SADOMASOCHISTIC JUDGING

LAW AND LEGITIMACY IN THE SUPREME COURT. Richard H. Fallon, Jr.* Cambridge, Mass.: Harvard University Press. 2018. Pp. xii + 221. $41.00 (Cloth).

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What makes a judicial decision legitimate? Common answers include fidelity to legal texts and precedent, coherence to natural or intersubjectively agreed upon norms, or endorsement from democratically accountable actors. But while these criteria each have strong theoretical appeal, their practical usefulness as a means of validating any contested judicial decision is often limited. In cases of legal indeterminacy or the proverbial "hard cases," many different outcomes can at least claim to fulfill these requirements. A decision which genuinely fulfills legitimacy criteria and one which is merely going through the motions often will be observationally equivalent.

As a means of practically establishing legal legitimacy in a way verifiable to external observers, pain is an underappreciated but important element of judicial practice. Judges routinely brag of rendering decisions which are painful to them—upholding "uncommonly silly laws," protecting "speech that we hate," reluctantly permitting terrible injustices to persist because the law "ties our hands." Far from being relegated to the embarrassed fringes, such cases play a central role in establishing judges as legitimate actors bound by law, and in many ways represent the demarcation line between good and bad judges—a good judge is one who does not flinch even in the face of great pain. Yet it should

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be clear that there is great risk in tying the validation of judges to the infliction and receipt of pain. To the extent judges are socialized into associating pain with legitimacy, the legal system that emerges will likely be one which needlessly and gratuitously inflicts pain.

INTRODUCTION

In 2013, Judge Richard Kopf of the District of Nebraska levied a powerful warning for aspiring federal judges. He asked them to ask themselves: "Am I a willing judicial executioner, a person who consciously does great harm to other human beings by faithfully executing the extraordinarily harsh national criminal laws?" The question, Judge Kopf continued, gets at a painful truth: "When sentencing people, federal trial judges literally and consciously destroy lives and most do so on a daily basis." "Those who covet a federal trial judgeship," he advised, "should think hard about this truth before pursuing the job."[2]

It's good advice. This reality of judging—the necessity of inflicting pain as a daily feature of the job—is one all judicial candidates should reflect upon. On the other hand, we probably don't want judges who, after pondering whether they can serve as a "willing judicial executioner," answer with a hearty and cheerful affirmative. Perhaps the moral of the story is that the best judges are perpetually miserable.

Richard Fallon's book *Law and Legitimacy in the Supreme Court* does not spend much time considering the emotional well-being of judges—their happiness or sadness. Its focus is, as the name implies, on questions of *legitimacy* in judicial decision-making. "By what moral right" does the United States Supreme Court "establish controversial rules of law . . . and then enforce its dictates coercively? Or, perhaps better, How [sic] would the Supreme Court of the United States need to decide the cases before it—both procedurally and substantively—in order to justify imposing its will on those who reasonably disagree with its conclusions . . . ?" (p. 7).

2. Richard Kopf, *Want Ad: A Judicial Executioner to Serve for a Lifetime*, HERCULES & THE UMPIRE (Sept. 30, 2013), https://herculesandtheumpire.com/2013/09/30/want-ad-a-judicial-executioner-to-serve-for-a-lifetime/. Judge Kopf's words also evoke Robert Cover's bracing declaration that "judges deal pain and death." Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986).

Yet the paradox of the miserable judge has more relevance to the question of legal legitimacy than might be apparent at first glance. It is not just that judges inflict pain as part of their daily job. It is more fundamental than that: judges inflict pain and thereby *validate* and *legitimize* their job. A judge who is charged to be simply a tyrant in a robe, maximizing her own policy preferences while dressing it all up in legalese, will instinctively rejoin by citing all the cases where she would have preferred to rule in a different way, was agonized by what the law compelled her to do, but nonetheless acted in accordance with it. In a very real sense, it is these "painful" decisions—the ones judges hate, the ones where they palpably and vocally wince and squirm, the ones which cause or sanction obvious harm and injury that goes beyond what seems fair or justifiable as a matter of pure ethics—that are the most important to establishing judges as constrained by law and therefore legitimate. In this way, the question of legitimation becomes inextricably bound up with questions of pain—the judge who inflicts pain and who reflexively feels pain in return.

Part I offers an introduction by assessing Fallon's approach to the judicial legitimation project as a means of distinguishing truly "legal" decisions from mere judicial caprice. While theoretically rigorous, it suffers because many of the features which putatively distinguish licit versus lawless judging are difficult if not impossible to observe and so cannot *actually* serve to legitimate any particular judicial decision in a universe where essentially all contested judicial decisions are at least plausibly legalistic.

Part II suggests that pain appears to offer a viable means of *observationally* confirming that a judicial decision genuinely stems from legalistic commitments—the decision that the judge is pained to hand down, generally because it causes unjust pain to others, is presumptively legitimate insofar as the judge has no other reason to make such a ruling *but* because he or she is legally compelled to do so. Of course, conceptually the only true connection between pain and legitimate judicial decision-making is one of compatibility: a decision can be painful and still legitimate. Yet—precisely because it appears to offer the elusive guarantee of judicial legitimacy—pain can easily become viewed as a heuristic for or even constitutive of legitimate judging. Judges come to sadomasochistically crave pain and the legitimacy it

provides, seeking out pain and reveling in the painful outcomes even when they are not demanded by the law.

Part III concludes by exploring the degree to which the judiciary today can be described as engaging in sadomasochistic judging. After the 2016 election, there were some predictions that the Supreme Court would serve as a check against extreme abuses by the Trump administration—expectations premised on the (likely true) assumption that even most conservative judges were not "Trumpist" in their personal beliefs. Instead, over the course of the Trump administration the Supreme Court in particular has not just handed repeated victories to the administration, it has taken extraordinary steps—often in the cases (particularly surrounding immigration) in which the Trump administration's cruelties are at their apex—to intervene on the administration's behalf in manners that circumvent the ordinary appellate review process. That the Court is wielding not just its purely legal analytic power but also its discretionary power (e.g., over when to grant certiorari, stays, injunctions, and so on) in these cases—and seems if anything *more* inclined to do so in cases where the judges might be thought to be *most* squeamish about the tangible outcomes of the decision—cries out for explanation. While it is possible that it simply reflects a basic policy affinity between the justices and the administration on these issues, it may actually stem from the opposite instinct: the sense that a good judge, a legitimate judge, is one who does not shy away from his or her duty in the face of pain; a suspicion that (lower court) judges who arrest pain are shirking this duty; and the conclusion that the rule of law demands if anything *greater* attention and scrutiny to those cases and rulings where courts are avoiding pain—and thereby, potentially, avoiding their judicial duty.

I. LEGAL LEGITIMACY VERSUS JUDICIAL CAPRICE

Fallon introduces his book by recalling a remark from Justice Brennan that "the most important number in the Supreme Court is five." Why? Because "[w]ith five votes, you can do anything" (p. x).[3] Justice Brennan was no doubt speaking somewhat tongue in cheek. Nonetheless, he was evoking one of the recurrent fears

3. Later on, Fallon quotes Charles Evans Hughes making a similar point: "the Constitution is what the judges say it is" (p. 105).

surrounding the exercise of judicial power—that it is naught but the caprice of a judicial majority, that given a panel majority judges are free to simply do anything they like.[4] Judicial *legitimacy* is meant as a conceptual check against this vision of terrifying judicial freedom-as-tyranny.[5]

One potential mechanism for constraining judges—ensuring that they decide based on *law*, and not their own subjective whim—is attempting to formulate a constitutional theory that minimizes if not eliminates indeterminacy. If there is only one correct outcome to any potential case or controversy, and that outcome is fairly discernable by a suitably well-trained legal observer, then a judge who deviates from the one true path can be immediately recognized as a rogue or usurper. Originalism often holds itself out as providing such legal determinacy,[6] though Fallon is deeply skeptical that it succeeds in its aspiration (pp. 137–142).

But Fallon makes the more expansive argument that "the very ambition of developing a perfectly determinate constitutional theory should strike us as misguided—indeed, as terrifyingly so" (p. 141). A perfectly determinate judicial theory always runs the risk of compelling "practically and morally

4. *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293 (1992) ("Constitutional theory in the last several decades has been obsessed with the question of how to constrain judges' exercise of will, . . . try[ing] to refute accusations that judges are simply expressing their own subjective preferences when they interpret the Constitution.").

5. The capacity to command while being absolutely free from the commands of others is the marker of sovereignty under an early modern tradition dating from Jean Bodin and continuing through Thomas Hobbes and Jean-Jacques Rousseau—an understanding which has generated considerable worry that their theories are simply apologies for tyranny. Under this view, judicial supremacy—where judges get the effectively the "last word" on interpretations of law, immune from reproach by the democratic branches—might be thought to strip sovereignty from the people and place it in the hands of unelected judges. But as I have argued elsewhere, a more careful reading of the Bodin/Hobbes/Rousseau tradition would adhere to the distinction between sovereignty and government, locating the former not in any of the branches of government but in the residual—and unlimited—constitution-making authority that remains in the hands of the people. *See* David Schraub, *Finding the "Sovereign" in "Sovereign Immunity": Lessons from Bodin, Hobbes, and Rousseau*, 29 CRIT. REV. 388 (2017).

6. Fallon cites KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 61–62 (1999); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); and Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015). Fallon criticizes the latter, in particular, in detail (p. 204 n.7).

disastrous outcomes," and few are willing to actually endorse these consequences simply because theory demands it (p. 141). This is the force of Michael McConnell's famous concession that "if any particular [constitutional] theory does not produce the conclusion that *Brown* [*v. Board of Education*] was correctly decided, the theory is seriously discredited" (p. 145).[7] Just as Anatole France suggested that "to die for an idea is to place a pretty high price on conjecture," in law, Fallon observes, "the stakes are too high" to tie oneself to "an advance, let-the-chips-fall-where-they-may commitment" to a determinate constitutional theory (p. 141).

Seeking to avoid both the dangers of utterly unconstrained, whim-based judging as well as rigid, algorithmic determinacy, Fallon lands upon an application of John Rawls' famous concept of the "reflective equilibrium."[8] Rawls promoted the reflective equilibrium as a mechanism for developing and fine-tuning principles of political justice. In short, Rawls observes that humans have convictions regarding both broad principles and specific cases of justice. Ideally, these convictions are in harmony—that is, application of the general principles yields the outcomes we intuitively understand to be "just" in essential cases. In practice, there will likely be discrepancies: circumstances where application of the principles does not lead to the results we would have expected based on our pre-investigative notions of justice. In those circumstances, we have two choices: we can revise our case-specific judgments to align with the theory, or we can revise the theory so that it generates the desired results.[9]

Either move is, or can be, appropriate. Certainly, in many cases where application of a principle requires an outcome that the deliberator did not as an initial matter endorse, the proper moral decision is nonetheless to adhere to the principle. After all, that's what principles are for. A deliberator who only adhered to their stated moral principles in cases where they agreed with the outcome could hardly be said to be bound by principles in the first place. Yet, it is equally clear that in some cases, the fact that the principle demands an especially appalling or unacceptable

7. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995).

8. *See* JOHN RAWLS, A THEORY OF JUSTICE 20, 48–51 (1971).

9. *Id.* at 20.

outcome is taken to indict the validity of the principle itself. For how do we assess which principles deserve our allegiance but by checking to see if they successfully generate desirable (or at least tolerable) states of the world? It hardly can be the case that we are duty-bound to follow a "principle" which, as applied to a specific social fact pattern, turned out to demand "genocide," "slavery," or "extinction-level environmental damage," even if we had all nominally agreed to the principle in advance.

As in justice, so too in law—or so Fallon argues. Contrary to the belief of some, judges should not ascend to the bench committed to a set of legal principles which they then must cling to come hell or high water (pp. 126–127). While judges should have at least "provisional" commitment to a particular interpretive theory, and should be willing to revise case-specific judgments to cohere to that theory, in certain cases judges should be willing to make adjustments on the side of principle, not just the side of outcomes. Like in deliberations about justice, a mismatch between one's overarching interpretive principles and one's intuitions regarding legal outcomes might normally suggest revising one's stance on the outcome, but in the right circumstances truly intolerable outcomes might call into question the robustness of the principle. Once we reject the simplistic notion, whereby we are powerless subjects of the founding generation, we must embrace "the role and responsibility . . . in maintaining and possibly reshaping the constitutional order" (p. 87). The notion of being fully bound and constrained interferes with our practical—and unavoidable—role in creating constitutional meaning.

So, if judges cannot be strictly bound to rigid and previously-agreed to interpretive theories, what makes judicial decisions legitimate? How must the judiciary "decide the cases that come before it—both procedurally and substantively—in order to justify imposing its will on those who reasonably disagree with its conclusions?" (p. 7). Fallon offers three basic "considerations" that judges must adhere to in order to maintain legitimacy in cases of sharp contestation:

1) They "must stay within the bounds of law," or at least within the realm of reasonable judgment about what the bounds of the law permit;

2) They must exhibit reasonable practical and moral judgment; and
3) They must support decisions via arguments made in "good faith" (p. 11).

These are indeed good guidelines for judges to follow. And it seems clear that considerations such as these generate at least some internal motivation that in practice constrains judicial behavior. Even judges who disavow explicit or rigidly mechanistic constitutional theorizing almost certainly "deny the appropriateness of deciding on whim" (p. 132). As Fallon observes, judges not only "feel bound by, and seek to obey and enforce, legal rules" but also "seek to hold each other to norms of proper conduct" vis-à-vis legal requirements (p. 93). Indeed, to some extent the judicial power depends for its very authority on the understanding that judges are limited as interpreters of duly enacted law. If there were no publicly accepted notion of legal and constitutional constraints that serve to effectively bind judges, the result would not be "constitutionally unconstrained Justices" but rather the absence of any figures recognized as judges at all (pp. 106–107).

The problem, of course, is that these norm-bound limits on judicial conduct are extremely fuzzy, as Fallon admits and indeed, in some ways, depends upon (for example, in insisting that we "not take too exacting or unforgiving a stance" in evaluating whether judges have failed to stay within the bounds of the law or exhibited reasonable practical and moral judgment) (p. 11). The cases that illustrate a failure to abide by these considerations—Fallon offers the example of an interlocutor who admits that an argument they made before that they now contradict was made "only for rhetorical purposes, without really believing it" (p. 12, see also p. 130)—are extreme, and unlikely to manifest in reality. Few of the controversial Supreme Court cases that generate anxiety about legitimacy will involve judicial conduct that decisively evinces an utter failure to stay within the bounds of law, catastrophic collapses of moral or practical judgment, or tauntingly brazen refusals to offer "good faith" arguments for a given legal position.[10]

10. Indeed, a large part of the problem is that even judicial opinions which seemingly fail Fallon's test often will not *read* as so failing—the judge who makes an argument in bad

This fuzziness generates a crisis at the core of the judicial legitimation project. Leslie Moran describes the dilemma well:

> When the language and the rules of the law are shown to be incapable of either providing clear guidelines or imposing strict limits upon action, the law begins to appear as a practice that is not so much a thing in opposition to violence but as a practice that has many characteristics that have been associated with violence. Thus law appears now as an arbitrary practice of domination rather than a practice controlled by language, rule and reason. Without the guidance arising from an authentic source of law, decision making might get out of hand. Without rule or reason judicial practice appears to be a practice without a referee or a controller. Legal practice no longer appears to be benign and impartial controlled by the rigorous demands of language, rule or reason but appears to be a practice of co-coercion more closely associated with the whim of those who have access to it.[11]

Judicial supremacy, coupled with the potential limitless power implied by the importance of "counting to five," renders judges deeply anxious about their seemingly unbounded and unending freedom—a freedom that can easily tilt into tyranny. This anxiety manifests as a need for legitimacy that is both internally and externally imposed: internally, because judges genuinely are uncomfortable with the prospect that they, personally, should possess so much power given their relative lack of democratic accountability, and externally, because in order for the judicial power to have practical effect in a system where they lack both power of the sword or the purse[12] their decision-making needs to be viewed as legitimate.

The crux of the dilemma is this: In order to be legitimated, judicial action must be understood to derive from authoritative legal sources that are not reducible to the simple whim and caprice of the presiding judge or panel majority. Otherwise it is scarcely distinguishable from capricious violence—impotent if it fails, tyrannical if it succeeds. Yet distinguishing between those

faith will nonetheless, if she is halfway competent, be able to dress it up in language that at least plausibly respects the standards of good faith and reasonable judgment. This goes to the broader point regarding the need for something which *observationally* distinguishes "good" and "bad" judicial practices. *See infra* Part II.A.

11. Leslie J. Moran, *Violence and the Law: The Case of Sado-Masochism*, 4 SOC. & LEGAL STUD. 225, 234 (1995).

12. THE FEDERALIST NO. 78, at 412 (Alexander Hamilton) (J.R Pole ed., 2005).

decisions which are authentically generated from law and those which are not is by no means straightforward. And so, Fallon asks, "In a world in which no one has perfect factual knowledge and in which we must anticipate and respect legal and moral disagreement, how do we mark the boundaries of legitimate judicial decision making?" (p. 125).

II. SADOMASOCHISTIC JUDGING

A. PAIN AS A SIGNAL OF LEGITIMATE JUDGING

In order to escape this dilemma, judges need ways to credibly signal that they are acting within the bounds of law. And in order to be effective, these signals must in some way serve to render observationally distinct those decisions which are genuinely generated from and are bounded by legal constraints from actions by judges that manage to follow proper legal forms even as they are actually motivated by or in pursuit of extra-legalistic interests.

But now we run into another serious problem: there are very few markers which facially distinguish these two sorts of cases. When Fallon dismisses the arrogant judge who simply declares "[m]y methodology is just to follow the law," as either "being mistaken, misleading, or possibly [speaking] in bad faith" (p. 133), he is alluding to this point—the *non-obviousness* of what decisions are and are not examples of "just following the law." Even to educated observers steeped in the legal tradition, the lawful and lawless ruling may look remarkably alike.

In 1950, Karl Llewellyn observed that virtually any well-respected canon of statutory construction has an equally venerable counter-canon pointing in the precise opposite direction. Each of these—canon and counter-canon, "thrust and parry"—carries a perfectly sound legal pedigree and plausible basis in legal theory.[13] These contradictory canons probably do not allow judges to do *anything* they desire. But they do vastly expand the number of legal readings which can plausibly call themselves correct "as a matter of law."[14] A judge who seeks to drape his or her whim in plausible legal garb will not lack for

13. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

14. *Id.* at 395 ("One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases.").

choices. Many years later, Philip Bobbitt discussed the various "modalities" of constitutional interpretation (e.g., textual, historical, doctrinal, prudential), which for any given legal question can each point to different plausible legal answers (p. 135).[15] Here too, there are opportunities for "legal" and "whim-based" judging to observationally converge—in few cases will *no* legal modality be available to a judge looking to justify a contentious ruling or holding. And the effect of precedent and prior practice, far from "liquidating" or otherwise settling constitutional meaning, can have the practical effect of further fragmenting it: each decision and each instance of practice proliferates the number of facially legitimate threads offering "eligible foundations for modern Court decisions" (p. 80).

Even in circumstances where we now know that anything resembling "law" took a subordinate stance to authoritarian power—such as judicial decisions involving Black litigants in the Jim Crow South—the rancid, racist lawlessness we associate with that state of affairs was not typically marked on the body of the text. Cases involving Black litigants that came before southern courts in fact look exceedingly normal in their manner of presenting evidence, citing precedents, and working through legal reasoning. Consider the Scottsboro cases. These are generally portrayed as an attempted "legalized lynching" by the Alabama judiciary,[16] checked only by two successive Supreme Court interventions in *Powell v. Alabama*[17] and *Norris v. Alabama*.[18] In context, that assessment is perfectly accurate. But the opinions of the Alabama Supreme Court, affirming the convictions nonetheless are styled in perfectly ordinary, prosaic legal prose.[19] They make arguments, cite relevant precedents, engage with the dissenting opinion filed by Chief Justice John C. Anderson,[20] and

15. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991).

16. Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1458 (2016).

17. 287 U.S. 45 (1932) (reversing convictions based on denial of counsel).

18. 294 U.S. 587 (1935) (reversing convictions based on systemic exclusion of Blacks from the juror selection process).

19. *See, e.g.*, Norris v. State, 156 So. 556 (Ala. 1934); Patterson v. State, 141 So. 195 (Ala. 1932); Powell v. State, 141 So. 201 (Ala. 1932); Weems v. State, 141 So. 215 (Ala. 1932).

20. Indeed, the fact that there was a dissenting opinion at all might be thought to further falsify the notion that a Black criminal defendant in a rape case would automatically lose his appeal in the Alabama judiciary without any substantive review.

otherwise look remarkably similar to criminal law decisions issued by state appellate courts today.

There is, however, one type of decision which—on face at least—can plausibly claim to result only from a judge "following the law" rather than his or her own personal moral or policy preferences. In certain cases, judges (credibly) express anguish or distress at what they are "forced" to do by law. These are "painful" judgments; they by stipulation entail a judge announcing a ruling whose results they *do* not wish to impose upon the world, carrying consequences which they are uncomfortable with or even abhor. But precisely they are so painful, they seemingly cannot be motivated by anything *but* adherence to the law. Hence, perhaps paradoxically, these painful decisions carry the *strongest* claim to legal legitimacy and do the *most* work in establishing that judges are actually and not just nominally constrained by law. Put differently: the legitimacy problem posed by Justice Brennan's "five votes" remark assumes that the alternative to legitimate judicial practice is one where judges just do whatever makes them happy. So what better proof that they're *not* doing that than decisions where they do things that bring them pain?

Judges love bragging about painful cases as visible demonstrations of their fealty to rule of law commitments. Why else would a judge issue such a ruling unless they were *bound* to do it? The pain offers up a form of martyrdom, for, as Robert Cover writes, "the miracle of the suffering of the martyrs is their insistence on the law to which they are committed, even in the face of world-destroying pain."[21] And if nothing else, we respect the martyrs, even when we may not endorse the cause upon which they offer their sacrifice. Consider the dissent in *Griswold v.*

Moreover, Chief Justice Anderson's dissent was actually quite vigorous. He attacked the "pro forma" representation the defendants received, *Powell*, 141 So. at 214 (Anderson, C.J., dissenting), noted that the universally-imposed death sentence on every defendant suggested that the defendants cases were not assessed individually or with any reflective appraisal of distinguishing features between the various defendants (on account of age, leadership, or other factors), *id.* at 215, and insisted that the trial should have been delayed until "after some months of cooling time have elapsed" to ensure that a fair decision could be reached, *id.* In a particularly striking passage, given the context of the times, Anderson even went out of his way to note that each defendant was "a human being" and therefore was entitled to "a fair and impartial trial" as well as a penalty (if found guilty) that "an impartial jury, unawed by outside pressure, may under the law inflict upon him." *Id.*

21. Cover, *supra* note 2, at 1604.

Connecticut, where Justice Stewart voted to affirm the constitutionality of what he called an "uncommonly silly law" prohibiting the sale of contraceptives to married couples.[22] This dissent is famous and generally well-respected with the legal profession—somewhat remarkably, given the ferocity with which *Griswold* itself is today defended against attempts to overturn or delegitimize it.

Free speech is another arena where judges validate their decisions based on the pain that they cause—to themselves and to others. In *Texas v. Johnson*, striking down bans on flag desecration, Justice Kennedy wrote that "[t]he hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."[23] Flag burning is protected by the Constitution, "however painful this judgment is to announce."[24] In another First Amendment case, upholding the right of a private club to have sex-discriminatory admissions rules, Judge Richard Arnold wrote that "if, in the phrase of Justice Holmes, the First Amendment protects 'the thought that we hate,' it must also, on occasion, protect the association of which we disapprove."[25] Even though this decision was ultimately reversed by the Supreme Court,[26] it was nonetheless flagged by Richard Garnett (one of Judge Arnold's former clerks) as an example of "constitutional courage" for which he "deserves praise."[27] Indeed, Professor Garnett devoted the entirety of a later tribute article to a defense of Judge Arnold's *Jaycees* opinion.[28]

Appeals to the legitimating power of pain appear very early in the history of the American judiciary, and I suspect this is no accident. When the judiciary's powers vis-à-vis the other branches remained unestablished and relatively untested, it was especially important to confirm that judicial action was not simply a cloaked

22. 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

23. Texas v. Johnson, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring).

24. *Id.* at 421.

25. U.S. Jaycees v. McClure, 709 F.2d 1560, 1561 (8th Cir. 1983).

26. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

27. Richard W. Garnett, *Tribute to the Honorable Richard Sheppard Arnold for His Service as Chief Judge of the United States Court of Appeals for the Eighth Circuit*, 1 J. APP. PRAC. & PROCESS 185, 212 (1999).

28. Richard W. Garnett, Jaycees *Reconsidered: Judge Richard S. Arnold and the Freedom of Association*, 58 ARK. L. REV. 587 (2005).

attempt by the justices to assert raw political power.[29] In *Hayburn's Case*, decided over ten years before *Marbury v. Madison*, the Supreme Court intimated at least the possibility of reviewing the constitutionality of federal laws, but did so couched in language of how wrenching such an act would be. The Court extensively quoted a letter written jointly by Justice Iredell and North Carolina Federal District Court Judge John Sitgreaves, where they stated that "we never can find ourselves in a more painful situation than to be obliged to object to the execution of any [legislative act], more especially to the execution of one founded on the purest principles of humanity and justice, which the act in question undoubtedly is."[30]

The Marshall court picked up this language of pain, using it to validate expansions of judicial power even as it supposedly demonstrated the continued allegiance of the judiciary to the law and Constitution. In *McCulloch v. Maryland*, the Court reaffirmed its prerogative to strike down unconstitutional federal acts, observing that "[s]hould Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."[31]

Cohens v. Virginia provides an even starker example. Chief Justice Marshall, establishing the authority of the Supreme Court to review and reverse state court judgments on matters of federal

29. The anti-federalists warned that judges who are "independent of the people, of the legislature, and of every power under heaven," will "soon feel themselves independent of heaven itself." *Brutus XV*, *in* 2 THE COMPLETE ANTI-FEDERALIST 438 (Herbert J. Storing ed., 1981).

30. Hayburn's Case, 2 U.S. 409, 410 n.+ (1792) (reprinting the letter of the Circuit Court for the District Pennsylvania to President Washington).

31. McCulloch v. Maryland, 17 U.S. 316, 423 (1819). Critics of the *McCulloch* decision, who were convinced that the Marshall Court would *not* strike down federal laws in circumstances where they impinged upon states' rights (as the National Bank was alleged to do), mocked this passage—but they did so because "[t]he latitude of their construction [in *McCulloch*] will render it unnecessary for them to discharge a duty so 'painful' to their feelings," i.e., because they were skeptical that the Marshall Court would in fact take on the "painful" (to them) duty of constraining federal power. *A Virginian's "Amphictyon" Essays* (1819), *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 75 (Gerald Gunther ed., 1969). See Kurt T. Lash, *"Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343, 1377–78 (2006), for discussion.

constitutional law, wrote:

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in *all* cases arising under the constitution and laws of the United States.[32]

Once again, the claimed authority to assert jurisdiction over state courts—an assertion sure to rankle the state judiciaries and states' rights enthusiasts more generally—was cast as a *painful* decision, something the Court did not relish but rather was compelled to take on due to the mandates of law and the Constitution. A decade later, Joseph Story generalized the notion. The judicial branch, he wrote, is burdened by "the constant necessity of scrutinizing the acts of [the other branches] . . . and the painful duty of pronouncing judgment, that these acts are a departure from the law or constitution. . . ."[33] Even today, commentators draw on *Cohens* and Justice Story to speak of "the Article III judge's duty, upon pain of 'treason to the Constitution,' to apply the whole supreme law, no matter how 'painful,' 'difficult,' or 'doubtful' doing so might be."[34]

The capacity of pain as a means of *validating* judicial practice continues to play a powerful role in discourse by and about the judiciary. In *Mitchell v. Roberts*, the Utah Supreme Court considered a statute which retroactively extended the statute of limitation for child sex abuse claims that had lapsed as of 2016.[35] The Court concluded that the statute violated the original

32. Cohens v. Virginia, 19 U.S. 264, 404 (1821).

33. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 542, at 391 (Thomas M. Cooley ed., 4th ed. 2008).

34. James S. Liebman & William F. Ryan, "*Some Effectual Power": The Quantity and Quality of Decision-Making Required of Article III Courts*, 98 COLUM. L. REV. 696, 861 (1998).

35. 2020 UT 24 (2020); *see* Utah Code § 78B-2-308(7), *invalidated by* Mitchell v. Roberts, 2020 UT 24 (Utah 2020).

meaning of the Utah Constitution, notwithstanding the "heart-wrenching" facts of the case and the Utah legislature's "reasonable policy basis" that those abused as children may take decades "to pull their lives back together and find the strength to face what happened to them" and require a reprieve from normal statute of limitations rules.[36] But, the Court continued, "our oath is to support, obey, and defend the constitution," and judges are bound to enforce the rules of the constitution "whether or not we endorse its dictates as a policy matter."[37] Writing on this decision, Josh Blackman favorably commented that "A good gut check for originalism"—and, we might add, any theory of constitutional interpretation—"is whether a decision leads to results you disagree with. Here, the Utah Supreme Court passed that gut check."[38]

Perhaps the most prominent articulation of pain as a legitimator of judicial decision-making emerged in the confirmation hearings for then-Judge Neil Gorsuch's nomination to the United States Supreme Court. Critics had seized upon one of Judge Gorsuch's dissents, in the so-called "frozen trucker" case, in an attempt to demonstrate his inflexibility and/or extreme deference to employer power.[39] The facts of the case are stark: the plaintiff, a commercial truck driver for TransAm, experienced catastrophic brake failure on his trailer while driving in sub-zero temperatures. He was instructed by his employer to remain with the trailer and await assistance. Unfortunately, his truck's heating unit also failed and—after three hours of waiting in vain for a promised repair vehicle, during which his feet and torso went numb—the driver unhitched the trailer and attempted to drive to safety. He was then fired by his employer for abandoning his vehicle.[40]

The locus of the case was whether or not the trucker's decision to abandon his trailer constituted "refus[ing] to operate a vehicle" due to "a reasonable apprehension of serious injury to

36. 2020 UT 24, at ¶¶ 6, 52.

37. *Id*. at ¶¶ 51–52.

38. Josh Blackman, Originalism in the State Courts: Justice Tom Lee of the Utah Supreme Court on the Due Process Clause of the Utah Constitution, Volokh Conspiracy (June 18, 2020), https://reason.com/2020/06/18/originalism-in-the-state-courts-justice-tom-lee-of-the-utah-supreme-court-on-the-due-process-clause-of-the-utah-constitution/.

39. TransAm Trucking, Inc. v. Admin. Review Bd., 833 F.3d 1206 (10th Cir. 2016).

40. *Id.* at 1208–09 (introducing the factual background of this case).

the employee or the public because of the vehicle's hazardous safety or security condition."[41] The court majority (alongside the OSHA administrative law judge and the OSHA's administrative review board) concluded that it was.[42] Judge Gorsuch dissented, contending that the trucker had not *refused* to operate a vehicle but "chose instead to *operate* his vehicle in a manner he thought wise but his employer did not."[43]

In his dissent, Judge Gorsuch did express sympathy for the driver, describing his employer's ultimatum as "legal if unpleasant" and conceding that "[i]t might be fair to ask whether TransAm's decision was a wise or kind one."[44] "But," he continued, "it's not our job to answer questions like that. Our only task is to decide whether the decision was an illegal one."[45] Challenged by Senators Al Franken and Mazie Hirono during his confirmation hearing, Judge Gorsuch said twice of the trucker that "my heart goes out to him," and (to Senator Hirono) continued by saying that "I said that in the opinion that he was put in a rotten position. And I go home at night with cases where sometimes the law requires results that I personally would not prefer."[46] Consequently, Gorsuch's backers sought to present his "frozen trucker" decision as *modeling* the sort of judicial behavior that should be rewarded via elevation to the Supreme Court, precisely because it conflicted with Gorsuch's (and everyone else's) moral intuitions.[47] Senator Thom Tillis suggested that "my guess is when you rode home that night, you wished that" the statutory text would justify an alternate conclusion. But, he went on to say, "[y]ou are not here to have a heart. You are here to interpret and apply the law."[48]

41. 49 U.S.C. § 31105(a)(1)(B).

42. *TransAm*, 833 F.3d at 1214.

43. *Id.* at 1216 (Gorsuch, J., dissenting).

44. *Id.* at 1215 (Gorsuch, J., dissenting).

45. *Id.*

46. *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 115th Cong. 171, 222 (2017) [hereinafter *Confirmation Hearing*].

47. John Murdock, *Why the "Frozen Trucker" Case Makes Me Like Judge Gorsuch More*, STREAM (Mar. 24, 2017), https://stream.org/frozen-trucker-case-makes-like-judge-gorsuch/ ("I would prefer to have on the Supreme Court [a judge] who is willing to endure a frustrating but legally correct result over someone who takes it upon himself to right every wrong according his own moral compass. Neil Gorsuch appears to be just such a disciplined justice.").

48. *Confirmation Hearing*, *supra* note 46, at 235.

B. PAIN AS CONSTITUTING LEGITIMATE JUDGING

In the above cases, the fact that a judicial decision is painful is taken to confirm that the decision is legally legitimate—indeed, its legal legitimacy is if anything more unimpeachable precisely because it is painful. To be clear, I do not indict any of the judges or commenters listed above for their observation that a painful, seemingly unjust decision may nonetheless be the legally correct one. Judges, after all, are not supposed to simply dispense justice, even in circumstances where there is widespread agreement regarding what "justice" would entail.[49] To the contrary, as Herbert Wechsler observes, "[i]t is the duty [of the judge] to decide the litigated case and to decide it in accordance with the law."[50] If, contra my reading of Judge Kopf above,[51] there is to be a good yet happy judge, it is the judge who finds contentment in *not* deciding cases based on straightforward applications of their own interest and pleasure.[52] On this note, the Supreme Court has been emphatic, and correctly so, in insisting that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . We refuse to sit as a 'superlegislature to weigh the wisdom of legislation' . . . ."[53] Some of the time, hopefully a large portion of the time, deciding in accordance with law will also yield just outcomes. But sometimes it will not—and that mismatch is baked into the foundation of legitimate judicial practice.

Yet it is precisely because this truth *is* a truth that we encounter a risk. The logic above at most suggests that painful decisions are a signal, a heuristic, for legitimate, lawful judging—they do not *constitute* lawful judging. But bereft of other modes of validation, this can easily be confused. Where pain is the primary

49. *See generally* Michael Herz, *"Do Justice!": Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996) (discussing lessons learned from Learned Hand's story about telling Justice Holmes to "do justice").

50. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959).

51. *See supra* text surrounding note 2.

52. *Cf.* Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 634 (2000) (comparing the practice of judging with playing chess).

53. Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963); *see also Confirmation Hearing*, *supra* note 46, at 274 ("[I]t is my [Gorsuch's] job to respect in part the boundaries of [the judicial] branch, and not engage in the temptation to legislate through the cloak of a judicial robe.").

mechanism through which we can conclude with confidence that a judicial decision is legitimate, the socialization of judicial legitimation becomes those instances where judges dispense and feel pain. This is the practice of sadomasochistic judging.

The "pain" in these cases need not be and often is not literal physical injury. More often it comes in the form of deprivation of rights, intrusions upon liberty, and letting seemingly manifest injustices stand. The pain judges experience is typically not direct—they are not among those who are literally hurt by the decisions they hand down. In the most immediate sense, they are the inflictors, not the recipients, of pain (as Justice Thomas recently quipped—albeit again, likely somewhat in jest"—"I don't have a lot of stress . . . I cause stress."[54]). But judges nonetheless feel pained by the fact that they often are the inflictors of pain—an act they do not intrinsically enjoy.[55] What judges do enjoy is the elusive feeling of judicial legitimation. And judges thus eventually learn to take pleasure in this pain (of inflicting pain), because the pain itself signals that they are doing their job correctly—following the law, not allowing themselves to be guided simply by their own preferences.

In the realm of sadomasochistic judging, judges (1) take pleasure from (2) the pain of (3) inflicting pain. This circuitous route is peculiarly modern in nature. As Nietzsche observed, modernity eliminated, or at least greatly reduced, the ability to enjoy cruelty in an unmediated fashion—as in the prince whose wedding entertainment includes a brutal execution or two.[56] The

54. Kimberly Strawbridge Robinson, *Clarence Thomas Perplexed by Retirement Rumors*, BLOOMBERG L. (June 3, 2019), https://news.bloomberglaw.com/us-law-week/clarence-thomas-perplexed-by-retirement-rumors.

55. *See* Cover, *supra* note 2, at 1613 (noting that "for most of us, evolutionary, psychological, cultural and moral considerations inhibit the infliction of pain on other people," but because "legal interpretation is as a practice incomplete without violence—because it depends upon the social practice of violence for its efficacy—it must be related in a strong way to the cues that operate to bypass or suppress the psycho-social mechanisms that usually inhibit people's actions causing pain and death").

Surgeons and other medical professionals face considerable distress due to their profession's constant requirement that they inflict pain, even if that pain is in ultimate service of healing. "One surgeon who participated in discussions about the suffering of the healer identified this threat as a major reason many surgeons retire early. They cannot go on inflicting the pain and bodily damage that healing requires. . . . It is painful to inflict pain upon another." John Rowe, *The Suffering of the Healer*, 38 NURSING F. 16, 18 (2003).

56. FRIEDRICH NIETZSCHE, THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS 198 (Francis Golffing trans., 1956).

modern pleasure in cruelty comes more indirectly—it is a step removed—and emerges instead from one's willing self-subjugation to the horrors one inflicts. Forbidden from enjoying the act of killing itself, the executioner instead takes pride in their commitment to their duty when carrying out an act as dreadful as an execution.[57]

Stephen D. Smith contends that judges are rendered "mute" when faced with a manifestly unjust (or ridiculous) law that they believe is nonetheless constitutional. They can protest, as in *Griswold*, that it is an "uncommonly silly" (Justice Stewart) or "nutty" (Judge Bork) law, but this utterance is not at all legal—it is a "personal protest which, on the plane of legal discourse, lacked significance."[58] What this misses is how the act of protest—indeed, the genuine emotive sensation that the decision *needs* to be protested—is actually doing something quite important as a means of validating the legal judgment.

For judges, pain—unto others, unto self—offers a particular form of relief from the anxiety of judicial delegitimization, and thus is pursued as an analgesic. Whereas nominally the link between judicial legitimacy and painful decisions is only one of compatibility—a painful or unjust decision isn't *necessarily* a wrongful one—sadomasochistic judging encourages judges to actively value those decisions which cause pain. Unsurprisingly, this may make them susceptible to erring on the side of pain, preferring the painful outcome to the fair or the just, even in circumstances where the latter may well have the better of the purely legal argument.[59]

To call this dynamic of judicial pain being converted into and constitutive of judicial pleasure sadomasochistic is not to call it sociopathic. The mechanics of the conversion are far more

57. *See* James Miller, *Carnivals of Atrocity: Foucault, Nietzsche, Cruelty*, 18 POL. THEORY 470, 475–76 (1990).

58. Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113, 125 (1988).

59. Daniel Greenwood notes that a similar phenomenon seems to occur in the corporate world, where directors and managers instructed to ruthlessly prioritize "shareholder value" over all else may mistakenly believe that a given strategy prioritizes shareholder value precisely *because* it is ruthless, and likewise dismiss courses of action which redound to the benefit of, say, employees or the public as incompatible with their fiduciary duties even when they are in fact perfectly viable, profitable business models. Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, 2004 COLUM. BUS. L. REV. 773, 780–808 (2004).

complex than simply desiring pain for its own sake.[60] To begin, it is a mistake to think that people (judges and otherwise) simply avoid pain. In many—albeit usual special—circumstances, pain can be and is affirmatively sought out, and can even bring about its own form of pleasure.[61] In *Beyond the Pleasure Principle*, Freud discusses patients who seem to desire the repeated replay of experiences they know will be painful for them: "[p]atients repeat all of these unwanted situations and painful emotions in the transference and revive them with the greatest ingenuity. They seek to bring about the interruption of the treatment while it is still incomplete; they contrive once more to feel themselves scorned, to oblige the physician to speak severely to them and treat them coldly."[62] "None of these things can have produced pleasure in the past, and it might be supposed that they would cause less unpleasure today if they emerged as memories or dreams instead of taking the form of fresh experiences. They are of course the activities of instincts intended to lead to satisfaction; but no lesson has been learnt from the old experience of these activities having led instead only to unpleasure. In spite of that, they are repeated, under pressure of a compulsion."[63] This leads to Freud's resurrection of masochism as a genuine phenomenon

60. Discussing sexual sadomasochism, Patrick Hopkins distinguishes between a "simulation" versus a "replication"—akin to the difference between acting out a scene in a movie versus committing a "copycat" crime. Desiring the former need not be simply a poor substitute for the latter—for example, one can enjoy roller coasters for simulating the adrenaline rush and danger of plummeting to earth at great speeds, while not actually wanting to experience the "reality" of it. Patrick D. Hopkins, *Rethinking Sadomasochism: Feminism, Interpretation, and Simulation*, 9 HYPATIA 116, 125–26 (1994).

That said, there are important dissimilarities between judicial sadomasochism and bedroom S&M. Sexual S&M is consensual—not just in an abstract, stipulated way, but often in a highly technical and layered way. "Safe words" allow the sub to regulate or even dictate the action; they are able to choose and even critique the performance of the "master" or dominator. *Id.* at 123–24. Note how these rationales do not extend to the judicial context, where the pain inflicted is quite real, not "simulated," there are no safe words which can call a halt to the action, and "consent," if it exists at all, comes from an extremely abstract and attenuated "consent of the governed."

61. *See* Leo Bersani, *Foucault, Freud, Fantasy, and Power*, 2 GLQ 11, 20 (1995) (citing Geoff Mains, *The Molecular Anatomy of Leather*, in LEATHER FOLK: RADICAL SEX, PEOPLE, POLITICS, AND PRACTICE 37–43 (Mark Thompson ed., 1991)) ("The pain so-called masochists enjoy is actually pleasure. They have simply found ways to transform stimuli generally associated with the production of pain into stimuli that set off intense processes identified as pleasurable.").

62. SIGMUND FREUD, BEYOND THE PLEASURE PRINCIPLE 43 (James Strachey trans., 1959).

63. *Id.* at 43–44.

and eventually to his famous "death instinct"—a desire to move back towards simplicity and the relief of tension (death being the ultimate "simple" state).[64]

Pain thus offers *relief* from a different, less tolerable source of pain. "Pain and suffering are sought, but only to avoid, evade, control, or master even more serious suffering or painful traumata."[65] For a Supreme Court Justice, the more serious trauma would be the sense of acting tyrannically or unlawfully, the anxiety around the Justice's seemingly limitless freedom to simply "count to five." The painful decision offers relief in the sense that it supposedly can confirm for the judge that *this* decision, at least, was not the product of their own whim and caprice—they can be confident in its lawfulness precisely because they abhor it as a matter of politics or ethics.

Yet even under the paradigm of sadomasochistic judging, pain can only legitimize under a particular frame where the judge is assumed to be pained by the pain—it is not what they desire, it is what they are compelled to do as against their underlying desire.[66] Pure sadism won't do the trick. If it is believed (perhaps notwithstanding their own protestations) that judges actually *do* want to hurt racial minorities, women, gays and lesbians, transgender individuals, the poor, and so on, then their acts inflicting pain will not legitimize but delegitimize—this is just a (particularly vicious) iteration of the dangers of "counting to five."[67] It is only when judges are (perceived to be) themselves wounded that their infliction of pain legitimizes their action. Judges thus come to desire *real* pain, the pain they desire is pain that is recognized by all—including themselves—as pain.

64. *Id.* at 48–50; *see also* SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 103–11 (Joan Riviere trans., 1958).

65. Harold P. Blum, *Sadomasochism in the Psychoanalytic Process, Within and Beyond the Pleasure Principle: Discussion*, 39 J. AM. PSYCHOANALYTIC ASS'N 431, 434 (1991).

66. *Cf.* Gary F. Greif, *Freedom of Choice and the Tyranny of Desire*, 27 J. VALUE INQUIRY 187, 193 (1993) (noting that we sometimes "desire that some of our desires dominate us. We desire this so strongly as to be dominated by the desire to be dominated. I desire to be unable to satisfy a desire to kill someone who inflames my anger. I desire, in other words, to control those desires which I judge capable of leading me beyond civilized into barbaric behavior.").

67. And it is worth noting here that it is a common tactic of abusers—those who are truly sadistic—to nonetheless claim that they are only acting, regrettably, under compulsion: "Why are you making me do this to you?" or "I hate that I have to do this."

Moreover, simple policy disagreement isn't enough to render a judicial decision painful.[68] As Fallon notes, judges frequently and with little consternation uphold, say, tax policy even if they personally feel that taxes are too high or too low. Judges "know they lack constitutional grounds to reject most if not all of the laws that they disagree with" (p. 94). Hence, more is required to harness the legitimating quality of a painful decision—it must be viscerally hurtful in some way, triggering intense feelings that the prevailing outcome is not just wrong in an abstract, technical, or debatable sense, but *wrong* on a deeper, more fundamental ethical register.

Fallon does suggest a limit on this logic. He thinks that a truly disastrous judicial decision—one that "would plunge millions into poverty or the economy into chaos, or [would] upset settled social and political expectations with no plausible basis in the Constitution's text or history for doing so"—"almost surely would not stick" (p. 116). Perhaps this is true—but notice even Fallon relies upon a crutch: "no plausible basis in the Constitution's text or history."[69] One can hardly claim credit for making a particular ruling where there was *no plausible basis* as a matter of legal interpretation for deciding otherwise. But ironically, the painful route may thus be *more* attractive and more legitimizing if there is a plausible legal pathway to avoid inflicting the pain. In cases where there *is* a "plausible legal basis" pointing in either direction, the painful consequences of the court's decision may be thought to further legitimate it as a question of law, and declining to succumb to the plausible legal "out" is even more demonstrative of the judge's commitment to following the law wherever it leads. Even if we agree with Fallon and admit that the fully cataclysmic decisions likely will be avoided by all judges ("legitimated" by pain or not), that still leaves a wide range of cases that are not quite so apocalyptic but still could register significant painful injustices—and in that arena judges may find the pleasures of pain more difficult to resist.

68. This tracks distinctions we draw in non-judicial policy disputes as well—not every political controversy is "painful" in the sense that the prospect of the wrong side prevailing is felt as an outright injustice or cruelty.

69. Later in the same paragraph, Fallon draws the same connection: "The Court," he concedes "can make, and has made, highly unpopular decisions. But it has not so far created havoc or issued rulings that *lack any plausible constitutional foundation*" (p. 116, emphasis added).

Ironically, given the attention paid to the "frozen trucker" case, a different Judge Gorsuch dissent while on the 10th Circuit aptly encapsulates both horns of the sadomasochistic judging dilemma. In *A.M. v. Holmes*, Judge Gorsuch dissented from a ruling giving qualified immunity to a police officer who arrested a middle schooler for fake burps in gym class.[70] In Gorsuch's view, it was clear that the relevant statute could not encompass mere "noises or diversions," and so the officer should have been on notice that the arrest was unlawful.[71] But Judge Gorsuch did not accuse the majority of being indifferent to the seeming injustice foisted upon a thirteen-year-old student whose childish prank was met with a criminal charge. To the contrary, he wrote that

> a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels. So it is I admire my colleagues today, for no doubt they reach a result they dislike but believe the law demands—and in that I see the best of our profession and much to admire. It's only that, in this particular case, I don't believe the law happens to be quite as much of a ass as they do.[72]

Here we see the difficulty of sadomasochistic judging at its fullest. On the one hand, there is the stated admiration of his colleagues for taking the painful route, reaching "a result they dislike but believe the law demands." On the other hand, there is the undertone that in their zeal to be so admirably bound by the law, the judges in the majority ended up reaching a result that actually defied the relevant legal rules. The pursuit of pain as a marker of legal legitimation can, if not carefully attended to, lead to judicial decisions that are neither lawful nor just.

III. OUR SADOMASOCHISTIC JUDICIARY

And so we are back to where we started from, but in reverse. Judges, terrified of doing whatever they will, desire nothing more than that their rulings be thought to stem from naught but the law—a desire that is most obviously effectuated through pain. This desire becomes the new driver of the judicial will, and soon judges are actively pursuing and praising the infliction of pain—

70. A.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016).

71. *Id*. at 1169 (Gorsuch, J., dissenting) (quoting State v. Silva, 525 P.2d 903, 907 (N.M. Ct. App. 1974)).

72. *Id*. at 1170.

all the more so in cases where the pain is *un*necessary, where it is *not* clearly compelled by the law. The very rhetoric of the judiciary as bound and constrained by law becomes an impetus for judges to seek out the opportunity to inflict pain for its own sake.

This is the grim era of sadomasochistic judging. Is it our era? There are worrisome signs. The Supreme Court, and its backers in the legal profession, have in the Trump era seemed to perceive the excesses of the administration as if anything counseling *greater* deference to the political branches enacting the cruelties. Shielding President Trump and Trumpists from legal accountability becomes itself the hill upon which the banner of legal responsibility must be planted—not in spite of but because of the genuine revulsion at the administration's policies.

Defending the constitutionality of the "Muslim Ban," Josh Blackman insisted that "I vigorously oppose the president's immigration orders as a matter of policy."[73] But, he continued, he also objected to courts seeking "to peer into the president's psyche" in order to ascertain if he was motivated by invidious intent. The acknowledged wrongfulness of President Trump's policy seemed to motivate an especially strong need to defend him against overzealous judicial checks. "[I]t doesn't matter if Trump is somehow different than his predecessors, or if he insults judges in a shocking breach of Oval Office decorum. The judiciary should not abandon its traditional role simply because the president has abandoned his."[74] Jeffrey Toobin expressed a similar worry: relying on statements by the President which seemed to show he was motivated by anti-Muslim animus "leads to a peculiar and unsettling possibility: that an identical order would be upheld if Barack Obama had issued it, but that this one was invalidated because Trump was the author." Toobin concluded that while Trump represents an "extreme example" of a politician who make "foolish statements or outright mistakes," courts should "reject the use of Presidential statements altogether" when assessing the legality of presidential actions. "The Muslim ban is either constitutional or it's not—and Donald

73. Josh Blackman, *Why Courts Shouldn't Try to Read Trump's Mind*, POLITICO MAG. (Mar. 16, 2017), https://www.politico.com/magazine/story/2017/03/why-courts-shouldnt-try-to-read-trumps-mind-214921.

74. *Id.*

Trump's words on the campaign trail don't settle that question one way or the other."[75]

There is something peculiar about this objection. After all, there's actually not anything unusual about courts probing state of mind to establish evidence of discriminatory intent. Indeed, that's built into the very foundations of our anti-discrimination law regime—much to the consternation of many liberal commentators who wish for more objective metrics centered around the tangible impact government policies have against vulnerable outgroups to replace a subjective quest for malign motives. Nonetheless, under current law, if an employer sends an email to her employee saying "you're fired," the relevant anti-discrimination question is whether the employer was motivated by discriminatory animus. If the boss had repeatedly promised she was going to implement a "complete shutdown" on minority employment at her firm, that insight into her psyche would play a very significant role in any ensuing litigation. An employer who had written the same note to the same employee, but who had exhibited no such indicia of prejudicial bias, would fare considerably better.

But the implicit worry here seems to be that judges are deriving special rules stemming from Trump's especially outrageous conduct, jerry-rigged in order to correct his injustice.[76] The result of this logic is that judicial decisions which check seemingly abusive or shocking conduct by the Trump administration become *more* suspect, while those which affirm or step out of the way of them become testaments to the power of the rule of law. And it's a short step from there to thinking that the rule of law *requires* heightened deference to Trump administration actions *precisely because* they seem, to many

75. Jeffrey Toobin, *The Courts and President Trump's Words*, NEW YORKER (Mar. 17, 2017), https://www.newyorker.com/news/daily-comment/the-courts-and-president-trumps-words.

76. This was Justice Thomas' position in *Department of Commerce v. New York*, concerning the addition of a citizenship question to the census: the inference by the district court and the Supreme Court majority that the purported justification for the addition—enforcing the Voting Rights Act—was pretextual "was transparently based on the application of an administration-specific standard." 139 S. Ct. 2551, 2576 (2019) (Thomas, J., concurring in part and dissenting in part). *See also id.* at 2582 (Thomas, J., concurring in part and dissenting in part) ("[A] judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and—with a jar of pins and a spool of string—create an eye-catching conspiracy web.").

judges and legal elites, to be unnecessarily cruel, painful, or malicious.

Trump v. Hawaii does not stand alone—indeed, it is not even the most obvious case. Stephen Vladeck has observed how the Supreme Court's "shadow docket"—cases which seek emergency or extraordinary relief from the Supreme Court, outside the normal and orderly pathways of litigation—has exploded since President Trump took office.[77] These cases stand out because they represent discretionary interventions in ongoing matters of litigation, in circumstances where the Supreme Court has historically kept a very light hand. But the Trump administration has been remarkably successful in, for example, securing stays of lower court injunctions pending litigation without even awaiting the conclusion of a trial, let alone the appellate process. Remarking on one such stay, nullifying (without substantive comment) an injunction against administration rules drastically restricting the right of refugees to apply for asylum in the United States unless they had previously applied for and been denied asylum in any country they had traveled through to reach America,[78] Justice Sotomayor observed that "[u]nfortunately, it appears the Government has treated this exceptional mechanism [of a stay pending appeal] as a new normal. Historically, the Government has made this kind of request rarely; now it does so reflexively."[79] And the Supreme Court seems willing to play along.

While not involving the Trump administration, *Dunn v. Ray* seems to also be part of this trend.[80] In *Dunn*, the Supreme Court stepped in to vacate a stay imposed by the Eleventh Circuit on an Alabama execution of a Muslim inmate where the state wouldn't allow an Islamic chaplain to be present. By a 5–4 vote, the Supreme Court concluded (again, without any substantive comment), that the execution could not be blocked because the inmate allegedly waited too long to seek relief—even though he had filed his case just five days after the prison warden denied

77. *See generally* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) (documenting the Supreme Court's unprecedented willingness to entertain petitions for emergency or extraordinary relief from the Trump administration).

78. Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3 (2019).

79. *Id.* at 5 (Sotomayor, J., dissenting).

80. 139 S. Ct. 661 (2019).

his request for a chaplain in his own faith tradition.[81]

Dunn provoked a furious backlash when it came out, even among conservatives, in its seemingly gratuitous viciousness towards a religious minority callously denied spiritual comfort as he approached his execution.[82] But what makes *Dunn* stand out—and what cries out for an explanation—is why the Court elected to intervene in the case at all. Three points are especially salient here:

1) The inmate, Ray, had secured a stay of execution in the Eleventh Circuit. Hence, the Supreme Court was not in a position where it was being asked to affirmatively step in and enjoin a potentially unlawful act by the state of Alabama. The path of least resistance—a decision to do nothing—would have been to leave the stay intact, and allow the appellate process to operate as normal. Instead, the Court made an affirmative decision to "short-circuit[] that ordinary process . . . with little briefing and no argument."[83]
2) The Court rested its decision to vacate the stay based on "the last-minute nature" of the application.[84] But note that in doing so it was not enforcing a formal rule—for example, that the claim was time-barred. It was a matter of pure discretion—and one in which, as noted above, compelling evidence suggested that Ray had in fact filed his application in a prompt and timely fashion.
3) The Supreme Court is not a court of general error correction. Even if the Eleventh Circuit was in error in granting the stay,

81. *Id.* at 662 (Kagan, J., dissenting).

82. *See, e.g.*, Robert Barnes, *Supreme Court's Execution Decision Animates Critics on the Left and Right*, WASH. POST (Feb. 11, 2019, 4:08 PM), https://www.washingtonpost.com/world/national-security/supreme-courts-execution-decision-animates-critics-on-the-left-and-right/2019/02/11/72da5ed8-2e3a-11e9-813a-0ab2f17e305b_story.html; David French, *The Supreme Court Upholds a Grave Violation of the First Amendment*, NAT'L REV. (Feb. 8, 2019, 2:30 PM), https://www.nationalreview.com/corner/the-supreme-court-upholds-a-grave-violation-of-the-first-amendment/; Dahlia Lithwick, *An Execution Without an Imam*, SLATE (Feb. 8, 2019, 2:56 PM), https://slate.com/news-and-politics/2019/02/domineque-ray-alabama-execution-imam-first-amendment-scotus.html; Frederick Mark Gedicks, Dunn v. Ray*: We Should Have Seen This Coming*, ACS EXPERT F. (Feb. 15, 2019), https://www.acslaw.org/expertforum/dunn-v-ray-we-should-have-seen-this-coming/.

83. *Dunn*, 139 S. Ct. at 662 (Kagan, J., dissenting).

84. *Id.* at 661 (quoting Gomez v. U.S. Dist. Court for N. Dist. of Cal., 503 U.S. 653, 654, (1992) (per curiam)).

> that alone does not compel the Court to review the case (or even make it particularly likely that the Court would do so). The question still remains: why was this error deserving of the Court's limited time and attention?

Is the answer latent anti-Muslim animus? Perhaps, and unfortunately in the wake of *Trump v. Hawaii* that possibility is less fanciful than one might hope. Another hypothesis, though, is that the justices recognized and were in some ways repelled by the decision to deprive a condemned man of spiritual comfort in his last days—but viewed that revulsion as corrupting proper "legalistic" judgment. They perceived the Eleventh Circuit as having indulged due to the extraordinary facts of the case, and felt it especially important to guard and check against *that* instinct. The justices may indeed feel pain at the pain they inflict, but they will take solace in the fact that it is in the service of their judicial duty.

To be sure, sadomasochistic instincts do not win out in every case. The litigation surrounding President Trump's decision to rescind DACA, for example, looked as if it might provoke a similar sort of decision—a conservative majority yielding to the power of the executive while exhibiting manifest discomfort with the policy outcome. In course of the DACA litigation, several prominent conservative voices interceding in favor of unraveling the limited protections DACA provides to undocumented immigrant children, even as they publicly (and I believe genuinely) declare their deep sympathy with the program's beneficiaries. Blackman, along with Ilya Shapiro, even went so far as to file a brief under the unconventional but telling title "Supporting DACA as a Matter of Policy but Petitioners [seeking to rescind DACA] as a Matter of Law."[85] And after oral

85. *Brief for the CATO Institute and Professor Jeremy Rabkin as* Amici Curiae *Supporting DACA as a Matter of Policy but Petitioners as a Matter of Law*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019) (mem), https://www.supremecourt.gov/DocketPDF/18/18-587/113553/20190826102722898_DHS%20v.%20Regents%20Amicus%20Brief%20-%20Final.pdf.

This brief also demonstrates that the dynamic I am identifying is not reducible to simple deference to democratic branches. While technically the posture of this brief was in support of the executive's authority to "unwind" DACA, the authors make clear that they also believe (along with the Trump administration) that the DACA program is substantively unlawful and should be struck down by the judiciary, notwithstanding their political belief that it is just and wise policy. *See id.* at 3–4.

arguments concluded, many observers predicted that this posture would be reflected in the majority opinion: court-watchers believed that the conservative justices were poised to allow DACA to be unwound even as they expressed sympathy for the immigrant children who would be victimized by their decision.[86]

When the case was decided however, Chief Justice Roberts joined the majority finding the DACA rescission unlawful, and a 5–4 decision against the immigrants became a 5-4 decision in their favor.[87] But one can still hear the themes of sadomasochistic judging reverberating in the language of the dissents. Justice Kavanaugh used sympathetic language to describe the "millions of young immigrants who, as children, were brought to the United States and have lived here ever since," even as he concluded that the Trump administration had adequately explained its decision to strip them of DACA's protection. The young immigrants, he wrote at the outset of his opinion, "live, go to school, and work here with uncertainty about their futures."[88] Justice Thomas for his part was even more blunt: describing the majority opinion as "an effort to avoid a politically controversial but legally correct decision." "Such timidity," he continued, "forsakes the Court's duty to apply the law according to neutral principles."[89] That the Court's decision gave a reprieve to an undeniably sympathetic class of individuals is, under this view, a glaring sign that the Court has been derelict in its constitutional duty.

Lower court judges, too, have begun to wear accusations of injustice as a badge of honor. Such was the case in *Jones v. Florida*, where a divided Eleventh Circuit, sitting en banc, upheld the Florida legislature's requirement that convicted felons pay any outstanding fines, fees, or restitution requirements before having their voting rights restored—even if the state itself could not reliably determine what those fees were.[90] Judge Jordan, at the

86. *See* Adam Liptak, *Supreme Court Appears Ready to Let Trump End DACA Program*, N.Y. TIMES (Nov. 12, 2019), https://www.nytimes.com/2019/11/12/us/supreme-court-dreamers.html (discussing the Justices' opinions on ending the DACA program). Justice Gorsuch, for example, said of the pro-DACA litigants: "I hear a lot of facts, sympathetic facts, that you've put out there, and they speak to all of us." *Id.*

87. Dep't of Homeland Sec. v. Regents of the Univ. of Calif., 140 S. Ct. 1891 (2020).

88. *Id.* at 1932 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

89. *Id.* 1919 (Thomas, J., concurring in the judgment in part and dissenting in part).

90. Jones v. Florida, No. 20-12003, 2020 WL 5493770 (11th Cir. Sept. 11, 2020).

end of a ninety-two-page dissent, compared the majority opinion unfavorably to the performance of the Eleventh Circuit's predecessor during the civil rights era, when they had insisted on protecting the constitutional voting rights of unpopular minorities in the face of sustained and often violent popular opposition. He concluded that this opinion, by contrast, would not "be viewed as kindly by history."[91]

Chief Judge William Pryor, who wrote the majority opinion, took the unusual step of writing a separate concurrence to his own ruling solely to respond to this line. He explained to his dissenting colleagues that they needed to learn "a difficult truth about the nature of the judicial role."[92] A judge's duty, he lectured, "is not to reach the outcomes we think will please whoever comes to sit on the court of human history."[93] Rather, it consists of "devotion to the rule of law and basic morality"—no more and no less.[94]

The "and basic morality" clause of that passage is an exception that arguably swallows the rule of the argument. But we'll leave that aside.[95] What's most striking about Chief Judge Pryor's concurrence is the presumption that, by citing to the proverbial "court of history," his dissenting colleagues were tacitly abandoning the terrain of legal obligation. But why should this be true? Judge Jordan's dissent, after all, was perfectly legalistic in character—if anything, it was distinguished by its markedly textualist orientation, and indeed he expressly criticizes members of the majority for abandoning textualist methodology when "they do not like the result."[96] Those legal failings—especially when in service to a grim cause like voter suppression—surely could be ones judged harshly by history's gaze. But Chief

91. *Id.* at *68 (Jordan, J., dissenting).

92. *Id.* at *21 (W. Pryor, C.J., concurring).

93. *Id.*

94. *Id.* (quoting Patrick E. Higginbotham, *Conceptual Rigor: A Cabin for the Rhetoric of Heroism*, 59 TEX. L. REV. 1329, 1332 (1981)).

95. I will only say here that one of the most well-established features of the internal morality of law is that legal requirements must be made public, in language intelligible to those purportedly bound by them. *See* LON FULLER, THE MORALITY OF LAW 33–38 (1969). The fact that Florida cannot even tell prospective voters what sums they are obliged to pay before registering—but is perfectly willing to re-incarcerate those who guess wrong—arguably fails even this extraordinarily thin moral requirement. *See Jones*, 2020 WL 5493770, at *57 (Jordan, J., dissenting) (expressing incredulity at the idea that "a state can impose a condition for the exercise of a right or privilege, and then refuse to explain to a person what the condition consists of or how to satisfy it").

96. *Id.* at *64 (observing that "[i]f that is textualism, textualism is a mirage").

Judge Pryor seemed to view the consonance between ethical and legal obligation as presumptively suspect; the fact of the former serves to discredit the latter.[97]

Chief Judge Pryor does not, to be clear, attack the decisions of his predecessors combating Jim Crow. Indeed, he characterizes those judges as "heroic."[98] But one might ask on what basis does he believe this "heroic" assessment is justified? Surely, it is not solely that these judges obeyed the law—most judges, one hopes, do that most of the time, without any particular valor or distinction. Equally surely, it is not that they flouted the law in service of their own moral code—these decisions were not lawless. What was heroic about the judges who rallied against Jim Crow voting restrictions is that the judges followed the law, and corrected grotesque injustices, notwithstanding powerful forces which insisted they had no right to do either.

Sadomasochistic judging turns this history on its head. It assumes that the only true instances of judicial bravery are cases where judges permit, experience, and facilitate pain in martyrdom to the rule of law. The easiest thing in the world for a judge to do, under this theory, is to expedite justice—it is so easy that judges need to be conditioned to do the opposite. But this is simply not true. Judges confronted with the obvious legal infirmities of the Jim Crow regime could nonetheless have easily hid behind the judiciary's constrained role as mere administrators of "the rule of law in courts of limited jurisdiction,"[99] or the need to "respect the political decisions made by the people of Florida and their officials."[100] Many urged them to do just that; many harshly indicted them as lawless tyrants for *not* doing just that.[101] The lesson of the struggle against Jim Crow in the courts is that, some of the time, correcting even evident wrongs that flout clear

97. Blackman, favorably quoting Chief Judge Pryor's concurrence, stated that "when I hear the phrase 'court of history' or 'arc of history,' I simply presume that a liberal is trying to shame a conservative into reaching a liberal result. These phrases no longer have any meaning for me." Josh Blackman, *There Is No Court of History*, VOLOKH CONSPIRACY (Sept. 12, 2020), https://reason.com/2020/09/12/there-is-no-court-of-history/.

98. *See Jones*, 2020 WL 5493770, at *21 (Pryor, C.J., concurring) ("Our dissenting colleagues predict that our decision will not be 'viewed as kindly by history' as the voting-rights decisions of our heroic predecessors.").

99. *Id.* (quoting Higginbotham, *supra* note 94, at 1343).

100. *Id.*

101. *See* William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 492–97 (2002).

constitutional commands is an act requiring great judicial courage. The lesson of the present moment is that some judges will fail to recognize these obvious legal violations not in spite, but because of the manifest injustices they accompany.

CONCLUSION

Speaking in defense of then-Judge Gorsuch's rulings in the "frozen trucker" case and other like rulings, Senator Thom Tillis remarked that "[o]ne thing I like about you [Gorsuch] is sometimes your decisions seem to make everybody mad, which probably means it is a pretty good decision."[102] Like Justice Brennan's quip about counting to five votes, it was no doubt meant somewhat tongue-in-cheek. But also like Justice Brennan's statement, it gets to something important and somewhat disconcerting. It suggests that judges are trustworthy to the extent they make us mad, to the extent that they hurt us—and the more that they hurt us the more they should be trusted.

The great philosopher, Judith Shklar, in her famous essay "Putting Cruelty First,"[103] speaks of the deep troubles that lie in the seemingly liberal position that ranks cruelty as the single worst vice: it "makes political action difficult beyond endurance, may cloud our judgment, and may reduce us to a debilitating misanthropy and even to a resort to moral cruelty."[104] So to reiterate once more: *any* theory of legal legitimation that locates proper judicial interpretation in something other than a judge's independent moral judgment has to leave open the possibility that a judge must, in adherence to the law, endorse a cruel decision. Judges cannot put cruelty first. But what they can choose to do, and may be at serious risk of doing, is elevate cruelty—precisely because it is cruel, and recognized as cruel and understood to be cruel—into its own form of ecstasy. The more one hates cruelty, the more one is convinced of one's own righteousness for tolerating it. And then—the more cruelty one tolerates, the more confident one can be in one's status as a legitimate judge.

One way of resolving this dilemma is to find a knockdown theory of correct legal interpretation that can decisively inform us

102. *Confirmation Hearing, supra* note 46, at 235–36.
103. Judith N. Shklar, *Putting Cruelty First*, *in* ORDINARY VICES 7–44 (1984).
104. *Id.* at 43.

which decisions are lawful and which are not, and which can *compel* our obedience—damn the consequences. But, as Fallon compellingly demonstrates, we cannot have this and likely would not want it. And so here, finally, Fallon's reflective equilibrium may well exercise a stabilizing influence. The problem of sadomasochistic judging assumes that the most serious threat to rule of law is the judge who flinches away from the cruel acts he or she must impose. Yet, as we've seen, this instinct, if carried too far, can generate a far graver risk—the judge who instead *leans in* to the cruelty, learns to seek it out and revel in it, precisely because they hate it. The reflective equilibrium mechanic does not abolish pain from judging. But it does offer a safety valve allowing judges to consider—*legitimately* consider—whether the pain they are dispensing is truly necessary to the service of the law.