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Some Reflections on Long-Term Lessons and Implications of the Access to Justice Technology Bill of Rights Process

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SOME REFLECTIONS ON LONG-TERM LESSONS AND IMPLICATIONS OF THE ACCESS TO JUSTICE TECHNOLOGY BILL OF RIGHTS PROCESS

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The Washington State Access to Justice Technology Bill of Rights (ATJ-TBoR) process (Process), described in detail in both its substantive and procedural aspects in other papers in this volume,[1] has the potential to have a major impact on access to justice in the state—its first and primary goal. In addition, however, it has the potential to have broader implications in the legal world, in the process of legal innovation, in access to other services, and internationally. This paper is intended to start the debate about these implications and how they can be optimized and maximized.

I. THE LESSONS OF THE ATJ-TBOR PROCESS

In the now almost three years of the Process, we have struggled to create a document that would be broadly legitimate, that would be adopted in a manner that would give it real authority and force, and that would be concretely useful in shaping the future and resolving disputes about that future. Some of the techniques utilized in the Process may well have applicability in other endeavors.

A. General Principles

Perhaps the most critical decision made in the development of the Principles of the Access to Justice Technology Bill of Rights (Principles) was to focus early on general principles. The benefit to generality is that it allows agreement on fundamentals even among those who may disagree strongly about detail. Indeed, it turned out during the

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1. *See* Donald J Horowitz, *Technology, Values, and the Justice System: The Evolution of the Access to Justice Technology Bill of Rights*, 79 WASH. L. REV. 77 (2004); Washington State Access to Justice Technology Principles (popularly referred to as the Access to Justice Technology Bill of Rights (ATJ-TBoR)) (Dec. 2, 2003), *available at* http://www.atjtechbillofrights.org, *reprinted in* 79 WASH. L. REV. 5 (2004).

drafting and internal comment process that it was much easier to get agreement about general principles than it would have been to get such agreement on specifics.

These general principles can now play at least three roles. First, they can be used to guide the many bureaucratic and institutional processes inside and outside the court system that must wrestle and are already wrestling with issues relating to the use of technology. Second, they are guiding the more specific processes such as the development of Promising Practices.[2] Finally, when there is a disagreement about specifics, the general principles can be the framework for an intellectually coherent analysis of these specifics. The true test of the general principles will be whether they have enough intellectual power to guide these processes and resolve disputes in a way that leads to results that are legitimate for all sides.

During the extended public but internal comment process,[3] there was much criticism of this generality. Commentators feared that the lack of specificity would render the document useless as a guide to action. As a general matter, these comments tended to be associated with particularly strong views about particular outcomes—especially in the area of privacy. There was fear, for example, that the absence of specificity with respect to how privacy and openness issues should be balanced, and the absence of listing of particular information that should be protected, would make it impossible to use the Principles to protect privacy. The test of the general approach will be whether in the process of long-term implementation the general language is given specific content, or whether the good intentions of the document are watered down to nothing. This much is sure, however: the document would never have stood a chance for acceptance had it taken specific stances on currently controversial issues. An excess of specificity in the privacy area might well, for example, have triggered fears of excessive restriction of information. The generality of the Principles is also required by the need for them to remain appropriate even as technology itself changes, and change it does, with extreme speed.

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2. The Promising Practices Committee and Promising Practices tool are also known as the Best Practices Committee and Best Practices tool in Washington State. *See infra* note 14.

3. Reference here is to the many stages of comment that the document went through within the Process, not any comment process for formal legal adoption. *See* Horowitz, *supra* note 1.

B. Mooting and Testing

Given the risks of overgenerality, it was important to test the viability for the general principles in real world situations. Those engaged in the drafting process for the Principles found one of the most useful tests to be a "mooting" of a hypothetical against the then-draft Principles of the ATJ-TBoR. In early 2002, we designed an electronic filing hypothetical, envisioned a litigation brought against this planned electronic filing project, and recruited advocates to argue for and against the plan.[4] There was no lack of specific argument on the facts of the hypothetical, and the general language of the then-draft of the Principles.[5] In particular, the oral arguments focused the drafters' attention on the mandatory or hortatory nature of certain language[6] and the relationship to local court rules, both of which insights proved highly useful to the drafting team. More generally, however, given how helpful the "mooting" was, the drafters were left with a sense of astonishment that such a testing process is not routine in drafting legislation or rules.

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4. An edited text of the hypothetical (which has also been used in CLE programs) follows: "A county is about to launch an electronic filing system. The system would: include electronic filing over the internet; set up computers in the courthouse so that people can use them to initially file and subsequently add to cases if they do not have access to the network; set up an agreement with the copy shop so that people can use it; require an e-filing fee, which MUST be paid at filing for all documents (this is small—$5.00); specify that if you use the copy shop, there is a $15.00 additional fee; allow the public to use the Internet to search through all documents that are electronically filed; charge a fee for this searching, 50% of the fee will go to the court and 50% to the private vendor; still allow paper filing; include the possibility that paper filed cases that do not require an early in-court hearing may have a lower handling priority relative to cases on the electronic docket; provide that paper files CANNOT be searched, except manually as in the current system; offer software that includes chat and audio and videoconference features; and includes no standards as to when these features might be used. In addition: the software that is planned for filing is in use in one other state. In that state, the local consumer group claims that it is hard to use for people with less than a tenth grade education; the software is hard for electronic 'readers' to use and has been criticized by advocates for the blind and visually impaired in other states; the software does not include document assembly features—that is to say the litigants have to generate their own documents, either using a word processor, or by purchasing or obtaining a form; the court provides some forms online, and others in paper."

5. The specific "mooting" assumed an action being brought against a court to enjoin the electronic filing system. The use of that procedural content at that point in the drafting process should not necessarily be construed to imply that the current draft envisions such a procedural route. *See infra* Part I.F (discussing enforcement procedures).

6. *See infra* Part I.F (discussing mandates).

C. *Maximizing Participation and Legitimacy Through Many Related Processes*

As is clear from other papers in this publication that describe at least in part the different processes in which the project engaged,[7] each process provided valuable insights and ideas. What may be less obvious from these narratives is the way that each of these processes built on each other. The surveys conducted by the ATJ-TBoR Judiciary and Court Administration Committee helped to alert judges and administrators to the issues that were faced by their colleagues and that informed the drafting of the Principles document itself.[8] The focus groups conducted by the ATJ-TBoR Outreach Committee set an important context for the Principles and for the issues faced by the ATJ-TBoR Implementation Committee.[9] The design process engaged by the ATJ-TBoR Opportunities, Barriers, and Technology Committee highlighted the possibilities and the risks, further illuminating the drafting process.[10] Finally, and perhaps most significantly, the ATJ-TBoR Promising Practices Committee demonstrated the value of the intellectual structure established by the draft of the Principles as it used that structure to establish promising practices that would give concrete meaning to the idea of the Principles.

This system of interlocking committees meant that all participants contributed to the ultimate product and came to feel a sense of ownership. That is an important lesson for future such projects, particularly those that are as ambitious in their reach.

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7. *See generally* Horowitz, *supra* note 1; T.W. Small et al., *Designing a Technology Driven Justice System: An Exercise in Testing and Challenging the Access to Justice Technology Bill of Rights*, 79 WASH. L. REV. 223 (2004).

8. These surveys, conducted relatively early in the process, made clear the penetration of technology into day-to-day judicial court processes, the level of interest in the issues raised by technology and access to justice, and highlighted the need for a systematic approach. The results of the survey will be made public and posted on the ATJ-TBoR website, http://www.atjtechbillofrights.org, in early March, 2004.

9. The ATJ-TBoR Implementation Committee focus group report results will be made public and posted on the ATJ-TBoR website, http://www.atjtechbillofrights.org, in early March, 2004.

10. T.W. Small et al., supra note 7.

D. Focus Group Work

It is hard to overstate the value of focus groups in a process designed to be so open. The Process used two different sets of focus groups,[11] the first early in the process to identify the needs and perceptions of a variety of groups, mainly the excluded, and the second near the end of the process to identify the impact and potential for those institutions most likely to be affected by the document.

Both processes had the effect of destroying stereotypes and keeping the process focused on the concrete needs of the players. The early focus groups told us something that few knew—that the problems of technology and access to justice are much less problems of access to technology than of the underlying content. The specific summary findings of these groups were as follows:

- With some exceptions, the degree to which technology has penetrated these groups is significant. Most have some basic computer skills, at least occasional access to a computer and the Internet, and some level of comfort with using the Internet (although perhaps 30–35% appear to be left behind).
- In spite of the foregoing, focus group participants are having a hard time finding useful law-related information on the Internet. Among the problems reported were: (a) the available information was too general; (b) there was too much information to absorb; (c) information was promotional, rather than substantive[;] (d) people have to spend limited available time searching rather than finding useful information; and (e) the language used in law-related material is too technical or not otherwise understandable.
- Except for really important interchanges, participants like the idea of dealing with the justice system remotely by

11. "The six low-income or otherwise vulnerable groups were chosen because it was thought they might have quite different experiences, skills and difficulties with respect to the use of technology. However, although there were differences between the groups [inmates, for example, had more difficulty obtaining access to the hardware], there were generally more similarities than expected." D. MICHAEL DALE, OUTREACH WORKING COMMITTEE, ACCESS TO TECHNOLOGY BILL OF RIGHTS COMMITTEE, WASHINGTON STATE ACCESS TO JUSTICE BOARD, TECHNOLOGY AND ACCESS TO THE JUSTICE SYSTEM: CONVERSATIONS IN FOCUS GROUPS WITH USERS OF THE JUSTICE SYSTEM IN WASHINGTON STATE, IN REPORT OF THE OUTREACH WORKING COMMITTEE OF THE ACCESS TO JUSTICE TECHNOLOGY BILL OF RIGHTS COMMITTEE OF THE WASHINGTON STATE ACCESS TO JUSTICE BOARD 3–4 (June 30, 2003), *available at* http://www.atjtechbillofrights.org/tbor/tbordocs/focusgroupsreport.

technological means. Since they are fearful of the courts, they see as a good thing the degree of distance from the courts made possible by technological means of communication. Exceptions to this are that they uniformly dislike voice mail, as well as any other obstacles that prevent them from getting good and timely information.

- Confidentiality and privacy concerns didn't generally seem to be significant to the low-income groups. The notable exception was the domestic violence group, all of which were women, all of whom were very concerned about privacy and security. To a lesser extent, but an exception nonetheless, was the veterans homeless group. It should be noted that the issue of public on-line availability of case records was not prompted or raised.

- Incarcerated men and women have very little access to any technologies, although they might benefit in appropriate ways if correctional system security concerns could be worked out.

The glaring and outstanding exception to those having any measurable degree of access to or familiarity with modern technology is the extent to which farm workers have not been exposed to new technologies, do not understand them, and cannot yet use them. If they are to be integrated into a justice system that relies to any significant degree on technology, farm workers and others similarly situated (such as persons with language or cultural barriers, or who live in remote locations) will, besides needing access to the technology itself, require either intensive training and assistance, parallel provisions for access that rely on more traditional, non-technical means of access to information, or perhaps both. Incarcerated persons, both male and female, irrespective of the kind of institution, are less of an exception, but are an exception nevertheless. The women seemed generally more technology savvy than the men, who were at best mixed in their knowledge or skills.[12]

The second set of focus groups, conducted by the Implementation Committee, told us that most institutions are much less nervous about being asked to comply with underlying values than many of their

12. *Id.*

bureaucratic leaders assume.[13] The Process would not have achieved the legitimacy it did achieve without these focus group processes.

E. Promising Practices

The Promising Practices process was designed to generate a product that would complement the general Principles and would fill in those principles with concrete, specific, and situation-tailored recommendations. These Promising Practices would have substantially less legal force than the Principles themselves, and their concreteness would not raise the political problems that too much specificity in the underlying Principles would have raised.

The process of drafting these Promising Practices—which is now funded in part by the State Justice Institute (SJI)[14]—still continues, but the documents already in draft show that they can be both specific and broadly useful. The integration of these Practices, in cooperation with NPower, the Seattle based national network of nonprofit technology support organizations,[15] into its TechAtlas tool,[16] and the inclusion of resources and tools with the recommendations, make them a far more effective tool for decision makers.

More generally, however, the Promising Practices process and product validate the power of Principles approach. The Promising

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13. The ATJ-TBoR Implementation Committee focus group report results will be made public and posted on the ATJ-TBoR website, http://www.atjtechbillofrights.org, in early March, 2004.

14. SJI Grant No. SJI-03-N-108, *ATJ-TBoR Best Practices Template*, *at* http://www.statejustice.org/grantinfo/apptech.htm (last visited Nov. 24, 2003). The version intended for national use, as funded by SJI, is termed "Promising Practices," to indicate their lesser force for states other than Washington. This is appropriate, given the far higher involvement of multiple stakeholders from Washington State, and the extent to which the recommendations come from experience and lessons learned in this state.

15. NPower describes itself as follows on its webpage:

> NPower helps nonprofits use technology to expand the reach and impact of their work. NPower is a federation of independent, locally based nonprofits providing accessible technology help that strengthens the work of other nonprofits. . . . [T]he NPower Network now has roots in ten communities and reaches thousands of nonprofits in over 50 communities nationwide.

NPower Home, *at* http://www.NPower.org (last visited Nov. 24, 2003).

16. The TechAtlas tool is described as "a web-based planning tool that your nonprofit can use to assess your current technology use and to receive recommendations on how to better implement technology to achieve your mission." *TechAtlas*, at http://www.techatlas.org/tools/origins.asp (last visited Jan. 13, 2004). The tool in its general form is available at http://www.techatlas.org/tools (last visited Jan. 13, 2004). As adapted for use by the Process, TechAtlas will ask users a number of questions about any chosen technology implementation and whether it meets the Promising Practices for that implementation, and then provide concrete suggestions for how to meet any that it does not yet meet.

Practices were generated by applying those general Principles to each of the substantive access technology areas for which Promising Practices are to be developed. In each case, the committees asked what concrete attributes the technology needed to have to meet the goals of the Principles.

That this process seems to have worked well confirms the validity and power of the Principles. If they work in this context and in this time they should work in other contexts and other times. A similar process of using the Principles as a guide to what should be done has been followed in developing *Giving Life to the Access to Justice Technology Bill of Rights*, a document designed to foster involvement in implementation of the vision by as many institutions as possible.[17]

F. Issues of Mandate, Guidelines, and Enforcement Mechanisms

By far the most difficult question in the entire process has been the question of how to structure and position the ATJ-TBoR so that it has the appropriate legal force. The challenge is that without clear legal authority, there is a great danger of the critics being right—of the document merely gathering dust on a shelf. On the other hand, the greater the authority and enforceability of the document, the greater the risks that stakeholders will fear an intrusion into their traditional areas of authority and discretion and that particular groups will see the enactment as inconsistent with a previously taken highly specific position.[18]

In coming up with a proposed resolution that the drafters believe satisfies all these concerns, they were guided by a number of core insights: (1) that the ATJ-TBoR must have sufficient authority to be given real effect in the real word; (2) that it deals with access to justice, and therefore the source of that authority should be the State Supreme Court in its rulemaking authority; (3) that the enactment cannot practically be seen as changing existing substantive law or creating on its own new causes of action; and (4) that the impact of the Principles will play out in a number of different forums and ways, including how the complex administrative structures of the justice system deal with the design, deployment, and use of technology, how the rulemaking

17. To view a draft version of the Principles, see Washington State Access to Justice Technology Principles, *supra* note 1.

18. The risk of this last danger is probably greatest in the area of privacy and openness, in which there is already extensive law and extensive dispute.

processes of the justice system deal with issues of technology and access to justice, and how the day-to-day business of the courts is conducted.

The solution, which may be termed "mandated consideration," requires the bodies under the authority of the Washington State Supreme Court, including courts conducting their day-to-day business, to consider, together with other rules and governing law, the ATJ-TBoR. Given the general nature of the document, mandated consideration is unlikely to dictate the details of the result of that consideration. But it does mean that a refusal to consider the ATJ-TBoR, or a blanket ignoring of its Principles, would violate the proposed court rule. In other words, the matter is one of sound discretion.

Similarly, the Principles do not create, on their own, new causes of action. Thus, a claim could not be predicated solely on an alleged violation of the specifics of the Principles. But the Principles are very much proposed to be a court rule that can be used in interpreting the relevance, scope, and requirements of any other law relied upon.

In the event that the mandated consideration approach is insufficient, the various ongoing implementation processes of the ATJ-TBoR will bring to decision makers such as the court or the legislature options for making sure that the vision in the document is complied with more fully.[19]

II. IMPLICATIONS FOR THE UNITED STATES LEGAL WORLD

The resonance that the Principles have achieved in Washington State suggests that they are relevant to the broader United States legal world. While Washington State's status as a tech "early adopter" may have resulted in the issues we have addressed coming more quickly to the fore, neither their relevance nor their potential force throughout the United States can hardly be doubted.

A. The Potential for Broader Adoption

There have been expressions of interest in adopting the Principles in several states. The speed of any such adoption will depend on the

19. At least as a theoretical matter, approaches might include setting up a separate reporting and monitoring system, strengthening the language of the rule to require more than "consideration," establishing a cause of action, or even placing enforcement jurisdiction in a specific court. No opinion is here implied as to efficacy or appropriateness of such approaches.

success of the enactment in Washington State, the extent of its impact, and the alliances it succeeds in creating.

At the federal level, the current political gridlock would appear to make progress impossible except possibly in a narrow and limited sense within the federal courts. A possible, and perhaps narrower, federal court rule enactment (subject to Congressional review) would at least guide federal court automation activity.

B. Impacts on More General Adjudication of Technology Issues

In the process of the Principles, there has as yet been little attention given to the potential impact on judicial sensibilities. The Principles have had a major educational impact on judges, increasing their understanding of the choices made about technology, the impact of these choices, the interrelationship of these choices with the accessibility of institutions, and any cost issues. This impact has been enhanced, of course, by direct judicial participation in the many processes of the Principles.[20]

It is perhaps inevitable that judges will bring this heightened sensitivity to other cases that have nothing to do with the courts. One possible example: a few years ago, there was extensive litigation about the detail required in welfare termination notices. The staple government defense—the "Fortran defense"—was that it was too hard to reprogram the computers. Judges may well be more skeptical of such claims now, given their own experience with keeping technology under the control of guiding values.

C. Constitutionalizing Access to Justice

More ambitious, however, is the possibility that the Principles can play a role in a broader re-conceptualization and constitutionalization of access to justice. On the litigation front, the attempt to create a "civil *Gideon*"[21] has been largely dead-ended at the federal level for over

20. There has been judicial participation in almost every committee and workgroup including the Drafting Group, the Promising Practices Committee, and the Judiciary and Court Administration Committee.

21. The relationship of the concept of a "civil *Gideon*," expanding the right to counsel to civil cases, to other areas of innovation is discussed in Richard Zorza, *Discrete Task Representation, Ethics and the Big Picture*, 40 FAM. CT. REV. 19, 19–20 (2002).

twenty years and at the state level for over a decade,[22] although a few states, including Maryland and Washington, are currently generating new efforts. Similarly, at the federal constitutional level the attempt to pull down financial barriers to fees for access has come to a halt,[23] although on the state-by-state level, there are broad systems of waiver in place.[24] All the debates, however, have taken place with an assumption of stasis. Access has been assumed to be constant in technique and methodology and constant in cost.

How technology can change this picture—and therefore the balancing test in even existing case law—is through a radical reduction in the costs of providing access and a dramatic increase in the methods of providing access. Buried in most due process analysis, sometimes explicitly, is the financial burden on the state of providing process.[25]

As we have found in the Process, appropriately deployed technology can create low-cost and effective routes to access that are far cheaper than the traditional full representation of a lawyer.[26] This makes it possible for us to argue for a right of access. In other words, people who need access to justice are entitled not to a lawyer, but to whatever it is that they need to obtain proper access.

Technology radically changes that calculation and makes such a broad claim more acceptable. Moreover, as the Principles gain broader

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22. In *Lassiter v. Department of Social Services*, the U.S. Supreme Court rejected the blanket claim of federal constitutional right to counsel in parental termination proceedings, and stated:

> The case of *Mathews v. Eldridge* . . . propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

452 U.S. 18, 27 (1981) (citation omitted).

23. *See* Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (per curiam) (affirming Oregon's requirement that a litigant challenging a welfare termination in court be required to pay a $25 filing fee); United States v. Kras, 409 U.S. 434, 445 (1973) (rejecting constitutional claim to waiver of bankruptcy court filing fee).

24. *See* O'Connor v. Matzdorff, 76 Wash. 2d 589, 600, 458 P.2d 154, 160 (1969) ("[C]ourts have found within their powers an inherent power to waive the prepayment of court fees, where a suitor or defendant has shown that he is impoverished, regardless of statutory authority."); *see also* Hous. Auth. v. Saylors, 87 Wash. 2d 732, 742, 557 P.2d 321, 327 (1976) ("[C]ourts retain an inherent power to waive their own fees in order to consider a case where it is made to appear that justice requires it."); Neal v. Wallace, 15 Wash. App. 506, 508, 550 P.2d 539, 541 (1976) ("Waiver of fees for an indigent is a discretionary act within the inherent power of the court."). Several of the above cases list other Washington cases considering indigence in the context of waiving fees.

25. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

26. Examples are laid out in Horowitz, *supra* note 1.

effects in the justice system, and as more access technologies are developed and deployed, the power behind this argument will become increasingly greater and the potential for establishing a broader right of access will become more realistic.[27]

III. IMPLICATIONS BEYOND THE LEGAL WORLD

The organizers of the ATJ-TBoR process have always believed that the process would have applications and implications in other areas, particularly in other service areas, such as health, senior, and consumer services.

A. The Relationship of Technology Innovation and Access to Services

Technology Creates New Routes to Access

The obvious lesson from our work is that technology creates, and can be shaped to create, new broadly defined routes of access to services. This means that in any area—medical, communications, financial planning, etc.—technology creates new ways of delivering the services, and therefore new routes to access the services.

Technology Changes the Politics of Any Market. Technology challenges all the political and market configurations and compromises that lead to stasis, and creates an environment in which fundamental questions can be asked about access, services, and equity, and how the levels of access, services, and equity can be changed. These questions can then be resolved in whatever the appropriate forum for that area is—the market, the regulatory environment, or some combination of the two.

Technology Offers Transparency. One of the most powerful of the lessons from the ATJ-TBoR is the power of transparency—the idea that with technology it is much easier to know what it going on. Data is easily susceptible to analysis and openness. This changes the equation with respect to power over information and thus over the ability to manage change.

Technology Changes the Roles of Capital, Investment, and Standardization. Technology in any area requires capital. This means that there is a pressure to standardize, to enhance the power of larger players, and to plan and build for the long term. This creates larger

27. The general relationship between access innovation and a possible strategy is briefly laid out in Zorza, *supra* note 21, at 24. *See also* Richard Zorza, *Making an International Case*, 2 EQUAL JUST. MAG., Summer 2003, *available at* http://www.ejm.lsc.gov/EJMIssue5/othervoices.htm.

markets, lesser short-term and greater long-term risk of monopoly. Also, this increases the power of a small number of large players in determining access to services.

B. The Value of a Similar Process in Such an Environment

All these forces increase the power of, and the need for, an ATJ-TBoR Process in other realms. Without such a process, the risk of surrender to the force of change is greater. With such a process, the best thinking can control that process of change.

Technology Creates the Possibility of Alliances Since All Can Identify with Risks. One of the unique aspects of technological change is that anyone can fear it. There is no one so well-connected or so wealthy that they cannot imagine being excluded by inability to use a technology. The result is that it is possible to build a much broader access coalition around issues of technology than around poverty, class, or even age or other suspect classifications. This is as true in the impact of technology in access to health or housing services as it is to justice.

The Value of a Principles-Driven Approach to Optimizing Opportunities. Similarly, the power of a principles-driven approach is particularly appealing in responding to technology-driven changes in any area, not just justice. Principles allow individuals to feel that they have regained power over something that they do not understand, something that might be out of control, something unpredictable. This is what they feel about technology. The principles themselves may vary with the substantive area, although the general issues addressed will all have power in any area and provide a powerful starting place.

The Value of an Access Approach. Of similar use is the general appeal to access as a value. It is not a technology justice bill of rights—a document that would have thrown us into the middle of a number of irresolvable disputes about technology. Rather, it is about access, a formulation that is less controversial, safer, and more universal. Buried, of course, in the word "access" are a number of possible meanings. Strictly speaking, access to justice can mean access to justice services, access to just results, or even access to a just society.

The Force of Transformative Opportunities. The key to creating consensus and energy around such a process is spreading the idea that technology is not about re-slicing the cake, but about finding new ways to transform the size and potential of the cake. Then all stakeholders can see that they can gain.

IV. IMPLICATIONS FOR AN EMERGING INTERNATIONAL RIGHT TO ACCESS TO JUSTICE

It is seldom recognized in the United States that most industrialized countries have a far stronger commitment to access to justice than does the United States, at least if that commitment is measured by a country's willingness to pay for legal help for those who cannot afford it. The United States pays far less than other countries for legal aid services, even on a per capita basis. The figures are even more dramatic when corrected for gross national product (GNP), legal GNP, or poverty population, or the number of problems that are dealt with in the respective legal system.[28]

Even more interestingly, the current Draft European Union Constitution includes under the heading "Right to an effective remedy and a fair trial" the following language: "Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."[29] This is at least in part a codification of a 1979 decision, *Airey v. Ireland*.[30] The *Airey* decision dealt with the right to counsel and was decided under Article 6, Section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[31] which states: "In the determination of his civil rights and obligations . . . everyone is entitled to a *fair and public hearing* . . . by an independent and impartial tribunal."[32] Similarly, the Canadian Supreme Court held in 1999 that there was a right to counsel when the state attempted to take even short-term custody of a parent's child.[33]

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28. *See* Zorza, *supra* note 27 (data assembled by Judge Earl Johnson). Significant additional data, also assembled by Judge Johnson, one of the founders of the Legal Services Movement in the United States, can be found on the website of the Equal Justice Library, *at* http://www.equaljusticelibrary.org.cnchost.com/international/comparative.asp (last visited Nov. 24, 2003).

29. Draft Treaty Establishing a Constitution for Europe, art. II-47, July 18, 2003, *available at* http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf.

30. 2 Eur. Ct. H.R. 305 (1979).

31. *Id.* at 313.

32. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, sec. 1, Nov. 4 1950, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm (emphasis added).

33. *See* New Brunswick v. J.G., [1999] 3 S.C.R. 46. J.G. relied upon Section 7 of the Canadian Charter of Rights and Freedoms, which states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." *Id.*

In the United States, as in Europe, the potential of technology and of an access to justice technology lies in the words "necessary to ensure effective access to justice." The perspective of the Principles raises the possibility of "effective access to justice" by making clear how realistic such access is. At the same time, it lowers the cost and increases the feasibility by reducing the range of circumstances in which there is a need for an attorney to "ensure effective access."

In the European context, this insight may make it less financially frightening for the language to be adopted, and when adopted, to be followed and broadly construed. Within the rest of the world, the cost-lowering and access-creating possibilities of technology should make similar enactments more appealing and acceptable.[34] The Principles might well provide an opportunity and organizing tool for groups in various countries committed to increasing access to justice. They might find allies, including in the technology industries, parallel to those recruited by the Washington State process.

All these rights derive ultimately from Article 8 of the United Nations Universal Declaration of Human Rights, which mandates that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[35] This common heritage and language should encourage advocates to think about how to create an international right of access to justice, and about the relationship of that right to the appropriate use of technology.

V. HOW WASHINGTON STATE CAN MANAGE ITS IMPLEMENTATION OF ATJ-TBOR TO FACILITATE BROADER USE OF THE MODEL

While our first obligation is to make sure that the Principles work as well as possible for the people of Washington State, our opportunity is also to move forward in this state in ways that increase the chances of the document having the broader impact outlined above. Below are some thoughts that the enactors and implementers may well bear in mind as the process moves forward.

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34. For a review of non-U.S. attempts to create non-attorney methods of access, see generally Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103 (2002).

35. *See* Universal Declaration of Human Rights, Dec. 10, 1948, *available at* http://www.un.org/Overview/rights.html.

A. The Importance of the Adoption Process

A smooth and unified adoption process is crucial for the credibility of the process and the product. That the ATJ-TBoR is seen at the same time as making a difference, yet arousing no focused opposition, will make it far more acceptable in other forums and fields.

B. Issues of Costs and Process

Equally important is management of the costs issue. The main fear that the ATJ-TBoR evokes is that institutions will be burdened with unacceptable "unfunded mandates." To the extent that the wording, adoption, implementation, and Promising Practice processes can show that the costs issue is manageable, and that the ATJ-TBoR provides a focus for generating agreement on appropriate investments without triggering unacceptable conflict, a powerful stepping stone will have been laid for broader deployment of the core ideas and approach.

C. Showing the Value of Principles-Driven Approach

There has been criticism of the broad principles approach. To the extent that the implementation process can show the value of this approach, that it can show that the principles provide a way of moving forward and structuring consensus even on difficult issues, the power of the whole concept will be validated. This can best be done by using the Principles in every stage of implementation.

D. Importance of Enforceability

Probably the most difficult drafting issue for the ATJ-TBoR has been the enforceability issue. The credibility of the project requires finding the right formula that puts real governmental authority behind the ATJ-TBoR, without undermining the current consensus behind its ideas.

E. Alliances and Engaging the Private Sector

Finally, the continued alliance building process is crucial to the long term power of the concept. Not only will the alliances built make the implementation more powerful, but each state ally can engage its own national and international network in support of broader deployment of the ATJ-TBoR.

VI. CONCLUSION

What has been built in Washington State with the Process is both powerful and unique. With skill and commitment it can have a powerful effect well beyond the state's borders in increasing access to justice, in transforming our understanding of the relationship between technology and access to justice, and in broadening our understanding of the potential for change to be channeled in the public interest. The judicial and legal leadership of the state, as well as the many community groups with which they have worked on this project, will be able to look back with pride upon a transformative and ongoing initiative, which is likely to have influence far beyond its borders.