

PART II

**COURTROOM INTERACTIONS
AND SELF-EMPOWERMENT**

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Troubling the Technological Imperative: Views on Responsible Implementation of Court Technologies

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Technology is often presented as a panacea for the ills that trouble the justice system: the solution that will reduce costs, decrease delays, increase efficiency, and generally improve access to justice. In many cases we hold an untroubled relationship to this claim, comfortable in the dual assumption that technological advances are inevitable and will necessarily result in improvements to the justice system.¹ Courts, and the legal system in general, are exhorted to “catch up” to current technologies; technologically advanced judges are portrayed as “dragging” the court system into the digital age.

The four chapters in this section of the book examine courtroom interactions and self-empowerment. Individually, and as a whole, they probe the reality and consequences of implementing technologies in the court system, discussing in the process a wide range of court technologies, including online court information systems, e-filing, videoconferencing, and technologies for evidence presentation and review. On the whole, the authors of these chapters are hopeful if not unreservedly enthusiastic about court technologies. More importantly, each of these chapters echoes the same message: if technologies are to be implemented in the court system so as to improve that system and access to justice within it, we must proceed with care and deliberation. We cannot assume that there is a necessary or a necessarily positive relationship between court technologies and access to justice;² instead, we should proceed with cautious rather

than unbridled optimism to ensure that technologies are implemented in such a way as to achieve the positive outcomes that we envision.

Donald Horowitz opens the section with an account of the development of Access to Justice Technology Principles within the Washington court system. He recounts his experience as chair of the committee that developed these principles, noting that the committee, and indeed the Access to Justice Board that created the committee, recognized the need to prepare for, constructively channel, and constructively use court technologies in order to ensure that those technologies enhanced access to justice and did not, in their implementation, do damage to the commitment to an "accessible, equitable, efficient and effective justice system." In his analysis, Justice Horowitz focuses on the importance of engaging a broad range of stakeholders in the development of system principles. In particular, he notes that while "buy-in" from the judiciary is critical for effective implementation of principles, consultation with a broad range of stakeholders, including those the system is designed to serve, is also crucial for a credible and legitimate process. The principles, developed by the Communications and Technology Committee of the Access to Justice Board established by the Washington Supreme Court, were adopted by the Washington State Supreme Court in 2004. These principles outline issues that must be considered in order to ensure that justice system technologies serve to enhance access to justice. Hence the principles serve as a blueprint for implementation of technologies in the court system.

In the next chapter, Sherry MacLennan provides us with a detailed analysis of the implementation, in British Columbia, of one important justice system technology: online legal information. She notes that the Legal Services Society of British Columbia introduced online self-help guides in direct response to a reduction in family law coverage available to low-income clients. Early on, the online court system "focused on court based self-help to replace the representation services lost due to coverage restrictions." At the same time, it was recognized that "technology supported by people" was "more empowering" for clients, and the online information system was supplemented by access to "live" assistance through helplines and consultation services. In addition, intermediaries were trained on the use of the system in order to assist clients with information access and use, and the information system was accessible to and used by

counsel both to provide information to their clients and to stay up to date on family law matters. MacLennan provides us with insight, based on experience, on the complexity of even apparently “simple” systems, discussing the importance of content, accessibility, and design (including “gamification” of system and content, and guided pathways as a design principle) in ensuring that the online information system is useful and used. She also emphasizes the importance of collaboration, networking, evaluation, and integration with existing systems in the development and implementation of online information systems. Her contribution emphasizes the points that new technologies must interact with existing systems and processes, and care in design and implementation must be taken to ensure that new technologies optimally enhance the justice system.

Amy Salyzyn focuses on “Courtroom Technology Competence” in her contribution. She proposes this competence as an ethical duty of lawyers and provides strong arguments to support her claim that lawyers have an *ethical duty* to develop and maintain appropriate competence with respect to court technologies. Salyzyn’s perspective is an interesting one, not entertained in the other chapters presented here: she takes court technologies as a “given” and, rather than exploring their implementation or development, discusses the attendant responsibilities incumbent upon those who, on behalf of their clients, must use at least some of these technologies in the courtroom. At the same time, her contribution rests on a realization shared by the other contributors to this section: court technologies are complex, and their implementation will not have unreservedly positive effects on courts and court processes. In particular, she notes that litigators have a responsibility to understand the technologies used in the courtroom in order both to identify potential malfeasance by others, and to optimally use those same technologies themselves in order to represent their clients. Having made the case that competence is an ethical responsibility, she explores potential regulatory avenues, including the use of surveys/audits to examine current state of lawyer competence in these areas, the inclusion of technical competence in professional codes of conduct, and the development and implementation of professional-education initiatives designed to improve technical competence among practicing lawyers. Although Salyzyn does not directly address judicial competence in courtroom technologies in her submission, the same arguments apply to this group. Ultimately, Salyzyn’s chapter emphasizes the fact that courtroom technologies will alter the system

and process of justice, and actors in the justice system have a responsibility to understand both the technologies and their impact.

The final chapter in this section focuses on one specific technology—tablets—and examines the implications of that technology for one specific aspect of the judicial process—jury deliberation. In “Tablets in the Jury Room: Enhancing Performance while Undermining Fairness?,” Tait and Rossner take an empirical approach to the question of whether the use of tablets influences the process and outcome of jury review of evidence during deliberation. Their preliminary results—and note that this is only the first phase of a larger project examining the role of tablets in the jury room—raise the possibility that jury deliberation and indeed verdicts could be influenced by the use of tablets. Specifically, their results suggest that jurors using tablets engage in more vigorous debate than do jurors reviewing paper evidence, and are less likely to shift their initial opinion on the verdict as a result of group deliberation. Moreover, in these results, jurors using tablets are more likely to find the defendant “guilty” and they assign a higher likelihood of guilt to defendants. Taken together, these results suggest that the use of tablets for evidence review by juries does indeed alter the nature and outcome of jury deliberation, potentially increasing conflict or providing opportunity for open debate, and possibly increasing the influence of evidence on the jury decision. This latter point is particularly relevant since typically the *prosecution*, rather than the defense, presents the bulk of the evidence, the role of the defense being to respond to the presented evidence in order to create reasonable doubt. Thus, Tait and Rossner’s results suggest that the implementation of technologies coupled with long-established court practices could have unexpected, and potentially detrimental, effects on the fairness of the justice system.

Technological change is as inevitable in the justice system as it is in other aspects of society, and there is every reason to embrace the changes with enthusiasm. Technology can, and undoubtedly will, enhance access to justice—if we carefully and responsibly steward the process. We should not implement technological change on the unexamined premise that the effects will be as anticipated and unreservedly positive, but instead proceed with impact and outcome in view. Each of the authors in this section emphasizes this responsibility, and their collective message should be taken to heart by those implementing technological change in the justice system.

Notes

- 1 See Jane Bailey, Jacquelyn Burkell and Graham Reynolds, "Access to Justice for All: Towards an 'Expansive Vision' of Justice and Technology," *Windsor Yearbook of Access to Justice* 31:2 (2013) at 181.
- 2 Ibid.

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