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Taking the Rule of Law Seriously

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ABSTRACT

American legal scholars and jurists have given the rule of law their sustained attention, and the international community has treated it as an important measure of societal well-being. But still the rule of law is not taken seriously. For one thing, little effort has been made to craft a definition of the rule of law that is actually useful. And even when legal scholarship does try at empiricism that could illuminate the vitality of our rule of law, it generally starts from the wrong hypotheses and uses the wrong methods. It focuses on how to achieve "access to justice" and privileges quantitative approaches and the supposed "gold standard" of the randomized controlled trial over the qualitative assessment that is necessary to hold ourselves accountable for the rule of law. However, it is nonetheless possible to derive a workable, consensus definition of the rule of law from the varied and elaborate concepts offered by legal scholars and jurists, which would provide a metric that could be used as the basis for more directly relevant research. Further, some of the research that has already been done about what goes on in our courtrooms does suggest what work evaluating the extent to which we are achieving the rule of law would look like. Such research must be done if we intend to ensure a fundamentally important mechanism for achieving many of our most cherished values, including equal treatment and social justice. We have to take the rule of law seriously if we intend to uphold those values.

AUTHOR'S NOTE

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INTRODUCTION

It would *seem* that we are taking the rule of law seriously. When we talk about our legal system and our society in general, we often insist that it follows the "rule of law."[1] Further, American legal scholars and jurists have given the rule of law their sustained attention.[2] The same applies to international legal scholars and organizations, which largely at our behest have treated the rule of law as an important measure of societal well-being.[3]

But the rule of law is not, in fact, taken seriously. Legal scholars and jurists have made little effort to work toward a definition of the rule of law that is actually *useful*. In addition, legal scholarship and research are nearly devoid of concern or consideration for whether our system is actually ruled by law. Rather than being taken seriously, the rule of law has been left an intellectual abstraction and a largely inert piece of rhetoric.

This Article explores what would be involved in taking the rule of law seriously.

First, as Part I of this Article explains, a common thread runs through the varied definitions of the rule of law that have been offered by legal scholars and jurists. That definitional core provides an opportunity to establish a workable, consensus metric. Seeing the rule of law as a basis for accountability is the first step toward taking it seriously.

Second, as Part II indicates, legal scholarship presently lacks concern for such practical matters as whether and to what extent we have a properly functioning rule of law. Even when legal scholarship does make an effort at empiricism, it privileges quantitative

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1 *See* discussions *infra* Part, I.A, I.D.

2 *See* discussion *infra* Part I.

3 *See e.g.*, Simon Chesterman, Vice Dean & Professor of L., Nat'l Univ. of Sing.; Glob. Professor & Dir. of the N.Y.U. Sch. of L. Sing. Programme, Keynote Address at United Nations Headquarters: Taking Stock: The U.N. Security Council and the Rule of Law (Oct. 28, 2010) (transcript on file with the UMass Law Review); Daniel Kaufmann & Aart Kraay, *World Governance Indicators*, WORLD BANK, http://info.worldbank.org/governance/wgi/ (listing the rule of law as one of six indicators used to assess governance). *See also* WORLD JUST. PROJECT, RULE OF LAW INDEX 2017-2018 at 3 (2019) (ranking the United States nineteenth in the world in adherence to the rule of law). The World Justice Project began as an initiative of the American Bar Association to "advance the rule of law worldwide." *About Us*, WORLD JUST. PROJECT, https://worldjusticeproject.org/about-us [https://perma.cc/NDV2-MXE7].

approaches that do not align with the distinctively qualitative assessment necessary to hold ourselves accountable for the rule of law. Taking the rule of law seriously requires us to be prepared to chart a new research agenda and approach.

Finally, Part III describes what it would look like to take the rule of law seriously. What little empirical work has been done on what goes on in our courtrooms has thus far only incidentally evaluated our adherence to the rule of law, rather than directly examining the extent of its achievement. And it is concerning that even such indirect examination indicates that we do need to be concerned about the vitality of our rule of law. Fortunately, some of this research does suggest what it would look like to take the rule of law seriously.

The rule of law is a fundamentally important mechanism that facilitates the achievement of many of our most cherished values, including equal treatment and social justice. We have to take the rule of law seriously if we intend to uphold those values.

I. DEFINING THE RULE OF LAW SO THAT IT WILL BE USEFUL FOR EVALUATION

Our legal scholarship and jurisprudence have not reached a clear consensus of what is meant by the rule of law, which prevents it from becoming a metric by which our legal system can be evaluated.[4] International legal scholars and organizations do try to treat the rule of law as a measure of accountability, but they have identified a grab-bag of good governance features as indicators of the rule of law rather than a distinctive and coherent norm.[5] In order to say whether we have the rule of law in our system—and to evaluate its extent and what reforms it needs—we need a workable definition.

Our current lack of such a definition does not result merely from the fact that the rule of law is a "big concept." Other concepts of similar apparent amorphousness, like access to justice,democracy, and

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4 *See* discussions *infra* Parts I.A to I.D.

5 *See e.g.*, *What is the Rule of Law?*, WORLD JUST. PROJECT, https://worldjusticeproject.org/about-us/overview/what-rule-law [https://perma.cc/LQG5-BDMS] (identifying accountability, just law, open government, and accessible and impartial justice as "four universal principles [that] constitute a working definition of the rule of law"); Kaufmann & Kraay, *supra* note 3 (establishing voice and accountability, regulatory quality, political stability and absence of violence/terrorism, rule of law, government effectiveness, and control of corruption as the six "dimension for governance").

racial equality, have lately been subjected to real evaluation.[6] If the rule of law is as important as we say, then we must find a way to examine it with similar urgency and intentionality.

Thus far, legal scholars and jurists have produced a remarkably murky conceptualization of the rule of law. It has often been lamented how "essentially contested,"[7] "deeply ambiguous,"[8] and "vague and imprecise"[9] the concept of the rule of law is. Indeed, attempts to formulate a definition would seem to be a hopeless endeavor if, as one scholar has asserted, "the rule of law is best thought of as a configuration of structures, social attitudes, and even traditions."[10] Broadly sweeping, multiplicitous, and widely ranging understandings of the rule of law are not useful for the purposes of measurement, comparison, and evaluation. If a definition cannot even be used to identify the thing which it is a definition of, then the act of defining has become a mere exercise.

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6 *See e.g.*, WORLD JUST. PROJECT, GLOBAL INSIGHTS ON ACCESS TO JUSTICE (2019), https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf (compiling information from 101 countries on access to justice and creating national profiles); William Y. Chin, *Racial Equality and Inequality in America and Lessons from Other Countries*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 473 (2021) (analyzing how the United States can improve racial equality by looking to practices implemented by other countries); Joshua Ulan Galperin, *Legitimacy, Legality, and the Life of Democracy*, VT. L. REV. (2021) (examining the role majoritarianism and individualist principles in a democracy); Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 399 (2003) (arguing that the myth of popular sovereignty in direct democracy should be rejected and that ballot initiatives should be viewed as efforts made by "initiative proponents" rather than the romanticized concept of "the people").

7 Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137, 151, 153-54 (2002). *See also* Bernice Bouie Donald, *When the Rule of Law Breaks Down: Implications of the 1866 Memphis Massacre for the Passage of the Fourteenth Amendment*, 98 B.U. L. Rev. 1607, 1612 (2018) ("[M]any agree that the rule of law is an 'essentially contested concept.'"); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997) ("[T]he precise meaning of [the rule of law] may be less clear today than ever before.").

8 Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989).

9 Frank Lovett, *A Positivist Account of the Rule of Law*, 27 L. & SOC. INQUIRY 41, 41 (2002).

10 Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 HAGUE J. ON RULE LAW 269, 272 (2011).

But that does not have to be the case. Upon close examination, many apparent differences between conceptualizations of the rule of law are actually variations regarding its scope. Other apparent differences seem more like attempts to bring other desiderata under the attractive aegis of the rule of law rather than true inconsistencies. Despite appearances, there appears to be a core understanding of what the rule of law means, and that core understanding provides the basis for a meaningful metric.

A. Simple Formulations

The most attractive formulation of the rule of law would seem to be the simplest one because simpler metrics are more easily applied than complicated ones. In addition, it is more likely that such a formulation will identify what is most essential to the rule of law, as opposed to additional—perhaps optional—features. Of course, the problem is the risk of being inaccurate due to oversimplification or truncation. But simple formulations are the best starting place for determining a workable metric, which can then be evaluated for accuracy and suitability.

Some of the simplest definitions of the rule of law are probably those found on the United States citizenship test. Acceptable answers for the meaning of the "rule of law" include: "[n]o one is above the law," "[e]veryone must follow the law," "[l]eaders must obey the law," and "[g]overnment must obey the law."[11] These statements are actually somewhat different from each other. "No one is above the law" emphasizes the idea that the law applies even to persons of the highest status. "Everyone must follow the law" is more focused on the general obedience of the citizenry to the law. "Government [and its leaders] must obey the law" moves the emphasis, making government the most important observer of the law. Although it could be a case of the blind

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[11] U.S. CITIZENSHIP AND IMMIGR. SERVS., CIVICS (HISTORY AND GOVERNMENT) QUESTIONS FOR THE NATURALIZATION TEST 2 (2019), https://www.uscis.gov/sites/default/files/document/questions-and-answers/100q.pdf [hereinafter 2008 NATURALIZATION TEST]. Note that the Trump administration published a new naturalization test where the rule of law question appeared as number thirteen. U.S. CITIZENSHIP AND IMMIGR. SERVS., M-1778, 128 CIVICS QUESTIONS AND ANSWERS (2020 VERSION) at 3 (2021), https://www.uscis.gov/sites/default/files/document/crc/M_1778.pdf. The 2020 revised naturalization civics test is no longer administered to first-time test takers. *USCIS Reverts to the 2008 Version of the Naturalization Civics Test,* U.S. CITIZENSHIP AND IMMIGR. SERVS. (Feb. 22 2021), https://www.uscis.gov/news/news-releases/uscis-reverts-to-the-2008-version-of-the-naturalization-civics-test [https://perma.cc/Q65P-M5YY].

men with the elephant, these definitions are not consistent in their focus on who is accountable for the rule of law or how it applies.

Judge Richard Posner also offers a simple definition of the rule of law. According to him, the rule of law means that judges decide cases "without respect of persons," that is, indifferent to parties' social status or attractiveness.[12] This version describes government's application of law as not only extending to all citizens regardless of status (as in "[n]o one is above the law"), but also more explicitly as banishing the consideration of parties from decision-making.

Another simple statement about what is meant by the rule of law was communicated by Chief Justice John Marshall in his remark (repeating John Adams) that our government is one "of laws, and not of men."[13] This understanding of the meaning of the rule of law differs somewhat from Posner's definition. Marshall's version makes clear that judges should base their decisions on the law as stated and not on anything extralegal; Posner's only specifies that judges should disregard who the parties are, leaving implicit what judges do regard in making their decisions.

Some of these simple conceptions of the rule of law seem better than others in capturing what the rule of law is. For example, it seems doubtful that the rule of law has much to do with the general obedience of the citizenry to the law (as in one of the acceptable answers to the citizenship exam, "[e]veryone must follow the law").[14] Obedience of citizens does not actually seem to be the essence of the rule of law, as there are some laws that many people fail to obey (like speed limits, drug laws, and laws that are the objects of civil disobedience), without there being any sense that the rule of law is under attack. On the other hand, if judges applied the law with the same regularity with which motorists obey speed limits, that would presumably be viewed as a serious threat to the rule of law.

Even widespread, material disobedience on the part of citizens would probably not be described as a breakdown in the rule of law as

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12 Dafna Linzer, *How I Passed My U.S. Citizenship Test: By Keeping the Right Answers to Myself*, PROPUBLICA (Feb. 23, 2011, 5:31 PM), https://www.propublica.org/article/how-i-passed-my-us-citizenship-test-by-keeping-the-right-answers-to-myself [https://perma.cc/F95E-3BT4].

13 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

14 2008 NATURALIZATION TEST, *supra* note 11. Some other sources, particularly those that do international comparisons, do consider the "likelihood of crime and violence" as one of the measures of whether a society can be said to have the rule of law. *See also* sources cites *supra* note 3.

such, but rather a more fundamental social collapse—a breakdown of law itself. A breakdown in the *rule of* law instead comes when the government fails to follow the law in running the society, and it is at this point we say that the rule of law is in jeopardy. Indeed, the citizens of a totalitarian society might be very obedient to the law, but that is not enough to say that such societies have the rule of law.[15]

It is perhaps for this reason that other acceptable answers to the question about the rule of law on the U.S. citizenship test put the emphasis on government actors as the ones who must be accountable for the rule of law ("[l]eaders must obey the law" or "[g]overnment must obey the law").[16] That is what seems to get more at the essence of the rule of law, which is primarily something that binds governmental decision-makers, as opposed to puts responsibilities on citizens.[17]

Posner's version of the rule of law, though evidently more precise and more accurate than some of the citizenship test's stylings, may still not be the best formulation. He says that the rule of law amounts to making decisions without partiality toward the parties.[18] It might well be understood by Posner that what is being impartially applied is the law, rather than some other criterion of decision. However, by stressing impartiality, this description seems like the tail wagging the dog. If a judge is applying the law—and no other criterion—then the result will necessarily be an impartial adjudication, as other criteria do not enter into the decision-making process. Impartiality, then, is a consequence of applying the law rather than a feature of the rule of law itself.

These conceptions of the rule of law are inconsistent with each other in minor respects. But it would not be difficult to imagine the proponents of these formulations agreeing with Marshall's sense of it as government decision-making that applies laws strictly according to their terms and does not employ any extra-legal preferences of those making the decisions—thereby qualifying as government "of laws, and

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15 *See* Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. Rev. 943, 947 (1958) (distinguishing between the rule of law and the "rule by law" seen in totalitarian countries).

16 2008 NATURALIZATION TEST, *supra* note 11.

17 Interestingly, the answers on the citizenship test speak of the government and the leaders as "obeying" the law, and everyone as "following" the law. *Id.* But strictly speaking it is citizens who are *obedient* to law and government actors that *follow* the law in their decision-making with respect to citizens.

18 *See* Linzer, *supra* note 12.

not of men."[19] This basic understanding is apparently shared across definitions, subject mainly to variations in emphasis or focus, and so would amount to a consensus view of what the rule of law means and appears to be accurate as far as it goes. Thus, this definition could be used as a workable metric by which to evaluate whether our system actually abides by the rule of law.

B. More Complex Formulations

It is true that many definitions of the rule of law prescribe additional features, suggesting that the simplest definition is incomplete, and thus inaccurate. For example, Lon Fuller describes eight "elements" associated with the rule of law: generality, publicity, prospectivity, clarity, noncontradictoriness, capability of being followed, stability, and congruence between norms as stated and norms as applied.[20] Most of these elements—the first seven—might be said to represent the "legislative" aspect of the rule of law. They are not features of the *rule of* law as such but what the law ought to have in order for its rule to be legitimate. The implicit idea in Fuller's description is that law is something that is intended to affect the behavior of citizens, and that it must be public, clear, etc., in order for it to have a chance of actually having such an effect.[21] Otherwise, the law acts more like a tripwire for the unfortunate persons who do not know about its existence or understand what it prohibits. It would not be fair or reasonable (except perhaps in a Kafkaesque world) to hold a person responsible for failing to obey a secret or incomprehensible law.

The eighth element in Fuller's list—congruence between norms as stated and norms as applied—addresses the *rule of* law as such, how a law that meets the other (legislative) criteria is to be enforced. Where congruence between norms as stated and norms as applied is lacking, even laws that meet the other criteria on the list would in effect be merely ceremonial or sham. (A law that is not actually enforced is

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19 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

20 Fallon, *supra* note 7, at 8 n.27 ("[Fallon's list] differs in detail from, but is in spirit consistent with, Lon Fuller's account of eight criteria that must be satisfied for law to exist . . . ."). *See also* LON J. FULLER, THE MORALITY OF LAW 39 (1964).

21 *See* FULLER, supra note 20.

probably better described as a bit of propaganda or rhetoric than as "law".[22])

While all of Fuller's elements might be essential to the rule of law, the seven legislative requirements are more readily assessed than the adjudicative criterion of congruence. There can be disputes over how public and how clear the law actually is, but if the words of the law can be obtained by most citizens and understood by them to a meaningful extent, then we can say that the society has those elements of Fuller's list. However, the eighth element, congruence between the norms as stated and norms as applied, is not as readily assessed. Indeed, it is not uncommon for societies to have laws that "sound good on paper"—that are public, clear, etc.—but that are not actually enforced as written. It may, moreover, take substantial investigation to document the failure of the words on paper to carry over into the everyday and granular business of government decision-making. Accordingly, it could be said that this aspect of the rule of law is particularly important as a metric.

Further, Fuller's list does not amount to a different description of the rule of law so much as an elaboration on what constitutes the *law* that the rule of law is promoting. The eighth of those elements, that the norms as stated are the norms as applied, is much the same in substance as the idea embodied in the simple procedural definition of the rule of law. Both are concerned with applying laws according to their terms and not using extra-legal considerations—government of

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[22] *See, e.g.*, Victoria Schwartz, *The Influences of the West on the 1993 Russian Constitution*, 32 HASTINGS INT'L & COMP. L. REV. 101, 144-45 (2009) (explaining that although the Russian Bill of Rights has been described as similar to the bill of rights in the U.S. Constitution, many of those rights "cannot be enforced by the court system" and therefore remain rhetorical); Kathryn Hendley, *Varieties of Legal Dualism: Making Sense of the Role of Law in Contemporary Russia*, 29 WIS. INT'L L.J. 233 (2011) (describing the dualism of the Russian government, which has lead to the inconsistent application of the law to citizens); Haiting Zhang, *Traditional Culture v. Westernization: On the Road Toward the Rule of Law in China*, 25 TEMP. INT'L & COMP. L.J. 355, 387 (2011) (describing how supporters of Chiang Kai-shek and the Communist Party in Taiwan argued that the Constitution existed simply "for reference"); Randle C. DeFalco, *The Uncertain Relationship Between International Criminal Law Accountability and the Rule of Law in Post-Atrocity States: Lessons from Cambodia*, 42 FORDHAM INT'L L.J. 1, 16 (2018) (detailing how Cambodia, which claims to be committed to "rule of law-based governance" ignores the law when "inconvenient").

laws and not of men.[23] Thus, this understanding of the rule of law is also not inconsistent with that definition.

C. Substantive Elements

Other jurists and legal scholars have proposed additional criteria for the rule of law that, if essential, would indicate that the simple understanding of the rule of law is inadequate. For example, Justice Kennedy has said that the rule of law "must respect and preserve the dignity, equality, and human rights of all persons."[24] This conceptualization invokes a more substantive conception rather than the purely procedural understanding of the concept of the rule of law that is embodied in the simple procedural definition.

It is true that in calling for the rule of law to show respect for "dignity," Kennedy could in fact be describing a procedural norm: a system that does not, say, harass or demean the parties to a case. Such a procedural norm is implicitly necessary to the rule of law, insofar as litigants would be impeded from availing themselves of a system that is routinely abusive of them. Or Kennedy might be calling for something more than that, for substantive law that does not treat persons in primarily instrumental ways. "Equality" presents a similar uncertainty as a criterion. It could refer procedurally to a system that treats all citizens the same, regardless of who they are (as in Posner's definition).[25] Or it might mean substantively a system of laws that prohibits discrimination based on race and certain other characteristics. But Kennedy's particular reference to "human rights" confirms that he does view the rule of law as not only involving procedural norms but also substantive ones.[26]

Indeed, other conceptions of the rule of law also suppose that substantive guarantees of human rights constitute an essential feature of it. For example, the Secretary General of the United Nations has defined the rule of law as involving accountability to "laws that are . . . consistent with international human rights norms and standards."[27] The

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[23] Linzer, *supra* note 12.

[24] Robert Stein, *Rule of Law: What Does it Mean?*, 18 MINN. J. INT'L L. 293, 299 (2009).

[25] Linzer, *supra* note 12.

[26] Stein, *supra* note 24.

[27] The rule of law is defined as a:

> principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally

American federal court system has similarly included in its own definition of the rule of law that it be "consistent with international human rights principles."[28]

Such substantive expectations for the rule of law represent an expansion of the simpler procedural definition, and, moreover, make for an unwieldy metric. Evaluation of whether the substance of law complies with human rights—for example, whether a law permitting abortion denies substantive equality or protects it—can be contested from society to society and even within a society. Determining whether a society's laws as written are the same as the laws as enforced is more objectively assessable (though this analysis may still give rise to disputes over certain details).

Despite its limits, we may still be inclined to accept the limited procedural concept of the rule of law because if such substantive equality were a required feature, then we would have to say we have not had the rule of law for most of the history of this country (and may not even have it now). While there may be disagreement about what human rights are, the rule of law as a procedural mechanism presently represents a more attainable standard. In addition, defining the rule of law in its most modest procedural sense is an important benchmark in another way: if our system falls short of achieving even this minimalist rule of law, then that is a disturbing fact worth confronting. It is important to note, moreover, that the more substantive understanding of the rule of law is not a rejection of the idea that it must also mean that the norms as stated are the norms as

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> enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616, (Aug. 23, 2004), https://undocs.org/S/2004/616.

[28] *See Overview–Rule of Law,* U.S. CTS. (2021), https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law [https://perma.cc/KQ7Q-KUPA] ("[the rule of law is] a principle under which all persons, institutions, and entities are accountable to laws that are: publicly promulgated, equally enforced, independently adjudicated, and consistent with international human rights principles.").

applied—for unless that is true the proposed substantive elements have no mechanism for enforcement.

D. Structural Features

There are also governmental structures that have been posited as essential to the rule of law, that may add details to what the rule of law means. For example, Justice Kennedy proposed that to have the rule of law, we "must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them."[29] Similarly, Justice O'Connor described the "separation of the legislative and judicial powers of government" as "essential" to the rule of law, and an independent judiciary as "the foundation that underlies and supports" it.[30] In addition, the World Justice Project has proposed that the rule of law is measured in part by "the extent to which, in practice, those who govern are bound by governmental and non-governmental checks such as an independent judiciary, a free press, the ability of legislatures to provide oversight, and more."[31]

The governmental structures commonly identified as crucial to the rule of law—constitution, democratic participation, separation of powers, free press, and independent judiciary—may well be conducive to its development, maintenance, and application. But in defining the rule of law, it is important to distinguish between facilitative structures and necessary features.

There are many jurisdictions in our country that lack an independent judiciary, if by independent one means that the judges must not be subject to the control of the electorate.[32] Yet, it is not assumed that such jurisdictions lack the rule of law. Also, it is not clear that we have even attained the kind of democratic participation that gives citizens "a meaningful voice in shaping and enacting the laws that govern them,"[33] since votes count differently in value from

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29 Stein, *supra* note 24, at 299-300.

30 Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE J. INT'L L. 1, 2-3 (2003).

31 Press Release, World Justice Project, World Justice Project Rule of Law Index 2019 (Feb. 27, 2019) (on file with UMass Law Review).

32 *See Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures [https://perma.cc/6AYX-UZ8T] (last updated May 8, 2021) (stating that thirty-nine states elect judges at some level).

33 Stein, *supra* note 24, at 299-300.

jurisdiction to jurisdiction and do not count at all in a few places. But it is not supposed that that prevents the application of the rule of law by the courts of those jurisdictions.

Certain structures may in fact be necessary to—not merely facilitative of—the rule of law. Exactly what those structures are presents a separate issue and subject for research. Their relationship to the rule of law is uncertain enough that they should not be considered necessary to the rule of law as a metric. Because it can be established directly whether the rule of law is operating in a society, it need not be ascertained whether certain structures are in place for it to be said that the society has a functioning rule of law, and the presence of such structures do not guarantee that it does have a functioning rule of law.

E. Due Process, Appellate Review, and the Rule of Law

If the rule of law is most helpfully defined as a procedural norm (as the simplest definition of the rule of law would have it), then it might be argued that it is already manifest that our system has the rule of law. Indeed, it might appear that a system has the rule of law as long as it provides due process and engages in appellate review of its decision-making. Due process indeed provides a propitious environment for adherence to the rule of law, and appellate review corrects misapplication of the law (ensuring that the norms as stated are the norms as applied, at least ultimately). Thus, it might seem that we do not need any deeper evaluation of our system to determine the extent to which it has the rule of law, because these features of the system theoretically ensure that it does.

No matter how beneficial these features are for the rule of law, they do not amount to the rule of law as such or ensure that it functions effectively. Due process, as the Supreme Court has defined it, involves the opportunity to be heard "at a meaningful time and in a meaningful manner."[34] What constitutes a "meaningful manner" is subject to interpretation, but it is primarily about ensuring that the court or other forum receives and pays attention to the relevant evidence rather than subjects it to any particular form of consideration.[35] A hearing that

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[34] Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). *See also* Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

[35] Accordingly, a defendant must have a "meaningful opportunity to defend" against the charge against him. *See* Musacchio v. United States, 577 U.S. 237, 243 (2016) (citing Jackson v. Virginia, 443 U.S. 307, 314-15 (1979). The

satisfies due process requirements does not ensure the rule of law, insofar as it does not ensure an outcome that accords with the law. Rather, it helps ensure that the parties have the ability to supply the facts to which the court, in theory, applies the law.[36]

Indeed, appellate review in general—rather than due process review in particular—is what is expected to ensure compliance with the law. However, appellate review as presently constituted is an inadequate means of ensuring the rule of law. For one thing, the right of appeal is not guaranteed to litigants, and review at the highest level is generally discretionary.[37] Accordingly, the opportunity of correction that appeal offers is contingent. In addition, many obstacles, including high cost, prevent parties, especially those of limited means, from appealing.[38] Further, the correct application of the law at the appellate

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opportunity to defend includes being able to present "competent, reliable evidence" for consideration. Crane v. Kentucky, 476 U.S. 683, 690 (1986). This also applies in civil cases, where parties must be able to present relevant evidence and the court "must listen" to what the parties have to say. *See* Little v. Streater, 452 U.S. 1, 16 (1981); Fuentes v. Shevin, 407 U.S. 67, 81 (1972). These norms of receiving evidence and considering it provide the context for decision-making, but due process does not compel any particular mode of evaluating evidence.

[36] *Musacchio*, 577 U.S. at 243 (explaining that when reviewing the sufficiency of evidence, courts have a duty to conduct a "limited inquiry" to ensure that at least the minimum due process requirements have been provided).

[37] *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) ("[The Supreme] Court has never held that the States are required to establish avenues of appellate review . . . ."); M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) ("[D]ue process does not independently require that the State provide a right to appeal."); Halbert v. Michigan, 545 U.S. 605, 610 (2005) ("The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions.") (citing McKane v. Durston, 153 U.S. 684, 687 (1894)).

[38] For example, it is common for an appeal bond to be required. *See, e.g.*, MD. CODE, ANN. REAL PROP. § 8-401(h)(2) (West 2019) ("The tenant, in order to stay any execution of the judgment, shall give a bond to the landlord . . . and answer to the landlord in all costs and damages mentioned in the judgment, and other damages as shall be incurred and sustained by reason of the appeal."). In addition, other obstacles may be placed in front of appeals, such as a very short window of opportunity. *See, e.g.*, MD. CODE ANN. REAL PROP.§ 8-401(h)(1) (West 2019) ("The tenant or the landlord may appeal from the judgment of the District Court to the circuit court for any county at any time within 4 days from the rendition of the judgment."). Moreover, limitations may be placed on when a record appeal can be sought. *See, e.g.*, MD. CODE ANN. CTS. & JUD. PROC. § 12-401(f) (West 2013) ("In a civil case in which the amount in controversy exceeds $5,000 exclusive of interest, costs, and attorney's fees . . . an appeal shall be heard on the record made in the District Court. In every other case . . . an appeal

level, if it occurs, is much delayed, which may, through attrition and collateral damage, reduce the impact of any ultimate correction. Perhaps most importantly, appellate review is not an ideal means of ensuring the rule of law because it does not provide it in the first instance. It only redresses a portion—probably a very small portion—of the cases where the norms as stated are not the norms as applied, and thus is a stopgap rather than a means of enacting the rule of law. And, finally, when appellate courts review trial courts, they do so under a deferential standard that is willing to overlook, to some extent, the failure of the application of norms as stated, reducing the value of appeal as a guarantor of the rule of law.[39]

To ensure that we have a functioning rule of law, it is not enough to point to these features of our system. In fact, the minimalist interpretation of due process that prevails and the limited access to appellate review that exists are reasons to be concerned about the well-being of our rule of law. To know the extent to which the rule of law functions in this country, we must apply the metric of what constitutes the rule of law to its enactment—in our trial courts rather than the appellate courts—to see if they are in fact ruled by law.

F. The Rule of Law as a Metric

For whatever reason, legal scholars and jurists have produced varied disquisitions upon the rule of law. The unwieldy academic enterprise of defining the rule of law may be well-intentioned and has no doubt proved revealing in many respects. However, it has not led to the vitally important development of a generally useful definition of the rule of law, one that represents a shared understanding and that can serve as means of identifying and evaluating the achievement of the rule of law.

Scholars and jurists do apparently agree that on its most fundamental level the rule of law means that the norms as stated are

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shall be tried de novo."). A de novo appeal essentially prevents the review of whether any errors were made by the trial court; the circuit court trying the case de novo "receive[s] evidence and make[s] determinations of facts as though no prior proceeding had occurred . . . ." *In re* Marcus J., 950 A.2d 787, 795 (Md. 2008).

[39] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 694-95 (1984) ("[In conducting its review] a court should presume . . . that the judge or jury acted according to law . . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.").

the norms as applied.[40] It is true that there are differences of perspective on the scope of the rule of law and other details, but this core idea is a constant. This core idea is also capable of being used as a metric to evaluate the legal system. If the system fails to adhere to this core understanding, then it should be said that it does not have the rule of law. As the existence of the other proposed features of the rule of law suggests, it might still be argued that even where the norms as stated are the norms as applied, that is not enough by itself to demonstrate that the rule of law prevails. But it seems safe to say that a system that does not meet at least this criterion does not have the rule of law.

II. THE SHORTCOMINGS OF CURRENT LEGAL SCHOLARSHIP (IMPEDIMENTS TO TAKING THE RULE OF LAW SERIOUSLY)

One of the current impediments to taking the rule of law seriously is a scholarly environment that is manifestly inhospitable to the relevant research. For instance, the legal academy currently focuses on the theoretical rather than the practical, discouraging the study of the real-life operation of the legal system that would be necessary to determine the vitality of our rule of law.[41] Further, even the rare relevant empirical work that is done about our courts tends to be focused on supporting a particular objective—such as a right to counsel for civil litigants—that may well represent a case of the conclusion driving the evidence rather than the evidence driving the conclusion.[42] Indeed, the type of study needed to evaluate the efficacy of our rule of law would be difficult to accommodate right now because it appears that the only empirical legal scholarship considered to be credible is that which is rigidly quantitative in nature, and is thus inherently inadequate to the task.[43] Taking the rule of law seriously will require a reorientation in legal scholarship.

A. Legal Scholarship and Its Focus on the Impractical

Empirical study of our legal system, of the kind necessary to evaluate how well it adheres to the rule of law, is uncommon. The norm in legal scholarship is more theoretical and philosophical as

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40 *See* sources cited *supra* note 20.

41 *See* discussion *infra* Part II-A.

42 *See* discussion *infra* Part II-B.

43 *See* discussion *infra* Part II-C.

opposed to empirical. It is seldom concerned with the operation and efficacy of our courts and how the law works in practice. More than a few scholars and jurists have expressed dismay over this current state of affairs.

For example, Judge Harry T. Edwards has argued that legal scholars should be "producing scholarship that judges, legislators, and practitioners can use," but have instead been "emphasizing abstract theory at the expense of [such] practical scholarship."[44] In his view,

> [t]here has been a clear decline in the volume of "practical" scholarship published by law professors. "Practical" legal scholarship, in the broadest sense . . . is *prescriptive*: it analyzes the law and the legal system with an aim to instruct attorneys in their consideration of legal problems; to guide judges and other decisionmakers in their resolution of legal disputes; and to advise legislators and other policymakers on law reform.[45]

Professor Robert W. Gordon has similarly bemoaned the "useless blather" of much legal scholarship, and has called for "more empirical work, institutional description, and law-in-action studies" and more attention to "describing how some court, agency, enforcement process, or legal transaction actually works."[46]

Similarly, Judge Richard A. Posner has observed that legal scholarship was at one time "oriented toward reform and hence sought its primary audience among those people—mainly legal professionals, including other law professors, judges, legislators, and practicing lawyers—who were interested in improving law and legal institutions."[47] And its future, as he saw it, is threatened unless scholars return to doing more to "influence practice, rather than merely to circulat[ing] their ideas within the sealed network of a purely academic discourse."[48] Further, Professor Deborah L. Rhode has complained that

> much conventional [legal] scholarship is out of touch with fundamental social problems. Too many debates in leading law reviews are excessively insular and self-referential. When

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[44] Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L.REV. 34, 34 (1992).

[45] *Id.* at 42-43.

[46] Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground"*, 91 MICH. L. REV. 2075, 2076, 2087 (1993).

[47] Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1314 (2001).

[48] *Id.* at 1317.

> professors write mainly for each other, they face little pressure to address the problems that practitioners or the public find most urgent or to identify solutions that have some realistic chance of adoption.[49]

It should be noted that, even to the extent that legal scholars concern themselves with practical aspects of law, they tend to focus on the appellate courts rather than the trial courts.[50] While the legal impact of appellate courts is obviously greater because of their role in establishing precedent, they are also highly unrepresentative. Trial courts address the greater number of legal cases by far, and have a more direct impact on people's lives.[51] If the rule of law in this country can be said to be working well, then it must work well in the trial courts where the vast majority of citizens experience whatever form of it the legal system offers.

The repeated refrain among critics is a call for more scholarship on the operation of the legal system. These critics believe legal scholars ought to be more concerned with "analyz[ing] the law and the legal system with the aim to instruct attorneys . . . [and] guide judges,"[52] and should give more consideration to "law-in-action studies" and with

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[49] Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1342 (2002).

[50] *See, e.g.*, Binny Miller, *Visibility and Accountability: Shining a Light on Proceedings in Misdemeanor Two-Tier Court Systems*, 63 ST. LOUIS UNIV. L.J. 191, 202 (2019) ("Appellate opinions are the bread and butter of much legal scholarship."); Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TUL. L. REV. 1161, 1163 (2006) ("[M]ost legal scholarship, focuses on the very top courts with an occasional glance at the intermediate appellate courts . . . ."); Anna E. Carpenter et al., *Studying the "New" Civil Judges*, WIS. L. REV. 249, 268 (2018) ("When legal scholars speak about the civil justice system, they most often speak about the federal system and appellate courts, whether they note this explicitly or not. Legal scholars have examined the work of lower civil court judges in only a relatively minuscule number of published studies.") (footnote omitted).

[51] In any given year, just one type of civil case filed in a single city has the potential to substantially exceed civil appeals of all kinds filed in all the federal circuit courts in the entire country. For example, the Baltimore City District Court alone saw 144,058 landlord-tenant cases filed in fiscal year 2017 (July 2016-June 2017), while all of the circuit courts for the entire federal system handled 28,071 civil appeals in total from April 1, 2016 to March 31, 2017. *Compare Federal Judicial Caseload Statistics 2017* at 1, U.S. CTS., https://www.uscourts.gov/sites/default/files/fjcs_b7_0331.2017.pdf, *with Landlord-tenant case filings from July 1, 2016 to June 30, 2017* at 2, MD ST. CT., https://www.courts.state.md.us/sites/default/files/import/district/statistics/2017/fy2017.pdf.

[52] Edwards, *supra* note 44, at 42-43.

"describing how some court . . . [or] enforcement process . . . actually works."[53] Such research should also be more dedicated to "law reform,"[54] "influenc[ing] practice,"[55] and addressing "fundamental social problems."[56]

That is not to say that all critics of the state of legal scholarship, or even these particularly prominent critics, see no value in the theoretical and innovative work that has become the norm. Rather, their concerns are more about proportion and impact. Too little legal scholarship has practical significance. In this environment of disinterest, where lower cachet is attached to scholarship concerned with practice, the project of evaluating the vitality of our rule of law faces an uphill battle.

B. The Wrong Emphasis in Existing Empirical Work on the Courts

The scant empirical work that exists on the operation of our courts has not been conceived as being about the rule of law. Rather, it has focused on "access to justice" and tends to conclude that whatever problems the legal system might have can be solved by ensuring greater availability of lawyers. However, it does not necessarily follow that civil litigants, who are mostly unrepresented, are getting unexpectedly bad results because of a lack of lawyers. It may mean that there are shortcomings in our system's adherence to the rule of law. The orientation of empirical research toward preconceived outcomes reflects that we are not taking the rule of law seriously, and it also bodes ill for efforts to do so.

It has been said that we are experiencing a "crisis" in access to justice.[57] Thirty-eight states have established Access to Justice Commissions;[58] Access to Justice Departments are now part of various

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53 Gordon, *supra* note 46, at 2087.

54 Edwards, *supra* note 44, at 43.

55 Posner, *supra* note 47, at 1317 (the quality of legal scholarship would improve if practitioners chose to "influence practice, rather than merely circulate their ideas within the sealed network of a purely academic discourse.").

56 Rhode, *supra* note 49, at 1342 ("[M]uch conventional scholarship is out of touch with fundamental social problems.").

57 *See Access to Justice*, U.S. DEP'T JUST. ARCHIVES, https://www.justice.gov/archives/atj [https://perma.cc/X8B8-VZGW].

58 MARY LAVERY FLYNN, AMERICAN BAR ASSOC., ACCESS TO JUST. COMM'NS: INCREASING EFFECTIVENESS THROUGH ADEQUATE STAFFING AND FUNDING 24 (2018), https://legalaidresearchnlada.files.wordpress.com/2020/01/ls_sclaid_atj_commission_report-1.pdf.

state courts;[59] the American Bar Association has set up a Resource Center for Access to Justice Initiatives;[60] and a National Center for Access to Justice tracks and supports such activities throughout the country.[61] These efforts are organized around a common theme, that civil litigants are not getting the justice they deserve because of the shortage of legal representation.

It is true that there are grounds for suspecting that such a problem exists. Litigants in civil cases have no entitlement to a lawyer, as they do in criminal cases.[62] Funding for free attorneys for those who cannot afford counsel has never been robust and has steadily declined over the last few decades.[63] Pro bono efforts are meager and do not come close

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[59] *See e.g.*, *Access to Justice Department*, MD ADMIN. OFF. COURTS, https://www.courts.state.md.us/accesstojustice [https://perma.cc/Z69E-VLYH], *New York State Access to Justice Program*, NY CTS., www.nycourts.gov/ip/nya2j/ [https://perma.cc/SK69-X3VH]; *Maine Justice Action Group*, ME JUST. FOUND., https://justicemaine.org/grants-and-programs/justice-action-group/ [https://perma.cc/6NJK-WYWR].

[60] *Resource Center for Access to Justice Initiatives*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/ (last visited Nov. 21, 2021).

[61] *Justice Index*, NAT'L CTR. FOR ACCESS TO JUST., https://ncaj.org/state-rankings/2021/justice-index [https://perma.cc/U9GX-TPE7].

[62] *See* Turner v. Rogers, 564 U.S. 431, 441 (2011) ("[T]he Sixth Amendment grants and indigent defendant the right to state-appointed counsel in a criminal case . . . . But the Sixth Amendment does not govern civil cases."); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981) ("[A]n indigent's right to appointed counsel . . . has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."); Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963) (ruling that an indigent criminal defendant is entitled to be represented by counsel).

[63] In constant 2012 dollars, funding for the Legal Services Corporation declined from a high of $836 million in 1980 to $348 million in 2012, the lowest level of funding in its history. LIBBY PEARL, CONG. RSCH. SERV., RL34016, LEGAL SERVICES CORPORATION: BACKGROUND AND FUNDING 6 tbl.1 (2013), https://www.everycrsreport.com/files/20161221_RL34016_561359d0831cd45bd0fadb404efe4a9267347be9.pdf. At the same time, funding provided by interest on lawyers' trust accounts (IOLTA), which has been used to fund lawyers for the poor, has trended downward, from $371 million in 2007 to $93.2 million in 2011. Terry Carter, *IOLTA Programs Find New Funding to Support Legal Services*, ABA J., (Mar. 1, 2013, 7:29 AM CST), http://www.abajournal.com/magazine/article/iolta_programs_find_new_funding_to_support_legal_services/ [https://perma.cc/EB9F-Q5GD]. *See also* I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 221-22 (2013) (describing cuts to Legal Services Corporation funding as well as reductions in other sources of funding for legal services to the poor).

to filling the gapbetween demand and supply, and mandatory pro bono has not been adopted in any state. Even where litigants have assistance from lawyers, it may well be in the temporary and superficial form of help from a "lawyer for the day" at the courthouse or just legal advice from an attorney who does not even enter the courtroom.[64]

In addition, civil litigants often lack the means and motivation to hire legal counsel. The cost of an attorney is beyond what many of them can afford.[65] In any event, a tenant who allegedly owes two months' rent or a defendant who is sued for a few thousand dollars in credit card debt could hardly be expected to spend an amount of money to litigate the case that would exceed the amount being sued for. Even in cases where the stakes are higher and more worthy of personal expenditure, civil litigants might believe that a lawyer could not do much to help them.[66] Lack of familiarity with the advantages of legal representation and with how the law works may actually make those with the most to lose the least aware of the risk they are running by not having counsel. Most civil litigants have little real understanding of the substantive law or how the legal process works, and therefore run a real risk of inadvertently failing to assert their legal rights.[67] Although they do not face the threat to liberty of a criminal

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64 D. James Greiner & Cassandra W. Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2127 (2012).

65 It appears that the cost of legal help has increased faster than the rate of inflation. For example, the Laffey Matrix, one commonly used measure of average hourly rates, indicates that in 1994-95 the hourly rate of an attorney with one to three years of experience was $151 and in 2019-20 was $372. *Laffey Matrix*, http://www.laffeymatrix.com/see.html [https://perma.cc/68UG-VYCW]. $151 would be only $256 in 2020, not $372. US INFLATION CALCULATOR, https://www.usinflationcalculator.com/ [https://perma.cc/9HGB-E8QV].

66 Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378 (2005).

67 *See, e.g.*, Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 62 J.L. SOCIETY 61 (2014) (explaining how unrepresented tenants in rent escrow lawsuits are barred from seeking assistance from non-lawyers, which puts them at a disadvantage compared to unrepresented landlords) [hereinafter *Case Study on Access to Justice*]; Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57, 83-84 (2015) (explaining how pro se tenants in Baltimore City District Courts are disadvantaged by their lack of familiarity with the court system) [hereinafter *Judges*]; Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145 (2020) (arguing that data suggests the rule of law does not ultimately assist represented tenants).

prosecution, the outcomes of their cases are nonetheless likely to have substantial effects on their finances, homes, and families.

It has been said that about eighty percent of civil litigants do not have lawyers representing them when they go to court.[68] Anyone who visits the typical civil court—where landlord-tenant, debt collection, and other relatively low-amount-in-controversy cases take place—can see for themselves the hordes of unrepresented litigants congregating there. This state of affairs has raised real questions for legal scholars about whether our system is producing "fair and just outcomes for all parties, including those facing financial and other disadvantages."[69] It is not surprising that lawyers would look at this situation of civil litigants struggling alone with their legal cases and conclude that the solution is the interjection of more free lawyers, and for legal scholars to conclude that research empirically demonstrating the benefit of legal representation is the most valuable use of their time and effort.

In addition, the constitutional right to counsel that applies in the criminal justice system offers a seductive analogy that has led many legal scholars to dedicate their efforts to achieving a similar benefit for civil litigants. The Supreme Court's explanation in its *Gideon* decision of why counsel is mandated in criminal cases would seem to apply to in many respects to civil cases as well.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[70]

Although consequences may *generally* be less dire in civil cases than in criminal cases, the rationale for a right to legal representation is

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[68] Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 749 n.23 (2015).

[69] *See Access to Justice*, *supra* note 57.

[70] Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

much the same: the legal system is inscrutable or nearly so to laypersons, which can inadvertently cause them to fail to assert their legal rights. This logic is sufficiently compelling that a whole movement has grown up around achieving "civil *Gideon*."[71]

While there is a basis for the particular direction empirical legal scholarship has taken, its orientation may also stem from ordinary cognitive biases. As Daniel Kahneman has pointed out, it is normal for people facing a difficult question to substitute one that is easier to answer, without even realizing that that is what they have done.[72] It is easier to answer the question of what would create more *access to* justice, than to answer the question of how to ensure more *justice*, as in ensuring that the rule of law governs the determinations that are made. The tendency toward answering the easier question in this situation is exacerbated by the "availability heuristic."[73] Lawyers see more lawyering as the solution to the problem of injustice because their usual way of addressing legal problems is through lawyering. The dynamic might be captured by the saying that "to a person with a hammer, every problem is a nail." Of course, it is not necessarily the case that scholars are wrong that the answer is more lawyers and more lawyering. But the risk of mistake about the nature of the problem (and accordingly the solution) naturally arises where such biases are

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71 *See* Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 728 (2006) ("[Numerous theories have been used] to argue for an indigent civil litigant's right to court-appointed counsel."); Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Evictions Proceedings*, 25 TOURO L. REV. 187, 210-23 (2009) (summarizing how the argument that the right to free counsel should be granted for civil cases stemmed from *Gideon* and then continued to gain popularity). *See also* Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 46-48 (1990) (recommending that the Court of Appeals issue a rule requiring private attorneys to represent the poor). Nevertheless, the Supreme Court has over many terms declined to find such a right to counsel in civil cases. *See* Lassiter v. Dep't of Social Servs., 452 U.S. 18 (1981); Turner v. Rogers, 564 U.S. 431 (2011). State-level efforts have been similarly unsuccessful. *See* Frase v. Barnhart, 840 A.2d 114 (Md. 2003); King v. King, 174 P.3d 659 (Wash. 2007); *In the Matter of the Petition to Establish a Right to Counsel in Civil Cases*, 85 WIS. LAW. 36, 49 (2012) (Supreme Court of Wisconsin's denial of a petition to establish right to counsel in civil cases).

72 DANIEL KAHNEMAN, THINKING, FAST AND SLOW 97-98, 129-130 (1st ed. 2011).

73 *Id*. at 129-30.

triggered, and the failure to examine other possibilities increases the likelihood that such a mistake will indeed occur.

In addition, while access to justice research has a plausible basis, it has nonetheless made two big assumptions: first, that there is indeed a problem with civil litigants getting justice from the legal system, and second, that the solution to the problem (if it exists) is more lawyering. We still need to know the nature and extent of the civil litigants' problems with the legal system. And it is not obvious that any problems are the result of insufficient lawyering and can be resolved by civil *Gideon*. Justice should presumably be something that courts provide to all parties, irrespective of whether attorneys are present to demand it. In an ideal universe, legal representation would not even be important to the achievement of justice. Rather, the judge would elicit the facts relevant to the elements of the cause(s) of action, as well as any defenses, and then apply the law to the facts to produce the outcome to which the parties are legally entitled. Indeed, the advocacy of counsel could distract or sway the judge away from decision-making based on the law.

Notwithstanding the questionable assumptions that it has made, existing research still provides important evidence on the questions of whether civil litigants are getting justice and, if not, whether more lawyers is the solution to the problem. If, for example, there was a substantial difference between the justice that civil litigants obtained when they had a lawyer versus when they did not, that would indicate two important things: (1) that the civil legal system was producing different outcomes among similarly situated litigants (suggesting that some of those litigants were not getting the outcomes they were legally entitled to), and (2) that providing them with lawyers is a likely solution to that problem. But, unfortunately, the research that has been done on access to justice provides confusing evidence on both of those questions.

This research appears to reflect motivated reasoning. Rather than reasoning from the evidence to a solution, it starts with the premise that we need more free lawyers and then looks for the empirical support. The evidence does indicate a potential problem with the legal system, so it should not be ignored. And it may be true that the most sensible investment in improving the system is the involvement of more lawyers for unrepresented litigants. Lawyers can push the system to pay more attention to the rule of law. But this orientation toward using the evidence to justify spending more money on lawyers, rather than looking at whether it makes sense to invest in improving the legal

system in other ways, means that we are not necessarily looking at the right problem or the right solution.

C. The Problems of Quantitative Analysis

In addition to a problem of being agenda-driven, existing empirical scholarship concerned with our courts also appears to have a problem of method. Almost no qualitative research is being done, and such privilege is given to quantitative research that it is difficult to pose and answer the kinds of questions about the rule of law that only qualitative research can address.

Nearly all of the research that has been done on our legal system has been quantitative in nature.[74] That is, it looks at what can be learned by using statistical methods and mathematical analysis. Such quantitative research is the standard approach to empirical study in many fields.[75] And it is indeed apt as a means of demonstrating the frequency of phenomena. For example, if it needs to be determined how often a summary ejectment proceeding brought by a landlord leads to the eviction of a tenant, or how often tenants are aware that they have a legal cause of action against their landlords for failure to make repairs of housing code violations, quantitative research is the most appropriate method for determining the answer. It can also (in theory) be used to test a hypothesis that is based on questions of frequency, such as whether representation by a lawyer makes it more

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[74] *See, e.g.*, Marilyn M. Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J.L. REFORM 8 (1973); Julian R. Birnbaum et al., *Chicago's Eviction Court: A Tenants' Court of No Resort*, 17 URB. L. ANN. 93 (1979); Barbara Bezdek, *Silence in The Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163 (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. AND SOC'Y REV. 419 (2001); Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385 (1995); Greiner & Pattanayak, *supra* note 64, at 2118; Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. POVERTY L & POL'Y 453 (2011); Summers, *supra* note 67.

[75] ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS 4, 10 (5th ed. 2014); Carl H. Coleman, *Duties to Subjects in Clinical Research*, 58 VAND. L. REV. 387, 393 (2005).

likely that a tenant will be able to avoid eviction than not receiving such representation.

The problems with this focus on quantitative research can be illustrated by some of the "best" access to justice research that has been done. The most rigorous empirical legal scholarship on access to justice has used the randomized controlled trial ("RCT"), which has frequently been described as the "gold standard" of quantitative research.[76] In theory, RCT could be very helpful in demonstrating the effect of lawyer representation. If the group of litigants receiving the intervention of lawyer representation was substantially similar to the control group that did not, and the only operating independent variable was whether the litigants received representation by a lawyer, then a statistically-significant difference in outcomes between the represented and the unrepresented should isolate the impact of representation.

Moreover, if such a difference were demonstrated, that would also provide support for two other hypotheses: that civil litigants are in fact having trouble obtaining justice, and that lack of legal representation is the reason why. Such findings would suggest a gap between the results that litigants receive and the results they could achieve—and that would indicate that the law was not being adequately enforced, at least for the unrepresented litigants.

However, the findings of RCT research on lawyer representation have been equivocal, telling us little about the degree to which civil litigants are obtaining justice and whether lawyers increase the likelihood that they will. The RCTs conducted by D. James Greiner, Cassandra Wolos Pattanayak, and Jonathan Hennessy found that representation by a lawyer substantially improved the outcomes for

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[76] Coleman, *supra* note 75 ("The 'gold standard' for clinical research is the randomized controlled trial, in which one group of subjects is randomly assigned to receive an investigational intervention while one or more other groups receive either a different intervention or a placebo."); Sarah Cotterill & Liz Richardson, *Expanding the Use of Experiments on Civic Behavior: Experiments with Local Government as a Research Partner*, 628 ANNALS AMERICAN ACAD. POL. AND SOC. SCI. SERIES 148, 156 (2010) ("A randomized controlled trial is a gold standard method for measuring whether or not a particular intervention works better than doing something else or doing nothing."); Nicholas Mader, *The Big Data Era and an Integrated Mode of Inquiry for Social Policy-Relevant Research*, 11 I/S J.L. AND POL'Y FOR INFO. SOC'Y 97, 101 (2015) ("For interval validity in policy investigations, the gold standard is typically held to be the randomized controlled trial (RCT), which is designed to isolate the impact of one causal factor—the policy of interest—on one or more outcomes.").

civil litigants in a Massachusetts District Court.[77] But their similar RCT in a Massachusetts Housing Court found that representation by a lawyer did not improve outcomes.[78]

It is important to note that these studies did not compare representation by a lawyer to no assistance at all.[79] The Massachusetts District Court study compared those who received legal representation to a control group that received self-help instruction and some assistance with completing court forms.[80] The Massachusetts Housing Court study compared those who received legal representation to a control group given limited non-courtroom assistance (legal advice) from a lawyer.[81] Thus, the benefit from lawyer representation when compared to no assistance at all could be much greater. However,

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77 Approximately two-thirds of treated-group occupants retained possession of their housing units at the end of summary eviction proceedings, as compared with about one-third of control group occupants. In cases involving nonpayment of rent or serious monetary counterclaims, the net financial effect of the litigation was such that those in the treated group were not obligated to pay an average net of 9.4 months of rent per case (relative to what the evictor alleged to be due), while the corresponding figure for control group occupants was 1.9 months of rent per case. Both results were statistically significant, despite the small size of our study (76 treated and 53 control cases).

D. James Greiner, Cassandra W. Pattanayak, & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 908-09 (2013) (footnote omitted) [hereinafter *District Court Study*].

78 D. James Greiner, Cassandra W. Pattanayak, & Jonathan Hennessy, *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* 5-6 (Sept. 1, 2012) (unpublished manuscript) (on file with the UMass Law Review) [hereinafter *Housing Court Study*] (the research found "no statistically significant evidence that the Provider's offer of a traditional attorney-client relationship, as compared to a referral to the Provider's LFTD [lawyer for the day] program, had a large (or any) effect on the likelihood that the occupant would retain possession; on the financial consequences of the dispute; on the judicial involvement in or attention to litigation cases; or on any other outcome.")

79 *District Court Study*, *supra* note 77, at 978.

80 *Id.* at 908.

81 *Housing Court Study*, *supra* note 78, at 2 ("The unbundled assistance consisted of court-hearing-day-only representation in hallway settlement negotiations and mediation sessions (but not in court appearances or in filing motions) through a lawyer for the day ('LFTD') program.").

high-quality research making that particular comparison has yet to be done.

These existing studies did not provide meaningful evidence for any particular hypothesis because they did not manage two important factors: the variables of judge and lawyer behaviors. Both of these potentially idiosyncratic features could have a large effect on outcomes to the extent that they can obscure the impact of any intervention. Moreover, due to the small number of lawyers and judges that were involved in this research, any such impacts would be enhanced. The relatively large sample of litigants in these studies can reduce the impact of variations between and among litigants through the buffering effect of numbers, but that is not going to be the case where the number of judges and lawyers involved are in the low single digits.

Lawyers may behave differently enough from each other to affect results. The lawyers in the district court study, for example, filed more pretrial motions and made demands for jury trials more often than the lawyers did in the housing court study.[82] Indeed, the researchers observed that the difference in results between the two studies might have reflected the "facilitative, non-confrontational litigation style" of the attorneys in the housing court study, as compared to the "assertive" style of the lawyers in the district court study.[83] The difference in tactics, possibly leading to better outcomes, may mean better enforcement of legal rights that occurred as the result of having a (more aggressive) lawyer. However, the results may also reflect the greater pressure that such aggressive lawyer behavior placed on opposing parties, and on the court, to make concessions to the litigants who had the greater leverage that these tactics created. In other words, civil litigants may obtain an advantage from legal representation, but the advantage may not be improved enforcement of the law. It may instead represent the "gamesmanship" advantages that come from vigorous, strategic lawyering. That is no insignificant benefit, but it is a different one from better enforcement of the law, and may be less worthwhile as a ground for reform than would be improved enforcement of the law.[84] In any event, variations in lawyer behavior weakened the capacity of these studies to say anything definitive.

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82 *Id.* at 46-47.

83 *Id.* at 47.

84 The benefit could be a "leveling of the playing field," which would increase the fairness of the system (to the extent that tenants were disproportionately

The impact of judicial behavior may also have skewed the results. It might not seem as if variables associated with judging should have much impact, insofar as judges all apply the same law. But we simply cannot assume that they apply it in the same way at all times. The researchers acknowledge that the single judge who heard most of the cases in the district court study might have been "unusually receptive" to the lawyers representing clients before that court, as he had worked for the same legal services provider himself at one time.[85] Judicial bias can affect or obscure the impact of an intervention, and that may have been the case in these studies.

The differences in outcomes that can result from differences in lawyering and judging can greatly reduce the value of the RCT in this situation, as compared to its other, more customary uses, such as drug trials. In the typical RCT drug trial, one group receives the treatment and the control group receives the placebo, and the subjects can be expected to have whatever response they have, regardless of who administers the treatment or the occasion upon which it is administered.[86] Or, at least, these factors do not have enough of an effect to overwhelm the evidence of the drug's efficacy. However, in using RCT to assess the value of lawyer representation, it matters which attorneys provide the representation and which judges preside over the cases, because these variables can potentially affect the outcomes. After these RCT studies of legal representation, we do not know whether lawyer representation frequently, sometimes, or hardly ever leads to better outcomes for civil litigants. The district court study showing a significant effect for representation by a lawyer supports the idea that legal representation can make a difference, but it does not tell us whether the impact obtained is readily achievable, occasionally achievable, or nearly impossible, or under what circumstances it might be achieved.

This research on access to justice not only tells us little of value about whether lawyer representation improves outcomes for civil litigants, but it also tells us little of value about whether civil litigants are generally getting, or not getting, justice in civil court, or what would be the means for them to get justice if they are not. The focus of

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unrepresented). But it would not necessarily increase the justice of the decision-making.

85 *District Court Study*, *supra* note 77, at 947.

86 *See* Eduardo Hariton & Joseph J. Locascio, *Randomised Controlled Trials—The Gold Standard for Effectiveness Research,* 125 BJOG 1716, 1716 (2018).

legal scholarship on access to justice has shaped the research agenda without much concern for the problem presented by its assumptions or about the appropriateness of the quantitative research methods used to answer the research question. In these RCT studies, a problematic method was employed to try to answer a problematic research question, leading to problematic results.

In other words, the quantitative approach currently emphasized for empirical work on access to justice shows that this "gold standard" has many shortcomings when applied in the context of our legal system. The quantitative methods that are touted as best practices for empirical study are being oversold, to the detriment of what can be learned from such methods. For study of the rule of law, which is difficult to examine other than by qualitative means, the emphasis on quantitative research is discouraging, if not foreclosing, the necessary work.

III. THE WAY FORWARD: USING THE RULE OF LAW AS A METRIC FOR EVALUATING THE LEGAL SYSTEM QUALITATIVELY (AS WELL AS QUANTITATIVELY) AS A WAY OF TAKING THE RULE OF LAW SERIOUSLY

A. The Case for Qualitative Study

Although quantitative research is not well-suited to studying many questions about the legal system, the prevalence of such research indicates that this incongruence is not well-appreciated.[87] On the other hand, the recognized shortcomings of qualitative research seems to have been held against it, as suggested by the fact that very little qualitative research has been done on the legal system.[88]

The paucity of qualitative research is concerning because it is doubtful whether quantitative research is the best method for answering all—or even the most important—questions about our legal system, including how well we are implementing the rule of law. The researchers behind the Massachusetts Housing and District Court studies recognized as much when they pointed out that "[t]he randomized control trial design tells researchers and policymakers nothing about where some set of outcomes fits on an absolute scale such as 'sufficient to meet minimum due process standards' versus 'insufficient to meet due process standards.'"[89] The question of due

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87 Mader, *supra* note 76, at 101-02.

88 *But see* sources cited *supra* note 67.

89 *District Court Study*, *supra* note 77, at 957.

process is closely related to the attainment of the rule of law, but it would be more important to know whether the outcomes satisfy the rule of law than whether they meet due process requirements.[90] Similarly, Paula Hannaford-Agor and Nicole Mott remark that the "question of just outcomes may be the most important question of all" in research on courts,[91] but it goes largely unexplored. "Just outcomes" should mean whether the norms as stated are the norms as applied.

Quantitative research is not well-suited to answering such "how" or "why" questions about the legal system—in demonstrating *how* the law is applied and *why* outcomes are reached. For example, even if a quantitative study demonstrated that tenants with legal representation were better able to avoid eviction than unrepresented tenants, it still would not tell us *why* or *how* legal representation helped. Qualitative research, by contrast, is uniquely suited to answer such questions.[92]

Although qualitative research is an uncommon method of legal scholarship, this does not detract from its importance in the social sciences.[93] For example, case studies have been recognized as making important contributions to the empirical work of many fields, including sociology, political science, anthropology, and business.[94] It is somewhat ironic that case studies are rare in legal scholarship. In general, legal education pays close attention to the "case method." But that interest in the analysis of illustrative examples has generally been limited to the law school classroom.

The "new legal realists" have advocated for expanding the scope and methods of empirical work in legal scholarship beyond statistical

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90 See discussion *supra* Part I.E.

91 Hannaford-Agor & Mott, *supra* note 74, at 178.

92 YIN, *supra* note 75, at 10 ("'[H]ow' and 'why' questions are more explanatory and likely to lead to the use of a case study, history, or experiment as the preferred research method.").

93 *Id.* at 4.

94 Yin identifies that case studies are commonly used in "psychology, sociology, political science, anthropology, social work, business, education, nursing, and community planning." *Id.* John Gerring remarks that

> [t]he case study occupies a vexed position in the discipline of political science. On the one hand, methodologists generally view the case study method with extreme circumspection . . . . At the same time, the discipline continues to produce a vast number of case studies, many of which have entered the pantheon of classic works.

John Gerring, *What is a Case Study and What is it Good for?*, 98 AM. POL. SCI. REV. 341, 341 (2004) (citation omitted).

study. For example, Howard Erlanger et al., have argued that we ought to be more concerned with "the impact of law on ordinary people's lives" and therefore should "include in our toolkit some of the social science methods best suited for this task" including "the qualitative methods developed by fields like anthropology and history for examining everyday experience."[95] Similarly, Victoria Nourse and Gregory Shaffer have called for "an empiricism that adopts anthropological and sociological approaches, in which academics leave their universities and investigate the world," with the goal of studying "the law in action,"[96] to "take account of people's lived experience of the law in particular settings."[97] Indeed, such qualitative study would better answer the most important questions about our legal system, such as how litigants are faring and why they are not getting justice if they are not.

Legal scholars may have shied away from qualitative research on the theory that "whether the litigant received a just or appropriate outcome" is "subjective," and "one of the most difficult questions for which to formulate accurate and reliable measures for empirical analysis."[98] However, it is not clear that the qualitative research necessary to address that question is particularly likely to be "subjective" or to be more so than quantitative research. It is true that data pertaining to frequency are presented objectively in the form of numbers and that quantitative research methods limit the effects of researcher bias. However, the analysis of results is always going to be affected by the perspective of the researcher.[99]

Even with the supposed gold standard of the RCT in the legal realm, some subjectivity creeps in. For example, in the RCT studies of Greiner, Pattanayak, and Hennessy, the authors described the housing court study's absence of statistically significant difference in outcomes as "good news" for limited assistance programs, insofar as their "outcomes are essentially indistinguishable from those that would have been achieved via a more expensive program offering full

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95 Howard Erlanger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 340 (2005).

96 Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a NewLegal Theory?*, 95 CORNELL L. REV. 61, 79 (2009).

97 Erlanger et al., *supra* note 95, at 345.

98 Hannaford-Agor and Mott, *supra* note 74, at 178.

99 Philip E. Tetlock et al., *Detecting and Punishing Unconscious Bias*, 42 J. LEGAL STUD. 83, 103 (2013).

representation."[100] Similarly, Jeanne Charn interpreted this study as "provid[ing] some rigorous evidence that self-representation can be successful, at least in some settings, some of the time" which "undercut[s] the civil *Gideon* premise that attorneys are essential to good outcomes."[101] These interpretations of the data are subjective. It could just as easily be true that limited assistance performed as *badly* as legal representation. In other words, it is not evident that these results are "good news" for any type of intervention. Researchers bring a particular perspective to the analysis of the data, whatever may be the objective nature of that data. Quantitative research does not eliminate that aspect of subjectivity.

In addition, qualitative research can be done in ways that improve its reliability and validity by increasing its generalizability and reducing the risk of subjectivity.[102] If such a method is the best means to answer the most important questions, and such measures can be taken, then qualitative research should play a much greater role in legal scholarship. As some of the existing research suggests, legal scholars have shied away from attempting to answer questions that involve considerations relevant to the rule of law because they are not easily quantifiable.

The weaknesses of quantitative research provide guidance for thinking about what kind of research would be necessary to take the rule of law seriously. It cannot simply be assumed, as much quantitative research does, that other kinds of research are less useful or not useful, or that the questions it fails to answer are unanswerable because they require the use of judgment or provide the opportunity for subjectivity. This attitude not only unreasonably disparages qualitative research but ignores questions that require qualitative research to answer, such as whether and to what extent the rule of law operates in our courtrooms and what kinds of things interfere with its full achievement.

B. The Relationship Between Qualitative and Quantitative Study

Although quantitative analysis is less useful for evaluating the rule of law, this does not mean that such research has no utility. It is, to

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100 *Housing Court study*, *supra* note 78, at 40.

101 Jeanne Charn, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2222 (2013).

102 *See* discussion *infra* Part III.B.

some extent, possible to quantitatively assess whether a system has the rule of law by identifying particular features as criteria and the frequency with which they occur. For example, it might be said that it is necessary to the rule of law that adjudicators communicate to litigants the particular law that is being applied to their cases,[103] and a quantitative analysis could be done of how often that communication actually occurs. Or it might be said that the rule of law requires limitations on the use of discretion,[104] and frequent exercises of discretion should be treated as evidence of a failing, and similarly tabulated. But it would be difficult to know whether such a quantitative approach has truly captured the nature and extent of any problem with the vitality of the rule of law in the legal system, insofar as it "pre-identifies" what is important to account for, rather than making that determination based on comprehensive study.

Quantitative research can also provide important indirect evidence about whether our system can be said to have the rule of law. The RCT studies may not have achieved such a purpose,[105] but Nicole Summers' study of enforcement of the warranty of habitability in New York City courts presents highly suggestive evidence that the norms as stated are not the norms as applied.[106] This New York study, which analyzed a large representative sample of cases from that jurisdiction, found that "more than 90 percent of tenants with meritorious claims did not benefit from the warranty [of habitability] at all."[107] That is, tenants occupying residences with housing code violations that technically made them eligible for rent abatements or mandated repairs

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[103] This feature could be derived from Fuller's precept that the law needs to be public. *See* FULLER, *supra* note 20, at 39; Fallon, *supra* note 7, at 8 n.27.

[104] Judge Posner has pointed out that the exercise of discretion is in tension with the rule of law. He has remarked that "[a] *system* of untrammeled official discretion would be inconsistent with the premises of the liberal state, prominent among which is the rule of law—the concept of a 'government of laws, not men.'" RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 61 (1990). Accordingly, "[i]t is desirable to minimize the discretion of officials, including judges." *Id*. at 60.

[105] *See* discussion *supra* Part II.C.

[106] Summers, *supra* note 67, at 210.

[107] *Id.* at 210. "Overall, less than [two] percent of tenants who had meritorious claims received rent abatements. Perhaps even more astonishing, only [seven] percent of tenants whose landlords have been cited by the City for hazardous or immediately hazardous Housing Code violations—a subset of those who had meritorious claims— received abatements." *Id.* at 150-51.

seldom actually received them.[108] This evidence is *circumstantial* rather than direct evidence that the norms as stated are not being applied—though it is difficult to account for such results in any other way.

The New York study did not focus on legal representation, though of course it had to give the impact of legal representation some consideration in light of the influence of the "access to justice" movement. Summers found that while legal representation increased the success rate of tenants, it did not have a substantial impact, and lack of representation did not account for the majority of tenants' failure rate.[109] For example, most of the tenants who had legal representation and documented housing code violations still did not get any compensatory rent abatement.[110]

As quantitative research, the New York study was unable to say why enforcement was so weak.[111] It demonstrated that the law was not producing the outcomes that would be expected—tenants whose units had documented housing code violations seldom got the legally-specified remedies—but failed to show why they were unable to do so, or why there was such "a major operationalization gap."[112]

Summers' analysis rejects certain possible explanations for why tenants were largely unsuccessful, including the idea that they lacked sufficient evidence to support their claims (the correlated housing code violations undercut that theory) and the idea that the failure to obtain justice was due to lack of counsel (even having counsel did little to change outcomes).[113] But the study reached—and can reach—few conclusions about why this "major operationalization gap" was occurring.[114] For example, judges sometimes ordered landlords to make repairs, but "landlords evaded compliance with the orders nearly three-quarters of the time."[115] What does "evaded compliance" mean here? Was there some problem with the order that was issued? With

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108 *Id.* at 210.

109 *Id.* at 211.

110 *Id.* at 151 ("The significant majority—at least 70 percent—of tenants who were represented by counsel and had meritorious warranty of habitability claims still did not receive a rent abatement.").

111 *See id.* at 215.

112 *Id.* at 210.

113 *Id.* at 208-11.

114 *See id.* at 210-14.

115 *Id.* at 210.

the enforcement of that order? With tenant persistence in the face of noncompliance? With lawyer follow-up where lawyer representation occurred? It is not possible to say.

Summers hints at the need for research that provides more fundamental explanations, that examines "court culture or imbalances of power."[116] And she notes anecdotally that tenants reported that their problems had less to do with proof of their claims and more with the fact that "judges did not want to entertain them."[117] In addition, Summers concludes that while the court does "function[ ] as a forum to order landlords to perform needed repairs, the forum lacks accountability."[118] These observations provide implications that could be productively examined in qualitative research.

Her description of what happened as involving a "major operationalization gap" is making a more modest claim than the claim that this court is not respecting the rule of law in its decision-making.[119] That more modest claim is appropriate, in that the research could not identify the causes of the results, or even confirm with direct evidence that they stem from the court's widespread failure to apply the norms as stated. But this "major operationalization gap" is strong evidence that we need to study how and why what is happening is happening.

Qualitative analysis is a means to that end. Such an approach should make it easier to determine the circumstances under which the norms as stated were (or were not) applied. It would provide a better basis for determining not only the causes but also what interventions could change outcomes (including possible measures to address any failures to apply the norms as stated).[120]

Case study research is particularly appropriate to such investigations, especially where it builds on existing quantitative study (and gains further validity when it supports and is consistent with such study).[121] To determine how and why these failures occurred, the ideal

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116 *Id.* at 217.

117 *Id.*

118 *Id.* at 151.

119 *Id.* at 210 ("These findings strongly indicate that the warranty of habitability suffers from a major operationalization gap.").

120 *See, e.g.*, *Case Study on Access to Justice*, *supra* note 67, at 63.

121 To the extent that case study is consistent with other kinds of research in the same area, its findings are entitled to greater validity. *Id.* at 47. *See also Judges*, *supra* note 67, at 58-62; Gerring, *supra* note 94, at 353 (the case study and other methods of research are "interdependent, and this is as it should be." Such other

research would probably consist of a multiple case study based on an appropriate sample of the cases, assessing whether the norms that were applied were the norms as stated. If these cases were sufficient in number, appropriately chosen to be representative, and randomly selected rather than cherry-picked or otherwise skewed to reflect any particular agenda, that should provide some degree of validity and reliability for whatever results are reached. Using an appropriately randomized and representative sample of cases could also allow for some measure of frequency for the occurrence of a particular problem, as could analytical generalization.[122]

Further, it would reduce the risk of subjectivity[123] if evaluation of whether the norms as stated were the norms as applied was limited to a determination whether the decision-making leading to any given outcome could be reasonably said to follow from the words of the law, as opposed to not following in any discernable way from the words of the law. Decision-making by courts cannot be described as violating the norms as stated merely because it differs from how many or even most people would interpret the stated norms. Only those decisions that cannot be understood as faithful to the language of the law, under such a deferential standard, should be seen as falling short of adherence to the rule of law. The norms as stated must *discernably* be the norms as applied. Taking such an approach to the analysis of the cases would reduce the risk that the evaluation was based on the researcher's preferred reading of the law.

In addition, the determination of whether the norms as stated were the norms being applied needs to be done *competently*. That is, it needs to be made with subject matter knowledge, as opposed to impressionistically or without specialized understanding. That ought to go without saying, but it is nonetheless true that litigants' perception of fairness or justice is sometimes treated as a meaningful analysis. Thus, some researchers have tried to assess the quality of justice received though surveys in which litigants are quizzed about their experience.[124] Such research would not be revealing about whether the

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forms of research "may be desperately in need of in-depth studies focused on single units.").

122 Properly done case studies achieve analytic generalizability rather than statistical generalizability. YIN, *supra* note 75, at 10.

123 *See* discussion *supra* Part III.A.

124 *See, e.g.*, GINA KUBITS ET AL., FOURTH JUD. DIST. STATE MINN., HOUSING COURT FAIRNESS STUDY 8 (Oct. 2004), http://www.mncourts.gov/Documents/4/Public/Research/Housing_Court_Fairness_(2004).pdf.

norms as stated are the norms as applied, given that most nonlawyers are not well-situated to evaluate whether cases were determined in accordance with law.

This sketch of appropriate qualitative study provides a way out of our current cul-de-sac, where legal scholarship tends to be about matters of little real-world importance, and what practical scholarship exists tends to focus on "access to justice" without addressing the more fundamental question of whether justice would be obtained even if access was provided. Quantitative analysis is appealing in light of our modern preoccupation with objective, data-driven evaluation, and it no doubt has enormous value when put to the purposes that it is suited for, as in the New York study.[125] But qualitative research remains the most useful means of answering some questions—including the fundamental question about whether litigants can count on receiving outcomes consistent with the rule of law—and we need to accept and encourage such research in order to better answer such important questions. Such a change in direction in legal scholarship and in empirical research is necessary to take the rule of law seriously, as something we intend to achieve and care about achieving.

CONCLUSION

The rule of law needs be taken seriously because it involves a fundamental understanding of how our legal system should work. Taking the rule of law seriously is, however, something that does not happen much. In fact, we have actually made it difficult to determine the extent to which the rule of law is operating effectively in our legal system, because we have left the concept ill-defined and have avoided the kinds of inquiry that could shed light on how well we are implementing the rule of law.

However, we do have an understanding of the rule of law that could work as a metric to help us determine whether we are in fact living up to this cherished ideal. And we know the kind of study that would illuminate whether we are entitled to claim that we have the rule of law in this country, and to determine what needs to be done to make it more effective. But to do that work, we must begin to take the rule of law seriously.

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[125] Summers, *supra* note 67.