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“Law and Economics” Literature and Ottoman Legal Studies

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Abstract: This article considers the relevance of hypotheses developed in the "law and economics" literature regarding settlement/trial decisions in the Ottoman Empire. In particular, it explores the applicability of the "selection principle" and "50 percent plaintiff win-rate" formulated by George Priest and Benjamin Klein. The article also demonstrates how existing research based on Ottoman court records can contribute to the "law and economics" scholarship, which is dominated by research based on modern, Western contexts. The article utilizes the court records from eighteenth-century Kastamonu to make observations about settlement/litigation decisions in an Ottoman context.

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“Law and Economics” Literature and Ottoman Legal Studies*

I. Introduction

In an attempt to demonstrate how Ottoman courts of law treated litigants of different gender, religion, and social class, Haim Gerber, in his *State, Society and Law in Islam*, examines a sample of Ottoman court records from a *sakk* treaty compiled by one Ottoman legal scholar, Debbağzade Numan (d. 1702 or 1703).¹ Within his sample, which includes 140 litigation entries, Gerber reports, women won seventeen of twenty-two cases against men, non-Muslims won seven of eight cases against Muslims, and “commoners” won six of eight cases against *askeris*, or members of “the official class.”² Based on these findings, Gerber claims that

the shari‘a court in the area under study cannot be said to have been a tool of the upper class. On the contrary, it seems more proper to view it as a means for people of the lower classes to defend themselves against possible encroachments by the elite. It might be considered that possible social inferiors went to court only when they were somehow confident that they would win. But how would they ever know that? And in any case, even if this were so, it merely enhances the conclusion that it was not in the law court that the hierarchy was enacted and concretized, but somewhere else.³

It is not clear that the 140 litigations identified by Gerber in Debbağzade’s treaty constitute a representative sample. The fact that the principle objective of this work is to provide examples of the types of documents found in court records, and not to illustrate all legal cases decided by a particular court within a specific time period, undermines the reliability of Gerber’s

findings.⁴ In fact, Gerber's empirical claims generate questions that he fails to address in his work. If the court was indeed inclined to defend underprivileged parties against the privileged, as Gerber suggests, why would the latter agree to have their cases litigated? They could have chosen not to sue the less privileged or, in many cases, avoided litigation initiated by such opponents by offering them attractive settlements or simply conceding to their demands. It is fair to assume that the privileged parties would have known at least as much as we do today about how the courts operated, especially if Gerber is correct in his claim regarding the consistency and predictability of the court's operations.⁵

More generally, Gerber does not explain how the existence of alternative methods and/or platforms of dispute resolution, indirectly acknowledged in his quote, might have influenced the types of conflicts litigated in court or the court's decisions in those cases. It is not clear what types of litigation positioned Muslims and non-Muslims, men and women, "commoners" and the members of the "official class" against one another. If the majority of these conflicts concerned trivial matters, does this suggest that disputes over more important issues were resolved out of court? If they involved large sums of money or very valuable property, does this indicate that more mundane contentions were resolved in non-litigious ways? What would it mean if we were to discover that the underprivileged and members of the "official class" opposed each other only in criminal litigations? Might we not interpret this as evidence that the former group did not trust the court with their property-related claims against the privileged? It is difficult to draw conclusions about the court's role in class relationships without knowing how and why litigants chose to resolve certain kinds of disputes in court and not others.⁶

Our doubts about them notwithstanding, it is not our intention in this article to challenge specific claims that Gerber has made about the role that Ottoman courts of law played in social

relationships.⁷ Rather, we seek to make a methodological contribution by proposing to study Ottoman court records in a novel manner, one that opens up new areas of research: Instead of treating dispute-related material in court documents as the starting point of our analysis, we consider them as end-products of a series of decisions that collectively shaped the dispute resolution process. These decisions included (but were not limited to) the following considerations on the part of disputants:

- 1) Whether to escalate a potential conflict into an actual dispute.
- 2) Conditional on initiating a dispute, whether to seek third-party help in resolving the dispute or to engage the opponent in direct, face-to-face negotiations.
- 3) Conditional on appealing for outside help, whether to litigate the dispute or settle it with the help of intermediaries.
- 4) If the disputants decided to engage in triadic (third-party involved) negotiations, whom to choose as intermediaries.
- 5) If the conflict was to be settled through negotiations, whether to register the terms of the settlement in official archives (for example, those of the court or the notary-public).
- 6) If the dispute was to be litigated, and assuming that more than one court existed, which court to use.

Such decisions were based on many factors, including the nature of the dispute, the identities of the disputants and their prior relationship with one another, and the availability of different mechanisms of dispute resolution in particular contexts.

Since the dispute-related material in the court records are generated by a series of decisions, our endeavors to interpret this material require that we attempt to understand how such

decisions were made, even if the lack of historical information does not allow this for every specific dispute-related decision. In this essay we study how disputants in one Ottoman context decided to resolve their disputes (through negotiated settlements or litigations) and how these decisions influenced the litigation results. Specifically, we explore the relevance and potential benefits of an approach to settlement-trial decisions, developed in the “law and economics” literature, for scholarship on Ottoman legal history. This approach, first proposed by George L. Priest and Benjamin Klein in a seminal article published in *The Journal of Legal Studies* in 1984,⁸ has influenced researchers in different fields interested in various aspects of dispute resolution. To date, however, it has not received any attention from scholars of Islamic law and legal practice. We hope to remedy this situation by presenting a synopsis of the major claims advanced by Priest and Klein and discussing how their insights -- as well as the critiques they have engendered – may be applied in an Islamic context to better explain the patterns that characterize settlement-trial decisions as well as trial results.

In this essay we also seek to demonstrate how existing research based on Ottoman court records (sing. *sicil* in Turkish) may contribute to law and economics scholarship. Although practitioners in the two fields differ in their methodological approaches, *sicil*-researchers do study the factors that influenced the processes of dispute resolution. Indeed, since the 1970s, their collective efforts have revealed the ways in which many Ottoman actors and institutions interpreted and utilized the law in their efforts to resolve conflict. Thus, *sicil*-based studies offer relevant historical insights that have yet to be explored by researchers affiliated with the law and economics field, which is dominated by studies based on the United States.

We conclude the article with a series of preliminary observations based on the court records of eighteenth-century Kastamonu in order to test several hypotheses derived from Priest and Klein's model in an Ottoman context.

II. A Review of the Priest-Klein Model and the Subsequent Literature

In the following discussion we describe a specific approach that has developed in what is known as the "law and economics" literature and that has attracted much interest in the fields of law, economics, and sociology. George L. Priest and Benjamin Klein's research explores issues relating to two principal questions of which cases go to trial and who (plaintiff or defendant) wins. Although Priest and Klein (like many researchers after them) ask these questions about modern Western contexts, in particular the United States, the questions are germane to non-Western and pre-modern milieus as well. The main points of their contribution to the law and economics literature are summarized below.

Many researchers have observed that litigations represent a small fraction of the ways in which disputes are resolved.⁹ Priest and Klein explain why disputes are litigated only in rare cases. One important reason is that litigation is costly, for it involves court fees, fees associated with representation, travel costs to and from court, as well as costs associated with lost income due to time spent in court. Of course, settlements may also be costly. Expenses associated with professional legal representation can be large, even when disputes are not resolved by litigation. In addition, negotiations and arbitative processes take time and effort on the part of disputants. Finally, the decision to take a dispute to court is based on an assessment of the potential gains of a favorable judgment. If the potential gain is high, plaintiffs show a higher propensity to have their cases litigated. Thus, the decision to litigate a dispute is based on the following formula:

$$P_p - P_d > (C - S)/J,$$

where, “ P_p ” and “ P_d ” are the plaintiff’s and the defendant’s settlement offers, respectively, “ C ” is the cost of litigation, “ S ” is the cost of settlement by non-litigious means, and “ J ” is the expected judgment award if the case is decided in plaintiff’s favor.¹⁰ Accordingly, the dispute goes to litigation if the difference between the plaintiff’s and defendant’s settlement offers is larger than the cost of litigation (minus settlement cost) relative to the expected judgment.

A defining feature of Priest and Klein’s model is that the decision to litigate or settle a dispute is made jointly by the disputants. Even though plaintiffs initiate the litigation, defendants can avoid it either by accepting the charges leveled against them or by offering plaintiffs attractive settlement terms (see below for exceptional situations in the Ottoman context). The model assumes that a case that is particularly strong (or weak) from either party’s point of view is likely to be settled because the results of possible litigation are not in doubt. Thus, only those cases about which both parties feel reasonably assured of a favorable outcome are litigated. The tendency to settle relatively clear disputes and to litigate close ones is called the “selection principle.”

The selection principle generates a number of important expectations about litigation. First, since litigated disputes are those that may be decided either way, the plaintiff-win rate should hover around 50 percent; in other words, plaintiff and defendant wins are expected to be equally frequent. Second, litigated disputes constitute neither a random nor a representative sample of all disputes. In other words, we cannot deduce from litigated disputes information about conflicts that were resolved through non-litigious means. And third, the decision standard--

that is, the political/ideological inclinations of the legal system, such as whom the laws favor, the judges' interpretive proclivities, and other factors that may influence the court—should not, in principle, affect the plaintiff-win rate. Since litigants are generally aware of these tendencies and adjust their thresholds for taking a case to litigation accordingly, the plaintiff-win rate should remain around 50 percent.

Priest and Klein considered specific situations in which the plaintiff-win rate might diverge from 50 percent. One is when the stakes for the litigants are asymmetrical, that is, one stands to lose more from a verdict than her opponent stands to gain.¹¹ In such circumstances the former may decide to settle a dispute that she has a reasonable chance of winning by proposing to her opponent a generous settlement, agreeing to litigate only if she has a significant chance of winning. For example, in a litigation in which one or more individuals sue a pharmaceutical company, asymmetrical stakes often define the litigants' prospects. In such cases, the potential award to the plaintiff is not usually as high as the potential cost to the company's reputation and future earnings. This is why "relatively more disputes with likely plaintiff verdicts will be settled and relatively more disputes with likely defendant verdicts will be litigated. Observing only litigated cases, defendant verdicts will be greater than 50 percent."¹²

Another factor that may affect win rates is the variation in the degree to which disputants are informed about, or experienced with, the court's operations. Priest and Klein suggest that the 50 percent plaintiff-win rate is possible only when litigants' expectations of their chances in the court are unbiased and reasonably sound.¹³ Inaccurate or unrealistic expectations may generate "divergent expectations" among disputants and lead them to litigate weaker cases. Although Priest and Klein did not elaborate on this possibility in their original essay, other researchers have explored the impact of "asymmetric information" on trial results. Bebchuk, for example,

has suggested that plaintiff-win rates should be less than 50 percent in many cases because defendants are usually better able to judge the extent of their own culpability and therefore make better decisions about when to settle or litigate.¹⁴ Finally, Priest and Klein acknowledge that their model is valid in cases in which only the liability of the defendant and not the damage is disputed (the latter is the case in most rear-end auto collision litigations). Although we should expect high plaintiff-win rates for such litigations, the real disagreement often concerns not the defendant's guilt, but the amount she should be required to pay in compensation for the damage she caused.¹⁵

Priest and Klein's 50 percent-win rate hypothesis has been tested in very different contexts. Some scholars have provided partial confirmation of the hypothesis.¹⁶ Others have reached conclusions that contradict Priest and Klein's arguments.¹⁷ Collectively, these studies allow us to better understand the particular circumstances in which the 50 percent plaintiff-win rate hypothesis holds and those in which it does not. For example, it has been suggested that the selection principle and plaintiff-win rates in labor disputes are sensitive to economic circumstances. In periods of economic crisis, aggrieved parties, usually laborers or their representatives, tend to litigate weaker cases, and, therefore, lose more often.¹⁸ Litigant representatives may also influence settlement and litigation decisions in ways that do not protect litigants' interests. For example, attorneys may pursue long litigations to maximize their earnings when it would make more sense to settle the dispute.¹⁹ It has also been suggested that plaintiff-win rates are not completely independent of legal standards, the inclinations of individual judges, region, and time period.²⁰

III. The Priest-Klein Model in the Ottoman Context

III.A. Potential Contributions of the Priest-Klein Model:

Sicils are Ottoman court records that contain documentation related to the court's legal and administrative activities. Many of these records from different Ottoman towns, some dating back to the fifteenth century, have survived intact. The distinctive feature of legal scholarship based on these sources, which emerged in the late 1970s and has flourished since the 1990s,²¹ is that it is more concerned with the practice of law and its local, contextual applications than with what the *shari'a* might have looked like in its pure form.²² Unlike their predecessors, scholars who work with *sicils* are less inclined to characterize the court as a peripheral institution and the *qadi* as a legal technician who simply applies the law without any discretion. It is this concern with legal practice that makes *sicil*-based scholarship likely to benefit from the insights of the law and economics literature.

The Priest and Klein model is valuable for Ottoman legal studies for at least two major reasons:

(1) Interest in settlements as a form of dispute resolution is new and still limited in Ottoman legal studies, *sicil*-based or not. The tendency to think about settlements and litigations in relation to one another in a systematic fashion is even less common.²³ By contrast, Priest and Klein urge researchers to perceive litigation not as an isolated event that can be studied on its own, but as one phase of a larger, more complex process that seldom begins in the courtroom and that often continues after the completion of adjudication. Thus, the tendency to focus exclusively on litigation in Ottoman legal studies has led to incomplete, and therefore flawed, analyses of dispute resolution in the Ottoman context. To be sure, it is the court records themselves, which isolate litigations from their broader contexts and present only the legally relevant details of the

disputes they relate, that have forced researchers to approach litigation in this fashion, but researchers have not made satisfactory attempts to overcome this problem.

The exclusive focus on litigation is also problematic because, as noted, conflicts that are resolved through adjudication are not reflective of prevalent conflicts in society, but only of exceptional incidents. For this reason, documents pertaining to litigation must be complemented with other types of sources. It is important to acknowledge here that in addition to litigation summaries, *sicils* contain other forms of documentation, including those pertaining to contractual arrangements and, more relevant for the concerns of this article, amicable settlements (sing. *sulh*). These documents provide valuable information about disputes that were not litigated, and therefore, may be used to complement the information pertaining to litigations. In the final section of this article, we make a preliminary attempt to demonstrate this potential.

(2) The basic question of how plaintiffs and defendants fare in litigations has not been well explored in Ottoman legal studies. This would make some sense if researchers were significantly more interested in the litigious performance of specific groups (such as women, non-Muslims, the poor and the underprivileged) and did not consider the categories of “plaintiff” and “defendant” to be useful analytical tools. But this has also not generally been the case. The few works that ask relevant questions, including Gerber’s study cited in the introduction, are generally brief and impressionistic, and they do not contain systematic analyses of the relationship between litigation results and the status of litigants.²⁴ Given the abundance of litigation-related documents in Ottoman court records, it is difficult to explain the general lack of interest in a systematic analysis of the results of adjudicative processes, which is essential to an understanding of how litigious interactions reflect intergroup relationships and local hierarchies.

In this context, it is important to distinguish the interest of Priest and Klein in plaintiff and defendant performances from the broader topic of how different segments of the society fare in litigations. In general, researchers associated with the law and economics literature are interested in what plaintiffs' and defendants' performances can reveal about the structural features of adjudicative processes and the tactical and strategic considerations that help parties make decisions about litigation. Thus, their concerns are different from those of researchers interested in power relations among different groups in the arena of the court.²⁵ Nevertheless, these orientations are also complementary. For those who seek to understand the functions of courts in reproducing (or resisting) class, gender, and religious hierarchies, the approaches developed in the law and economic literature are useful because they focus on how good and bad outcomes are determined by the decisions made by litigants in different roles.²⁶

In fact, Ottomanists have yet to examine *why* some litigants win and others lose. Priest and Klein's research, as well as the contributions of its critics, give us ideas to explore and terminology to adopt or reject. For example, how do we define asymmetrical stakes in the Ottoman courtroom? What determines the divergent expectations of among specific groups of plaintiffs and defendants? How exactly do wealth, gender, and religious status influence verdicts? It is by attempting to answer such questions that we can better understand how the legal system functioned to uphold or undermine divisions within the society.

The law and economics literature has identified variables that may have influenced settlement-trial choices and plaintiff-win rates in the modern world. Although many of these variables are potentially relevant in Ottoman contexts, we can also imagine factors that were specific to Ottoman society. Research on such factors in any historical setting is rare and the vast scholarly

literature on Ottoman law and legal practice provides Ottoman historians the opportunity to inform and contribute to modern scholarship on law and economics. In the following subsections, we provide a list of relevant factors in the Ottoman milieu and consider how they may have influenced settlement-trial choices (III. B.) and plaintiff-win rates (III. C.). It is our hope that future, empirical research will confirm, qualify, or disconfirm the validity of our speculations and also reveal other factors that influenced settlement-trial considerations and plaintiff-win rates.

III. B. Factors That May Have Influenced Settlement-Trial Rates in the Ottoman Context

Based on the available literature on Ottoman legal history, we have identified four general factors that may influence settlement rates. These are institutional factors, factors related to the court's operations and organization, the types and nature of the disputes, and factors related to the wider setting in which the courts operated. Each one of these general factors includes one or more specific variables. In what follows we describe these variables and speculate how they may have influenced settlement-trial rates.

1) Institutional Factors

Availability of courts: One institutional factor that has failed to attract much attention in studies of modern disputes is the availability of arenas in which formal litigations can take place. The relative absence of courts in remote and isolated locations, however, must have influenced settlement rates in the Ottoman Empire. A trip to the National Library in Ankara, where the microfilm copies of all available *sicil* collections in Turkey are kept, or examination of Ahmed Akgündüz's catalogue of existing volumes of court registers in various Turkish libraries and

archives, is suggestive in this regard. Although it is likely that many *sicil* collections, or portions of them, failed to survive due to negligence or inability on the part of court functionaries to maintain the courts' archives, it is also possible that many locations in the empire lacked formal, state-run courts until a later period.

Table 1: The Years in Which Select Anatolian Towns were Incorporated into the Ottoman Empire and the Years in Which Their *Sicils* Begin

Location	Year of inclusion	Year that <i>sicils</i> begin
Adana	1517	1633-4
Amasya	1393	1624-5
Aintab	1516	1531-2
Ankara	1356	1429-30
Balıkesir	1345 (?)	1533-4
Bolu	1324 (?)	1668-9
Bursa	1326	1456-7
Çankırı	sometime in the 1390s	1648-9
Edirne	1362	1538-9
Izmir	1426 (?)	1853-4
Karaman	1467	1525-6
Kastamonu	1462	1673-4
Kayseri	1398	1493-4
Manisa	sometime in the 1390s	1522-3
Sivas	sometime in the 1390s	1777-8
Tokat	1392	1772-3
Trabzon	1461	1555-6

Notes: *Sicil* dates are from Akgündüz, *Şer'îye Sicilleri*, vol. 1, 169-215. Incorporation dates are from *İslam Ansiklopedisi*, (Istanbul: Milli Eğitim Bakanlığı Yayınları, 1941-1987). After Timur's invasion of Anatolia in 1400 and the following civil war, the Ottomans lost control of some of these cities for a brief period.

In communities that had no formal, state-sanctioned courts, disputes were likely to be decided by means other than litigation. Of course, it is possible that some communities, especially large ones with established religious institutions and/or sizable populations of religio-legal dignitaries, had indigenous institutions in which cases were litigated according to Islamic law before these communities were incorporated into the Ottoman legal system. We cannot make the same assumption, however, for all communities. Thus, individuals in many provincial locations must have had difficulty in arranging for litigations in formal, state-sanctioned courts. They may have traveled elsewhere for access to courts or court-like institutions, but this would have been costly (see below). By the same logic we also assume that the availability of multiple courts in major urban centers such as Istanbul, which had four or five courts in different areas,²⁷ must have generated higher litigation rates by making access to adjudicative arenas easier.

Availability of alternative venues of dispute resolution: The leaders of many corporate bodies, such as guilds, the military, and descendants of the Prophet Muhammad, often found ways to resolve conflicts among their members. It is possible that approaches to dispute resolution differed from one corporate body to another. Many trade and artisanal organizations may have sought amicable settlements because this method shielded existing relationships from dissolution. Others, such as the military, which was more likely to be interested in preserving military discipline and hierarchies, may have opted for more litigation-like or arbitral (that is, triadic) processes in which independent third parties made decisions. What is clear is that, collectively, their efforts must have reduced trial rates in Islamic law courts.

Our sources also indicate that high-level provincial military-administrative authorities, in particular governors and their representatives, often heard complaints and decided punishments

independently of courts. Although such practices were not always legally sanctioned, and sometimes generated protests from local court officials, they happened often, mainly because executive authorities charged for this service and collected fines from parties deemed guilty.²⁸ Again, how exactly those authorities administered justice is far from clear. Nevertheless, such activities also must have reduced trial rates.

Legal pluralism: The official legal school (sing. *madhhab*, in Arabic) of the Ottoman Empire was the Hanafi school. But many big cities in the empire, in particular those located in Arab lands populated by people belonging to other law schools, also contained Shafi'i and Maliki courts.²⁹ Furthermore, non-Muslim communities had their own denominational tribunals.³⁰ We know that Muslim litigants could choose between Hanafi and non-Hanafi courts when they were available, regardless of their personal *madhhab* affiliations. And non-Muslims were allowed to take their cases to Islamic courts even when they shared the religious affiliation of their opponents. This situation, combined with the existence of significant variations between Islamic and non-Islamic legal principles, as well as between Hanafi and non-Hanafi legal interpretations on a wide range of issues (including, but not limited to, inheritance, divorce, annulment of marriage, document use in court, and heresy), must have enhanced legal unpredictability. This unpredictability would have contributed to forum-shopping, a well-known phenomenon in the Ottoman context, which would have increased the trial rates in those areas that featured multiple courts affiliated with different law schools and/or denominations.

2) Factors Related to the Court's Operations and Organization

Costs of litigation versus settlement: We know little about the costs of litigation in the Ottoman Empire. Before the Tanzimat era (1839-76), the income of court personnel, including *qadis*, was largely based on court fees.³¹ Official sources, including Ottoman law books (*qanunnames*), indicate unrealistically that court fees did not change between the sixteenth and nineteenth centuries.³² In fact, there is evidence that after the sixteenth century court personnel adjusted their fees in response to inflation and also in order to compensate for increasingly shorter tenures in their jurisdictions, followed by longer wait times before their next appointment.³³ Kuran and Lustig suggest that “(i)n a commercial dispute, judges might collect ... 2 percent of the amount at stake,”³⁴ although it is not clear how representative this figure is for other contexts. Indeed, Abraham Marcus informs us that *qadis* claimed as much as 10 percent of the sum awarded in litigations in late eighteenth-century Aleppo, to be paid by winning parties.³⁵ Not included in this amount were the fees due to other court personnel such as ushers (sing. *muhzir*) and scribes (sing. *katib*). Contemporary Ottoman sources and Western travelers’ accounts indicate that gifts and bribes came to be associated with court use in the seventeenth and eighteenth centuries.³⁶ All these factors must have made litigations not only expensive but also financially unpredictable. One may also assume that, in the countryside, where there were few or no courts, court use required significant travel time and time away from work. The availability of multiple courts in many big cities must have made access relatively cheaper. This being said, the relatively high cost of living in large, metropolitan areas may have increased court fees in these locations as well.

The cost of settlement, on the other hand, would have been negligible since most settlements took place informally, often with the involvement of kin, neighbors, and community members. It is likely that legal and administrative authorities were involved in arbitrations and

sulh negotiations.³⁷ Possibly, they participated in these processes as members of the community interested in maintaining peace and social harmony. If, however, their involvement was based on their professional qualifications and legal functions, it is not clear whether, or to what extent, they were compensated.

Predictability of the court's decisions: The predictability of a court's verdicts reduces the likelihood of litigation because parties can assess how the court might decide their dispute, saving them from actually pursuing litigation. According to Ramseyer and Nakazato, trial rates in modern Japan are low compared to those in many Western contexts because "uniformity in time is something that judges take pride in."³⁸ In this environment, disputants often develop accurate estimations of court tendencies and negotiate their differences with their opponents under the law.

The predictability of Islamic courts of law is an issue that has long interested scholars. Max Weber's notion of "kadijustiz," for example, is premised on the idea that *shari'a* courts were more concerned with what Weber called "substantive rationality," which requires a flexible approach to decision-making in order to accomplish specific social objectives, than with "formal rationality," which is more concerned with a uniform application of legal rules regardless of their social consequences.³⁹ More recently, Lawrence Rosen has suggested that modern Islamic courts in Morocco tend to show context-based adaptability and fluidity in their operations in order to maintain peace and harmony, rather than demonstrating legal formality or consistency.⁴⁰ According to Rosen, the main objectives of courts in Morocco are to regulate reciprocity among disputing parties and to prevent a breakdown in social relations. On the other hand, many Ottoman historians have insisted that courts in the Ottoman Empire enforced the law formally

and consistently across time and space,⁴¹ a claim that has found support among legal historians who work on non-Ottoman contexts.⁴²

One might surmise from the insights of Weber and Rosen that court actions, which they characterize as context-based and unpredictable, contribute to legal uncertainty and, thus, generate more litigations. However, an opposite conclusion is also possible. If Islamic courts seek to maintain peace and harmony, as Weber and Rosen have suggested, they are likely to steer litigants to negotiated settlements or to ratify the results of such processes that may have taken place alongside litigations. This is what Rosen proposes when he defines the court's function primarily as putting disputants in a position to negotiate their differences. Not every litigation ends with a verdict; thus, if a court does indeed seek reconciliation, litigations must demonstrate a propensity to turn into settlements. According to Rosen, in most disputes brought to court in Morocco, the role of the judge is limited to mediation or arbitration.⁴³ Paradoxically, if the Ottomanists are right about the formality and predictability of the Ottoman court's proceedings, this may have encouraged negotiating settlements "under the law," as in modern Japan.⁴⁴

There is at least one institutional factor relating to the predictability of court decisions that may have encouraged trials rather than settlements. The fact that Ottoman *qadis* were periodically rotated through different judgeships, to prevent them from establishing strong local connections and being influenced by local power-holders,⁴⁵ would have increased the unpredictability of the system, though it is true that local court officials, including deputy judges (*naibs*), must have provided a degree of continuity. The literature on legal practice in modern contexts indicates that decision standards vary from one judge to another and also that short tenures prevent disputants from forming reliable opinions about individual judges.⁴⁶ Since this

situation hampers predictability, it contributes to increased trial rates. It is reasonable to expect the same in the Ottoman context.

Speed of Litigation: Another reason suggested by Ramseyer and Nakazato for low litigation rates in Japanese courts is the significant amount of time they require to reach conclusion, which allows litigants to observe and understand the judge's disposition towards their case.⁴⁷ In the Ottoman contexts, however, court records give a different impression. According to Marcus, the "judicial process worked with remarkable speed" in eighteenth-century Aleppo. "Many matters came before the judge on the day of the complaint or shortly after. The deliberations were usually concluded and the judge's sentence handed down in one or two sessions."⁴⁸ If indeed litigation took little time, this would have discouraged litigants from engaging in lengthy negotiations and settling disputes before verdicts were returned.

3) Types of Disputes

Disputes among family members and kin: We should expect variations in settlement rates among disputes that involved relatives and those that did not. This is because litigations tend to be zero-sum games which, more so than other forms of dispute resolution, have the potential to damage existing relationships among the disputants. Since it is safe to assume that tolerance for such a risk is generally lower when the dispute involves family, we should expect higher settlement rates among disputes among family members and kin.

Disputes among members of different gender, denominational, or status groups: It is possible that disputes involving individuals of different gender, religion or status influenced settlement

and trial tendencies. It is not clear, however, that we can make a broad generalization in this regard. Kuran and Lustig have claimed that in seventeenth-century Istanbul individuals not affiliated with the state were reluctant to litigate against “state officials,” and that non-Muslims did not sue Muslims unless their cases were strong.⁴⁹ On the other hand, we have established in a recent study that disputes in late-seventeenth- and eighteenth-century Kastamonu were more likely to go to trial if the parties held significantly different honorary titles, which signified socioeconomic status.⁵⁰ The same study also demonstrated that gender difference was inconsequential in the choice between settlement and trial.

Criminal Disputes: Islamic law does not permit settlements for *hadd* crimes, that is, crimes with fixed mandatory punishments, i.e., theft, illicit sexual intercourse, false accusation of illicit sexual intercourse, brigandage, apostasy, and consumption of alcohol.⁵¹ There are also other criminal cases for which the chances of *sulh* settlement are low. Often, an alleged criminal is apprehended by the local police force in the midst of the act and taken to court for immediate hearing and punishment. In such a situation it is not clear whose interests, other than the defendant’s, a settlement may have served. In fact, given frequent imperial pressures on local courts and law enforcement officers to curb crime rates, they may have been particularly motivated to try and punish alleged criminals.⁵² On other occasions, local residents brought to court an alleged sexual and moral offender (a prostitute or pimp) to banish him/her from the community, which required a court verdict. We can imagine that in this type of case as well the incentives for settlement were few for the parties, who were not necessarily seeking compensation for damages but simply wanted to eliminate crime from their surroundings.

On the other hand, at least one researcher has suggested that some sexual crimes, such as abduction and elopement, especially in the countryside, were often resolved outside of the court.⁵³ In such cases, offenders were punished by their own kin or by relatives of the harmed parties. This practice may have reduced the trial rates in disputes that involved specific sexual crimes.

Fictitious Litigations: Students of Ottoman court records have noticed that some litigations were pursued because parties desired to have their pre-arranged agreements validated by the judge and registered in the court ledger as verdicts.⁵⁴ For instance, a plaintiff might make a superfluous claim regarding property he or she once owned, and the defendant would then prove that this property had been sold to him or her by the plaintiff. In another example, a plaintiff might present in court a contractual agreement with a defendant and argue that the latter was failing to fulfill his or her obligations, a claim that subsequently would be acknowledged by the defendant. In such cases the judge would decide for the “aggrieved” party and order his or her “opponent” to abide by the conditions of the agreement, which are also listed in the court-produced documentation. The same tactic may have been used in potentially more serious situations, such as cases involving accidental death or injury or lost or stolen property. In such cases the defendant may have welcomed a suit brought by the aggrieved party as an opportunity to prove his or her innocence.

These litigations were mechanisms that often functioned to protect the defendants or their contractual arrangements with plaintiffs from future challenge. Although costly, they generated a degree of security because Islamic law maintains that the judge’s decision on a particular issue, unless deficient because of a legal error, cannot be overturned by a later verdict.⁵⁵ Since we

cannot easily differentiate fictitious litigations in court records from real ones, we are unable to exclude them from our attempts to determine settlement and trial rates. Thus, we expect such cases to artificially inflate the trial rates.

4) Wider Setting:

Finally, and because litigations are often zero-sum endeavors, we may expect to see variations in settlement-trial rates according to community size. This expectation is based on the assumption that in larger communities, in which individuals likely have numerous actual and potential social networks and relationships, tolerance for the social consequences of litigations is relatively high. In smaller communities, on the other hand, the goal of maintaining peace and social harmony may be more important since the range of available or potential relationships is more limited, making them potentially more valuable. For this reason we can expect relatively higher trial rates in bigger cities.

Table 2 summarizes the possible and likely effects of the variables discussed above on settlement and litigation decisions. The interpretation of the table is straightforward: For example, a positive (/negative) sign under the “Possible” column indicates, according to our preliminary and speculative estimations, that a particular factor *possibly* improved (/diminished) settlement or trial rates. A positive (/negative) sign under the “Likely” column suggests that a particular factor is *likely* to have increased (/decreased) the chance of settlement or litigation. As our discussion demonstrates, there are legitimate reasons to assume that specific factors may have influenced settlement-trial rates in contradictory fashions. These factors are marked in the table by a question mark.

Table 2: Factors for Settlement and Litigation Decisions

General Factors	Specific Factors	Settlement		Litigation	
		Likely	Possible	Possible	Likely
Institutional Factors	No court (compared to single court)	+			
	Multiple courts (compared to single court)			+	
	Availability of alternative venues for dispute resolution		+		-
	Legal Pluralism			+	
Court's Operations and Organization	Cost of litigation	+			
	Speed of Litigation			+	
	Court's ideology		+ (?)		
	Rotation of qadis			+	
Types of Disputes	Disputes among kin/family members (compared to disputes among unrelated parties)	+			
	Disputes among individuals with non-symmetric gender, religious, status markers (compared to disputes among individuals with symmetric markers)	?	?	?	?
	Criminal Disputes			+(?)	
	Fictitious Litigations				+
Setting	Big cities (compared to medium-sized communities)			+	
	Small communities (compared to medium-sized communities)		+		

III.C. Factors That May Influence Plaintiff-Win Rates:

Many of the factors that have been shown to influence plaintiff win rates in modern milieus were also potentially relevant in Ottoman society. It is, for instance, easy to imagine asymmetric stakes or differential expectations among different groups of litigants.⁵⁶ As an example of the former, the resulting loss of reputation to an administrative official convicted of corruption must have been more consequential than the gain to the plaintiff who brought him to court. With respect to the latter, it is likely that religio-legal authorities had more realistic expectations of court processes than did underprivileged parties.

In addition, factors specific to the Ottoman legal world must have influenced plaintiff win rates as well. Here are the two that we can propose based on the available literature on Ottoman legal history:

1) Evidentiary Procedures Followed in Court

According to Islamic law, litigants possess different evidentiary responsibilities based on the nature of their claims. The law places the burden of proof on the party whose contention is contrary to the initial legal presumption. In accordance with this principle, it is the *qadi* who decides which party should bear the burden of proof; he may assign this responsibility to either the plaintiff or the defendant. For example, in an unpaid-debt dispute, the *qadi* would first hear the claim by the plaintiff (the alleged creditor) and then demand a response from the defendant (the alleged debtor). If the defendant denies the debt claim, the *qadi* would require the plaintiff to provide evidence to support his claim, since the legal presumption in this case is that the alleged debtor is free from debt.

However, if the defendant acknowledges the original debt transaction but also contends that the debt had been paid before the trial, then the court would require him to prove it, since in

this situation it is the defendant making a counter claim. In either case, the *qadi* would hold in favor of the party who assumed the burden of proof, if the latter brought to court credible evidence. In other words, if the evidence is credible, the opposing party has no opportunity to provide evidence supporting his or her own position.⁵⁷ Thus, Islamic evidentiary procedures may favor those who assume the burden of proof. Indeed, in a sample of 859 trials from eighteenth-century Kastamonu, litigants who assumed the burden of proof won about 77 percent of the cases in which the *qadi* placed the burden of proof on one of the parties.⁵⁸ And since plaintiffs were assigned the burden of proof more often than defendants, it is conceivable that they possessed an advantage. In our sample of trials, plaintiffs assumed the burden of proof about twice as often as defendants.⁵⁹

As discussed, Priest and Klein's model suggests that the decision standard or the court's sympathy towards specific groups of litigants should have no impact on the 50 percent plaintiff-win rate, since litigants are theoretically able to adjust their expectations according to circumstances. However, empirical research in modern Western contexts indicates that plaintiff win rates are not completely insensitive to decision standards or the court/legal system's inclinations.⁶⁰ The same may have been true in the Ottoman context.

2) Pro-plaintiff nature of criminal disputes

Ottoman and Middle Eastern historians have noticed that in criminal litigations the standards of proof against individuals of poor reputation are generally low.⁶¹ This finding reflects the fact that with respect to many types of crime and issues of security, the court's legitimacy is not based on its neutrality, as is the case in disputes involving private parties, but on its ability to protect communal interests and earn communal approval. According to Mohammed Fadel, this quest for

communal approval has led the courts to relax the evidentiary standard in cases pertaining to violations of public rights, general security, rights of state, felonies, and assaults.⁶²

Consequently, in many such cases, circumstantial evidence and confessions extracted through torture or imprisonment, which are otherwise inadmissible, have been permitted.⁶³ Given the difficulty of settling criminal disputes, especially for defendants, as discussed above, we might therefore expect relatively high plaintiff-win rates in these types of litigations.

3) Fee-for-service adjudication

Daniel Klerman has posited with reference to pre-modern England that a fee-for-service compensation regime in courts and the judges' desire to maximize their incomes may have led to a pro-plaintiff bias in courts.⁶⁴ Kuran and Lustig have suggested that this factor must also have been relevant in the Ottoman context, given that litigants had the ability to take their disputes to any court of their choice.⁶⁵ Since potential litigants were not required to use the court where they lived, Ottoman courts must have competed for business: "Although Ottoman judges received a salary from the sultan, they also collected fees from litigants. Moreover, individual plaintiffs could seek out judges known for their propensity to rule in favor of the plaintiff. One would expect judges to have ruled for plaintiffs more frequently than they would in the absence of a choice among courts. They would have exhibited a pro-plaintiff bias..."⁶⁶

Again, according to the Priest-Klein model, any pro-plaintiff bias would have been known to potential litigants and should not have influenced plaintiff-win rates. However, we cannot easily predict how this principle applied in practice.

IV. A Preliminary Analysis of Settlements and Litigations in Eighteenth-Century

Kastamonu

In the final section of this article we examine in a preliminary manner the empirical data on litigations and settlements from one judgeship (*kaza*) in Ottoman Anatolia and discuss the extent to which they confirm the claims presented in previous sections.⁶⁷ Our data is based on the court records of Kastamonu. The mid-eighteenth-century *kaza* of Kastamonu was located in north central Anatolia and included a town (also named Kastamonu) that had about 41 quarters, as well as seventy-seven villages. There is no clear information on the population of the *kaza*. Official records give the number of *avarız* households in the *kaza* as 266 in the late eighteenth century.⁶⁸ Assuming that each *avarız* household was composed of fifteen real households and that each real household was composed of five individuals, we may speculate that the population of the *kaza* cannot have been more than 20,000. According to Western observers, the town had a population of about 12,000 at the beginning of the nineteenth century. There is no indication that the town experienced major demographic fluctuations over the course of the eighteenth century. Colin Heywood suggests that non-Muslims constituted no more than 15 percent of the town's population.⁶⁹

As far as we can tell, the *kaza* had one court that served the legal needs of the townspeople and villagers. This is not surprising because the area was not particularly populous. A *qadi* or *naib* (a deputy judge) presided over the court, which also included scribes (sing. *katib*), ushers (sing. *muhzır*), and other personnel. As was the case elsewhere in the Ottoman Balkans and Anatolia, *qadis* were rotated periodically, although other court personnel might retain their positions for much longer periods. According to the catalogue prepared by Ahmet Akgündüz, the date of the earliest court register, which we were not able to locate in the National Library in

Ankara, is 1084 H. (1673-4); the earliest register we were able to locate is from 1095 H. (1684). The court records of Kastamonu intermittently cover the late seventeenth, eighteenth, and very early nineteenth centuries (until 1806). The impressions presented in this section are based on the registers from three sub-periods roughly equal in length, which will constitute the empirical basis of a broader and more detailed analysis of Kastamonu court records. These sub-periods are as follows: (1) 1095 /1684 - 1110/1698; (2) 1148 /1735 - 1156 /1743; and (3) 1195/1781 - 1204/1790. The first period is slightly longer than the other two because it lacks documentation for some years.

Ottoman court records contain brief and formulaic summaries of litigations and amicable settlements. We used these summaries to compile the simple statistics given in the tables below. Table 3 separates “civil disputes,” that is, contentions over money and property (e.g., debt, ownership of property, and commercial disputes) from “criminal disputes,” that is, contentions over assaults (sexual and otherwise), robbery, and forced usurpation. It also distinguishes civil disputes among related parties (family members and kin) from civil disputes among unrelated ones. All but three criminal disputes involved unrelated parties.

Table 3: Litigations and Settlements Classified According to Types and Periods

		1 st Period	2 nd Period	3 rd Period	Total
Litigations	Civil -- Unrelated Parties	160 (69%)	156 (57%)	208 (59%)	524 (61%)
	Civil -- Related Parties	46 (20%)	66 (24%)	126 (36%)	238 (28%)
	Criminal	27 (12%)	50 (18%)	20 (6%)	97 (11%)
	Total	233 (100%)	272 (100%)	354 (100%)	859 (100%)
Settlements	Civil -- Unrelated Parties	16 (36%)	34 (29%)	76 (28%)	126 (29%)

	Civil -- Related Parties	23 (52%)	66 (56%)	140 (51%)	229 (53%)
	Criminal	5 (11%)	18 (15%)	56 (21%)	79 (18%)
	Total	44 (100%)	118 (100%)	272 (100%)	434 (100%)

Note: Values in parentheses give percentage proportions in a given time period.

What is most striking about Table 3 is how small the litigation figures are in general. For settlements, registration in court records was not a legal requirement, which is why we should assume that those found in the ledgers represent only a fraction of all settlements reached during our time period. Litigations, however, had to be registered upon conclusion and therefore the numbers presented in the table should give pause to all researchers who have devoted their lives to studying them: If we assume that each sub-period contained about 120 months, the court litigated about 1.9, 2.3, and 3.0 cases per month in the first, second, and third periods, respectively. In a judgeship of about 20,000 and town of 12,000 people, these averages strongly suggest that an overwhelming majority of disputes were resolved through non-adjudicative means. If so, then litigation, as a form of dispute resolution, was also an exception in our context. Considering that many of the factors that may have encouraged litigations were not operative in eighteenth-century Kastamonu (see Table 2), the numbers we observe in the court records come as no surprise. Kastamonu was not a big city, and it did not have multiple courts representing different legal schools or religious denominations. Thus, given our earlier discussion, it is safe to assume that in contemporary metropolitan centers such as Istanbul, Salonika, Aleppo, or Cairo, litigation rates were higher.⁷⁰

The fact that both litigations and registered settlements increased over time is interesting in light of the absence of evidence for demographic growth during the eighteenth century. This finding suggests that the people of Kastamonu may have become more litigious during the

eighteenth century. It may also be an indication that the court, if it was indeed established in the second half of the seventeenth century, became more accepted by the community as it aged.

Originally an institution that was imposed from outside by the imperial government, it may have come to shape local expectations of fairness and equity as much as it was shaped by them.

The figures in Table 3 suggest that while litigations tended to take place among unrelated opponents, court-registered settlements often involved family members and kin. This finding supports Priest and Klein's suggestion that litigated disputes should not be seen as a random or representative sample of all disputes in a particular location. On the other hand, the fact that the proportion of litigations among relatives increased significantly over time may be interpreted as another sign that the inhabitants of Kastamonu were increasingly inclined to use the legal system.

Finally, the uptick in criminal settlements in the third period, at a time when criminal litigations appear to have been exceptionally low, suggests that settlements and litigations were strongly connected. Considered on its own, the dip in criminal litigations may suggest either that crime rates were low in the third period or, conversely, that the local government was ineffective in controlling crime.⁷¹ However, if we also take into consideration the information provided by settlement numbers, we reach a different conclusion: For reasons that are not clear to us, in the third period, the people of Kastamonu were more inclined to resolve criminal disputes through settlement than through litigation.

Table 4 provides the plaintiff- and defendant-win scores for different types of cases in the three periods. For example, the first cell indicates that in the first period plaintiffs and defendants won 93 and 67 civil litigations involving unrelated parties, respectively. The figures in parentheses provide plaintiff-win rates for each cell.

Table 4: Plaintiff and Defendant Wins According to Types and Periods

	1 st Period	2 nd Period	3 rd Period	Total
Civil -- Unrelated Parties	93-67 (58%)	84-72 (54%)	86-122 (41%)	263-261 (50%)
Civil -- Related Parties	21-25 (46%)	34-32 (52%)	38-88 (30%)	93-145 (39%)
Criminal	17-10 (63%)	30-20 (60%)	4-16 (20%)	51-46 (53%)
Total	131-102 (56%)	148-124 (54%)	128-226 (36%)	407-452 (47%)

Note: Figures in parentheses are plaintiff-win rates

We identify two major findings in Table 4: First, the data appear to offer some support for the 50 percent plaintiff win rate hypothesis. We have calculated the overall plaintiff-win rate as about 47 percent, which is closer to the 50 percent baseline than Kuran and Lustig's figure (about 60 percent) for commercial litigations in seventeenth-century Istanbul.⁷² The rate remained in the 45 to 56 percent range in two of the three sub-periods and for two of the three case types. In other words, plaintiffs do not appear to have significantly benefitted from the possible pro-plaintiff biases in the system. On the contrary, the results support Priest and Klein's claim that litigants tend to adjust their expectations in accordance with the structural proclivities in the system.⁷³

Nevertheless, we have also observed major differences in plaintiff-win rates across litigation types and periods, an observation that is consistent with what researchers have found in many modern contexts. Particularly interesting are the rates for criminal litigations, which appear to have been quite high in the first two periods and very low in the third period; and the overall rate for the third period, which is low compared to those observed for the first two periods. It is tempting to explain the high plaintiff-win rates in criminal litigations with reference to the

combined effects of the defendants' inability to push for settlement in many such cases and the pro-plaintiff bias of the courts in these types of litigations. The high defendant-win rates in the third period, on the other hand, may be explained by a shift in the number of fictitious litigations during this time period, a hypothesis that is difficult to prove given the nature of our sources. However, we should remember that the literature on the topic has brought to light many other factors that can affect plaintiff-win rates in any given context. Thus it is difficult to pinpoint the reasons for the variations in plaintiff-win rates across periods and types of litigations without a comprehensive analysis that takes into consideration all of these factors.

V. In Place of a Conclusion

This article has made a case that a methodological approach developed in the "law and economics" literature may provide us with a better understanding of settlement-trial decisions and litigation outcomes in the Ottoman Empire. We argued that Priest and Klein's research and the responses it generated are beneficial to the field because they provide a coherent framework within which we can examine the relationship between settlement and litigation decisions and scrutinize the factors that contributed to plaintiff and defendant wins. We also discussed the ways in which the Priest-Klein model may be adapted to the Ottoman context by considering how specific factors in different Ottoman milieus may have influenced settlement and plaintiff-win rates. Finally, we examined court records from eighteenth-century Kastamonu to test a number of hypotheses formulated by Priest and Klein. The data provide partial support for their model and hypotheses: We demonstrated that litigations constituted a rare method of dispute resolution, that litigated disputes did not constitute a random or representative sample of all resolved disputes, and that the variations in litigation and settlement trends were likely related.

We also found that the overall plaintiff-win rate in eighteenth-century Kastamonu was close to 50 percent, as Priest and Klein predicted, notwithstanding temporal and case-based variations.

ENDNOTES

* The authors are grateful to David S. Powers, Charlotte Weber, and the two anonymous referees of *ILS* for their assistance and helpful suggestions.

¹ Haim Gerber, *State, Society and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994), 55-6. Debbagzade's compilation includes several hundred court registries presented to instruct readers in the legal and scribal standards that courts were expected to observe in producing documentation.

² *Ibid.*, 56. "Only in the category of commoners against religious doctors," Gerber observes, "do we find a tie of ten cases each"; *ibid.*

³ *Ibid.*, 56-7.

⁴ Gerber does not discuss how Debbagzade compiled his sample. When we consulted the 1843 edition of Debbagzade's treaty, we realized that the examples included in the compilation were taken from the archives of many different courts, including those in Istanbul, Plovdiv (in modern day Bulgaria), and Erzurum (in eastern Anatolia). Debbagzade does not explain how or why he picked his examples, nor does he provide the dates for specific case entries that he selected. See Debbagzade Numan, *Tuhfat al-Sukuk* (Istanbul: Evkaf-ı İslamiye, 1843); accessed at: <http://ia600505.us.archive.org/9/items/tufetsukk00numn/tufetsukk00numn.pdf>.

⁵ Gerber, *State, Society and Law*, 2, 17, 26, 27, and *passim*.

⁶ Scholarly attempts to make generalizations about legal processes and court operations based on a similar reading of Ottoman court records are common. Thus, it would be unfair to isolate Gerber's work and methodological choices as focal points of criticism. We give the example above because of Gerber's well-deserved prominence in the field of Ottoman legal studies and, more importantly, the representative nature of his attempts at generalization. Indeed, one of the authors of this article, in his earlier work, shared many of Gerber's assumptions and, therefore, is also deserving of criticism; see Boğaç A. Ergene, "Social Identity and Patterns of Interaction in the Shari'a Court of Kastamonu (1740-44)," *Islamic Law and Society* 15 (2008): 20-54.

⁷ For a recent study that examines how litigants who belonged to specific gender, religious, and socio-economic groups performed in the arena of an Anatolian court, see Metin Coşgel and Boğaç Ergene, "Dispute Resolution in Ottoman Courts: A Quantitative Analysis of Litigations in Eighteenth Century Kastamonu" (working paper, 2012).

⁸ George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation," *The Journal of Legal Studies* 13 (1984): 1-55.

⁹ Most researchers agree that only 5 to 10 percent of disputes go to trial. For a summary and critique of the literature on settlement rates, see Theodore Eisenberg and Charlotte Lanvers, "What is the Settlement Rate and Why Should We Care?" *Journal of Empirical Legal Studies* 6 (2009): 111-46.

Although the authors suggest that settlement rates may vary depending on how one defines a range of formal outcomes, and also across different types of cases, they still agree that settlement is the primary civil case outcome; *ibid.*, 112.

¹⁰ Priest and Klein, "The Selection of Disputes," 13.

¹¹ Ibid., 5 and *passim*.

¹² Ibid., 26.

¹³ Ibid., 19.

¹⁴ Lucien A. Bebchuk, “Litigation and Settlement under Imperfect Information,” *Rand Journal of Economics* 15 (1984): 404-15.

¹⁵ Priest and Klein, “The Selection of Disputes,” 29.

¹⁶ See, for example, Joel Waldfogel, “The Selection Hypothesis and the Relationship between Trial and Plaintiff Victory,” *Journal of Political Economy* 103 (1995): 229-60 and idem, “Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation,” *NBER Working Paper No. 6409* (1998). <http://www.nber.org/papers/w6409>.

¹⁷ For example, Donald Wittman, “Is the Selection of Cases for Trial Biased?” *Journal of Legal Studies* 14 (1987): 185-214; Theodore Eisenberg, “Testing the Selection Effect: A New Theoretical Framework with Empirical Tests,” *The Journal of Legal Studies* 19 (1990): 337-58; Samuel R. Gross and Kent D. Syverud, “Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial,” *Michigan Law Review* 90 (1991): 319-93; and Steven Shavell, “Any Frequency of Plaintiff Victory at Trial Is Possible,” *The Journal of Legal Studies* 25 (1996): 493-501.

¹⁸ Peter Siegelman and John J. Donohue, “The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis,” *The Journal of Legal Studies* 24 (1995): 427-62; and Daniel Kessler, Thomas Meites, and Geoffrey Miller, “Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation,” *The Journal of Legal Studies* 25 (1996): 233-59.

¹⁹ Robert D. Cooter and Daniel L. Rubinfeld, “Economic Analysis of Legal Disputes and Their Resolution,” *Journal of Economic Literature* 27 (1989): 1067-97; and Kessler et al., “Explaining Deviations,” 246-7.

²⁰ Kessler et al., “Explaining Deviations”; Waldfogel, “The Selection Hypothesis”; and Peter Siegelman and Joel Waldfogel, “Toward a Taxonomy of Disputes: New Evidence through the Prism of the Priest/Klein Model,” *The Journal of Legal Studies* 28 (1999): 101-30.

²¹ The following works are the early examples of this scholarship: Ronald C. Jennings, “The Office of Vekil (Wakil) in 17th Century Ottoman Shari‘a Courts,” *Studia Islamica* 42 (1975): 147-69; idem, “Kadı, Court, and Legal Procedure in 17th C. Ottoman Kayseri,” *Studia Islamica* 48 (1978): 133-72; idem, “Limitations on the Judicial Powers of the Kadi in Seventeenth Century Ottoman Kayseri,” *Studia Islamica* 50 (1979): 151-84; Galal El-Nahal, *The Judicial Administration of Ottoman Egypt in the Seventeenth Century* (Minneapolis and Chicago: Bibliotheca Islamica 1979); Haim Gerber, “Sharia, Kanun, and Custom in the Ottoman Law: The Court Records of 17th-Century Bursa,” *International Journal of Turkish Studies* 2 (1981): 131-47; Abdülaziz Bayındır, *İslam Muhakeme Hukuku; Osmanlı Devri Uygulaması* (İstanbul: İslami İlimler Araştırma Vakfı, 1986); and Ahmet Akgündüz, *Şer‘iye Sicilleri: Mahiyeti, Toplu Kataloğu ve Seçme Hükümler*, 2 vols. (İstanbul: Türk Dünyası Araştırmaları Vakfı, 1988). In the 1990s and 2000s the number of legal studies based on Ottoman court records increased significantly. Many of these works are cited in the following discussion.

²² Iris Agmon and Ido Shahar suggest that the foundations of this earlier scholarship on Islamic law “were established during the second half of the 19th century by Goldziher, Nöldeke, Wellhausen, Snouck-Hurgronje and others, all educated in the textualist, mostly German, philological tradition. Within this intellectual tradition, the scholar who did the most to shape the study of Islamic law as a distinct field was arguably Joseph Schacht. Influenced both by Islamic studies and German legal history, Schacht and others directed their attention to the study of Islamic sacred texts and classical *fiqh* manuals”; see “Shifting Perspectives in the Study of Shari‘a Courts: Methodologies and Paradigms,” *Islamic Law and Society* 15 (2008): 1-19.

²³ For a detailed discussion of the reasons for and the consequences of privileging litigation as a focal point of analysis in Ottoman studies, see Boğaç A. Ergene, “Why Did Ümmü Gülsüm Go to Court? Ottoman Legal Practice between History and Anthropology,” *Islamic Law and Society* 17 (2010): 215-44. For two studies that focus exclusively on settlements, see Işık Tamdoğan, “*Sulh* and the 18th Century Ottoman Courts of Üsküdar and Adana,” *Islamic Law and Society* 15 (2008): 55-83; and Abdülmecid Mutaf, “Amicable Settlement in Ottoman Law: *Sulh* System,” *Turcica* 36 (2004): 125-40. For a rare attempt to consider the impact of settlements on the frequency and nature of criminal litigations, see Eyal Ginio, “The Administration of Criminal Justice in Ottoman Selanik (Salonica) During the Eighteenth Century,” *Turcica* 30 (1998): 185-209.

²⁴ See, for example, Nelly Hanna, “Administration of Courts in Ottoman Cairo,” in *The State and Its Servants*, ed. Nelly Hanna (Cairo: American University Press, 1995), 44-59; Jennings, “Kadı, Court, and Legal Procedure”; idem, “Limitations”; and Abraham Marcus, *The Middle East on the Eve of Modernity: Aleppo in the Eighteenth Century* (New York: Columbia University Press, 1989). For two recent exceptions, see Coşgel and Ergene, “Dispute Resolution,” and Timur Kuran and Scott Lustig, “Judicial Biases in Ottoman Istanbul: Islamic Justice and Its Compatibility with Modern Economic Life,” *Journal of Law and Economics* 55 (2012, forthcoming). We are grateful to Kuran and Lustig for sharing their article with us prior to publication.

²⁵ See, for example, Edward P. Thompson, *Whigs and Hunters: The Origin of Black Act* (New York: Pantheon, 1976).

²⁶ Coşgel and Ergene have explored how plaintiff and defendant success rates according to gender, religious affiliation, and socio-economic status in eighteenth-century Kastamonu; see their “Dispute Resolution.” Kuran and Lustig provided consistent results in the context of seventeenth-century Istanbul, although their categories of analysis are different from those employed by Coşgel and Ergene; see their “Judicial Biases.”

²⁷ *EF*², s.v. “Maḥ kama” (Halil İncılık); and Fariba Zarinebaf, *Crime and Punishment in Istanbul, 1700-1800* (Berkeley: University of California Press, 2010), 143.

²⁸ Jennings, “Limitations”; and Ginio, “Criminal Justice,” 200-204.

²⁹ See *EF*² “Maḥ kama” (Halil İncılık); and Ido Shahar, “Legal Pluralism and the Study of Shari‘a Courts,” *Islamic Law and Society* 15 (2008): 112-41. One of our referees suggested that “*madhhab* differences mattered little in court proceedings in Anatolia after the mid-16th century,” although, according to İncılık, Shafi‘i judges continued to function in southern Anatolia in later periods; see *EF*², s.v. “Maḥ kama” (Halil İncılık). Leslie Peirce also mentions

that there were Shafi'i legal scholars and deputy judges in Aintab from the fourteenth to the nineteenth century; see her *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003), 416, n. 19.

³⁰ Joseph R. Hacker, "Jewish Autonomy in the Ottoman Empire: Its Scope and Limits. Jewish Courts from the Sixteenth to the Eighteenth Centuries," in *The Jews of the Ottoman Empire*, ed. Avigdor Levy (Princeton: Princeton University Press, 1994), 153-203; Timur Kuran, "The Economic Ascent of the Middle East's Religious Minorities: The Role of Islamic Legal Pluralism," *Journal of Legal Studies* 33 (2004): 475-515; and Ginio, "Criminal Justice," 188.

³¹ *Qadis* also received salaries; see Zarinebaf, *Crime and Punishment*, 144.

³² Sources indicate that the courts charged 12 *akçes* as a registration fee and 25 *akçes* for notary service between the late sixteenth and late eighteenth centuries; see Boğaç A. Ergene, *Local Court, Provincial Society and Justice in the Ottoman Empire: Legal Practice and Dispute Resolution in Çankırı and Kastamonu* (Boston and Leiden: Brill, 2003), 77; and *EF*², s.v. "Maḥ kama" (Halil İnalçık). Prices increased about 850 percent in Istanbul according to Süleyman Özmucur and Şevket Pamuk, "Real Wages and Standards of Living in the Ottoman Empire, 1489-1914," *Journal of Economic History* 62 (2002), 301. Official sources do not indicate how much courts charged for litigation.

³³ *EF*², s.v. "Maḥ kama" (Halil İnalçık); and Zarinebaf, *Crime and Punishment*, 143-4.

³⁴ Kuran and Lustig, "Judicial Biases."

³⁵ Marcus, *Aleppo*, 106.

³⁶ Ergene, *Local Court*, ch. 6.

³⁷ Ergene, "Ümmü Gülsüm"; Ginio, "Criminal Justice."

³⁸ Mark Ramseyer and Minoru Nakazato, "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan," *The Journal of Legal Studies* 18 (1989), 264.

³⁹ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978), 891-2, 897, 976, and *passim*.

⁴⁰ Lawrence Rosen, *Bargaining for Reality: The Construction of Social Relations in a Muslim Community* (Chicago: University of Chicago Press, 1984); idem, *Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989).

⁴¹ See, for example, Gerber, *State, Society and Law*, ch. 1 and *passim*; Marcus, *Aleppo*, 110-16; Akgündüz, *Şer'iyecileri*.

⁴² See, for example, David S. Powers, *Law, Society and Culture in the Maghrib, 1300-1500* (Cambridge: Cambridge University Press, 2002).

⁴³ Rosen, *Anthropology of Justice*, 43. Doctrinal works consider it appropriate for the *qadi* to push the litigants toward negotiated settlements before allowing litigation. To understand how classical legal studies treat amicable settlements, see Aida Othman, "'And *Ṣulḥ* is Best': Amicable Settlement and Dispute Resolution in Islamic Law" (Ph.D. diss., Harvard University, 2005); and idem, "'And Amicable Settlement is Best': *Ṣulḥ* and Dispute Resolution in Islamic Law," *Arab Law Quarterly* 21 (2007): 64-90. Anthropological research reveals a similar

tendency in modern Islamic courts; see, among others, Richard Antoun, “The Islamic Court, The Islamic Judge, and the Accommodation of Traditions: A Jordanian Case Study,” *International Journal of Middle East Studies* 12 (1980): 455-67; idem, “Litigant Strategies in an Islamic Court in Jordan,” in *Law and Islam in the Middle East*, ed. Daisy H. Dwyer (New York: Bergen and Garvey Publishers); Aharon Layish, *Women and Islamic Law in a Non-Muslim State* (New Jersey: Transaction Books, 1975); idem, *Divorce in the Libyan Family* (New York: New York University Press, 1991); Enid Hill, *Mahkama! Studies in the Egyptian Legal System: Courts & Crimes, Law & Society* (London: Ithaca, 1979); Erin Stiles, “Broken Edda and Marital Mistakes: Two Recent Disputes from an Islamic Court in Zanzibar,” in *Dispensing Justice in Islam: Qadis and Their Judgments*, eds. M. Masud, R. Peters, and D. Powers (Leiden and Boston: Brill, 2006), 95-116; John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge: Cambridge University Press, 2003); Lynn Welchman, *Beyond the Code: Muslim Family Law and the Shari‘a Judiciary in the Palestinian West Bank* (The Hague, London, and Boston: Kluwer Law International, 1990); Michael Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press, 2000); and Ido Shahar, “Practicing Islamic Law in a Legal Pluralistic Environment: The Changing Face of a Muslim Court in Present-Day Jerusalem” (Ph.D. diss., Ben-Gurion University of the Negev, 2006).

⁴⁴ There is now evidence that Ottoman courts, which regularly followed well-established procedural and legal standards that remained relatively consistent over time and space, were also sensitive to the social environment in which they operated. See Elyse Semerdjian, *Off the Straight Path: Illicit Sex Law and Community in Ottoman Aleppo* (Syracuse: Syracuse University Press, 2008), ch. 3; and Ergene, *Local Court*, ch. 10.

⁴⁵ By the late sixteenth century, the tenure of the qadi was limited to three years. Later it became two years and by the end of the seventeenth century, one year; see *Et*², s.v. “Ma ḥkama” (Halil İnalçık). .”

⁴⁶ Kessler et al., “Explaining Deviations”; Waldfogel, “The Selection Hypothesis.”

⁴⁷ Ramseyer and Nakazato, “The Rational Litigant,” 268-70.

⁴⁸ Marcus, *Aleppo*, 111.

⁴⁹ Kuran and Lustig, “Judicial Biases.”

⁵⁰ Metin Coşgel and Boğaç A. Ergene, “The Selection Bias in Historical Records: Settlement and Trial in Eighteenth-Century Ottoman Kastamonu” (working paper, 2012).

⁵¹ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2005), 54. Because it was often difficult to prove these crimes due to their stringent evidentiary requirements and also because their punishments could be quite severe, *ḥadd* litigations are rare in Ottoman court records; *ibid.*, 53-61.

⁵² Cf. Uriel Heyd, *Studies in Ottoman Criminal Law* (Oxford: Clarendon Press, 1973), 250; and Ginio, “Criminal Justice,” 207.

⁵³ Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998), 68-9.

⁵⁴ Iris Agmon, "Women, Class, and Gender: Muslim Jaffa and Haifa at the Turn of the 20th Century," *International Journal of Middle East Studies* 30 (1998): 477-500.

⁵⁵ *EF*³, s.v. "Appeal" (David Powers).

⁵⁶ Coşgel and Ergene, "Dispute Resolution."

⁵⁷ On the other hand, if the party bearing the burden of proof fails to produce evidence, or if the evidence is deemed untrustworthy, the *qadi* will rule in the opponent's favor, often after the latter is asked to take an oath of truthfulness. If he or she refuses, the *qadi* will rule for the former, even in the absence of evidence, sometimes after forcing him/her to take an oath as well.

⁵⁸ The total number of such cases is 668. In 191 cases, decisions were reached through other means, including confessions, the *qadi*'s interpretation of the validity of the complaint, or considerations based on the statute of limitations.

⁵⁹ Most of the cases in our study are simple litigations in which straightforward accusations by plaintiffs are followed by defendants' denials.

⁶⁰ Kessler et al., "Explaining Deviations"; Waldfoegel, "The Selection Hypothesis."

⁶¹ Heyd, *Studies*, 130, 318, and *passim*; Ginio, "Criminal Justice"; Peters, *Crime and Punishment*, 16, 83, 133, and *passim*; Ergene, *Local Court*, ch. 8.

⁶² Mohamed Fadel, *Adjudication in the Maliki Madhhab* (PhD diss., University of Chicago, 1995), 125-6 and 185.

⁶³ Heyd, *Studies*, 252-3; Peters, *Crime and Punishment*, 34, 77, 82, 84, and 98.

⁶⁴ Daniel Klerman, "Jurisdictional Competition and the Evolution of the Common Law," *University of Chicago Law Review* 74 (2007): 1179-226.

⁶⁵ Kuran and Lustig, "Judicial Biases."

⁶⁶ *Ibid.*, 10.

⁶⁷ A more substantive and quantitatively sophisticated empirical treatment of settlement-trial decisions in our context can be found in Coşgel and Ergene, "The Selection Bias."

⁶⁸ *Avariz* was initially an irregular tax collected to support military campaigns; to maintain the post system, the imperial kitchens or the navy; to guard mountain passes; and to uphold bridges, roads, and waterworks. Beginning in the late sixteenth century, it was regularized and began to be collected annually in cash. The size of the *avariz* tax levied on a particular locality was determined according to the number of *avariz* households in that area. Although each *avariz* household included a number of real households, the exact number of these units varied from one place to another. Each *avariz* household could comprise three to as many as fifteen real households, depending on their size and the relative prosperity of the district. Although it is difficult to be certain, our impression is that this number was closer to fifteen in Kastamonu in the eighteenth century.

⁶⁹ *EF*², s.v. "Kastamonu" (Colin Heywood).

⁷⁰ Comparable figures are rare in the secondary literature for other Ottoman contexts. According to Ginio, the court in Salonika heard 184 cases between 3 June 1740 and 27 July 1741, or about fourteen cases per month. Thirteen of these cases were crime-related; "Criminal Justice," 187-8.

Although he does not provide comparable statistics for civil litigations, Abraham Marcus reports that in eighteenth-century Aleppo “(o)nly a dozen or so complaints (involving crimes against life and property) reached the shari‘a court each month”; *Aleppo*, 102. He also states that “serious crimes against life and property appear to have been less numerous than violations of public morals, such as drinking, gambling, the production of wine, and illicit sexual relations”; *ibid.*

⁷¹ Based on low numbers of crime-related litigations, Abraham Marcus suggests that crime rates should be low in eighteenth-century Aleppo; *Aleppo*, 102. However, Ginio and Faroqhi emphasize that there may not be a direct correspondence between crime rates and crime-related documentation in the court records. See Ginio, “Criminal Justice,” 187-8; Suraiya Faroqhi, “The Life and Death of outlaws in Çorum,” in *Coping with the State: Political Conflict and Crime in the Ottoman Empire*, ed. Suraiya Faroqhi (Istanbul: Isis Press, 1995), 145.

⁷² Kuran and Lustig, “Judicial Biases,” 16.

⁷³ Litigants’ (if limited) ability to respond to the inherent biases in the system becomes clear when we investigate how plaintiffs and defendants won their cases. While plaintiffs assumed the burden of proof more often than defendants (429 and 239, respectively), as we suggested earlier, the win rate of defendants in such cases (about 90 percent) was significantly higher than that of plaintiffs (about 69 percent). Thus, even though (or because) the evidentiary standards may have favored plaintiffs, defendants agreed to litigation in disputes that they had a greater chance of winning compared to plaintiffs, if/when they assumed the burden of proof.