

# Legal Information as Social Capital\*

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*Existing discussions of the value of legal information tend to focus either on its obvious value for individual practitioners and researchers, or on its value in enabling individual citizens to ensure that government behavior conforms with the requirements of formal written law. Not as widely recognized, however, is the way in which legal information can help foster that variety of horizontal collective initiative that is often referred to as social capital. One of the various mechanisms that can be used to produce social capital is shared knowledge, especially shared knowledge about government and its operations. Legal information, the written record of society's shared official efforts, can, if widely known, serve as the knowledge base for collective effort and thus as a causal agent for the development of social capital. The authors explore how this can happen and offer ideas on how the creation and distribution of legal information can be improved so as to enable it even more effectively to be a catalyst for the creation of social capital.*

¶1 It is in the very nature of law to be general. Laws, by definition, are not commands that are specific to person, place, time, and act;<sup>1</sup> but rather they apply to a multiplicity of people across different places and at different times and doing different things. Both law and the rule of law hinge, therefore, on the idea that different citizens with different goals and different situations will be subject to the same laws. Exceptions to laws abound, of course, and obviously all laws are limited as to their scope; but there remains something important about law that is captured by the fact that all drivers on a given stretch of road must drive at the same speed regardless of differences in driving skill, or that most of the requirements of the

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1. John Austin famously distinguished between general laws and specific commands. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 18–19 (Noonday Press 1954) (1832, 1863). Other discussions of the inherently general nature of law include LON L. FULLER, *THE MORALITY OF LAW* 46–49 (rev. ed. 1969); FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 251–77 (2003); ROBERT S. SUMMERS, *The Jurisprudence of Law's Form and Substance*, in *ESSAYS IN LEGAL THEORY* 188–91 (2000).

Securities Act of 1933<sup>2</sup> apply in the same way to vast categories of very diverse issuers of securities.

¶2 These preliminary observations are banal, but beneath the banality is the significant fact that law, by treating the unequal equally and the dissimilar similarly, possesses the capacity to serve an important community-creating function. Law not only applies to communities, but it has considerable power to create them; and law can be the vehicle by which the members of those communities share something in common. If law treats those who are different in undifferentiated fashion, then the law that does so is what those who are otherwise different now have in common. More importantly yet, the bonds that are created by shared legal status can be understood as a form of *social capital*, the mechanism of cooperation and coordination by which communities perform tasks that could not be performed, or could not be performed as well, by unconnected individuals acting atomistically. And even if shared legal status is not itself social capital, the cohesion that law can foster may well serve an important causal role in the creation of social capital.

¶3 Like other forms of coordination and cooperation, however, the formation of social capital requires the existence of shared information, for without a shared knowledge base the possibility of cooperation is virtually nonexistent. And so too with the social capital facilitated or created or constituted by law. For law to serve as the vehicle by which we coordinate with each other to serve collective goals, the content of the law must be known by those who engage in that cooperation. Legal information, therefore, and especially the legal information available to citizens and not just to legal professionals like lawyers and judges, can be seen to have an important but rarely appreciated function in facilitating the creation of social capital, and at times being itself a form of social capital. When governments—federal, state, and local—provide easy access to legal information, they are helping citizens not only to learn about the law, but also to further their common goals and strategies. And so too with various private sector and nonprofit organizations, which can further the development of social capital by facilitating access to official governmental and legal information, thus facilitating one of the mechanisms by which social cooperation and consequently social capital can be developed.

### The Idea of Social Capital

¶4 That cooperation and reciprocity are necessary conditions for a vast range of socially beneficial activities needs little explanation or justification. Whether it be the initiation of a volunteer fire department, the deployment of sandbags during a flood, the creation of a neighborhood watch system to fight crime, or the more complex cooperation and coordination necessary for a wide variety of economic activities, mutual interaction among citizens is often and even perhaps

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2. 15 U.S.C. §§ 77a–77aa (2000 & Supp. IV 2004).

necessarily the engine that drives social progress and produces public as well as private goods.

¶5 Yet although the necessity of cooperation and the existence of norms of reciprocity for the production of socially beneficial outcomes are close to self-evident, the method of creating the mechanisms and incentives for that cooperation is far less so, as is the way in which norms of reciprocity come to be established. This is where the concept of social capital comes in, for social capital is not the idea of cooperation, nor is it the principle of reciprocity, but it is rather the preexistence of human resources and institutions—hence “capital”—that will facilitate this cooperation and reciprocity.<sup>3</sup> So, when Robert Putnam identified the existence of such civic traditions as choral societies and soccer clubs in Italian towns as being genuinely causal of economic progress,<sup>4</sup> the point was not about the cooperation necessary for a choral society or similar organization to exist and, of course, was not at all about any direct causal relation between the activity of singing and temporally subsequent economic activity. Rather, Putnam’s data showed that the cooperation necessary to create a choir, for example, not only produces singing, but also creates an institution of coordination, as well as reflecting and reinforcing norms of cooperation and reciprocity that then become available as capital to foster cooperative activity other than singing itself. Similarly, the research about Native American constitution making by Joseph Kalt and his collaborators has identified a causal relationship between tribal constitution making (as opposed to adopting “off the shelf” a standard issue boilerplate constitution written by the Bureau of Indian Affairs<sup>5</sup>) and economic development.<sup>6</sup> Once again, the nature of the causal relationship is not one between constitutions as constitutions and economic activity. Rather, Kalt’s research undergirds the conclusion that the cooperative and coordinated activity necessary to create a constitution, cooperative activity that is not necessary if the tribe simply adopts an off-the-rack constitution from the Bureau of Indian Affairs, tends to create institutions and habits of cooperation that are then available for *other* purposes, in particular the fostering of community-based economic activity.<sup>7</sup>

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3. For general surveys of the idea of social capital, see GEORGE C. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* 378–98 (1961); James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 *AM. J. SOC. (SUPP.)* S95 (1988); Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 *ANN. REV. SOC.* 1 (1998); Michael Woolcock, *Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework*, 27 *THEORY & SOC’Y* 151 (1998).
  4. See ROBERT D. PUTNAM ET AL., *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 162–85 (1993). Putnam’s later and more popularly well-known book, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000), builds on many of the same themes and applies Putnam’s earlier work on Italy in the context of the United States.
  5. See Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–79 (2000).
  6. See Joseph P. Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS* 184 (Eric Lemont ed., 2006).
  7. See generally Stephen Cornell & Joseph P. Kalt, *Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache*, 33 *ECON. INQUIRY* 402 (1995).

¶6 Phenomena as diverse as Italian choirs and Native American constitutional conventions thus represent typical examples of the creation of social capital. As institutions of civic cooperation and coordination, they stand available to promote forms of cooperation and coordination *other* than the ones that prompted their initial existence. Social capital, then, can be understood as the capital represented by institutions, habits, and norms of coordination, cooperation, and reciprocity. A recurring task of political and economic development is to strive to create just these institutions, habits, and norms so that they will be available to support a panoply of socially beneficial activities.

### Legal Information and the Creation of Social Capital

¶7 As observed earlier, law is by its nature general. By being general, law contains the capacity to regulate divergent behaviors in parallel ways, to create similar possibilities for different motives, and in doing so to constitute a genuinely collective part of human existence. It is the very generality of law that gives it its commonality, and the commonality of law can itself, like choral societies and constitutional conventions, contain the potential to be the vehicle for the creation of social capital.

¶8 Law itself can create social capital in (at least) two different ways. One, of less concern for us in this article, is the way in which the substance of the law may force otherwise diverse people into having a common situation, common problems, and common goals. When groups as diverse as the American Civil Liberties Union,<sup>8</sup> the United States Chamber of Commerce,<sup>9</sup> the Cato Institute,<sup>10</sup> Wisconsin Right to Life, and the AFL-CIO<sup>11</sup> join together to oppose restrictions on campaign spending and campaign advertising, for example, they do so in part because the First Amendment casts their lot together and gives them all a shared opportunity for First Amendment-grounded opposition to such restrictions and various other aspects of campaign finance reform. Indeed, as this example shows, the very practice of filing amicus briefs may often join together those with otherwise diverse agendas and ideologies. Similar forms of law-fostered cohesion exist even in such everyday procedural devices as the class action and in substantive legal principles with far grander aspirations. So, too, when the Americans with Disabilities Act<sup>12</sup>

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8. See Brief Amicus Curiae of the American Civil Liberties Union in Support of Appellant, *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 546 U.S. 410 (2006) (No. 04-1581), 2005 WL 3067184.

9. See Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Appellant, *Wis. Right to Life*, 546 U.S. 410 (No. 04-1581), 2005 WL 3076075.

10. See Brief Amici Curiae of the Center for Competitive Politics et al. in Support of Appellant, *Wis. Right to Life*, 546 U.S. 410 (No. 04-1581), 2005 WL 3087269.

11. See Brief Amicus Curiae of the American Federation of Labor and Congress of Industrial Organizations in Support of Appellant, *Wis. Right to Life*, 546 U.S. 410 (No. 04-1581), 2005 WL 3076074.

12. 42 U.S.C. §§ 12101–12213 (2000).

creates common ground for otherwise diverse disabled people, and when the law as well as the rhetoric of equality and antidiscrimination create a community of interests (and possibly simply a community) among women, racial and ethnic minorities, the disabled, the elderly, gays and lesbians, and many others who see themselves as under the same umbrella of the encompassing legal concept of legal protection.<sup>13</sup>

¶9 Law's ability to create community and cooperation among otherwise diverse citizens is of course facilitated by information about the law, for only with that information can people know the identities of their allies and of the members of their law-created communities. But the ability of legal information to create social capital can in fact be more direct, and it is this second way to which we refer. More specifically, information about the law that is available to the public, especially in direct (primary) form, can provide a platform for discussion and debate that makes it clear to all of those who are discussing and debating that they are involved in a common enterprise.

¶10 The history of the creation of the current constitution of the Republic of South Africa<sup>14</sup> provides an excellent example of this phenomenon. Starting in 1993, South Africa embarked on the dramatic post-apartheid governmental, political, and constitutional transformation that created the South Africa of today. The writing of a new constitution was one of the most visible and important parts of this transformation, but the public nature of this process is often forgotten.<sup>15</sup> In dramatic contrast with the Constitution of the United States, written behind closed doors by fifty-five men sworn to secrecy and prohibited from taking any written notes out of Independence Hall, and in equally dramatic contrast to the recently proposed constitution for the European Union, the defeat of which in France was blamed by its principal drafter and promoter (Valéry Giscard d'Estaing) in part on the fact that French voters were actually sent the text of the document on which they were to vote,<sup>16</sup> the constitution of South Africa was the product of a highly public and publicly engaged process.<sup>17</sup> This process not only involved numerous subject-specific "theme" committees which worked and drafted in public session, and not only relied on a constitutional assembly of 490 members whose proceedings were fully open to the public, but also, and most importantly for our purposes, was a process that actively engaged the public in deliberations and debate about

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13. On the ability of rights in particular and law in general to serve this community-creating function, see Frederick Schauer, *The Generality of Rights*, 6 LEGAL THEORY 323 (2000).
  14. S. AFR. CONST. 1996.
  15. See SARAS JAGWANTH, DEMOCRACY, CIVIL SOCIETY AND THE SOUTH AFRICAN CONSTITUTION: SOME CHALLENGES 7–10 (Management of Social Transformation Discussion Paper No. 65, 2003), available at <http://unesdoc.unesco.org/images/0012/001295/129557e.pdf>.
  16. Elaine Sciolino, *EU Leader Lays Blame on Chirac*, INT'L HERALD TRIB., June 16, 2005, at 5. Given that the document was 485 pages long, Mssr. Giscard d'Estaing did have a point.
  17. See Christina Murray, *Negotiating Beyond Deadlock: From the Constitutional Assembly to the Courts*, in THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW 103 (Penelope Andrews & Stephen Ellman eds., 2001).

the particular *text* of the document. A biweekly newsletter titled “Constitutional Talk,” published by the Constitutional Assembly and widely distributed as a newspaper supplement and by other means, exposed the public to particular proposed wordings of the document and debates about the purposes and desirability of those wordings. Weekly or biweekly television and radio talk shows with the same title did much the same. There were also Internet sites and numerous other forms of outreach, all of which placed the text of the primary document at center stage. A significant consequence of this was that the people of South Africa not only had a pretty good idea of what the debates were about and which were the important parts of the text, but they also became engaged in discussions and debates whose focal point was a *common* text. South Africans came to understand that they would *all* be governed by the same text, and thus seemed to understand as well that the final text would be something they all shared and in whose creation they were all involved. As with the constitution making among American native nations analyzed by Kalt, constitution making in South Africa was a genuinely cooperative, and thus social capital-creating, enterprise. It is far from implausible to suppose that the degree of information about the process and its product provided to the public had much to do with this outcome.

¶11 The example of South Africa thus makes it possible to formulate our claim more crisply. We hypothesize<sup>18</sup> that public awareness of general laws whose applicability and actual effect encompasses otherwise diverse citizens can lead those citizens to become more engaged in cooperative discussions about the substance of those laws than would be the case without that awareness (or with less awareness). They also are more likely to see themselves as part of the same community as the others who are engaged in the discussions and who are governed by the same laws than would be the case with less legal awareness. Moreover, we hypothesize that this cooperation-creating dynamic is greater when citizens are aware of the actual texts of the laws than when they are not. Thus, we believe that public awareness of the texts of laws may have some causal effect on the incidence and effectiveness of institutions of and inclinations toward social cooperation, coordination, and reciprocity. If this is so, then legal information may serve a function not dissimilar to that served by Italian choirs and American bowling leagues in Putnam’s examples, and by constitution making in Kalt’s. Legal information, especially legal information available to the public in “raw” form, may thus, we hypothesize, be a significant driver of the creation of the norms, habits, networks, and institutions of coordination, cooperation, and reciprocity that collectively go by the name of social capital.

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18. We should make clear, first, that our claims are substantially empirical, and, second, that these empirical claims are best understood as hypotheses subject to empirical testing. Unlike too much of the legal academy, we try to take care not to confuse intuitions, hunches, suspicions, and anecdotes with data, but we do believe that intuitions and anecdotes, especially, can provide the fodder for the formulation of serious testable hypotheses, and doing just that is how we understand the enterprise represented by this article.

### The Importance of Primary Information

¶12 There is an alternative to our hypothesis that the public availability of primary legal information will increase the ability of law to create social capital by virtue of its generality. And this alternative is the hypothesis that although information *about* law may well serve the social capital-creating function, there is no reason to suppose that the effect is increased when the information is primary rather than secondary. In other words, public discussion *about* the law may well be causally related to social capital production, but there is no reason to suppose that public knowledge of (or discussion about) the details or texts of *actual* laws will have any effect on the degree of social capital formation.<sup>19</sup>

¶13 Yet, although this alternative hypothesis is far from implausible, it appears to ignore the way in which secondary information, when standing alone, is especially likely to be the vehicle for heightening preexisting divisions rather than lessening them.<sup>20</sup> The popular term for this phenomenon is “spin,” but the basic point is that in the absence of primary information held by the audience—voters, citizens, etc.—information about the law will be presented by advocates and other interested parties in ways that are consistent with the beliefs, goals, and agendas of those interested parties. And in the absence of easy public access to the primary information, the audience may likely—and this is again a hypothesis, subject in theory to testing—see disputes about the law as just another example of the ever more divisive, acrimonious, and noncooperative partisan, political, and ideological debate that increasingly characterizes and plagues modern American political life.

¶14 A recent and contentious issue in Massachusetts illustrates the point. On November 9, 2006, the Massachusetts legislature (technically and confusingly called the Great and General Court) was presented with a petition containing 170,000 signatures that sought to amend the Massachusetts Constitution in order to prohibit same-sex marriage, an amendment designed to overturn the rulings—both based on the Massachusetts Constitution—in *Goodridge v. Department of Public Health*<sup>21</sup> and *Opinions of the Justices to the Senate*.<sup>22</sup> Proponents of the proposed amendment argued that putting it on the ballot was mandatory under article 48 of the Massachusetts Constitution,<sup>23</sup> while the opponents claimed that such issues of individual rights should not be subject to popular referendum. Against the background of this debate, the legislature adjourned by a vote of 109 to 87 without explicitly taking a vote on the actual question of putting the proposed amendment

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19. Or perhaps that it might have a negative effect, arguably by making the issues more technical and less accessible to the general public.

20. In this context we use the term “secondary” to refer not to secondary technical legal sources like treatises, legal encyclopedias, and law review articles, but instead to descriptions of the law by engaged advocates or by commentators with a particular point of view.

21. 798 N.E.2d 941 (Mass. 2003).

22. 802 N.E.2d 565 (Mass. 2004).

23. MASS. CONST. amend. art. XLVIII. (Article 48 was adopted in 1918).

on the ballot,<sup>24</sup> a course of action that proponents claimed again violated the plain words of the Massachusetts Constitution and opponents argued was both constitutionally permissible and compelled by moral principles of gay and lesbian rights in particular and moral rights in general.

¶15 For our purposes, the most interesting thing about this controversy was in the way it was covered in the press. In the *New York Times*, widely understood as the nation's "paper of record," there was an extensive report, replete with ample sound bites from both sides of the debate, but at no place did the *Times* quote, explain, or even describe the constitutional provision whose terms were at the center of the controversy.<sup>25</sup> For the *Times*, this was a dispute about the politics and advocacy of gay rights and not about the law as law, and thus the actual primary legal provision that lay at the center of the controversy, article 48, was totally ignored. So too in the *Boston Globe*, the most serious daily newspaper in Massachusetts, which also translated a legal dispute into a purely political one, said virtually nothing about the relevant law, and certainly did not think it at all necessary to provide its readers with a description or explanation or even a portion of the text of the pertinent constitutional provision.<sup>26</sup>

¶16 This neglect of primary legal information by even the so-called elite press should come as little surprise. As is well documented,<sup>27</sup> the press displays a strong preference for the horse race and competitive dimensions of policy, politics, and elections, and thus tends to concentrate in its coverage on issues that have a strong dimension of conflict, and on the conflictual dimensions of issues that have both conflictual and nonconflictual elements. It follows from this that the press would have a relative lack of interest in those primary materials that are not themselves (except in the case of judicial opinions, but certainly not for the provisions of constitutions, statutes, or regulations) intrinsically conflictual, but which often provide the basis for actual legal conflict.

¶17 This tendency of the press to ignore, and certainly to refrain from providing, primary legal information is, especially in the United States, hardly a recent phenomenon. Although the elite press in the United Kingdom and in other com-

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24. Journal of the Mass. Senate in Joint Session (Nov. 9, 2006), available at <http://www.mass.gov/legis/journal/jsj110906.htm> (reporting result of Senate Yeas and Nays No. 681 & House Yeas and Nays No. 909, vote on question of recessing joint session). In the wake of an intervening decision in late December 2006 by the Massachusetts Supreme Judicial Court, making clear (but not ordering) that taking a vote was required by the Massachusetts Constitution, *Doyle v. Sec'y of Commonwealth*, 858 N.E.2d 1090 (Mass. 2006), the legislature on Jan. 2, 2007, by a vote of 62 for and 134 against (50 being required), advanced the measure to the next legislative session.

25. Pam Belluck, *Massachusetts Effort to End Same-Sex Marriage is Dead for Now*, N.Y. TIMES, Nov. 10, 2006, at A16.

26. Andrea Estes & Scott Helman, *Legislature Again Blocks Bid to Ban Gay Marriage*, BOSTON GLOBE, Nov. 10, 2006, at 1A. The same lack of any reference to the actual constitutional provisions, or even descriptions of them, can be found in the report of the subsequent legislative action. See *supra* note 24; Frank Phillips & Lisa Wangsness, *Same-Sex Marriage Ban Advances*, BOSTON GLOBE, Jan. 3, 2007, at A1.

27. See, e.g., THOMAS PATTERSON, *OUT OF ORDER* 78 (1993).

mon law countries has traditionally liberally published the primary tests of many judicial opinions and, occasionally, even statutes and regulations, such a practice is largely absent in the United States, with the exception of the comparatively recent tendency of the *New York Times* to publish generous portions of the text of important U.S. Supreme Court decisions. To the extent that judicial decisions are noticed at all,<sup>28</sup> they are noticed as outcomes, with there being much less of a tradition of thinking that even public-minded citizens might want to see the primary legal texts themselves in the United States than elsewhere in the common law world.

¶18 Nor is there any significant likelihood of a change in this state of affairs. Indeed, were there to be a change, it would much more likely be in the direction of the traditional press providing less rather than more primary legal information. As American newspapers lose their advertising base, partly because of the decline of the downtown department store but mostly because of the loss of classified advertising to online outlets and various sources of free advertising, they struggle to make themselves increasingly attractive to mass audiences by providing more and more immediately practical information about health and consumer products, for example, and less and less hard news.<sup>29</sup> Given this situation, the possibility that the American print and even mainstream online press will see any economic benefits to providing an increased amount of primary legal information to the citizenry is less than remote. If there is to be a strategy for providing primary legal materials to large numbers of citizens, doing so through traditional print news outlets seems hardly worth considering seriously.

### Primary Legal Information and Its Providers

¶19 Let us recapitulate. We hypothesize that law itself may have valuable community-building functions because of its generality, and we hypothesize further that direct public access to primary legal information might serve important social-capital-creating functions by providing a common focal point for political and policy debate, thus encouraging citizens to see themselves more as part of a common and public-value-producing enterprise and less as partisan adherents to one or another warring faction. To the extent that this is so, then the provision of primary legal

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28. And they tend to be noticed far less than legal insiders typically believe. See generally Frederick Schauer, *The Supreme Court, 2005 Term: Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4 (2006). On the other hand, it may be unduly pessimistic to believe that this state of affairs is unchangeable. When the Cornell Legal Information Institute posted the full texts of U.S. Supreme Court opinions on the Internet, there was widespread usage, and not from legal professionals, who already had such access through LexisNexis and Westlaw, but from journalists, students, and other members of the public, for all of whom the Cornell site was providing new and widely desired information.

29. It is only a slight exaggeration to note that a prominent report on the future of newspapers has urged that newspapers assure their long-term survival by getting out of the news business. See AM. PRESS INST., *NEWSPAPER NEXT: BLUEPRINT FOR TRANSFORMATION* (2006), available at <http://www.papernext.org/N2%20report.pdf>.

information may consequently foster the development of those networks of coordination, cooperation, and reciprocity that lie at the heart of the idea of social capital. And insofar as *this* is so, then we might expect, all other things being equal, that societies that have more direct citizen access to primary legal (and governmental) information will have more social capital available for general welfare-enhancing purposes than societies that have less direct citizen access to (and use of) such material. Some or all of this multipart hypothesis may be false, but the hypothesis seems plausible enough to make it worth considering its implications were it to be true, and that is our focus here.

¶20 If the hypothesis is true, and thus if the increased provision to ordinary citizens of primary legal information can serve socially valuable purposes, then the discussion turns to the issues of just who is to provide such information and how it is to be provided. We have already considered the most obvious possibility—that such information will be provided by the same traditional print press that provides us with much of our news, weather, stock market reports, and batting averages—and have found that such an expectation was never a realistic one in the past and is an increasingly unrealistic one now.

¶21 If the press is an unlikely candidate for this role, then how might such primary legal information be provided to the public? One possibility is that the government itself will do so, an approach entirely consistent with legal information likely being an example of a classic public good—something that it would be good for society at large to have provided, but for which because of the nonexcludable and nonrival aspects of the good there is little economic incentive for people to purchase it, and thus little economic incentive for providers to provide it. Lighthouses, national defense, environmental quality, public health programs, traffic signals, street lights, and law enforcement are among the traditional examples, and it is quite possible that legal information should be seen in the same way.<sup>30</sup> If widespread information about the law is a good thing, and if people are unwilling to pay for it because they can free ride on others, then there will be little incentive for private information providers to provide that information, and the consequence will be that the public good of legal information will be systematically under-provided. In such cases, the most obvious solution is to think that providing public goods is among the central functions of government, with government stepping in to provide that which is publicly necessary or desirable when there is no economic model under which it will be provided nongovernmentally. Accordingly, it may be natural to suppose that government would provide legal information to the public just as and for the same reasons it provides defense, police protection, and streetlights to the public.

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30. See generally GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul et al. eds., 1999); JOHN O. LEDYARD, PUBLIC GOODS: A SURVEY OF EXPERIMENTAL RESEARCH (1993); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971); ELINOR OSTROM, GOVERNING THE COMMONS (1990); R.H. Coase, *The Lighthouse in Economics*, 17 J. L. & ECON. 357 (1974); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

¶22 Historically, the federal government has had a strong tradition both of initiating and of disseminating legal information. Early in the history of the Republic, the federal government established the Government Printing Office. And through early publication of congressional activity in the *Annals of Congress* (1789–1824) and *Congressional Globe* (1833–73), the government started a long tradition of governmental facilitation of citizen access to knowledge about the workings of government. When, in *Wheaton v. Peters*,<sup>31</sup> the Supreme Court denied copyright to court decisions, it set in motion the practice by which the government not only does not claim copyright in court decisions, but also does not do so for statutes, regulations, and most other government-produced information, a strategy that has allowed both public and private dissemination of legal information to flourish. And the same tradition of encouraging access has led to the establishment and support of a pervasive system of government depository libraries devoted to the distribution of federal governmental and legal information.

¶23 This trend of proactive federal governmental involvement in making available governmental information has continued. In the 1970s, statutes like the Freedom of Information Act<sup>32</sup> and the Federal Advisory Committee Act<sup>33</sup> dramatically opened access to government information, a trend that has continued through the Internet age as a result of citizen pressure and interesting coalitions like that between Newt Gingrich and Al Gore, neither of whom invented the Internet but both of whom have been active users and promoters of it.

¶24 Although the federal government's record of providing direct citizen access to governmental and legal information has been good, the record of state and local government has been less so. States do, of course, provide access to statutes and court decisions, but they have been less proactive than the federal government in actively initiating and encouraging access. Local governments have been quite poor at distributing legal information to citizens, an ironic example of the fact that the more likely a law is to affect someone's daily life, the less likely it is to be published. We can easily locate the federal regulations governing the possession and transmission of nuclear fissionable material, but it is far more difficult to locate and access the parking ordinances for the city of Cambridge, Massachusetts.

¶25 That government, especially the federal government, has been effective at providing primary legal information to the public does not mean that more could not be done.<sup>34</sup> Although Web sites like BBC Online ([www.bbc.co.uk](http://www.bbc.co.uk)) in the United

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31. 33 U.S. (8 Pet.) 591 (1834).

32. 5 U.S.C. § 552 (2000).

33. 5 U.S.C. app. §§ 1–16 (2000).

34. An interesting development is the [regulations.gov](http://www.regulations.gov) Web site ([www.regulations.gov/fdmspublic/component/main](http://www.regulations.gov/fdmspublic/component/main)), which allows citizens quickly to identify and comment on proposed federal regulations without having to master all of the intricacies of the *Federal Register*. As Ethan Katsh and Beth Noveck note, government has yet to identify effective ways to handle the increase in citizen input that initiatives like this may produce, but they are surely right that technology may help solve this problem as well. See generally Ethan Katsh & Beth Noveck, *Peer to Peer Meets the World of Legal Information: Encountering a New Paradigm*, 99 LAW LIBR. J. 365, 2007 LAW LIBR. J. 20.

Kingdom are highly effective in making available to the population at large a vast range of primary governmental information, including legal information, an equivalently pervasive American counterpart has yet to come into being. Part of the explanation for this disparity is plainly that there is no American counterpart to the BBC or to the public broadcasters in other countries. In the United States, unlike virtually every other country in the world, private broadcasting has traditionally been the norm, with public broadcasting being a niche market afterthought. Consequently, there has never been a strong American tradition of understanding that government broadcasting or press-like publication may play a significant role in informing the citizenry about matters of public concern, including matters relating to the law. Another part of the explanation for the disparity between the United States and some other parts of the developed world, not unrelated to the previous explanation, is that in the United States there is also some tradition of believing that legal information is something to be provided to lawyers and other legal system professionals, but not as much in raw form to the population at large.<sup>35</sup> As a result, even sophisticated government legal databases like the Library of Congress's THOMAS (<http://thomas.loc.gov>) have traditionally not seen the public as their primary audience or constituency, although there is no reason to believe that this cannot or will not change.<sup>36</sup>

¶26 In the United States, of course, the provision of legal information to professionals has been performed not primarily by the government, but by private for-profit enterprises such as the West Publishing Company, LexisNexis, Lawyers' Co-operative Publishing Company, Michie, Aspen, Commerce Clearing House, BNA, and a considerable number of others. Even now, when a significant part of the business of publishing primary legal materials has turned from print to online, and when mergers, acquisitions, and consolidations have virtually eliminated the exclusively legal publishers or made them mere components of vast and diverse multinational information conglomerates like Thomson and Reed Elsevier, it is still the case that most legal publishing in the United States is nongovernmental.

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35. It is interesting to speculate—and here we can do no more than that—on the relationship between the tradition of understanding legal information as something to be provided to legal professionals and some of the traditional features of the common law. One can go to a newsstand in Santiago, Chile, for example, and purchase a copy of the most important laws (we have done so), but it would be bizarre to suppose that this could happen in a common law country. To Jeremy Bentham's famous anger (see GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 425–26 (1986)), the common law, in theory, is more dependent on lawyers to translate and interpret a mass of judicial decisions for laypeople than is the civil law, which, again in theory, can make the code available to the citizens in a form in which translation and interpretation by lawyers is less necessary. These theoretical differences are often frustrated or diminished in practice, but it may still be that a system like the common law that sees judges as central lawmakers is less amenable to providing primary legal information to the public than is one like the civil law that sees a coherent code as the central legal item.
36. The legislative page of the Lyme Disease Foundation ([www.lyme.org/legislative/legislative.html](http://www.lyme.org/legislative/legislative.html)) makes specific reference to THOMAS, thus supporting the view that there can be a close connection between government-provided legal information and interest group participation. See also Home Sch. Legal Defense Ass'n, State Laws, <http://www.hslda.org/laws/default.asp> (last visited Jan. 20, 2007) (fifty-state survey of home schooling statutes).

¶27 This tradition of nongovernmental publication of primary legal materials (or “raw law,” as Bob Berring has been known to call it) began to flourish in the late nineteenth and early twentieth centuries, when companies like West, Lawyers Co-op, and Commerce Clearing House took public domain information and edited, indexed, packaged, and marketed it for a targeted (and well-paying) audience of legal and business professionals who could support the creation of this “refined” product. But one consequence of targeting such a small audience was that little of this information was available to ordinary citizens. Only the most adventurous would go to government depositories or public libraries to get information that was far more easily available to legal professionals in the commercial products. And when they did seek out legal information, these citizens would often be frustrated by the “I cannot give you legal advice” mantra commonly employed by librarians, one consequence of which was that legal information was often more easily available to the incarcerated<sup>37</sup> than to those who would simply walk into a public library.<sup>38</sup>

¶28 The dominance of nongovernmental for-profit legal publishing in the United States has produced both consequences and controversy. In the 1980s and 1990s, the private publishers vigorously protected their copyright claims in legal materials against “upstart” publishers trying to enter the market.<sup>39</sup> But the mid-1990s brought significant developments. On September 2, 1994, then-Attorney General Janet Reno announced that the Justice Department was “exploring ways to improve public access to court opinions to make legal research more affordable.”<sup>40</sup> A month later, LexisNexis was sold to the Dutch company Reed-Elsevier. In February 1995, the West Publishing Company attempted to control public access to legal information by inserting a provision in the Paperwork Reduction Act that would have protected “any right to data produced when a private company adds value” to government information. Due to efforts by law librarians and by Jamie Love and the Taxpayer Assets Project, the attempt was defeated,<sup>41</sup> and by summer

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37. See *Bounds v. Smith*, 430 U.S. 817 (1977).

38. For an example of a positive change in the way that libraries are providing primary legal information, see the Seattle Pub. Library, Municipal Codes Online, [http://www.spl.org/default.asp?pageID=collection\\_municodes](http://www.spl.org/default.asp?pageID=collection_municodes) (last visited Jan. 20, 2007) (providing links to city and county codes available for unrestricted searching on the World Wide Web). This is one more example of the fact that municipal law was virtually inaccessible until Internet publishing made dissemination of such materials cost-effective.

39. See *Matthew Bender & Co. v. West Publ'g Co.*, 153 F.3d 693 (2d Cir. 1998); *Matthew Bender & Co. v. West Publ'g Co.*, 240 F.3d 116 (2d Cir. 2001). Some of these efforts were political and legislative rather than litigation. See Mark Hansen, *A Question of Influence: Critics See Dividends in Political Contributions by Former Publisher*, A.B.A. J., June 1997, at 36.

40. Laura Duncan, *Public Domain Legal Research System “Unneeded”: Publishers*, 140 CHI. DAILY L. BULL., Sept. 20, 1994, at 1.

41. See Benjamin Wittes, *West Loses Round in Cite Fight*, LEGAL TIMES, Feb. 20, 1995, at 5. See also Joel Howard Cheskis, *Copyright of Legal Materials from Wheaton to West—Shaping the Practice of Law in America*, COMM. & L., Sept. 1998, at 1; Emon H. Jarrah, Comment, *Victory for the Public: West Publishing Loses its Copyright Battle over Star Pagination and Compilation Elements*, 25 U. DAYTON L. REV. 163 (1999); Richard A. Leiter, *Assault on the Citadel: Romancing the Crown Jewels of West Publishing*, LEGAL INFO. ALERT, Jan. 1995, at 1.

1995 the O.J. Simpson trial had increased Americans' desire for direct legal information. When West merged with the Canadian company Thomson in February 1996, the argument of American legal publishers that protecting American legal information in international trade rang far more hollow. As a consequence of these developments, by 2007 it had become clear that LexisNexis and Westlaw could both flourish in ways that are not inconsistent with vendor-neutral, medium-neutral citation,<sup>42</sup> nor with the rise of a well-entrenched American constituency for primary legal information unimpeded by private monopolies of that information.

¶29 Although publishing primary legal materials for use by the public can have a significant positive effect on the creation of social capital, it is a classic public good whose socially beneficial aspects cannot adequately be supported by a private enterprise model. As a result, the optimal provision of primary legal information to the public requires publishing of legal information by the government as well as by private publishers. And insofar as increased publication for the public by private publishers could supplement government publication or relieve pressure on government to publish in this form, this could occur either by the development of a business model that makes providing legal information to the citizenry profitable,<sup>43</sup> or by private publishers deciding (or being persuaded or compelled) to provide such information at a loss (or, more accurately, at a smaller profit than they would reap from alternative uses of the same resources) as a civic good or as part of their commitment to corporate social responsibility.

¶30 All of these approaches have demonstrated promise, but they also have risks. For government to dramatically change its scale of legal publication would require the institutions of government legal publishing to take a much broader conception of their mission than they now have, at taxpayer expense. Although taxpayers have traditionally seen the need for government provision of public goods like lighthouses and fire departments and street lights and even environmental quality, they have been less convinced of the necessity of public support for things like museums, symphonies, and even libraries. As long as this political and taxpayer reluctance continues, it will be far from clear that a major expansion of the government's already-considerable amount of legal publishing is a feasible alternative for the foreseeable future.

¶31 So too is the development of a successful business model for the private provision of primary legal information to the public at large. As the interrelated recording, publishing, and entertainment worlds are now discovering, it is hardly certain that there is a viable business model for the sale of easily reproduced infor-

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42. See Peter C. Martin, *Neutral Citation, Court Web Sites, and Access to Authoritative Case Law*, 99 LAW LIBR. J. 329, 334, 2007 LAW LIBR. J. 19, ¶ 8.

43. It is a staple of libertarian arguments that public goods might with some creativity be more easily provided under a private enterprise model than is typically supposed. See, e.g., Daniel Klein, *Tie-Ins and the Market Provision of Public Goods*, 10 HARV. J. L. & PUB. POL. 451 (1987).

mation even with the protection of copyright and products that the public actively desires. If this is so, then the possibility of there being a viable business model for providing to the public primary legal information that its members may not actively desire (except perhaps at a very low and not economically viable) price, and without the benefit of copyright protection, is even less likely.<sup>44</sup>

¶32 It may be, therefore, that the solution is a combination of somewhat increased governmental dissemination of primary legal information and private legal publishers providing increased legal information to the public even if it is not in their best economic and business interests to do so. We have seen some shift in the behavior of large and highly visible enterprises like Levi Strauss, Coca-Cola, Wal-Mart, and Starbucks toward seemingly more public-spirited corporate practices,<sup>45</sup> but such so-called corporate social responsibility seems much more like a response to diverse consumer preferences and to the possibility of involuntary government control than it is an expression of genuine corporate altruism. As a result, the changes that have occurred in such visible multinationals may be less likely with respect to the providers of primary legal information. It is obvious, of course, that Thomson West and Reed-Elsevier occupy very different places in the minds of the public and political figures than do companies such as Coca-Cola and Wal-Mart. It is hardly evident that the kinds of social pressures that might work for the latter will be effective for the former.

¶33 In the final analysis, therefore, it is not at all apparent that there is a clear path to a large-scale increase in the provision to the public of primary legal information, whether by government or by the traditional private providers of legal information. Consequently, it is far from evident that there is a clear path to the effective use of legal information in the creation of social capital, even though the hypothesis that legal information could serve this function seems likely to be true. As a public good, primary legal information is likely to be under-provided absent nonmarket intervention, and at the moment all of the prospects for greatly increased nonmarket provision of what the market will under-provide seem beset with substantial practical, political, and economic obstacles. Fortunately, however, there is already a high enough level of such provision, especially from the government (and a strong enough tradition of such provision), that even the small likelihood of great increases leaves a moderately optimistic scenario.

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44. But not impossible. Credit card access to the Westlaw and LexisNexis systems is an example of an experiment toward such a business model for profitable provision of legal information to the general public, as are the undergraduate-focused LexisNexis Academic product and low-cost legal research services such as Versuslaw (<http://versuslaw.com>) and Loislaw (<http://loislaw.com>).

45. For a gateway into the voluminous literature on corporate social responsibility, including those of the companies noted here, see CSRwire, <http://csrwire.com> (last visited Jan. 25, 2007); Wash. Council on Int'l Trade, Online Sources of Information on Corporate Social Responsibility, [http://www.wcit.org/topics/csr/csr\\_online\\_resources.htm](http://www.wcit.org/topics/csr/csr_online_resources.htm) (last visited Jan. 25, 2007).

### **Conclusion: Toward Progress at the Margins**

¶34 This article was written for a symposium conceived as a way to honor the writings of Bob Berring. There are numerous reasons for honoring Berring, but one of them is that throughout a long and distinguished career he has remained concerned with the importance of legal information for purposes broader than just providing to lawyers and judges the information they and other legal system professionals need to perform their professional tasks. There are many such broader purposes, but one of them, and one that Bob Berring has stressed repeatedly in teaching, writing, and in his role as prominent spokesperson for law librarianship and the world of legal information, is the role that legal information can serve in connecting the citizenry to the world of the law.

¶35 We believe that connecting the public to the world of law is crucial, but it has a horizontal as well as a vertical aspect. To the extent that law is out there, up there, or down there, then legal information can provide citizens with information necessary to function individually and as citizens of a democratic society. But in addition to this function, which can be thought of as vertical in the sense that law occupies a different level or space than that occupied by citizens, there is another for which the best spatial metaphor is significantly more horizontal. As we have emphasized here, law and legal information can connect citizens with each other as well as to the law itself. To the extent that law helps citizens connect to and with each other, it can play an important role in the creation of the social capital that in turn can ground a large number of socially beneficial activities that are not themselves closely connected with the law or the legal system. Like the relationship between Putnam's Italian choirs and economic progress, law and legal information can assist activities having not much more to do with the law than economics has to do with choirs.

¶36 Yet, although this potential role for legal information seems to exist, it turns out that providing primary legal information to nonprofessionals in a way that will enable it to have substantial social-capital-creating effects must surmount a host of formidable political, sociological, and economic obstacles. Some of these have been surmounted, and that is why our final conclusions are more optimistic than pessimistic. Although the prospects for dramatic increases may not be especially promising, that does not mean that the current state of affairs is to be lamented, or that no changes are possible. Helping legal information to assist in the further creation of social capital will require marginal changes, which can be made in both the public and the private sectors. In the public sector, these changes can make primary legal information more and more easily available in public libraries, more and more easily available in schools, more and more easily available in widely used Web sites, and more and more easily available in print and electronic versions. And in the private sector, appropriate professional and social pressures may encourage those legal publishers whose business is so dependent on publicly produced information to devote more of their energies to serving the public directly, even if this comes at some cost to their short-term profit maximization.

¶37 Such marginal changes may have only a small immediate or even medium-term effect on increases in social capital formation. But once we recognize that legal information, especially primary legal information, can provide just the kind of focal point that is necessary for coordinated public action,<sup>46</sup> we can see primary legal information in a new light. And perhaps this new light will itself enable the larger public to support providing legal information just as they are willing to support a host of other public goods. We have traditionally seen law as a public good. The court system, after all, is not and could not be designed on a private enterprise model. But when it comes to the information that is generated by the courts and other law-making bodies, the public good model has yet to strongly take hold. As the world of information changes, largely as a result of economic and technological changes, perhaps now is the time to imagine and promote changes in how (and why) we conceive and support legal information as well. Obviously, there are issues to be confronted regarding the currency, accuracy, comprehensiveness, and citation practices of direct public access to primary legal information, something that might more pejoratively be called self-help legal information. But potential problems at the margins should not diminish our central point about the way in which citizen access to and exchange of legal information can be part of a network of instruments for fostering social cooperation and creating social capital. There is no reason to believe that leaving the dissemination of legal information by legal publishers to the traditional technocracy of lawyers, judges, and libraries will become less viable in the future, but there is also no reason to believe that the dissemination of legal information cannot serve larger, deeper, and even more important social and public purposes.

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46. On the importance of focal points for coordinated and cooperative activity, *see generally* THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* (1963).