

Criticizing the Court

How opinionated should opinions be?



The Supreme Court is, naturally, supreme. And in the vast majority of cases, lower courts dutifully enforce the law handed down by the Court without criticism or conversation. Sometimes, however, there are murmurs from the gallery: A lower court opinion explicitly takes issue with Court doctrine, using a dissent, concurrence, or even a majority writing to describe the problems with the prevailing precedent — often while applying that precedent nonetheless. We invited two leading scholars to comment on this kind of commentary: UC-Berkeley Law Professor **ORIN KERR**, an expert in criminal procedure and computer crime law, and Cornell Law Professor **MICHAEL C. DORF**, a constitutional law scholar.

Is a lower court judicial opinion an acceptable vehicle through which to criticize Supreme Court precedent?

KERR: Generally, no. I propose a simple rule for lower court judges to follow: If you want to criticize Supreme Court decisions, you should do it some place other than in a legal opinion. You can publish an op-ed, or you can write a law review article. But don't publish your criticism of the Supreme Court as an opinion issued by your court, even just as a separate opinion only in your own name.

That's the best approach, in my view, because judicial opinions are special documents. Opinions are government rulings exercising government power. They receive respect not because they're wise or well-reasoned. Some opinions are, and some opinions aren't. Rather, judicial opinions receive respect because they are legally operative documents issued by judges with the power to issue them. Their legitimacy rests on legal formalities that empower those opinions to be law instead of just opinion, such as the for-

mal appointment of the judges and a case or controversy that gives judges the authority to rule.

As I see it, the formalities that give legal opinions their legitimacy imply a corollary that judges should follow: When you write a judicial opinion, you should limit yourself to what you have formal authority to decide. You should explain why you voted as you did in the case before you, as every legal opinion does. But judges shouldn't also use legal opinions to pontificate about other views they have outside of the case and outside their authority. If the public respects judicial opinions for their formal power, maintaining that respect requires sticking to the limits of that formal power.

In my view, that means judges shouldn't use their legal opinions to criticize U.S. Supreme Court decisions. Lower court judges were not nominated and confirmed to a seat on the Supreme Court, and they are bound by the Supreme Court's decisions. They should respect that role by resolving the case and controversy before them in their opinions and saving commentary for other forums, like law reviews.

But wait, some may be thinking: The Supreme Court can be really wrong. And everyone agrees with that. I teach law students, and most law students can reel off the names of many Supreme Court decisions that they think are deeply misguided. We law professors can do this, too. (Don't get us started.) And Supreme Court justices themselves feel the same way, of course. When a decision is 5-4, that means the four dissenting justices thought the Court's decision was wrong.

It's understandable that lower court judges may also disagree with the Supreme Court. In some legal systems, that may even be partly by design. Who becomes a judge may be influenced in part based on which judicial decisions a person finds misguided. For example, imagine you're a Trump appointee to the federal court of appeals. You probably think *Roe v. Wade* was wrongly decided. It's not that being a judge convinced you of that. Instead, the Trump Administration's expectation that you have that view likely was part of what led to your nomination.

But if you are a lower court judge, it's best to express outside views some place other than an opinion. Keeping your exercises of formal authority separate from your views of legal questions outside that authority helps maintain the legitimacy of the authority you exercise.

This doesn't mean you can't write separate opinions, such as concurrences and dissents, if you sit on a multi-member court. Your exercise of power is your vote. If your view hasn't prevailed, a concurrence or dissent explaining your vote is entirely appropriate even though your approach didn't garner a panel majority. But I think your opinion should be about why you exercised your vote as you did, based on the formal authority you

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have as a lower court judge, rather than your sense of whether you would have joined onto the Supreme Court's opinion if you had been a justice.

DORF: Judges write reasoned opinions in part to legitimate the power they exercise over disappointed litigants. An explanation may not persuade, but if well-crafted, it can mollify. Courts also speak to the broader public and for roughly the same reason. A precedent-setting ruling that controversially construes or invalidates a law requires some justification.

The parties and the people are the external audience for judicial opinions. Judges also write for an internal audience that includes other judges. Higher courts write opinions that set forth the law for lower courts to follow in later cases, but in a well-functioning judicial hierarchy, information flows both ways. Lower court judges have knowledge and views that can and should usefully inform judges on higher courts. A private-sector analogy can illuminate how and why.

We often conceptualize businesses as top-down institutions, in which

firm managers give instructions to workers. A team at corporate headquarters designs the latest car model and precisely specifies the process for manufacturing it. Workers on the factory floor execute their orders. Automation reinforces this picture. If humans can be replaced by robots, then the humans were only ever performing rote tasks.

Yet that conventional picture is outdated. Since at least the 1980s, firms around the world have adopted methods pioneered in Japan and designed to give floor workers some ability to provide engineers and managers with feedback. In the "Toyota Production System" (TPS), workers have discretion to halt manufacturing when something goes wrong by pulling an Andon Cord — a physical rope that stops the machinery up and down the line. Workers and managers then assess and fix the problem before it undercuts the quality of the finished products. TPS outperforms the top-down form of early automation we associate with Henry Ford because TPS recognizes the limits of central planning. Even the best engineers and managers cannot ►

anticipate all of the ways in which their well-laid plans may go awry.

As with cars, so with law. Most of the time, workers perform their assigned tasks. So, too, in most cases, lower court judges simply apply the law as given to them by the legislature, an administrative agency, or a higher court. Occasionally, however, they will spot a defect — a rule that misfires or that ought to but does not contain an exception. Many judges will, in such circumstances, find a way to read the rule in a way that serves justice. To use a much-mooted example in the scholarly literature, a creative judge might read a blanket prohibition on “vehicles in the park” as inapplicable to ambulances and other emergency vehicles. But such readings are controversial, and even the most creative or result-oriented judges will sometimes find their hands tied by very clear language. What should they do then?

In a sufficiently extreme case, a judge might refuse to apply the law. Abolitionist judges in the antebellum period sometimes took this approach with respect to the Fugitive Slave Acts of 1793 and 1850, even though the Supreme Court upheld the federal mandate to re-enslave escapees in *Prigg v. Pennsylvania* in 1842. Today, as well, a judge might think that federal law is profoundly immoral: a conservative might be appalled by abortion rights; a liberal might be outraged by the permissibility of the death penalty.

Yet we take for granted that where the law is sufficiently clear, lower court judges must follow it. There is no judicial Andon Cord they can pull. Writing an opinion, concurrence, or dissent that criticizes the law a judge must follow is the next best thing.

To be sure, judges should only rarely criticize the law in their opinions, concurrences, or dissents. After all, no

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reasonably sophisticated observer of the courts attributes to the judges who apply the law agreement with all of the policy choices it embodies. But rarely does not mean never.

Sometimes a statute or opinion of a higher court will be based on a seemingly reasonable premise that proves false in practice. Trial court judges are especially well-positioned to discover such a misfiring in laws and higher court opinions that concern matters peculiarly within their expertise, like rules of evidence and procedure. Pointing out the mistake will speed its correction.

Can moral disagreement ever be a sound basis for lower court judges criticizing the higher court precedents they must apply? Professor Kerr correctly observes that judicial experience will not be the basis for a judge’s moral views. And judges who repeatedly express moral disagreement with a line of precedent accomplish little. But given that law often incorporates moral judgments, there should be room for an occasional statement by lower court judges that the precedent they must apply is wrong and thus should be reconsidered.

How often, and in what kinds of cases, might lower court criticism be warranted?

KERR: Professor Dorf argues that lower courts can helpfully object to Supreme Court decisions when they see those decisions misfire. He analogizes lower court judges to workers in an auto plant who can spot defects that the engineers and managers have missed. Lower courts can point out a mistake, he writes, and pointing out the mistake will speed its correction by the Supreme Court.

Can this happen? In rare cases, yes. Perhaps the best example in Professor Dorf’s favor is the qualified immunity rule of *Saucier v. Katz*, 533 U.S. 194 (2001), that the Supreme Court overturned in *Pearson v. Callahan*, 555 U.S. 223 (2009). *Saucier* had required lower courts in constitutional tort cases to always decide whether the constitution was violated before addressing if qualified immunity applied. Lower court judges objected to the rule’s operation, and that criticism helped persuade the justices to eliminate the *Saucier* rule in *Pearson*.

This is a good example. But I don't think the example justifies Professor Dorf's optimism about how lower court opinions have a special capacity to show the justices when their rules have gone astray. I'm unpersuaded for three reasons.

First, lower court judges are free to do all the misfire-pointing they want in other forums. Supreme Court justices can receive criticisms just as easily when those criticisms are not published as judicial opinions. That happened on the road to *Pearson v. Callahan*. Probably the most influential judicial criticism of *Saucier*, cited twice in *Pearson*, was an article by Second Circuit Judge Pierre Leval published in the *NYU Law Review*.

Second, *Saucier* was a rare example of a Supreme Court rule specifically about lower court administration. The Supreme Court based *Saucier* on a prediction about how litigation would proceed in district courts and circuit courts under its rule. It makes sense that lower court judges would have useful feedback about whether *Saucier*'s predictions were correct. I don't think that lesson applies to the run of cases, where we wouldn't expect lower court judges to have any special insight about the merits of the Supreme Court's decision.

Finally, and more speculatively, perhaps we should draw a distinction between pointing out possible implications of a Supreme Court rule and arguing that the decision is wrong and should be overturned. When lower-court judges point out a problem with how a Supreme Court decision works in practice, they can draw attention to its dynamics without taking a view on whether the justices should overturn it. To my mind, that feels different from an argument that the justices should overrule a case. It stays in the

lane of the lower court's expertise and authority.

DORF: Professor Kerr and I disagree about the propriety of lower court judges issuing opinions, concurrences, and dissents criticizing the Supreme Court in two relatively narrow ways. First, although we agree that in virtue of the function that lower court judges perform, they can sometimes have knowledge about how a rule, standard, or procedure prescribed by the Supreme Court misfires, we disagree about how often this phenomenon occurs. He thinks it occurs very rarely. I think it occurs somewhat more frequently than he does.

Second, although we agree that on at least some occasions when lower court judges do have knowledge about a misfiring they should be free to point it out, we disagree about the appropriate forum for doing so. Professor Kerr objects to their speaking *ex cathedra* and would thus restrict occasions for criticism to extracurricular activities like the giving of speeches and the writing of law review articles. By contrast, I think that in addition they may legitimately include such criticisms in their opinions.

To resolve our first disagreement, we might conduct an empirical study that would first specify precisely what we mean by an occasion for a Supreme Court rule or standard to misfire and then choose some mechanism for measuring it. Needless to say, we have not done so and must therefore rely on our intuitions. My intuition is that misfiring opportunities are pretty common.

Federal district court judges decide questions regarding discovery, evidence, sentencing, and a host of other matters that are either effectively unreviewable or subject only to deferential review. The work of the courts

of appeals is more similar to that of the Supreme Court, but the latter's discretionary control of its docket means that many issues that federal appeals court judges routinely resolve do not work their way up to the Supreme Court in the ordinary course. Where the law is clear but misguided, the justices will not ordinarily learn that fact unless someone informs them.

Professor Kerr is right, of course, that the point need not necessarily be made in a formal opinion. He refers to Judge Leval's law review article criticizing a Supreme Court rule for prioritizing summary judgment issues in qualified immunity cases. More dramatically, Federal District Judge J. Lawrence Irving resigned his commission in 1990, publicly stating that he could no longer impose mandatory minimum sentences that he thought were very often too harsh.

Yet resigning in protest is extreme, and writing law review articles, while a joy for the likes of Professor Kerr and myself who do it for a living, is time-consuming for judges with day jobs. Meanwhile, taking a stand on specific cases or issues in articles or speeches might itself raise hackles. Although I think it can be appropriate for lower court judges to criticize Supreme Court cases on occasion, it is hardly obvious that doing so outside of the context of a concrete case is the least controversial way to do so.

To return to the analogy I offered in my last go 'round, the Andon Cord halts production so as to get the attention of management when it matters most: at a moment when the problem is manifest. Likewise for a lower court judge who wishes to call attention to a misfiring or otherwise seriously defective Supreme Court doctrine, sometimes — perhaps rarely but not never — it pays to strike while the iron is hot. ►

Might there be a compromise solution to the question of criticizing the Court?

KERR: Perhaps. How about this approach: A lower court judge can write an opinion urging the Supreme Court to overturn a precedent only when the judge's basis for that opinion is a special insight, gained only in a judicial capacity, into how the precedent is working. When judges gain perspectives from their dockets that only they have — Professor Dorf's model of judges as assembly line workers pulling the Andon Cord — they can express that in opinions.

This would be a narrow allowance. Under this practice, judges should not use opinions to express opposition to precedents they came to in other ways. Perhaps a particular Supreme Court case has always struck them as terribly wrong. Or maybe a judge read a new decision and came away persuaded by the dissent. Or perhaps they went to a conference where a controversial opinion was discussed and they decided they were opposed to it. In these situations, judges should save their criticism of the Supreme Court for an op-ed or a law review article.

This middle-ground practice would let judges teach the Supreme Court about when its rules are misfiring in lower courts. In Professor Dorf's terms, they could get management's attention. But it would also mean that judges don't use legal opinions just to recycle Supreme Court dissents, or to advance reforms that they favored before they became judges, or to otherwise announce their ideological priors. It would save opinions for actual rulings plus those rare situations, likely technocratic, where a judge has something truly new to add about how a Supreme Court decision is working.

DORF: I appreciate Professor Kerr's gracious offer of compromise. If I were a lower court judge trying to decide whether and, if so, where to criticize Supreme Court precedent, I might well follow his prescription — restricting my *ex cathedra* criticisms to issues as to which my judicial experience was the basis for my view. Because I am not a lower court judge, however, I hesitate to endorse his suggestion as a regulatory ideal.

I previously analogized the federal judiciary to an automobile manufacturing plant. Now I offer a different comparison, to something about which I know a bit more. Over the course of three decades as a law professor, I have developed some strong opinions about how to do my job: I prefer to write in the voice of a scholar rather than an advocate; in the classroom, I do not hide the ball but neither do I spend much time going over basics like the facts and holdings of cases (except in the first few weeks of first-semester 1L courses); when I chair committees, I cancel meetings if there is no business to accomplish that cannot be done via email. In my heart of hearts, I think the foregoing are truly best practices, not merely best practices *for me*. And yet, I would not dream of imposing any of these ultimately stylistic preferences on my colleagues. And just as different members of a faculty can have distinctive views about how to do our jobs, judges, too, hold a range of views of what is and is not appropriate to put in an opinion.

Above I referred to the no-vehicles-in-the-park rule. That hypothetical example was first mooted in a famous 1958 exchange between Oxford's H.L.A. Hart and Harvard's Lon Fuller. They disagreed about the relation between law and morality. Scholars and judges still disagree, but even lower court judges

who side with Fuller in thinking that law and morality are virtually inseparable will sometimes feel bound to apply Supreme Court precedents they think immoral. If such a judge cannot do so without a pang of conscience that occasions a formal statement condemning the precedent, I do not believe it is for me (or Professor Kerr) to tell that judge to keep mum until a law journal offers to publish the *cri de coeur*.



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