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Fairness has a face: neutrality and descriptive representation on courts

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ABSTRACT

Some have argued that US judges should act like umpires, neutral actors who call balls and strikes according to the law. Though this is an appealing idea, it may have some troubling implications for descriptive representation on the courts. I explore two possible problems: first, that descriptive representation is erased for judges who fit the norm and, second, that it is over-emphasized for judges who do not. The judges-as-umpire ideal may lead to the reinforcement traditional identity hierarchies and the stigmatization of descriptive representation. I argue for an alternative approach to judging that avoids these problems and has implications for the study of descriptive representation in the judiciary more generally.

Introduction

Disagreement about whether the US Supreme Court and other elements in the federal judiciary should be more descriptively representative was brought to the fore in 2018 during the confirmation hearings of Brett Kavanaugh. Opponents of Kavanaugh's nomination pointed out that only 5.3% of Supreme Court justices have been women or minorities and that until 1981 every justice on the court was male (Campisi and Griggs 2018). They wanted greater descriptive representation on the court – that is, they wanted more women or minority justices who would “stand for” their respective groups and mirror common interests or shared experiences in their decisions (Pitkin 1972). Judge Kavanaugh's defenders argued that a justice's primary task was to be fair, not to act as a descriptive representative (Warner 2018). Some argued that justices should act like an umpire, a dispassionate interpreter of the law. As Kavanaugh put it during his testimony in the Senate, “A good judge must be an umpire – a neutral and impartial arbiter who favors no litigant or policy ... I don't decide cases based on personal or policy preferences” (Kavanaugh 2016; also see Kavanaugh 2018).

The umpire ideal is an appealing concept. It emphasizes that judges should be fair, and they should enforce the rules without regard to who they are as individuals. This approach strives to leave personal characteristics, such as race, class, age, religion, gender, etc. out of judging. Still, this ideal deserves a second look. As a number of commentators have pointed out, there are some substantive differences between judges and umpires: judges interpret

rules, while umpires do not; judges do not witness events, while umpires do (Weber 2009; Blake 2018; Chemerinsky 2018). Also, this approach asks judges to forget who they are, not just for one game but in every moment of their professional lives as judges. This may be a difficult task. Indeed, Chief Justice Roberts, another advocate of the umpire-as-judge ideal, admitted that “we all bring our life experiences to the bench” (Weber 2009).

I probe the judge-as-umpire ideal a bit further in this essay, especially as it relates to descriptive representation on the judiciary. My interest is in exploring some potential problems of this ideal of a judge as umpire. What can this ideal of neutrality hide, vis-à-vis descriptive representation? What harm can it do?

Two potential areas of concern emerge. First, the judge-as-umpire concept may be used to obscure the descriptive representation done by white, male judges. The descriptive representation that these judges do may be cast as “neutral” or the norm. White men have historically defined the judicial role and they tend to serve as the reference of what it means to be a judge. Thus, even when white men mirror a racial, ethnic, gender, class, religious, or regional identity on the court, observers may miss any mirroring is taking place. Second, there is potential that the ideal of impartiality may be harmful if it is used to highlight the descriptive representation of judges who are seen as different from the white, male norm. These non-standard judges have in the past been more readily seen as mirroring, that is, of being a descriptive representative of groups that share their background or beliefs. This, in turn, can create a suspicion of bias. If, as the umpire ideal suggests, judges should simply call balls and strikes, then mirroring the experiences any race, gender, class, age, religion, etc. can be seen as a corruption of neutrality.

In contrast, I argue that descriptive representation needs to be turned inside out. In the past, the study of descriptive representation has sometimes become synonymous with a narrow set of identities, that is, with women and minorities. While this focus has yielded valuable knowledge, it may unwittingly leave the norm of white men in place, making them the norm or the baseline (Murray 2014). “Women ‘Doing’ the Judiciary” in this symposium makes a similar point, noting that men have sometimes become the “Archimedean point” in research. While it is true that women and minority judges are descriptive representatives, so too are *all* judges. Seeing that all judges are descriptive representatives means being explicit that white, male judges are descriptive representatives as well. Moreover, judges represent multiple identities, not just one, as “Diverse and Inclusive High Courts” suggests with its focus on intersectionality.

The first section of this paper begins with the debate about Kavanaugh’s appointment, using it to illuminate and enliven some of the theoretical problems with the umpire view. My interest is in neither hypothesis testing nor partisan politics. Rather, I use this event to tease out some of the theoretical implications and contradictions of the umpire view. The second section explores how the umpire view can be harmful when it is used against judges who are seen as differing from the norm. The paper concludes by suggesting briefly some advantages of turning descriptive representation inside out, seeing it as something that all judges do.

Fairness has a face

I have suggested that the judge-as-umpire concept may obscure the descriptive representation done by white, male judges who are seen as the norm. To understand this potential

dynamic, it is helpful to turn to the Kavanaugh hearings, a prominent instance in which the umpire view was defended.

Justice Kavanaugh himself gives an extensive discussion of the judge-as-umpire approach in “The Judge as Umpire: Ten Principles,” a 2016 speech he gave at Catholic University. Kavanaugh’s speech focused on the idea that good judges are dispassionate. As Justice Kavanaugh put it, “A good judge and a good umpire must demonstrate civility. Judges must show that we are trying to make decisions impartially and dispassionately based on the law and not based on our emotions” (Kavanaugh 2016, 689). Dispassion implies coolness, Kavanaugh noted, and a certain kind of reserve that allows a judge to see events clearly and without bias. But, dispassion for Kavanaugh also refers to partisan feelings. Kavanaugh argued that this is the first principle of being a good, neutral judge.

First, and most obviously, a good judge, like a good umpire, cannot act as a partisan. Judges are often from backgrounds in politics or policy ... But federal judges have to check any prior political allegiances at the door. You have to shed them. (Kavanaugh 2016, 686)

In this same speech, Kavanaugh reflected on the importance of his religious background as a Catholic. Reminding his audience that he was “a product of Catholic boys schools” in the DC area, Kavanaugh affirmed that this education was a part of who he is. “[Y]ou don’t forget your time in Catholic schools.” Referring to his position as Staff Secretary for President Bush, Kavanaugh recalled meeting the Pope as a high point in his career: “As the product of a Catholic education, to be [at the Vatican] in the presence of both the Pope and the President of the United States ... –well, you can’t get any better than that” (Kavanaugh 2016, 689, 683, 685).

The contradiction here is noteworthy. Kavanaugh’s lengthy discussion of Catholicism in his speech would seem inconsistent with the umpire view. Surely just as the particular religion of an umpire should be immaterial to calling balls and strikes, so too should the religion of a judge be immaterial. Yet, Kavanaugh is clear that his religion does matter; it informs his worldview. Moreover, he is telling an audience, presumably many of whom were Catholic, that his religion is a central part of who is as a judge. For more than two pages of his 10-page speech, Kavanaugh praises Catholicism and Catholic values, stating that both are central to how he understands the world on and off the bench.

Kavanaugh claims to be a descriptive representative as a Catholic: he asserts this identity and asks his audience to see him in that way. This is a noteworthy claim in large part because it occurs within a speech arguing for neutrality and impartiality. Taking both parts of his speech together, Kavanaugh claims *to be* and *to not be* a descriptive representative. Kavanaugh declares that he is an upstanding Catholic judge who is shaped by his religion *and* he is a neutral umpire who is not shaped by his religion. The importance of his religion is both communicated – Kavanaugh’s audience understands that he is a Catholic judge – and it is also erased.

A similar kind of dynamic occurred in the hearings themselves. Kavanaugh explained, as he had in 2016, that a judge should exemplify non-partisan dispassion. A judge should be an umpire. At the same time, he acted unlike a calm or dispassionate umpire. Challenged repeatedly and aggravated by the questions he was asked, Kavanaugh described the hearings as “a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election ... [and by a desire for] revenge on behalf of the Clintons,” a comment that was widely viewed as partisan. According to

his own description of his performance, Kavanaugh was “passionate” and “forceful” during his testimony before the Judiciary Committee. He felt “overwhelming frustration” and “deep distress” at the questions that he faced (Kavanaugh 2018).

Others agreed with Kavanaugh’s self-assessment that he was temperamental and excitable. Over 2400 law professors and scholars of judicial institutions observed that Justice Kavanaugh responded to questions in an emotional way (“The Senate Should Not Confirm Kavanaugh” 2018). Quoting the Congressional Research Service, they noted that a judge requires “a personality that is even-handed, unbiased, impartial, courteous yet firm.” Kavanaugh, they argued, failed to meet this standard. Judge Kavanaugh “responded in an intemperate, inflammatory and partial manner, as he interrupted and, at times, was discourteous to senators” (“The Senate Should Not Confirm Kavanaugh” 2018).

Though these scholars disputed that Kavanaugh was fit for office, they agreed in general with the ideal of judges being dispassionate and neutral. The problem, for them, was not with the ideal that Kavanaugh advanced, but rather simply that he failed to live up to it. In the end, the ideal of judge-as-umpire got the last word. Justice Kavanaugh was described at his swearing in ceremony as “a fair-minded, unbiased, and even-handed person” who understands that “justice must be divorced from the passions of the day – tethered instead to the enduring foundation of our republic: the Constitution” (“Transcript: Remarks of Trump ...” 2018).

Why is someone like Kavanaugh able to have it both ways, that is both to be a passionate judge who is a descriptive representative of his faith *and* to be a neutral, call-it-like-he-sees-‘em judge? There are many plausible answers to this question, but let me suggest one connected to descriptive representation: white, male judges can more easily hide their descriptive representation. They can more readily be seen as being neutral and impartial because they fit the optics of neutrality. They look the part.

Since the Supreme Court first convened in 1790, only six of 119 justices have not been white men. President Trump’s appointees in his first two years to the federal judiciary were 92% white and 76% male. None of the nearly fifty Circuit Court nominees was African-American, none was Latino (Arenberg 2020). For almost 200 years white masculinity was a sign of being qualified to sit on the Supreme Court – that is, to be a justice, one had to be white and male. Elite, white men have historically defined what it meant to be a good judge and for many decades were the primary exemplars of that ideal. They have historically been seen as more equitable and even-keeled than women, who were portrayed as flighty and emotional (Code 1991). For much of American history, fairness had a face, in other words. It was white, male, and attended Yale (or some other suitably elite law school).

My point is not to place blame for this cultural legacy, but rather to see it and to acknowledge it. This is, it turns out, not as easy as it sounds. What I am asking us to see is something that we tend to not see. Descriptive representation can sometimes vanish on courts, dissolving from sight under a wave of history, tradition, and norms. It is important to remember that this is an illusion. Descriptive representation never actually dissolves. We should remember judges are descriptive representatives, all.

Weaponizing fairness

I have thus far raised one possible problem with the ideal of judicial neutrality, specifically as it relates to descriptive representation. This first potential problem consists of forgetting

that judges who fit the norm are actually descriptive representatives. Judges who fit the norm may be seen as not as representing personal characteristics, such as religion, gender, race, ethnicity, age, region, class, etc. or as representing characteristics that are neutral as they relate to justice. In either case, descriptive representation is lost to view or fades in importance.

The second potential problem involves over emphasizing descriptive representation by those who do not match the norm. Rather than falling away or ceasing to be significant, descriptive representation for these groups becomes focal. Instead of receding in importance, it becomes central. One personal characteristic of a judge may be understood to be decisive in his or her judgments: a black judge is defined by race or a female judge by gender, for example. The focus on identity narrows – it centers on one part of a judge’s identity, isolating it from others – and it simplifies. The judge acts as a representative of this single identity, a delegate who transmits the will of the shared constituency fully. He or she is primarily a representative of some group, so this thinking goes, not really a fair judge at all.

There are some well-known examples of this kind of stigmatizing focus on descriptive representation. Objections were raised to Thurgood Marshall, as well as to other black judges in hearing civil rights cases. A black judge’s race, it was argued, created an “emotional attachment” that biased these judges in favor of civil rights (Higginbotham 1975, 362–363; Bell 1993, 13; Graycar 2008). In *Bush v. Gore*, the litigation that followed the 2000 presidential election, the only formal challenge of bias was against an African-American judge in a lower court hearing in Florida (Ifill 2002, 639–645). Women have faced accusations of bias, as well as Jews and members of the LDS Church (Graycar 1998). Asked to recuse himself from a case involving racial discrimination, Judge Leon Higginbotham observed, “black lawyers have litigated in the federal courts almost exclusively before white judges, yet they have not urged that white judges be disqualified on matters of race relations” (Higginbotham 1975, 389).

A more recent example concerns Judge Gonzalo Curiel, a US District Judge in California who ruled on two cases important to President Trump. The first case was a class action lawsuit against Trump University and the second was a lawsuit intended to block the construction of a border wall between the US and Mexico. Unhappy with Curiel’s ruling in the first case, then-candidate Trump accused Curiel of being “totally biased,” an “unfair judge,” and a “hater” (CNN 2018; Gomez 2018). In the border-wall case Trump suggested that Judge Curiel had an “absolute conflict” because of his “Mexican heritage” (Kendall 2016). President Trump explained, “I’m building a wall. It’s an inherent conflict of interest.” In this instance, the alleged bias due to ethnicity mingled with the alleged bias of partisan politics (Judge Curiel was appointed by Obama). Some commentators today link federal judges to the president who appointed them, identifying them as “Obama judges,” “Clinton judges,” or “Bush judges.” Scholars have long drawn a connection between attributed party identification, ideology, or policy preferences and decision making (See, for instance, Segal and Spaeth 1993). The implication in this case was that Judge Curiel was doubly biased. There was, in the end, no evidence to support either the charge of ethnicity bias or partisan bias (Judge Curiel ruled in favor of President Trump in the border wall case).

What we see in these examples is that descriptive representation can be portrayed as rigid and defining. Rather than representing many descriptive identities, the judge in

question is defined by one identity and one kind of descriptive representation. In contrast to the disappearing act of descriptive representation noted in the first section, in these examples one axis of descriptive representation crowds out all others from view and is understood to be determinative. Marshall's race loomed large; Kavanaugh's religion disappeared. Moreover, in these cases the judge tends to be defined as the problem – that is, a component of their identity (and the descriptive representation that it implies) interferes with the performance of judging (Minow 1990). The implication is that part of their identity – part of who they are – is inimical to the ethical conduct of a judge.

A skeptic may point out that this is a small problem, one that only effects a handful of judges. While this may be true, the damage can be serious. At the individual level addressing an accusation can take time and energy, a point demonstrated by Judge Higginbotham's careful analysis in *Commonwealth of Pennsylvania v. Local Union 542* (Higginbotham 1975). These accusations, moreover, may not halt at the level of the individual judge, but rather extend to other judges, officials, or citizens who are black, Latino, women, or so on. The suspicions, distrust, and antipathy created may be hard to dislodge, especially when they are voiced by political leaders.

In addition to these significant problems, the focus on neutrality vis-à-vis descriptive representation offers a troubling view of what constitutes a good judge. It may imply that it is unethical for judges to bring their life experiences or identities into their work. Judges might, as a result, try to erase or hide their personal identities from their professional lives, or scrub decisions from suggesting that any sort of descriptive representation is taking place. The implication seems to be that there is something wrong or unethical about descriptive representation.

Descriptive representation inside out

There is, I have suggested, reason to be concerned about the umpire model of judging. Though it is an attractive ideal, especially in highly partisan times, the umpire approach may have some unfortunate and troubling effects on descriptive representation. On the one hand, it may obscure the descriptive representation done by judges who accord the identity characteristics of the normal or baseline judge. On the other hand, it may lead to the unjust over-emphasis of the descriptive representation done by judges who do not fit the norm. These outcomes can, in turn, reinforce traditional identity hierarchies and stigmatize descriptive representation.

Fairness is crucial to being a good judge and advocates of the umpire model are right to be concerned about it. But, being fair does not necessitate an absence of descriptive representation or a lack of identity. Defenders of a strict version of the umpire view neglect this. They tend to define fairness as an absence of personal background and shared experiences. According to this strict umpire view, being fair is forgetting about one's personal background or one's experiences.

There is an epistemological challenge here: how can a judge forget who she or he is? Is it possible for a judge to forget his or her life experiences? But there is also a question about good judging. Being a good judge does not mean forgetting about who you are or where you came from. It means remembering it. This appears to be, for example, Justice Kavanaugh's view as his speech emphasizes the influence of Catholicism and of a Catholic education on his decision making. History presents another challenge to the umpire view:

demographics have long been an important factor on courts. Even when the bench was exclusively white and male, demographics played a role. In the past, it was deemed important to have a sitting New York justice, a Southern justice, a Western justice, a Catholic justice, and a Jewish justice. The demographics we select on have altered; what we want represented has changed over time. Yet, the desire for descriptive representation on courts has remained steady.

Descriptive representation can provide additional information to courts and aid in the process of reaching justice. A judge like Thurgood Marshall, who was knowledgeable about the experience of racial oppression and well-versed in the legal mobilization efforts of civil rights organizations, can be an asset to courts. Kavanaugh too offers his political experiences as yielding important perspectives on justice. Background knowledge like this can provide additional perspectives, awareness, and information. It can widen the scope of justice and increase the lives touched by courts. Social science research shows that multiple views on a problem leads to better results and that divergent ways of seeing and interpreting the world are more important than individual expertise in producing smarter outcomes (Feddersen and Pesendorfer 1997; Persico 2004; Page 2008; Landemore 2013). Knowledge, experience, and wisdom are beneficial to justice. Why would we refuse these benefits when it comes to descriptive representation?

It is important to acknowledge that descriptive representation can go too far on courts, and it can damage the work that they do. We should be concerned, for instance, if a judge decides cases solely based on personal experiences or renders decisions exclusively as a descriptive representative. These would be ethical violations. Descriptive representation and personal identity should not dominate law or justice. Rather, they should inform decisions and expand the data or information that courts consider. A more open and transparent approach toward descriptive representation will be helpful in the long term to seeing potential ethical violations more clearly.

Excluding these clear violations, there need not be anything suspect, on the face of it, of a judge who acknowledges the importance of his or her many identities or sees herself or himself as a descriptive representative of various constituencies (See, for instance, Lewis 2009). Most judges are probably a descriptive representative of at least some population or are seen as being representative by some groups. Descriptive representation, to put this slightly differently, is likely not something that can be controlled or excised, even with a compelling sports analogy like a judge-as-umpire. Rather than hiding from descriptive representation or demonizing it, we will be better off accepting it, acknowledging it, and being transparent about the way that it effects decision making. As a first step, we should be willing to turn descriptive representation inside out, seeing it as normal, legitimate, and even beneficial part of attaining justice.

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