

ASPECTS OF DECONSTRUCTION: REFUTING INDETERMINACY WITH ONE BOLD THOUGHT*

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If law is indeterminate, *must* it be so? Joseph Singer says no. There is a possible legal system, he claims, in which law is completely determinate. Hence, he argues, our own legal system *could* be determinate as well.¹

What is Professor Singer's example of a completely determinate legal system? It is: Consider a legal system with the rule "the plaintiff always loses."² *That*, according to Professor Singer, spells total determinacy. Kenneth Kress considers Singer's sentence so irrefutable that he employs it as a throwaway line:

Although complete determinacy is attainable in a legal system (Singer considers the rule: The plaintiff always loses), any completely determinate system³

This is one of those "although" throwaways that was a bit too hasty.

Professors Singer and Kress would have us believe that we can have a legal system where the outcome of any case is totally determinate, because each and every outcome is the same and known in advance—namely, the defendant wins and the plaintiff loses. The point is of extreme importance to these professors and to similar-minded doctrinalists. They *must* cite at least one hypothetical legal system that is clearly determinate, or else risk allowing the camel's nose of indeterminacy into their tent.

However, Professors Singer and Kress have failed to consider what coherent or even plausible meaning they can possibly give to the term "legal system" when the system in question contains the single rule "plaintiff always loses." I would contend that such a "system" is not and cannot possibly be a "legal system."

To show this, let us for the moment accept their "legal system" and consider its consequences. If the plaintiff always loses, in practice nobody is going to want to be a plaintiff. Thus, if you defraud me out of

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¹ Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 11 (1984).

² *Id.*

³ Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 286 (1989).

\$1,000 of my money, I would not want to be a plaintiff against you in court, because plaintiffs always lose. So instead I will buy a gun and threaten to shoot you until you return my money. Suppose you go to court to get a restraining order against me; no luck, because you will be a plaintiff and plaintiffs always lose. Suppose instead that you persuade the state to prosecute me for threatening you with a gun. Too bad; the state is the plaintiff and so it loses also.

Now suppose that, emboldened by my successful physical assault against you, I decide to embark on a career of robbing banks. I hire accomplices, we shoot our way into banks, we take money; the state cannot prosecute any of us because plaintiffs always lose. Soon everyone goes into the assault and robbery business. The police shoot to kill because they have no incentive to arrest anyone; all court cases against arrested persons are losers because the defendants always win. The scenario can be extended, but the picture should be clear. In a word, it's anarchy. It is the entire absence of any law and order; indeed, it is the absence of anything that can be called a "legal system."

Professors Singer and Kress have created total anarchy. True, it is *determinate* in the sense that it is *total* anarchy. There is no doubt that redress in court is futile. But then, in such a situation of chaos, there would *be* no "courts." The term "court" will be archaic, because it is part of the conventional (though unnoticed) meaning of "courts" that at least on some occasions plaintiffs will win.

Thus the rule "the plaintiff always loses" is a far cry from a throwaway line that refutes the legal indeterminacy thesis. It is, instead, a shambles.

A similar attempt to refute indeterminacy in one bold stroke, this time by the use of a statistic, is the demonstration of a low rate of dissenting opinions in present-day judicial decisions. For example, two federal judges in their role as scholars have examined a sampling of appellate decisions in federal courts, and found that dissents were filed in less than four percent of the cases.⁴ They conclude that law is not so indeterminate after all. Professor Ken Kress restates their conclusion: law cannot be radically indeterminate in light of such certainty about the correct outcome.⁵ To drive the point home he adds the standard homily that academics focus too much on indeterminate cases in the classroom and in academic writing, and ignore the vast bulk of routine litigation. "Belief in indeterminacy," he writes, "results in part from a bad diet."⁶

⁴ Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200, 204 (1984) (all federal courts for the year ending June 30, 1983); Rubin, *Doctrine in Decision-Making: Rationale or Rationalization*, 1987 UTAH L. REV. 357, 367 (Fifth Circuit Court of Appeals from 1981 to 1985).

⁵ Kress, *supra* note 3, at 324.

⁶ *Id.* A standard objection to the statistic is that overworked federal judges have little time to write dissents; the magnitude of litigation, and not determinacy, produces the low dissent rate.

Professor Kress does not understand legal indeterminacy; if he did, he would see that it is law's *indeterminacy*—not determinate law—that produces a low rate of dissent! Given the deconstructionist's view that law does not constrain a judge's ruling in any given case, there is little point in dissenting. A decision in any case is reached by the brute force of majority rule. The majority was not constrained by law to reach the decision it reached, as the minority well knows. Hence there is nothing to be gained by dissenting.

Not only is there nothing to be gained, but a dissent can be perceived as chipping away at the court's legitimacy. Would-be dissenting judges probably are subjected to collegial pressure to change their intended negative vote to a positive recorded vote, so that the opinion of the court will appear less controversial, more authoritative, more constrained by the law. This dynamic, I suggest, operates in all courts at all times and in all places. A judge who dissents too often is looked upon as a maverick, a non-team player, a person who, for egotistic reasons, would erode the authority of the court by unnecessarily challenging its wisdom in dissenting opinions.

Since recognition that law is indeterminate exposes the futility of filing a dissent, the indeterminacy thesis would predict an eventual disappearance of judicial dissents. The statistical question at present is not why a four percent dissenting rate is so low, but rather why it is so high! One possible answer has been suggested by Professor Robert Benson: some judges have simply fooled themselves into believing that law is determinate, and therefore they write dissents out of the mistaken belief that what they write could make a difference (perhaps to the Supreme Court, or to a future appellate court in a similar case).⁷ If Professor Benson is correct, we should see the four percent rate diminishing as judges shed their illusions as a result of their growing awareness of deconstruction scholarship. The decline in dissenting opinions may even accelerate because of an intellectual runaway effect. For the more that legal scholars talk about deconstruction, the more that many judges—feeling a threat to their public legitimacy—will attempt to produce the appearance of certainty. Judges may well join together to discourage dissents.

One might object that my thesis does not explain why there is so much dissent in the United States Supreme Court. The objection is in a sense ironic, for up to now the proponents of legal indeterminacy have cited the cleavages on the Supreme Court as proof of indeterminacy, whereas the doctrinalists have sought to explain the phenomenon by pointing out that only the most indeterminate cases get to the Supreme

Although crowded dockets probably push the rate of dissent downward, the rate probably remains low enough to warrant additional explanation.

⁷ Benson, *How Judges Fool Themselves: The Semiotics of the Easy Case*, in 2 *LAW AND SEMIOTICS* 31 (R. Kvelson ed. 1988).

Court in the first place. I reject both of these arguments, and instead contend that the fact of indeterminacy predicts increasingly fewer dissents; consequently, I accept the burden of explanation. Since a full explanation, complete with citations to "authorities," would comprise an entire article, I bequeath this task to anyone who might want to take it up, and here simply outline my arguments.

The Supreme Court, I contend, is no longer a court that decides cases. It has become in the last fifty or so years a legislative body which uses a case simply as a serendipitous vehicle for enacting social legislation. This century has seen the emasculation of the Court's original jurisdiction and the virtual elimination of its appellate jurisdiction. Instead, the Court has become a certiorari Court. As a general proposition, the Court grants certiorari to cases that four justices out of nine believe are "important" in some sense or other (perhaps "interesting" might be a more descriptive word). One does not have to be a deconstructionist to accept the proposition that the vague certiorari standards do not constrain the Justices in deciding which cases they want to hear.⁸

Nevertheless, the Court spends much of its time arguing over which petitions should be granted certiorari. Since there are so many petitions, and so few can be granted, the general practice has evolved that *justice to individual litigants cannot be a significant factor in granting certiorari*. The Court is simply "too busy" to right individual wrongs. No matter how unjustly a petitioner has been served by the courts below, the Supreme Court takes the attitude that the petitioner at least has had the benefit of judicial review, and therefore the Supreme Court cannot waste its time granting one more review process. The Court instead must husband its scarce resources to benefit society as a whole.

Having abandoned any sense of judicial duty toward individual litigants, the "facts" of a case before the Supreme Court become supremely unimportant. The Court does not have time to review the facts in any depth. Although a careful examination of the facts would be essential to any court that wanted to render justice between the parties, the Supreme Court's lack of interest in the facts of a case goes hand in hand with its unwillingness to waste its time righting individual injustices.

To be sure, there are occasional Supreme Court opinions that delve deeply into the facts of a case. But on close reading, these will be seen as attempts by the writer of the particular opinion to categorize the case as one that should be "confined to its facts." Of course, if the case was truly to be confined to its facts, then certiorari would never have been granted; considering such a case would truly be an inefficient use of the Court's resources. Instead, "confining a case to its facts" is simply a ploy to limit

⁸ I suspect that Supreme Court clerks inform the Justices of the "issues" in certiorari petitions, and the Justices initially vote on what "issues" they would like to deal with. Only if the certiorari battle within the Court becomes heated will the Justices look beyond the "Issues Presented" part of the cert. petitions to the circumstances of the case.

the scope of the Court's legislative pronouncement emanating from the case at hand. Or, more exactly, it is a ploy to undercut the authoritative-ness of the legislative pronouncements of the Justices who disagree with the opinion-writer and hold instead that the case should not be confined to its facts.⁹

Having become institutionally disengaged from doing justice to the litigants based on the facts of a case, the Supreme Court has become a legislative body that derives its apparent authority from the mere appearance of deciding particular cases. I think that each Justice is acutely aware of all of this, even though it is of course a forbidden subject for public acknowledgement. For a Justice to admit that the facts of a case and the rights of the parties are unimportant would undermine the public's confidence in the Court, because the public still regards it as a "court" and not a legislature. If nevertheless the public eventually catches on to what the Court is actually doing, public opinion may force a reduction toward the rather limited adjudicatory role envisaged by the framers.

Simply put, what counts today is not what the Justices do but rather what they say. They do not themselves care very much about what they do to the actual litigants before them; individual justice has become irrelevant.¹⁰ But what they *say* has broad legislative consequences. They can either expand or reduce Title Seven; they can expand or reduce at will the Sherman and Clayton Acts; they can "interpret" what Congress says any way they like; and on occasion they declare statutes unconstitutional.¹¹ A "case" is simply a convenient vehicle to justify this kind of errant social legislation. The Court's power¹² and public acceptability is very much a shrewd product of labelling its legislative enactments

⁹ More precisely still, a fact-laden opinion may reflect a move toward minimum law-making acceptability among the Justices signing it.

¹⁰ Is there any other way to account for the way the Court treated the various petitioners in the *Miranda* decision? (It picked a handful of defendants out of some 70 applicants, and made the new *Miranda* rule applicable to them; the others were unceremoniously thrown back into prison.)

¹¹ But a deconstructionist would argue that it is never necessary for the Supreme Court to declare a statute unconstitutional. The "interpreting" process can eviscerate any statute. Indeed, as I argued in 1978, the finding in *Brown v. Board of Education* that "separate but equal" was unconstitutional was not only unnecessary, but actually set back the civil rights movement by at least an entire generation. See S. WASBY, A. D'AMATO & R. METRAILER, *DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES* (1978).

¹² Nor is this power illusory even though it relies on the language of judicial opinions. The indeterminacy thesis does *not* say that language does not affect human behavior; it only holds that the language of the law does not point with certainty to a decision for one party rather than another in any given case. The words of a statute indeed affect aggregate social behavior. Ninety percent of the public may change their conduct as the result of a statute (but we cannot tell in advance which individuals will fall into the 90%)! There is no doubt that Supreme Court decisions will affect aggregate social behavior. But when this is done at the expense of caring about justice to the individual litigants, it is worse than parasitical upon the adjudicatory role of the Court—it is a usurpation of a role constitutionally delegated to elected legislators.

“decisions.”¹³

Given the reality of the Supreme Court’s new institutional role as a legislator rather than an adjudicator, it follows that individual Justices will use a panoply of individual opinions, concurrences, and dissents, to publicize their own legislative preferences. Given the further reality that what counts today is not what the Court does but rather what it says, it follows that individual Justices will try to say as much as possible.¹⁴ The proliferation of individual opinions is a function of nine legislators in black robes competing for legislative attention. It has nothing to do with changing anyone’s opinion as to the merits of the litigants’ positions in any given case.

In brief, deconstruction has already happened on the Supreme Court—and with a vengeance! Not only can no member of the Court really believe that “the law” (self-invented by the very Court it is supposed to govern!) can constrain the result in any individual case, but its members have also convinced themselves that they have no time to be concerned with dispensing justice to the parties. The justificatory legal language used in judicial opinions is not what our law teachers told us it was. The justificatory legal language is not provided to explain—much less constrain—the result in the case. Rather, it is a mode of couching the personal legislative preferences of unelected judges in the publicly venerated language of a judicial decree.¹⁵

¹³ The shrewdness may be more institutional than individual. I am not sure that individual Justices have consciously intended the Court to become a legislative body. Rather, this result seems to have been produced by institutional evolution. Caseload pressures have eroded the original and appellate dockets, and the huge competition for certiorari slots has forced the Justices to abandon concern for doing justice to the parties. As a result, perhaps by default, the judges have turned into legislators. Unfortunately, the new visibility of their role—played up by the media—has made the Court better known and better accepted by the public than ever before in its history. This new sense of power then reinforces the legislative tendencies that I have suggested, and each new Justice learns that legislation is what the Supreme Court is all about.

¹⁴ The extended essays of Justice Fortas, during his brief stay on the Court, appeared at the time to me (as a teacher of Constitutional Law) as an aberration. I remember telling my students that Justice Fortas mistakenly used a case as a vehicle—sometimes even a loosely-fitting vehicle—for writing his own philosophy into the public record. What I was unaware of was that the Fortas approach was then only an exaggeration of what the other Justices were doing. From today’s perspective, the opinions of Justice Fortas have a very “modern” ring! The Supreme Court Justice of today is a philosopher with a roving commission.

¹⁵ Northwestern’s Law Review editors, looking over this Article, have asked me whether I am opposed to judicial activism for ideological or political reasons. Actually, I rather like a great deal of the Court’s social legislation. On freedom of speech, in particular, the Court has led and educated the country. I have the simple faith that if the Court were driven primarily by a desire to ensure that justice is done to the parties, the quality of its decisions would improve. Many of those decisions will anyway have broad social ramifications. But I think the societal impact of a decision should be its byproduct rather than constituting the reason for making the decision.