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Joseph A. Hamm

University of Nebraska–Lincoln

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Understanding Public Trust in the Courts: The Centrality of Vulnerability

Joseph A. Hamm

Courts have an important place in American life. While many would think first of the police as the institution most directly responsible for maintaining the law, the courts are an integral part of ensuring social order. Indeed, as illustrated by practices regarding warrants and cases challenging police action, much of the authority typically attributed to the police is, to some degree, controlled by the courts.

Importantly, however, as is often the case with institutions of government in the United States, this considerable authority comes with relatively limited power: The judiciary controls “neither the purse nor the sword,” leaving it heavily reliant upon other institutions and upon the public in general.¹ Thus, an extreme argument can be made that the courts *need* the positive perceptions of the majority of the public to function at all,² but others have pointed to these perceptions as important simply because effective courts *should* be perceived well by the public they serve.³ In either case, there is little question that public perceptions of the courts matter and in recognition of this, considerable effort has been expended by to improve and protect them.⁴

TRUST

A wide variety of constructs have been investigated within this umbrella notion of “public perceptions of the state courts” and include constructs like confidence, legitimacy, cynicism, support, and so on,⁵ but one especially important construct is trust. From the National Conference on Public Trust and Confidence in the Justice System in 1999⁶ to the more recent National Initiative for Building Community Trust and Justice,⁷ trust is widely recognized as critical for positive court-community relationships. Despite the strong emphasis on the construct, however, consistency in conceptualization has been elusive. In fact, courts scholarship contains at least three importantly different understandings.

The first of these “versions of trust” arises primarily from the scholarship addressing the Process Model of Legitimacy. This model suggests that procedural concerns are especially important for evaluations of legal authorities⁸ and has been supported by an impressive body of research, especially in the policing context.⁹ Trust has an important role in this literature but, notably, its specific nature is not well-defined.¹⁰ Instead, this “trust” is variously understood as an outcome or driver of

Footnotes

1. THE FEDERALIST NO. 78 (1788) (Alexander Hamilton).
2. George W. Dougherty et al., *Evaluating Performance in State Judicial Institutions: Trust and Confidence in the Georgia Judiciary*, 38 ST. & LOC. GOV. REV. 176 (2006); Susan Olsen & David A. Huth, *Explaining Public Attitudes towards Local Courts*, 20 JUST. SYS. J. 41 (1998).
3. Sandra Day O'Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust*, 36 CT. REV. 10 (1999).
4. David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 CT. REV. 24 (Fall 1999); Steve Leben, *Public Trust and Confidence in the Courts*, 36 CT. REV. 36 (Fall 1999); NATIONAL CENTER FOR STATE COURTS, *SEPARATE BRANCHES, SHARED RESPONSIBILITIES: A NATIONAL SURVEY OF PUBLIC EXPECTATIONS ON SOLVING JUSTICE ISSUE* (2009), available at <https://cdm16501.contentdm.oclc.org/digital/collection/ctcomm/id/118>.
5. E.g., Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697 (2006); Sara C. Benesh & Susan E. Howell, *Confidence in the Courts: A Comparison of Users and Non-Users*, 19 BEHAV. SCI. & THE LAW 199 (2001); Dougherty, *supra* n. 2; Joseph A. Hamm et al., *Exploring Separable Components of Institutional Confidence*, 29 BEHAV. SCI. & THE LAW 95 (2011); Joseph A. Hamm et al., *Deconstructing Confidence in State Courts*, 3 J. TRUST RES. 11 (2013); Olsen & Huth, *supra* n. 2; David B. Rottman, *On Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It?* 35 CT. REV. 14 (Winter 1998); James P. Wenzel et al., *The Sources of Public Confidence in State Courts: Experience and Institutions*, 31 AM. POL. RES. 191 (2003).
6. NATIONAL CENTER FOR STATE COURTS, *NATIONAL ACTION PLAN: A GUIDE FOR STATE AND NATIONAL ORGANIZATIONS* (2000), available at <https://cdm16501.contentdm.oclc.org/digital/collection/ctcomm/id/20>.
7. The National Initiative for Building Community Trust and Justice, a collaboration of several entities with the United States Department of Justice, has a website at <https://trustandjustice.org/>.
8. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. OF PSYCH. 375 (2006).
9. E.g., Kristina Murphy, *The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders*, 28 LAW & HUMAN BEHAV. 187 (2004); Maarten Van Craen & Wesley G. Skogan, *Trust in the Belgian Police*, 12 EUR. J. CRIMINOLOGY 129 (2004); Jonathan Jackson et al., *Does the Fear of Crime Erode Public Confidence in Policing?* 3 POLICING 100 (2009); JONATHAN JACKSON ET AL., *JUST AUTHORITY? TRUST IN THE POLICE IN ENGLAND AND WALES* (2014).
10. Jonathan Jackson & Jacinta M. Gau, *Carving up Concepts? Differentiating between Trust and Legitimacy in Public Attitudes of Legal Authority*, in INTERDISCIPLINARY PERSPECTIVES ON TRUST: TOWARDS THEORETICAL AND METHODOLOGICAL INTEGRATION (Ellie Shockley, Tess M. S. Neal, Lisa PytlikZillig, & Brian Bornstein eds, 2016); Jacinta M. Gau, *The Convergent and Discriminant Validity of Procedural Justice and Police Legitimacy: An Empirical Test of Core Theoretical Propositions*, 39 J. CRIM. JUST. 489 (2011); Tom R. Tyler & Jonathan Jackson, *Future Challenges in the Study of Legitimacy and Criminal Justice*, in LEGITIMACY & CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION (Justice Tankebe & Alison Lieblich eds., 2013).

procedural justice, as a subcomponent or operationalization of legitimacy, or as an umbrella term for all perceptions of legal authorities.¹¹ It suffices, however, to say that this account of trust is strongly tied to legitimacy in that both center on a perception that the courts should have authority. Thus, this account suggests that when courts behave or are expected to behave appropriately as authorities, they will be trusted.

The second version of trust arises from political science scholarship. Although much of this work focuses on perceptions of the United States Supreme Court,¹² some has addressed perceptions of the state courts specifically.¹³ Trust within this literature is also somewhat inconsistently defined but is usually associated with constructs like confidence and support. In one of the only explicit definitions presented in this literature, George Dougherty and colleagues argue that trust is a fiduciary concept that concerns whether the courts fulfill expectations.¹⁴ Thus, within this literature, trust is strongly connected to perceptions of satisfaction with the courts such that trust is a function of their ability to address public expectations regarding the services they provide.

The third version of trust in the courts comes from the broader literature on trust more generally.¹⁵ In this work, scholars across contexts are increasingly settling on an understanding of trust as a willingness to accept vulnerability to the agency of the target of that trust.¹⁶ This account differs from the previous two by suggesting that trust resides not in an evaluation of the courts themselves, but is instead a psychological state or feeling within the trustor that orients them toward acting in ways that accept their vulnerability to harm from the direct actions of the courts.¹⁷ Thus, within this account, trust exists when the public, recognizing this potential for harm, remains willing to work with—or at least not against—them.

VULNERABILITY AND THE COURTS

I argue that operating from this third account has especially strong potential to foster efforts that most successfully improve and protect the court-community relationship, but this requires the acceptance of two fundamental arguments: (1) that there is potential for harm to the public in the court-community relationship and (2) that the courts are at least per-

ceived to have some level of control over this potential for harm.

Regarding the first argument, the most obvious potential harms controlled by the courts are faced by defendants. For these individuals, appearing in court necessarily opens them up to potential harm in both outcome (e.g., an unnecessarily harsh verdict) and process (e.g., an inability to tell their side of the story), but other participants in court proceedings are not immune. For example, victims risk that their attacker could go free and witnesses risk public embarrassment in an inconsiderate examination. For these and other individuals, cooperation with the courts requires at least a tacit acceptance of the fact that they could experience these and other harms.

In addition to the potential for harm to participants in court proceedings, the court-community relationship also involves the potential for harm to the wider public. A 2009 survey by the National Center for State Courts suggested that a little less than half of the population has not had direct contact with the courts.¹⁸ Nonetheless, it is important to remember that, given their place in American life, the operation of the courts is not inconsequential to these individuals, especially because of the strong popular focus on them.¹⁹ Thus, one important potential harm to this *second public*²⁰ arises from violations of more abstract notions of what the courts should be. For example, when the courts are believed to have systemically disparate impacts on minority communities, there is often a perceived harm, even for individuals who are unlikely to experience those disparate outcomes personally. The public outcry against the abuses in Ferguson, Missouri, and the backlash against the outcome of the case against Brock Turner both serve as poignant reminders of the fact that even though the potential for harm to the courts' second public may be somewhat attenuated as compared to those who have had direct court contact, it is nonetheless present and influential.

The second argument upon which this conceptualization of trust rests regards the courts' role in addressing the probability and intensity of these potential harms. As noted in the definition posed above, trust is a willingness to accept vulnerability, specifically, to the *agency*²¹ of the courts. This agency is defined as a *perceived* ability to make decisions that affect the potential harm to the trustor. Thus, even though courts are typically

11. Tom R. Tyler, *The Psychology of Procedural Fairness: A Test of the Group-Value Model*, 57 J. PERS. & SOC. PSYCH. 830 (1989); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC. REV. 513 (2003).
12. James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. OF LAW & SOC. SCI. 201 (2014).
13. E.g., Benesh & Howell, *supra* n. 5; Christine A. Kelleher & Jennifer Wolak, *Explaining Public Confidence in the Branches of State Government*, 60 POL. RES. Q. 707 (2007); Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy, Assessing Citizen's Diffuse Support for State Courts*, 36 AM. POL. RES. 297 (2008); Geoffrey D. Peterson et al., *Electing to Trust: An Exploration of the Relationship between Public Opinion and Localized Processes of Judicial Selection*, 33 AM. REV. POL. 51 (2012).
14. Dougherty et al., *supra* n. 2, at 178.

15. Roger C. Mayer et al., *Integrative Model of Organizational Trust*, 20 ACAD. MGMT. REV. 709 (1995).
16. Bill McEvily & Marco Tortoriello, *Measuring Trust in Organisational Research: Review and Recommendations*, 1 J. TRUST RES. 23 (2011).
17. Joseph A. Hamm et al., *On the Cross-Domain Scholarship of Trust in the Institutional Context*, in INTERDISCIPLINARY PERSPECTIVES ON TRUST: TOWARDS THEORETICAL AND METHODOLOGICAL INTEGRATION (Tess M. S. Neal, Ellie Shockley, Lisa PytlikZillig, & Brian Bornstein eds., 2016).
18. NATIONAL CENTER FOR STATE COURTS, *supra* n. 4.
19. David B. Rottman, *Who Trusts the Trial Courts, to What Extent, and Why? In MOTIVATING COOPERATION AND COMPLIANCE WITH AUTHORITY* (Brian H. Bornstein & Alan J. Tomkins eds, 2015).
20. David B. Rottman, *Adherence to Procedural Fairness in the Justice System*, 6 CRIMINOLOGY & PUB. POL. 835 (2007).
21. Albert Bandura, *Toward a Psychology of Human Agency*, 1 PERSP. ON PSYCH. SCI. 164 (2006).

bound to specific processes or decisions (e.g., sentencing guidelines), the considerable power differential between the courts and the public often means that the public still perceives the courts as chiefly responsible for their decisions. This account of trust suggests that when an individual trusts the courts, they feel that even though there is a possibility that the courts may cause (or at least allow) some level of harm, they are willing to take a *leap of faith*²² and cooperate.

IMPLICATIONS

So what does this mean for judges as they go about their daily work of hearing cases and interacting with the public? The most important takeaway of this argument regarding the nature of trust lies in the proposed centrality of perceived vulnerability. As a result, efforts to improve public perceptions that explicitly address salient vulnerabilities should be most effective. For judges, addressing these vulnerabilities can be as simple as remembering that even though the courts are primarily intended to address harm, they do create at least the *potential* for harm rooted in their agentic actions. To the extent that this conceptualization of trust is applicable in the state courts context, taking the time to understand and acknowledge the potential harms that defendants, witnesses, jurors, and victims feel as they enter the courtroom will help build trust. Adherence to procedural justice and working to meet expectations in these interactions will remain relevant, but directly addressing vulnerability allows judges to acknowledge their power differential as it matters most to the individual and to highlight the concerns that most saliently get in the way of a positive relationship.

Although taking time to elicit and address these perceived vulnerabilities may be helpful in all interactions with the public, it may well be that these discussions would be disruptive to individual proceedings. Instead, judges may be better served by separate engagement efforts that seek to bring representatives into a dialogue with the court to help understand the salient vulnerabilities that may impede a more positive relationship. Many previous court engagement efforts have peripherally addressed assumed vulnerabilities but most have not, as yet, allowed these issues to take center stage: Rather than working with communities to identify and then explicitly address the public's perceived vulnerabilities, most engagement efforts start by working to determine knowledge or service gaps and work to address them directly. Although these approaches may, in fact, address vulnerabilities that communities feel, these problem-centered approaches may fail to allow sufficient space for community members to highlight specific vulnerabilities as they see them. What is needed are efforts that seek specifically to identify the potential harms that the public is concerned about and then work to provide the assurances necessary to

help the public see that the courts are not only aware of these specific concerns but are worthy of being entrusted with them.

A second implication of this account of trust lies in what it suggests about measurement. Increasingly, courts are working to integrate monitoring and evaluation efforts that allow them to determine efficacy, and to identify and adjust elements that are less effective than expected. Comprehensive monitoring and evaluation strategies often involve surveying court users or the public generally about court processes (e.g., procedural fairness), general evaluations (e.g., legitimacy and satisfaction), and the respondents' willingness to cooperate or actual cooperation (e.g., willingness to bring current or future cases to court for resolution). While these factors are important, the notion of trust presented here suggests that they may neglect a critical issue. Because trust as conceptualized here is neither an evaluation of the courts nor cooperation with them, most existing monitoring and evaluation efforts fail to account for it.²³ This may be an important oversight because evidence suggests that trust be the intervening state that connects these evaluations to cooperation behavior.²⁴ This, however, should not be understood to suggest that monitoring and evaluation not include measures of evaluations or cooperation. Evaluations of the courts should be measured, especially as performance indicators. Applying this conceptualization of trust, however, suggests that these perceptions will only lead to cooperation when the individual is willing to accept their vulnerability. Similarly, cooperation is also important to measure, but it can only be directly addressed retroactively and in relation to specifically identified behavior(s). Future behavior, however, by definition, cannot be directly measured and, although it is interesting, asking people how likely they feel they *would be* to cooperate is not necessarily reliable or valid. Measuring a willingness to accept vulnerability to the agency of the courts may be closer to cooperation than evaluations of the courts and more applicable to a variety of future cooperation behaviors than specific measures of past or current cooperation.



Joseph A. Hamm is Assistant Professor of Criminal Justice and Environmental Science at Michigan State University. A psychologist by training, his work lies at the nexus of government and the public where he investigates what trust is, how best to measure it, and its connection to outcomes like cooperation and compliance. Hamm's work has included research on trust in courts and law enforcement, as well as other state and federal entities, and is designed to advance a cross-boundary social science of trust. He has a Ph.D. in psychology and a Master of Legal Studies degree from the University of Nebraska–Lincoln.

22. Guido Möllering, *Rational, Institutional, and Active Trust: Just Do It!? in TRUST UNDER PRESSURE: EMPIRICAL INVESTIGATIONS OF TRUST AND TRUST BUILDING IN UNCERTAIN CIRCUMSTANCES* (Katinka Bijlsma-Frankema & Rosalinde Klein Wollthuis eds., 2005).

23. Here are examples of survey questions that move in this new direction: (1) I am generally comfortable with the authority the courts in my community have to make rulings that I have to abide by. (2) I would be comfortable letting the courts in my commu-

nity decide a case that was important to me. These were used in a recent evaluation of the Hennepin County (Minn.) courts. See Joseph A. Hamm, *An Application of an Integrated Framework of Legitimacy to the State Courts Context*, in preparation.

24. Joseph A. Hamm et al., *Fair Process, Trust, and Cooperation: Moving Toward an Integrated Framework of Police Legitimacy*, 44 CRIM. JUST. & BEHAV. 1183 (2017).