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Against *Kadijustiz*: On the Negative Citation of Foreign Law

Intisar A. Rabb*

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INTRODUCTION

In the controversy over judicial citation of foreign law,[1] little noticed are the effects of citations that *contrast* American law with the laws of foreign jurisdictions.[2] The controversy typically revolves around the extent to which

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* Professor of Law, Harvard Law School. A version of this essay was first presented as a Donahue Lecture at Suffolk University Law School, and subsequently to the Federal Judicial Center's Law and Society Seminar at Harvard Law School. The participants of each session have my sincere appreciation, as do Abigail Balbale, Meagan Froemming, Vicki Jackson, Darryl Li, Vlad Perju, Chantal Thomas, and Adnan Zulfiqar for comments and conversations about the idea, as well as Dean Camille Nelson for helping to host the Donahue Lecture and the student editors of this Review—including Joy Backer, Benjamin Conery, Lyndsay Montour, and Douglas Sweeney.

1. Compare, for example, then-Justice John Stevens's majority opinion in *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002), declaring execution of the mentally impaired unconstitutional and consistent with norms prevalent "within the world community," with Justice Antonin Scalia's dissent in that case, *id.* at 347-48 (Scalia, J., dissenting), stating "the practices of the 'world community' . . . [are] irrelevant."

2. For an analogous assessment of negative models in constitutional borrowing, see generally Kim Lane

judges may legitimately look to foreign law as persuasive authority in American courts.[3] It arises out of the Supreme Court's longtime penchant for referring to foreign law,[4] which has attracted particular attention in recent years after it surfaced in a number of high-profile cases.[5] This practice has prompted both judicial criticisms and defenses.[6] Likewise, many constitutional and comparative law scholars have raised questions about the permissibility and prudence of the practice.[7]

One little-attended-to aspect of the debate involves the existence or consequence of *negative* citation of foreign law. Exceptionally, in constitutional design, Kim Scheppele has usefully uncovered patterns of foreign citation and borrowing that are both "positive and negative, direct and

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Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296 (2003).

3. For an insightful round-up of the academic debates, see Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167, 168 (2007), providing an overview of the major strands of the foreign law controversies, and arguing in favor of the foreign law citation in recognition of its "potential to enrich and refine" domestic interpretation.

4. *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 12-87 (2006) (collecting cases).

5. *See* Roper v. Simmons, 543 U.S. 551, 577 (2005) (declaring execution of juvenile homicide convicts out of step with the international law norm "that has turned its face against the juvenile death penalty"); Lawrence v. Texas, 539 U.S. 558, 577 (2003) (declaring state criminal law banning homosexual sodomy unconstitutional as contravening Fourteenth Amendment, in line with general foreign law norms of accepting sexual liberty as "an integral part of human freedom"); *Atkins*, 536 U.S. at 317 n.21 (declaring execution of mentally impaired unconstitutional and inconsistent with norms prevalent "within the world community"). For opinions in noncriminal cases, see *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring), relying on international law to bolster the holding that affirmative action does not violate the Equal Protection clause of the Fourteenth Amendment, and *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997), examining Dutch law to determine whether physician-assisted suicide constitutes a fundamental right.

6. *See, e.g.*, *Atkins*, 536 U.S. at 347-48 (Scalia, J., dissenting); Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 522-524 (2005); Justice Ruth Bader Ginsburg, *Keynote Address at the Ninety-Ninth Annual Meeting: Remarks to the American Society of International Law: The Value of a Comparative Perspective in Constitutional Adjudication* (Apr. 1, 2005), *in* "A DECENT RESPECT TO THE OPINIONS OF MANKIND . . .": SELECTED SPEECHES BY JUSTICES OF THE U.S. SUPREME COURT ON FOREIGN AND INTERNATIONAL LAW (Christopher J. Borgen ed., 2007), *available at* http://www.hiil.org/data/sitemanagement/media/asil_speeches(1).pdf, *archived at* http://perma.cc/D6Z5-Y2B2 (including remarks by Justices O'Connor in 2002, Breyer in 2003, Scalia in 2004, and Ginsburg in 2005).

7. *See, e.g.*, Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1277 (2006) (assessing claims judges unlikely to understand and therefore refer usefully to foreign law); Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129, 129 (2005) (providing the "law of nations" concept as an authoritative basis for citation to foreign law). *See generally* Steven G. Calabresi, Lawrence, *The Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004) (discussing relevance of foreign law citations in helping domestic judges assess reasonableness in interpretation); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353 (2004) (agreeing with Justice Scalia's conclusion on irrelevance of international law for deciding questions implicating distinctively American constitutional values).

indirect."[8] When considering the relevance of foreign ideas to domestic law, she notes that constitutional drafters sometimes valorize and accept certain constitutional ideas,[9] while they malign and reject other constitutional ideas.[10] She calls the latter practice "aversive constitutionalism," which calls attention to *negative models* of foreign constitutional ideas as crucial to understanding domestic values.[11] For her, negative models are significant because the forceful rejection of ideas often says more about what constitution builders wish to avoid than the model they wish to positively adopt.[12] Moreover, negative models hold particular sway on the U.S. Supreme Court, which operates under a constitution that "appear[s] to be famously insular since the founding period,"[13] and tends to define itself in contradistinction from models that promote self-evidently contrary values. Scheppele identifies the laws of Nazi Germany and the Soviet Union as two examples.[14] The negative citation of Islamic law through the trope of *kadijustiz*, I argue, is a third.

As identified in this Essay, the practice that I describe involves the use of foreign law to condemn contrary judicial decisions—by virtue of the citation itself—as inherently pathological, self-evidently undesirable, and just plain wrong.[15] Such a citation is, moreover, a pathetic argument.

Pathetic argument refers to appeals to pathos, or emotion, rather than reason.[16] In identifying and assessing the use of pathetic argument in constitutional law, Jamal Greene explains that "[p]athetic argument in constitutional law attends to and manipulates the reader's emotions in order to persuade her either as to the ultimate adjudicative outcome or as to the substance or valence of established 'modalities.'"[17] Often cited as fact, pathetic argument is deliberately designed to arouse emotions in the reader.[18] It is one form, among many, of arguments found often enough in the federal courts.[19]

Citation to *kadijustiz* is a notable illustration of this phenomenon. This sort

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8. Scheppele, *supra* note 2, at 297.

9. *Id.* at 297, 299 (calling this phenomenon "aspirational constitutionalism").

10. *Id.* at 297, 300; *see also* Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196 (2003) (describing instances of constitutional drafters considering and refusing to adopt constitutional alternatives).

11. Scheppele, *supra* note 2, at 297, 300.

12. *Id.* at 300.

13. *Id.* at 312-13. Scheppele observes that the Supreme Court "mentions almost no positive examples from the burgeoning comparative constitutional law efforts around the world and has never found any positive comparative model decisive in its decisions." *Id.* at 307.

14. *Id.* at 313 ("Precisely because they provide a sharp idea of what the U.S. does *not* stand for, Nazi Germany and the Soviet Union became irresistible points of reference for the Supreme Court . . . on numerous occasions and in many doctrinal contexts.").

15. *See* Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1390 (2013).

16. *Id.* at 1390 (defining pathetic argument).

17. *Id.* at 1394.

18. *Id.*

19. *See generally* Greene, *supra* note 15 (detailing instances of pathetic argument in constitutional law).

of citation makes reference to the infamous, if inaccurate, trope of the "kadi under a tree dispensing justice according to considerations of individual expediency."[20] Popularized by Justice Felix Frankfurter in his dissent to the 1949 free speech case *Terminiello v. Chicago*, invoking *kadijustiz* ends up being a convenient way for judges to cite foreign law in order to contest one set of values without being specific about the reasons for their own value preferences.[21] Without claiming that this instance is exhaustive of negative citations of foreign law,[22] I focus on *kadijustiz* in order to round out the incomplete debates about the permissibility or pathos of the citation of foreign law with respect to an area that well exemplifies the phenomenon: citation to this imagined form of Islamic law as a negative model for U.S. law.

Arguing against *kadijustiz*, this Essay identifies the practice and effects of what we may call "repudiation by contrast" through the negative citation of foreign law. Because judicial citation of Islamic law both exemplifies and embodies the phenomenon so closely, I will use *kadijustiz* to refer not only to the fictitious norm of the arbitrary *qāḍī* but also to the negative citation of foreign law itself.

Two problems result from the penchant for citation of *kadijustiz*. First, this practice facilitates opinions that confuse or obscure bases for judicial decision-making. Being nonspecific about the reasons on which a decision turns or should turn cuts against a bedrock element of the judicial power requiring judges to offer reasoned decisions.[23] In the past, judges have employed this device in several cases to make rather easy arguments that would otherwise have been better articulated on the actual grounds for which they invoked *kadijustiz*. It is not that *kadijustiz*-invoking judges do not *also* announce, at times, some alternative reasons for their opposition. But when they adorn their opinions with citations to *kadijustiz*, they tend not to acknowledge the crux of the disagreement (that they prefer one set of values to another) or articulate specific reasons for why the reader should agree. At most, dissenting judges typically identify a set of values on which a particular case was *not decided* in order to register that their opinions are at odds with that of the majority. In short, rather than explain *why* their competing set of values should prevail over that of the majority, they simply declare the opposing judges to be arbitrary and lawless applicants of *kadijustiz*. The results are rather unhelpful arguments that

20. Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

21. *See infra* Part II.

22. See, especially, Scheppele, *supra* note 2, at 313-17, for a discussion of cases in which negative models of foreign law helped shape criminal procedure, freedom of speech, national security law and other doctrines—all "against the negative model of totalitarianism" represented by Nazism, Stalinism, and the Cold War Soviet threat.

23. *See, e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366-67 (1978) ("Adjudication is . . . a device which gives formal and institutional expression to the influence of reasoned argument in human affairs . . . . A decision which is the product of reasoned argument must be prepared itself to meet the test of reason.").

obscure the fact that there are equally legitimate and contested values that they prefer, and which less pathetic argument would offer reasons for adopting.

A second problem is that the notion of *kadijustiz* is at odds with most historical accounts of Islamic law. That much has been well-known to historians, who have documented various aspects of judicial processes in multiple locales over the course of Islam's fourteen hundred-year history.[24] To be sure, these historians have documented instances in which *qāḍī*s and other officials have acted arbitrarily and capriciously.[25] Moreover, scholars and policymakers working on issues relevant to the contemporary Muslim world have identified numerous instances in which judges similarly act with arbitrariness and caprice.[26] Yet, as I have demonstrated at length elsewhere in the context of criminal law,[27] these accounts are marginal to the Islamic legal tradition's mainstream. That is, the historical sources more often record judicial procedures attached to relevant cases and note instances of divergence *from* those procedures to lay bare and object to exceptions to the rule of law.[28] In fact, the tension reflected the struggle between jurists on the one hand, who informed the *qāḍī* of what the law was, and executive officials (the caliph or sulṭān) on the other, who operated in a jurisdiction almost free from the constraints of Islamic law.[29] In the struggle for power and legitimacy in applications of Islamic law, the historical legal literature records Muslim jurists and judges often attempting to reign in the injustices and caprice often exhibited by executive officials.[30] In this way, medieval Muslim *qāḍī*s rejected the idea of *kadijustiz* as invoked and sometimes embodied by judges in American courts.[31] But rather than recapitulate this well-documented intervention, the point here is to query: What work were the fictitious accounts

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24. *See infra* Part I.

25. *See generally* CHRISTIAN LANGE, JUSTICE, PUNISHMENT AND THE MEDIEVAL MUSLIM IMAGINATION (2008).

26. For two examples of political Islamists and extremist groups that purport to apply Islamic law, consider reports of arbitrary justice in so-called *sharī'a* courts of Nigeria and ISIS territory. *See* Philip Ostien & Albert Dekker, *Sharia and National Law in Nigeria*, *in* SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 589-93 (Jan Michiel Otto ed., 2010) (describing adoption and application of Islamic criminal law in Northern Nigeria, and its negative application to Amina Lawal and others in Northern states' *sharī'a* courts); UNITED NATIONS, REPORT OF THE INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC: RULE OF TERROR: LIVING UNDER ISIS IN SYRIA 4-5 (2014), *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/HRC_CRP_ISIS_14Nov2014.pdf, *archived at* http://perma.cc/F5ZW-PE5L ("[M]any residents of ISIS-held areas complained of the brutality of violent acts perpetrated under the guise of corporal hudud punishments based on the group's radical interpretation of Shariah law [sic], including lashings and amputations, for offences such as smoking cigarettes or theft.").

27. *See generally* INTISAR A. RABB, DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION AND ISLAMIC CRIMINAL LAW (2015).

28. *See generally id.*

29. *See generally id.*

30. *See generally id.*

31. *See infra*, Part I.C.

doing in American cases, and to what effect?

To return to the main point: judicial citation of *kadijustiz* obscures the reasons for adopting certain values over others in contested judicial decision-making, thereby weakening invoking-judges' arguments overall. To elucidate this claim, this essay proceeds in three parts. Part I sketches the background.[32] It offers definitions of *kadijustiz* and examines the career of the *qāḍī* in the academic study of Islamic law.[33] The goal is to identify the accounts that have informed legal education and therefore judicial information about *kadijustiz*, in contrast to historical accounts to the contrary.[34] Part II fills out the main ground.[35] It examines invocations of *kadijustiz* in the American courtroom.[36] While that notion arises in myriad cases, I focus on cases of constitutional and statutory interpretation to highlight the striking ways in which *kadijustiz* has been used to challenge some values and promote others.[37] A review of the cases reveals that *kadijustiz* has served typically dissenting judges' failure to make strong arguments for federalism, deference, and textualism against competing values adopted by a majority.[38] I conclude with brief notes about the problem of *kadijustiz* as pathetic argument and offer suggestions as to what judges should do about it.[39]

I. *KADIJUSTIZ* IN THE CLASSROOM

Judicial process in Islamic law is a relatively new field in American law school classrooms, with a storied history in university departments of sociology and history. The idea of *kadijustiz* was meant to represent Islamic judicial process, and it was a prominent aspect of the 1950s sociology of law. The idea was then taken on faith by comparative law scholars but rejected on the grounds of documentary evidence to the contrary by Islamic legal historians. This section examines the origins of the idea and how it has since fared in academic contexts to lay the groundwork for examining in the next section how it translated into pathetic argument in judicial contexts.

A. Kadijustiz *in Weber's* Sociology of Law

Max Weber popularized the notion of *kadijustiz*.[40] That notion centers on

32. *See infra* Part I.
33. *See infra* Part I.
34. *See infra* Part I.
35. *See infra* Part II.
36. *See infra* Part II.
37. *See infra* Part II.
38. *See infra* Part II.
39. *See infra* Part Conclusion.
40. *See* BABER JOHANSEN, CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM FIQH 48-49, n.183 (1999) (citing RICHARD SCHMIDT, 1 ZEITSCHRIFT FÜR POLITIK 266 (1908)) (noting Schmidt coined term *kadijustiz*—later popularized by Weber—to describe arbitrary, irrational, and

the image of the *qāḍī* (Arabic for judge) as a medieval Muslim judge who issued arbitrary, irrational, and expedient decisions without respect for general principles of law.[41] According to Weber, the Muslim judge had no guiding principles, policies, or procedures.[42] Instead, he rendered "informal judgments [based on] . . . concrete ethical or practical valuations."[43] In Weber's estimation, this approach to law and judicial decision-making reflected—and perhaps caused—deleterious effects on the legal and economic systems in which it operated as a whole.[44] For him, capitalism and development of a functioning economic system faltered because of the reign of *kadijustiz* in legal systems and economic structures.[45]

Notably, for Weber, *kadijustiz* was not limited to the Muslim judge.[46]

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individualistic judicial decisions). Legal academics and judges have rendered the term differently in ways that typically signal a conceptual proximity to the Weberian sense of the term. *See* Bos. & Me. Corp. v. Ill. Cent. R.R., 396 F.2d 425, 425 (2d Cir. 1968) ("Cadi justice"); ANTHONY T. KRONMAN, MAX WEBER 76-77 (William Twining ed., 1983) ("Khadi justice"); 2 ROSCOE POUND, JURISPRUDENCE 355-56 (1959) ("Oriental justice"). Historians of Islamic law, by contrast, have used terminology deliberately distancing their research on judges in the medieval and early modern Islamic world from the Weberian notion of *kadijustiz*. *See, e.g.*, David S. Powers, *Kadijustiz or Qāḍī Justice? A Paternity Suit from Fourteenth-Century Morocco*, 1 ISLAMIC LAW AND SOC'Y 332, 365-66 (1994) (contrasting Weber's imagined notion of *kadijustiz* with history-based notions of *qāḍī justice* as term of art among scholars of Islamic law refering to judicial practices and procedure drawn from historical sources); *see also infra* notes 79-84.

41. *See* MAX WEBER, ECONOMY AND SOCIETY 806 n.40 (Guenther Roth & Claus Wittich eds., Ephraim Fischoh et al. trans., 1968) (defining *kadijustiz* as "the administration of justice which is oriented not at fixed rules of a formally rational law but at the ethical, religious, political, or otherwise expediential postulates of a substantively rational law"); *see also* BRYAN S. TURNER, MAX WEBER: FROM HISTORY TO MODERNITY 48 (1993) (discussing varied interpretations of Weber's definition).

42. See KRONMAN, *supra* note 40, at 76-77 (describing "'khadi-justice' (after the judge presiding in a Moslem *sharihah* [sic] court) [as] adjudication of a purely *ad hoc* sort in which cases are decided on an individual basis and in accordance with an indiscriminate mixture of legal, ethical, emotional and political [and one might add, religious] considerations") (citing WEBER, *supra* note 41, at 813, 845, 891, 976-78; WEBER, ECONOMY AND SOCIETY, *supra* note 41, at 229, 264, 317).

43. WEBER, *supra* note 41, at 976.

44. *See* TURNER, *supra* note 41, at 42-47. Turner discusses the "Weber theses" on the Protestant Ethic as a cause for capitalism, as well as the causal relationships between values and socio-economic factors for the same—namely that Islamic institutions dominated by patrimonialism and substantively irrational law are incompatible with capitalism. *See id.*

45. *See* Chantal Thomas, *Re-Reading Weber in Law and Development: A Critical Intellectual History of "Good Governance" Reform* (unpublished article) (on file with author); *see also* Chantal Thomas, *Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutionalist Critique of Institutionalism*, 96 CORNELL L. REV. 967 (2011); Chantal Thomas, *Max Weber, Talcott Parsons and the Sociology of Legal Reform: A Reassessment with Implications for Law and Development*, 15 MINN. J. INT'L L. 383 (2006); David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 736-37 n.31 (1972) (noting Weberian link between development, or "modernization," and formally rational law, or "legalism").

46. *See* KRONMAN, *supra* note 40, at 77. Weber applied concepts of *kadijustiz* and substantive irrationality to Greek Attic law and English law to criticize the common-law-like case-by-case analysis at odds with European law's formal-rational movement from principles to outcomes descendant from Roman law. *See id.* For applications and critiques of *kadijustiz* to law in China, see TEEMU RUSKOLA, LEGAL ORIENTALISM (2013). *See also* Carol G.S. Tan, *How a "Lawless" China Made Modern America: An Epic Told in Orientalism*, 128 Harv. L. Rev. 1777 (2015); Jed Kroncke, *The Flexible Orientalism of Islamic Law*, 4 UCLA J.

Rather, the term described any judge who operated in a legal system that ran on an arbitrary, ad hoc basis.[47] It included the prophetic sort of justice of any religion, encapsulated in the rather contradictory dictum attributed to Jesus: "It is written . . . but I say unto you."[48] And it applied to all "sacred laws" as well as to Chinese law and to the English common law.[49] For Weber, none of these legal systems were—like civil law—driven by general principles.[50]

All such legal systems with a type of *kadijustiz* were, for Weber, substantively irrational—particularly religious legal systems like Islamic law.[51] He considered any religious legal system to be only seemingly rational to the extent that its judges seek to apply ethical or moral presuppositions derived from religious mores.[52] This type of system is not truly rational, however, because it uses texts that are divinely ordained,[53] and it appeals to "'material, rather than formal'" reason.[54] In his macrocomparative analysis of the legal systems of the world, Weber concluded that Islamic law rather excessively focuses on morality (substance) over law (formalism and procedure).[55]

Islamic law epitomized *kadijustiz* for Weber because, in his estimation, it lacked formal rationality altogether.[56] Specifically, it lacked three critical

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ISLAMIC & NEAR E. L. 41 (2005).

47. *See* TURNER, *supra* note 41, at 48.

48. *See, e.g.*, RICHARD SWEDBERG & OLA AGEVALL, THE MAX WEBER DICTIONARY: KEY WORDS AND CENTRAL CONCEPTS 136 (defining "kadi justice").

49. *See* WEBER, *supra* note 41, at 978 (suggesting *kadijustiz* represents ideal type of religious, patriarchal, and common law systems).

50. *See* JOHANSEN, *supra* note 40, at 49-50.

51. *See* WEBER, *supra* note 41, at 845, 976-78. *But see* TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY (2003) (offering "macrocivilizational" view of secularity and capitalism as modernity in critique of Weber's thesis that, to be modern, legal rationality must supplant religious authority).

52. *See* JOHANSEN, *supra* note 40, at 49-50. Johansen described systems of sacred law in which ethics, politics, or utilitarian rules of expediency dominate in which theocratic or patriarchal rules are "developed into norms or general principles and take the place which, according to Max Weber, the logical generalization of abstract principles occupy in a law which is characterized by the 'formal rationality.'" *See id.*

53. *See* TURNER, *supra* note 41, at 48.

54. KRONMAN, *supra* note 40, at 77. Kronman described certain theocratic or priestly legal systems, in which legal education is based on "'a sacred book or a sacred law fixed by a stable oral or literary tradition'" and exhibits a "'predilection for the construction of a purely theoretical casuistry oriented less to the practical needs of the groups concerned than to the needs of the uninhibited intellectualism of scholars'" but is nevertheless "'bound by tradition'" and "'carries with it elements which represent only idealistic religious or ethical demands on human beings or on the legal order, but which involve no logical systematization of an actually obtaining legal order.'" *Id.* (quoting WEBER, *supra* note 41, at 205-206, 789-80). Although he gives no examples, Weber presumably had Jewish law in mind. In his definition, Islamic law as conventionally understood would be a better or at least as good a fit—with the exception that the "fact" of essentially unchanging legal principles derived from a sacred edict do not accord with the historical conception and interpretation of the sacred texts or the principles derived from them, as evident from the construction and deployment of judicial procedures and legal maxims of criminal law, for example. *See generally* RABB, *supra* note 27.

55. *See* SWEDBURG & AGEVALL, *supra* note 48, at 136-37 (describing Weber's quadripartite typology of ideal types of legal systems of the world); *see also* KRONMAN, *supra* note 40, at 76-77 (citing WEBER, *supra* note 41).

56. *See* KRONMAN, *supra* note 40, at 93-95 (noting alternative titles for formal rationality, including

elements of formal rationality. First, Islamic law is not "governed by rules or principles."[57] Second, it is not independent or self-contained because it fails to "recognize a distinct line between legal principles and non-legal ones."[58] As Anthony Kronman explained in his commentary on Max Weber: "Khadi-justice is [formally] irrational in the sense that it is peculiarly ruleless; it makes no effort to base decisions on general principles but seeks, instead, to decide each case on its own merits and in light of the unique considerations that distinguish it from every other case."[59] Third, because Islamic law does not separate morality from law, it consistently fails to adopt a dispassionate "'juridical' treatment" of law.[60] Again, as Kronman put it, quoting Weber: "Where no such separation exists, the law becomes a 'featureless conglomeration of ethical and legal duties', and ceases to be perceived as an independent or autonomous [legal] order."[61] Weber's Muslim judge operates outside of institutions, without separation between institutional functions, and is wholly dissimilar to the operation of judges in Western legal systems. In short, the image of *kadijustiz*, is this: justice without law, substance without procedure.

B. Kadijustiz *in Comparative Law*

The *kadijustiz* version of Islamic law is common in the legal academy, when addressed at all.[62] Without attempting a comprehensive review, one example should suffice to illustrate the point: its treatment in comparative law scholarship before recent years.

In comparative law scholarship, the notion of *kadijustiz* is well represented,

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"formal justice," "formal rational administration of justice," and related term, "[formal] legal rationality"); *see also* TURNER, *supra* note 41, at 48. For further discussion of formal rationality, emphasizing the importance of procedure, see TALCOTT PARSONS, SOCIETIES: EVOLUTIONARY AND COMPARATIVE PERSPECTIVES 27 (1966): "Modern legal systems must also emphasize the factor of *procedure*, as distinguished from substantive precepts and standards. Only on the basis of procedural primacy can the system cope with a variety of changing circumstances and cases without prior commitment to specific solutions."

57. KRONMAN, *supra* note 40, at 73.

58. *Id.* at 93.

59. *Id.* at 77.

60. *Id.* at 93 (quoting WEBER, *supra* note 41, at 810).

61. KRONMAN, *supra* note 40, at 93.

62. It had been common to some extent in Islamic studies as well, through the most influential German scholar of Islamic law of the twentieth century, Joseph Schacht. *See* JOHANSEN, *supra* note 40, at 51-52 (discussing influential German scholar Joseph Schacht's work on Islamic studies).

> It is Joseph Schacht, the leading authority of "Islamic law" in the twentieth century who uses it [i.e., "the category of 'sacred law' as developed and used by Weber"] as a tool of investigation into the history and the systems of Islamic law . . . . Schacht's approach . . . . has had a long lasting influence on the occidental understanding of Muslim law in the twentieth century.

Id. (citing Schacht's first book on Islamic law, BERGSTRÄSSERS GRUNDZÜGE DES ISLAMISCHEN RECHTS (1935), and his article, *Zur soziologischen Betrachtung des islamischen Rechts*, 22 DER ISLAM 207 (1935)).

if not explicitly so. For instance, in the 1970s, the authors of a prominent comparative law treatise, Konrad Zweigert and Hein Kötz, implicitly adopted the idea of *kadijustiz* in pointedly eliding Islamic law as a comparable legal system.[63] They famously named a "presumption of similarity" (*praesumptio similitudinis*) for comparative law—that different legal systems produce similar practical legal solutions for common social problems.[64] This presumption led them to articulate a "better-law functionalism" as both goal and method of comparative law.[65] In their estimation, the task of comparative law was to evaluate the laws of two or more systems with an eye to identifying which system has devised the better legal solution to common social problems.[66]

Given the differences between Islamic and Anglo-American or Continental legal systems, comparative law scholars following this method did not seriously consider Islamic law.[67] On the functionalist theory, in order to be comparable, legal systems could not have historical or institutional structures with differences that were too stark. As Zweigert and Kötz explain: "Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill the same function."[68]

The problem was that by presuming (or requiring) similarity for comparison, these scholars reduced comparative law to "microcomparison."[69] In doing so, they excluded from the comparative law ambit the study of institutional and

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63. *See generally* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir, trans., 3d ed. 1998).

64. *See id.* at 39-40 ("[O]ne can almost speak of a basic rule of comparative law: different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation."). This presumption of similarity was also a major presumption behind Alan Watson's idea of legal transplants. *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 83 (2d ed. 1993) (arguing laws transferable from one system to another).

65. *See* Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 383, 394-96 (Matthias Reimann & Reinhard Zimmerman eds., 2006).

66. *See* ZWEIGERT & KÖTZ, *supra* note 63, at 34 (identifying functionality as basic principle common to comparative law studies). "From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on." *Id.*

67. *See id.* at 74-256, 303-13 (focusing primarily on private law in Europe, and devoting only short sections to Hindu and "Muslim law").

68. *Id.* at 34. *But see* DANNEMANN, *supra* note 65, at 385 (tracing historical roots and applications of difference theory, and arguing comparative law in eighteenth and nineteenth-century Europe alternated between similarity and difference); James Whitman, *The Neo-Romantic Turn*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 312-44 (Pierre Legrand & Roderick Munday eds., 2003) (discussing the origins and deployment of difference theory in legal, philosophical, and sociological literature, with emphasis on German Romantic philosopher Herder's idea of a *Volksgeist*—the idea that each nation has a unique spirit); *see also infra* note 75.

69. Side-stepping culturally relevant facts with a focus on seemingly common rules, functionalism restricts the comparative enterprise to only the relevant substantive private laws that are not politically or culturally sensitive—thereby excluding criminal law, family law, and all other areas concerned with public law, political structure, and moral values. *See* DANNEMANN, *supra* note 65, at 387, 394-96; *see also* Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 689-90 (2002).

interpretive differences known through "macrocomparison" of identifiably different legal systems like Islamic law.[70]

To be sure, the presumption of similarity and the related method of functionalism are no longer the sole or even dominant methods of comparative law.[71] One comparatist argued over two decades ago that limiting comparative law to similarity rather than difference misses opportunities to grasp justifications for law in different legal systems and to thereby better understand our own:[72]

> Much of present-day comparative law is concerned with studying the legal rules of modern industrial mass democracies. The theoretical presuppositions of comparative law do not emerge with particular clarity in such a study because the similarities of the systems are so great that one is tempted, without ever giving the matter much thought, to take many things for granted . . . . [B]y considering alien legal practices . . . we will be jolted out of habitual ways of thinking and see more clearly what is involved in studying a foreign legal system.[73]

He further argued—correctly in my view—that to be effective, comparative law must countenance different legal systems by exploring both textual and contextual aspects of social, economic, and cultural phenomena as law.[74] In

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70. *See, e.g.*, MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 181 (1986) (providing example of macrocomparison). Damaška compares European political and institutional structures governing legal process, classifying systems of authority as hierarchical or coordinate and procedural orientations as policy-implementing or conflict-solving, to show how different models of justice produce different procedural and substantive outcomes. *See id.*

71. For recent surveys of more expansive comparative law methods, see THE CAMBRIDGE COMPANION TO COMPARATIVE LAW (Mauro Bussani & Ugo Mattei eds., 2012), providing reflections on comparative law methodologies and sampling of fields where varied methodologies apply; Chibli Mallat, *Comparative Law and the Islamic (Middle Eastern) Legal Culture*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 65, at 609, 609-40, offering an example of Islamic and Middle Eastern law; and WERNER F. MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA (2006), including chapters on Hindu, Islamic, African, and Chinese law.

72. *See generally* William Ewald, *Comparative Jurisprudence (I): What Was It Like To Try a Rat?*, 143 U. PA. L. REV. 1889 (1995) [hereinafter Ewald, *Comparative Jurisprudence*] (examining internal legal logic behind animal trials in European Middle Ages); *see also* William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats,"* 46 AM. J. COMP. L. 701, 703-704 (1998) (clarifying idea presented in his 1995 article as proposal for approach to comparative law aiming to "grasp, from the inside . . . the conscious reasons and principles and conceptions that are employed by foreign lawyers—a grasp of the styles of legal *thought*").

73. *See* Ewald, *Comparative Jurisprudence*, *supra* note 72, at 1897.

74. *See id.* at 1893-97. Ewald echoes the insights of Robert Cover, who articulated Stanley Fish's interventions on text and context with respect to both religious and secular legal systems. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 6-8 (1983) (noting texts do not have common meaning because of precision of their words, but because they are read according to context through which different interpretive or normative communities understand them, whether interpreting secular or religious law).

line with these intuitions is a new presumption of difference, by which a group of "difference theorists" argue for macrocomparisons of different legal systems.[75]

With some exceptions,[76] *kadijustiz* is no longer blindly accepted by scholars who now have access to more historically grounded sources. While the Weberian notion had once carried over into and dominated Islamic legal history,[77] as detailed in the next section, the field has advanced considerably over the past half century to better chart the landscape of "*qāḍī* justice"—that is, judicial procedure in Islamic law based on the historical evidence.

C. Kadijustiz *in Islamic Legal History*

All is not lost. Recent scholarship has provided plenty of material for more sophisticated treatments of Islamic law in ways that can shed comparative light on notions of judicial procedure—at least with respect to the post-founding period of Islamic law. In contrast to paltry treatments of Islamic law *kadijustiz*-informed legal academy, recent scholarship provides plentiful fodder to fuel history-informed comparative legal studies.

While some scholars sought to debunk the Weberian theses directly,[78] most

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75. *See* Pierre Legrand, *The Same and the Different*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS, *supra* note 68, at 240-311 (proposing a presumption of difference). Notably, while a difference presumption challenges functionalism, it reduces the perceived scope and utility of comparative law even more than did the presumption of similarity. *See id.* at 271 (arguing useful approach to comparative law pursuit of comparative inquiry of similar legal systems, with aim of showing how "things which look the same are really different"); *id.* at 298 (arguing even common law and civil law jurisdictions in England and Europe irreconcilably different: "[A] civilian can never understand the English legal experience *like an English lawyer* because he cannot interpret it from within the culture itself."); *see also* Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52, 76 (1996) ("In the absence of shared epistemological premises [different legal traditions] . . . cannot . . . engage in an exchange that would lead one to an understanding of the other . . . ."). *cf.* Whitman, *supra* note 68, at 313 (reviewing several difference theorists—including Vivian Curran, Nora Demleitner, Josef Esser, Pierre Legrand, and Annelise Riles—together with Romantic theories of national character of law preceding them).

76. *See* TIMUR KURAN, THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST (2011) (examining continuing influence of Weberian *kadijustiz* on law and economics scholarship in his explanations of economic underdevelopment in Muslim world). Drawing on Weberian theses of "economy and society," especially the relationship between belief or *kadijustiz* and modern capitalism, Kuran made the controversial claim often taken up by economists and law and development scholars that Islamic law is responsible for the economic situation of the Muslim world. *See id.* at 45-47. If the consequence of wholesale adoption of *kadijustiz* was impoverished comparative law scholarship in the classroom, and undesirable pathetic argument in the courtroom, we might well see negative consequences of its adoption in economic theory as unhelpful to law and development and in the boardroom. *See supra* note 45.

77. *See* JOHANSEN, *supra* note 40, at 51. Johansen detailed the ways in which Schacht substantially shaped the study of Islamic law in the "occident" through application of the Weberian notions of "sacred law" from the "orient." *See id.*; *see also supra* note 66.

78. *See, e.g.*, Amira Sonbol, *Women in Shari'ah Courts: A Historical and Methodological Discussion*, 27 FORDHAM INT'L L.J. 225, 227 (2003) (rejecting Weber's "*qadi* justice paradigm" and advocating for "more meticulous archival research . . . [to] provid[e] detailed knowledge of the legal system practiced during various periods of Islamic history"); *see also* Powers, *supra* note 40 (distinguishing imagined notion of Weberian *kadijustiz* with history-based notions of "*qāḍī* justice," in reference to judicial practices and procedures drawn

provided detailed local histories of judicial practice. These histories include judicial reforms to the structures and procedures of Egyptian courts in the thirteenth and fourteenth centuries,[79] Andalusian courts in the fifteenth century,[80] and Ottoman courts in the sixteenth century and afterward,[81] to name a few.

Less well-studied are the courts of the "founding period" of 'Abbāsid courts—when Weber and Griswold's *kadi* ostensibly lived—courts in the seventh through eleventh centuries.[82] Although Emile Tyan made an early attempt to chart judicial procedure in early Islamic legal history, his work offered generalities and was based on sources from a period later than the time on which they reported.[83] More compellingly, Mathieu Tillier has written extensively on early courts under the 'Abbāsids in Iraq, Egypt, and elsewhere, as have Christian Müller and Wael Hallaq.[84]

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from historical sources).

79. *See* Yossef Rapoport, *Legal Diversity in the Age of Taqlīd: The Four Chief Qāḍīs under the Mamlūks*, 10 ISLAMIC L. & SOC'Y, July-Oct. 2003, at 210, 210-23 (discussing changes to medieval Islamic judicial system accompanying appointment of four chief *qāḍīs*); *see also* ÉMILE TYAN, HISTOIRE DE L'ORGANISATION JUDICIARE EN PAYS D'ISLAM 138-42 (2d ed. 1960); Joseph H. Eskovitz, *The Establishment of Four Chief Judgeships in the Mamlūk Empire*, 102 J. AM. ORIENTAL SOC'Y 529 (1982); Sherman A. Jackson, *The Primacy of Domestic Politics: Ibn Bint al-A'azz and the Establishment of Four Chief Judgeships in Mamlūk Egypt*, 115 J. AM. ORIENTAL SOC'Y 52 (1995); Jørgen Nielsen, *Sultan al-Ẓāhir Baybars and the Appointment of Four Chief Qāḍīs, 663/1265*, 60 STUDIA ISLAMICA 167 (1984). For further discussion of Syrian and Egyptian courts, see Michael Winter, *Ottoman Qāḍīs in Damasucus in the 16th-18th Centuries*, *in* LAW, CUSTOM, AND STATUTE IN THE MUSLIM WORLD: STUDIES IN HONOR OF AHARON LAYISH 88-89 (Ron Shaham ed., 2007), showing system of representation continued in Ottoman empire, through deputies to the chief *qāḍī*; and Adel Allouche, *The Establishment of Four Chief Judgeships in Fāṭimid Egypt*, 105 J. AM. ORIENTAL SOC'Y 317 (1985), discussing studies of earlier system of chief judgeships in twelfth century.

80. *See generally* Powers, *supra* note 40.

81. *See* Ronald C. Jennings, *Kadi, Court, and Legal Procedure in 17th C. Ottoman Kayseri: The Kadi and the Legal System*, 48 STUDIA ISLAMICA 133, 134 (1978) [hereinafter Jennings, *Kadi, Court, and Legal Procedure*]; *see also* Ronald C. Jennings, *Limitations of the Judicial Powers of the Kadi in 17th C. Ottoman Kayseri*, 50 STUDIA ISLAMICA 151 (1979) [hereinafter Jennings, *Limitations of the Judicial Powers of the Kadi*] (detailing court procedures and other limitations on *qāḍī*'s power based on administrative requirements from the texts of substantive legal doctrine from *fiqh* works as well as positive law regulations (*kanun*), and local traditions from other Ottoman state officials and neighboring *qāḍīs*, including the *kadi asker*, the *kadi* of the *paşa sancak*, and the local *muftī* or *şeyh ul-Islam*). Though he rejects the Weberian ideal of *kadijustiz*, Jennings notably states that the *qāḍī* in Ottoman Kayseri adopted all three forms of Weberian legitimacy: the "rational-bureaucratic, the traditional, and the charismatic." Jennings, *Kadi, Court, and Legal Procedure*, *supra*, at 137.

> Weber's own conclusions about the nature of kadi-justice and the sharia are quite different from mine. They are outdated and tinged with europeanophile presumptions of cultural superiority which make them of little scholarly value. The intention here, however, is simply to use Weber's sociological theory of legitimacy to explain a particular phenomenon with which Weber would certainly have disagreed.

Id.

82. *See generally* RABB, *supra* note 27.

83. *See* TYAN, *supra* note 79, at 7-9 (elaborating on the "founding period" of Islamic law).

84. *See* Mathieu Tillier, Qāḍīs *and the Political Use of the* Maẓālim *Jurisdiction Under the 'Abbāsids*, *in* PUBLIC VIOLENCE IN ISLAMIC SOCIETIES: POWER, DISCIPLINE, AND THE CONSTRUCTION OF THE PUBLIC

To be sure, more work is required to round out a picture of the courts and judicial procedure from Islam's long founding period—the task for a larger project. Once completed, such an account in conjunction with the others can be fruitfully connected to comparative law scholarship for deeper comparative work.[85] Nevertheless, existing studies of courts from various periods of Islamic history are sufficiently well documented to present intriguing pictures of the *qāḍī*'s process of adjudication, unsurprisingly at odds with the fictitious *kadijustiz* account.

By fictitious, I do not mean only that it is historically inaccurate, nor do I mean to suggest that it is universally false. Instead, I mean that the notion of *kadijustiz* popular in American courtrooms literally came from works of fiction.[86] Justice Frankfurter likely got at least part of his notion from the *Arabian Nights*, which a well-known British orientalist and diplomat had translated several decades before.[87] The justice had gotten the main part from Weber himself, as a German speaker born in Vienna who "had habitually read Weber," and who introduced that notion of *kadijustiz* together with the fictional version to American courtrooms.[88] After all, he wrote before the English translation of Max Weber, whose *kadi*, in any case, had never sat beneath a tree.[89] Harvard Law School Deans Roscoe Pound and Erwin Griswold similarly must have consulted the *Arabian Nights*, identifying the caliph's court of equity (*maẓālim* courts and other jurisdictions) rather than the *qāḍī*'s court of Islamic law (*sharī'a* courts). Unaware of the differences between the two, Judge Irving Kaufman of the Second Circuit Court of Appeals combined the executive justice of Hārūn al-Rashīd, that was repeatedly depicted in *Arabian Nights* with that of Weber's *kadi* to produce the amalgamated notion of American *kadijustiz*.

Thus, it is no headline to suggest that the Weberian idea of *kadijustiz* does not match the historical practice of most judges in Islamic contexts.[90] The

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SPHERE, 7TH-19TH CENTURIES CE 42-66 (Christian Lange & Maribel Fierro eds., 2009); *see also* TYAN, *supra* note 79.

85. I am in the process of undertaking such a study of courts and the administration of justice in early Islamic law.

86. *See* William Raveis Real Estate, Inc. v. Comm'r of Revenue Servs., No. 387235, 1994 WL 324417, at *8 n.2 (Conn. Super. Ct. June 24, 1994) (citing directly to *Arabian Nights*); *see also infra* note 164.

87. Justice Frankfurter had ready access to the works of fiction depicting the tree-hovering *qāḍī*, which, by then, was well known in English popular literature. *See* THE BOOK OF THE THOUSAND NIGHTS AND A NIGHT (Richard F. Burton trans., 1885).

88. Laura Nader, *Law and the Theory of Lack*, 28 HASTINGS INT'L & COMP. L. REV. 191, 198 (2005).

89. After publication of the "faulty edition" of Weber's *Rechtssoziologie* (*Sociology of Law*) in 1921, the original manuscript was rediscovered in 1957, first published in German in 1960, and first translated into English in 1968—almost two decades after Frankfurter's famous formulation. *See* JOHANSEN, *supra* note 40, at 47 n.168.

90. In addition to the legal historical studies reconstructing pictures of judicial practice in the Muslim world, Edward Said famously identified and deconstructed "orientalism" decades ago in the humanities. *See generally* EDWARD W. SAID, ORIENTALISM (2014) (identifying in European and Anglo-American discourse

curiosity is that the law school classroom and courtroom engagement with the *qāḍī* have largely failed to take this history into account. For purposes of this Essay, I am interested in the negative consequences of this failure for judicial reasoning in American courts engaged in pathetic argument as the negative citation of foreign law.

II. *KADIJUSTIZ* IN THE COURTROOM

In some ways, judicial process in Islamic law is virtually *terra incognita* in American courtrooms. Virtually, because that landscape has not typically figured into judicial reasoning in American courts. But when it has, American judges have readily invoked Justice Frankfurter's *kadijustiz* in order to distance themselves from a line of reasoning with which they disagreed.[91] Judge Kaufman made clear that he was "no exponent of what Max Weber once referred to as 'Khadi justice,' in which the great caliph would sit on his cushion and decide each case intuitively, without regard to precedents or reasoned elaboration of law."[92] Likewise, other judges in federal,[93] as well as state,[94] courts have repeatedly cited *kadijustiz* with the aim of bolstering their opinions, and have done so as recently as 2005.[95] Notably, law school professors and deans, who train judges, have also been known to deploy the notion. We have seen how Harvard Law School Deans Griswold and Pound depicted a limitless Islamic judicial power as "justice as administered by Harun al Raschid sitting under a tree" to promote, by contrast, their vision of a more reason-oriented, procedure-laden, and scope-limited judicial power in American law.[96] For

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"subtle and persistent Eurocentric prejudice against Arab-Islamic peoples and their culture," that emerges from exotic images essentializing the so-called Orient, especially the Middle East, in ways that implicitly justify colonial ambitions of European powers, the United States, and ruling Arab elites aligned with either or both).

91. *See infra* Part II.

92. Irving Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U. L. REV. 201, 208–209 (1970).

93. As recently as 2000, a federal judge resurrected Frankfurter's image of the *qāḍī* to contest his colleagues' conclusion that a "sympathetic plaintiff" had standing to sue on what he regarded as equitable grounds in contravention of the plain meaning of the applicable statute. *See* Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1164 & n.9 (9th Cir. 2000) (O'Scannlain, J., dissenting).

> We must decide cases based on the law, not on our subjective view of the equities . . . . As aptly stated by Justice Frankfurter, "[t]his is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."

Id. (alteration in original) (quoting Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting)).

94. In 2005, a state judge invoked Frankfurter's *qāḍī* to similar ends. *See* Credit Union Cent. Falls v. Groff, 871 A.2d 364, 368 (R.I. 2005) (citing Sullivan v. Chafee, 703 A.2d 748, 753 (R.I. 1997) (quoting *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting)) (emphasizing court may not address moot orders: "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.").

95. *See infra* Part II.

96. Erwin N. Griswold, *The Judicial Process*, 31 FED. B.J. 309, 319 (1972) ("I am definitely *not*

these jurists and scholars, Islamic judicial process escaped *terra incognita* only for its judge to become *persona nongrata* in rather nonspecific ways.

Accordingly, in typical pathetic argument style, judges have invoked *kadijustiz* to register their distrust (or disgust) of their colleagues' exercise of interpretive discretion to choose some values over others.[97] Obscuring their true arguments about *why* their preferred values should prevail over those chosen by the majority, typically dissenting judges invoke *kadijustiz* not as a reason-based challenge, but as an emotional appeal to reject the values adopted by the majority as altogether illegitimate. In this way, *kadijustiz* became a vehicle for nonspecific arguments that, upon close examination, exhibited the very features of unreasoned (or insufficiently reasoned) opinions that the invoking judges sought to reject.

A review of constitutional and statutory interpretation cases in which judges invoked the notion of *kadijustiz* reveals three core values that judges used the notion to promote. It turns out, as I will try to demonstrate below, that judges often used *kadijustiz* to challenge decisions that seemed to cut against specific values of textualism, federalism, and agency deference. Yet relying on *kadijustiz*, they consistently failed to articulate why the majority or the reader should privilege their preferred values over the prevailing ones in each case.

A. Kadijustiz *as Anti-Textualism: Judicial Appeal to Substance over Text and Procedure*

The most oft-repeated invocation of the "kadi under the tree" trope came from Justice Frankfurter in his dissent to the 1949 *Terminiello* decision.[98] In that case, the Court reviewed the conviction of a man fined for violating a Chicago ordinance against disorderly conduct, based on a speech he gave at an auditorium that resulted in a rowdy crowd outside.[99] Appealing his conviction,

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contending for a rigidly confined concept of judicial power. I do not like Baron Parke's approach any more than anyone else; neither do I like, for us, justice as administered by Harun al Raschid sitting under a tree.") (citing POUND, *supra* note 40, at 355-56); *see also* POUND, *supra* note 40, at 355 (identifying "Oriental justice," as an example of "administration of justice without law . . . [in which] the will of the judge and his personal sense of what should be done to achieve a just result in the cause before him" "greatly preponderates . . . . as in the stories of Harun al Raschid in the Arabian Nights, where one wrongdoer who tells a clever story and amuses the Commander of the Faithful will go free while the severest penalty will be inflicted on another who adds dullness to no greater crime and bores his judge.").

97. *See* Marie A. Failinger, *Islam in the Mind of American Courts: 1800 to 1960*, 32 B.C. J.L. & SOC. JUST. 1, 13-28 (2012) (citing examples of American references to *kadijustiz* and to Islamic law more generally). To be clear, I do not claim that *kadijustiz* is the sum total of judicial knowledge or citation of Islamic law. State and federal judges have referenced Islamic law since its founding—at times lamenting it as primitive and perpetuating moral ills such as polygamy and at other times to praising it for maintaining moral laws such as the ban on usury. Moreover, some citations of *kadijustiz* have been positive rather than negative. *See infra* notes 165-71.

98. Terminiello v. Chicago, 337 U.S. 1, 11-12 (1949) (Frankfurter, J., dissenting).

99. *See id.* at 2-3 (explaining petitioner's violation); *see also* LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY 58 (1989) (suggesting Justice Frankfurter may have gotten his

the petitioner argued that the ordinance, as applied, violated his First Amendment right to free speech. He further argued that the Court should reverse his conviction because he had not himself used "fighting words" or other derogatory speech that would place his comments beyond the scope of constitutional protections.[100] The majority declined to reach that issue, holding instead that the ordinance was unconstitutional on its face.[101] Writing for the majority, Justice William Douglas noted that the state court judge defined the statutory phrase in question—"breach the peace"— to mean "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[102] Each of these meanings were in contravention of the First Amendment's protection of free speech, a major function of which "under our system of government is to invite dispute."[103] The Court reversed the conviction on the grounds that the ordinance was unconstitutional.[104]

Justice Frankfurter objected. It was not that he did not agree on the merits of protecting the substantive constitutional right to free speech. Instead, he thought that the Supreme Court violated its own constitution-based *procedures* for adjudicating significant cases or controversies raised in lower courts.[105] In this case, he argued, the issue was not significant in the usual sense because the ordinance was civil rather than criminal, and there was only a $100 fine at stake (though he was careful to say that the importance of free speech could not be quantified).[106] More egregiously, he argued, there was no federal case or controversy because no one had challenged the constitutionality of the ordinance, nor even objected to the jury instructions. Instead, he complained that the Court had taken it upon itself to reverse a state court interpretation of its own law in order to protect a federal question never raised:[107]

> For the first time in the course of the 130 years in which State prosecutions have come here for review, this Court is today reversing a sentence imposed by a State court on a ground that was urged neither here nor below and that was

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"picture" of the *qāḍī* from a statement issued by an English Court of Appeals). Years before, Lord Justice Goddard had stated that "'the court . . . is really put very much in the position of a Cadi under the palm tree. There are no principles on which he is directed to act. He has to do the best he can in the circumstances, having no rules of law to guide him.'" *See* ROSEN, *supra*, at 58 (quoting Lord Justice Goddard).

100. *See Terminiello*, 337 U.S. at 4.

101. *Id.*

102. *Id.*

103. *Id.*

104. Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949) (citing Stromberg v. California, 283 U.S. 359 (1931)) ("[J]udgment of conviction based on a general verdict under a state statute was set aside in that case, because one part of the statute was unconstitutional.").

105. *See* U.S. CONST. art. III, § 2.

106. *See Terminiello*, 337 U.S. at 12 (Frankfurter, J., dissenting).

107. *See id.* at 9 (contrasting this case with facts and legal issues raised in *Stromberg*).

explicitly disclaimed on behalf of the petitioner at the bar of this Court.[108]

Justice Frankfurter complained that, by doing so, the Court had entered the realm of *kadijustiz*, which was unbounded by the constraints of law. Appealing to emotion, he exclaimed in his dissent: "This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."[109]

What precisely was Justice Frankfurter rejecting? It seems that he invoked *kadijustiz* to condemn the Court for privileging a constitutional right to free speech over a constitutional procedure requiring litigants to raise a case or controversy to trigger the Court's jurisdiction. That is, the Court failed to live up to Justice Frankfurter's larger ambition for the law to be "bound by rules and principles" such that "each legal decision . . . should be justifiable not just by the good that it does but as part of the fabric of the law."[110] Though hidden beneath the cloak of mere citation to Islamic law, his invocation of *kadijustiz* was an accusation that the Court was unguided by textual rules, and had elevated substance over procedure.

In another free speech case several decades later, Judge Richard Cardamone of the Second Circuit Court of Appeals similarly invoked this sense of *kadijustiz* when assessing the right of federal courts to review laws and regulations on First Amendment grounds: "A court's power to review government restrictions imposed on the exercise of a First Amendment right occupies middle ground between extremes. *It does not kowtow without question to agency expertise, nor does it dispense justice according to notions of individual expediency 'like a kadi under a tree.'*"[111] Through mixed metaphors of *kadijustiz*-style law from the far and near east—both equally objectionable forms of foreign law[112]—Judge Cardamone was suggesting that the judicial ability to review orders for substantive constitutional violations was wide, but not so wide as to accommodate substance over procedure in the exercise of unfettered discretion based solely on the equities of a case. In that case, Judge Cardamone had concluded that the scope of judicial authority allowed the court to overturn a New York City police order precluding Catholic homosexuals from demonstrating in front of St. Patrick's Cathedral during the New York City Gay Pride Parade on free speech grounds.[113] But in doing so,

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108. *Id.* at 8-9.

109. Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

110. For a basic commentary on the meaning behind this statement, see CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 2 (2004), explaining that Frankfurter's objection to the "kadi under a tree" reflected his larger ambition about the role of judges and courts.

111. Olivieri v. Ward, 801 F.2d 602, 606 (2d Cir. 1986) (emphasis added) (quoting *Terminiello*, 337 U.S. at 11 (Frankfuter, J., dissenting)).

112. *See generally* RUSKOLA, *supra* note 46.

113. *See id.* at 607; *see also infra* Part II.C (discussing interplay between federal judicial review and

he was careful to elucidate that, because it was based on substantive constitutional grounds that had been properly raised, the court's decision was no *kadijustiz*.[114]

Other cases followed the theme of *kadijustiz* as anti-textualist substance-over-procedure decision-making beyond the constitutional law context. One example of a statutory interpretation case is *Stewart v. Thorpe Holding Co. Profit Sharing Plan*.[115] Here, the majority of a Ninth Circuit Court of Appeals panel held that the former spouse of a pension plan participant was entitled to sue for a community property share of her former husband's pension distribution.[116] The district court had ruled that she did not have standing under the Employee Retirement Income Security Act (ERISA).[117] Agreeing with the lower court, Judge Diarmuid O'Scannlain complained that "the majority interpret[ed] ERISA in a manner inconsistent with the statute's plain meaning."[118] In dissent, he noted that the majority only disregarded the text of the statute because it wanted to serve equity over law, using anti-textualism to elevate substance over procedure in the way of *kadijustiz*:

> Stewart is a sympathetic plaintiff, and the majority's rewriting of the [statutory] requirements is, no doubt, motivated by the best of intentions. What the majority fails to realize, however, is that the days of Chancery are over. We must decide cases based on the law, not on our subjective view of the equities . . . . As aptly stated by Justice Frankfurter, "[t]his is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."[119]

In these and other cases, invoking *kadijustiz* was a simple way for dissenting judges to accuse those with contrary opinions of equity-driven, consequential, anti-textualist activism in both constitutional and statutory interpretation.[120]

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administrative regulations).

114. *See Olivieri*, 801 F.2d at 607.

115. 207 F.3d 1143 (9th Cir. 2000).

116. *See id.* at 1158.

117. *See id.* at 1147 (detailing procedural history); *see also* Employee Retirement Income Security Act of 1974 §§ 206, 502, 514, 29 U.S.C. §§ 1056(d)(1), 1132(a)(1), 1144(a) (2012).

118. *Stewart*, 207 F.3d at 1158 (O'Scannlain, J., dissenting) (discussing standing requirements under ERISA in the following terms: "In order to have standing to bring ERISA claims of the type brought by Stewart, a person must be a 'participant' or 'beneficiary' of a covered plan," which the purported state statutory restrictions did not disturb or preempt).

119. *Id.* at 1164 & n.9 (footnote omitted) (quoting Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting)).

120. Not all such references come in dissents. For example, a unanimous panel of judges on the Fourth Circuit Court of Appeals concluded that, despite that court's leanings toward equitable consideration of compensating an accident victim, the Virginia statute at issue clearly did not put the accident within coverage of the insurance policy, and that to conclude otherwise would be the anti-textual equivalent of *kadijustiz*. *See* Clarke v. Harleysville Mut. Casualty Co., 123 F.2d 499, 502 (4th Cir. 1941). The *Clarke* court referenced

Citation to *kadijustiz* was *not*, however, an argument that acknowledged two legitimate and competing values, or that made specific arguments about why the court should choose the one set of values over the other (here: marital property rights and fairness versus arguments about legislative supremacy on a textual reading).

B. Kadijustiz *as Anti-Federalism: Judicial Discretion in Favor of Federal Rules over State Sovereignty*

A second interpretation of *Terminiello* was that the decision—and the embodiment of *kadijustiz* by its critic—was *against federalism.*[121] In addition to the alleged procedural violation of deciding a constitutional issue that no one had alleged, Justice Frankfurter also complained that the Supreme Court majority only came to its decision by ignoring a state interpretation of its own ordinance.[122] In other words, the Court had not only privileged substance over procedure, it had also privileged federal judicial power over states rights.

Judges cited *kadijustiz* in other cases that presented federalism issues, on complaints that courts allowed the federal government to supplant state action. An illustrative case arose in a 1991, when a federal court of appeals was presented with a question of whether federal law prevailed over state law standing rules in federal prison litigation.[123]

In *Harris v. Reeves*, the Third Circuit Court of Appeals considered whether a Philadelphia district attorney had standing to intervene in federal prison litigation pursuant to a statute passed specifically to confer that standing.[124] In a class action suit in which inmates contested local federal prison conditions, Philadelphia District Attorney Lynne Abrams had attempted to intervene, on the argument that she would have an interest in administering any changes to conditions or releases of inmates.[125] Rule 24(a)(2) of the Federal Rules of Civil Procedure governed the district attorney's ability to intervene.[126] That rule specified intervention as of right, provided the intervener had "sufficient

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kadijustiz in the majority opinion as follows:

> The words in paragraph two of the Virginia statute are quite clear and seem to express a positive and clean-cut legislative intent. The[n] we cannot torture these words into fanciful meanings; we cannot ignore what appears to have been a crisp legislative distinction expressed in terms that are anything but uncertain. We sit, after all, as an appellate court, administering justice under the law, not as an ancient oriental cadi, dispensing a rough and ready equity according to the dictates of his own unfettered discretion.

Id.

121. *See* Terminello v. Chicago, 337 U.S. 1, 9 (1949) (Frankfurter, J., dissenting).
122. *See id.* at 8-9.
123. *See generally* Harris v. Reeves, 946 F.2d 214 (3d Cir. 1991).
124. *See id.* at 221.
125. *See id.* (reviewing district attorney's argument).
126. *Id.* at 222 n.10.

interest in the litigation."[127] This was the second time this issue was before the Third Circuit. When the issue was first raised in a 1987 case, *Harris v. Pernsley*, the court concluded that she had no standing.[128] The *Pernsley* court determined that the number and relevance of her "legal duties under Pennsylvania law" did not confer on her a right to intervene at that time.[129]

One year later, the Commonwealth passed a statute conferring "automatic standing" on the district attorney in any federal prison litigation.[130] The statute was specifically designed to override the *Pernsley* decision.[131] Yet when the issue came before the court for a second time, it concluded that the district attorney still had no right to intervene.[132] Even though the statute's language purported to create such a right, it had not created a corresponding "legal duty or power regarding prison conditions or administrative responsibilities over the Philadelphia prisons."[133] Because the duties were the same as when the court decided *Pernsley* four years prior, the *Reeves* court concluded that the state attempt to create standing to intervene had failed, and that federal law rather than state law properly regulates intervention.[134]

Judge Ruggero Aldisert, like Justice Felix Frankfurter before him, objected. For him, this decision was the equivalent of allowing federal judges to issue rules regarding state law on constitutional grounds that were impermissibly applied because no one had raised them and because the state had issued a clear statement of law to the contrary.[135] This was problematic because it

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127. *See* FED. R. CIV. P. 24(a) (providing rules governing "intervention of right").

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Id.; *see also* Harris v. Pernsley, 820 F.2d 592, 596 (3d Cir. 1987).

128. *Pernsley*, 820 F.2d at 604.

129. *Id.* at 597-99.

130. 18 PA. CONS. STAT. ANN. § 1108 (West 2014) ("The district attorney shall receive written notice of, and shall have automatic standing and a legal interest in, any proceeding which may involve the release or nonadmission of county prisoners, delinquents or detainees due to the fact, duration or other conditions of custody.").

131. *See* Harris v. Reeves, 946 F.2d 214, 227 (3d Cir. 1991) (Aldisert, J., dissenting) (detailing legislative history).

132. *See id.* at 224 (majority opinion) (holding § 1108 of the Commonwealth's statute does not confer standing).

133. *Id.* at 220 (citing Harris v. Pernsley, 820 F.2d 592, 602 (3d Cir. 1987)).

134. *See id.* at 222 (citing right to intervene as question of federal law unchanged by Pennsylvania law).

135. *See Reeves*, 946 F.2d at 228 (Aldisert, J., dissenting). Judge Aldisert stated:

> [I]t flies far beyond the outer limits of mere sophistry or fallacious reasoning and becomes a federal judicial fiat rendering a state statute null and void. No one has alleged, in either the district court or this court, that section 1108 is unconstitutional under the Pennsylvania or federal constitutions, and unless and until this statute is declared unconstitutional—either because it violates a specific

contradicted the famous *Erie* doctrine, which established state laws as the rules of decision in federal courts.[136] In Judge Aldisert's evaluation:

> [W]e saw a federal district judge refuse to recognize the unambiguous language of a state statute granting standing and conferring a legal interest. When this was done, we did not witness the traditional judicial process at work. In its place we saw the exercise of the type of naked judicial power that *I thought went out with the demise of the kadi, the ancient Moslem magistrate who dispensed justice under a palm tree, beholden to no authority but the dictates of his own will.*[137]

What he failed to say explicitly, when invoking *kadijustiz*, was that he was arguing for states' rights federalism above federal judicial authority; and he accordingly failed to express why. He had instead made a pathetic argument that offered a nonspecific reason for *why* the majority should have preferred his value of federalism over federal rules.

As did the *Terminiello* Court for Justice Frankfurter, the *Reeves* court had, for Judge Aldisert, violated what is now typically expressed as the federalism canon of statutory interpretation. According to this canon, "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that [a] federal law overrides'" "the usual constitutional balance of federal and state powers."[138] Here the court neither found a constitutional violation, nor did it defer to state law that had gone through the proper legislative process. This was a kind of anti-federalism that, in Judge Aldisert's view, amounted to *kadijustiz*.

Similar federalism concerns prompted a dissenting judge's invocation of *kadijustiz* in the Ninth Circuit case that recognized a constitutional right to physician-assisted suicide.[139] Judge O'Scannlain memorably objected to what he saw as the arbitrariness of the majority of the Ninth Circuit's en banc court,

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> substantive provision or because it violates the Supremacy Clause of the United States Constitution—we must give it full force and effect.

Id.

136. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71 (1938); *Reeves*, 946 F.2d at 228 (Aldisert, J., dissenting) (citing *Erie*, 304 U.S. at 71, and 28 U.S.C. § 1652) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply.").

137. Harris v. Reeves, 946 F.2d 214, 229 (3d Cir. 1991) (Aldisert, J., dissenting) (emphasis added).

138. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985)). For a recent restatement of the federalism canon for criminal cases, see Bond v. United States, 134 S. Ct. 2077, 2083 (2014): "Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach."

139. *See* Compassion in Dying v. Washington, 85 F.3d 1440, 1440, 1450 & n.6 (9th Cir. 1996), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997).

this time for recognizing a right that had failed to prevail in a Washington statewide referendum.[140] He argued that, instead of dispensing justice like the ancient Muslim official "under a tree" (this time in the person of Hārūn al-Rashīd), in the absence of a clear constitutional standard or violation, states rather than the federal government should decide the legality of the thorny issue of physician-assisted suicide.[141] Agreeing with the dissent, the Supreme Court reversed a year later.[142] In both cases, *kadijustiz* was convenient shorthand for arbitrariness, discretion, and substance over procedure. In both cases, it was also only an *implicit* argument in favor of federalism, but in neither case did the judges articulate reasons *why* the judges with whom they disagreed should choose between the competing values of state sovereignty over federal power.

C. Kadijustiz *as Anti-Deference: Judicial Activism on Grounds of Equity over Reasonableness Restraint*

A third interpretation of *Terminiello*—and of Justice Frankfurter's *kadijustiz* accusations—was that the majority decision was an enlargement of judicial restraint in ways that improperly contravened principles of judicial deference and power. In addition to deference to state interpretation of local ordinances on federalism grounds, this restraint could also include interpretations of statutes administered by government agencies.

Deference to agency interpretations is due—as later articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[143]—to *reasonable* interpretations of statutes made by the government agencies charged with enforcing them. Courts sometimes conferred agency deference before *Chevron*, and at other times adopted a conflicting practice of de novo review of interpretations of agency statutes.[144] One reason for deference is that agencies

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140. *See id.* at 1440 (O'Scannlain, J., dissenting) (suggesting error in majority's refusal to rehear case).

141. *See id.* at 1450 (Trott, J., dissenting, joined by O'Scannlain and Kleinfeld, JJ.) (asserting physician-assisted suicide as state issue). Judge O'Scannlain concurred in Judge Trott's dissent, which stated:

> By promulgating a new constitutional right, one unheard of in over two hundred years of American history, six men and two women-endowed with life tenure and cloaked in the robes of this court-have enacted by judicial fiat what the people of the State of Washington declined to do at the polls only five years ago.

Id. The dissent continued, "If the only limit on our authority is the grandiloquence of our rhetoric, then we live by fiat of the judiciary. Dean Griswold called this, 'Justice as administered by Harun al Rashid sitting under a tree.'" *Id.* (citing Griswold, *supra* note 96).

142. Washington v. Glucksberg, 521 U.S. 702, 709 (1997).

143. 467 U.S. 837 (1984).

144. For a comprehensive review of agency deference between 1984 and 2006, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513 (1989) (emphasizing general deference to administrative agencies often ignored in interpreting statutory terms).

have specialized expertise in interpreting technical statutes.[145] In contravention of those norms, this third sense of Justice Frankfurter's *kadijustiz* refers to any judicial decision that fails to pay deference to any specialized, and therefore reasonable, agency interpretation.

The First Circuit Court of Appeals illustrated this sense of *kadijustiz* in *United States v. Murray*,[146] decided just a few years before *Chevron*. There, the court examined an agency interpretation of laws barring knowing and willful importation of products into the United States for commerce by means of false statements as to the country of origin.[147] The defendant, Mr. John Murray, Jr., had been tried for importing glue that originated in China, and that he represented as having come from Holland because it had been processed and blended with other glues there.[148] Federal regulations require importers to announce the "country of origin" of their products, defined as "the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a *substantial transformation* in order to render such other country the 'country of origin.'"[149] Federal law further makes it a crime to defraud the Customs Service by offering false or misleading statements that obstruct its lawful administration of customs laws.[150] Murray was convicted in federal district court.[151]

On review, the First Circuit affirmed the conviction. It concluded that glue purchased in China originated in China, even if blended with other glues elsewhere.[152] The blending process, it stated, did not meet the plain meaning of "substantial transformation" within the meaning of the regulation, unless the defendant could show that the glue had increased in value by any particular percentage or amount.[153] It viewed contrary interpretations by the Customs Service as unprincipled and irrelevant. The court noted:

> We feel no obligation to defer or give much weight to those administrative rulings which are not supported by reasoning, which are "unprincipled," and

145. *See Chevron*, 467 U.S. at 844.

146. 621 F.2d 1163 (1st Cir. 1980).

147. *Id.* at 1169.

148. *Id.* at 1167 (describing facts).

149. 19 C.F.R. § 134.1(b) (2015) (emphasis added) (implementing Tariff Act of 1930 as amended, 19 U.S.C. § 1304 (2012), and Tariff Schedules of the United States, 19 U.S.C. § 1202 (2012)).

150. *See* 18 U.S.C. § 371 (2012) (providing conspiracy provisions); 18 U.S.C. § 542 (2012) (outlining false statement provisions).

151. *Murray*, 621 F.2d at 1165.

152. United States v. Murray, 621 F.2d 1163, 1171 (1st Cir. 1980).

153. *See id.* at 1167-69. *Murray* cited dictionary definitions, statutory purpose, and common usage to interpret "substantial transformation," and concluding that the lower court had construed the term as it "would naturally occur to a person of common education and common sense who realized, as he should from reading the whole of 19 C.F.R. § 134.1(b), that the general rule was to treat the country where an article was produced as the 'country of origin' in determining the applicable tariff rate." *Id.*

> which Judge Learned Hand would have analogized to decisions by a Kadi at the gate. This is not a situation in which the agency entrusted by Congress with the task of applying a statute has adopted a view which not only reflects a greater familiarity than ours with the intricacies of the statute, but also embodies a principle or rationale which is applicable beyond the particular case in hand.
>
> Nor is there any evidence that the defendant or those with whom he was associated relied upon any rulings of the Customs Service when they made statements or acted with respect to the glue here involved.[154]

This *kadijustiz* reference was to a lecture by Judge Learned Hand, complaining of the enlargement of federal law without any principled means to resolve particular cases.[155] This comment more broadly referred to the sort of decision-making that suggested a notion that we might call administrative *kadijustiz*—where *agencies* act arbitrarily or with respect to equity over law. But the judge had failed to spell out *why* the court should regard agency expertise as the most relevant factor for deference in that case, or indeed why he viewed it to be absent.

Interestingly, this sense of *kadijustiz* yields opposite rules of deference in arbitration contexts of labor law, without losing the work done by the term. A review of arbitration decisions in labor disputes shows that courts tend to defer to arbitrators. Writing for the Second Circuit in 1968, Judge Friendly once pointed out that deference was due to an arbitrator even though he disagreed with the equities of an arbitration award in the following terms: "*[I]f we were dispensing Cadi justice, we would be disposed to rule in defendant's favor.* However, the limited scope of judicial review under the Federal Arbitration Act forbids our doing so . . . ."[156]

Judge Posner came to a similar conclusion on the Seventh Circuit Court of Appeals in his review of an arbitration award in a 1984 labor dispute:

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154. *Id.* at 1169-70 (emphasis added) (citation omitted).

155. *See* Learned Hand, *Some Modern Tendencies in the Law*, 43 HARV. L. REV. 1165, 1167 (1930) (book review).

> Just what we are to do with the increasing avalanche of reports is another matter . . . . The assumption that a precedent rules, if on all fours, becomes intolerable as more and more accumulate . . . . There must be some more accessible means of discovering authority; else the burden will be more than we can carry, and we shall separate helterskelter. The problem is not unconnected with what the first lecture considered; an inaccessible rule is no rule at all; decision is left to the inspiration of the moment, an involuntary substitution of the kadi at the gate.

Id.

156. Bos. & Me. Corp. v. Ill. Cent. R.R. Co., 396 F.2d 425, 425 (2d Cir. 1968) (emphasis added) (holding limited scope of Federal Arbitration Act requires courts to enforce arbitration judgments as "[t]he grounds for vacating an arbitration award are exceedingly few").

> The arbitrator purported to be interpreting the language of the collective bargaining agreement in finding that the [preferential hiring] clause had been violated. His interpretation may very well have been incorrect, but that is none of our business. *Our function is complete when we are satisfied that the arbitrator was not dispensing qadi justice but was construing the collective bargaining agreement.*[157]

In the first case, the court supported the arbitration award to avoid the trap of dispensing *kadijustiz* on the equities of the case.[158] In the second case, the court supported the arbitration award because it was satisfied that the arbitrator was not guilty of *kadijustiz* as a lack of reasonableness.[159] That is, the court was satisfied that the arbitrator's award was grounded in *some* rational basis. Here, the bar for deference was low.

In other words, arbitration was different from agency decision-making. In the former, deference was due on statutory grounds, and in the latter, it was due on interpretive grounds relevant—in principle—to the degree of agency expertise among other factors noted in *Chevron*.

Despite opposite outcomes, *kadijustiz* was used to the same end in the administrative law and labor law-arbitration contexts. In administrative law, the term became an accusation of anti-deference when dissenting judges

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157. Miller Brewing Co. v. Brewery Workers Local Union, 739 F.2d 1159, 1163 (7th Cir. 1984) (emphasis added); *see also* Hillcrest Foods, Inc. v. United Food & Commercial Workers Union, 753 F. Supp. 1541, 1543, 1546 (D. Kan. 1990). The *Hillcrest Foods* court noted:

> The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations . . . . "The arbitrator purported to be interpreting the language of the collective bargaining agreement in finding that the [preferential hiring] clause had been violated. His interpretation may very well have been incorrect, but that is none of our business. Our function is complete when we are satisfied that the arbitrator was not dispensing qadi justice but was construing the collective bargaining agreement."

Hillcrest Foods, 753 F. Supp. at 1543, 1546 (alteration in original) (citing Labor Management Relations Act of 1947, ch. 120, tit. II, § 203, 61 Stat. 154, 29 U.S.C. § 173(d)) (quoting *Miller Brewing* approvingly to uphold an arbitration award). For a similar characterization in a federal district court affirming an injunction and relief pending arbitration in another labor dispute, see Trans World Airlines, Inc. v. Int'l Ass'n of Machinists & Aerospace Workers (IAM) AFL-CIO, 629 F. Supp. 1554, 1560 (W.D. Mo. 1986). The *Trans World Airlines* court stated:

> Perhaps arbitrators generally do not consider themselves bound by precedents. Arbitration of grievances is sometimes likened to the dispensing of 'rough and ready equity' in the manner of an 'ancient oriental cadi" . . . . Consistency of construction . . . is important to stable labor relations in the industry . . . . I would therefore expect the arbitrator to reject what may have been IAM's original intention in 1946 and what may be a conventional construction of the language in other industries and to follow the arbitration precedent of 1970.

629 F. Supp. at 1560 (footnotes omitted).

158. *See Bos. & Me. Corp.*, 396 F.2d at 425.

159. *See Miller Brewing Co.*, 739 F.2d at 1163.

perceived the majority to be ignoring the rule of deference. In labor law, it became a tool through which judges distanced themselves from accusations of anti-deference in reviews of arbitration decisions arising from labor disputes—where the call for deference was stronger and the bar for reasonableness lower than in the agency context.

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The Weberian notion of *kadijustiz* popularized by *Terminiello* dominated judicial citation of Islamic law in the last half-century.[160] Beginning in the mid-twentieth century, several federal judges deployed *kadijustiz* to accuse a court or the majority of a court of issuing decisions with which that dissenting judge disagreed.[161] State judges followed suit, often quoting Justice Frankfurter's dissent in *Terminiello* to voice their claims in self-evidently objectionable language without having to specify their reasons.[162] One court

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160. For a partial list and commentary, see Asifa Quraishi, *On Fallibility and Finality: Why Thinking Like a Qadi Helps Me Understand American Constitutional Law*, 2009 MICH. ST. L. REV. 339, 339-40 & nn.1-2 (listing nine of sixteen federal cases and thirteen state cases invoking *kadijustiz*). For additional cases, see *infra* notes 161-65.

161. *See* United States v. Freeman, 357 F.2d 606, 613 (2d Cir. 1966). *The Freeman* court noted:

> As a distinguished attorney and former Secretary of State has recently and perceptively observed in another context, federal judges are hardly empowered to satisfy a mere "desire for change in the law in accordance with the decider's own conception of right. (They) may conscientiously be seeking to administer justice, but it is personal justice—the justice of Louis IX or Harun al-Rashid, not that described on the lintel of the Supreme Court Building, 'Equal Justice Under Law.'"

Id. (alteration in original) (quoting DEAN ACHESON, MORNING AND NOON 69 (1965)); *see also* Colonial Trust Co. v. Goggin, 230 F.2d 634, 635-36 (9th Cir. 1955) (defeating bankruptcy referee's decision ignoring state statute because plaintiff had no "intention . . . that the adjudication of its title and right to possession should proceed upon such abstract theory of justice which might be entertained by an oriental cadi."); New Alliance Party v. Dinkins, 743 F. Supp. 1055, 1067 (S.D.N.Y. 1990) ("The Second Circuit, in contrast to the District of Columbia Court of Appeals, has ruled that it is appropriate for federal courts to set forth detailed *procedures* in balancing the [substantive, constitutional] interests involved.") (emphasis added) (quoting Terminiello v. Chicago, 337 U.S. 1, 11 (Frankfurter, J., dissenting)) (citing Olivieri v. Ward, 801 F.2d 602, 606 (2d Cir. 1968)).

162. In recent years, for example, the Rhode Island Supreme Court has become fond of the trope of *kadijustiz*, and in *Credit Union Central Falls*, merely asserted that the court could not address moot orders by citing that trope: "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency." Credit Union Cent. Falls v. Groff, 871 A.2d 364, 368 (R.I. 2005) (quoting *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting)) (citing Sullivan v. Chafee, 703 A.2d 748, 753 (R.I. 1997)); *see also Sullivan*, 703 A.2d at 752-53. The *Sullivan* court stated:

> [B]ecause "our whole idea of judicial power" is entailed within the concept of courts applying laws to cases and controversies within their jurisdiction, a court issuing declaratory relief is treading on thin legal ice every time it chooses to skate around the case or controversy requirement. Like the United States Supreme Court, "[t]his is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."

tied Justice Frankfurter's notion to Max Weber's notion explicitly:

> The *New Encyclopedia Britannica* defines kadi . . . as "a Muslim judge who renders decisions according to the Shari'ah, the canon law of Islâm." Justice Frankfurter was referring to Max Weber's term "kadi justice," used to describe a "legal system oriented 'not at fixed rules of a formally rational law but at the ethical, religious, political, or otherwise expediential postulates of a substantively rational law.'"[163]

Other state court judges have similarly cited Max Weber or Justice Frankfurter's *Terminiello* dissent in attempt to distinguish well-reasoned opinions from *kadijustiz*.[164] In nearly all of these cases, the citation of

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703 A.2d at 752-53 (quoting *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting)).

163. *Credit Union Cent. Falls*, 871 A.2d at 368 n.3 (citing 9 THE NEW ENCYCLOPEDIA BRITANNICA 830 (15th ed. 1988)); Pierre Bourdiew & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 825 n.33 (1987) (quoting MAX WEBER ON LAW IN ECONOMY AND SOCIETY 213 & n.48 (Max Rheinstein ed., 1954) (translator's note)).

164. *See, e.g.*, Konover v. West Hartford, No. 538098, 1996 Conn. Super. LEXIS 1097, at *13 (Conn. Super. Ct. 1996). In *Konover*, the court stated:

> The role of the court on appeal is not to sit in Solomonic judgment to consider the value of whatever property Konover may happen to own. "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency." The role of the court is instead to decide cases properly brought to it by appropriate legal procedures.

Id. (quoting *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting)). Similarly, another Connecticut Superior Court noted,

> Judges cannot, in Justice Frankfurter's telling phrase, "sit like a kadi under a tree dispensing justice according to considerations of individual expediency." I do not know what tax liability a kadi under a tree might visit upon Raveis. It is, however, axiomatic that judges must act according to law. The relevant law does not authorize any of the relief that Raveis seeks.

William Raveis Real Estate, Inc. v. Comm'r of Revenue Servs., No. 387235, 1994 WL 324417, at *8 n.2 (Conn. Super. Ct. June 24, 1994) (quoting *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting)). Judge Blue also noted that "[r]eaders of the *Arabian Nights* may recall that a kadi was a judge in Islamic religious matters." *William Raveis Real Estate*, 1994 WL 324417, at *8 n.2 (citing THE BOOK OF THE THOUSAND NIGHTS AND A NIGHT, *supra* note 87, at 21 n.1); *see also* Espy v. Espy, 238 Cal. Rptr. 182, 191 (Ct. App. 1987) (Poché, J., dissenting) (quoting *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting)) ("Years ago Justice Frankfurter chided his colleagues for a much less disturbing departure from the principles of appellate restraint: 'This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.'"); Coldwell Banker Commercial Real Estate Servs. v. Calabrese Dev. Corp., No. 101887, 1993 WL 78588, at *4 (Conn. Super. Ct. Mar. 11, 1993). The *Coldwell Banker* court stated:

> Of course, in all likelihood, the legislature never anticipated the scenario before the court in this case, but while this provides some reason for hope that the legislature will once again look at the statute, it cannot provide an avenue for escape from the statute's present clear and express words. Society requires its judges to administer justice within certain rules and guidelines, and there are

kadijustiz served as a pathetic argument that was a form of repudiation by contrast—that is, a negative model—typically without specifying the reasons why their preference in a set of contested value should prevail.

* * *

Lest I leave a monochromatic picture of *kadijustiz*, it is worth noting that American courtroom depictions of the *qāḍī* have not always adopted an aversive model. This fact has important implications for the strong link that I have been trying to indicate between the classroom and the courtroom when it comes to legal education and judicial information. But it is something that would need to be further explored to connect the correlative dots in a causative direction. For now, consider a few examples of invocations of the *qāḍī* as the positive citation of foreign law.

Nineteenth and early twentieth-century judicial citations of the *qāḍī* were no doubt informed differently from the fictitious idea, that is, before Justice Frankfurter and comparative law scholarship popularized Weberian and Schachtian notions of the *qāḍī*.[165] In the 1850s, a district court judge invoked

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> limits beyond which judges simply may not go. "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."

1993 WL 78588, at *4 (quoting *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting)); *see also* Max Weber, *Bureaucracy*, *in* FROM MAX WEBER, ESSAYS IN SOCIOLOGY 196, 216-21 (H. H. Gerth & C. Wright Mills eds., 1946) ("defining Kadi justice as informal judgments rendered according to individual decisionmaker's ethical or practical valuations"); Dexter v. Idaho State Bar Bd. of Comm'rs, 780 P.2d 112, 115 (Idaho 1989) (citing Weber, *supra*, at 196, 216-21 ("The current administration of moral character criteria is, in effect, a form of Kadi justice with a procedural overlay."); Barrett v. Lubin, 188 A.D.2d 40, 45 (N.Y App. Div. 1993). The *Barrett* court stated:

> Although courts will give deference to an administrative agency's interpretations of the statutes and regulations that it administers, courts are not exponents "of what Max Weber once referred to as 'Khadi justice,' in which the great caliph would sit on his cushion and decide each case intuitively, without regard to precedents or reasoned elaboration of law."

188 A.D.2d at 45 (quoting Kaufman, *supra* note 92, at 208); *see also* First Fed. Sav. & Loan Ass'n v. Vandygriff, 639 S.W.2d 492, 500 (Tex. Ct. App. 1982) ("Neither APTRA, the Savings and Loan Act, nor the Texas Banking Code of 1943 contemplate that the Commissioner's adjudicatory powers be exercised in oriental fashion where he sits 'like a kadi under a tree dispensing justice according to considerations of individual expediency.'"). The *Vandygriff* court quoted Justice Frankfurter's *Terminiello* dissent and added an explanatory—albeit inaccurate—footnote: "'Kadi' is a variant of 'cadi,' from the Arabic word pronounced 'gada,' from which the Spanish word 'alcalde' is also derived, and refers to a civil judge among the Turks, Arabs, Persians, and others, usually a judge of a town or village." *Vandygriff*, 639 S.W.2d at 500 (citing OXFORD ENGLISH DICTIONARY 314 (Compact ed. 1971)).

165. While the mere mention of Islamic legal-historical figures of the *qāḍī*, 'Umar, and Hārūn al-Rashid clearly suggest that judges obtained their knowledge of *kadijustiz* from academic and literary writings about Islamic law, identifying the precise records available to the issuing judges, temporally and regionally, is an avenue worth pursuing though beyond the scope of this essay. For a brief discussion, see *supra* notes 87-90 and accompanying text.

the *qāḍī* to contrast his restrained and law-abiding common law judgments from what he saw as moralistic and discretion-expanding civil law judgments.[166] In a common law context farther afield, a member of the British Parliament defended the *qāḍī* from inaccurate references to a *kadijustiz* depiction of him.[167]

This same sentiment prevailed in the 1920s and 1930s. By the time the Supreme Court got a permanent home in 1935, its architects featured the bust of Prophet Muḥammad as one of several just lawgivers in a frieze that included Confucius, Moses, Hugo Grotius, and John Marshall.[168] During this same period, American state court judges also signaled that they saw the *qāḍī* as a paragon of justice. Several of these judges in the northwest (especially Montana, Oregon, and Utah) referred positively to the instructions given by Islam's second caliph, 'Umar, to his first judge, Abū Mūsā al-Ash'arī.[169] For

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166. *See* Turner v. Hand, 24 F. Cas. 355, 364 (D.N.J. 1855). Justice Grief wrote:

> An ecclesiastical court may assume like cadis or sultans to dispose of rights of property on principles of compromise and convenience, without troubling themselves to find out the truth as to a contested instrument. But juries in a common law court exercise no such irresponsible power to dispose of men's property by such compromises to save themselves trouble of investigation.

Id. In a later decision Justice Grief wrote:

> I know that it was decided . . . that courts of admiralty have a wide discretion to allow expenses of this nature . . . . I must confess my decided repugnance to the exercise of discretionary power over men's property. This principle has been introduced from civil law courts. It partakes rather of the hall of the cadi, than of the judgment seat of the court . . . . "Sound discretion" is discretion as settled by rules. Otherwise it is sound only when you decide as the party seeking the decision wants. And hence in practice it would come to mean the notion, whim or caprice of the judge who exercises it.

The Margaret v. The Connestoga, 16 F. Cas. 716, 718-19 (E.D. Pa., 1851).

167. See 11 Feb. 1887, 310 PARL. DEB., H.C. 1264 (3d Ser.) (1887) (U.K.) (recording Mr. Sexton's, *Address in Answer to Her Majesty's Most Gracious Speech: Agrarian Affairs, Ireland* (Feb. 11, 1887)), in which he debates an amendment introduced by a Mr. Parnell calling for reform to law regulating land rents in Ireland:

> Why, Sir, umbrage has been felt at the comparison of Judge Curran to an Oriental Cadi who dispenses justice under the shadow of a palm tree. I think it is uncomplimentary to the judicial habits of a Cadi, who makes and concludes his Court. I never heard of a Cadi who after he rose from the shadow of the palm tree, and after the parties had left, took upon himself to set about revising his own decrees.

168. *See Symbols of Law: Information Sheet*, SUPREME COURT (May 23, 2002), *available at* http://www.supremecourt.gov/about/symbolsoflaw.pdf, *archived at* http://perma.cc/T8TV-NPCX (showing pictures).

169. For basic translations of and commentaries on the letter containing those instructions, see R. B. Serjeant, *The Caliph 'Umar's Letters to Abū Mūsā al-Ash'arī and Mu'āwiya*, 29 J. SEMITIC STUDS. 65 (1984); TYAN, *supra* note 79; D.S. Margoliouth, "Omar's Instructions to the Kadi," J. ROYAL ASIATIC SOCIETY OF GREAT BRITAIN AND IRELAND 307 (1910). For other eighteenth- and nineteenth-century treatments, see Serjeant, *supra*, at 65-66 (citing William MacGuckin de Slane, *Notices et extraits*, partial trans., LES PROLÉGOMÈNES D'IBN KHALDOUN xix, 449 (1934-1938) [Fr.]; RICHARD J. H. GOTTHEIL, THE HISTORY OF THE

example, Chief Judge Callaway of the Supreme Court of Montana noted approvingly that one of his colleagues changed his mind upon reviewing the evidence in a case on rehearing:

> Considering the case upon motion for a rehearing, and as a result of an extensive study of the authorities, one of the Justices has changed his mind [on a trial court reversal in a three-two decision], now being of the opinion that the judgment ought to be affirmed. In coming to this conclusion he but followed the commendable rule of judicial conduct expressed a thousand years ago by Khalif Omar, instructing his first Kadi: "If today thou seest fit to judge differently from yesterday, do not hesitate to follow the truth as thou seest it; for truth is eternal, and it is better to return to the true than to persist in the false."[170]

EGYPTIAN CADIS vii (1908); JOSEPH FREIHERR VON HAMMER-PURGSTALL, ÜBER DIE ÜBERLIEFERUNG DES WORTES MOHAMMEDS. ALS FORTSETZUNG DES AUSZUGES AUS DEM COMMENTAR DES MESNEWI 206-207 (1852) [Ger.]).

170. McManus v. Fulton, 278 P. 126, 127 (Mont. 1929); *see also* Judson v. Bee Hive Auto Serv. Co., 297 P. 1050, 1051 (Or. 1931) (stating dismissal proper). The *Judson* court stated:

> Defendant urges that error was committed in holding that there was evidence to support the verdict. Believing that pride of opinion should not preclude correction of error, we will again give careful consideration to this case, thus following the admonition of an ancient lawgiver: "If today thou seest fit to judge differently from yesterday, do not hesitate to follow the truth as thou seest it; for truth is eternal, and it is better to return to the true than to persist in the false."

297 P. at 1051. In a second Oregon Supreme Court case, the court stated:

> The city again earnestly urges upon this court . . . that the act under consideration is a local law as applied to cities and therefore transcends article 11, § 2, of the Constitution of Oregon . . . . It is, indeed, a very important question, and, regardless of the former decision and the lapse of time since it was rendered . . . the court will again consider the matter as no question should ever be deemed settled until it is settled right . . . . Pride of opinion should never deter a court from confession of error. As stated by an ancient lawgiver: "If today thou seest fit to judge differently from yesterday, do not hesitate to follow the truth as thou seest it; for truth is eternal, and it is better to return to the true than to persist in the false."

City of Portland v. Welch, 59 P.2d 228, 231 (Or. 1936) (en banc). Both Oregon decisions were written by Judge Belt, both without citation to the *qāḍī* and or explicit reference to 'Umar—from whence the quote originated. A more recent reference to this theme from the same region came up in *Scarborough v. Granite School District*:

> In view of the fact that our statutes are to be liberally construed to effect their objectives and to promote justice, I would not extend, by implication, the terms of [the statute] . . . . The instant matter sparks recollection of the instructions given by the Khalif Omar, to his first Kadi c. 900 A.D.: "If thou seest fit to judge differently from yesterday, do not hesitate to follow the truth as thou seest it; for truth is eternal and it is better to return to the true than to persist in the false!"

531 P.2d 480, 483 & n.5 (Utah 1975).

Again, these alternative views of the *qāḍī*—at odds with *kadijustiz*—suggest a connection between legal education and judicial information about Islamic law. During the periods in which the scholarly view differed from the Weberian view, judges invoked *qāḍī* justice to different ends. During those times, the notion of *kadijustiz* popularized by Weber and Schacht had not yet come to dominate the literature that informed the courts.[171]

CONCLUSION

Kadijustiz is emblematic of pathetic argument and the negative citation of foreign law. This problem as it arises with respect to *kadijustiz* caricatures a certain type of obscurity of argument that Greene himself noticed in some pathetic dissents. Consider that of Justice Scalia in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[172] comparing *Roe v. Wade* to the author of the *Dred Scott* decision, Justice Roger Taney:

> There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."[173]

As Greene observes, Justice Scalia seems to suggest that "affirming a constitutional right to abortion is akin to affirming a constitutional right to keep slaves in federal territories."[174] But, he further observes,

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171. Precisely what did go into their legal education is a topic worthy of further exploration, though beyond the scope of this Essay.

172. 505 U.S. 833, 998, 1001 (1992) (Scalia, J., concurring in part and dissenting in part) (upholding Pennsylvania's abortion regulations without overturning women's right to seek abortions before the point of viability of the fetus—then construed as the third trimester—in *Roe v. Wade*, 410 U.S. 113 (1973)).

173. *Id.* at 1001-02 (alteration in original) (quoting joint opinion, which also decried potential of "unprincipled emotional reactions" to its decision).

174. Greene, *supra* note 15, at 1420.

> the argument is occluded beneath a thick layer of pathos. Justice Scalia, a skilled rhetorician, means to compare the visage of Roger Taney, a villain within the American constitutional narrative, with the joint [majority] opinion. He knows that showing rather than telling us that abortion is like slavery and that *Roe* is like *Dred Scott* enlivens the moral message and makes his opponent's position feel not just wrong but shameful.[175]

This instance of pathetic argument leaves the reader unclear about the true reasons behind Justice Scalia's claim. Was he claiming that *Roe* was *wrong*, that reliance on substantive due process was *wrong*, that abortions were wrong, or something else?[176] And why?

In a similar way, rather than challenging and clarifying contested values directly, judges who cite *kadijustiz* as a general "reason" to reject contrary arguments themselves fail to offer specific reasons for their views. These judges leave the reader nonplussed, and they weaken their arguments in ways that reflect the very notion of *kadijustiz* that they decry.

For Greene, not all pathetic argument is undesirable, and some of it may well be unavoidable as an ordinary element of argument.[177] That is, while American *constitutional law* is tied to a unique text, structure, history, and the like, American *constitutional argument* is a continuation of global modes of persuasion about those subjects that appeal to logic (logos), character (ethos), and emotions (pathos).[178] To be sure, most judges and commentators dismiss the latter—pathetic argument—as illegitimate in constitutional interpretation.[179] But, Greene argues, pathetic argument is at least sometimes appropriate as essential to lawmaking because emotion is essential to public morality.[180] As he sees it, this type of argument can be useful in certain contexts—including establishing doctrines of prospective application, encouraging deliberation, and agitating for reform through dissent.[181]

Taking a less favorable view in the context of negative citation of foreign law, I argue that invocation of *kadijustiz* is as an instance of pathetic argument

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175. *Id.*

176. *Id.* at 1422-23. For his further assessment of constitutional law decisions involving pathetic argument in dissents and concurrences, see his useful chart in *id.* at 1443.

177. Greene, *supra* note 15, at 1393, 1395.

178. *Id.* at 1394-95.

179. *Id.* at 1407 ("Overt appeal to emotion is as scandalous in judging as it is prevalent in trial advocacy treatises."); *cf.* PHILIP BOBBITT, CONSTITUTIONAL FATE 95 (1984) (objecting to pathetic argument on grounds that it appeals only to "the idiosyncratic, personal traits"); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 31-32 (2008) (arguing advocates should use facts appealing to "judge's sense of justice" to arouse emotion and persuade rather than make unrelated, direct emotional pleas).

180. Greene, *supra* note 15, at 1446-69.

181. *Id.* at 1394, 1460-69.

that is undesirable and entirely avoidable.[182] This sort of negative citation of foreign law is undesirable because it presents a basic problem for judicial decision-making. That is, instead of offering specific reasons, citations to *kadijustiz* are deliberately designed to arouse emotions in the reader *against* reasoned decisions that privilege one set of judicial values over another without saying why. Citation to *kadijustiz* is also avoidable. The practice trades on impoverished Weberian notions of Islamic law as arbitrary and procedure-less, which historians of the field have increasingly addressed since the days of Justice Frankfurter.[183] It is not that the history of Islamic courts and judicial procedure is complete. But the record is robust enough for judges to grasp the inner workings of courts during various periods of Islamic history if they wish to compare or contrast Islamic law, without resorting to inaccurate notions of *kadijustiz* that cloud rather than clarify their reasoning.[184]

Throughout this Essay, I have argued that the invocation of *kadijustiz* signaled typically dissenting judges' positions against contrary opinions. Specifically, these judges used *kadijustiz* in various contexts to decry the elevation of substance over procedure, improperly exercised discretion, and judicial activism in violation of their commitments to textualism, federalism, and agency deference.

But problematically, these judges hid their commitment to these values behind the guise of *kadijustiz*, without offering specific reasons as to *why* their opposing jurists or their readers should agree. So deployed, *kadijustiz* clouds the enterprise of effective comparative law or useful citations of foreign law, and it meets none of the values for which pathetic argument may be useful.[185] In other words, *kadijustiz* does not clarify doctrine but tends instead to decry established doctrine for nonspecific reasons. It does not encourage deliberation, but rather reifies inaccurate notions of Islamic legal process that

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182. For an argument that it is avoidable following relatively recent advances in the scholarship on Islamic law that sketch what has been called "*qāḍī* justice" in contrast to *kadijustiz*—that is, the historical practice of judicial practice and procedures in Islamic courts rather than Weberian notions of it, see *supra* Part II.C.

183. *See supra* Part II.C.

184. *See, e.g.*, Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004) (arguing American and European conceptions of constitutionalism differ in ways making their doctrines unsuitable for easy adoption); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 153 (2005). Young stated:

> I submit that the Court's neglect of the reasoning behind foreign practices is not simply sloppy opinion writing. The Justices are not searching foreign court opinions for innovative doctrinal formulae or new arguments not found in the American discourse (even though we might well find such if we looked). There is none of Vicki Jackson's 'engagement' with the foreign sources in *Roper*, nor did the Court use foreign law as a repository of common wisdom in the manner of Jeremy Waldron's "ius gentium." Rather, it is precisely the fact of foreign practice that is most relevant for the Court's analysis . . . . It was a different method, with an entirely different focus."

Young, *supra*, at 153.

185. Greene, *supra* note 15, at 1460-69.

are at odds with the well-established and newly emerging historical accounts. And it does not effectively agitate for reform through dissent. This use of *kadijustiz* is ultimately counterproductive. If there has ever been any reform on the basis of *kadijustiz*, it has escaped my attention.

Whither *kadijustiz*? The solution is likely dual-pronged. First, it is to bolster the comparative and academic study of Islamic law in law schools, if the connection between legal education and judicial information is as firm as it seems. Second, it may well be to encourage judges to undertake citation of foreign law that is accurate and engages the reasons behind it—as other comparatists have argued for in this larger controversy. All this negative citation to foreign law has made for a weaker and less transparent case for the policies and the values really at stake in both the classroom and the courtroom.


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