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-

tice to be "blind," it must systematically (*i.e.*, nonrandomly) consider each case on its merits—on the basis of the situation as detailed by the evidence. This point is so obvious that we feel we are beating a dead horse to pursue it further.

Suffice it to say that Pepinsky seems confused between the rather familiar normative notion of judicial blindness and the ideological notion of redistribution, a point which we consider and disregard as unscientific. We can draw no other conclusion from his claim that "prior social position" produces "a greater probability of a favorable decision." This claim, of course, is an assumption. Pepinsky presents no evidence to support it. Moreover, it is beside the point. We make no claims about social positions—a distinctly nonjudicial concept. Finally, we note Pepinsky's confusion of "discrimination" (his term) and "attitude" (ours).

To turn to other points raised by Pepinsky: We do not assume that attitude toward object (AO) and attitude toward situation (AS) are additive. Following Rokeach's formulation, we state that "behavior is a function of the interaction between AO and AS: $B = f(AO, AS)$."

Pepinsky's statement—"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"—may conceivably be accurate. But the fact that the justices tend to treat the situational content of the cases in a given scale as though they contain a common issue supports the irrelevance to decision of Pepinsky's "differential probabilities."

As for his hypothetical situation involving black sales clerks, if a cumulatively scalable set of such decisions correlated with other sets involving different kinds of situations involving blacks, such as those listed in Tables 9 and 10 of our article, then AO would dominate decision. On the other hand, if the reverse were true, then AS would dominate and the finding of judicial blindness stands.

Pepinsky's comments concerning invalid operationalization of constructs ignores the character of the adversary system. If the litigants to a case are a labor union and a business, and if the Court's decision favors the union's claims, the decision is pro-union and anti-business. The fact that the union's victory may not have been total and complete is irrelevant. We do not weigh cases on any measure of importance/unimportance due to the obvious difficulty of operationalizing an importance/unimportance construct. What is crucial is whether, via cumulative scale analysis, the justices treat a given set of cases

as though they pertain to a single universe or category as refined as the data permit.

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REPLY TO MAX GLUCKMAN

Max Gluckman pays me the high compliment of devoting a good portion of his recent article (1973) to a re-analysis of my interpretation (1969) of a case drawn from the records of the primary courts of Kenya. And he is extremely flattering in his comments upon that interpretation. A reply would therefore seem unnecessary at the least, and possibly ungrateful. I know I am not the latter, and I hope the reply is not wholly superfluous.

With the distance created by time, I now see my article, Gluckman's criticism, and my reply, as a dialectic. In writing my article, I was reacting to a body of scholarship that was almost totally preoccupied with rules. Although I only quoted at length from the work of Charles Dundas (a colonial administrator), I also cited numerous other examples by both lawyers and anthropologists. And Gluckman, himself, acknowledges that "some lawyers tend to be concerned in Africa to record rules, as the *Restatement of African Law* shows . . ." (1973: 635). I therefore do not agree that it has been "long established and accepted" that "a study of abstract rules is not enough" (1973: 624).

In reacting to this preoccupation with rules, I confess that I went to the other extreme, and gave the impression that I believed "that cases are more important than rules," for which Gluckman has quite rightly criticized me (1973: 634). But I never contended that "the study of the case, or the dispute, or the conflict should be the only focus of the study of law" (1973: 613), nor did I assert "that cases alone will give rules" (1973: 622). Indeed, I could hardly have done so, for, as Gluckman writes, the "analysis by Abel, does not observe the rule (note!) he promulgates" (1973: 613). The reason it does not is that I promulgate no such rule.