IS JUSTICE BLIND: AN EMPIRICAL INVESTIGATON OF A NORMATIVE IDEAL

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Of the many enduring myths which serve as the foundation for American democracy, none is as pervasive as that of judicial objectivity. While the assertion that justice is blind is probably met with understandable cynicism, most Americans still believe that their judges, especially those in the appellate courts, should approach their responsibilities with a certain myopia. The rules and customs that are the foundation of Anglo-American legal practices may be considered the basis upon which judicial objectivity rests.

More than any other judicial institution, the Supreme Court is expected to satisfy these requirements of objectivity. Specifically, it is expected that justice should be situationally determined; that is, the personal attributes of the litigants should never be relevant to the justices' decisions.

Recently, this expectation has been subject to normative and substantive attack. On the one hand, certain radicals maintain that in order to achieve "real" justice, decisions should, at times, be partially predicated on personal characteristics. They assert that society has placed certain groups in an objectively (some might even say subjectively) disadvantaged position; consequently, a situationally (rather than a personally) relevant dispensation of justice merely exaggerates the unfair inequalities that "real" justice would eliminate. In this context, for example, some maintain that the color of a defendant may indeed be relevant to the case. An extreme, although perhaps not unrepresentative, example of this position is the demand to dismiss without trial all charges against black suspects regardless of the severity of the alleged crime (e.g., Bobby Seale, Huey

Newton, Angela Davis) on the grounds that "white" justice (however that may be interpreted) is not applicable.

The important feature of this radical position is its attack on the normative expectations of the law. This indictment of American jurisprudence does not rest so much on the charge that justice is unfairly distributed (although one hears this charge also) as it does on the assertion that our traditional notion of fairness is itself inherently unfair. Briefly, the indictment maintains that if an economic and political system leaves certain individuals in a permanent or near permanent position of inferiority, then it *ought* to be the function of the judiciary to "correct" this imbalance. Hence, an individual's color, social position, or degree of poverty are criteria relevant to decision.

Other critics, while perfunctorily reasserting their commitment to the normative desirability of judicial objectivity, maintain that the Supreme Court is not, in fact, living up to this standard. They assert that recent decisions of the Court have at least partially been based upon personal characteristics. The Court stands accused of having a "liberal" bias, of being "soft" toward blacks, communists, pornographers, and criminals.

The normative criticism discussed above cannot be subject to empirical falsification. Hence, this criticism does not admit of scientific analysis. The substantive criticism, however — that the Court is not *in fact* following the strictures of judicial blindness — is, in principle, amenable to empirical falsification and hence does constitute a proper subject for scientific inquiry. More simply put, 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." We say "in principle" because until recently no suitable methodology was available to test this contention.

THEORY

Given the fact that univariate explanations of human behavior are almost never sufficient, we do not expect that judicial decision making will be either totally "blind" or "nonblind." In addition, measurement imprecision precludes our describing justice more specifically than "more" or "less" blind — that it either does or does not *approximate* the ideal. Rather, mixed attitudes probably prevail and it is the aim of this work to specify the dimensions of this mix.

The normative assertion with which we are concerned is

based upon certain assumptions that are, in turn, analogous to the basic assumptions underlying attitude theory and the latter's concern with empirically testing the relationship between the psychological determinants of behavior ("beliefs," "attitudes," and "values") and resulting behavior.

The nature of individual motivations and predispositions to behave in particular ways is, of course, the concern of attitude theory. Most attitude theorists would agree that the construct "attitude" performs two primary functions. First, the attitude or set of attitudes is assumed to provide the individual with a conceptual framework with which to structure and arrange, in a manageable fashion, the wide variety of stimuli the individual encounters. Second, attitudes are assumed to provide the individual with predispositions to behave in preferred manners.

Attitude theory may be considered a stimulus-organism-response model of human behavior. In this context, attitudes are assumed to function as intervening variables between stimuli and responses. In other words, the individual is assumed to evaluate a given stimulus within a personalized set of attitudes and, as a result, to respond in a fashion consistent with the behavior the relevant attitude(s) advocates.

Similar assumptions are implicit in any discussion of normative behavior. The individual is assumed to be aware of which set of normative expectations is relevant to a particular stimulus. If the individual evaluates stimuli in this manner, normative theory further stipulates that he should behave according to the applicable normative criterion.

Among attitude theorists, Milton Rokeach sharply distinguishes between attitude toward object (AO) and attitude toward situation (AS) (Rokeach, 1968a; 1968b). He argues that to predict or explain behavior exclusively on the basis of either AO or AS is theoretically and empirically unsound (Rokeach, 1968a). It is not sufficient to know a person's attitude, say, toward such attitude objects as blacks, students, indigents, labor unions, or businesses. One must also know the situation, the setting, in which the attitude object is behaving. A person may respond in an entirely different manner toward a black sitting next to him at a lunch counter as opposed to a black moving in next door, or to one employed as his job supervisor.

For Rokeach, then, behavior is a function of the interaction between AO and AS: $B = f(AO, AS)$. Rokeach further argues

that the relative strength or importance of AO vis-à-vis AS (or AS vis-à-vis AO) may vary in magnitude and thus affect behavior differentially. These assertions have been demonstrated empirically (Spaeth and Parker, 1969). Theoretically, the values of AO and AS in relation to each other are reciprocal (AO + AS = 1.00). Thus, the relative importance of AS or AO can range from 1.00 (completely determinative) through .50 (equally determinative) to .00 (the other is completely determinative).

The two-attitude theory of behavior described above may be used to investigate the extent to which the normative ideal of "blind" justice operates. This ideal is analogous to the assertion that judges should decide their cases on the situational aspects of the case alone, i.e., that the importance of AS should equal 1.00, while that of AO is .00. Hence, AS should completely explain behavior.

Attitude theory, then, provides us with the conceptual power to determine whether the Court meets the normative demands of "blind" justice. If the justices reach decision on the situational merits of the case alone, then AS explains such behavior. On the other hand, if the justices reach decision on the basis of the particular litigant before the Court, AO explains behavior.

Given the fact that our data are necessarily incomplete and, further, given the imprecision of our measures, precise delineation of the relative magnitudes of AO and AS is not possible. However, as has been shown (Spaeth and Parker, 1969), it is possible to specify the relative magnitudes of AO and AS in terms of "more than"/"less than," and to indicate numerically the relative importance of AO and AS in given data sets.

Thus, the focus of this study is to ascertain the relative importance of attitude toward situation (AS) vis-à-vis attitude toward object (AO) in light of the normative desideratum specified above. Therefore, our hypothesis is that for all data examined, the justices' behavior is predominantly explained by AS.

DATA AND METHODOLOGY

The data used to test the hypothesis is drawn from the last eleven terms of the Warren Court (1958-1969), a period in which the Court was under rather constant criticism. From a universe of some 2,100 cases decided by a vote on the merits by at least one of the participating justices,[1] 430 were chosen on the basis that their AO-AS linkages were well suited for testing the

hypothesis. The basis for choice was a set of cases sufficient in number to meet one or the other of the following criteria: 1) an AO common to a set of cases with more than one discrete AS, 2) an AS common to a set of cases with more than one discrete AO. Five sets of cases resulted: data sets A, B, and C which meet criterion 1, and data sets D and E which meet criterion 2.

Cumulative scales (Guttman, 1950a) were constructed from the cases in each of the five data sets. These scales were established via *ad hoc* content analysis. By reference to the published opinions of the Court and the headnotes accompanying them, the major facts and issues of each case were identified. Two of the authors, four Ph.D. candidates, and a colleague read the items used here and categorized the cases on legal and semantic bases defined as narrowly as the data permitted. Interrater reliability was .95, and consensus on the remaining items was achieved in conference.

The scales comprising each of the five sets in terms of designated AO's and AS's are as follows:[2]

Data set A includes four cumulative scales, the designated AO of which is "labor unions." The AS's for each of the scales in this set are defined as follows:

> Scale A1:   "The rights of unions vis-à-vis business." Sanctions that labor unions use against business, e.g., strikes, picketing, collective bargaining, representational elections, etc.
> Scale A2:   "The rights of business vis-à-vis unions." The converse of Scale A1, namely, the sanctions that businesses employ against organized labor, e.g., the discharge and locking out of employees, and the discouragement of union membership.
> Scale A3:   "Federal antitrust regulations." The applicability of such legislation as the Sherman, Clayton, and Landrum-Griffin Acts to anti-competitive labor union activity, e.g., secondary boycotts and uniform industry-wide working conditions.
> Scale A4:   "Union membership as a condition of employment." The legality of closed, union, and agency shops.

Data set B includes four cumulative scales the designated AO of which is "persons exercising freedom of communications." The AS's for each of the scales in this set are defined as follows:

> Scale B1:   " 'Harmful' beliefs or ideas." The conventional First Amendment freedom cases, excluding those pertaining to freedom of religion, establishment of religion, and obscenity.
> Scale B2:   "Defamation." The extent to which the First Amendment inhibits the application of libel laws.
> Scale B3:   "Privacy." The conflict between freedom of the press and a person's right to privacy.

> Scale B4:   "Protest demonstrations." The use of demon-strations to communicate ideas and beliefs. Sit-in demonstrations are not part of this scale because this set of cases pertains to the equal protection clause of the Fourteenth Amendment, not to the First Amendment.

Data set C includes three cumulative scales the designated AO of which is "security risks," that is, persons whose beliefs and/or behavior are deemed "un-American" or "subversive." The AS's for each of these scales are defined as follows:

> Scale C1:   "Legislative investigation." The legality of the activities of the House Un-American Activities Committee and related state legislative committees.
>
> Scale C2:   "Public employment or benefits." The dismissal of public employees, admission to the bar, and the constitution-ality of loyalty oaths.
>
> Scale C3:   "Federal legislative sanctions." The interpreta-tion of the provisions of such legislation as the Subversive Ac-tivities Control, Internal Security, and Smith Acts.

Insofar as testing the hypothesis is concerned, sets A, B, and C permit us to test the effects of AO across the AS's con-tained in each set. Because sets A, B, and C contain only a single designated AO, a test of AS across AO's cannot obtain. Such a test does obtain in sets D and E, however.

Data set D includes three cumulative scales the designated AO of which is "physically injured employees" and two cumu-lative scales the designated AO of which is "non-physically in-jured persons." AS's for each of the "physically injured em-ployees" scales are defined as follows:

> Scale D1:   "Sufficiency of evidence." Whether or not the injured person has presented sufficient evidence to permit the jury to determine whether or not the injured person is entitled to compensation.
>
> Scale D2:   "Election of remedies." The laws, state or fed-eral, governing an injured person who brings legal action.
>
> Scale D3:   "Liability." The responsibility of the person being sued for the injury suffered.

The AS's for the two "non-physically injured persons" scales (D4 and D5) are identical to those of Scales D2 and D3.

Data set E includes five cumulative scales the designated AO of which is "black" and four cumulative scales the desig-nated AO of which is "non-black." The AS's for each of the "black" scales are defined as follows:

> Scale E1:   "First Amendment freedoms." The conventional First Amendment freedom cases excluding those pertaining to freedom of religion, establishment of religion, and obscenity. The contents of this scale and Scale E6 taken together are identical

to that of Scale B1. The only difference is conceptual: The AO-AS linkage of Scale B1 is "persons communicating 'harmful' beliefs or ideas"; that of Scales E1 and E6 is "blacks (non-blacks) exercising First Amendment freedoms." Thus, the AS of B1 differs semantically but not substantively from E1 and E6, while the AO of E1 and E6 differ in that the focus of the set E scales is race while that of set B is not.

Scale E2: "Voting." The right to vote, plus electoral and ballot qualifications.

Scale E3: "Comity." The practice of non-intervention by the federal judiciary in state court proceedings. The issue here is whether or not cases in state courts that contain a federal question may be removed to the federal courts before remedies available under state law have been exhausted.

Scale E4: "Protest demonstrations." The use of demonstrations to communicate ideas and beliefs. The contents of this scale and Scale E9 taken together are identical to that of Scale B4. Again, the only difference is conceptual: The AO-AS linkage of Scale B4 is "persons exercising freedom of communication by means of protest demonstrations"; that of Scale E4 (E9) is "blacks (non-blacks) engaging in protest demonstrations."

Scale E5: "Sit-in demonstrations." The AO of this scale is exclusively "black." The AS difference with Scale E4, as previously noted, is that the protests of E4 are First Amendment connected, while the sit-in cases pertain to the equal protection of the laws clause of the Fourteenth Amendment. Whereas the AO of Scales E1 through E5 is "black," the AO of Scales E6 through E9 is "non-black."

Scale E6: The "First Amendment freedom cases" (see Scale E1) involving "non-blacks."

Scale E7: The "voting" cases (see Scale E2) involving "non-blacks."

Scale E8: The "comity" cases (see Scale E3) involving "non-blacks."

Scale E9: The "protest" cases (see Scale E4) involving "non-blacks."

The procedure used to test the hypothesis is as follows: We employ two techniques — cumulative scaling (Guttman, 1950) and rank order correlation (Kendall, 1955). Cumulative scaling orders the respondent justices along each attitudinal dimension; rank order correlation compares the order of the respondent justices among attitudinal dimensions.

If, for each of the five data sets, all the cases therein scale acceptably on the basis of their respective AO's (forming what we shall call an "AO scale"), then we would tentatively conclude that the hypothesis is not confirmed. This conclusion would be strengthened if we find that no substantial reduction in nonscale responses occurs when the AO scale is broken into its component AS scales. For example, if all the 86 cases in data set A formed a perfect cumulative scale (coefficient of

reproducibility $= 1.00$)[3] based upon the labor union AO, regardless of the situational context which gave rise to the litigation, then the data would show conclusively that the common attributes of all this litigation (that one of the parties in each of these cases was a labor union) completely dominated the Court's decision making, to the utter exclusion of the situation from which the litigation arose. Similarly, if the 93 cases in data set E in which the designated AO is "black" formed a perfect cumulative scale, the hypothesis would again be disconfirmed because the litigants' "blackness" accounts for the Court's decisions, rather than the situational context which gave rise to the litigation.

The foregoing are hypothetical examples which, of course, are not likely to occur. Consequently, the pertinent methodological problem is the definition of an "acceptable" rather than a "perfect" cumulative scale. This definition depends upon two elements: the mechanics of scale construction and the criteria that determine "acceptability." The most crucial aspect of scale construction is the ordering of cases. In this, we follow Spaeth's procedure (Spaeth, 1965). Our criteria for "acceptability" are threefold. First, a scale must have a CR $\geq$ .95. The reasons for this higher than conventional CR have been specified elsewhere (Spaeth and Peterson, 1971). The absence of an acceptable CR is *prima facie* evidence that AS dominates AO. Second, nonscale responses ("errors") must be random; that is, they should not be concentrated disproportionately among the votes of a few justices, nor should they be found disproportionately in but a few of the cases comprising the scale (Guttman, 1950a: 77, 79; Suchman, 1950a: 119; 1950b: 159-160). If nonscale responses are nonrandom, this again indicates the dominance of AS over AO. Third, the majority of the nonscale responses in the AO scale should disappear when component AS scales are formed. Without such disappearances, AO dominates AS. Thus, for example, a given AO may form an acceptable scale. If, however, the nonscale responses in this AO scale are greatly reduced when its component AS scales are constrtucted, then we would judge AS to be of more than minimal importance. On the other hand, if no acceptable AO scales can be formed on the basis of an AO in one or the other of our five data sets, then we would tentatively conclude that the hypothesis for that set of data is supported — that justice is indeed situationally determined.

Apart from the presence or absence of an acceptable AO scale in one or the other of our data sets, we also wish to know

the extent to which AS affects the behavior of the justices. Accordingly, we rank order the respondent justices from 1 to N on the basis of their individual breakpoints in each of the situationally based scales for each of our five data sets (these we call "AS scales"). Tau-b rank order correlations (Kendall, 1955: 34-35) are then computer calculated for each pair of scales in each of our five data sets (Morris, 1967).[4]

By comparing the correlation between each pair of AS scales in each of the five data sets, we test to what extent their unique feature (different AS's) or their common feature (the same AO) explains behavior. Calculation of the mean correlation for all pairs of scales within each of the five data sets provides a descriptive statistic of the importance of AO vis-à-vis AS. Furthermore, because data sets D and E have different AO's and AS's, an analysis of the interaction of AO and AS is possible; in these two data sets, then, we can test AS across AO's as well as each of the AO's across the AS's.

Our decision rules are as follows:

1)   the lower the CR, below .95, in an AO scale, the greater is the dominance of AS.

2)   the presence of nonrandom nonscale responses in an AO scale strengthens the dominance of AS where decision rule 1) obtains.

3)   the presence of nonrandom nonscale responses in an AO scale where CR $\geq$ .95 lessens the dominance of AO than would be the case were these responses random.

4)   if nonscale responses fail to be reduced substantially ($\geq$ 50%) when component AS scales of an otherwise acceptable AO scale are formed, then AO dominates AS.

5)   the relative importance of AO vis-à-vis AS is determined by the average tau correlation of the component AS scales of an AO scale.[5]

RESULTS

To ascertain whether or not the hypothesis is supported, we proceed through each of the five data sets, observing the quality of the cumulative scales and the size of the mean tau-b correlations.

TABLE 1:   Data Set A

		N	CR
AO	labor unions	86	.882
AS	labor's economic sanctions	43	.943
	business' economic sanctions	21	.977
	federal antitrust regulations	10	.964
	union membership as a condition of employment	12	.960

The summary findings from data set A are displayed in Table 1. Clearly, no acceptable AO scale obtains from the AO of this data set (labor unions). The coefficient of reproducibility is an extremely poor .882. Thirty computable nonscale responses result[6] and the pattern of these responses is not random. Sixty percent of the computable nonscale responses occur in the votes of Justices White, Clark, and Stewart, a percentage which remains constant when noncomputable nonscale responses are added. Also, the AS scales of data set A are not particularly sturdy. As Table 1 shows, Scale A1 does not attain a CR of .95, which suggests that the Court distinguishes among the various sanctions employed.

We conclude, then, that data set A supports the hypothesis: The Court does not decide cases on the basis of the AO of "labor unions," but on the basis of the situational context which produced the litigation to which the labor union was party.

TABLE 2:   RANK ORDER CORRELATIONS BETWEEN SCALES OF DATA SET A

Scale Number	AS	A1	A2	A3	A4
A1	labor's economic sanctions vis-à-vis business		.52	.18	.61
A2	business' economic sanctions vis-à-vis labor			.07	.76
A3	federal antitrust regulations				.00
A4	union membership as a condition of employment				
				mean correlation = .36	

The extent to which the AS's dominate in this data set may be gleaned from Table 2. The correlations range from .00 to .76, with a mean of .36. Hence, AS in this data set is considerably more explanatory than the AO of labor unions.[7] We say "considerably more" because: 1) None of the CR's in Scales A1-A4 is especially high; this suggests that the AS's of these scales are more specific than the data permit us to ascertain. 2) The mean correlation in this data set is 18 points less than the mean correlation of *all* the pairs across *all* five data sets.

TABLE 3:   DATA SET B

		N	CR
AO	persons exercising freedom of communication	71	.901
AS	"harmful" beliefs or ideas	30	1.00
	defamation	20	1.00
	privacy	4	1.00
	protest demonstrations	17	.951

Table 3 displays the summary findings of data set B. As

above, no acceptable scale obtains when the cases are ordered on the basis of AO disregarding AS's. Not only is the CR a low .901, but nonscale responses are again not randomly distributed. Fifteen of the 29 computable nonscale responses locate among the votes of only two justices: Black (9) and Fortas (6).

This data set further supports the hypothesis. "Persons exercising freedom of communication" is a much less important criterion for decision than the situations in which such actions occur. When the cases of this data set are formed into AS scales, three perfect scales result, one of which, "privacy," is not unexpected given its small N. The low CR of "protest demonstrations" is explained by observing that three of the four nonscale responses occur in a single case, *Street* v. *New York* (1969).[8]

TABLE 4:   RANK ORDER CORRELATIONS BETWEEN SCALES OF DATA SET B

Scale Number	AS	B1	B2	B3	B4
B1	"harmful" beliefs or ideas		.70	.55	.25
B2	defamation			.52	.11
B3	privacy				.52
B4	protest demonstrations				−.12
			mean correlation = .335		

Table 4 displays the rank order correlations between AS scales of data set B. The average correlation of .335 indicates that the AO "persons exercising freedom of communication," is no more explanatory of behavior than is the AO of the previous example, "labor unions." As before, we judge AS to account for much more of the behavior than AO.

TABLE 5:   DATA SET C

		N	CR
AO	security risks	71	.988
AS	legislative investigation	29	.989
	public employment or benefits	17	.983
	federal legislative sanctions	25	1.00

Table 5 displays the summary findings of data set C. Unlike data sets A and B, a very acceptable AO scale obtains when the cases are ordered on the basis of AO disregarding AS's. The five nonscale responses are shared by four of the justices, and the CR even exceeds that of one of the component AS scales. Furthermore, when the AO scale is broken into its three component AS scales, nonscale responses are reduced by only one.

Accordingly, the hypothesis is not supported where the designated AO is "security risks." As Table 6 shows, situational

context, except for "legislative investigations," is minimally explanatory. In contradistinction to our previous findings (data sets A and B), the mean correlation of .75 indicates that AO is much more explanatory of behavior than AS.

TABLE 6: RANK ORDER CORRELATIONS BETWEEN SCALES OF DATA SET C

Scale Number	AS	C1	C2	C3
C1	legislative investigation		.65	.65
C2	public employment or benefits			.96
C3	federal legislative sanctions			
			mean correlation = .75	

The two remaining data sets, unlike those above, provide a further control in testing the hypothesis. In data sets D and E, we have been able to designate more than a single AO, thereby permitting us to test AS across AO's.

TABLE 7: DATA SET D

AO	1 physically injured employees		2 non-physically injured persons		injured persons (1 + 2)	
	N	CR	N	CR	N	CR
physically injured employees	78	.969				
non-physically injured persons			25	1.00		
injured persons					103	.971
AS						
sufficiency of evidence	32	.992			32	.992
election of remedies	22	.975	8	1.00	30	.983
liability	24	.962	17	1.00	41	.964

Table 7 displays the summary findings of data set D. Each designated AO in this set produces an acceptable scale, with "non-physically injured persons" achieving perfect reproducibility. Indeed, we can combine the two designated AO's of data set D into a single designated AO — "injured persons." The resulting AO scale produces a CR of .971. Nor are the 14 nonscale responses in this scale reduced markedly when the five AS scales are constructed. Only five disappear; nine remain in the AS scales. Obviously, then, as in the "security risks" data set, the hypothesis is not supported. Attitude toward object overwhelmingly dominates the three identifiable situations in which AO is present: "sufficiency of evidence," "election of remedies," and "liability."

TABLE 8: RANK ORDER CORRELATIONS BETWEEN SCALES OF DATA
SET D

AO	Scale Number	AS	D1	D2	D3	D4	D5
				physically injured employees		non-physically injured persons	
physically injured employees	D1	sufficiency of evidence		.91	.89	.87	.83
	D2	election of remedies			.78	.90	.91
	D3	liability				.94	.70
non-physically injured persons	D4	election of remedies					.82
	D5	liability					
		mean correlation = .855					

The dominance of AO in data set D is further illustrated in Table 8. The mean correlation for the ten pairs is an extremely high .855. Further disconfirmation of the hypothesis is the fact that the two common AS pairs (D2-D4 and D3-D5) produce an average correlation of .80, whereas the two AO's across AS's and the mixed AO-AS pairs all yield higher mean correlations. Thus, for the AO, "physically injured employees," across AS's (D1-D2, D1-D3, and D2-D3), the mean correlation is .86; for the AO "non-physically injured persons," across AS's (D4-D5), the mean correlation is .82; and for the mixed AO-AS pairs (D1-D4, D1-D5, D2-D5, D3-D4), the mean is the highest of all — .89.

Consequently, we find that for data set D, AO accounts for virtually all behavior. Moreover, the controlling AO is neither "physically injured employees" nor "non-physically injured persons," but the more general and less differentiated AO, "injured persons."

TABLE 9:   DATA SET E

AO	1 blacks		2 non-blacks		1 + 2	
	N	CR	N	CR	N	CR
blacks	93	.960				
non-blacks			53	.921		
AS						
First Amendment freedoms	12	1.00	18	1.00	30	1.00
voting	24	.991	13	.952	37	.960
comity	13	1.00	18	.975	31	.986
protest demonstrations	13	.952	4	1.00	17	.951
sit-in demonstrations	31	.986			31	.986

The remaining data set, like data set D, also permits us to test AS's across AO's. Separately, but not together, the "black" and "non-black" cases yield marginally acceptable AO scales as

measured by the coefficient of reproducibility (Table 9). In neither scale, however, are nonscale responses random. Six of the 17 computable nonscale responses in the "black" AO scale locate among the votes of Justice White, while seven of the 18 computable nonscale responses in the "non-black" AO scale locate among the votes of Justice Black. (One could say, then, that White "errs" among blacks, while Black "errs" among whites.)

Furthermore, with the exception of "protest demonstrations," all of the "black" AS scales yield CR's which are markedly superior to the "black" AO scale. The same result obtains for the "non-black" scales. With the exception of "black protest demonstrations" and "non-black voting" (CR for both = .952), no AS scale for data set E reproduces < .975, while four of the nine reproduce perfectly.

Therefore, with regard to data set E, we are unable at this point to determine whether or not the hypothesis is disconfirmed. This holds despite the fact that the mean correlation of data set E is .66 (a correlation which is closer to the .75 and .855 of data sets C and D, where the hypothesis is unsupported, than it is to the .36 and .335 of data sets A and B, where the hypothesis was supported).[9] It is necessary, then, to turn to Table 10 which compares "black" AO across AS's, "non-black" AO across AS's, AS across AO's, and the mixed AO-AS pairs.

TABLE 10:   RANK ORDER CORRELATIONS BETWEEN SCALES OF DATA
             SET E

AO	Scale Number	AS	blacks					non-blacks			
			E1	E2	E3	E4	E5	E6	E7	E8	E9
blacks	E1	First Amendment freedoms		.52	.60	.47	.39	.87	.81	.50	.30
	E2	voting			.83	.78	.78	.36	.77	.97	.80
	E3	comity				.88	.71	.46	.80	.87	.74
	E4	protest demonstrations					.57	.45	.60	.95	.79
	E5	sit-in demonstrations						.47	.78	.65	.82
non-blacks	E6	First Amendment freedoms							.69	.43	.23
	E7	voting								.60	.62
	E8	comity									.89
	E9	protest demonstrations									
		mean correlation = .66									

The mean correlation for the "black" AO across AS's (the ten correlations in the upper left of Table 10) is .65. The mean correlation for the "non-black" AO across AS's (the six correla-

tions in the lower right of Table 10) is .58. As between these two AO's then, "black" provides a slightly better explanation of behavior than "non-black." In other words, the situational context is more salient in "non-black" cases than it is in "black" cases. For purposes of comparison, note that the four common AS pairs (E1-E6, E2-E7, E3-E8, E4-E9) yield a mean correlation of .83. This is substantially higher than that obtained from either the "black" or the "non-black" AO across AS's. If we then compute the mean correlation of both AO's across their respective AS's the result is .62, which is 21 points lower than the mean correlation of AS across the two AO's. Clearly, the AS's are more explanatory in this data set than are the AO's. This finding is further strengthened when AO's and AS's are both crossed. The mean correlation of these 16 pairs is .65, slightly higher than the .62 produced by AO's across AS's but still 18 points below the common AS pairs.

Close analysis of the cells of Table 10 reveals that 7 of the 8 highest correlations pertain to "comity." "Comity" is unique to the AS's contained in data set E in that it alone relates to matters of procedure . By comparison, the other AS's are wholly substantive, i.e., the right to vote and the communication of ideas by verbal as well as nonverbal means. But whatever the reason(s) for "comity's" high interassociation with other cells in Table 10, we may test the data further by excluding "comity." The results are essentially unchanged. AS across AO's average .81; "black" AO across AS's, .585; "non-black" AO across AS's, .51; and the mixed AO-AS pairs, .60. We conclude, then, that AS remains a better explanation of behavior when the "comity" AS is excluded from consideration and that the "non-black" AO remains slightly less important than the "black" AO.

We may also control for the AS that yields the lowest correlations in Table 10 ("First Amendment freedoms"). We may speculate that these low correlations may result from less crucial deprivations or less disadvantaged groups than do the other AS's in data set E.[10] But whatever the reason(s), they need not detain us. When the "First Amendment freedoms" scales are excluded, the results differ in magnitude from those reported above, but AS across AO's continues to yield the highest mean correlation, .81; "black" AO across AS's is .76; "non-black" AO across AS's, .70; and the mixed AO-AS pairs, .79. AS, then, remains dominant, but by a much smaller margin. On the other hand, the "black" and the "non-black" AO correlations are both lower than the mean correlation of the mixed AO-AS pairs.

Our conclusion, then, with regard to data set E is that the hypothesis is supported, although not as strongly as it was in sets A and B. Comparing the "black" AO and the "non-black" AO, the latter is a slightly weaker explanation of behavior.

CONCLUSIONS

Although an effort to operationalize a normative assertion is a risky enterprise, we believe that our procedures have allowed us to "capture" what is meant by the "blindness" of justice. Of the five data sets, three support this assertion. The Court does not reach decision on the basis that a litigant is a labor union, that he is a person exercising freedom of communication, or that he is black or non-black. The assertion is not supported, however, where litigants are security risks or injured persons.

Are there extenuating circumstances that may explain the Court's failure to abide by the normative criterion in these two data sets? We think there are. With regard to security risks, one may argue that the three AS's with which the security risks AO was linked was not particularly dissimilar from one another. Certainly the AS of "legislative investigation" is taxonomically similar to the AS of "federal legislative sanctions." Most of the legislative investigations were congressional, and they were conducted by those committees who promoted congressional legislative sanctions against security risks. Moreover, one such set of sanctions, though not statutory, is the denial of "public employment or benefits," the AS of the remaining security risk scale. One may further argue that the security risk AS's are more closely related than are the AS's in the other data sets.

An additional factor is also present in the security risk cases. Most of them date from the McCarthy era, an era in which the fear of subversion and the threat of Soviet aggression loomed large in the public mind. No more damning indictment could be levied against an individual than that he was a "security risk" or "subversive." The question to be posed here is whether it is reasonable to expect courts to dispense blind justice when a climate of fear and vigilantism pervades society. Operating in this type of environment, one may expect the Court to heed another, equally important, norm: that courts should be especially protective of those who are victims of lawlessness; that courts should not legitimate the activity of those who would punish "political" offenders. The data tend to indi-

cate that this was indeed what was taking place, as 45 of the 71 security risk decisions (63%) favored the accused. If the dispensation of "blind" justice should be tempered in such circumstances, then the decision making of the Court may be understandable.[11]

The extenuating circumstances that may mitigate the Court's failure to adhere to the principle of "blind" justice in the injured persons data set are different from those pertaining to security risks. The Court violates the norm in these cases because it consciously desires to do so. Congress has never seen fit to enact a workmen's compensation law. Commentators (Conner, 1958; Schubert, 1962), as well as Supreme Court justices themselves,[12] have pointed out that the Court, at least since 1939, has been attempting to remedy this congressional neglect by functioning as a workmen's compensation commission for those fortunate few who manage to secure access to the Court. The thrust of the Court's decisions has been highly supportive of injured persons, especially injured employees, of whom 76% emerged victorious.

The five data sets which we analyzed are neither exhaustive nor a random sample of Supreme Court decision making. Although other AO's, with the exception of "business," have not been systematically analyzed (Spaeth and Parker, 1969), we are reasonably confident that in these unanalyzed data sets the Court will also have satisfied the normative ideal of judicial blindness.

FOOTNOTES

[1] I.e., all formally decided and *per curiam* cases, as well as those cases where certiorari was denied over a dissent on the merits by one or more of the justices.

[2] The distinction between AO and AS in the following scales may be open to some question. For instance, data set C is designated as "security risks," a category which this study considers as an AO. One can make the argument that "security risks" is really a situation as much as an object. This point was considered by the authors, but was rejected after careful consideration of set C's subscales. There seemed to be an important qualitative distinction between the broad category "security risks" and the subcategories "legislative investigation" (C1), "public employment or benefits" (C2), "federal legislative sanctions" (C3). This distinction could best be explained in terms of the AO-AS dichotomy. Similar analysis holds for each of the scales. For Rokeach's distinction between AO and AS, see Rokeach (1968b: 455-456).

[3] The coefficient of reproducibility (CR) is computed according to the formula:

$$1 - \frac{\text{NSR}}{\text{V}}$$

where NSR = the total number of nonscale responses in cases containing > one dissenting vote, and V = the total number of votes cast in cases containing > one dissenting vote. See Suchman (1950a: 117).

[4] The significance levels of tau-b may also be calculated. We did not do so because significance levels are applicable only when one wants to generalize from a sample to a population; that is, they are useful only with respect to statistical inference. Since our data covers the universe of data relevant to our discussion, the use of significance levels is unjustified.

[5] Tau, of course, ranges from ± 1.00. For a matrix of the AS components of an AS scale to produce an average tau < .00 is statistically impossible if the directionality of the rank order of the AS scale(s) producing the highest negative correlation is reversed. Compare with Coombs (1964: 279).

[6] A computable nonscale response is one which occurs in cases containing more than a solo dissent. Inclusion of solo dissent cases inflates the coefficient of reproducibility (CR). See Suchman (1950a: 119) and Guttman (1950b: 287-288).

[7] Among the data analyzed in an article that tested the validity of Rokeach's two-attitude theory was a set of Supreme Court decisions whose designated AO was "business." Four AS's were identified in this set of cases which was drawn from Warren Court decisions of the 1958-1966 terms. The AO scale produced a CR of .901, with the tau-b correlations averaging .30. On the basis of this data, "business" is no more explanatory of behavior than "labor unions." Spaeth and Parker (1969: 175-177).

[8] The protest in this case was the burning of the American flag, the only such case in which such action occurred.

[9] Arguably, to speak of an average correlation between the AS scales of data set E is not particularly meaningful. This is so because it forces us to designate a single AO for this data set. Such an AO would have to be labeled "disadvantaged minority" or "negatively sanctioned minority." Such an AO designation is so broad that it applies just as well to a host of AO's other than those considered in this data set, such as aliens, indigents, and persons accused of crime. If we had included all the AS scales pertaining to this extremely broad category of persons, we would have stacked the deck heavily in favor of judicial blindness.

[10] In this connection, see Spaeth and Parker (1969: 180-181).

[11] See Murphy (1962: Chaps. 7-9) for an account of the conflict between Congress and the Supreme Court on security-risk issues.

[12] For example, *Bailey* v. *Central Vermont R. Co.* (1943), *Stone* v. *N.Y.C. &St. L. R. Co.* (1953), *McAlister* v. *United States* (1954), *Rogers* v. *Mo. Pacific R. Co.* (1957).

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