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Revisiting the emergence of the rule of law in Russia

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In an extended comment on work by this paper's authors, Gustafsson in a previous issue of this journal reaches scathing judgements on Russia's *arbitrazh* (or commercial) courts and draws strong conclusions about the prospects for the rule of law in Russia. He concludes that litigants use the courts because they can bribe the judges. His paper revives old tales about the 1990s that we showed previously were myths. We examine Gustafsson's argument both conceptually and empirically. We demonstrate that this argument rests on two erroneous assumptions: that the use of legal institutions equates with trust in these institutions and that strategies for use of law are not context-dependent. We show that Gustafsson's empirical specification is not uniquely related to a single theory and indeed that one interpretation of his results is that enterprises use the courts because they perceive less corruption there than in other venues, a theory diametrically opposite to the one Gustaffson chose emphasise. Using a rich data set collected in Russia in 1997, we are led to the tentative conclusion that firms turned to the *arbitrazh* courts because of the relative quality of this institution.

Keywords: *arbitrazh* courts; Russia; rule of law; corruption; legal institutions

1. Introduction

A recent issue of *Global Crime* contains a paper by Pär Gustafsson that comes to some remarkably strong conclusions about the prospects for the rule of law in Russia. According to Gustafsson, 'A considerable number of economic actors gravitated towards Russia's commercial courts in the 1990s *because of* (rather than in spite of) the fact that the judicial outcome could be influenced with bribes'(Italics in original).[1] His evidence, he claims, endorses a description of court conduct where 'a judge might first examine a case, decide which party should prevail on its merits, and then seek payment for issuing the proper decision. Other judges will simply favour the highest "bidder" for a favourable result'.[2] This is a scathing judgment on an institution, Russia's *arbitrazh* (or commercial) courts, where a reputation for rejecting bribery should be especially prized by its many working professionals. One would hope that there is powerful evidence in support of such a strong judgment, appearing as it does in a research journal.

But the professionals in the courts are not the only ones to earn rebuke from Gustafsson. His paper is an extended comment on earlier work of ours and rejects conclusions that we reached in our earlier work.[3] Stating our conclusions in their very strongest version, Gustaffson writes that 'Legal scholar Kathryn Hendley and her co-authors conclude that economic actors relied on "the law and legal institutions" because the commercial courts (*arbitrazhnye sudy*) were relatively effective'.[4] But then twisting our findings beyond recognition, he characterises our work as having a 'favourable view

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of the rule of law in Yeltsin's Russia ...' He rejects that view and claims to refute much of our earlier work. One would hope that there is powerful evidence in support of such a strong judgment.

A close reading of Gustafsson's paper reveals many obvious weaknesses, and so, we would not normally bother to respond. But two particularly troublesome elements of his paper encouraged us to spend the time to correct his errors. First, his paper feeds into many myths and old saws about the development of legal institutions in Russia, an important story that is not as well understood as it should be. Second, he mischaracterises our views repeatedly in his paper, and we feel that by not responding we might lead some readers to mistakenly believe that we have no serious objections to what he writes. As the reader will see in the following, we use facts and logic to show that there is nothing that the reader can learn about Russia or our work from his paper.

Indeed, we are pleased to be able to comment on the paper by Gustafsson because it stimulates us to revisit an issue on which we focused in the 1990s and on which our papers were some of the few that relied on empirical evidence. We showed that firms used the *arbitrazh* courts in early post-transition Russia surprisingly often. We showed that this use reflected the fact that firms did perceive benefits from pursuing cases in the courts. We showed that this reflected a fairly positive evaluation of these courts, relative to the assessment of other institutions existing at that time in Russia. We interpreted these findings as being quite inconsistent with a view of the courts as being ineffective and riddled with corruption, a view, which although unsubstantiated with systematic evidence, held some sway in both Russia and the West. We did provide systematic evidence for our conclusions – evidence that Gustafsson does not directly challenge in his paper. Our position – that the courts were useable and somewhat effective – was only startling compared to the 'Wild East' folklore of the time. We did not connect up our evidence to any grand statements about the rule of law.

The essence of Gustafsson's paper is as follows. He concludes that those who trusted the courts were not supporters of the rule of law: they trusted the court because they believed that it was possible to manipulate judges informally, with bribes. The evidence for this conclusion is derived using the payment of bribes for the purpose of registering a firm as an indicator of a non-believer in the rule of law. He finds that this variable is positively related to whether the firm thinks that the commercial court is the best way to resolve a business conflict. From this, he concludes that those who do not believe in the rule of law trust the courts more, and this refutes our earlier work.

We begin in Section 2 by examining Gustafsson's argument at a conceptual level. As our summary of his argument in his own words reveals, he routinely conflates trust and use. Given the seemingly boundless literature on trust, treating it as indistinguishable from use is an odd choice. Along similar lines, despite framing his argument in terms of the rule of law, his treatment of this highly contested concept is remarkably perfunctory. At the heart of his analysis is an overly simplified view of how Russian managers think about courts and law. It leaves no room for the possibility that managers' strategies might vary depending on context, or for the possibility that managers who are sceptical about the integrity of judges in politically charged cases (e.g., bankruptcy) might regularly use the courts in mundane matters (e.g., debt collection).

Then in Section 3 we turn to the details of Gustafsson's empirical exercise. The central flaw in this exercise is that the empirical specification is not uniquely related to a single theory (partially because the variables used are rather remote proxies from the theoretical concepts they are supposed to represent). There are therefore several valid interpretations of his empirical results, depending on to which theory one chooses to subscribe. One such

theory that is fully consistent with Gustafsson's empirical results is that enterprises use the courts because they perceive there is less corruption there than in other institutional venues, a theory diametrically opposite to Gustaffson's remarkably strong conclusion. We then examine which of the various interpretations of Gustaffson's results are consistent with the data that we collected in Russia in 1997. Given the comprehensiveness of our data set, we are able to explore several relationships that are assumed within Gustafsson's empirical work. The resulting picture strongly rejects his interpretation of his empirical work. Indeed, our new empirical results point to the same tentative conclusion that we drew in our earlier empirically driven articles, namely that firms turn to the *arbitrazh* courts because of the relative quality of this institution, where it is important to emphasise that the relative is in comparison with other Russian institutions.

2. Gustafsson's underlying (and shifting) assumptions

Gustafsson employs a number of contentious concepts in his analysis. These include trust, efficiency, and rule of law. He is to be applauded for tackling these difficult issues. But because they are subject to a variety of definitions, clarifying exactly what is meant at the outset is essential. His failure to do undermines the effectiveness of his argument.

The 'rule of law' is a notoriously slippery concept. Dani Rodrik plaintively asked, 'am I the only economist guilty of using the term without having a good fix on what it really means?' He then answered his own question, saying 'well, maybe the first one to confess to it'.[5] We can now add Gustaffson to the long list of scholars who reference the concept without wading into the definitional quagmire. Given the title of his article, some effort to make clear how he understands the rule of law would have been welcome. His unwillingness to enter the fray renders much of his analysis impossibly fuzzy.

Much ink has been spilt in the scholarly debate over whether basic due process guarantees are sufficient (the 'thin' version) for the rule of law or whether it requires active protection of rights and, if so, what sorts of rights (the 'thick' version).[6] Though Gustafsson is correct that any definition would eschew bribery, his failure to engage with this debate is disappointing. He implicitly, and repeatedly, allies himself with a definition that he attributes to Joseph Raz, namely that courts should rely solely on law in resolving disputes.[7] A rereading of Raz's influential essay on 'The Rule of Law and Its Virtue' reveals that the definition attributed to him by Gustafsson is a pale reflection of the multifaceted concept he develops. Yet, Gustafsson's data do not allow him to test even his pared-down version of Raz's rule of law concept. His data are too removed from the motives of litigants in going to court, from court decisions, and from the motives of judges, which are the places to find evidence of a propensity to accept bribes rather than follow rules. Even if we assume for the sake of argument that these litigants were open to bribing judges, we cannot know how these bribes would have influenced the outcome of the cases.

Gustafsson's determination to categorise everyone who wrote about the economic transition of the 1990s in Russia as either bulls or bears on the prospects for the rule of law is odd. Somehow he has conflated the larger issue of shock therapy versus gradualism with legal reform. Because our research showed that economic actors were using the *arbitrazh* courts more than had been thought and were finding them to be effective,[8] he has labelled us as having 'a favourable view of the rule of law in Yeltsin's Russia'.[9] Elsewhere, he has lumped us in with the 'transition optimists'. We were surprised by these characterisations of our work, given what we had written about transition in general.[10] The series of articles we wrote analysing our survey of industrial enterprises was aimed at

correcting the 'Wild East' narrative that predominated, in which enterprises were thought to eschew written contracts and rely on private enforcers to collect from recalcitrant customers.[11] In our view, our micro-level data on firms' problem-solving strategies did not warrant any sort of grand conclusion about the rule of law, though Gustaffson has read this into our work.

In the early years of the transition, courts were generally seen as unimportant for economic actors.[12] We did not go into our 1997 survey with any preconceived notion as to whether this was true or not. When responding to our survey questionnaires, respondents were given a very wide range of options when answering closed-end questions about how they dealt with delinquent suppliers and customers. As we were winnowing down our survey for the pilot phase in 1996, our Russian collaborators lobbied to delete 'wasteful' questions about the *arbitrazh* courts, ridiculing us for thinking that enterprises might be going to court. When we visited enterprises in Moscow and Ekaterinburg to test the survey instruments, we saw why. We always began with a general conversation with the general director, explaining the purpose of our research. Invariably, these general directors would pooh-pooh the very idea of using the courts to collect debts, repeating the well-trod common wisdom that judges were incompetent and venal, and that going to court was a lengthy process that resulted in decisions that could not be enforced.[13] But our project differed from many other enterprise-based surveys (including the survey Gustaffson relies upon) in that we did not limit ourselves to the general director's views. We also queried the sales director, the procurement director, and the head of the legal department. When we spoke to the top lawyer as part of the piloting process (or her functional equivalent for firms without legal departments), we often learned that the firm routinely went to court to collect overdue debts, but that this sort of operational detail was not always shared with the general director. Even so, we were shocked to discover from the survey data that almost 80% of the 328 enterprises surveyed had been to the *arbitrazh* courts between 1995 and 1997.[14] This would be a high incidence of use for a well-respected legal system, but was unexpected given the widely held beliefs as to the low quality of service offered by the courts. Yet, our survey also showed that firms did not go to court half-cocked. Litigation was a last-ditch solution, resorted to only when informal mechanisms failed. We found that only about 1% of potential claims for unpaid debts ended up in the courts.

We did not, however, assume that economic actors who went to court necessarily trusted the courts. Gustaffson, by contrast, equates trust with use. In his words, '[c]onventional wisdom has it that people use (and trust) the court of law to resolve conflicts ...'[15] Trust is also a concept that has been much debated among social scientists. Its dictionary definition emphasises a reliance on the integrity of another. It is not until nine pages into the article that Gustaffson clarifies that his definition (actually Gambetta's definition) is different. He is using it to mean that there is a strong subjective probability that an action will be performed. To put it in context, if a Russian manager believes that he will get his desired outcome by bribing the judge, in Gustaffson's view, he can be said to have trust in the court. Of course, trust would also be present if he believes that the judge will decide the case according to the law. Precisely, how this definition serves his argument is unclear. But there is no doubt that it is confusing to readers.[16]

Although we asked respondents to assess their experiences in the *arbitrazh* courts and to evaluate the integrity of *arbitrazh* judges (see Section 3), the survey did not allow us to ascertain firms' motivations for using the courts (or any other dispute resolution strategy). Hendley's subsequent research on the *arbitrazh* courts explored these questions. Much of it is grounded in the official data collected by the statistical department of the Higher *Arbitrazh* Court. These caseload data have documented a steady increase

in the number of cases since 1994. In Gustaffson words, 'Hendley ... interprets the surge in the number of court cases towards the end of the 1990s as a sign of the increasing efficiency of Russia's commercial courts'.[17] In reality, her argument focused on both the negatives and positives of the increasing caseload. While noting that firms were voting with their feet to use the courts, she pointed to the remarkable capacity of *arbitrazh* judges to resolve cases within the two-month deadline imposed by the procedural code as evidence of their efficiency. Judges' prospects for salary increases and promotions are tied to their ability to manage their docket. She argued that the speed of these courts, combined with the relatively low filing fees and firms' apparent ability to sue business partners without fracturing the relationship, contributed to the willingness of Russian firms to go to court.[18] Yet, she has also drawn attention to the disadvantages of this need for speed. The obsession with avoiding violations of the statutory deadlines has led *arbitrazh* judges to stage manage how cases proceed, rather than ceding control over the sorts of evidence presented as the embrace of adversarialism in the procedural code portended.[19]

In an effort to probe motivations at the firm level, she gathered details on a set of 100 non-payments cases decided in 2000, equally divided between Moscow, Saratov, and Ekaterinburg.[20] In all but one of these cases, the petitioner-creditor prevailed, and she followed up with the petitioners to find out why they went to court and whether they were able to collect on the judgment. At that time, conventional wisdom held that implementation of *arbitrazh* court decisions was well-nigh impossible. Yet, in almost two-thirds of the cases, the judgments were paid, in whole or in part, a track record that stacks up favourably against that of courts in the U.S. and England and Wales.[21] The motives for pursuing litigation were varied. In addition to wanting their money back, many firms reported needing a court judgment for accounting or tax purposes. Hendley's intention was to challenge the prevailing conventional wisdom, which had been driven by anecdotal evidence rather than systematic data. In resurrecting the old canards, Gustaffson seems to prefer the former over the latter.

The multiplicity of motivations for going to court illustrates the critical importance of context. The stakes matter, whether measured in monetary or relational terms. Economic actors are unlikely to approach bankruptcy cases and small debt-collection cases in the same way. It is not surprising that Lambert-Mogiliansky, Sonin, and Zhuravskaya found a high likelihood of extra-legal involvement of governors and bribery in bankruptcy cases, given that these disputes put the very future of firms in play.[22] Whether similar behavioural patterns would be present in the average debt collection case is less likely. Viewed in monetary terms, the stakes were dramatically lower. In 2000, for example, the average amount of such cases had a US dollar equivalent of $148 in Moscow, $57 in Ekaterinburg, and $27 in Saratov.[23] For most of these cases, the outcome was a foregone conclusion. In Hendley's 2000 study, more than half of the defendant-debtors did not bother to participate. Paying bribes in such cases would not make any sense.

What this suggests is that there is no single narrative of court use in Russia (or indeed anywhere else). We would not dispute the possibility that Russian economic actors paid bribes to judges in an effort to secure desired outcomes in high-stakes claims. This hardly marks them as unusual. We question whether this same gusto for bribery is present in mundane cases. This idea of a dualistic legal system in Russia in which some claims are handled in an extra-legal fashion, while the bulk of claims are processed according to the law, was first raised by Robert Sharlet in his dissection of Stalinist legal culture.[24] He was drawing a distinction between politicised and ordinary cases, but his analytical frame also helps explain why the high-profile cases like the tax claim against Yukos or the

bankruptcy of strategically important enterprises would be handled differently than garden-variety debt claims.

Gustaffson offers several anecdotes that purport to show the frustration of Russian entrepreneurs who are desirous of following the law, but are stymied in their effort to do so. In response, we offer an additional anecdote, culled from the case studies Hendley carried out as a follow-up to our mid-90s survey. Of the six in-depth case studies, one enterprise, which has been anonymised as Moskovskaya Bytovaya Tekhnika (MBT), distinguished itself as law compliant.[25] MBT produced consumer goods, which it sold to an ever-changing list of retail outlets. When payment was delinquent, the sales department personnel would use personal levers, but if they failed, MBT was not shy about taking its customers to court. Hendley tagged along with MBT's in-house lawyer for one of these cases. When they arrived at the courthouse, they found out that the lawyer for the other side was talking to the judge behind closed doors. The judge's secretary told them that the lawyer and the judge had been law school classmates. The MBT lawyer reacted by telling Hendley that the case was being decided without her between the old friends, that the hearing would be for show. When the formal hearing was convened, the judge listened to both sides and decided in MBT's favour. In this instance, the Russian lawyer's fatalism was not born out. We offer this not as representative, but simply to show that the pessimistic rhetoric of Russian economic actors is not always warranted.

3. Gustaffson's empirical analysis

This section has two aims. First, it provides a critique of Gustaffson's empirical methodology, focusing on the validity of the data that he uses and the interpretation that he provides of the relationship that he estimates. We argue that even if one interprets the variables he uses as valid measures of the phenomena in which he is interested – a dubious proposition in itself – his estimated empirical relationship is open to a variety of interpretations. That is, there are many theories consistent with his estimated empirical relationship. One such theory is that enterprises use the courts because they perceive there is less corruption there than in other institutional venues – a theory inconsistent with Gustaffson's general conclusion.

Second, we examine which of the various interpretations of Gustaffson's results are consistent with the data that we collected in Russia in 1997. A central problem in his empirics is that his data are not really suitable for testing the hypothesis in which he is interested – they do not operationalise closely enough the relevant theoretical phenomena. Thus, subsumed within Gustaffson's one estimated relationship there are many sub-relationships that he assumes implicitly to hold. Our data are much more comprehensive. Therefore, we are able to explore each of these sub-relationships, examining whether each has the character that Gustaffson assumes. The resulting picture strongly rejects his interpretation of his empirical work. Indeed, it even makes a tentative case that enterprises were using the *arbitrazh* courts because of the perceived quality of these courts.

3.1. Gustaffson's methodology

Gustaffson makes the claim that he is testing the hypothesis implicit in this question 'Were those who trusted the courts supporters of the rule of law, or did they trust the court because they believed that it was possible to manipulate the system informally, with bribes?'[26] To do this, he needs a variable that validly measures beliefs about whether it was possible to manipulate judicial decisions with bribes.[27] In fact, the variable that he

uses is one that measures 'the use of bribes outside the judiciary'[28] which he claims is 'a proxy for the type of belief about corruption held by the economic actor' and belief that 'corruption is a fact of life'. The very least that can be said is that use of bribes outside the judiciary is not the obvious proxy for the use of bribes within the judiciary.

Whether a proxy is acceptable in testing a hypothesis depends on the context in which the hypothesis is placed and the data that are being used. In the case under consideration, enterprises are considering the relative advantages of different methods of dispute resolution. Some methods are 'outside the judiciary' and some methods use the judiciary. A variable that validly measures 'corruption is a fact of life' is irrelevant in such an analysis since it is as likely to measure corruption outside as inside the courts, and therefore does not speak to the comparative advantage of the courts, as seen by the enterprises.

But despite protestations to the contrary, Gustaffson does not actually measure 'corruption is a fact of life', but rather corruption 'outside the judiciary'. And his dependent variable measures willingness to use the courts. So his regression results show that the more likely an enterprise is to engage in corruption outside the judiciary, the more willing are enterprises to use the courts. This leads to a plausible simple interpretation of Gustaffson's regression results. Enterprises that have been forced to engage in corruption outside the courts would rather not deal with institutions outside the courts, which makes the courts more attractive on a comparative basis. We find this interpretation of Gustaffson's results more compelling, relatively speaking, than his interpretation, although each is possible given how poor are the proxies for the theoretical phenomena that enter into the empirics. The important point here is that because both interpretations are possible, there is absolutely no basis to make the broad conclusions that Gustaffson does in his paper.

We can note other problems with the 'corruption is a fact of life' variable. The data for this variable actually measure 'The manager paid an informal fee (bribe) for the business licens. (sic)'.[29] Interestingly, this variable is also a proxy for whether the enterprise is formal or not, since paying an informal fee is evidence that the enterprise has obtained its licence. Perhaps, enterprises who did not pay this bribe were more likely to remain informal. Since being formal is a requirement to go to court,[30] the variable might be correlated with a willingness to use the court simply because it is correlated with whether an enterprise is formal or not.

We note also that several of the less emphasised results in Gustaffson's paper support our interpretation of his main result, rather than his. For example, firms that have in-house lawyers are more likely to be willing to use the courts. Why would this be the case if bribes were going to settle the issue? It would certainly be useful to have a lawyer if the law was to decide the case. In the same vein, enterprises that have informal credits are less likely to use the courts. Why would this be so if all it took to tip the scales of justice was a bribe? But because judges have to establish the existence of a contract to make a ruling, the necessary evidence to win a case is less likely to exist in the case of an informal than a formal arrangement.

Lastly, Gustaffson sets great store by his finding that enterprises in markets that involve strong-arm tactics are less likely to use the courts and concludes that this is not in tune with findings in our previous papers.[31] In fact, it must be the case that enterprises willing to be in such markets are much more likely to use strong-arm tactics themselves. Therefore, it is not surprising that they do not turn to the court. This is another example of the point made in the opening paragraphs of this subsection that Gustaffson's results must be viewed in the context of enterprises choosing between

alternative dispute resolution mechanisms. Once one uses this lens, his results can be viewed as consistent with the conclusions we reach in our earlier papers.[32] It is also an example of the point made in Section 2 that there is no single narrative that applies to decisions on the use of courts: an enterprise that finds itself in a violent market is unlikely to view the courts in the same way as an enterprise in a quiet corner of the economy.

3.2. Some alternative empirical results

To operationalise the concept of 'trusted the courts', Gustaffson uses a dummy variable that captures the answers to a survey question on whether 'the economic actor trusts that the commercial court is the best way to resolve a business conflict that involves a considerable amount of money'. For a measure of beliefs about whether it was possible to manipulate judicial decisions with bribes, he employs 'the use of bribes outside the judiciary'. Because these variables are rather remote proxies for the concepts in which he is directly interested, there are in fact five implicit relationships that are subsumed in the logic that Gustaffson uses to draw his broad conclusions from the relationship he estimates and the variables he uses. They are as follows:

(A) Previous informal payments indicate a general attitude that the whole system is subject to corruption.
(B) Previous informal payments indicate the specific attitude that courts can be manipulated
(C) The general attitude that the system can be manipulated immediately translates into the specific attitude that courts can be manipulated.
(D) The general attitude that the system can be manipulated leads to more court use.
(E) The specific attitude that courts can be manipulated leads to more court use

Gustaffson cannot test any these relationships. As it happens, we can provide evidence pertinent to all five using data from the survey that underpinned several of our previous papers.

Between May and August 1997, we surveyed 328 Russian industrial enterprises, equally divided between six cities (Moscow, Barnaul, Novosibirsk, Ekaterinburg, Voronezh, and Saratov). Enterprise size ranged from 30 to 17,000 employees, with a median of 300 and a mean of 980. Although most of the enterprises were established during the Soviet era, 77% were privatised. Russian surveyors administered different survey instruments to four top managers: the general director and the heads of the sales, purchasing (supply), and legal departments.

For simplicity and brevity, we use simple cross-tabulations of discrete variables with few categories for all of the empirical analysis. This is consistent with the fact that the estimated relationships hardly reflect deep underlying causal phenomena, making simple descriptive statistics sufficient. The main body of the text provides brief descriptions of variables. The Appendix reproduces the exact survey questions used to derive the variables.

3.2.1. Relationship A

Our variable on general attitudes to bribery is based on the responses by all four respondents to a question that asked them to provide a ranking on a 0–10 scale of whether they agreed with the statement 'Giving in to demands for bribes in the course of carrying

out duties can never be justified'. We aggregated these rankings to make a score for the whole enterprise and then categorised enterprises into three types, which we name 'accepting' (bribes as justified), 'neutral', and 'rejecting'. Boundaries between the three categories were chosen to give the same number of enterprises in each, as closely as possible. The indicator of informal payments is whether in the previous year the enterprise paid any fees for any licence in excess of those legally required. The results, in Table 1, concur strongly with the assumption implicit in Gustaffson that individual acts of bribery are indicative of general attitudes on bribery.

3.2.2. Relationship B

But it is also important to ask whether an act of bribery in one area indicates anything about opinions on the possibility of bribery in other areas, particularly the courts. We use the same variable for informal payments and examine the relationship between this and opinions on the judges of the *arbitrazh* courts. We asked enterprises whether they assessed the honesty and ethical standards of judges of the *arbitrazh* court as high, average, or low. Table 2 indicates absolutely no connection between willingness to bribe in one sphere – the obtaining of licences – and opinions on the ethical standards

Table 1. Relationship between making informal payments and attitudes to bribes.

	Firms previously making an informal payment	Firms not previously making an informal payment	All firms
Percent of firms accepting that bribes are justified	59.3	28.9	32.7
Percent of firms neutral on bribes	22.2	36.4	34.6
Percent of firms rejecting that bribes are justified	18.5	34.8	32.7
Number of firms	27	187	214

Notes:
1. Chi-squared test statistic for significance of relationship (2 degrees of freedom) is 9.93 with p-value of 0.007.
2. Column percentages might not sum to 100 due to rounding.

Table 2. Relationship between making informal payments and assessment of honesty and ethical standards of judges.

	Firms previously making an informal payment	Firms not previously making an informal payment	All firms
Percent of firms assessing that judges have low standards	13.0	11.3	11.5
Percent of firms assessing that judges have average standards	65.2	69.1	68.6
Percent of firms assessing that judges have high standards	21.7	19.6	19.9
Number of firms	23	168	191

Notes:
1. Chi-squared test statistic for significance of relationship (2 degrees of freedom) is 0.1408 with p-value of 0.932.
2. Column percentages might not sum to 100 due to rounding.

in another sphere, the courts. We do not find this surprising at all – the enterprise registration system had completely different institutional origins than the *arbitrazh* courts. But it is important to note that the absence of this relationship suggests the incorrectness of an assumption that is crucial to Gustaffson's interpretations of his own regression results.

3.2.3. *Relationship C*

Gustaffson's interpretations also imply an assumption that general attitudes to bribery are correlated with specific attitudes about corruption in a particular institution. We have already introduced the variables to examine this, the one on honesty and ethical standards of the judges of the *arbitrazh* courts and the one on the enterprise's general attitudes to bribery. Table 3 examines the relationship between these two variables, finding only a very weak relationship between general attitudes to bribery and opinions on the judges. How could this be the case? One possibility is that the *arbitrazh* courts are viewed as a rather distinctive institution in Russia and therefore general opinions on institutions do not correlate well with opinions on this particular one.

3.2.4. *Relationship D*

Now let us examine how general attitudes to bribery relate to the use of the courts. We use the general attitudes to bribery variable already encountered in examining relationships A and C. To measure willingness to use the courts, we created an indicator variable for whether the enterprise had been a plaintiff in the *arbitrazh* court more than five times in the previous year. Table 4 shows that actors who are less accepting of bribery in general use the courts more, and the result is highly significant. This one result alone undermines the whole of Gustaffson's thesis.

3.2.5. *Relationship E*

Does the strong relationship between the use of the courts and general attitudes to bribery translate into a relationship between the use of the courts and opinions on the standards of the courts themselves? Table 5 shows that this second relationship is statistically

Table 3. Relationship between assessment of honesty and ethical standards of judges and firm's attitudes to bribes.

	Firms assessing that judges have low standards	Firms assessing that judges have average standards	Firms assessing that judges have high standards	All firms
Percent of firms accepting that bribes are justified	18.6	9.5	12.6	13.6
Percent of firms neutral on bribes	62.8	71.4	66.3	66.8
Percent of firms rejecting that bribes are justified	18.6	19.0	21.0	19.6
Number of firms	86	84	95	265

Notes:
1. Chi-squared test statistic for significance of relationship (4 degrees of freedom) is 3.3168 with p-value of 0.506.
2. Column percentages might not sum to 100 due to rounding.

Table 4. Relationship between attitudes to bribery and the use of the courts.

	Firms accepting that bribes are justified	Firms neutral on bribes	Firms rejecting that bribes are justified	All firms
Percent of firms using courts 5 times or less	72.5	57.1	52.3	60.8
Percent of firms using courts more than 5 times	27.5	42.9	47.7	39.3
Number of firms	109	105	107	321

Notes:
1. Chi-squared test statistic for significance of relationship (2 degrees of freedom) is 10.036 with p-value of 0.007.
2. Column percentages might not sum to 100 due to rounding.

Table 5. Relationship between firm's assessment of honesty and ethical standards of judges and use of the courts.

	Firms assessing that judges have low standards	Firms assessing that judges have average standards	Firms assessing that judges have high standards	All firms
Percent of firms using courts 5 times or less	64.9	61.2	53.9	60.3
Percent of firms using courts more than 5 times	35.1	38.8	46.2	39.8
Number of firms	37	183	52	272

Notes:
1. Chi-squared test statistic for significance of relationship (2 degrees of freedom) is 1.289 with p-value of 0.525.
2. Column percentages might not sum to 100 due to rounding.

insignificant. Nevertheless, those who have a higher opinion of the *arbitrazh* courts' ethical standards show a tendency to use those courts more than others. The sign of this relationship is of course the opposite to that claimed by Gustaffson.

Using the five relationships investigated earlier, we can tell a consistent story. Enterprises that were willing to make informal payments in the licensing process do condone bribery more than other enterprises (A), but this informal-payments variable is not at all informative about attitudes concerning the honesty and ethical standards of the *arbitrazh* court (B). Perhaps, the *arbitrazh* courts are viewed as a rather distinctive institution. This is consistent with the fact that general attitudes about the condoning of bribery are not informative about attitudes concerning the standards of these courts (C). Those who condone bribery the least use the courts more (D) and those who think the courts have high ethical standards use the courts more (E). These results are consistent with a theory that the *arbitrazh* courts are a rather distinctive Russian institution with properties on corruption and bribery that do not correlate well with the same properties of other institutions. It is these comparative properties of the *arbitrazh* courts that help to determine enterprise decisions on the use of the courts. These results are completely inconsistent with the notion that enterprises use the courts because of a belief that court decisions can be manipulated by bribes.

The reader will notice that the variables we have used earlier contain two that are close to those two that drive the conclusions of Gustaffson's paper: ours are the use of the courts and the making of an informal payment on licences. Do we get the same results as Gustaffson?

Table 6. Relationship between making informal payments and use of the *arbitrazh* courts.

	Firms previously making an informal payment	Firms not previously making an informal payment	All firms
Percent of firms using courts 5 times or less	72.4	54.2	56.6
Percent of firms using courts more than 5 times	27.6	45.8	43.4
Number of firms	29	192	221

Notes:
1. Chi-squared test statistic for significance of relationship (1 degree of freedom) is 3.4143 with p-value of 0.065.
2. Column percentages might not sum to 100 due to rounding.

Table 6 shows the answer is a resounding no. Those more willing to pay bribes for licences are less willing to appear in court frequently as plaintiffs. We do not have a theory as to why Table 6 indicates the opposite sign to the relationship Gustaffson found in his Table 3, but it is another piece of evidence indicating that his very strong conclusions on the motives of enterprises in using the courts in Russia are completely unwarranted.

Notes

1. Gustaffson, 101.
2. Ibid.
3. Hendley, Murrell, and Ryterman, "Law, Relationships and Private Enforcement," 627–56; Hendley, Murrell, and Ryterman, "Do 'Repeat Players' Behave Differently," 833–67.
4. Gustaffson, 82–3.
5. "Order in the Jungle."
6. The origins of this debate lie in the dialogue between Fuller and Hart. See Fuller, *The Morality of Law* and Hart, *The Concept of Law*. For a more contemporary review of the very different ways the concept of the rule of law has been used by scholars and policy makers, see Chukwumerije, "Rhetoric Versus Reality," 399–414; Kleinfeld, "Competing Definitions," 31–74; Tamanaha, *On the Rule of Law*; and Peerenboom, "Let One Hundred Flowers Bloom," 471–544. For a discussion of the rule of law in Russia, see Hendley, "Telephone Law," 241–64; Kahn, "Vladimir Putin," 511–58; and Ledeneva, "Telephone Justice," 324–50.
7. Raz, *The Authority of Law*, 89. Elsewhere in his essay, Gustafsson implies that the rule of law requires judicial independence. See Gustaffson, 82. This argument, which goes to the institutional role of courts and their relationship with the legislative and executive branches, broadens his original definition.
8. Hendley, Murrell, and Ryterman, "Law, Relationships and Private Enforcement."
9. Gustaffson, 83.
10. Murrell, "The Transition," 164–78; Hendley, "Legal Development," 231–56.
11. Hendley, Murrell, and Ryterman, "Law, Relationships and Private Enforcement" and Hendley, Murrell, and Ryterman, "Do 'Repeat Players' Behave Differently."
12. For example, Hay and Shleifer, "Private Enforcement," 398–402; Black and Kraakman, "A Self-Enforcing Model," 1911–81; Greif and Kandel, "Contract Enforcement Institutions," 291–321; and Rubin, "Growing a Legal System," 1–46.
13. Interestingly, when the general directors responded to the highly specific and structured questions in the survey, they gave a more favourable view of the use of the courts. This dissonance is not unusual – going to court is not a pleasant experience and is, in some senses, an admission of failure. It is not unusual to see a combination of a very negative general impression of courts and highly specific data that indicate otherwise.
14. Hendley, Murrell, and Ryterman, "Do 'Repeat Players' Behave Differently."
15. Gustaffson, 88.

16. Gustaffson writes as if 'trust in the commercial courts' and 'trust that the commercial courts will accept my bribes and respond to them' are using the same word 'trust'. In fact, the semantic content of trust in the two phrases is very different. For example, a paper that proved that Stalin could be reliably trusted to kill his political enemies should not be entitled 'The Soviet People Trust Stalin'.
17. Gustaffson, 88.
18. Hendley, "Business Litigation in the Transition," 305–48 and Hendley, "Growing Pains," 302–31.
19. Hendley, "Are Russian Judges Still Soviet?" 240–74.
20. Hendley, "Business Litigation" and Kathryn Hendley, "Enforcing Judgments," 46–82.
21. Although Gustafsson cites the articles reporting these data (Hendley, "Business Litigation" and "Enforcing Judgments"), he does not reference them, preferring to rely on sources that repeat the common wisdom of Russian managers about the difficulty of enforcing judgments. Our survey results document that enterprise lawyers viewed problems with enforcing judgments as the biggest shortcoming of the *arbitrazh* courts. Hendley, Murrell, and Ryterman, "Law, Relationships and Private Enforcement," 646. In a 1996 interview, the then-Chairman of the Higher *Arbitrazh* Court identified enforcement as the 'achilles heel' of the *arbitrazh* court system. See Vasil'eva, "Nel'zya zhit,' " 54–9. Yet, Hendley's research shows that, at least for debt collection cases, most of the victors in court were able to recover something. The reality is that litigants and court officials everywhere complain about enforcement. Russia is no exception.
22. Lambert-Mogiliansky, Sonin, and Zhuravskaya, "Are Russian Commercial Courts Biased?," 254–77.
23. Hendley, "Enforcing Judgments," 319.
24. Sharlet, "Stalinism and Soviet Legal Culture," 155–79.
25. Hendley, "Beyond the Tip," 20–55.
26. Gustaffson, 90.
27. As is clear in the quote, there is a slippage in Gustaffson between manipulating the system and manipulating the court. This vagueness leads to the validity problem.
28. Gustaffson.
29. Ibid., 106.
30. The *arbitrazh* courts are open to legal entities, individual entrepreneurs, and shareholders. The first two categories require formal registration. The third category opens the door to individuals, but only if they are pursuing claims as shareholders. Unregistered or informal entities cannot bring claims to the *arbitrazh* courts.
31. Gustaffson, 96. One reason why he reaches this finding is that he uses the erroneous reasoning that the size and significance of a regression coefficient is indicative of the pervasiveness of a phenomenon. Being at the epicentre of a nuclear bomb explosion is surely strongly and statistically significantly related to death, while indicating nothing about the prevalence of such events.
32. Hendley, Murrell, and Ryterman, "Law, Relationships and Private Enforcement" and Hendley, "Business Litigation."

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Bibliography

Black, Bernard, and Reinier Kraakman. "A Self-Enforcing Model of Corporate Law." *Harvard Law Review* 109, no. 8 (1996): 1911–1982. doi:10.2307/1342080.

Chukwumerije, Okezie. "Rhetoric Versus Reality: The Link Between the Rule of Law and Economic Development." *Emory International Law Review* 23, no. 2 (2009): 399–414.

Fuller, Lon L. *The Morality of Law.* New Haven, CT: Yale University Press, 1963.

Greif, Avner, and Eugene Kandel. "Contract Enforcement Institutions: Historical Perspectives and Current Status in Russia." In *Economic Transition in Eastern Europe and Russia*, edited by Edward P. Lazar, 291–321. Stanford, CA: Hoover Press, 1995.

Gustafsson, Pär. "The Emergence of the Rule of Law in Russia." *Global Crime* 14, no. 1 (2013): 82–109. doi:10.1080/17440572.2012.759747.

Hart, H.L.A. *The Concept of Law.* Oxford: Clarendon Press, 1961.

Hay, Jonathon R., and Andrei Shleifer. "Private Enforcement of Public Laws: A Theory of Legal Reform." *American Economic Review* 88, no. 2 (1998): 398–402.

Hendley, Kathryn. "Are Russian Judges Still Soviet?" *Post-Soviet Affairs* 23, no. 3 (2007): 240–274. doi:10.2747/1060-586X.23.3.240.

Hendley, Kathryn. "Beyond the Tip of the Iceberg: Business Disputes in Russia." In *Assessing the Value of Law in Transition Economies*, edited by Peter Murrell, 20–55. Ann Arbor: University of Michigan Press, 2001.

Hendley, Kathryn. "Business Litigation in the Transition: A Portrait of Debt Collection in Russia." *Law & Society Review* 38, no. 2 (2004a): 305–348. doi:10.1111/j.0023-9216.2004.03802010.x.

Hendley, Kathryn. "Enforcing Judgments in Russian Economic Courts." *Post-Soviet Affairs* 20, no. 1 (2004b): 46–82. doi:10.2747/1060-586X.20.1.46.

Hendley, Kathryn. "Growing Pains: Balancing Justice and Efficiency in Russian Economic Courts." *Temple International and Comparative Law Journal* 12, no. 2 (1998): 302–331.

Hendley, Kathryn. "Legal Development in Post-Soviet Russia." *Post-Soviet Affairs* 13, no. 3 (1997): 231–256.

Hendley, Kathryn. "'Telephone Law' and the 'Rule of Law:' The Russian Case." *Hague Journal on the Rule of Law* 1, no. 2 (2009): 241–264. doi:10.1017/S1876404509002413.

Hendley, Kathryn, Peter Murrell, and Randi Ryterman. "Do Repeat Players Behave Differently in Russia? Contractual and Litigation Behavior of Russian Enterprises." *Law & Society Review* 33, no. 4 (1999): 833–868. doi:10.2307/3115152.

Hendley, Kathryn, Peter Murrell, and Randi Ryterman. "Law, Relationships and Private Enforcement: Transactional Strategies of Russian Enterprises." *Europe-Asia Studies* 52, no. 4 (2000): 627–656. doi:10.1080/713663079.

Kahn, Jeffry. "Vladimir Putin and the Rule of Law in Russia." *Georgia Journal of International and Comparative Law* 36, no. 3 (2008): 511–558.

Kleinfeld, Rachel. "Competing Definitions of the Rule of Law." In *Promoting the Rule of Law Abroad: In Search of Knowledge*, edited by Thomas Carothers, 31–74. Washington, DC: Carnegie Endowment for International Peace, 2005.

Lambert-Mogiliansky, Ariane, Konstantin Sonin, and Ekaterina Zhuravskaya. "Are Russian Commercial Courts Biased? Evidence from a Bankruptcy Law Transplant." *Journal of Comparative Economics* 35, no. 2 (2007): 254–277. doi:10.1016/j.jce.2007.03.009.

Ledeneva, Alena. "Telephone Justice in Russia." *Post-Soviet Affairs* 24, no. 4 (2008): 324–350. doi:10.2747/1060-586X.24.4.324.

Murrell, Peter. "The Transition According to Cambridge, Mass." *Journal of Economic Literature* 33, no. 1 (1995): 164–178.

"Order in the Jungle – Economics and the Rule of Law." *The Economist*, March 15, 2008.

Peerenboom, Randall. "Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China." *Michigan Journal of International Law* 23, no. 2 (2002): 471–544.

Raz, Joseph. *The Authority of Law: Essays on Law and Morality.* Oxford: Clarendon Press, 1979.

Rubin, Paul. "Growing a Legal System in the Post-Communist Economies." *Cornell International Law Journal* 27, no. 1 (1994): 1–46.

Sharlet, Robert. "Stalinism and Soviet Legal Culture." In *Stalinism: Essays in Historical Interpretation*, edited by Robert C. Tucker, 155–179. New York: W.W. Norton, 1977.

Tamanaha, Brian Z. *On the Rule of Law: History, Politics, Theory.* Cambridge: Cambridge University Press, 2005.

Vasil'eva, M. "Nel'zya zhit' po zakonam dzhunglei." *Chelovek i zakon*, no. 7 (1996): 54–59.

Appendix: Survey questions and variables

Informal payments

The General Director was asked 'During the past year, did your enterprise pay fees for any license in excess of those legally required?' with possible answers yes and no. The 'Firms previously making an informal payment' variable reflects the responses to this question.

Attitudes to bribes

All four respondents were asked separately to rate on a scale of 0–10 their agreement with the following statement 'Giving in to demands for bribes in the course of carrying out duties can never be justified'. The mean of all four scores provided a single score for the enterprise. Enterprises were divided into three roughly equal groups (with the dividing lines at mean scores of 6.5 and 8.5), which were then labelled as 'accepting' of bribes (low scores), 'neutral', and 'rejecting' (high scores).

Honesty and ethical standards of the arbitrazh *court*

The head of the sales department was asked 'How would you rate the honesty and ethical standards of the Judges of the *Arbitrazh* court?' and were given the options of answering high, average, or low. The variable used reflects these three categories of answers.

Use of the courts

The head of the legal department was asked 'During the past year, how often did your enterprise participate in a proceeding at an *arbitrazh* court as a plaintiff?' The possible answers were never, 1–5 times, 6–19 times, 20–49 times, and 50 times or more. The variable used is an indicator variable capturing whether the enterprise had been to the courts as plaintiff 6 times or more.