COMMENT AND EXCHANGE

IS JUSTICE BLIND?

TO THE EDITOR:

I am writing in reaction to the article by Spaeth, Meltz, Rathjen and Haselswerdt, "Is Justice Blind: An Empirical Investigation of a Normative Ideal," which appeared in vol. 7, no. 1. The authors attempt to support the Aristotelian myth that blind justice can systematically obtain. The premise in the myth is fallacious, and confirmation of the authors' research hypothesis in three of their five data sets cannot therefore be an adequate basis for concluding that justice is blind in the cases comprising the three sets.

In an adversary legal system, there is only one logical way that decisions can be just in the Aristotelian sense (*i.e.*, decisions treating equal cases equally) connoted by Spaeth *et al.*'s discussion of blind justice. They must be randomly made. Thus, as between petitioners and respondents in cases heard before the Supreme Court, the Court's decisions would be just if a table of random numbers were used to decide which of the parties' positions to adopt in each case. When decisions are systematically made, one of the parties to a case, by virtue of his prior social position, has a greater probability of a favorable decision than does the other, and legal discrimination operates in his favor. So far Spaeth *et al.*'s argument holds; this they would see as discrimination toward situations rather than discrimination toward objects.

However, discrimination toward situations and discrimination toward objects are not additive, as Spaeth *et al.* assume. They are interactive. Differential probabilities also attach to various classes of people occupying any given social position as against others. Hence, situational discrimination necessarily (implicitly at least) implies object discrimination. This may be illustrated by a problem in interpretation of a statutory provision prohibiting racial discrimination in employment. Supposing the facts of a case are that a black woman is denied employment as a sales clerk in a department store because the store has found that its customers buy more from white clerks than black clerks. This is a situational decision by the store—that its personnel decisions are based upon the projected ability of prospective employees to sell its wares. It is nevertheless effectively an object decision in that it discriminates in favor of white candidates for employment. If a court now orders that the black be hired, it is discriminating in favor of blacks (*i.e.*, increasing the probability that blacks will be hired)—discrimination toward objects—while probably stating that projected sales ability is not a reasonable basis upon which

to make employment decisions—discrimination toward situations.

In trying to convert discrimination toward objects and discrimination toward situations to measurable additive factors in judicial decision-making, Spaeth *et al.* have invalidly operationalized the concepts. Taking the decisions in which labor unions were parties as an example, the authors' first mistake was in equating the element of injustice, discriminative decisions, with the attitudes of the decision-makers toward the litigants. There are many circumstances under which a judge could love a union more than its adversary and yet discriminate against it. (The analogue with racial discrimination: "I don't discriminate against blacks; some of my best friends are black.") In other words, discrimination definitive of injustice can in fact exist without being purposive.

The authors' second operational mistake is in trying to treat discrimination (or, as they put it, attitude) toward objects as the mere explanatory residuum of what is not explained by situational differences. I may be missing a great deal of the unstated rationale for this operationalization but it appears that it was selected (1) because suitable labels were available for the categories of cases—that is, one category could readily be labeled as a set of objects and the other as a set of situations, (2) because it fit the equation, (AO + AS = 1.00), (3) because available data could easily be so categorized and (4) because the categories were reliable. How it validly distinguishes discrimination toward objects from discrimination toward situations in the same set of decisions remains for the authors to explain. How, for instance, would a decision directed toward the legality of a strike by itself not necessarily be directed toward favoring the interests of labor over management or management over labor? Could not discrimination in favor of labor in this situation coexist with a favoring of management interests in an antitrust case against a union? Even an attempt to balance one discrimination against another can hardly represent equality of treatment to one who is in a position to take advantage of one discrimination and not the other.

To sum up, the fallacy in the concept of equal treatment of equal cases is that while one characteristic of situations or objects may be held constant (*i.e.*, equal), some others will systematically vary. Spaeth *et al.* fail to recognize this point, and so engage in a futile attempt to demonstrate empirically that systematically conferred blind justice is for large categories of cases a reality. In a larger sense, they help instead to demonstrate that Aristotelian justice is not a viable criterion for normative evaluation of judicial decision-making.

Unless we are to advocate judicial abandonment of rational decision-making in favor of the institutionalization of randomness, the normative question cannot be one of whether discrimination is acceptable but must be one of what kinds of discrimination are to be made.

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THE AUTHORS' REPLY:

Because Professor Pepinsky's criticism appears to lack what could best be referred to as academic "blindness" or simple unbiased objectivity, we deem it essential to underscore the investigatory nature of our article, an investigation which does not seek justification of the normative ideal. With this in mind we turn to substantive concerns.

Pepinsky states that: "Unless we are to advocate judicial abandonment of rational decision-making in favor of the institutionalization of randomness, the normative question cannot be one of whether discrimination is acceptable but must be one of what kinds of discrimination are to be made." Why there should be "discrimination" at all escapes us. Nor do we accept Pepinsky's inference that evidences of judicial blindness are anything other than a manifestation of the normative ideal. To so infer is an apodictic prepossession. Rather, we explicitly state that "we are not in a position to determine whether the Court *should* or *should not* be 'blind.' But we can address ourselves, in principle at least, to a determination of the extent to which justice, as dispensed by the Court, *is* 'blind.' "

An additional indication of Pepinsky's bias is found in his assertion: "When decisions are systematically made, one of the parties to a case, by virtue of his prior social position, has a greater probability of a favorable decision than does the other. . . ." Whether or not this statement be understood in a Marxist sense, prediction based upon nothing more than the "prior social position" (a concept, the exact meaning of which eludes us) of a business, labor union, physically injured employee, purveyor of alleged pornography, the NAACP, or a person accused of crime will likely be inaccurate.

Furthermore, Pepinsky's assertion that for justice to be blind, judicial decisions must be arrived at by consulting a table of random numbers is absurd. Because the context in which the assertion appears is unclear, we are uncertain whether Pepinsky is claiming this as an Aristotelian position or as a consequence of our own. In either sense, he is wrong. Judicial fairness (or "blindness") does not proceed randomly, but systematically. What the criterion patently does not permit are decisions based upon *ad hominem* characteristics. For jus-