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Dennis J. Sweeney

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THE COMMON LAW PROCESS: A NEW LOOK AT AN ANCIENT VALUE DELIVERY SYSTEM

Dennis J. Sweeney*

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with [others], have had a good deal more to do than the syllogism in determining the rules by which [all] should be governed.¹

I. INTRODUCTION

This Article is prompted by the Access to Justice Technology Bill of Rights (ATJ-TBoR) project.² Part of the charge to the ATJ-TBoR Committee is to

[d]evelop and implement an Access to Justice Technology Bill of Rights (“ATJ-TBoR”) premised on relevant principles contained in the United States and Washington State Constitutions, the mission and underlying principles and declarations generating the creation and operation of the Access to Justice Board, the principles contained in the Hallmarks of an Effective Statewide Civil Legal Services Delivery System adopted by the Access to Justice Board in 1995, and subsequent and effectuating documents and declarations.³

One important aspect of this project is the application of the principles generated by this effort to the societal disputes they are intended to influence. Put another way, once we develop these principles, what do we do with them? One goal the ATJ-TBoR project must address is the practical problem of moving the lofty notions

* Judge, Division III of the Washington State Court of Appeals. I thank Judge Donald Horowitz, the Chairperson of the ATJ-TBoR Committee, for allowing me to be a small part of this interesting and important project.

1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1945) (1881) (edited for gender neutrality).

2. 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).

3. Access to Justice Technology Bill of Rights, *History and Context*, at <http://www.atjtechbillofrights.org> (last visited Jan. 5, 2004).

generated from the thinking and formulation stage to the practical arena of everyday conflict resolution.

I am a common law judge.⁴ I serve on a common law court in Washington state. So I spend my days in the realm of what is: real people with real controversies come to the court for the answers to real questions.⁵ Common law appellate courts answer the questions presented through the vehicle of a written opinion, resolve the dispute, and, incidentally in the process, make law.⁶

And it is in this sense that common law courts become a delivery system—a delivery system for society's values. These values in some fashion embody the customs of the community, the society, the courts, and the legal community. As with any set of broad principles, such as those found in constitutions or other basic laws, the ATJ-TBoR principles do not come alive and have no meaning until they are applied to a societal dispute—an actual case or controversy. No one can anticipate all the questions, all the nuances that real people with real conflicts will bring to their application. Until then, they remain largely an abstraction.

It is, therefore, somewhat incongruous for a common law judge like me to participate in a project to develop a set of principles to influence future, and as yet, hypothetical disputes. That conflict came crashing in on me as I struggled to collect my thoughts for this Article. Here, I participate in a project to construct and then promote a set of principles, all without the benefit of a case that has been prepared and argued. The courts of this state have had and will have almost nothing to say about the development of these principles—not, at least, in any traditional common law sense. And so it may be appropriate for me to express some ambivalence about the ATJ-TBoR project, or at least my involvement in it. That said, I want to address technology, societal values expressed as

4. See R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW 3 (D.E.L. Johnston trans., 1992) (“[T]he common-law system differs fundamentally from the continental system.”). The common law is generated by the courts and traces its origins to the royal courts of England beginning in the twelfth century. *Id.*

5. See R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 88 (2d ed. 1988) (noting that the common law depends on precedent and is empirical). And, I would add, common law is essentially inductive while continental law tends to be more theoretical and deductive, and based more on abstract principles.

6. EVA H. HANKS ET AL., ELEMENTS OF LAW 4 (1994) (“Unlike statutes and constitutions, the common law rests on no authoritative text external to the judiciary. The law is knowable only by reading past ‘cases’; it is not to be found anywhere other than in those very cases (and in *non*authoritative summaries of them).”).

“rights,” and common law courts and processes as a vehicle for transforming values into rights.

The ATJ-TBoR is the product of a group of smart people periodically gathering around a table for a few years and developing what we think are good ideas—based maybe on some custom, legal lore, constitutional values, or case law. Indeed, the history of both common and civil law is a history rich in its diverse sources.⁷ But, whatever the source of these principles, the implicit notion is that they are good ideas and should, therefore, be law. In fact, the implicit argument in this project is that the ideas embodied by these principles are so important that they should assume the status of guiding principles for integrating technology into the many facets of modern conflict resolution. Surprisingly, no one questions this approach to the development of broad legal principles.

Have common law courts subtly and incrementally put themselves out of the substantial and traditional business of law-making or, at least, put themselves out of business as we once knew it? More personally, do I belong here? Or am I helping to betray the common law tradition I preach and practice and which has served the citizens of Washington since statehood and before?

The short answer is: I think not.

Each of the relevant principles, if they are to have any practical application at all, must someday be applied by a court to an actual case, to an actual controversy. I suggest in this Article that regardless of the form these principles ultimately assume—court rule, legislation, or uniform code—it will be through common law courts and common law processes that they ultimately become part of the fabric of our legal culture. Only when a trial judge in King, Clark, or Benton County, Washington, treats them as law and applies them as law in the process of deciding a case will they become “law.”

The essence of the common law tradition is a process for resolving societal disputes—a process that generates law as a byproduct.⁸ The process does not set out to make law. Its goal is to resolve a particular societal dispute in some principled and structured way. But, in doing so, every decision becomes part of the fabric of “the law.” Every decision

7. See VAN CAENEGEM, *supra* note 4, at 2 (“Historically, the major elements of the law belong to a common European inheritance: ancient and medieval Roman law, canon law, old Germanic law, feudal law, medieval municipal law, the natural law of early modern times.”).

8. See *Windust v. Dep’t of Labor & Indus.*, 52 Wash. 2d 33, 35–36, 323 P.2d 241, 243 (1958).

by a common law court innervates and gives meaning to what otherwise would be just a lifeless paragraph in a dusty book.⁹

II. TECHNOLOGY AND COMMON LAW COURTS

The common law develops slowly and uncertainly. If no case is brought, no rule is developed. And the common law is conservative. It always looks to what has been done before.¹⁰ But technology is neither slow nor conservative. The potential for technology to influence the courts, and the need for the law to accommodate this change, are not unanticipated:

As we look ahead we may reasonably expect great changes in the law, both statutory and decisional, in a number of areas. Illustrative changes include a continued effort to improve the quality of life Related problems involve . . . increasing demand by many members of the public for greater participation in the benefits of our improving technology.¹¹

But who could have predicted the speed with which technology would influence the entire spectrum of the law¹²—legal policy,¹³ trial tactics

9. See DANIEL J. MEADOR ET AL., *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL* 235 (1994).

10. See *Windust*, 52 Wash. 2d at 36, 323 P.2d at 243 (noting that “common law is comprised of that body of court decisions in the nonstatutory field to which the doctrine of stare decisis applies”). *But see* *State v. McCollum*, 17 Wash. 2d 85, 107, 136 P.2d 165, 174 (1943) (noting that where personal liberty is at stake, stare decisis will not save a prior holding “so patently erroneous that it is hardly necessary to discuss it”).

11. 2 WASH. STATE BAR ASS’N, *WASHINGTON APPELLATE PRACTICE DESKBOOK* 36-15 (1993).

12. See, e.g., *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37 (D. Mass. 1990) (concluding that a menu command structure of a computer program, including the choice of command terms, the structure and order of those terms, their presentation on the screen, and the long prompts could be protected by copyright law); *State v. Townsend*, 105 Wash. App. 622, 630, 20 P.3d 1027, 1032 (2001) (stating that use of ICQ computer communications program results in consent to recording by the recipient as a matter of law because of the characteristics of the software), *aff’d*, 147 Wash. 2d 666, 57 P.3d 255 (2002).

13. See, e.g., Ruth Gavison, *Privacy and the Limits of Law*, in *COMPUTERS, ETHICS & SOCIAL VALUES* 332 (Deborah G. Johnson & Helen Nissenbaum eds., 1995); see also Dean Colby, *Conceptualizing the “Digital Divide”: Closing the “Gap” by Creating a Postmodern Network That Distributes the Productive Power of Speech*, 6 *COMM. L. & POL’Y* 123, 163 (2001). Colby argues that the mere passive access to modern communication technology is not enough: “[t]he linchpin for any solution to the DD [digital divide] must include a judicial review of the First Amendment that will yield case law that allows the government to protect speech by requiring private enterprise to provide access to the means of speech.” *Id.*

and legal procedure,¹⁴ and the courts themselves¹⁵—all of which have the potential to influence access to justice? The analogy of law as the tortoise and technology as the hare is an apt one.¹⁶

So the need to import values into the judicial process for application to everyday conflicts generated or complicated by technology was apparent. And part of the problem is access. Should the poor, the disadvantaged, be assured access to the courts on an equal footing with the well-to-do members of our society? If they should, then in what way should they participate? And if the inexorable advance of technology can serve either to impede or advance access to the courts, then what can the courts do to ensure that technology does not impede but does in fact advance access?

14. See, e.g., FED. R. CIV. P. 5, 43(a); Richard Zorza, *Re-Conceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*, 67 FORDHAM L. REV. 2659, 2659–63 (1999) (“For the first time since the invention of the typewriter and the telephone, technology has again begun to exert a significant influence upon the practice of law. New communications technologies hold the promise of increased access to legal services for the public at large, and particularly for the poor. The tide of innovation has, however, triggered disquiet among experts in legal ethics, particularly in response to the practice innovations that incorporate these technologies.”); see also Marc A. Ellenbogen, Note, *Lights, Camera, Action: Computer-Animated Evidence Gets Its Day in Court*, 34 B.C. L. REV. 1087, 1087–90 (1993).

15. See, e.g., *United States v. Munn*, 507 F.2d 563, 567 (10th Cir. 1974) (defendant hearing portion of trial through broadcast system); *United States v. Ives*, 504 F.2d 935, 938 (9th Cir. 1974) (special phone system connecting defense counsel with defendant’s cell), *vacated on other grounds*, 421 U.S. 944 (1975); *State v. Gillam*, 629 N.W.2d 440, 451 (Minn. 2001) (giving defendant option of using room with interactive video capabilities); *State v. Koontz*, 145 Wash. 2d 650, 657, 41 P.3d 475, 479 (2002) (requiring protection against undue emphasis when video testimony is replayed for deliberating jurors); *Wallace v. Kuehner*, 111 Wash. App. 809, 823, 46 P.3d 823, 831 (2002) (determining that service by facsimile is not approved by Civil Rule 69 (Offer of Judgment)); *State v. Syrotchen*, 61 Wash. App. 261, 265, 810 P.2d 64, 66 (1991) (videotaping an arraignment); Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today’s—and Tomorrow’s—High-Technology Courtrooms*, 50 S.C. L. REV. 799, 808–12 (1999); Gerald R. Williams et al., *Juror Perceptions of Trial Testimony as a Function of the Method of Presentation: A Comparison of Live, Color Video, Black and White Video, Audio, and Transcript Presentations*, 1975 BYU L. REV. 375, 410–12 (1978) (noting differences in juror response to live and videotaped testimony).

Unequal access to technology may exacerbate the potential mismatch between an affluent client’s technology-savvy counsel and the poor or pro se litigant’s pedestrian procedures. Lederer, *supra*, at 832. But courtroom technology is expanding access for the disabled. For example, real-time transcription and closed captioning allow hearing-impaired people to be jurors, trial counsel, and even judges. *Id.* at 834.

16. See *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 149 Wash. 2d 17, 20, 65 P.3d 319, 320 (2003) (stating that “the tortoise of federal law finally caught up with the hare of communications technology” (quoting Michael I. Meyerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251, 252 (1997))).

Society changes, culture changes, and as this Symposium and, indeed, the whole ATJ-TBoR project assumes, technology will drive or at least influence that change. But if access to justice is to be a reality, regardless of the inexorable march of technology,¹⁷ then where will the guiding principles come from? For those of us participating in the ATJ-TBoR project, the answers are to be found in the principles generated by this project. The introduction of this basic set of tools is necessary if the courts are to cope with the impact of technology and its ramifications on the justice system.¹⁸ It is then the goal of the ATJ-TBoR Committee to provide that framework.

A. *Established Rights and New Technology*

Describing the ATJ-TBoR as the development of a list of rights is a bit misleading. Many of the rights in jeopardy, or at least at issue, are well developed and, indeed, already drive courts' decisions.

Both Washington and United States courts have long and well-established precedents supporting fundamental rights, such as the right to privacy,¹⁹ the right to travel,²⁰ and the right to a fair trial.²¹ The

17. "It is not technology, as such, which affects society for good or bad, but its uses, which are . . . shaped by the values of society and by the historical context in which the technology is used. . . . We must remember that we are not trapped helplessly in front of an unstoppable technological steamroller. Our control is in how we use our knowledge that we will be required to live with the results of our decisions on the use of this new technology."

Peninsula Counseling Ctr. v. Rahm, 105 Wash. 2d 929, 948, 719 P.2d 926, 936 (1986) (quoting Fred W. Weingarten, *Privacy: A Terminal Idea*, 10 HUM. RTS. Q. 18, 56 (1982)).

18. And, indeed, at least one recently adopted court rule accommodating the use of briefs on CD-ROM appears to be based squarely on the right proposed by Principle Number 1 of the ATJ-TBoR "Requirement of Access to Justice." Proposed Principle Number 1 would require that "[i]ntroduction of technology or changes in the use of technology must not reduce access or participation and, whenever possible, shall advance such access and participation." See ATJ-TBoR, *supra* note 2. Washington Rules of Appellate Procedure permit the submission of a brief on CD-ROM. WASH. R. APP. P. 10.9, available at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=app&set=RAP&ruleid=appr10.09. But the rule does not require such a format. *Id.* 10.9(d). Nor does the rule allow the imposition of the costs incurred in the preparation of those briefs. *Id.* 10.9(f).

19. *Griswold v. Connecticut*, 381 U.S. 479, 482–86 (1965) (recognizing a right to privacy and also noting that although the First Amendment does not specifically mention the freedom of people to associate, to choose their children's schools, or choose a particular subject of study, these rights have been construed to fall within the First Amendment); *State v. Jackson*, 150 Wash. 2d 251, 259–60, 76 P.3d 217, 222 (2003) (recognizing a broader privacy interest under article I, section 7 of the Washington State Constitution than under the Fourth Amendment to the United States Constitution).

20. *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969); *Sorenson v. City of Bellingham*, 80 Wash. 2d 547, 553, 496 P.2d 512, 515 (1972); *State v. McBride*, 74 Wash. App. 460, 465, 873 P.2d 589, 593 (1994) ("However, both the right to move about freely and the right to travel are protected by our constitution."); *Eddy v. Moore*, 5 Wash. App. 334, 340 n.7, 487 P.2d 211, 215 n.7 (1971).

challenge to the ATJ-TBoR Committee was to craft a set of principles that will at least safeguard those rights as technology advances. So this exercise of crafting a technology bill of rights entails protecting or, in some cases, revisiting well-established rights such as privacy.

The fundamental right to privacy is well established independently of any consideration of technology.²² But sophisticated technologies have affected the problem of privacy and, necessarily, the way privacy issues are perceived by the courts.²³ The ATJ-TBoR principles assure that existing and emerging technologies do not undermine this and other already well-established rights.

The courts have already had to grapple with the influence of technology on privacy in a variety of contexts. By statute in Washington, it is unlawful to record any

[p]rivate communication transmitted by telephone, telegraph, radio, or other device between two or more individuals . . . [using] any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication.²⁴

In three cases consolidated as *State v. McKinney*,²⁵ each defendant was arrested after police officers accessed information contained in their Department of Licensing (DOL) driver's license records. Each moved

21. *Strickland v. Washington*, 466 U.S. 668, 684 (1984); *State v. Bone-Club*, 128 Wash. 2d 254, 260, 906 P.2d 325, 328 (1995) ("The Washington Constitution provides at minimum the same protection of a defendant's fair trial rights as the Sixth Amendment."); *In re Richard*, 75 Wash. 2d 208, 212–13, 449 P.2d 809, 812 (1969).

22. *O'Hartigan v. Dep't of Pers.*, 118 Wash. 2d 111, 117, 821 P.2d 44, 47 (1991) (evaluating right to privacy in the context of marriage and family); *State v. Farmer*, 116 Wash. 2d 414, 429–31, 805 P.2d 200, 208–09 (1991) (applying right to privacy to HIV testing); *State v. Koome*, 84 Wash. 2d 901, 904, 530 P.2d 260, 263 (1975) (recognizing minors' right to privacy).

23. *See, e.g., Jackson*, 150 Wash. 2d at 264, 76 P.3d at 224 (holding that police installation of Global Positioning System (GPS) tracking device on murder suspect's vehicle infringes upon Washington state constitutional right to privacy and therefore requires a search warrant); *State v. McKinney*, 148 Wash. 2d 20, 32, 60 P.3d 46, 51 (2002) (evaluating right to privacy in the context of Department of Licensing records); *State v. Young*, 123 Wash. 2d 173, 186, 867 P.2d 593, 599 (1994) (holding that warrantless thermal imaging to detect heat sources within home is a violation of right to privacy); *State v. Gunwall*, 106 Wash. 2d 54, 63, 720 P.2d 808, 813 (1986) (holding that police was not permitted to learn who a person was contacting by tracking her phone calls); *State v. Myrick*, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984) (holding that warrantless aerial surveillance violates state privacy clause).

24. WASH. REV. CODE § 9.73.030(1)(a) (2002).

25. 148 Wash. 2d 20, 60 P.3d 46 (2002).

for dismissal or suppression on the ground that the search of DOL databases prior to arrest violated the privacy provisions of the state constitution. Their motions were denied, and the defendants were convicted. The court held that access to a computer database to confirm license plate numbers is not an invasion of the vehicle owner's right to privacy:

Based on the historical treatment of driver's license records, the fact that these records reveal little about a person's associations, financial dealings, or movements, and the purpose for which the State compiles and maintains these records, we hold that there is no protected privacy interest in the information contained in a DOL driver's record under article I, section 7 of our state constitution.²⁶

Likewise, the release of the names of public employees, without more, has been held not to be a violation of privacy, even if that information could be linked to other computer-generated information about the employee.²⁷ An essential argument in both *McKinney* and *Tacoma Public Library v. Woessner*,²⁸ was that technology—the computer—with its capacity to collate information easily and quickly should change the rules for disclosure of information (licensing information in *McKinney*, and personal information in *Woessner*) given the statutory and constitutional right to privacy in Washington. The courts rejected arguments for nondisclosure simply because computers changed the ease and accuracy with which this information could be associated or accessed.²⁹

But evidence obtained in violation of Washington's privacy statute³⁰ is inadmissible in a criminal case.³¹ The Washington State Supreme

26. *Id.* at 32, 60 P.3d at 52.

27. *King County v. Sheehan*, 114 Wash. App. 325, 346, 57 P.3d 307, 317–18 (2002) (“It is a fact of modern life in this age of technology that names can be used to obtain other personal information from various sources, but we conclude that this is not sufficient to prevent disclosure of the names of police officers under the act.”); *Tacoma Pub. Library v. Woessner*, 90 Wash. App. 205, 218, 951 P.2d 357, 363 (1998) (involving release of names of library employees).

28. 90 Wash. App. 205, 951 P.2d 357 (1998).

29. *McKinney*, 148 Wash. 2d at 30–31, 60 P.3d at 51; *Woessner*, 90 Wash. App. at 218, 951 P.2d at 363. *But see* *State v. Young*, 123 Wash. 2d 173, 181–82, 867 P.2d 593, 597 (1994) (“The right of privacy under Const. art. 1, § 7 is ‘not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.’” (quoting *State v. Myrick*, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984))).

30. WASH. REV. CODE § 9.73.050 (2002).

31. *Id.*

Court concluded that under Washington’s privacy act, e-mail messages to a fictitious minor to arrange for an illegal sexual liaison were private and hence inadmissible because the communications in real time by way of the ICQ instant messenger program were intended to be private and were recorded on a device (the sting officer’s computer).³²

Similarly, in *State v. Nordlund*,³³ the appellate court noted with approval the trial court’s characterization of the “personal computer as ‘the modern day repository of a man’s records, reflections, and conversations’” and thereby conferred Fourth Amendment protection to the exercise of a First Amendment right.³⁴

Suits or defenses based on privacy are nothing new—and, indeed, may be on the increase as a byproduct of advancing technology. The object here is to provide the courts with principles that assure that technology, and the advance of technology, do not erode fundamental rights, like privacy.

B. *Implied Rights*

I will make another point on the topic of rights and common law courts. I have selected rights that are, at least constitutionally, implied. I will explore this more fully in my review of Washington case law supporting access to justice. But my point here is that it was necessary for the courts to imply these rights in order to give effect to other express and accepted rights.

To take a few other examples: The right to vote—how do I participate in democratic government if my right to vote is restricted? The right to work—how do I work (particularly in this modern economy) if I cannot travel? The right of access—how do I assert any right or vindicate any right for others if I am denied access to the courts because of poverty? And, finally for purposes of the ATJ-TBoR, how do I participate in any dispute resolution process when I neither have access to nor understand the dizzying array of technology that is fast becoming a part of the system?

32. *State v. Townsend*, 147 Wash. 2d 666, 673–77, 57 P.3d 255, 259–61 (2002).

33. 113 Wash. App. 171, 53 P.3d 520 (2002), *review denied*, 149 Wash. 2d 1005, 70 P.3d 964 (2003).

34. *Id.* at 181–82, 53 P.3d at 525 (quoting trial court record).

III. COMMON LAW

I turn now to a few observations about the operation of a modern common law system, or at least, the operation of the common law system in Washington state.

A. *Common Law Reasoning*

The courts of this state exercise their authority through legal reasoning. They do not provide a technique for supplying the right answers.³⁵ Indeed, in this pluralistic society, the “right answer” is frequently the subject of some debate. So “ultimate results are often less important than how they are arrived at.”³⁶ In fact, “[t]he most important ‘reception’ from England was perhaps not any particular body of doctrine but a way of thinking about law which made it easier for our great jurists (such as Story) to create an indigenous American jurisprudence.”³⁷ What the courts do, instead, is choose between competing arguments and then, through the vehicle of a written opinion, justify that choice.

And the court’s analysis can always be distilled into a logical syllogism.³⁸ The major premise is the statement of the law—the rule: running a red light is negligent; obtaining money by lying is fraud. The minor premises are the particular facts of a case: the defendant ran the red light; the defendant lied to obtain money. And, finally, the conclusion: the defendant ran the red light and was, therefore, negligent. Or the defendant lied to obtain money and was, therefore, guilty of fraud.³⁹

In modern common law analysis, the major premise—the rule—frequently originates outside of the judicial system. The ATJ-TBoR was not generated by our common law court system. And that may well be in keeping with the modern common law approach to the development of law. So then, where do these rules come from?

35. See LIEF H. CARTER, *REASON IN THE LAW* 12 (4th ed. 1994).

36. Robert S. Summers, *Professor Fuller’s Jurisprudence and America’s Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 448 (1978).

37. HANKS, *supra* note 6, at 7.

38. Perhaps the most familiar of all syllogisms: All men are mortal; Socrates is a man; Socrates is therefore mortal.

39. RUGGERO J. ALDISERT, *OPINION WRITING* 124–27 (1990).

B. *The Major Premise (the Rule) and Its Sources*

“What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute?”⁴⁰

Any common law resolution of a case begins with the identification of some principle—some rule of law. And a variety of sources contribute to those rules. It is not usually a judge-made rule that adds the major premise to the syllogistic proposition⁴¹ that ultimately resolves the case. Sources include state and federal constitutions, state and federal legislation, learned treatises, law reviews, and restatements of the law. But all have a common attribute. They have been identified by some court as worthy of application to a societal dispute. In traditional common law, the rule with which the court started reflected the custom, or at least the court’s understanding of the custom of the realm. Indeed, the common law system has been described as the “custom of following custom.”⁴² And, at least during one period of the long common law tradition, the rules articulated by the judges were, if not God’s law, at least a reflection of the laws of nature.⁴³

We have, of course, abandoned any notion of judges speaking eternal truths in favor of a more rational, utilitarian approach to values, at least those that we are willing to apply to societal disputes. But, that said, the grounding of common law values in natural law endowed the system with the aura of doing the “right thing”; some sense of the absolute; something beyond the here and now and the “just us.” This notion seems to have been accepted when our state constitution was adopted.⁴⁴ And I think it finds expression in Washington’s access to justice cases.

40. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921).

41. See ALDISERT, *supra* note 39, at 28.

42. CARTER, *supra* note 35, at 121–22.

43. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 42 (1983); CARTER, *supra* note 35, at 123–24; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 12 (1990); M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L.J. 555, 572 (1996) (“The origins of the common law can be traced at least from Aristotle and Cicero through the Book of Exodus. It is generally supposed that much of the animating basis for early common law derived from an innate, elemental, and sometimes theocratic concept of justice often termed ‘natural law.’”).

44. See WASH. CONST. art. I, § 32 (requiring “[a] frequent recurrence to fundamental principles [as] essential to the security of individual right and the perpetuity of free government”); ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION, A REFERENCE GUIDE* 44 (2002).

That aside, the major premise, the black letter rule, of a court's syllogistic exercise is frequently supplied by sources outside of the court system.⁴⁵ Of course, in a democratic and remarkably populist state (by constitutional declaration of rights, all political power resides in the people),⁴⁶ much of our public policy is outside the province of the courts. The usual source is the legislature. We now have extensive codes for everything from commerce,⁴⁷ to crime⁴⁸ and sentencing,⁴⁹ to probate,⁵⁰ and marital dissolution.⁵¹ Uniform laws fill almost every nook and cranny of areas previously reserved to the discretion of judges, the courts, and case precedent.

But, regardless of the source of the general principle or major premise, the black letter rule reflects the custom of the society. Or, at least, it represents the ideal of what that custom should be. A common law system is said to identify and apply the "customs" of the community.⁵² The sources used to identify those customs have changed over the centuries. But the courts still work to identify principles that in some sense continue to represent the customs of a community.

So one obvious and important source of rules for judges in this state is the legislature.⁵³ But it is not the only source. In our modern common law system there are many other sources of law. And each claims its own authority to speak for the community. Each claims its own right to say that this principle, this statement, this rule, is the custom in the community or is generally acknowledged to be a good idea and should be the custom in this community.

Some rules are articulated by the Washington State Supreme Court acting in its rulemaking capacity.⁵⁴ Some are the product of a persuasive

45. CARTER, *supra* note 35, at 15.

46. WASH. CONST. art. I, § 1.

47. Uniform Commercial Code, WASH. REV. CODE tit. 62A (2002).

48. Crimes and Punishments, WASH. REV. CODE tit. 9.

49. Sentencing Reform Act of 1981, WASH. REV. CODE ch. 9.94A.

50. Probate and Trust Law, WASH. REV. CODE tit. 11.

51. Dissolution of Marriage—Legal Separation, WASH. REV. CODE ch. 26.09 (containing detailed legislative directions and standards for marital dissolution actions).

52. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 21 (2d ed. 1985).

53. *See State v. Laitinen*, 77 Wash. 2d 130, 133, 459 P.2d 789, 791 (1969) (stating that courts do not consider whether a statute plain on its face is unwise or ineffectual, only whether it is within the legislature's constitutional powers).

54. WASH. REV. CODE § 2.28.150 ("When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by

law review or other learned treatises, in which the authors collect, synthesize, and analyze what others have said about a topic.⁵⁵ Some rules are the product of restatement editors as they collect and organize what courts have said about an issue.⁵⁶ And traditional common law remains by legislative mandate a source of rules.⁵⁷ This is particularly so with the contribution of the American Law Institute, which identifies and distills common law rules and systematizes them in the process.⁵⁸ Even a cursory review of Washington cases shows that the sources of the principles that control the outcome of societal disputes are many and varied. Finally and specifically, the principles represented in the ATJ-TBoR are founded upon Washington's tradition of universal access to justice.⁵⁹ These are principles identified by a broad spectrum of lawyers, judges, scholars, and citizens concerned with the poor, the courts, and technology.⁶⁰

The wells from which common law courts have drawn the customs of the realm have changed over the years. But identification of these rules, principles, and statements continues to represent an acknowledgement by the courts that a rule, principle, or statement in some way represents the demands of an ordered society. The law generated by appellate judicial opinions should reflect the social, political, and economic influences and ideas of our age.

statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.”). The validity of a court rule need not stand solely on either constitutional or statutory grounds. *State v. Templeton*, 148 Wash. 2d 193, 217, 59 P.3d 632, 644 (2002) (“A nexus between the rule and the court’s rule-making authority over procedural matters validates the court rule, despite possible discrepancies between the rule and legislation or the constitution.”).

55. *See Del Rosario v. Del Rosario*, 116 Wash. App. 886, 893, 68 P.3d 1130, 1133 (2003) (“*Bennett* has been criticized. The Corbin treatise concludes it is wrong. A law review article makes an extensive analysis in disapproving of the rationale and possible broad holding.” (quoting *Nevue v. Close*, 123 Wash. 2d 253, 256, 867 P.2d 635, 636 (1994))).

56. FRIEDMAN, *supra* note 52, at 676.

57. WASH. REV. CODE § 4.04.010 (“Extent to which common law prevails. The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.”).

58. FRIEDMAN, *supra* note 52, at 676.

59. *See infra* Part IV.

60. *See supra* Part I.

Case law is the wide stream flowing uninterrupted since the twelfth century.⁶¹ Principles like those set out in constitutions or statutes or those represented in the proposed ATJ-TBoR are, then, the levees, embankments, and even the dams that structure and direct the resolution of that stream of disputes.

The ultimate expression of law by the courts may not always be clear, clean, or even well organized, but that reflects the reality of human conflict. That reality is driven home when one asks: How will the ATJ-TBoR influence a specific divorce action? A criminal prosecution? A complex commercial case? Without the context of a specific case, the answer is unknown and unknowable. It may be educated speculation, but speculation nonetheless.

Through the work of the ATJ-TBoR Committee, an important new source of legal principles has been added to those a Washington judge can draw upon. And, ultimately, the speed at which these principles work their way into the common law of Washington may not depend upon the vehicle used to implement them—legislation, Supreme Court rule, uniform body of law, law review. It may instead turn on the work of judges of this state, who, with the aid of trial and appellate lawyers, identify them in traditional common law parlance as customs of the community.

Let us now move from the major premise, the rule, to other steps in the common law process of deciding cases.

C. *Common Law as Process*

If we regard the common law as a mechanism for delivering the values of a society at a given time, the common law courts are very much alive. Indeed, they are an indispensable and vibrant dispenser of a society's values. "The common law is not a body of rules; it is a method. It is the creation of law by the inductive process."⁶² It is courts that first identify principles from a variety of sources and then apply them by traditional processes based on the exigencies of a given case and, in the process of doing so, make law.

The processes by which the lawsuit and law developed have remained stable, even if the sources for the rules have changed and expanded over

61. VAN CAENEGEM, *supra* note 4, at 3 (noting that the common law developed "from the twelfth century" and is "characterized by historical continuity").

62. Madden, *supra* note 43, at 559 (quoting RICHARD A. COSGROVE, *OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN COMMUNITY 1870-1930*, at 33 (1987) (citations omitted)).

the centuries. Lawyers still bring a case—a question—to the courts. A trial judge in some fashion decides the facts, with or without a jury. Those facts become the minor premises in the syllogism that ultimately dictates the result.

Whether the source is the constitution, a statute, or a prior judicial decision, all rules must be applied before they become law. In at least one sense, then, the rules do not dictate the result. Indeed, in the common law tradition, the function of rules is guidance.⁶³ Common law processes allow the courts to tailor broad principles and general rules to the demands of the particular case before the court. It is always the general being applied to the particular.⁶⁴ “Thus, one possible answer to our initial question (‘what is law?’) is that, at least in ‘common law,’ *law is application*—application of legal norms by individuals in ordinary interactions.”⁶⁵

Common law processes include, at a minimum, a case in controversy, identification of a general principle, and application of that principle to the specific case in controversy, employing canons of construction and interpretation, standards of review, equity, juries, and a judge exercising discretion at every stage of the process. Even if a case is not strictly speaking one of first impression, the nuances of a specific fact pattern will amplify or explain established precedent. Thus, a new statement of the law results from the resolution of the case.

Even the selection of the rule requires an exercise in judgment, an exercise in discretion by the court. Is the right at issue constitutional or one conferred by statute or court rule?⁶⁶ If the rule is a constitutional mandate, is it controlled by our Washington State Constitution or the United States Constitution?⁶⁷ Does an administrative regulation supply

63. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 179 (1960).

64. See Maurice Rosenberg, *Judicial Discretion of the Trial Court Viewed from Above*, 22 SYRACUSE L. REV. 635, 643 n.19 (1971) (“The justification for discretion is often the need for individualized justice. . . .” (quoting KENNETH DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 17 (1969))).

65. HANKS, *supra* note 6, at 4.

66. See, e.g., *State v. Templeton*, 148 Wash. 2d 193, 216–17, 59 P.3d 632, 643–44 (2002) (evaluating juvenile’s right to counsel); *Sackett v. Santilli*, 101 Wash. App. 128, 133, 5 P.3d 11, 14 (2000) (noting that court rule may constitutionally supersede statute so as to permit waiver of jury in civil proceedings), *aff’d*, 146 Wash. 2d 498, 504, 47 P.3d 948, 951 (2002).

67. See, e.g., *State v. O’Neill*, 148 Wash. 2d 564, 595, 62 P.3d 489, 506 (2003) (Chambers, J., concurring) (comparing article I, section 7 of the Washington State Constitution with Fourth Amendment to the United States Constitution).

the principle?⁶⁸ And if so, is it within the purview of the legislative enabling act, and is it constitutional?⁶⁹ And even if the principle is supplied by a statute, regulation, or constitution, do the elements meet traditional common law requirements, say, to sustain a conviction for the commission of the crime charged?⁷⁰ Classification of a question as arising in equity or at law greatly influences the application of the principle and the ultimate outcome.⁷¹

A general principle of law is a statement of values. But what does it mean? How is it to be applied? In short, how does the principle find expression and application to the societal disputes it is intended to affect? It is here, as a mechanism by which evolving societal values are transmitted and applied, that the essence of the common law system endures. Values are transmitted by common law courts resolving everyday societal disputes, both civil and criminal.

First and probably foremost, the standard of review determines the degree of deference, if any, to be given to the trial court's interpretation and application of the rule.⁷² Next, the principle may be filtered through one or more canons of construction to determine the manner in which it will be applied.⁷³ Rules of evidence, whether incorporated into court rules or established at common law, may also influence the outcome of a given case.⁷⁴ Outcomes are also affected by conscious and (as Justice

68. See, e.g., *Hillis v. Dep't of Ecology*, 131 Wash. 2d 373, 397–400, 932 P.2d 139, 151–53 (1997) (looking at policies for prioritizing water rights).

69. See, e.g., *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wash. 2d 887, 901–02, 64 P.3d 606, 613–14 (2003).

70. See, e.g., *State v. Marcum*, 116 Wash. App. 526, 534, 66 P.3d 690, 694–95 (2003) (holding that knowledge is an essential element of the offense of unlawful possession of a firearm, despite its absence from the statute).

71. See, e.g., *Green v. McAllister*, 103 Wash. App. 452, 462, 14 P.3d 795, 801 (2000) (stating that in granting remittitur, court failed to distinguish between equitable and legal issues).

72. See, e.g., *In re Parentage of Jannot*, 149 Wash. 2d 123, 126, 65 P.3d 664, 666 (2003) (stating that child custody procedural rulings reviewed for abuse of discretion, not de novo, even if based on affidavits); *State v. Read*, 147 Wash. 2d 238, 243, 53 P.3d 26, 30 (2002) (noting that standard of review for refusal to instruct jury on self-defense depends on reason for refusal).

73. See, e.g., *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash. 2d 224, 274–76, 59 P.3d 655, 680–81 (2002) (Sanders, J., dissenting) (using several canons in the application of anti-discrimination statute), *cert. denied*, ___ U.S. ___, 123 S. Ct. 2221 (2003); *City of Tacoma v. William Rogers Co.*, 148 Wash. 2d 169, 182, 60 P.3d 79, 86 (2002) (Sanders, J., dissenting) (construing ambiguity in revenue-generating statutes most strongly against government and in favor of citizen); *State v. Keller*, 143 Wash. 2d 267, 276–77, 19 P.3d 1030, 1035 (2001) (utilizing plain meaning rule in sentencing under three-strikes law).

74. A party who moves unsuccessfully to exclude the opponent's proposed evidence may offer that same evidence without waiving his claim of error. See *State v. Thang*, 145 Wash. 2d 630, 647

Holmes reminds us⁷⁵) unconscious factors the court brings to bear on the particular dispute before it. Finally, such traditional common law processes as harmless error⁷⁶ and appellate deference to judicial discretion⁷⁷ give common law courts a significant role in bringing general principles to bear on the outcome of a given case.

Besides that, all of this is filtered through minds trained in a specific tradition:

The judge, even when [s]he is free, is still not wholly free. [S]he is not to innovate at pleasure. [S]he is not a knight-errant roaming at will in pursuit of his [or her] own ideal of beauty or of goodness. [S]he is to draw his [or her] inspiration from consecrated principles. [S]he is not to yield to spasmodic sentiment, to vague and unregulated benevolence. [S]he is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life.”⁷⁸

The common law is, then, a process of courts applying societal norms to people in real life disputes. Judges exercise discretion at every stage of the process.

A court finds the facts of a given controversy. It then decides which of those facts are material and excludes others as immaterial. Only the material facts are then permitted to influence the decision in a given controversy. The court next identifies the legal principle to be applied to that specific set of facts. And deciding that one legal principle controls

n.6, 41 P.3d 1159, 1168 n.6 (2002) (citing JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 18, at 836 (Peter Tillers ed., 1983)); *State v. Ellis*, 136 Wash. 2d 498, 521, 963 P.2d 843, 855 (1998) (applying decisional law rather than Rule of Evidence 702 to admissibility of expert testimony in capital case).

75. See *supra* note 1.

76. See generally Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L. REV. 277, 278 (1995/96).

77. See *State v. Karpenski*, 94 Wash. App. 80, 101–06, 971 P.2d 553, 564–67 (1999).

To identify the nature of the trial court’s discretion is not, of course, to identify the nature of our own discretion on appeal. When a trial judge’s function is to decide whether the evidence is sufficient to support a finding, a reviewing court’s function will be the same. When a trial judge’s function is to decide whether the evidence preponderates, a reviewing court’s function may or may not be the same. If the reviewing court’s information is as good or better than the trial court’s, the reviewing court will sometimes be permitted to substitute its own view, without deference to the trial court; but if the reviewing court’s information is not as good as the trial court’s, the reviewing court will limit itself to deciding whether the evidence is sufficient to support what the trial court did.

Id. at 104, 971 P.2d at 566 (footnotes omitted).

78. CARDOZO, *supra* note 40, at 141 (edited for gender neutrality and footnote omitted).

over another is an exercise in judgment by the court. Many dissents are generated by disagreement over the dispositive rule.⁷⁹ The court then, of course, applies these principles to the facts.⁸⁰

Finally, juries remain an important part of our legal tradition. Their application of a given rule to a specific controversy is nothing less than a reflection of the customs of a society. An intricate, nicely worded jury instruction setting out the rule to be applied may provide a trial lawyer some fodder for appeal. But, once the jury retires to deliberate, it is free to ascribe to the words whatever meaning it chooses.⁸¹

Rumors of the demise of the common law may be premature.⁸² Codes, rules, and statutes do not apply themselves. Rather, it is the common law process of making law by arriving at principled decisions in real cases, based not upon a single rule or statute, but upon a whole tradition of looking at and thinking about law and legal problems that both yields a decision and incrementally adds to the body of common law. The common law approach remains the single most effective mechanism for adapting the law incrementally to society's changing values. Witness the way in which the law has accommodated dramatic changes in our economic structure and practices,⁸³ or the incorporation of the ongoing scientific advances in DNA evidence.⁸⁴ And, of course, the common law approach retains the ability to tailor law to the needs of the individual case.

79. See, e.g., *State v. Fire*, 145 Wash. 2d 152, 175, 34 P.3d 1218, 1229–30 (2001) (Sanders, J., dissenting); *State v. Valentine*, 132 Wash. 2d 1, 28, 935 P.2d 1294, 1307–08 (1997) (Sanders, J., dissenting); *Griffin v. Eller*, 130 Wash. 2d 58, 75, 922 P.2d 788, 795–96 (1996) (Talmadge, J., dissenting); *State v. Ray*, 116 Wash. 2d 531, 556, 806 P.2d 1220, 1233 (1991) (Dolliver, J., concurring in part & dissenting in part); *State v. Crenshaw*, 98 Wash. 2d 789, 813, 659 P.2d 488, 501–02 (1983) (Dore, J., dissenting).

80. See MEADOR, *supra* note 9, at 235–36.

81. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash. 2d 747, 769, 818 P.2d 1337, 1348 (1991); *Rasor v. Retail Credit Co.*, 87 Wash. 2d 516, 532, 554 P.2d 1041, 1051 (1976); *Gardner v. Malone*, 60 Wash. 2d 836, 841, 376 P.2d 651, 654 (1962); *Chiappetta v. Bahr*, 111 Wash. App. 536, 541, 46 P.3d 797, 800 (“Accordingly, evidence that a juror misunderstood or failed to follow the court’s instructions inheres in the verdict and may not be considered.”), *review denied*, 147 Wash. 2d 1018, 56 P.3d 991 (2002); *State v. Hatley*, 41 Wash. App. 789, 794, 706 P.2d 1083, 1086–87 (1985).

82. Madden, *supra* note 43, at 555 n.2.

83. *Kinkade v. Witherop*, 29 Wash. 10, 19, 69 P. 399, 402 (1902); Madden, *supra* note 43, at 609–10.

84. See *State v. Gore*, 143 Wash. 2d 288, 303–04, 21 P.3d 262, 271 (2001).

With these reflections on the common law in the twenty-first century here in Washington, let me now turn to Washington's evolution of the notion of access to justice and examine some of these processes at work.

IV. WASHINGTON'S ACCESS TO JUSTICE

A bedrock foundation for the ATJ-TBoR project and, indeed, for the whole concept of access to justice, is the notion that all citizens of this state have a basic right to access justice. But this principle will not be found in any state or federal constitution,⁸⁵ or in any statute, book, or rule.⁸⁶ The principle of access to justice will only be found in a short list of Washington State Supreme Court cases beginning with *O'Connor v. Matzdorff*⁸⁷ in 1969 and ending with *Doe v. Puget Sound Blood Center*⁸⁸ in 1991.

I will focus on two aspects of each case: first, the underlying principle supporting the concept of access to justice in this state; second, and just as importantly for this Article, the source of authority from which the court derives the principle underlying access to justice—the well from which the court drew its inspiration, if not the rule.

A. *O'Connor v. Matzdorff*

Glennie O'Connor tried to file a lawsuit in Yakima Justice Court for replevin and damages of \$215.50. State statute required payment of a filing fee. Ms. O'Connor filed a motion and affidavit to proceed *in forma pauperis* instead of paying the fee.⁸⁹ The court clerk refused to accept

85. See *Carter v. Univ. of Wash.*, 85 Wash. 2d 391, 397–98, 536 P.2d 618, 622–23 (1975) (“In weighing the nature of a right, it is clear that the fact that it is not specifically mentioned in the constitution is not dispositive. For instance, both the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), and the right to privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972), are both fundamental rights under the Constitution of the United States although nowhere specifically so mentioned.”), *overruled in part by Hous. Auth. v. Saylor*, 87 Wash. 2d 732, 557 P.2d 321 (1976).

86. *But see Saylor*, 87 Wash. 2d at 739, 557 P.2d at 325 (questioning the existence of any such right, or at least its foundation); *Filan v. Martin*, 38 Wash. App. 91, 97, 684 P.2d 769, 772–73 (1984) (in response to the assertion of a constitutional right to access, the court notes that “[t]he [N]inth [A]mendment to the United States Constitution ensures only those rights deemed fundamental by history and tradition. It does not necessarily give constitutional magnitude to all unenumerated rights. The same analysis applies to the Tenth Amendment.”) (citations omitted).

87. 76 Wash. 2d 589, 458 P.2d 154 (1969).

88. 117 Wash. 2d 772, 819 P.2d 370 (1991).

89. *O'Connor*, 76 Wash. 2d at 590, 458 P.2d at 154–55.

the filing. Ms. O'Connor petitioned the Washington State Supreme Court for a writ of mandamus requiring the clerk to accept and file her papers without payment of a fee.⁹⁰

The first question the court addressed was whether to assume original jurisdiction and hear the case at all.⁹¹ Holding that the question of whether Ms. O'Connor was entitled to proceed with her suit despite her poverty was "fundamental," the court agreed to decide this question.⁹²

The court based its holding that the right to sue, despite indigence, was fundamental on a series of law review articles and a book.⁹³ A preliminary proposition established was that, at least, the question of poverty as a bar to suit is fundamental.⁹⁴ The right is then accepted as fundamental in a later case.⁹⁵

The next question was whether or not Ms. O'Connor was indigent as a matter of law.⁹⁶ The court concluded that, given the size of her family and that her sole income was a public assistance grant, she was indigent.⁹⁷ This legal conclusion was based on authority of a Social Security Administration definition of poverty, an editorial in the Seattle Post-Intelligencer, and a law review article.⁹⁸ The court then expanded and clarified the legal definition of poverty based on an earlier

90. *Id.* at 590–91, 458 P.2d at 155.

91. *Id.* at 591–92, 458 P.2d at 155.

92. *Id.* at 592, 458 P.2d at 155–56.

93. Although only an individual's right is being asserted in this proceeding, the question to be decided involves very deeply the interests of the public and in particular those of a regrettably large segment of our society. The right of the poor to obtain redress for wrongs, and to defend themselves when sued by the more affluent, is presently of nationwide concern, as is evidenced by the attention given to the subject in legal periodicals. Some notable discussions are to be found in the following: Samore, *Legal Services for the Poor*, 32 ALBANY L. REV. 509 (Spring 1968); Shriver, *Law Reform and the Poor*, 17 AM. U. L. REV. 1 (Dec. 1967); Stumpf, *Law and Poverty: A Political Perspective*, 3 WIS. L. REV. 694 (1968); Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO U. L. REV. 21 (Fall 1967); Barvick, *Legal Services and the Rural Poor*, 15 KAN. L. REV. 537 (1967). The leading article was written years ago by John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (Feb. 1923), reviewing the history of the relations between poor people and the courts and lamenting the slowness of the movement toward justice for the indigent. *See also* a book by J. COMER, FORGING THE FEDERAL INDIGENT CODE (1966).

Id. at 592–93, 458 P.2d at 156.

94. *Id.* at 592, 458 P.2d at 155.

95. *Carter v. Univ. of Wash.*, 85 Wash. 2d 391, 398, 536 P.2d 618, 623 (1975) ("Accordingly, we consider access to the courts to be a fundamental right."), *overruled in part by Hous. Auth. v. Saylor*, 87 Wash. 2d 732, 557 P.2d 321 (1976).

96. *O'Connor*, 76 Wash. 2d at 593, 458 P.2d at 156.

97. *Id.* at 593–94, 458 P.2d at 156–57.

98. *Id.* The law review article was William Samore, *Legal Services for the Poor*, 32 ALBANY L. REV. 509 (1968).

Washington State Supreme Court decision⁹⁹ and a United States Supreme Court decision:¹⁰⁰

We held that the term does not and cannot, in keeping with the concept of equal justice to every man, mean absolute destitution or total insolvency. Rather it connotes a state of impoverishment or lack of resources on the part of the defendant which, when realistically viewed in the light of everyday practicalities, substantially and effectively impairs or prevents his pursuit of his remedy.¹⁰¹

The next question in the analysis was “has the court the inherent power to waive fees prescribed by *statute*?”¹⁰² In dicta, the court observed that if a *court had created the rule* requiring the filing fee, a court could waive it. But the fee here was required by legislative enactment. The court ultimately held that it has “inherent power” to waive the fee, notwithstanding the statute.¹⁰³ The source for this remarkable holding is important. The court quoted extensively from an *American Law Report*, which in turn relied on ancient treatises (*Britton: Views on Disseisin; Mirrour of Justices*); English case law; English statutes (from the reigns of Henry VII and Henry VIII); and miscellaneous state and federal cases.¹⁰⁴ The court also concluded that justice courts have the same inherent power because “[t]he justice courts of this state do exercise a portion of the common law jurisdiction.”¹⁰⁵

The final question was whether the court “should exercise the power to waive its fees in a given case.”¹⁰⁶ And the answer to that question turned on the validity of the argument that the poor, unchecked by prohibitive filing fees, would “inundate the courts with frivolous cases.”¹⁰⁷ And, again, the authority for the court’s conclusion that the concern was unwarranted included two law review articles, one of which cited a legal periodical.¹⁰⁸

99. *State v. Rutherford*, 63 Wash. 2d 949, 389 P.2d 895 (1964).

100. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

101. *O'Connor*, 76 Wash. 2d at 594, 458 P.2d at 156–57.

102. *Id.* at 597, 458 P.2d at 158 (emphasis added).

103. *Id.* at 600, 458 P.2d at 160.

104. *Id.* at 598–600, 458 P.2d at 159–60.

105. *Id.* at 604, 458 P.2d at 162.

106. *Id.* at 600, 458 P.2d at 160.

107. *Id.* at 601, 458 P.2d at 160.

108. *Id.* at 602, 458 P.2d at 161–62.

With *O'Connor*, access to justice became a reality in Washington. In sum, the court decided: (1) the right of an indigent citizen to sue is fundamental and significant; (2) "indigent" does not necessarily mean "utterly destitute" or "totally insolvent"; and (3) courts have inherent authority to waive a filing fee imposed by the legislature.

Another interesting and significant aspect of this case is the court's approach to identifying and supporting the principles announced. It is classic common law. What is the custom of the community on these questions? The answer, if *O'Connor* is any guide, is that it is what lawyers, commentators, and judges are saying and have said it is and the court's own sense of the felt necessities of the times.¹⁰⁹

B. *Iverson v. Marine Bancorporation*

In *Iverson v. Marine Bancorporation*,¹¹⁰ Lil Iverson recovered a \$1000 judgment following a wrongful eviction action. She did not think it was enough, so she tried to appeal.¹¹¹ Following some procedural wrangling, the Washington State Supreme Court remanded to the trial court for findings of fact on those questions required by the *O'Connor* decision. A trial court then found (1) Ms. Iverson did not have the money to perfect and prosecute an appeal, and (2) her appeal was prosecuted in good faith and was not frivolous.¹¹²

With that factual backdrop, the question framed for the court was whether the Washington State Constitution obligated the court to accept the appeal without cost.¹¹³

The court began its analysis with article IV, sections 1 and 30 of the Washington State Constitution.¹¹⁴ These provisions vest all judicial

109. See CARDOZO, *supra* note 40, at 141.

110. 83 Wash. 2d 163, 517 P.2d 197 (1973).

111. *Id.* at 164, 517 P.2d at 197.

112. *Id.* at 166, 517 P.2d at 198-99.

113. *Id.* at 166-67, 517 P.2d at 199 ("[Amicus] argue that the state constitution sets up both the Court of Appeals and this court to handle a particular mission. That mission, they argue, is for the courts to hear and decide all cases regardless of whether the parties are rich or poor; that they be accessible to all citizens; and that they resolve individual and social conflicts regardless of whether the parties are rich or poor. We agree.")

114. *Id.* at 167, 517 P.2d at 199; see also WASH. CONST. art. IV, § 1 ("Judicial Power, Where Vested. The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide."); *id.* art. IV, § 30 ("Court of Appeals. (1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.")

power in the courts of this state.¹¹⁵ Then, based on authority of *O'Connor*, the court proceeded from that constitutional grant of power to examine the “duties” imposed by that authority.¹¹⁶ This step was significant, because what followed is not spelled out in the constitution (state or federal) or in any statute. It is court-made law, based on the way the deciding court and past courts (including the *O'Connor* court) defined their duties:

These duties include, among others, the fair and impartial administration of justice and the duty to see that justice is done in the cases that come before the court. The administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief.

In the *O'Connor* case we stated . . . :

Were this court to hold that the Supreme Court has the power to waive prepayment of costs and that the superior court has a like power, but that no such power exists in justice courts, an anachronism would result. This would be tantamount to a holding that, if a poor person has a large claim, the courts will open their doors to him; but if his claim is small, those doors must be closed, simply because there were no justice courts at common law. . . .

. . . .

The proper and impartial administration of justice requires that these doors be kept open to the poor as well as to those who can afford to pay the statutory fees.¹¹⁷

The court concluded from all of this that it had the constitutional duty to allow Lil Iverson to prosecute her appeal without cost.¹¹⁸

Now, the important dimension that *Iverson* adds to the access to justice struggle is the constitutional dimension. But it does so in a characteristically common law way. The state constitution says simply that judicial power is vested in the courts. But what does the court do? It decides what that judicial power entails. And it does so by looking at what it said in the past on the same question—what it said in *O'Connor*. The court then adds another important constitutional justification for the notion of access to justice—that the courts are a separate branch of

115. *Iverson*, 83 Wash. 2d at 167, 517 P.2d at 199.

116. *Id.*

117. *Id.*

118. *Id.* at 167–68, 517 P.2d at 199.

government—the branch vested with judicial power. And, more importantly, the court then defines its obligations to the poor: “The administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief.”¹¹⁹

After *Iverson*, access to justice is now firmly rooted in a state constitutional grant of authority to the courts and the common law of this state.

C. *Carter v. University of Washington*

In *Carter v. University of Washington*,¹²⁰ the University of Washington fired Sidney Carter because he violated regulations (which ones and how are unstated). He appealed to the Higher Education Personnel Board and later to the superior court. Both affirmed his dismissal. He then tried to appeal to the Washington State Supreme Court without paying a filing fee or posting a bond.¹²¹ It was this failure to pay the filing fee that stimulated the court’s discussion in this case.

Only three justices signed the lead opinion, which reached out most expansively for authority to support the notion of access to the courts. First, the lead opinion stated that the idea of access to justice has been around for a long time, maybe even two millennia: “Universal access to the courts is certainly not a novel concept in the annals of jurisprudence. Access to the courts was prized and protected by the Romans over 2,300 years ago.”¹²²

Next, the lead opinion remarked that the problem of access had been noted, but movement toward easier access to the courts had been “less than impressive”.¹²³

119. *Id.* at 167, 517 P.2d at 199.

120. 85 Wash. 2d 391, 536 P.2d 618 (1975), *overruled in part by* *Hous. Auth. v. Saylor*, 87 Wash. 2d 732, 557 P.2d 321 (1976).

121. *Id.* at 392, 536 P.2d at 620.

122. *Id.* at 393, 536 P.2d at 620 (citing John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923)). A number of other law review articles are used to bolster this claim:

For further comparative studies, see Ginsberg, *The Availability of Legal Services to Poor People and People of Limited Means in Foreign Systems*, 6 INT. LAW. 128 (1971); Cappelletti, *Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends*, 25 STAN. L. REV. 651 (1973); Cappelletti & Gordley, *Legal Aid: Modern Themes and Variations*, 24 STAN. L. REV. 347 (1972).

Id. at 393 n.2, 536 P.2d at 620 n.2.

123. *Id.* at 393, 536 P.2d at 620.

Fifty years ago, in 1924–[19]25, the American Bar Association’s Committee on Legal Aid Work drafted a model Poor Litigant’s Statute which provided, *inter alia*, that a poor litigant would be excused from giving security for costs and from payment of any fees. But the ABA’s model statute apparently has had only nominal influence in most jurisdictions in the development of poverty law.¹²⁴

Additionally, the lead opinion noted that the courts serve as society’s “complaint desk.”¹²⁵ And in that capacity, the courts implement part of the social contract between society and individual citizens. Judicial resolution of private and public grievances promotes peace and avoids violent resolution of those disputes.¹²⁶ Again, authority for this comes from a series of law review articles.¹²⁷

The lead opinion also stated that public policy alone cannot be the basis for access to the courts (why it cannot be the basis of a judicial decision is left unstated) and, specifically, waiver of fees and costs on appeal. The opinion turned, therefore, to more structured sources of common law doctrine—case precedent and the state constitution.¹²⁸ It relied on *O’Connor* and *Iverson* for the conclusion that the courts have the inherent power to waive costs. The conclusion was bolstered by citation to a series of California cases and a law review article.¹²⁹ It then turned to the Washington State Constitution. It is in this part of the opinion that two additional justices joined for a five-to-four majority.

The constitutional argument supporting the opinion came in steps. First, the court argued that access to the courts is a prerequisite to every other right—there are no rights if there is no right to enforce any right.

124. *Id.* (citing generally Lee Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. U. L. REV. 21 (1967)).

125. *Id.*

126. *Id.* at 393–94, 536 P.2d at 620–21.

127. *Id.* at 394, 536 P.2d at 621 (“See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (1968); Note, *Boddie v. Connecticut: Free Access to Civil Courts For Indigents*, 76 DICK. L. REV. 749 (1972). See also Abrams, *Access to the Judicial Process*, 6 GA. L. REV. 247 (1972).”).

128. *Id.* at 394–96, 536 P.2d at 621–22.

129. *Id.* at 395, 536 P.2d at 621 (“Several California decisions are in accord. See, e.g., *Ferguson v. Keays*, 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971) (appellate filing fee); *Roberts v. Superior Court*, 264 Cal. App. 2d 235, 70 Cal. Rptr. 226 (1968) (appellate cost bond); *Bank of Am. Nat’l Trust & Sav. Ass’n v. Superior Court*, 255 Cal. App. 2d 575, 63 Cal. Rptr. 366 (1967) (non-resident plaintiff’s cost bond); Note, *California’s Civil Appeal in Forma Pauperis—An Inherent Power of the Courts*, 23 HASTINGS L.J. 683 (1972). Cf. *In re Karren*, 280 Minn. 377, 159 N.W.2d 402 (1968).”).

The right of access must, therefore, be implied, like the right to travel and the right to vote.¹³⁰ The concurring justices agreed only on those arguments grounded in the actual wording of two provisions of the Washington State Constitution:¹³¹ article I, section 4 (the right to petition)¹³² and article I, section 12 (requirement of equality of privileges and immunities).¹³³

Second, the *Carter* decision held, based on the right to petition, “that the explicit provision in our constitution preserving the right to petition for grievances encompasses and, indeed, makes fundamental the right of access to the courts.”¹³⁴

The *Carter* decision next grounded the right to access in Washington’s privileges and immunities clause. Before launching into this last bit of constitutional analysis, the court reached out for one more bit of custom to justify the use of the state constitution—Washington’s populist tradition. Its source for this bit of cultural information, which soon became law, is history.¹³⁵

And finally, the court reasoned that only a compelling state interest would justify denying indigent citizens access to the courts under the state privileges and immunities clause. The interest advanced by the state was the deterrence of frivolous lawsuits and controlling work load. But the court, relying yet again on a series of law review articles, concluded that this interest was constitutionally too broad, given other available safeguards.¹³⁶

At the end of the day, the only grounds for a right of access to justice that five justices could agree on were state constitutional grounds—the right to petition the government (article I, section 4) and the guarantee of equal privileges and immunities (article I, section 12).¹³⁷ And, while the

130. *Id.* at 397–98, 536 P.2d at 622–23.

131. *Id.* at 403, 536 P.2d at 625.

132. “The right of petition and of the people peaceably to assemble for the common good shall never be abridged.” WASH. CONST. art. I, § 4.

133. “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” *Id.* art. I, § 12.

134. *Carter*, 85 Wash. 2d at 399, 536 P.2d at 623.

135. *Id.*, 536 P.2d at 623–24 (“Indeed, Washington is well noted for its populist tradition. See generally M.W. AVERY, HISTORY AND GOVERNMENT OF THE STATE OF WASHINGTON 199–216 (1961). Against this backdrop of our Washington Constitution, classifications based upon wealth are indeed dubious.”).

136. *Id.* at 400–01, 536 P.2d at 624.

137. *Id.* at 403, 536 P.2d at 625–26 (Utter, J., concurring).

most interesting and far reaching sources of authority are set out in the lead opinion, it is not the majority opinion. Only the Washington State Constitution provides the basis for the majority holding—a holding partially undone in *Housing Authority v. Saylor*.¹³⁸

D. Housing Authority v. Saylor

The King County Housing Authority evicted Frances Saylor from her home for maintaining a “nuisance.” An administrative tribunal, composed of fellow tenants, affirmed the action, as did a superior court judge in the Housing Authority’s unlawful detainer action. Ms. Saylor, armed with the court’s decision in *Carter*, marched up to the Washington State Supreme Court and asked for public funds to prosecute her appeal.¹³⁹ The court rejected her petition.¹⁴⁰

The rationale of the *Saylor* decision is straightforward. The court interpreted the Washington State Constitution’s privileges and immunities clause (article I, section 12) similarly to the way in which federal courts have interpreted the equal protection clause of the Fourteenth Amendment.¹⁴¹ The United States Supreme Court, in construing the Fourteenth Amendment, does not require waiver of court fees for indigents when the right at stake is not a *fundamental* one and “there is another procedure available, not requiring the payment of fees, through which redress can be sought.”¹⁴² Therefore, the court held, since litigation in the field of economics and social welfare does not involve a suspect class, no special scrutiny is required.¹⁴³

So, after *Saylor*, indigent civil litigants are back to relying on *O’Connor* and *Iverson*. To repeat the essential instructions of those cases: The courts have inherent power to waive fees and costs in civil appeals based on tradition and the constitutionally vested inherent authority of the courts if (1) the indigent litigant makes a showing of

138. 87 Wash. 2d 732, 557 P.2d 321 (1976).

139. *Id.* at 733–34, 557 P.2d at 322–23.

140. *Id.* at 744, 557 P.2d at 328.

141. *Id.* at 738–39, 557 P.2d at 325.

142. *Id.* at 739, 557 P.2d at 325.

143. *Id.* at 739–40, 557 P.2d at 325–26. On the question of whether poverty should be a suspect class, see Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1279 (1993), stating the obvious that the poor do not fully participate in the democratic processes and therefore democratic legislation disfavoring them should be reviewed with more scrutiny than simple rational basis.

poverty, (2) justice requires, and (3) the appeal is not frivolous and is prosecuted in good faith.

The dissent in *Saylor*s reiterates the constitutional principles laid down in *Iverson*, *Carter*, and *O'Connor*. First, the Washington State Constitution (article IV, sections 1 and 30) vests the courts of this state with the power to administer justice (a principle not challenged by the majority): “These duties include, among others, the fair and impartial administration of justice and the duty to see that justice is done in the cases that come before the court.”¹⁴⁴ Second, “[t]he administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief.”¹⁴⁵ Third, the right to petition for redress of grievances, pursuant to article I, section 4, is not limited to cases involving political grievances. The court should “construe article I, section 4, so as to give full effect to its broad language and purpose to the end that both the poor and the affluent may be heard by government.”¹⁴⁶ Finally, article I, section 12, of the state constitution must be interpreted differently than the Fourteenth Amendment to the United States Constitution. When properly applied, this provision is more protective of individual rights.¹⁴⁷

Recently, the constitutional rationale of *Saylor*s (reliance on the United States Supreme Court’s view of the Fourteenth Amendment’s privileges and immunities clause) has been eroded by the decision in *Grant County Fire Protection District No. 5 v. City of Moses Lake*.¹⁴⁸ There, residents challenged the Washington state statutory scheme that permitted the petition method (by landowners) rather than an election method (by residents of the area to be annexed) as a means of annexing property to a city. Under the petition method, the petition can be based upon ownership of the majority of property in an area to be annexed

144. *Saylor*s, 87 Wash. 2d at 744, 557 P.2d at 328 (Horowitz, J., concurring in result only) (quoting *Iverson v. Marine Bancorporation*, 83 Wash. 2d 163, 167, 517 P.2d 197, 199 (1973)). This common law notion is all that remains as support for access to justice at the end of *Saylor*s.

145. *Id.* at 744–45, 557 P.2d at 328 (Horowitz, J., concurring in result only) (quoting *Iverson*, 83 Wash. 2d at 167, 517 P.2d at 199).

146. *Id.* at 755–56, 557 P.2d at 334 (Horowitz, J., concurring in result only).

147. *Id.* at 756–57, 557 P.2d at 335 (Horowitz, J., concurring in result only).

148. 145 Wash. 2d 702, 42 P.3d 394 (2002), *rev'd on reh'g*, ___ Wash. 2d ___, ___ P.3d ___ (2004) (“And, although in recent cases this court has held that the privileges and immunities clause is substantially similar to the equal protection clause, *Seeley v. State*, 132 Wn. 2d 776, 788, 940 P.2d 604 (1997), the possibility that article I, section 12 could be analyzed separately from the federal equal protection clause has been left open.”).

rather than upon an equal vote by those residing in the area.¹⁴⁹ The court engaged in a *State v. Gunwall*¹⁵⁰ analysis¹⁵¹ and held:

[T]he *Gunwall* factors weigh in favor of a determination that article I, section 12 of the Washington State Constitution provides *greater protection than the equal protection* clause of the United States Constitution when the threat is not of majoritarian tyranny but of a special benefit to a minority and when the issue concerns favoritism rather than discrimination.¹⁵²

The important point of *Grant County* for the access to justice community is that analysis of our own state's privileges and immunities clause is not tied to federal Supreme Court Fourteenth Amendment jurisprudence. The constitutional support for access laid out in *Carter* and the dissent in *Saylors*, therefore, remains viable.

It is certainly true, as the *Saylors* decision notes, that democratically-elected legislators are appropriately vested with authority to legislate in the area of social and economic welfare. But it is also true that access to the court to redress grievances cannot be limited by either economics or social status. That remains a constitutional matter, the resolution of which is reserved to the courts.¹⁵³

E. Doe v. Puget Sound Blood Center

Doe v. Puget Sound Blood Center is the last in this series of access to justice cases. I will first make a few observations about this decision. First, the author for this eight-judge majority also signed the *Saylors* opinion, which, as I have noted, unraveled some of the constitutional underpinning for access to justice.¹⁵⁴ Next, the access issue was ancillary to the main question—whether the trial court abused its discretion by requiring production, subject to restrictions, of the name of a blood donor. The court nonetheless launched into a discussion of access and, in doing so, criticized the analysis of the *Saylors* decision.

149. *Id.* at 709–12, 42 P.3d at 397–99.

150. 106 Wash. 2d 54, 720 P.2d 808 (1986).

151. In *Gunwall*, the court settled upon six nonexclusive criteria to determine whether the Washington State Constitution extended broader rights to its citizens than the United States Constitution and should therefore apply, incidentally relying on a number of law review articles in the process. *Id.* at 59–61, 720 P.2d at 811–12.

152. *Grant County*, 145 Wash. 2d at 731, 42 P.3d at 408 (emphasis added).

153. *Iverson v. Marine Bancorporation*, 83 Wash. 2d 163, 167, 517 P.2d 197, 199 (1973).

154. *Doe v. Puget Sound Blood Ctr.*, 117 Wash. 2d 772, 781–82, 819 P.2d 370, 375–76 (1991) (Brachtenbach, J).

Doe alleged that he contracted AIDS from a blood donation. He sued the Puget Sound Blood Center (Blood Center). Doe later died—the suit alleged as the result of AIDS—and the superior court substituted his estate as party plaintiff. The estate moved for an order requiring the Blood Center to disclose the identity of the donor of the infected blood. The Blood Center refused. The court exercised its discretion and required production of the identity subject to restrictions.¹⁵⁵ The Washington State Supreme Court ultimately affirmed the court's exercise of discretion.¹⁵⁶ In doing so, however, it placed the discovery question in the broader context of access. In that broader context, the court made a number of noteworthy comments about access in general, and the *Saylor*s decision in particular. First, the court observed that “[o]ur cases on the right of access are somewhat perplexing.”¹⁵⁷ Next, the court quoted from the *Iverson* discussion of access to justice: “[t]he administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief,” and “[c]onsistent with our affirmative duty to keep the doors of justice open to all with what appears to be a meritorious claim for judicial relief, we hold that the plaintiff is entitled to the relief requested [waiver of fees and costs].”¹⁵⁸

Commenting on the *Saylor*s court's rejection of the *Carter* court's grounding of the right of access in sections 4 (right to petition) and 12 (privileges and immunities) of article I of the Washington State Constitution, the court noted: “The *Saylor*s court held that reliance upon the cited constitutional provisions was in error. However, the important point in *Saylor*s is the statement that ‘[a]ccess to the courts is amply and expressly protected by other provisions.’ Unfortunately, the court did not explore the rationale for its conclusion.”¹⁵⁹

Finally the court returned to a rationale expressed in *O'Connor*, *Carter*, and *Iverson*: “The right of access is necessarily accompanied by those rights accorded litigants by statute, court rule or the inherent powers of the court, for example, service of process, [Revised Code of

155. *Id.* at 775–76, 819 P.2d at 372–73.

156. *Id.* at 776, 819 P.2d at 372.

157. *Id.* at 781, 819 P.2d at 375.

158. *Id.*, 819 P.2d at 375 (emphasis omitted) (quoting *Iverson*, 83 Wash. 2d at 167–68, 517 P.2d at 199).

159. *Id.* at 781–82, 819 P.2d at 375 (emphasis added) (citation omitted) (quoting *Hous. Auth. v. Saylor*s, 87 Wash. 2d 732, 742, 557 P.2d 321, 327 (1976)).

Washington] 4.28, or statutes of limitation.”¹⁶⁰ The court rejected as inadequate the Blood Center’s submissions in support of nondisclosure: “The Blood Center and allied amici attempt to support these contentions with materials ranging from a quote from *Newsweek Magazine* to a quote from the Secretary of State of Scotland to testimony before a congressional subcommittee.”¹⁶¹ Among the court’s reasons for rejecting those submissions was the absence of a factual basis, either lay or expert.¹⁶²

V. ACCESS TO JUSTICE IN WASHINGTON—IN SUM

By way of summarizing this tour of Washington access to justice cases:

1. The right of an indigent person to sue is fundamental and significant.
2. Indigence does not mean complete destitution or total insolvency.
3. The authority for the courts to accommodate the petitions of indigent civil litigants is well grounded in English common law and English legislative enactments, both of which are part of our own common law.
4. “The right of access is necessarily accompanied by those rights accorded litigants by statute, court rule or the inherent powers of the court, for example, service of process, RCW 4.28, or statutes of limitation.”¹⁶³
5. The Washington State Constitution vests judicial power in the courts¹⁶⁴ whereby the courts have assumed certain duties. These duties include the “fair and impartial administration of justice.”¹⁶⁵
6. The further constitutional grounding of access to justice in, at least, the privileges and immunities clause of article I, section 12, is still an open question.
7. And all of this is so because a common law court, relying on a variety of traditional and present day sources, has said so. Any

160. *Id.* at 782, 819 P.2d at 375.

161. *Id.* at 786, 819 P.2d at 377.

162. *Id.* at 786–87, 819 P.2d at 377–78.

163. *Id.* at 782, 819 P.2d at 375.

164. WASH. CONST. art. IV, §§ 1, 30.

165. *Iverson v. Marine Bancorporation*, 83 Wash. 2d 163, 167, 517 P.2d 197, 199 (1973).

accommodation to the poor through the implementation of the ATJ-TBoR principles is necessarily premised on the recognition of a fundamental right of access to justice. And that right is the product of common law judges' application of traditional common law processes to the resolution of individual cases.

A final thought: Unrestricted access by the poor to our legal system for the resolution of their disputes is important in one other way. It has implications for the development of law. Common law courts articulate and bring to life the values of a society. They do so in the form of legal principles—principles developed in case law. Every single appellate case, then, adds to the body of law. If our guiding principles are truly to reflect the full range of the values of our society, and not just a narrow segment of it, all members of the community must have at least the opportunity to influence their development. So, to the extent that the poor are denied access to the courts, the principles articulated by the courts will not reflect the general customs and traditions of this state.

Two basic questions repeatedly crop up in the judicial debate over access to justice. First, is it a good idea? This is a question posed by those who tend toward the more economic model of justice and rights. Their concern is that easy access simply opens up the floodgates of litigation, including lots of frivolous lawsuits that economic constraints now hold in check.¹⁶⁶ In this view, access is a public policy and, therefore, solely a legislative concern.¹⁶⁷ The second recurrent question is, if it is a good idea, then is it required to be implemented, or at least accommodated, by our state constitution? Of course, if access to justice is constitutionally required, then the first question goes away. It makes no difference whether access to justice is a good idea.

These ATJ-TBoR principles reflect economic, philosophical, and moral judgment; they all sound like a good idea: that is, as a purely rational proposition, as simply a matter of scholarly deduction. Their justification will be developed on a case-by-case basis by the courts.

VI. CONCLUSION

The proposed principles memorialized in the ATJ-TBoR fit into our modern common law system. It is impossible to divine the ultimate effect of every new technology on every rule, practice, or procedure. But

166. See *O'Connor v. Matzdorff*, 76 Wash. 2d 589, 600–01, 458 P.2d 154, 160 (1969).

167. See *Hous. Auth. v. Saylor*, 87 Wash. 2d 732, 740–41, 557 P.2d 321, 326 (1976).

what we can do in the common law tradition is promulgate a set of principles that public rulemaking bodies—the legislature, the courts, the American Law Institute—can use so as to avoid the possibility, indeed the probability, that technology will reduce or inhibit the enjoyment of a fundamental right—the right of access to the courts.¹⁶⁸

The best that any rulemaking body can do is craft a set of general principles. Those principles will then influence the exercise of discretion in the courts in a way that improves access to the courts in spite of and, we hope, because of technology. The specifics, then, for implementing this general set of principles for a technology bill of rights are best left to judges, passing upon individual cases brought about by particular controversies that come before the court.

By advancing the common law system, I do not suggest that we turn back the clock to the days when common law judges were regarded as oracles.¹⁶⁹ I look instead to the ways in which a common law system functions in this state at this moment in our history. The judicial approach to legislation is an imperfect, but helpful, parallel. The court reads legislation so as to effect the purpose of the legislative body.¹⁷⁰ Likewise, other rules are applied by the courts on a case-by-case basis to effect their articulated purpose—rules of evidence, rules of practice and procedure, and statutory enactments affecting the processing and filing of litigation.¹⁷¹

The modern common law judge usually works with rules promulgated by someone else—the legislature, administrative agencies, state supreme courts in their rulemaking capacity, or uniform law committees. But

168. One concern, for example, is e-filing of court documents by proprietary systems (such as West or Lexis) upon which users will become as dependent for electronically filed documents much as they presently are for judicial opinions. See, e.g., Wendy R. Liebowitz, *Courts Electrify Suits, Sparks Fly; New Rules Needed for E-filings*, NAT'L LAW J., Sept. 7, 1998, at B6, cited in Dale A. Whitman, *Digital Recording of Real Estate Conveyances*, 32 J. MARSHALL L. REV. 227, 268 (1999). Off-line members of the public will need assistance to access electronic court files. Lederer, *supra* note 15, at 804–05.

169. See BLACKSTONE, *supra* note 43, at 69.

170. See *Cockle v. Dep't of Labor & Indus.*, 142 Wash. 2d 801, 807, 16 P.3d 583, 585–86 (2001) (“The primary goal of statutory construction is to carry out legislative intent.”); *State v. Fjermestad*, 114 Wash. 2d 828, 837, 791 P.2d 897, 902 (1990) (Guy, J., dissenting) (“Under general principles of statutory construction, when construing a statute the court’s purpose is to ascertain and give effect to the intent of the Legislature.”).

171. See, e.g., *State v. Hubbard*, 106 Wash. App. 149, 153, 22 P.3d 296, 298 (2001) (court rule); *City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue*, 104 Wash. App. 253, 260, 17 P.3d 1206, 1210 (2001) (administrative regulations), *rev'd*, 145 Wash. 2d 445, 38 P.3d 1010 (2002).

whatever the source, it is the application of these rules that must reflect the needs of a particular case, and it is that case that will be cited to by future courts when the same or a similar question is presented. It is in that way that law becomes “self-generating.”¹⁷² Another benefit of a common law system is its ability to adapt to changing conditions¹⁷³—“to meet these new and unexpected conditions of society.”¹⁷⁴ Witness the changes in the law that accommodated the industrial revolution or the current changes with the scientific advances in DNA.

The common law has the capacity to adapt to new technologies. Of concern here is the way in which it adapts. Ultimately, judges must sit and reason to the notion that all of our fellow men and women should have equal access to these courts. That is what we have tried to do with the ATJ-TBoR.

Is it perfect? Of course, it is not. But it is a start. It provides the judges of this state with the ability to craft rulings that at a minimum do not impede access to the justice system and perhaps may enhance the access of the poor to the system. Judges must reconcile often inconsistent and contradictory values.¹⁷⁵ Adoption of the ATJ-TBoR in some form is in keeping with a long tradition of not only access to the courts by the poor but also liberal resort to extrajudicial sources for principles to effect such rights. These principles should, by a process of accretion, become a part of the common law here in Washington. As such, they will be part of a principled approach to adapting to the state’s changing social, cultural, and political conditions.¹⁷⁶

172. See HANKS, *supra* note 6, at 4.

173. Madden, *supra* note 43, at 593.

174. William B. Hornblower, *A Century of “Judge-Made” Law*, 7 COLUM. L. REV. 453, 453 (1907).

175. See Charles Horowitz, *Legal Justice, Values and Appellate Decision-Making*, 18 GONZ. L. REV. 633, 642 (1982/83).

176. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 13 (1982).