

Maintaining Public Trust in State Courts: Why Privacy Matters

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This post is part four in a series examining privacy and transparency issues in the context of public access to digital court records, building on my essay [“Digital Court Records Access, Social Justice and Judicial Balancing: What Judge Coffin Can Teach Us.”](#)

Trust is a precious commodity. Our social interactions, as well as our relationships with businesses and other organizations, including government agencies, are dependent upon it.

Although trust can be defined in various ways, at its core, [according to scholars](#), “[t]rust is a state of mind that enables its possessor to be willing to make herself vulnerable to another – that is, to rely on another despite a positive risk that the other will act in a way that can harm the truster.”

People disclose more when they trust. When they believe the other party is trustworthy, they are more likely to share information about themselves.

Pine Tree Watch (PTW), a Maine nonprofit, has been examining trust in a series called, “The Maine Trust Project.” Recognizing the importance of cultivating trust in society and in our democratic institutions, PTW sits down each month with a Maine resident to discuss which people and institutions Mainers trust and how the concept of trust drives their thought processes and actions.

[PTW](#) recently interviewed Maine Secretary of State Matthew Dunlap. In response to the question of how he defines trust, Mr. Dunlap stated: “[t]his whole trust thing runs through us like capillaries. It has many facets to it. I think, generally speaking, the basic definition of trust is you can predict what somebody’s going to do before they do it.” When asked whether his definition of trust has changed over the years, Mr. Dunlap answered: “No, it hasn’t changed. I trust people until I have reason not to.”

In the context of citizen interaction with state courts, trust boils down to the willingness of parties and witnesses to make themselves vulnerable to others by disclosing personal information about themselves.

In January 2020, the [National Center for State Courts](#) reported that, based on its most recent annual survey, overall public trust and confidence in our nation’s state court systems has declined. Among

the survey findings, there has been a significant decline in the number of those who say that state courts are committed to protecting individual and civil rights and treat people with dignity and respect.

Engendering public trust and confidence in the state court system in one of the top strategic priorities of the Maine Judicial Branch (MJB). [According to the MJB](#), “[t]he only real source of its power is the respect of the people,” and “[p]ublic trust and confidence in the judiciary is a critical aspect of the rule of law and the enforcement of judicial decisions.”

So what role does privacy play in promoting trust?

In the private sector, consumer privacy is known to play a significant role in building customer trust and confidence. Examples abound of businesses choosing to embrace and protect consumer privacy to fortify customer trust and loyalty, all driven for profit-maximizing reasons. Apple is illustrative.

In 2015, in launching a new initiative to be conspicuously transparent, [Apple CEO Tim Cook announced](#): “At Apple, your trust means everything to us. That’s why we respect your privacy and protect it with strong encryption, plus strict policies that govern how all data is handled....We believe in telling you up front exactly what’s going to happen to your personal information and asking for your permission before you share it with us.”

Privacy is an enabler of public trust in our state court system. Trust-promoting privacy rules allow people to safely disclose their personal information. Trust, in effect, functions as a counterweight to peoples’ vulnerability and loss of power inherent in disclosure. Parties involved in civil litigation need to feel safe disclosing their personal information to be able to protect their rights and to seek redress from harms. Witnesses need the same to be able to provide the court with relevant information. The court system relies on such disclosures to be able to adjudicate claims and resolve disputes fairly and efficiently.

Privacy rules governing public access to digital court records often are viewed solely in terms of preventing harm to individuals. That is a mistake. The aims of such rules also must be understood in positive terms, as protecting, fostering, and incentivizing citizens’ trust in the court system. In other words, privacy is a positive force promoting societal and institutional interests of critical importance.

As noted in my recent essay, [Digital Court Records Access, Social Justice and Judicial Balancing What Judge Coffin Can Teach Us](#), Judge Coffin’s judicial balancing philosophy and rights-sensitive balancing framework captures the same point: “If a protectable individual right is at stake, society has a genuine interest in that right, as well as the individual; both interests must then be weighed against the countervailing institutional interest at stake.”

Too little privacy protection will serve to erode public trust in the court system, causing those who can afford it to choose an alternative dispute resolution process, thus avoiding the court system altogether. For those less fortunate without any other option, typically the most vulnerable people in our population, too little privacy protection will also result in experiencing more human indignity and suffering.

Confidentiality has been and continues to be a central design feature in most if not all private dispute resolution systems. While this feature certainly has its pros and cons from a public policy perspective, most people who elect to use in-person arbitration or mediation processes, or online dispute resolution systems powered by software and algorithms, do so at least in part out of a desire

to avoid airing their dirty laundry (and vulnerabilities) in a public court setting. This has been true ever since the emergence of alternative dispute resolution options in the 1970s. It rings true even more so in the digital age because the stakes for citizens' privacy are even higher, given the seismic and uncontrolled power of the internet.

The privacy-conducive environment created in private dispute resolution systems offers some lessons for the SJC in ensuring its digital court records access rules incorporate adequate privacy protections to maintain citizens' trust in the court system.

Under Maine's constitution, judicial power is vested exclusively in the Supreme Judicial Court. Of course, with the exercise of such power comes certain responsibilities, one of which is to preserve the institutional integrity of the court system so that it can fulfill its [mission](#) "[t]o administer justice by providing a safe, accessible, efficient and impartial system of dispute resolution that serves the public interest, protects individual rights and instills respect for the law."

As an integral part of our state government, the MJB has a duty to protect the personal information entrusted to the state courts by Maine citizens. While its exact contours might be difficult to define, that duty is firmly rooted in the Maine Constitution and the judicial branch's institutional charge to maintain public trust and confidence in the state court system. It means that the courts should treat personal information in accordance with the expectations under which it was disclosed in the first place. Citizens rightfully have come to trust that the courts will handle their personal information discreetly, so that disclosure of the information will not later be used by others to harm them.

Preserving citizens' trust in the state court system requires that the MJB adopt and implement digital court records access rules that maintain that trust, not destroy it. If the rules do not adequately protect peoples' privacy, the public's expectations of trust in the courts will be broken, de-incentivizing citizens from interacting with the court system.

Abandonment of the state courts in favor of private justice tribunals by the wealthy and others who have a choice whether to interact with the courts is one thing. Among other issues, it would leave the court system without powerful advocates. It is another thing entirely for many of the poor and most vulnerable people in our population for whom there is no real choice. They will be forced to use an underfunded court system lacking adequate privacy protection, and to do so at their own peril.

It will be a sad day if the digital transformation of the state courts causes Maine citizens to lose trust in the state's judicial system.

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