation hearing, we find no legal support for such authority."[82] In this case, the VOP court judge was not merely following the law, but instead substituting the judgment of all three parties to the proceeding with her own judgment.

2. Role Substitution

Judges have considerable discretion to insert themselves into the roles of the parties before them. As discussed, judges often insert themselves into positions that would otherwise be filled by a pro se litigant themself or, instead, counsel that the litigant does not have. However, role substitution also occurs outside the context of pro se litigation. When the District Attorney in Commonwealth v. Colon declined to question witnesses the court had compelled them to call, the VOP court judge conducted the questioning herself—thereby assuming the role of the State and acting in its stead.[83] As Commonwealth v. Colon illustrates, judges have considerable latitude not merely to compel parties to act as the judge sees fit, but also to assume the roles of those parties, substituting those parties' judgments and actions with their own.[84]

[79]Burdett v. Miller, 957 F.2d 1375, 1380 (7th Cir. 1992) (Posner, J.).

[80]Commonwealth v. Colon, 248 A.3d 465 (Pa. Super. Ct. 2021).

[81]*Id.*

[82]*Id.* On October 14, 2021, the Supreme Court of Pennsylvania denied Mr. Colon's appeal. Commonwealth v. Colon, No. 152 EAL 2021, 2021 WL 4784823, at *1 (Pa. Oct. 14, 2021).

[83]Commonwealth v. Colon, 248 A.3d 465 (Pa. Super. Ct. 2021).

[84]Even if the judge's behavior in Commonwealth v. Colon is an extreme example of role substitution, indeed notable enough that the Superior Court of Pennsylvania included the aforementioned fifth footnote, the superior court did not find error by virtue of it, meaning that it was not found to be outside

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However, role substitution also occurs in more mundane contexts. When the judge enters a "not guilty" plea on behalf of a nonpleading or creatively pleading defendant, they do something that the defendant's attorney or the defendant themself would otherwise have done for the defendant. There can be no denying that a defendant's attorney is the defendant's representative to the court. So, even if, in the normal course of things, mere interpretation or translation should not be considered a form of representation, when the judge performs a function for a party (here, a defendant) that counsel would otherwise have performed for that party, the judge temporarily assumes the role of counsel for that narrow, specified purpose—they are the defendant's role substitutive representative.

E. Taking Stock

So far, I have categorized and examined different ways that judges represent the parties before them in adversarial proceedings. As the examples illustrate, judges represent the parties before them in a wide variety of contexts. Far from being an outlier case, Judge Aquilina's bench representation of Nassar's victims is just a recent instance of a well-established practice, not a reinvention of the judge's role.

Still, there is something odd in saying that judges represent parties before them in adversarial proceedings. But is there something wrong with the practice of bench representation?

IV. The Ethics of Bench Representation

At first glance, the idea that a judge may (or even in some cases should) represent a party to a proceeding before them is worrisome. It raises questions concerning whether those proceedings could be fair, which in turn depends partly on whether the judge could be impartial. Does bench representation threaten the fairness of legal proceedings? If so, is it because it hinders a judge's ability to be (or appear) impartial? Finally, what other concerns, if any, ought we have about the widespread but worrisome practice of bench representation?

A. Fairness and Impartiality

Fairness in legal proceedings is a complex good, and has a number of components, including impartiality. That is, impartiality is partly constitutive of the fairness of a legal proceeding. To have a fair proceeding, then, is, in part, for the decisionmaker (the judge, in the cases of interest to us) to be impartial in their conduct of the proceeding. For instance, in U.S. legal contexts, a defendant has a constitutionally protected right to a fair trial before an impartial judge. A trial before a judge who is not impartial is fundamentally unfair.[85]

of the bounds of permissible judicial behavior even despite the absence of legal authority in support of it. Naturally, there is a question whether the VOP court judge's behavior was permissible as a moral matter. But the superior court did not find that what the judge did in this case was impermissible as a legal matter.

[85]Rose v. Clark, 478 U.S. 570, 577 (1986); 21A Am. Jur. 2d *Criminal Law* §909 (2023).

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Although there are a variety of different conceptions of impartiality,[86] the conception relevant for our purposes is the conception of impartiality as a lack of bias toward or against any party to a proceeding. Charles Fried has characterized this sense of judicial impartiality as "a duty of loyalty to both sides" to a proceeding.[87] Judicial impartiality in this sense is satisfied only when the judge exhibits "humane concern . . . for both parties" ("even . . . agoniz[ing] about the difficult cases") without allowing this concern to devolve into rooting for either party.[88] So characterized, the duty is satisfied only when the judge adopts an attitude that allows them to care about both parties' interests without thereby championing either party's ends. Only a bit differently, the Court in Republican Party of Minnesota v. White characterized the lack of bias required for impartiality not in terms of an occurrent affective state judges should adopt, but instead in terms of habits of mind judges should rout from their conduct—namely, "bias for or against either party to the proceeding."[89] The Court predicted that "[i]mpartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party."[90]

Concerns about impartiality arise most often when judges have one or more types of special, personal interest in a case: personal interest in the outcome,[91] relational interest in one or more of the parties,[92] political interest in deciding the case

[86]Less relevant for our purposes are conceptions of impartiality that emphasize a judge's lack of legal preconceptions or ideological commitment—that is, a judge's "lack of preconception in favor of or against a particular *legal view*." Republican Party of Minn. v. White, 536 U.S. 765, 777 (2002) ("This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case."). Another similar conception of impartiality emphasizes the judge's open-mindedness to viewpoints not their own. *Id.* at 778 ("This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.").

[87]Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 Hofstra L. Rev. 1227, 1228 (2004).

[88]*Id.* at 1228.

[89]*White*, 536 U.S. at 775 (italics removed).

[90]*Id.* at 775–776. The Court further emphasizes that the lack of bias conception of impartiality is closely connected to the promotion of equal treatment and due process, and the maintenance of fairness between the parties. *Id.* at 776 ("This is the traditional sense in which the term is used. See Webster's New International Dictionary 1247 (2d ed. 1950) (defining 'impartial' as '[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just'). It is also the sense in which it is used in the cases cited by respondents and *amici* for the proposition that an impartial judge is essential to due process.").

[91]Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 Fla. L. Rev. 493, 499–502 (2013).

[92]*Id.* at 502–503. Though note that, according to Fried's characterizations of impartiality (equal involvement and duty of loyalty), having personal interest in all parties to an equal degree seems to be compatible with maintaining impartiality, provided that the judge pairs this with "studied remoteness." Fried, *supra* note 87, at 1228. *See also* Tumey v. State of Ohio, 273 U.S. 510, 523 (1927) ("All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. Wheeling v. Black, 25 W. Va. 266, 270. But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in

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consistently with a particular ideological bent or so as to promote their own judicial future,[93] or personal bias toward or against particular parties or groups to which those parties belong.[94] But actual bias need not be proven for impartiality to be brought into question as a legal matter[95]: "there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[96] Despite the Court's "presumption of honesty and integrity in those serving as adjudicators," the objective standard is justified by a concern that "psychological tendencies and human weakness" may in some cases "pose[ ] such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[97]

Some are, of course, skeptical about the prospects for any of us, judge or not, being truly capable of exercising impartiality. Iris Young, for instance, cautioned that "impartiality is an idealist fiction."[98] Others less skeptical are still realists about what the demands of impartiality can reasonably be—namely, when we expect judges to be impartial, we in fact expect them to be "impartial enough."[99] This article does not operate in an idealist's vacuum about the prospects or promises of impartiality.[100]

Note, too, that the concern raised here is not as to whether particular judges are able to remain impartial despite the representative demands of their role but rather as to (i) whether the practice of bench representation imperils all judges' abilities to remain impartial or, even if it does not, (ii) whether the practice gives the appearance of partiality, and (iii) whether and how departures from impartiality or the appearance of impartiality could be justified.

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his case."); *see also, e.g.*, Charles Lane, *Scalia Won't Sit Out Case on Cheney*, Washington Post (Mar. 19, 2004), https://www.washingtonpost.com/archive/politics/2004/03/19/scalia-wont-sit-out-case-on-cheney/16177033-f529-4e4f-8291-a53fb2b158e4/; Bernard Ries, *You Can't Duck This Conflict, Mr. Justice*, Washington Post (Feb. 29, 2004), http://www.washingtonpost.com/archive/opinions/2004/02/29/you-cant-duck-this-conflict-mr-justice/d937d4dd-1702-461e-9662-01bff3de9152/; *Ziegler Receives Public Reprimand from Colleagues*, Wisconsin Law Journal (Jun. 2, 2008), https://wislawjournal.com/2008/06/02/ziegler-receives-public-reprimand-from-colleagues/; Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. Times (Jun. 18, 2011), https://www.nytimes.com/2011/06/19/us/politics/19thomas.html; Eric Segall, *A Liberal's Lament on Kagan and Health Care: Should Elena Kagan Recuse Herself in the ACA Case?*, Slate (Dec. 8, 2011), https://slate.com/news-and-politics/2011/12/obamacare-and-the-supreme-court-should-elena-kagan-recuse-herself.html.

[93]Geyh, *supra* note 91, at 503–505.

[94]*Id.* at 505–509.

[95]Withrow v. Larkin, 421 U.S. 35, 476 (1975).

[96]Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (quoting *Withrow*, 421 U.S. at 47).

[97]*Withrow*, 421 U.S. at 47.

[98]Iris Marion Young, Justice and the Politics of Difference (1990), at 104.

[99]Geyh, *supra* note 91, at 497.

[100]Or, as Robert Green Ingersoll put the point more elegantly and quippily in a public speech on the 1875 *Civil Rights Cases*: "We must remember, too, that we have to make judges out of men, and that by being made judges their prejudices are not diminished and their intelligence is not increased." *Civil Rights Cases*, 109 U.S. 3 (1883); *see also* Robert G. Ingersoll, *Address on the Civil Rights Act*, *in* 11 The Works of Robert G. Ingersoll (Dresden Edition 1902), https://bit.ly/3fkYUdm (cited in Geyh, *supra* note 91, at 508).

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B. Varieties of Bench Representation

Descriptive bench representation seems not to imperil a judge's actual ability to remain impartial, at least when impartiality is characterized as a concern for both parties. Nor does it seem to raise a concern as to whether a judge will appear partial to one party or the other. Substantive bench representation and substitutive bench representation, by contrast, raise both concerns—and some others, besides.

1. Descriptive Bench Representation

In descriptive bench representation, the judge acts as a mere mouthpiece or interpreter for the parties before the court. The performance of the role does not require the judge to show bias or favor to one party or another. The judge simply transmits information from the party to the court record and, mediately, to future audiences of that record.

Certainly, nothing about the activity of recapitulating or abridging parties' arguments seems to put a judge in the position of having to show bias or favor to one party over another. Neither does the entry of "not guilty" pleas seem to put a judge in the position of having to favor the party in whose name the plea is entered. Indeed, because the judge is legally compelled to enter the plea on the defendant's behalf, the practice does not seem to require the judge to have any particular disposition to the party at all.

Still, there is the question whether either practice gives the appearance of partiality. The recapitulation and abridgment of parties' arguments is a practice undertaken on behalf of both parties to a proceeding, and so does not require a judge to specially favor one or another party in order to perform the practice. Of course, it is not hard to imagine a case in which the judge's manner of recapitulation or abridgment in fact gives the appearance of partiality. But that is not the question under discussion. Rather, we are interested to know whether the judge's recapitulation and abridgment of parties' arguments will in all cases give the appearance of partiality—and that certainly does not seem to be inevitable. The entry of "not guilty" pleas is a practice the judge is legally compelled to perform on the defendant's behalf, so it is reasonable to conclude that the judge will not be regarded as showing partiality toward the defendant by following the law.

So, bench representation and impartiality are not always at odds—in fact, they can be mutually supporting. These are, however, the easy cases—where the bench representative role is required by law and where it is unambiguous what the role requires.

Construing pro se litigant's pleadings liberally is a trickier case. Here, although the judge is legally compelled to construe the pleadings liberally, what a judge must do to satisfy this legal mandate will vary from case to case. U.S. law requires the judge to give the pleading "every reasonable intendment,"[101] to search the pleading for "a justiciable claim for relief,"[102] and to view the pleading in a manner "favorabl[e] to the pleader."[103] Built into this legal requirement is the expectation that the judge will show interpretive charity to the pro se litigant.

[101]Brandon v. Humana Hosp.-Huntsville, 598 So. 2d 950, 951 (Ala. Civ. App. 1992).
[102]Tyler v. Whitehead, 583 S.W.2d 240, 242 (Mo. Ct. App. 1979).
[103]Bishop v. Cir. Ct. of Cole Cty., 702 S.W.2d 554, 556 (Mo. Ct. App. 1985).

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Doubtless, a judge's interpreting nonstandard pleadings in a manner favorable to the pleader can give the appearance of partiality. But is there cause for moral concern here? There does not seem to be, on any one of several different interpretations of this practice.

First, we may think that construing pro se litigant's pleadings liberally is merely apparently partial. The practice simply makes it possible for the pro se litigant to be heard by the court. It does not require of the judge that they exhibit bias or favor to the pro se litigant, only that they take reasonable steps to avoid removing the litigant's case from court for reasons having nothing to do with the litigant's claim for relief—namely, the litigant's lack of legal training and counsel.

Even so, the legal standard for whether there is impartiality is not whether the judge in fact exhibits bias or favor but whether they appear to exhibit bias or favor. As to whether the practice makes a judge appear to exhibit bias or favor, we may again quite reasonably think that the fact that the judge is legally required to construe the pleadings liberally will mitigate any impression that the judge is going out of their way to show bias or favor to the pro se party—they are just satisfying what the law requires of them.

If, however, the practice does appear to undermine impartiality, that appearance in turn threatens to render the proceeding unfair. Below, I consider justifications for departures from the appearance of impartiality.

2. Substantive Bench Representation and Justifications for Departures from Impartiality or the Appearance of Impartiality

To depart from the appearance of impartiality is to depart from one component of fairness. Of course, that does not mean that the departure cannot be justified. To justify a departure from the appearance of impartiality (and so, from a component of fairness), it must be shown that the sacrifice is justified by the gain in some other contributory value. Departures from the appearance of impartiality can be justified by whether and how they augment other values that contribute to the overall fairness of a proceeding.

Here, I focus on substantive bench representation, where concerns about the appearance of partiality are most salient. The paradigmatic example of substantive bench representation is the judge who assists a pro se litigant by questioning witnesses or raising objections on the litigant's behalf. When providing this support, judges act in the furtherance of an end shared by the pro se party and the court—namely, getting at the truth of the matter by adducing evidence sufficient to support the pro se litigant's claim and, thereby, ensuring that disadvantaged parties are not denied equal treatment under the law.[104]

[104]In calling the pro se parties at issue "disadvantaged," I assume only that they are disadvantaged relative to their adversaries who have access to legal counsel. I note that this way of characterizing the disadvantage faced by pro se litigants is a bit different (and more demanding) than the type of disadvantage that courts are required to protect against as a legal matter. Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. Nat'l Ass'n Admin. L. Judiciary 97, 154 (2007) ("At a minimum, judges . . . are prohibited from placing self-represented litigants at a disadvantage *other than whatever disadvantage arises from proceeding without the assistance of counsel.*") (emphasis added).

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The American Bar Association has explicitly acknowledged this permission to provide additional support in Comment [4] on Rule 2.2 of the Model Code of Judicial Conduct. Rule 2.2 states: "A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*"[105] Comment [4] clarifies: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[106] Although it is left open what accommodations would be reasonable, some standard accommodations are enumerated: "assistance in rephrasing questions to a witness, re-naming a pleading so that the title conforms to court procedural rules, or clarifying the steps of the trial process."[107] Judges are rarely (if ever) regarded as having abused their discretion when they do provide such accommodations, even when doing so may appear to undermine their impartiality.[108] To the contrary, judges have frequently been disciplined for "hav[ing] used the absence of an attorney to take advantage of self-represented litigants in blatantly unfair proceedings."[109]

When a judge helps a pro se litigant question a witness (for instance), they in effect serve as that litigant's legal representative and do so expressly for the benefit of that litigant,[110] even when it is also for the benefit of the coherence of the court proceeding and even if it happens also to be the case that "[o]ften the lawyer representing the other party appreciates these efforts to bring the matter to an orderly conclusion in a timely manner."[111]

These accommodations are very similar to related tasks that counsel would otherwise perform for the pro se party. It is unsurprising, then, that "pro se[ ] litigants challenge a judge's traditional role," imperil their ability to "maintain[ ] . . . impartiality," and put them in the difficult position of trying to "facilitate a meaningful

[105]Model Code of Jud. Conduct r. 2.2 (Am. Bar Ass'n 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/.

[106]Model Code of Jud. Conduct r. 2.2 cmt. 4 (Am. Bar Ass'n 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/commentonrule2_2/.

[107]Greenstein, *supra* note 67, at 47.

[108]*Id.* at 47 ("In fact, the fear of judges that they may be disciplined for assisting pro se litigants appears to be without basis. In the comprehensive publication, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* by Cynthia Gray, the disciplinary cases cited most often reflect a failure to help pro se litigants make their appearances in court meaningful.") (internal citations omitted).

[109]Gray, *supra* note 104, at 154.

[110]Some judges have explicitly expressed the concern that being placed in the role of counsel or advocate for pro se litigants is at odds with their duties to remain impartial. *See, e.g.*, Barker v. Norman, 651 F.2d 1107, 1133 (5th Cir. 1981) (Gee, J., concurring in part and dissenting in part) ("Nor do I see how, once the judge is cast in the role of counsel for the pro se litigant in one respect and reversed for failing to ascertain that role and embrace it, we can easily cut steps in the slippery slope onto which we have advanced."); Gordon v. Leeke, 574 F.2d 1147, 1156 (4th Cir. 1978) (Hall, J., dissenting) ("My concern lies instead with the delicate procedural balance to be struck between the settled right of an indigent to proceed pro se in the courts, the duty of such a litigant to proceed by complying with certain of the basic rules of legal procedure and substantive law, and the role the court is to impartially play in monitoring such litigation throughout. In striking that balance, no matter how well-intentioned a judge may be, once he assumes the role of an 'advocate' for a pro se litigant, he or she will lose the respect of either the pro se prisoner litigant, or the defendants whom he has sued or both.").

[111]Greenstein, *supra* note 67, at 47.

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coherent court hearing without providing legal assistance that turns the judge into an advocate."[112]

Defenses of judges' substantive bench representation of pro se litigants tend (i) to encourage a relaxed account of what impartiality requires[113] or instead (ii) to emphasize not that these judicial behaviors exhibit impartiality but instead that they promote fairness between the parties to the proceeding.[114]

One natural thought to have about a judge providing substantive bench representation to pro se litigants is that, while the practice may appear to exhibit partiality, it is in fact better thought of as an impartiality-restoring procedural mechanism. Consider the alternative: were a judge not to assist a pro se litigant, they would in effect preclude that party from having meaningful access to the litigation forum. To exclude a party from having meaningful access to a litigation forum on the basis of their inability to conform to draconian legal procedures could quite reasonably be interpreted as a judge showing bias or favor toward the party represented by counsel just because they have counsel. Far from being an exhibition of partiality, the judge's substantive bench representation of a pro se litigant shows "humane concern" for that party, who would otherwise be dominated by opposing counsel on the basis of legal technicalities that have little bearing on the merits of the case. To do otherwise would be to fail to exhibit "humane concern . . . for both parties."[115]

But, let us now instead consider the perspective of those attorneys who object that "'the court is trying to represent the pro se'"[116] and regard the practice of substantive bench representation as appearing to or in fact undermining a judge's impartiality by showing special bias or favor to the pro se party. Should a judge's substantive bench representation of a pro se litigant undermine the judge's impartiality or their appearance of impartiality, it may still be permissible if it can be justified in terms of its contribution to the overall fairness of the proceeding.

As stated, impartiality is only one of a number of values that contribute to the fairness of a legal proceeding. Another relevant for our present discussion is equality and, in particular, "equality of arms."[117] Equality of arms is a value contemplated within many legal systems. Although it is not recognized as a constitutionally protected right in the United States, some have argued that it is immanent in the Sixth Amendment and, so, should be.[118] Equality of arms requires that there be a fair balance between the opportunities afforded to the parties involved in litigation. This could in some

[112]*Id.* at 46.

[113]Gray, *supra* note 104.

[114]*See, e.g.*, Greenstein, *supra* note 67, at 46 (quoting the reporter's notes to the 2007 Model Code Comment to Rule 2.2) ("'This Comment makes clear that judges do not compromise their impartiality when they make reasonable accommodations to pro se litigants who may be completely unfamiliar with the legal system and the litigation process. To the contrary, by leveling the playing field, such judges ensure that pro se litigants receive the fair hearing to which they are entitled.'"); Gray, *supra* note 104, at 99–100.

[115]Fried, *supra* note 87, at 1228.

[116]Goldschmidt, *supra* note 69, at 18.

[117]European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 221.

[118]*See, e.g.*, Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 Wis. L. Rev. 1007, 1037 (1990) ("Instead, in the battle in court, there must be an *equality of arms* among contestants, that is, the procedural rights permitting each advocate to formulate and present her case must, in principle, be accorded equally and to the same extent. Just as it would not have been fair to

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cases extend to helping one party to present its case. A sacrifice in the appearance of impartiality (through offering assistance to one of the parties) may serve to bolster the value of equality of arms.

Most cases of pro se litigation take place under markedly nonideal and unequal conditions. Pro se litigants tend to come into court as the relatively disadvantaged parties. The "playing field" between pro se litigants and their moneyed adversaries with counsel is not level.[119] The fact of this unequal starting position threatens to render the legal proceeding unfair to the pro se litigant.

So, one justification for departures from apparent impartiality in contexts of pro se litigation is this: although impartiality contributes to the fairness of a proceeding, it is not the only value that does so, and a sacrifice in apparent impartiality can be justified when (i) the background conditions are such that the proceeding would otherwise be substantively unfair to one of the parties and (ii) the apparently not-impartial judicial intervention will correct for these background conditions, diminishing the inequality between the parties, and, so, rendering the proceeding fair (or, at least, less unfair).

Assistance to a pro se litigant is only one form of substantive bench representation. The lessons from this example will generalize to other cases. There is a general background presumption against imperiling a judge's actual or even apparent impartiality in a legal proceeding. Impartiality partly constitutes the fairness of a legal proceeding. However, there are also other values that contribute to the fairness of a proceeding. So, in some cases, a sacrifice in impartiality might be justified by the gain in some other contributory value—like the equality of arms.

A point of clarification: I am not arguing that impartiality and equality of arms (nor any other contributing components of fairness) ought to be weighed against one another in the interest of maximizing the overall amount of fairness of a proceeding. Nor am I arguing that we can justify divergences from apparent impartiality in exigent circumstances when and because some other, competing value becomes necessary to promote instead. (One could, I imagine, structure the argument that way. But that is not my approach.) Rather, I am arguing: A fundamental value that must be promoted in an adversarial court proceeding is fairness, both substantive and procedural, to both (or in more complex cases, all) of the parties to that proceeding. Different types of proceedings are imperiled by different possible sources of unfairness. Because this is so, ensuring or restoring the fairness of different types of proceedings in light of the different possible sources of unfairness will require context-sensitive considerations concerning what, in fact, would ensure or restore the fairness of the proceeding. And the justification for pursuing a particular fairness-restoring course of action in a given case is not that it will maximize fairness but instead that, but for pursuing that course of action, the proceeding could not rightly be considered fair.

So, now, focusing more directly once again on the two particular fairness-promoting considerations before us—namely, impartiality and equality of arms: When and how

give one contestant in a trial by battle a lance and a shield and the other only a knife, equality of arms is essential to the pursuit of fairness and truth.").

[119]Of course, not all cases involving pro se litigants will have the David-and-Goliath structure described here. In some cases, both litigants to the proceeding will be pro se. In such cases, concerns about the appearance of partiality will, hopefully, be mitigated by the recognition that the judge is legally required to assist both parties.

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can we justify divergences from the strictest notions of impartiality (again, understood as the appearance of partiality—since I doubt anyone besides grumbling opposing counsel could possibly think that showing special concern for pro se litigants is inconsistent with a judge in fact being impartial) in the interest of promoting equality of arms as a means of ensuring the overall fairness of a proceeding? Here, I offer four conditions that must be satisfied for divergences from strict impartiality to be permissible—these are necessary, not sufficient, conditions:

First, there must be (1) *manifest background unfairness*. That is, the background conditions must be such that it is reasonably foreseeable that, without judicial intervention of some sort, the proceedings will be manifestly unfair to one of the parties. This condition follows from the recognition that a fundamental value that must be promoted in an adversarial court proceeding is fairness, both substantive and procedural, to the parties. Only if this condition is satisfied should we next consider:

(1a) *Foreseeable success*: It must be reasonably foreseeable that the divergence from strict apparent impartiality will succeed in promoting fairness between the parties. Why? Because a judge's appearance of impartiality is, in the normal course of things, expected to partly constitute the overall fairness of adversarial court proceedings, so any measure that might imperil the appearance of impartiality should not be undertaken unless that measure is itself likely to bring the proceedings closer to in fact promoting fairness between the parties.

(1b) *Counteracting intent*: Any divergence must be undertaken with the intent of counteracting the manifest background unfairness. It matters not just that a judge promotes and restores the fairness of the proceeding. We care, too, about their reasons for undertaking their actions and care especially about their reasons for undertaking role-divergent actions.

(1c) *Narrow tailoring*: Any divergence should be exercised in a manner that is narrowly tailored to undermine the unfairness it is meant to correct, both (i) to avoid giving the impression that its practice is being abused by the judge for the purpose of smuggling personal favoritism or biases into the proceeding and (ii) to preserve the appearance of impartiality as far as possible.

Only if (1) is satisfied should (2)–(4) be contemplated.

(2) *Procedural integrity*: Connected to *foreseeable success*, divergences should not imperil other procedural aspects of the adversarial court proceedings. So, for instance, a judge ought not risk giving the appearance of partiality in a manner that is foreseeably likely to unduly influence jurors' judgments of the case before them. This may in some cases require divergences to be undertaken outside of jurors' earshot (although note that the in camera nature of this suggestion may be in tension with the transparency requirement discussed below). Why pursue procedural integrity? Because, as stated, the fairness of the proceeding is of paramount concern and many of the procedures for adversarial court proceedings take as one of their aims (although not their only aim) preserving a baseline of fairness between the parties. So, any divergence from the appearance of impartiality must be considered and, ultimately, justified with regard to its impact on the overall proceeding.

(3) *Transparency*: With some exceptions, including those contemplated in (2), divergences should be undertaken in a transparent and announced manner so as to promote public confidence in the judiciary. This transparency requirement obliges

judges to be able to give reasons for whatever assistance they provide to pro se litigants or other disadvantaged parties–reasons that would, one hopes, on their own restore the audience's impression that the judge is not acting partially but is simply working to promote equality of arms between the parties, which is (as stated) not inconsistent with impartiality. Note that the transparency requirement is not an ex ante requirement, particularly for the reasons contemplated in (2)—namely that, in some cases, ex ante transparent disclosures could negatively impact the integrity of the proceedings (biasing jurors, for instance). And, at least with regard to juries, this is not a radical departure from courts' practices: courts often curate jurors' information environments to prevent them from prejudging the case about which they will deliberate and to protect them from avoidable sources of bias.

(4) *Public confidence*: Divergences from apparent impartiality should be undertaken in a manner that is not foreseeably likely to mar public confidence in the court. There is a connection here to the transparency requirement: one proactive measure a court can take to avoid the public's loss of confidence in the court based on its divergence from the appearance of impartiality is to explain the divergence's fairness-restoring ends in a public and accessible manner—through opinions, for instance. However, (4) is the weakest of the conditions enumerated here. It should be pursued to the extent compatible with satisfying (1) through (3).

What I have said here about justifiable divergences from the appearance of impartiality will apply beyond the context of bench representation and may justify other sorts of judicial interventions that would promote fairness in a proceeding at the expense of apparent impartiality. I leave those applications for another day.

3. Substitutive Bench Representation

Substitutive bench representation occurs when the judge assumes the role of a party to the proceeding or substitutes their own judgment for the judgment of one of the parties.

Here, I will primarily consider one particularly controversial example of substitutive bench representation: sua sponte issue-raising. When a judge raises issues sua sponte, they engage in both role substitution and judgment substitution: they insert themself into the role of one or more of the parties by raising an issue that neither party has raised and substitute their judgment for the parties' judgment concerning which issues ought to be before the court. I will also discuss further concerns that arise when a judge decides a case on the basis of issues raised sua sponte.

a. Role Substitution. One concern commonly raised about the role substitution aspect of sua sponte decision-making is that it can undermine the adversarial process. Traditionally, the adversarial process is conceived as comprising at least these two main elements: neutral and passive decisionmakers and party presentation of evidence and arguments.[120] Many justifications are given for the adversarial process, including (i) a concern that decisionmakers who are not passive will be perceived

[120]Milani & Smith, *supra* note 76, at 272.

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as partial, which will undermine public trust in the judicial system as a whole,[121] (ii) a concern that the judge who does not remain neutral and disinterested imperils their moral authority as a judge—they "would be sacrificing [their] moral position as a judge for that of [a] legislator,"[122] and (iii) the prediction that courts are more likely to reach correct decisions by reflecting on the arguments and evidence adduced by parties than they would be were they to develop the arguments and evidence on their own.[123]

Within this adversarial process, judges are meant to play the institutional role of the neutral and passive decisionmaker. But the judge who enters into the role meant for another party by, say, raising an issue that neither party has raised, will (it is thought) be perceived as partial, undermining the fairness of the proceeding, and thereby undermining public trust in the judicial system as a whole. Note that this concern about the preservation of distinct roles between judge and parties in an adversarial system can stand independently of particular considerations as to why a judge may have chosen to enter the role reserved for another. (Indeed, there are many good reasons for judges to raise issues not raised by the parties, including subject matter jurisdiction, giving full consideration to matters of public concern, avoiding plain error, protecting pro se litigants, because the issue is related to another issue already before the court, or, broadly, in the interest of justice.[124]) The concern at issue is simply that the judge, by their very role substitution, undermines core values that the distinction between roles is meant to preserve in an adversarial system.

Still further concerns about role substitution arise when the judge's role substitution is undertaken in a manner that suggests that they are displacing the party (as when the VOP court judge in Commonwealth v. Colon questioned witnesses in lieu and over the objections of the prosecution). In cases of displacement, the party has reason to complain that they did not have an opportunity to be heard, because someone acted in their stead and against their wishes. Or, instead, it may be that the judge is viewed to be partial when they throw the weight of their position as judge behind a particular party—giving that party special favor by, in effect, becoming that party.

It is pro tanto wrong for a judge to engage in role substitution with other parties to the proceeding—it undermines impartiality (imperiling the fairness of the proceeding) and gambles with public trust in the judicial system as a whole. In such cases, to override the general prohibition on such role substitution, the judge must be able to justify why the role substitution is nevertheless permissible in the particular

[121]Stephan Landsman, Readings on Adversarial Justice: The American Approach to Adjudication (1988), at 2, 35–39.

[122]Lon L. Fuller, The Problems of Jurisprudence (temp. ed. 1949), at 707.

[123]Milani & Smith, *supra* note 76, at 273; Landsman, *supra* note 121, at 35; *see also* Penson v. Ohio, 488 U.S. 75, 84 (1988) ("Th[e adversarial] system is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.'"); Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."); Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error."); Jerold H. Israel, *Cornerstones of the Judicial Process*, 2 Kan. J. L. & Pub. Pol'y 5 (1993); Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 Ind. L.J. 301, 316–319 (1989).

[124]Miller, *supra* note 76, at 1280–1286.

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case. They might do so by, for instance, arguing that their displacing a party promotes the overall substantive and procedural fairness of the proceeding—in which case, they would aim to provide justifications that satisfy conditions (1)–(4) discussed in Section IV.B.2.

b. Judgment Substitution. It is difficult to argue that judges ought not, in the normal course of their responsibilities, substitute their own judgment for the judgment of the parties. This is something we expect judges to do, at least when they are deciding which party's arguments and evidence should prevail at the conclusion of a legal proceeding. Still, there are limits on what judgment may be substituted, and when.

One of the chief concerns about sua sponte decision-making (wherein a judge decides a case on the basis of issues raised sua sponte) is that it is inconsistent with fundamental principles of due process (violating the Fifth and Fourteenth Amendments of the U.S. Constitution) because it deprives parties of "the right 'to be heard'—that is, an opportunity to present objections and arguments with regard to governmental actions that may result in a deprivation of their life, liberty, or property."[125] Although we expect that courts will have the last word in the adjudication of disputes between parties, we also expect the parties to have some say in between. When a court substitutes their judgment for the parties' by not merely raising an issue sua sponte but also deciding the case on the basis of that issue, the parties are not given a meaningful opportunity to be heard—violating those parties' due process rights. This seems to suggest that judicial judgment substitution is at least in some cases pro tanto wrong, and so requires remediation or justification. Some courts aim to remedy this wrong by asking parties to provide supplemental briefs on the new issues.[126] Here, the concern that parties will be subject to judgments without the protection of their due process rights is allayed by the assurance that their voices will be heard in the supplemental briefs. (There are, of course, arguments against supplemental briefing.[127] I will set those aside.)

What justification might be given for a judge substituting their judgment for the parties', deciding a case on that basis, and not in the process asking for party input as to the novel issue raised? As discussed, there are many good reasons why courts raise issues sua sponte, and in particular cases those reasons may further justify a judge's decision to substitute their judgment by deciding the case on the basis of issues raised sua sponte, as well. What is needed in such cases is a justification that explains how due process has been preserved or, if it has not, why sua sponte decision-making was nevertheless required.

C. Taking Stock

From these particular considerations concerning different forms of bench representation, we glean three generalizations about the ethics of bench representation:

First, those forms of bench representation that (i) are mandated by law and (ii) leave little about their implementation up to a judge's discretion raise the fewest

[125]Milani & Smith, *supra* note 76, at 263.
[126]Miller, *supra* note 76, at 1297–1300.
[127]*Id.* at 1301–1303.

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ethical concerns. These forms of descriptive bench representation do put the judge in a representative position, but it is one that is carefully limited in scope and does not seem to raise concerns about a judge's showing favor or bias to either party.

Second, neither descriptive nor substantive bench representation appears to imperil the parties' due process right to be heard. Indeed, the roles of mouthpiece and interpretive bench representatives are intended to amplify rather than mute the parties' voices. Similarly, the substantive bench representative who, for instance, assists pro se litigants, augments rather than stifles the represented party's voice. By contrast, both forms of substitutive bench representation raise concerns about whether they impede the fulfillment of a party's right to be heard.

Third, both substantive bench representation and role substitutive bench representation raise concerns about whether the judge engaged in the practice is able to remain impartial or is able to preserve the appearance of impartiality. In these cases, the concern is that the judge, by representing the party, appears to favor the interests of that party over those of their adversary. In some cases—like special judicial assistance to pro se litigants—this concern is ameliorated by looking at the bench representation in the context of the overall proceeding. When, for instance, the background conditions are such that the litigation would be markedly unfair to one party absent bench representation, reasonable departures from strict impartiality may be justified by the contributions those departures make to the promotion of other values essential to the overall fairness of a proceeding, like the equality of arms and the right to be heard. In other cases—like raising issues or making decisions sua sponte—there is a concern about the looming specter of partiality that is not in all cases defeated just by pointing to nonideal background conditions. Judges must in these cases be able to provide special justification for taking actions that threaten to undermine the appearance of impartiality.

V. Conclusion

In the foregoing, I have shown that the perennial question as to whether judges are representatives can be answered in a new way simply by giving careful attention to the everyday work of the courts. In Section II, I discussed how courts and scholars have traditionally characterized judges as representatives. In Section III, I introduced an overlooked but foundational form of judicial representation—bench representation. I showed that there are many ways that judges are either required or permitted to serve as representatives of the parties before them in adversarial proceedings. Bench representation is more proximate to the everyday work of the judiciary and more personal to the parties (who entrust some of the most challenging moments of their lives to the judges they come before) than the metaphorical conceptions of judicial representation discussed in Section II. In Section IV, I explored some novel normative considerations that emerge by looking at this underexplored but ubiquitous judicial practice.

Although the account offered here is focused on the particular context of the judiciary, it offers insights for theories of representation more generally. Many of our traditional notions of representation implicitly (if not overtly) assume that representatives are meant to be partial to the concerns of those they represent. If I

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am your representative in a context, surely you would expect me to show some favor toward your interests, in some sense, in that context. But that is precisely what we do not want judges to do—we do not want them to take on one party's interests as their own, at least not to the exclusion of the other party's interests. One of the insights of this article is that one may be an impartial representative—that is, one can give voice to another's concerns or act in the furtherance of their interests (by, say, preserving their presumption of innocence or acting as their legal representative in order to help them adduce evidence sufficient to make their case) without championing or even appearing to champion their ultimate ends.[128]

Competing interests. The author declares none.

[128]I have found guidance here from Seana Valentine Shiffrin, *Democratic Representation as Duty Delegation*, Proceedings of the American Philosophical Association (2022).

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