Shadow Docket Ethics

JONATHAN SHELNUTT*

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INTRODUCTION: LEGAL ETHICS UNDER THE SHADOW DOCKET

Lawyers have an ethical obligation to bring the Supreme Court's shadow docket into the light. Insofar as the shadow docket carries precedential weight, zealous advocates are duty-bound to leverage this precedent for effective representation. Practitioners who seek to improve their arguments should look to the shadow docket. However, the legal foundation for shadow docket precedent is murky, with untested boundaries and an unclear horizon.

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* Georgetown University Law Center, J.D. expected 2026; University of Georgia, B.S.

This Note will shed light on the shadow docket by tracing its historical jurisprudence, exploring the contentious state of scholarship, and charting a path forward across the evolving landscape of shadow docket ethics.

A. BOUND BY SHADOWS: THE BRAVE NEW WORLD OF TANDON V. NEWSOM

On April 9, 2021, hidden deep in the reams of procedural paperwork in the Supreme Court's non-merits docket, a single unsigned order transformed a fundamental feature of the American legal system.[1] The injunction, titled *Tandon v. Newsom*, only purported to prevent the enforcement of a California COVID policy that unconstitutionally burdened religious practices.[2] The heart of the change was buried in an almost parenthetical aside to the Ninth Circuit, scolding the court for neglecting to follow the precedent set by four earlier decisions.[3] This critique would not be notable except that each of the four earlier decisions was itself an emergency injunction, which traditionally carry very little precedential effect.[4] Because lawyers are ethically restricted to arguments with a valid legal basis, *Tandon* provided a skeleton key opening up new lines of argumentation based on shadow docket decisions.

Although *Tandon v. Newsom* marked the first time that the Supreme Court 'said the quiet part out loud' on the precedential value of non-merits docket decisions, the issue had been subtly rising in the background for some time. For instance, following an emergency injunction in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court vacated other lower court decisions and remanded them for reconsideration in light of the *Roman Catholic Diocese* decision.[5] This type of order, called a GVR (granting cert, vacating the lower court's decision, and remanding the case for further consideration), is typically used following a watershed decision which should be used as controlling precedent in other cases.[6] Although the Court did not explain the rationale for the GVR, the implication was that a shadow docket decision was precedential on similar cases.[7] Through a series of subtle steps, the Supreme Court has shifted the precedential

1. *See* Tandon v. Newsom, 593 U.S. 61, 64–65 (2021).

2. *See id.* at 62–63.

3. *See id.* at 64–65. The four earlier decisions were Harvest Rock Church v. Newsom, 141 S. Ct. 889, 889 (2020); South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021); Gish v. Newsom, 141 S.Ct. 1290, 1290 (2021); Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021).

4. *See infra* Part I.

5. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 15 (2020); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 834–35 (2021).

6. GVR stands for "Grant, vacate, remand." In other words, the Court grants cert, vacates the lower court's order, and remands the case for further consideration in light of an intervening case. *See* Roman Cath. Diocese of Brooklyn, 592 U.S. at 15.

7. McFadden & Kapoor, *supra* note 5, at 835.

paradigm to transform the shadow docket into a tool for declaring law outside the traditional method of adjudication on the merits of a dispute.[8]

As the nature of the docket has changed, so too has the terminology used to reference it. The term 'shadow docket' was first popularized in reference to the Supreme Court's non-merits docket by conservative legal scholar William Baude.[9] Baude criticized the way that the Supreme Court's 'shadow docket' decisions undermined the legitimacy born of the procedural regularity of the merits docket.[10] Baude was concerned by the lower courts' substitution of shadow docket orders for binding precedents on substantive issues.[11] Although the 'shadow docket' is defined in contrast to the Supreme Court's merits docket, the moniker 'non-merits docket' is increasingly obsolete due to recent doctrinal developments.[12] For instance, the four traditional factors for granting emergency relief on the shadow docket are (1) likelihood of success on the merits; (2) certworthiness; (3) irreparable harm; and (4) balancing the equities.[13] The Supreme Court has increasingly recognized that the latter three factors tend to cancel each other out, leaving the merits of the prospective case as the deciding factor.[14] Although some have pushed back on the term 'shadow docket' for its "sinister" connotations, the more neutral alternatives like 'non-merits docket' are no longer descriptively accurate.[15] Since the shadow docket is increasingly taking on more precedential weight and forward-looking importance, Professor Huang has recently suggested a new title for precedential decisions outside the traditional merits docket: the 'foreshadow docket.'[16]

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8. For a full analysis of the historical background, *see* Part I *infra*.

9. William Baude, "Foreword: The Supreme Court's Shadow Docket" (University of Chicago Public Law & Legal Theory Working Paper No. 508, 2015).

10. *See id.* at 1.

11. Baude used the example of the Seventh Circuit's stays of voter identification laws based on the "signals" sent by the Supreme Court by refusing to stay injunctions on same-sex marriage laws. *Id.* at 17. This practice, which Baude saw as a concerning aberration, became the norm over the following decade. *See* Part I *infra*.

12. *See* Labrador v. Poe, 144 S.Ct. 921, 933 (2024) (discussing the need to decide emergency injunctions in light of merits) (Kavanaugh, J., concurring).

13. *Id.* at 929 n.2. 'Certworthiness' means a "reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

14. *See* Labrador, 144 S.Ct at 929, 931 ("not infrequently—especially with important new laws—the harms and equities are very weighty on both sides. In those cases, this Court has little choice but to decide the emergency application by assessing likelihood of success on the merits . . . some of the most significant and difficult emergency applications will readily clear the certworthiness bar"); Maryland v. King, 567 U.S. 1301, 1303 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury") (quoting New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977)).

15. *See* Katie Barlow, *Alito blasts media for portraying shadow docket in "sinister" terms*, Scotusblog.com (Sep 30, 2021), https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/ [https://perma.cc/55H9-G4X5]; *see also* Lois J. Scali, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. REV. 1020, 1047 (1985) (discussing the "non-merit myth" controversy around the Supreme Court's docket).

16. Bert I. Huang, *The Foreshadow Docket*, 124 COLUM. L. REV. 851, 855.

B. BOUND BY ETHICS: THE LEGAL FRONTIER

If shadow docket decisions create legal precedents, then creative lawyers have access to a new arsenal of argumentation. The ethical lawyer may only raise an issue with "a basis in law and fact," taking into account "the law's ambiguities and potential for change."[17] Therefore, the specific ethical question derived from recent developments to the Supreme Court's practice is: 'what legal basis do shadow docket decisions provide?'

The bar for Rule 3.1 is relatively low. Claims only violate Rule 3.1 if they are 'frivolous,' which requires that they be "*both* baseless *and* made without a reasonable and competent inquiry."[18] *Tandon v. Newsom* implies that there is *some* basis for argument in shadow docket precedent, but it does little to illuminate the 'reasonable and competent inquiry' for extrapolating that basis into new cases.[19] Professors McFadden and Kapoor argue that the Supreme Court's shadow docket orders should be divided into different categories, each of which with a different precedential weight.[20] First, only the decisions of the full Court should be considered precedential, and that the precedential weight of an emergency order where the vote was carried by a "courtesy fifth" should be only situationally persuasive.[21] Second, if the emergency order expresses a clear opinion on the *merits* of the underlying issue, then that opinion is precedential.[22] Third, the precedential value of a shadow docket decision is directly proportional to the thoroughness of the written opinion accompanying it; an unexplained and unsigned order is not precedential, while a fully explained and thoughtfully reasoned order is precedential.[23] Although these scholarly rules are attractively clear and robust, they have not been universally embraced by the courts.[24] Thus, the outer limit of contemporary shadow docket argumentation under Rule 3.1 has not been rigorously tested.

In Part I, this Note will trace the historical contours of shadow docket development from 1980 through 2024. The dawn of the 1980s provides a *tabula rasa*

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17. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2018).

18. *In re* Girardi., 611 F.3d 1027, 1036 (9th Cir. 2010) (quoting Holgate v. Baldwin, 425 F.3d 671, 676–77 (9th Cir 2005)).

19. *See id*.; Tandon v. Newsom, 593 U.S. 61, 64–65 (2021).

20. McFadden & Kapoor, *supra* note 5, at 849–872.

21. *Id.* A "courtesy fifth" vote is a tradition on the Supreme Court that a fifth Justice will vote for an emergency order even if she is not persuaded on the merits if four of her colleagues vote for the order. *See, e.g*., Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm, 579 U.S. 961, 961 (2016) (Breyer, J., concurring). A Sixth Circuit panel deciding a similar case later that year considered the Gloucester emergency order non-precedential, but the dissent claimed that "lower courts should adhere to the Supreme Court's [shadow docket] stay decisions when faced with indistinguishable claims." *See* Dodds v. U.S. Dep't of Ed., 845 F.3d 217, 223 (6th Cir. 2016) (Sutton, J., dissenting).

22. McFadden & Kapoor, *supra* note 5, at 857-64.

23. *See id.* at 864–72.

24. *See, e.g*., Religious Rts. Found. of PA v. State Coll. Area Sch. Dist., 2023 WL 8359957, at *7 (M.D. Pa. Dec 1, 2023) ("Some have cast doubts as to *Tandon's* precedential value. . . Yet our Court of Appeals has found *Tandon* to be 'significant intervening Supreme Court precedent' providing 'crucial guidance'") (quoting Clark v. Governor of N.J., 53 F.4th 769, 780 (3d Cir. 2022)).

where the shadow docket was minimally precedential and the ethical implications were relatively clear. Part I will explain how the rapid influx of emergency applications to stay executions following a death penalty moratorium forced the Supreme Court to radically restructure the shadow docket, setting the stage for precedential and ethical complications. Next, this Note will show how the expansion of nationwide injunctions and the increasing importance of the merits in shadow docket decision making in the 2010's began to warp the traditional notions of their precedential value. Part I will conclude with the transformational shadow docket decisions surrounding the COVID-19 pandemic and the formal introduction of shadow docket as precedent.

In Part II, this Note will evaluate the state of contemporary shadow docket jurisprudence, focusing on its ethical valence with Rule 3.1 of the *Model Rules of Professional Conduct*. The current situation will be evaluated from the perspective of academia, lower courts, and the Supreme Court. Finally, Part II will briefly describe the academic backlash against the changes to the shadow docket and discuss the calls for reform.

In Part III, this Note will argue that the ethical lawyer has a duty to adapt to the evolving landscape of shadow docket precedent. In the light of Rules 3.1 and 1.3, this Note will carve out the boundaries of the lawyer's obligations to both their clients and the court in creating meritorious arguments that are necessary to provide effective representation. Notwithstanding the calls for reform, when the 'rubber meets the road,' this Note will conclude by contending that lawyers must learn the language of the shadow docket in order to advocate both effectively and ethically.

I. HISTORICAL OVERVIEW OF THE SHADOW DOCKET

This Part will explain the historical background of shadow docket jurisprudence from 1980 until the present. First, the initial growth of the shadow docket in the 1980s will provide the baseline and the trajectory of shadow docket history. The rise of applications for emergency relief from the death penalty provides the root cause of the expansion, while Justice Rehnquist's opinion on *Heckler v. Lopez* illustrates the direction that the shadow docket would move over the following decades. Next, this Part will describe the new importance of the shadow docket in the 2010s as the Supreme Court addressed multiple controversial nationwide injunctions through emergency relief. This Part will end by connecting the historical narrative with the story of *Tandon v. Newsom* and the emergence of the shadow docket as a source of binding precedent during the COVID-19 pandemic.

A. 20th CENTURY GROUNDWORK

Modern shadow docket jurisprudence stands in sharp contrast to the backdrop of traditional norms on emergency applications and summary orders. Prior to

1980, emergency applications were typically resolved by single Justices in their capacity as Circuit Justices, not claiming to speak for the full Court.[25] Thus, emergency applications had no precedential value.[26] Chief Justice Burger summed up the conventional wisdom on summary orders in *Fusari v. Steinberg*, writing: "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established."[27] Later that year, the Court expounded on the issue in *Illinois State Board of Elections v. Socialist Workers Party*, "not[ing] at the outset that summary affirmances have considerably less precedential value than an opinion on the merits."[28] Until 1980, only the Supreme Court's merits decisions carried the full weight of binding precedent.[29]

The modern shadow docket was born from necessity in the 1980's after a moratorium on the death penalty lapsed, as a grim tide of desperate emergency applications to the Supreme Court began to roll in.[30] Death row prisoners flooded the Court with petitions to review their sentences based on newly recognized constitutional safeguards around capital punishment.[31] At the same time, states also petitioned the Court to overturn lower court stays of execution based on those safeguards.[32] The Court handled this deluge of exigencies by designating a "death clerk" to monitor the status of capital cases and handle the logistical elements of staying executions or allowing them to continue.[33] In contrast to the traditional Circuit Justice model, the legal questions for these emergency applications were handled by the full Court without oral arguments or full published opinions.[34] These morbid tribunals laid the groundwork for the growth of the Supreme Court's non-merits docket.

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25. STEPHEN VLADECK, THE SHADOW DOCKET 100 (2023).

26. *See id.;* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10637, The "Shadow Docket": The Supreme Court's Non-Merits Orders 5 (2021). Other types of shadow docket orders (like denial of certiorari) also carried no precedential weight. *See, e.g.*, State of Md. v. Baltimore Radio Show, 338 U.S. 912, 917 (1950).

27. Fusari v. Steinberg, 419 U.S. 379, 392 (1975).

28. *See* Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180 (1979).

29. *See id.* Notwithstanding this general norm, some lawyers did try to read the non-merits docket as signals from the Supreme Court even before this point. As Justice Harlan said to Learned Hand: "when you read in Monday morning's New York Times 'Certiorari denied' to one of your cases, then despite the usual teachings, what the notation really means is 'Judgment affirmed." Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1278 (1979) (quoting In Commemoration of Fifty Years of Federal Judicial Service by the Honorable Learned Hand 23) (Apr. 10, 1959), *reprinted preceding* 264 F.2d i (1959).

30. VLADECK, *supra* note 25, at 101–02; *see also* Furman v. Georgia, 408 U.S. 238, 240 (1972) (holding that capital punishment may be unconstitutional); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (holding that capital punishment may be constitutionally permissible); Gilmore v. Utah, 429 U.S. 1012, 1012 (1976) (terminating stay of capital punishment for the first time since Furman).

31. During the October 1983 Term, death row prisoners submitted eighty-three applications for emergency relief. By comparison, during the October 1960 Term, death row prisoners submitted only four applications for emergency relief. VLADECK *supra* note 25, at 103–05.

32. *See id.*

33. *See id.* at 107.

34. *See id.* at 106.

Issued in 1983, Justice Rehnquist's opinion in *Heckler v. Lopez* provides a snapshot into the contemporary considerations for an emergency stay and foreshadows the growing omnipresence of the Supreme Court's non-merits docket.[35] In *Heckler*, a District Court in California enjoined the Department of Health and Human Services to restore disability benefits which had been terminated in an allegedly unconstitutional way.[36] The Ninth Circuit declined to stay the injunction, and Margaret Heckler, the Secretary of HHS, appealed to the Supreme Court.[37] Justice Rehnquist noted that "a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted."[38] However, Rehnquist nevertheless chose to stay the injunction before the Ninth Circuit had a chance to rule on the merits for two reasons. First, he balanced the "stay equities," and second, he predicted the decision of the full Court on the merits of the issue.[39] The former consideration represents the primary factor for emergency orders in the past, while the latter represents the prevailing concern today.[40] Rehnquist's decision to stay the injunction was striking at the time because, although he conceded that the "stay equities" favored the injunction, he still stayed the injunction based on a prediction of the Court's decision on the merits.[41] Rehnquist's favor of the merits drew sharp dissent from four Justices, who would not have decided the case based on a prediction of the merits.[42] Although this decision was controversial, it was also groundbreaking: Justice Rehnquist's resolution of the "unusual" case in *Heckler* would become increasingly normal over the next four decades, despite rumbling dissent at every turn.[43]

B. 21st CENTURY RAPID EXPANSION

The erosion of traditional norms of a limited and non-precedential shadow docket accelerated in 2012 with Chief Justice Roberts' opinion in *Maryland v. King*.[44] In *King*, Roberts wrote that any injunction against a government action caused irreparable injury that could justify emergency relief.[45] At the time, the

35. Heckler v. Lopez, 463 U.S. 1328, 1330 (1983).

36. *See id.* at 1328–29.

37. *See id.*

38. *See id.* at 1330 (quoting Atiyeh v. Capps, 449 U.S. 1312 (1981) (Rehnquist, J., in chambers)).

39. *See id.*

40. *Compare id.* at 1330–1331, *with* Ohio v. Environmental Protection Agency, 603 U.S. 279, 291 (2024) (noting that because both parties can often show significant stay equities, "resolution of these stay requests ultimately turns on the merits and the question who is likely to prevail").

41. Lois J. Scali, Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices, 32 UCLA L. REV. 1020, 1055 (1985); Heckler v. Lopez, 463 U.S. 1328, 1337 (1983).

42. Heckler v. Lopez, 464 U.S. 879, 884, 887 (1983) (Stevens, J. and Brennan, J., dissenting).

43. *See infra* Part I(b) and II(b). As an example of recent dissent, a bill was recently proposed in Congress to require the Supreme Court to explain its shadow docket decisions. Shadow Docket Sunlight Act of 2024, S. 4388, 118th Cong. § 2(a) (2024). Additionally, Professor Steven Vladeck's book criticizing the Supreme Court's shadow docket practices was a New York Times bestseller in 2023.

44. Maryland v. King, 567 U.S. 1301, 1303 (2012).

45. *See id.*

full implications of this decision were unclear, since emergency applications to stay an injunction of government action were relatively rare.[46] During the Bush and Obama presidencies combined, the federal government brought only eight petitions to stay lower court injunctions.[47] The full implications of *King* materialized in 2017 with the change in administration, as a torrent of constitutionally-controversial executive actions tested the lower courts' appetite to enjoin the executive branch.[48] In less than three years, the Solicitor General filed more than twenty petitions to stay lower court injunctions of Trump administration edicts.[49] At the forefront of these decisions were the self-styled "Muslim ban," the ban on transgender military service, and the recission of the Deferred Action on Childhood Arrivals program.[50] On each issue, the lower courts had enjoined executive enforcement of the policies on constitutional grounds.[51] The Supreme Court was faced with an unprecedented cascade of petitions to stay lower court injunctions on the emergency docket, citing the irreparable harm to the nation by injunctions against state action under the reasoning of *King*. The shadow docket, which had been focused on death penalty appeals for three decades, necessarily began to turn to wider constitutional issues.[52]

The most recent watershed moment for the shadow docket was the COVID-19 pandemic, which caused a new wave of unprecedented government actions requiring judicial scrutiny.[53] The federal courts and state governments clashed over issues like restrictions on religious gatherings, injunctions on prison COVID policies, and orders for widespread business closures.[54] Just as the 1980's

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46. As of 2015, Baude described this comment as a "mystery," speculating that the Supreme Court's recent shadow docket decisions regarding same-sex marriage might suggest that the Court "intend[ed] to finally endorse the categorical claim" of *King*. William Baude, *Foreword: The Supreme Court's Shadow Docket* (University of Chicago Pub. L. & Legal Theory Working Paper, Paper No. 508, 2015).

47. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019).

48. Anthony Winer, *Action and Reaction: The Trump Executive Orders and Their Reception by the Federal Courts*, 44 MITCHELL HAMLINE L. REV. 908, 908.

49. Vladeck, *supra* note 47, at 125.

50. *See id.*; Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 3:18 AM), http://www.cnn.com/2015/12/07/politics/donald-trumpmuslim-ban-immigration/index.html [https://perma.cc/CNM7-AYN5] (reporting on Trump's call for a "total and complete shutdown of Muslims entering the United States").

51. Washington v. Trump, No. C17-014IJLR, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017) (enjoining enforcement of the ban on Muslim entry); Stone v. Trump, No. MJG-17-2459, 2017 WL 5589122, at *16 (D. Md. Nov. 21, 2017) (enjoining enforcement of the ban on transgender military service); Amended Memorandum & Order & Preliminary Injunction, Batalla Vidal v. Nielsen, 279 F.Supp.3d 401, 437 53–55 (E. D.N.Y. Feb. 13, 2018) (enjoining enforcement of the rescission of DACA).

52. McFadden & Kapoor, *supra* note 5, at 834; *see e.g.,* Trump v. Hawaii, 583 U.S. 1009, 1009 (2017) (granting stay of injunction against the "Muslim ban").

53. *See* Tandon v. Newsom, 593 U.S. 61, 62 (2021) (enjoining COVID restrictions on First Amendment grounds); Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 15 (2020) (holding the same).

54. *See* Stephen Wermiel, *Symposium: Coronavirus litigation lurks in the shadows*, SCOTUSblog (Oct. 26, 2020, 5:18 PM), https://www.scotusblog.com/2020/10/symposium-coronavirus-litigation-lurks-in-the-shadows/ [https://perma.cc/UG2U-XMVS]; *see, e.g.,* South Bay United Pentecostal Church v. Newsom, 140 S.Ct. 1613, 1613-14 (2020) (denying injunctive relief for religious institutions); Barnes v. Ahlman, 140 S.Ct. 2620, 2620 (2020) (granting stay of injunction implementing prison COVID safety requirements); Friends of Danny Devito v. Wolf, 140 S.Ct. 2758, 2758 (2020) (denying stay of injunction compelling business closure).

Supreme Court expanded the shadow docket to stem the tide of death penalty appeals, the 2020 Supreme Court also leaned on the shadow docket to combat the legal crisis raised by the pandemic.[55]

In one sense, *Tandon v. Newsom* was an inflection point, with the shadow docket taking on a new life as a source of precedent; in another, *Tandon v. Newsom* was the natural consequence of a steady progression from *Heckler* to *Roman Catholic Diocese*.[56] Either way, the shadow docket is more substantial now than ever, and its pervasive influence has not withdrawn proportionally to the retreat of the pandemic.[57] *Tandon* itself has been cited in hundreds of lower court decisions as binding precedent, and more recent shadow docket decisions have also been afforded precedential weight in lower courts.[58]

II. LEGAL ARGUMENTS IN THE SUPREME COURT'S SHADOW

In this Part, this Note will explain how academics, lower courts, and the Supreme Court use the shadow docket today, with a focus on the precedential value of shadow docket decisions. First, this Part will contrast the work of Professor Huang against the work of Professors McFadden and Kapoor on this topic to illustrate how prescriptivist versus descriptivist theories conceive of the precedential value of the shadow docket. Next, this Part will touch on some of the Justices' opinions that represent their thoughts on the shadow docket and how it should be used. Finally, this Part will conclude with a brief recognition of the extensive work that has been done towards reforming the shadow docket.

A. MECHANICS: HOW THE SHADOW DOCKET OPERATES TODAY

The development of shadow docket doctrine has opened new avenues for legal argumentation. Instead of arguing based on what the Supreme Court has done in cases with full merits review, it is possible to argue using inferences from its conduct in the shadow docket.[59] For instance, if the Supreme Court enjoined the application of a law in one state through the emergency docket, attorneys in all other states could evaluate their own laws with the same rationale.[60] For

55. *See supra* Part II(a).

56. *See infra* Parts I(a) and II(a). Tandon v. Newsom, 593 U.S. 61, 62 (2021); Heckler v. Lopez, 463 U.S. 1328, 1330 (1983); Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 15 (2020).

57. *See* John Fritze and Devan Cole, *Supreme Court's 'shadow docket' returns with a vengeance*, CNN POLITICS, https://www.cnn.com/2024/08/21/politics/supreme-court-shadow-docket-abortion-climate-election-student-loans/index.html. [https://perma.cc/BC5L-7BCB]; Lampe, *supra* note 26, at 1.

58. *See, e.g.*, Pleasant View Baptist Church v. Beshear, 78 F.4th 286, 303 (6th Cir. 2023) (citing *Tandon*) (Murphy, J., concurring); Gun Owners of America, Inc. v. City of Philadelphia, 311 A.3d 72, 89 n.2 (Commonwealth Ct. of Pa, 2024) (citing a shadow docket case, *Garland v. Vanderstok*).

59. *See, e.g.*, Alabama Association of Realtors v. Dep't of Health and Human Services, 594 U.S. 758, 759 (2021) ("applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority").

60. Roman Catholic Diocese v. Cuomo, 592 U.S. 14, 15 (2020).

unexplained orders where the rationale is not explicit, it is still possible to reverse-engineer the Court's rationale from trends on the shadow docket.[61]

The precise precedential value of shadow docket cases is hotly contested by legal academia. In "The Foreshadow Docket," Professor Huang considers the precedential effects of the Supreme Court's "guesses" about the merits of future cases, describing a system with "*stare divinatis*" paralleling *stare decisis*.[62] In other words, in this system, the cases that have been *predicted* would carry the same weight as the cases that have been *decided*.[63] After laying out this hypothetical, Professor Huang argues strenuously that it is not (and should not be) the reality based on underlying fundamental rules of precedent.[64] Professor Huang contends that shadow docket decisions should be seen as inherently temporary, with only as much precedential force as the rough draft of a Supreme Court opinion.[65] When considering cases like *Tandon* and *Roman Catholic Diocese* that contradict this contention, Professor Huang wrote that "a majority of the Justices now look back warily at their pandemic-era experimentation with using emergency orders to send precedent-ish signals to the lower courts."[66] As evidence, Professor Huang cited several more recent emergency orders containing warnings not to overread the precedential force of the order.[67] It is odd, though, that the Justices would specify that individual emergency orders should not be given precedential effect if those Justices believed that emergency orders should *never* be given precedential effect.[68] It is equally possible to read these opinions with the opposite conclusion: that the Supreme Court's explicit narrowing of the precedential value of some shadow docket orders implies that those decisions would merit more precedential weight absent the instructions.[69]

Professors McFadden and Kapoor take a more descriptivist approach to the precedential force of shadow docket opinions, compared to the more prescriptivist approach of Professor Huang.[70] In their appendix, McFadden and Kapoor

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61. *See generally* VLADECK, *supra* note 25.

62. Huang, *supra* note 16, at 856-58 ("For a theorist of precedent, the foreshadow docket must seem like a bizarre thought experiment come to life. Theory has something new here to ponder and may well have something new to learn.").

63. *Id.*

64. *Id.* at 858–68.

65. *Id.*

66. *Id.* at 867.

67. *See, e.g.*, Robinson v. Ardoin, 144 S. Ct. 6, 6 (2023) ("nothing in our decision not to summarily reverse the Fifth Circuit should be taken to endorse the practice of issuing an extraordinary writ of mandamus in these or similar circumstances") (Jackson, J., concurring).

68. *See id.*

69. *See id.*

70. *Compare* McFadden & Kapoor, *supra* note 5, at 834–35, *with* Huang, *supra* note 16, at 856–58 ("For a theorist of precedent, the foreshadow docket must seem like a bizarre thought experiment come to life. Theory has something new here to ponder and may well have something new to learn."). "Descriptivism" and "prescriptivism" refers to a linguistic dichotomy: McFadden and Kapoor's theory describes the use of the law in practice, while Huang's theory prescribes a rational use of law in theory. *See generally Governing English: Prescriptivism, Descriptivism, and Change*, University of Kansas Libraries, https://exhibits.lib.ku.edu/exhibits/show/english-language/governing-english [https://perma.cc/H3NB-Y8WG].

include a table of Supreme Court stays and how lower courts have cited them, painting a picture of the precedential landscape of the shadow docket leading up to *Tandon v. Newsom*.[71] The result is clear: when the Supreme Court issued an emergency stay, or if they declined to issue a stay with a fully-reasoned opinion, lower courts across many circuits and districts still cited the shadow docket decisions as precedential.[72] This trend has continued until the present; for example, in *Alabama v. U.S. Secretary of Education*, the Eleventh Circuit justified an injunction on the Department of Education by citing *Louisiana v. U.S. Department of Education*, which was a shadow docket decision on similar facts.[73]

The Court is increasingly sending signals through the shadow docket to those who are savvy enough to pick up on them. For instance, when certiorari is denied on a specific case, concurrences or dissents sometimes hint that another case with similar facts might be worthy of certiorari.[74] In *Harrel v. Raoul*, despite the fact that the Court refused to take up a Second Amendment case in an interlocutory posture, Justice Thomas presaged the merits of the case in a fully-reasoned way.[75] Although the opinion is not precedential per se, the opinion provides a helpful window into the rationale behind an argument that would be practically guaranteed to garner sympathy in the Supreme Court.[76]

Lawyers in high-profile cases attuned to the shadow docket can shift their legal arguments in response to these hints to tailor the case for certain Justices. Even in lower-profile cases, lawyers should be cautious about making arguments similar to those which are being shot down on the shadow docket, regardless of whether the Court's actions are unexplained. Justice Kagan recognized this possibility in her dissenting opinion on the shadow docket decision *Louisiana v. American Rivers*.[77] She wrote that since Louisiana was granted relief on the shadow docket based primarily on the merits of the case, other states in a similar position would be incentivized to take the same actions under the same rationale.[78] Although she framed the statement in a negative light, Justice Kagan's opinion summed up the fundamental truth of the modern shadow docket post-*Tandon*: "the Court's emergency docket [is] not for emergencies at all. The docket becomes only another place for merits determinations."[79] Thus, just as lawyers adjust their arguments based on the Court's merits docket, they can now take shadow docket opinions into account.

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71. McFadden & Kapoor, *supra* note 5, at 887.

72. *See id.*

73. Alabama v. U.S. Sec'y of Educ., 2024 WL 3981994, at *6 (11th Cir. Aug. 22, 2024) (citing Dep't of Educ. v. Louisiana, 603 U.S. 866, 868, 2510 (2024) ("the burden is on the Government as applicant to show, among other things, a likelihood of success on its severability argument").

74. Harrel v. Raoul, 144 S. Ct. 2491, 93 (2024).

75. *See id.*

76. *See id.*

77. Louisiana v. American Rivers, 142 S. Ct. 1347, 1348-49 (2022).

78. *See id.*

79. *Id.* at 1349.

When lawyers argue to enjoin the application of a certain law or executive order, they must be especially mindful of the likelihood of emergency relief from the Supreme Court since *Maryland v. King*.[80] It has become clear that the merits are especially central for a decision regarding the injunction against enforcement of a law, since enjoining law enforcement is a *per se* irreparable harm.[81] The days when shadow docket decisions carried little precedential weight are swiftly coming to a close.

B. CRITICISMS: ACADEMIC BACKLASH

The rise of the shadow docket has not been well-received among many legal scholars.[82] Although this Note will not delve deeply into the arguments for reform, it is important to recognize that substantial time and effort has been devoted to pushing back against the growth of the shadow docket. Both Justice Kagan and Justice Sotomayor have castigated the shadow docket's expansion while writing in dissent.[83] Although the trajectory of the shadow docket may reverse through legislation, public pressure, or the shifting composition of the Supreme Court, the remainder of this Note will focus on the lawyer's ethical obligations under current and foreseeable jurisprudence.

III. ADAPTING TO THE SHADOW DOCKET

In this Part, this Note will argue that lawyers have an ethical duty to adapt to the shifting legal landscape of the shadow docket rather than to resist it.[84] When considering whether to use shadow docket decisions as precedent for a legal argument, ABA Rule 3.1 should be read in the context of Rule 1.3. Rule 1.3 requires that "a lawyer shall act with reasonable diligence and promptness in representing a client," which requires the lawyer to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[85] Read together, Rules 3.1 and 1.3 illustrate the bounds of the lawyer's behavior on either side: a lawyer must not make an argument unless it is meritorious, but a lawyer must make the available arguments required to effectively represent their client.[86] In this paradigm, if an argument based on shadow docket decisions is meritorious and that argument is required to effectively represent a client, then the client's

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80. Maryland v. King, 567 U.S. 1301, 1303 (2012).

81. *See id.*

82. *See, e.g.*, VLADECK *supra* note 25; Cole Waldhauser, *Unprecedented Precedent: The Case Against Unreasoned "Shadow Docket" Precedent*, 37 Const. Comment 149, 169 (2022); Huang, *supra* note 16, at 885; Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 WAKE FOREST L. REV. 1021, 1101 (2021).

83. Louisiana v. American Rivers, 142 S. Ct. 1347, 1348–49 (2022) (Kagan, J., dissenting); Wolf v. Cook County, Illinois, 140 S. Ct. 681, 683–84 (2020) (Sotomayor, J., dissenting).

84. This is *not* to say that lawyers have an ethical duty to avoid efforts for reform by the Supreme Court. There is extensive academic writing already on that topic, as discussed in part II(c) *supra*. This Note merely suggests a course of action assuming that the trajectory of the shadow docket continues in its current direction.

85. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2020).

86. *See id.*; MODEL RULES OF PROF'L CONDUCT R. 3.1 (2018).

lawyer has an ethical duty to use an argument based on shadow docket decisions.[87] This Part will consider each element in turn: first, what arguments based on shadow docket decisions are meritorious; second, when are shadow docket decisions required to effectively represent a client; and third, how should lawyers carry out this duty on the ethical and precedential frontier?

A. RECOMMENDATION: THE DOCKET IN DAYLIGHT

Whether arguments based on shadow docket decisions are meritorious hinges on the question: "what legal basis do shadow docket decisions provide?"[88] As discussed in Part I(b), the answer to that question is not abundantly clear from either Supreme Court opinions or scholarly analysis, although there are a few plausible options.[89] For instance, Professors McFadden and Kapoor argue for a variable level of precedential or persuasive value based on the qualities of the shadow docket decision, and Professor Huang argues that shadow decisions cannot carry precedential weight.[90] While it is difficult to map the exact *position* of the shadow docket on a precedential scale, it is relatively easy to chart its *momentum*. The shadow docket is becoming more important, more focused on the merits, and more precedential in character, with consistent acceleration in that direction for over four decades.[91] It would be a futile and unhelpful project to write a decisive description of the precedential weight of shadow docket decisions at the present moment. Instead, this Note lays out a frame of reference for determining which shadow docket decisions to use and when.

Shadow docket decisions are required to effectively represent a client when those decisions are the best representations of the Supreme Court's opinion on the merits. For each relevant shadow docket decision, ABA Rule 3.1 should be considered first: whether the decision creates a valid legal basis for an argument in light of the law's ambiguities and potential for change.[92] *Tandon* is the quintessential example here: when the case charts new territory (like First Amendment protections during an unprecedented global pandemic) and the Supreme Court has expressed an opinion on a similar issue in an emergency posture, the reasoning in that opinion provides a valid legal basis for an argument.[93] The logic in nationwide injunctions is similar, since the Supreme Court's "resolution of these stay requests ultimately turns on the merits and the question [of] who is likely to prevail at the end of [the] litigation."[94] If a shadow docket decision has been used

87. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2020); MODEL RULES OF PROF'L CONDUCT R. 3.1 (2018).

88. *See* Part (b) of the Introduction *supra*.

89. *See id.*

90. *Compare* McFadden & Kapoor, *supra* note 5, at 834–35 (2021), *with* Huang, *supra* note 16, at 856–58.

91. *See* I(b) *supra*.

92. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2018).

93. Tandon v. Newsom, 593 U.S. 61, 62 (2021).

94. Ohio v. Environmental Protection Agency, 603 U.S. 279, 292 (2024).

as the basis of a GVR, then the Supreme Court clearly intends for its influence to stretch beyond the facts of the case.[95] All of these considerations should be evaluated in light of the fact that the precedential status of shadow docket decisions is constantly in flux: the most recent shadow docket cases might illuminate the Court's expectations even on an unrelated issue. For instance, *Tandon* radically changed the nature of shadow docket precedent in a quiet way, so it is necessary to keep an eye on what new changes might arise over time.

Next, ABA Rule 1.3 should be considered to determine whether the case is necessary to effectively represent the client.[96] This is most prevalent at the cutting edge of law, where the binding decisions on the merits docket leave ambiguity for the decision at hand. In addition, the shadow docket is most useful as context to flesh out the opinions of the Court on issues which have not been finally resolved.[97] Even when shadow docket decisions are not fully explained, they should be used as signals to inform the opinion of Justices on the issue. At this point, the best strategy on this front is moderation and conservative use of shadow docket decisions, since some courts will not afford shadow docket precedent much weight unless the facts are extremely similar.

The last question is how lawyers should operate at this ethical frontier in a way which serves their clients and the justice system as a whole. Although there is no precise set of rules to follow, some principles can be derived from the historical and ethical context. First and foremost, flexibility is key. The nature of the shadow docket has been shifting for over four decades, and it is likely that those changes will continue into the future.[98] In order to balance their obligations to their clients and the court, lawyers should monitor developments in shadow docket jurisprudence and how those developments affect lower courts. Second, lawyers should separate their opinions about whether the shadow docket should be reformed from their willingness to use shadow docket decisions for arguments. Legal clients deserve representation that will make use of the tools available to provide zealous advocacy, which may include leveraging shadow docket decisions.

Third, lawyers should focus on how to interpret the Court's express or implicit signals. The Court frequently does not operate at the limits of its power; instead, it practices the "passive virtues" of maintaining power by leaving certain questions unanswered.[99] In other words, a great deal of the Supreme Court's power is hidden behind a veil, carrying out on the shadow docket what might be fraught with risk and confusion on the merits docket. Lawyers have an opportunity to pierce the veil and bring those issues into the daylight by unlocking the power of the shadow docket for everyday justice. The docket is only 'shadowy' because it

95. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 15 (2020).
96. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2020).
97. *See, e.g.*, Harrel v. Raoul, 144 S. Ct. 2491, 2491–93 (2024).
98. See *supra* Part I(b).
99. Alexander M. Bickel, *Foreword: The Passive Virtues,* 75 HARV. L. REV. 40, 79 (1950).

has unforeseen and intangible implications; however, after *Tandon* it is increasingly possible to translate shadow docket decisionmaking into foreseeable and tangible argumentation at every level of the judicial system. If ethical lawyers act flexibly, separate their preferences for reform from their practical application of client representation, and learn to speak the language of the shadow docket, then perhaps the title of 'shadow docket' will soon become just as obsolete as the 'non-merits docket' has over the past decades.

CONCLUSION

The shadow docket holds tremendous untapped potential for the future of Supreme Court jurisprudence. Now that the predicted merits of shadow docket cases provide the core of many decisions, they provide a gold mine of insight into the Supreme Court's perception of the present and future of the law. While many scholars want to hit the brakes or shift into reverse, the momentum of shadow docket jurisprudence heralds a greater focus on the merits with more precedential effect. Lawyers have not only an opportunity, but an ethical obligation to adapt to the evolving legal landscape of the shadow docket in order to effectively advocate for their clients.