



Understanding and Managing Trust Norms

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ABSTRACT

Trust is complex: it is a multilevel and institutionally variegated concept acquired through different pathways. This paper breaks down the complexity to provide a framework that can be used to assess innovations designed to build greater trust. The basic building blocks are trust norms, beliefs held by individuals, shared widely across society, about the conditions necessary if trust is to be placed in other persons, organizations or institutions. Survey, interview and observational data underpin the analysis of how citizens come to trust major institutions and what might be done to build trust. Trust building in response to what is called resistant defiance to authority generally contributes to increases in public perceptions of institutional integrity; meaning that the public accepts institutional power as legitimate and come to view authorities as using their powers appropriately and responsively to fulfil their purpose. In contexts where dismissive defiance is in play, that is, citizens refuse to defer to authorities and psychologically cut themselves off from obligations, trust building is a less certain process with less certain outcomes.

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Trust in its broadest sense can be commonly understood through the verb “entrust”. When we trust we place our well-being, meaning our security and our hopes for a better future, in the hands of another.¹ We do so in the belief that one course of action is preferable to other options, and that the preferable course of action will be followed by the other party.² The “other” may be a person, group, organization or institution.³ The other takes responsibility for acting in ways that live up to our expectations, that is, being trustworthy.⁴ Most importantly, a trusted other should not disappoint or betray us.⁵ How we arrive at trust in an individual may differ from how we arrive at trust in a group. How we arrive at trust in an institution may be different again. Yet the essential feature of trust is the same. It is a relational concept through which we “gift” others our vulnerability.⁶ Entering into a trust relationship with courts or Royal Commissions or Sentencing Councils or official inquiries fits this conception of trust well. We defer to the laws of the land and with that, to the rules and judgment of the court: We put our well-being in the hands of the court as individuals and as a collective.⁷ Sometimes we do so generously, sometimes begrudgingly, sometimes guardedly, and sometimes without any trust at all.

This article uses the concept of trust norms to propose a framework for how courts might position trust within their operational environment and analyse its impact. Trust norms have been measured in Australian surveys to understand what citizens expect of their government, statutory authorities and regulatory institutions.⁸ These and other survey data have been used to build up a more complete picture of (a) how citizens judge the trustworthiness of authorities, (b) how they balance trustworthiness against their understanding of the formal powers of authority (its legitimacy) to arrive at an overall judgment of the authority's integrity, and (c) how they signal defiance when they feel disenchanting with how authorities are performing.⁹

1 V. Braithwaite, Communal and Exchange Trust Norms: Their Value Base and Relevance to Institutional Trust, in V. Braithwaite & M. Levi (eds.) *Trust and Governance*, Russell Sage Foundation, 1998, pp. 46–74, p. 47.

2 Ibid. This definition is consistent with the agreed elements in trusting, that is, that the trustor willingly makes themselves vulnerable or takes a risk with expectations about the future actions of the trustee, see R. Borum, *The Science of Interpersonal Trust*, Mental Health Law and Policy Faculty Publications, 2010, 574. p. 2. <http://scholarcommons.usf.edu/mhlp_facpub/574> [last accessed 10 October 2021].

3 P. Sztompka, *Trust: A Sociological Theory*, Cambridge University Press, Cambridge 1999, p. 46.

4 Braithwaite, supra note 1, p. 56. See also J.A. Colquitt, B.A. Scott, & J.A. LePine, Trust, Trustworthiness, and Trust Propensity: A Meta-Analytic Test of their Unique Relationships with Risk Taking and Job Performance. *Journal of Applied Psychology* (2007) 92(4) pp. 909–927.

5 K. Jones, Trustworthiness. *Ethics* (2012) 123 pp. 61–85. Jones discusses the responsibility and responsiveness of the trustee on pp. 67–69; P.H. Kim, K.T. Dirks, & C.D. Cooper, The Repair of Trust: A Dynamic Bilateral Perspective and Multilevel Conceptualization. *Academy of Management Review* (2009) 34 (3) pp. 401–422.

6 P. Pettit, The Cunning of Trust. *Philosophy and Public Affairs* (1995) 24 pp. 202–25.

7 F. van Dijk, Judicial Independence and Perceptions of Judicial Independence, in *Perceptions of the Independence of Judges in Europe: Congruence of Society and Judiciary*, Palgrave MacMillan, Cham, Switzerland 2021, p. 16; see also K. Laster, Epilogue: Courts as ‘Low Trust’ Environments: Repurposing Francis Fukuyama. *International Journal for Court Administration* 12(3).

8 V. Braithwaite, The Hope Process and Social Inclusion. *The Annals of the American Academy of Political and Social Science* (2004) 592 pp.128–151, p. 140; Braithwaite, supra note 1.

9 V. Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy*, Edward Elgar, 2009.

In Part 2 of this article, different sources for developing trust relationships¹⁰ explain the impracticability and undesirability of either complete trust or the absence of trust. Trust norms strengthen this case, showing how multifaceted the pursuit of trust has to be in institutions. Trust norms provide guidance on how to develop the goal of optimal trust. Trust norms are the community's shared beliefs about what members must do to be considered trustworthy. There is surprising agreement on this question, with trust norms routinely attracting support from 80 to 90 percent of the population.¹¹ Yet it is impossible for an institution to activate all trust norms to satisfy all people all the time. Being cognizant of trust norms and breaches of trust norms enables critical responsiveness to particular sources of distrust, the ultimate goal being to improve overall citizen trust.

Part 3 addresses a model for trust building that may be adapted for use in the courts. Therese Laanala's work on how electoral management bodies can best build trust in new democracies provides a model of the moving parts that need to be monitored and continuously strengthened in a responsive way.¹² Part 3 relies on Katie Miller's argument in this issue that champions of our legal system need to exercise intellectual humility. The task of pooling and critically reflecting on data from many sources to decide priorities for trust building is undertaken under the umbrella of institutional integrity,¹³ a bridging concept that safeguards the formal legitimacy of the court while listening to, engaging with and responding to public needs and expectations. As Kathy Laster discusses in this issue, courts have a complex relationship with the public. Legal architecture is built around assumptions of distrust of citizens, yet citizens want to be treated as trustworthy. Part 4 makes an argument for innovation of the kinds discussed by Ingo Karpen and Melis Senova, Marcia Neave, Arie Freiberg and Kathy Laster in this issue. Innovation is needed to address subcultures of defiance against the legal system, which are likely to strengthen with declining institutional trust. Resistant defiance that shifts to dismissive defiance threatens the place of the rule of law in a democratic society.¹⁴

2. MULTIFACETED SOURCES OF TRUST

DISPOSITIONAL TRUST

Part of the explanation of how willing a person is to trust is dispositional.¹⁵ Learning to trust is a social developmental process that involves bonding with carers who meet a child's needs. Attitude to authority may be another component of this disposition.¹⁶

¹⁰ See A. Wallace and J. Goodman-Delahunty, Measuring Trust and Confidence in Courts. *International Journal for Court Administration* 12(3).

¹¹ P. Maguire, M. Reinhart, M. Mearns, & V. Braithwaite, Progress Report 2, Hope, Trust and Democracy Project. August 2007; Braithwaite, supra note 8, p. 140; Braithwaite, supra note 1, p. 59.

¹² T. Pearce Laanala, Beyond the Checklist: Addressing New Challenges in Election Observation Methodology. *Nordic Journal of Human Rights* (2017) 35(4) pp. 327–340 DOI:10.1080/18918131.2017.1400336; T. Pearce Laanala, Institutional Trust-Building in Practice: An Examination of the Relational Dimension of Electoral Management Work, PhD thesis, Australian National University, to be submitted 2022.

¹³ Braithwaite, supra note 9.

¹⁴ *Ibid.*, p. 1.

¹⁵ J.B. Rotter, Generalised Expectancies for Interpersonal Trust. *American Psychologist* (1971) 26 pp. 443–452; E. Erikson, *Childhood and Society*, 1950, Imago Publishing; Colquitt et al, supra note 4, pp. 909–927.

¹⁶ Braithwaite, supra note 9, p. 1.

Low trust combined with fear of authority will not be conducive for gifting vulnerability to anyone in a court setting. Jenny Job has shown that trust in our society's institutions ripples out from familial trust.¹⁷ If you trust your family and close friends, you are more likely to trust community groups and local organizations. Locally situated trust then ripples out to placing trust in more distant, national government institutions. Jenny Job and Monika Reinhart analysed empirical survey data using structural equation modelling.¹⁸ The best fitting model for the data showed that the flow of trust from the familial to the national level was stronger than the flow of trust from the national level down to the local and familial level. Understanding trust from a "propensity to trust" perspective explains why there will always be a ceiling on how much trust a single institution is able to generate. The relationships that are shown to exist between the trust that citizens have in quite different institutions further places constraints on capacity to build trust by any particular institution.

INFORMATIONAL TRUST

A second empirically-supported approach to explaining who we decide to trust focuses on the contextual information we have about the situation and about the other that enables us to know how they will act toward us.¹⁹ Sometimes we have deep contextual knowledge of the other's likelihood of being trustworthy in a given situation, and may even have some control over the levers likely to sway their actions in the direction we want²⁰. More often, however, when engaging with others beyond our close circle, we have limited knowledge and insight. For the vast majority of citizens, court contacts are beyond our close circle.²¹ Then we fall back on our dispositional trust in part, but also we are likely to use cognitive short-cuts or trust heuristics.²² We use trust heuristics not only when we are not privy to all the information we need, but also when we are overwhelmed with information complexity. We then need something simple to guide our actions. Using trust heuristics includes aligning our trusting with that of 'significant others'. We use those we are close to or look up to or who are similar to us as a social prop: we trust when they trust, we distrust when they distrust.²³

17 J. Job, *Ripples of Trust: Reconciling Rational and Relational Accounts of the Sources of Trust*, PhD thesis, Australian National University, 2007.

18 J. Job, & M. Reinhart, *Trusting the Tax Office: Does Putnam's Thesis Relate to Tax?* *Australian Journal of Social Services* (2003) 38(3) pp. 299–322; J. Job, *How is Trust in Government Created? It Begins at Home, But Ends in the Parliament.* *Australian Review of Public Affairs* (2005) 6(1) pp. 1–23.

19 R.C. Mayer, J.H. Davis, & F. Schoorman, *An integrative model of organizational trust.* *Academy of Management Review* (1995) 20 pp. 709–734; Coleman, *supra* note 23; see also R. Borum, *supra* note 2, p. 11.

20 R. Hardin discusses this in the context of "encapsulated interest". R. Hardin, *Trust in Government*, in V. Braithwaite & M. Levi (eds.) *Trust and Governance*, Russell Sage Foundation, 1998, pp. 9–27, p. 12.

21 van Dijk, *supra* note 7, p. 17.

22 J. T. Scholz, *Trust, Taxes and Compliance*, in V. Braithwaite & M. Levi (eds.) *Trust and Governance*, Russell Sage Foundation, 1998, pp. 135–166. A trust heuristic can be thought of as a "subconscious running estimate of the costs and benefits involved in risky relationships. Summary trust attitudes are much easier to store and retrieve when situations requiring choice are confronted than would be the case if all information had to be separately stored, retrieved, and processed when a choice was required." p. 157.

23 J. Coleman, *Foundations of Social Theory*, Harvard University Press, 1990.

Significant others help us decide who and when we trust: They ‘teach’ us about trust. A third body of literature addresses the social process by which we assume others to be trustworthy through feelings of connectedness rather than knowledge of behaviours. This explanation for the trust we place in our significant others, be they family members, politicians, celebrities or media influencers is that we share with them a social identity – the significant other is so strongly connected to us that we feel as though we are one in beliefs, needs and aspirations.²⁴ Therefore the trustworthiness of the other is a given; it is as if we are trusting ourselves. Trust that initially is based on information and knowledge can transition into trust that is social and identity-based if our relationship with the other deepens.²⁵

Social or identity-based trust has been linked with charismatic leaders, where leaders and followers are responsive to each other, building shared goals and strategies for their realisation.²⁶ A shared social identity can create in-group allegiance and out-group rejection, which can put fiercely loyal groups at odds with social institutions, including legal institutions. Examples include political activists and their followers as in the case of Julian Assange with Wikileaks, or Nigel Farage with Brexit, or Donald Trump and his presidential election defeat. Courts and commissions of inquiry also run into conflict with supporters of high profile individuals such as leaders of the Catholic Church accused of child sexual abuse²⁷ and celebrities such as Britney Spears and her fight against her conservatorship.²⁸ In such circumstances, public affirmation (as opposed to denigration) that the court needs to have the time and space to perform its duties independently and impartially is important in a democracy.²⁹ The courts can be undermined in circumstances where collective outrage spirals as a result of misunderstandings, false information and emotional contagion. Courts are not immune from pressure from populist movements and fearful governments, including authoritarian governments.³⁰

While the independence and impartiality of the courts is critical for their legitimacy, governments, the public and the judiciary have views about how the courts should make

24 T. R. Tyler, Trust and Democratic Governance, in V. Braithwaite & M. Levi (eds.) *Trust and Governance*, Russell Sage Foundation, 1998, pp. 269–294.

25 Borum, *supra* note 2, pp. 16–17. Also see D.M. Rousseau, S.B. Sitkin, R.S. Burt, & C. Camerer, Not so different after all: A cross discipline view of trust. *Academy of Management Review* (1998) 23 pp. 393–404, p. 396.

26 See S. Reicher, S.A. Haslam, & N. Hopkins, Social Identity and the Dynamics of Leadership: Leaders and Followers as Collaborative Agents in the Transformation of Social Reality. *The Leadership Quarterly* (2005) 16(4), pp. 547–568.

27 In Australia’s Royal Commission into Institutional Responses to Child Sexual Abuse, Cardinal George Pell was found to have knowledge of child sexual abuse within the Catholic Church in Australia and to have failed to take adequate action to address it. Pell also was accused and found guilty of child sexual offences, but the convictions were quashed by the High Court of Australia. These events attracted supporters and critics, putting the courts, as well as Pell, in the national spotlight and creating a media storm. See D. Marr, *The Prince: Faith, Abuse and George Pell. Quarterly Essay* (2013) 51. Black Inc. Books.

28 R. Farrow & J. Tolentino, Britney Spears’s Conservatorship Nightmare. *The New Yorker*, July 3, 2021.

29 van Dijk, *supra* note 7; O. Fiss, The Bureaucratization of the Judiciary, *The Yale Law Journal* (1983) 92 pp. 1442–1468.

30 See Laster, *supra* note 7.

their decisions, and these views do not necessarily align.³¹ In 2021, Australians' belief in the trustworthiness of law courts was surveyed at 67%, a little below trust in the Australian Taxation Office (71%) and above trust in the social security and welfare agency, Centrelink (53%). At the top of the list of most trusted institutions were fire stations (98%), hospitals (90%), schools (87%) and police (80%). A single question that asks how much trust a person places in an entity is a crude indicator,³² yet a useful comparator across time. The most recent findings from 2021 are comparable to those from 2005.³³

Local government authorities traditionally fare better on trustworthiness than more distant authorities.³⁴ Law courts and government statutory authorities such as the Australian Taxation Office and Centrelink (responsible for welfare payments) are institutions that are more aloof and bureaucratic with limited contact with the public. Like courts, they operate with administrative and legal complexity and require more work to build informational trust. Discussions of court architecture, design and delivery³⁵ and public education programs³⁶ are pathways for addressing the contextual sources of mistrust in courts, the hope being that if the public are considered part of a well-functioning justice system, trust will follow and fan out among the community. Ideally, mistrust acquired through one bad experience or adverse media stories can then be offset to some degree by informational trust boosted by social trust.³⁷

Ideas of designing courts so that they are less intimidating,³⁸ explaining how courts operate so they are less confusing,³⁹ and using more dialogic processes to listen to community voices⁴⁰ are trust building measures that, in effect, address a substantial component of what are called trust norms.

31 See K. Warner, J. Davis, C. Spiranovic, H. Cockburn, & A. Freiberg, Why sentence? Comparing the views of jurors, judges and the legislature on the purposes of sentencing in Victoria, Australia. *Criminology and Criminal Justice* (2019) 19(1) pp. 26–44.

32 See Wallace and Goodman-Delahunty, *supra* note 10.

33 V. Braithwaite, T. Hodges & B. Lyons, Progress Report 1, Hope, Trust and Democracy Project. December, 2006, p. 6. The 2021 survey results have been collected from a survey of 1883 residents of greater Sydney and greater Melbourne from June–July 2021. Details of the survey can be found at <<http://valeriebraithwaite.com>>.

34 M.K. Jennings, Political Trust and the Roots of Devolution, in V. Braithwaite & M. Levi (eds.) *Trust and Governance*, Russell Sage Foundation, 1998, pp. 218–244.

35 M. Rossner, D. Tait, B. McKimmie, & R. Sarre, The Dock on Trial: Courtroom Design and the Presumption of Innocence, *Journal of Law and Society* (2017) 44(3), pp. 317–344; E. Rowdon, A. Wallace, D. Tait, M. Hanson, & D. Jones, Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings, University of Western Sydney.

36 J. Charles, The Court Education Project 2019–2021 Churchill Fellowship Report, Churchill Trust; S. Swain, *Born in Hope: The Early Years of the Family Court of Australia*, NewSouth Publishing, 2012, see chapter 2.

37 See Johnston on the role of the public information officer: J. Johnston, A History of Public Information Officers in Australian Courts: 25 years of Assisting Public Perceptions and Understanding of the Administration of Justice (1993–2018), The Australian Institute of Judicial Administration Incorporated; J. Johnston, Courts' Use of Social Media: A Community of Practice Model. *International Journal of Communication* (2017) 11, pp. 669–683.

38 I. Karpen and M. Senova, Designing for Trust: Role and Benefits of Human-centered Design in the Legal System. *International Journal for Court Administration* 12(3).

39 Charles, *supra* note 36.

40 See M. Neave, Building Trust: Can Courts Learn from Royal Commissions? *International Journal for Court Administration* 12(3); also Laster, *supra* note 7.

Trust norms are a useful point of departure for understanding trust in courts because they are limited in number, they attract very high endorsement in the community, and they are rooted in shared value systems about how the world works. They also align well with typologies that single out the following as the bases of trust: ability (can do) and character (will do). The dimension of character is subdivided further by many researchers into a dimension of loyalty and caring toward others, and a dimension of probity and fairness in dealing with others.⁴¹

Trust norms fall into two broad categories – exchange trust norms and communal trust norms. The focus of exchange trust norms is for the other to reciprocate the trust placed in them by performing tasks or roles as prescribed (the can do dimension). Exchange trust norms mean acting with predictability. Trust is offered because we believe we know about the other’s competence, commitments, track record, and competing interests. Exchange trust norms allow the risks associated with placing trust in another to be minimized. There is a clear and shared understanding of what needs to be done, along with confidence in the capacity and willingness of the other to do it well. There may even be known consequences for not doing things well.

Communal trust norms comprise criteria that reflect concern for the well-being of the other (the will do dimension). Thus, when a person believes that the other is respectful, attentive and responsive to needs, consultative, accountable, and understanding of their position, trust follows.

When attention is focused on trust in institutions like government and courts, one might expect exchange trust norms to be more relevant than communal trust norms. This is not the case. In an early study of trust norms, placing importance on communal trust norms predicted trust in the Family Court.⁴² Placing importance on both exchange and communal trust norms predicted trust in the High Court of Australia.⁴³ Interestingly, the Family Court in Australia has undergone periodic assaults of a political nature and now has been merged with the Federal Circuit Court of Australia.⁴⁴ Katie Miller’s article in this issue provides an interesting contrast with the High Court. The High Court dealt with allegations of sexual harassment through consideration of both exchange and communal trust norms. Exchange trust norms lack an imperative for compassion, while communal trust norms lack an imperative for consistency: Attending to both types of norms means that one can off-set the weaknesses of the other.⁴⁵ Other articles in this issue suggest innovations that similarly address both exchange and communal trust norms. When authorities respond to exchange trust norms, they act in line with shared values upholding the rituals and traditions of the profession and the court. When authorities respond to communal trust norms they do so in response to broader humanistic values of care, concern for the other and fairness.

⁴¹ Colquitt et al, *supra* note 4, p. 910. Also see Borum, *supra* note 2, pp. 13–14.

⁴² Braithwaite, *supra* note 1, pp. 57–65.

⁴³ *Ibid.*

⁴⁴ See commentary on The Mandarin, <<https://www.themandarin.com.au/151591-controversial-family-law-inquiry-tables-report/>> and <<https://www.themandarin.com.au/167762-ag-welcomes-merged-federal-circuit-and-family-court-of-australia/>> [last accessed 10 October 2021].

⁴⁵ Braithwaite, *supra* note 1, p. 68.

Exchange and communal trust norms are highly correlated. Citizens who say they want authorities to embrace exchange trust norms also want them to embrace communal trust norms.⁴⁶ Those who respond by saying that there is nothing the authority can do to win their trust, in other words, abiding by any trust norm is not going to win them over, are of concern for courts, government and the democracy.⁴⁷ This subculture of the dismissively defiant will be discussed below in Part 4.

The explanation for why we endorse exchange and communal trust norms lies in their links to basic value orientations.⁴⁸ Values are shared beliefs about how we should function in society and how others should function, including our institutions.⁴⁹ Values are goals in life and ways of behaving that transcend time and place, though value priorities change with changing circumstances, particularly in times of social upheaval. We don't always behave in accordance with our values, but our values are the standards that we judge ourselves and others by. These shared values are enshrined in many of our laws. They also provide a rationale for both legislation and judicial decisions.

Values have been measured in survey work across the globe for more than a century. Trust norms were theoretically developed out of one such body of work.⁵⁰ The values that citizens profess to hold for themselves and their society cluster around two dimensions, one referred to as the security value system, the other the harmony value system. Security values include national economic growth, national strength, economic prosperity, ambition, achievement, and competition. Also included in this cluster of security values is the rule of law. People believe that external control is needed in a competitive world to enable citizens to be safe, preventing oppression, exploitation and the abuse of power. Harmony values include peace, expressions of good will and concern for others, preservation of the natural environment, equality, democratic rule, cooperation, sharing of resources, respecting others and upholding human dignity. According to this perspective, people believe that social bonds and personal well-being are needed to produce a cohesive and inclusive society. Like exchange and communal trust norms, both security and harmony values are critical to connecting citizens with their institutions and to each other. We share a desire for security and harmony in our society, our communities, our workplaces and our families.

Exchange trust norms are derived from the security value system. Communal trust norms are derived from the harmony value system. When a security-oriented value orientation dominates, we are wary of power and control and how others might act against our interests. In these circumstances, exchange trust norms strengthen when we are called upon to engage with others. When a harmony-oriented value orientation dominates, we are reaching out to others to establish common interests, mutual respect and a shared fate. Communal trust norms lead us to take more risk with others with hopes for feelings of personal wellbeing, connection and social solidarity.

⁴⁶ Ibid, p. 59.

⁴⁷ Braithwaite, *supra* note 8, Chapter 9; Braithwaite, *supra* note 8, p. 145.

⁴⁸ See more detail in Braithwaite, *supra* note 1.

⁴⁹ For summary see V. Braithwaite, *The Value Balance Model and Democratic Governance*. *Psychological Inquiry* (2009) 20(2) pp. 87-97.

⁵⁰ Ibid.

The trust norms that are relevant to us vary with context. In a study of a lingerie factory in Poland, researchers compared the bases of trust for co-workers, for employees in relation to management, and for management in relation to employees. At the horizontal level of co-worker to co-worker, trust was linked with honesty, help and support. Employees were more likely to trust managers who were concerned for their welfare, kept them informed and kept promises. Managers saw trust in their employees in terms of having good intentions and motives, efficiently performing their tasks, being honest and reliable.⁵¹ Trust norms and their use are far more variegated and dynamic than one might assume from public opinion polls that ask a single question of the whole population.⁵²

This article argues that trust in the courts should be conceptualised as multi-layered, multifaceted and variegated across different social groups and nodes of power. Trust norms as described above demonstrate why this is the case in practice. There is another argument for why too heavy an emphasis on improving an institution's trustworthiness ranking is not ideal: Both too high and too low a rating can be dangerous for democratic governance. Trust should be a contested quality, neither complete nor absent. Complete trust in an institution leaves it open to abuses by the most powerful. The absence of trust makes it difficult to steer the flow of events without domination and coercion, which conflicts with democratic values.⁵³

Both practically and normatively, the best option is optimal trust. There will always be critics of the courts in a democratic society. But with dialogue around trust norms and how they may have been breached, a path forward usually can be found for re-building trust to an optimal level. In a well-functioning democracy, this dialogic process will occur against the backdrop of institutional safeguards that make it easy for individual citizens and groups to engage in open discussions of what optimal trust in authorities might look like, without fear of being silenced or punished. John Braithwaite describes a circle of guardianship whereby each institution serves as a check on the trustworthiness of other institutions.⁵⁴ An institutional circle of mutual oversight serves to raise the trustworthiness stakes and creates space for citizens to feel comfortable placing trust in others. In this issue, Marcia Neave describes the way in which Royal Commissions put special efforts into ensuring the community is aware of safeguards for trustworthiness and how this is necessary for people to feel safe enough to be willing to tell their stories and enable hidden truths to be recognised and redressed. Arie Freiberg⁵⁵ describes the values that underpin enhanced citizen engagement as accountability, transparency, responsiveness, inclusiveness and integrity. These values also are relevant to how institutions engage with each other to create institutional guardianship of trustworthiness. The ways in which different courts engage with each other and the public, the opportunity to appeal decisions, the input of sentencing councils, and of Royal Commissions and inquiries would be expected to commit to circles

⁵¹ K. Krot & D. Lewicka, The Importance of Trust in Manager-Employee Relationships. *International Journal of Electronic Business Management* (2012) 10(3) pp. 224–233.

⁵² See Wallace and Goodman-Delahunty, *supra* note 10.

⁵³ J. Braithwaite, Institutionalizing Distrust, Enculturating Trust, in V. Braithwaite & M. Levi (eds.) *Trust and Governance*, Russell Sage Foundation, 1998, pp. 343–375, p. 354, p.369.

⁵⁴ *Ibid.*

⁵⁵ See A. Freiberg, Bridging Gaps, Not Leaping Chasms: Trust, Confidence and Sentencing Councils. *International Journal for Court Administration* 12(3).

of guardianship of trustworthiness.⁵⁶ Also important in this regard is an informed free press, responsible democratic participation and a government that genuinely respects the rule of law. Otherwise guardianship may revert to a confusing and obtuse legal bubble that is mistrusted by the public.

3. A MODEL FOR BUILDING INSTITUTIONAL TRUST

Therese Pearce Laanala⁵⁷ has spent the past decade researching how electoral management bodies (EMBs) can improve the likelihood that elections will run smoothly and outcomes accepted in newly emerging democracies. EMBs manage the electoral process, being legally responsible for core activities such as: (a) determining who is eligible to vote; (b) receiving and validating the nominations of electoral participants; (c) conducting polling (which can involve preparing ballot papers and distributing them to polling stations across geographically difficult areas); and (d) counting and tabulating the votes. EMBs may also be tasked with voter registration, voter education, monitoring communication through the media, and electoral dispute resolution.

Pearce Laanala argues that running an election successfully in a new democracy is much more than a technocratic exercise. The stakes are high for candidates, powerful interest groups, citizens and those wishing to see a new democratic process emerge in their country. Pearce Laanala argues that in order for EMBs to guide the process, trust relationships must be built from scratch with stakeholders, bearing in mind that the EMB team are likely to be internationals who are unknown to local candidates and voters. Pearce Laanala uses an extensive body of data collected from case studies, participant observation in Tunisia, and interviews with experienced EMB field practitioners to propose three interconnected wheels that need to be pushed forward together in the on-going work of building trust.

First, the EMB must ensure that the technical delivery of the elements required for the election to proceed is on track. Because each election is different and the operational challenges are often enormous in a country without established electoral institutions, the logistics of running an election are no small matter. Ballot papers may not arrive on time, floods, landslides or political unrest may interfere with setting up polling booths, and delays can stack up to disrupt the announcement of election results. This wheel relies on EMB planning, competence and skill, and quite a bit of luck.

The second wheel is primarily relational and involves dealing with the emotions of anxiety, ambition, anger, fear, disappointment and shame that surround elections. There can be only one winner and suspicions abound about the fairness or reasonableness of the process. Tyler's⁵⁸ work on the importance of procedural justice – of treating people with respect, trusting them, giving them voice, and being an impartial decision maker – represents part of the work that must be done relationally to keep the trust building process moving forward. Also relevant to the relational

⁵⁶ Owen Fiss regards the the “bureaucratization of the modern judiciary” as inevitable, even offering some benefits. But he also points to two bureaucratic dysfunctions that would “threaten the moral foundations of the judicial power,” namely “insularity from critical educational experiences and diffusion of responsibility”. Fiss, *supra* note 29, p. 1462.

⁵⁷ *Ibid.*

⁵⁸ T. Tyler, *Why People Obey the Law* (revised edition), Princeton University Press, 2006, pp. 6–7.

wheel is communication that is honest, open and sincere, responsiveness to threats of harm and intimidation, and the management of emotions of shame, guilt, rage and pride.

The third wheel that intersects with the above two involves the management of expectations. An EMB, like a court, cannot be all things to all people. Boundaries need to be clearly defined and explained. Indeed the whole process needs explanation and justification so that the expectations of the stakeholders converge with the expectations of the EMB. The contractual arrangements and formal rules governing how the EMB operates and must operate to maintain its legitimacy come into play in deliberations around expectations. Pearce Laanela describes this third wheel as offering security and certainty to all those with a stake in the elections. Managing expectations also means formulating means for redress should it be necessary.

Pearce Laanela's model provides authorities, including law courts, with a practical approach to organizing their trust building efforts, an approach which is consistent with our understanding of trust norms, and yet accommodates the problems occurring with a high-stakes, unfamiliar and adversarial event. The work of the court is different in so far as it draws on tradition and ritual and incorporates accepted mechanisms of accountability to ensure cases are heard with independence and impartiality. These procedures are central to the formal legitimacy of the court. Yet these same procedures may arouse misunderstandings, disappointments and distress in those coming before the courts, and even sometimes to those working in them.⁵⁹ In such circumstances, Pearce Laanela's model is useful for purposes of monitoring and adjusting court proceedings to reduce the likelihood of breaches of trust norms and to maintain an optimal level of trust.

Pearce Laanela's intersecting wheels of relational work and expectation work are designed to provide remedies when meeting the formal requirements of an office fail to deliver the processes or outcomes that people want. In the court setting, attending to relational work and realigning expectations mean that the logistics that give the court legitimacy can proceed smoothly. When there is reason to question the logistics because they no longer hold up court legitimacy (maybe court procedures discriminate against certain groups), experience in managing the relational and expectation wheels provide valuable insights into how court procedures might be changed.

This is where the concept of integrity can be used as a bridging concept between trust and legitimacy. Integrity can be defined as coherence in institutional functioning, soundness in purpose, pursuit of that purpose with reasonableness, fairness, and responsiveness to community needs, and with willingness to be accountable for actions and decisions.⁶⁰ Meeting the public's trust needs and maintaining institutional legitimacy through sound purpose may not always be compatible objectives: Formal requirements of the court and its officers may clash with what people want. Integrity involves balancing trust norms and institutional legitimacy, as well as explaining the balance and accepting responsibility for how it is done.

⁵⁹ See K. Miller, Intellectual Humility: A Necessary Precondition to Building Trust in Courts. *International Journal for Court Administration* 12(3); M. Neave, Building Trust: Can Courts Learn from Royal Commissions? *International Journal for Court Administration* 12(3).

⁶⁰ V. Braithwaite, Tax System Integrity and Compliance: The Democratic Management of the Tax System. In V. Braithwaite (ed.), *Taxing Democracy: Understanding Tax Avoidance and Evasion*. Ashgate, 2003, pp. 269–287; V. Braithwaite, Beyond the Bubble that is Robodebt: How Governments that Lose Integrity Threaten Democracy. *Australian Journal of Social Issues* (2020) 55(3), pp. 242–259.

4. SUBCULTURES OF DEFIANCE AND COURT INNOVATION

Authorities of all kinds encounter opposition when they act to interfere with people's freedom. Only part of that opposition will stem from a violation of trust norms. Where trust norms have been violated, authorities can redress the situation through reflecting on their processes and addressing misunderstandings or injustices. Defiance that is successfully managed in this way is termed resistant defiance and is the most common form of defiance in democracies. The institution can, if it chooses, redeem itself by rebuilding trust through attending to trust norms. Resistant defiance is healthy in a democracy as a signal to those with power that institutional correction is required.⁶¹

Another defining feature of resistant defiance is that willingness to defer to the authority is not dead. There is hope that the authority will make the changes required to earn the position of a trusted and legitimate authority. This is not the case with dismissive defiance. Dismissive defiance occurs when an authority is deemed irrelevant or not worthy of deference. The authority becomes subject to game playing and its legitimacy is challenged. A distinctive feature of dismissive defiance is that trust norms are irrelevant: There is nothing that the institution can do to be considered trustworthy. Working with the institution and making it better, which is what most citizens prefer, is replaced by working against the institution. In the regulatory context of taxation, dismissive defiance is associated with both tax evasion and tax avoidance.⁶²

Resistant and dismissive defiance have been investigated in regulatory contexts, not in relation to courts. Resistant defiance has proven links to procedural justice, however, and there has been a substantial volume of work demonstrating the importance of procedural justice to the acceptance of court decisions. The degree to which dismissive defiance threatens the integrity of the court and ultimately, its legitimacy remains speculative. The costs of dealing with dismissive defiance for any institution are high. That said, in work on tax evasion and avoidance, the courts have provided effective deterrence and have reduced dismissive defiance.⁶³

Possibly the greatest danger of dismissive defiance to the courts and democracy occurs when boundaries are removed and game playing is accompanied by moral disengagement from society. Gaming the law is the quintessential feature of dismissive defiance. It means dismissing the intention of the law and using legal loopholes or workarounds to win against the law. When gameplaying occurs within the legal community, there are professional codes and ethical standards that inform and constrain the form that gameplaying takes. For the public, however, the complexities and intricacies of the law are not known. With the failure of law to correct what is perceived by the public as an injustice, a message is sent that the intent of the law is less important than the specific rules and workarounds. A sense of normlessness can take hold. The role that the courts play in setting a society's moral compass is lost.

Dismissive defiance of regulatory authorities has been measured through surveys over more than 20 years. The proportion who acknowledge feeling dismissively defiant toward an authority hovers around 15%, suggesting that this is not a stance that

⁶¹ Braithwaite, *supra* note 9, Chapter 9.

⁶² *Ibid.*

⁶³ V. Braithwaite, K. Murphy & M. Reinhart, Taxation Threat, Motivational Postures, and Responsive Regulation. *Law & Policy* (2007) 29(1) pp. 137–158.

attracts the majority of Australians. But the question to ask is whether subcultures of dismissive defiance will produce leaders who will attract to their ranks those who are nursing resistant defiance that authorities have ignored. As trust in institutions declines and as resistant defiance grows, there is a larger population that can be targeted for recruitment by those who harbour socially disruptive purposes and understand how to capture the hearts and minds of those who are attracted to a more dismissive posture.

COVID-19 gave rise to legitimate expressions of resistant defiance against freedoms of movement being curtailed. But it also gave rise to what at face value looked like leadership from groups that were dismissively defiant of government, police and courts. In the US the storming of the Capitol looked very much like an act of dismissive defiance, but at the same time there were many Americans who genuinely believed the election was unfair and that Donald Trump was a victim, as were they, of an unjust system. When forces of dismissive and resistant defiance combine, the political fallout is great, with implications for legal institutions.

The problem of dismissive defiance is not easily resolved. It will flourish in a bureaucratized world where rules are used for decision making without consideration for ethics or context or what the public considers to be fair and just. This article does not seek to remedy dismissive defiance. Rather it is introduced to make the point that the more relationally responsive form of resistant defiance should be addressed. Insights gained from seeing resistant defiance in terms of breaches of trust norms will provide direction as to the changes that are most likely to make a difference in building confidence in the legal system. While this course of action may seem risky to custodians of the legal system, slippage of resistant defiance into dismissive defiance is far riskier for the courts and for a democratic system of government.


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The author has no competing interests to declare.

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