

**ENHANCING LEGAL AID ACCESS THROUGH AN OPEN  
SOURCE COMMONS MODEL**

*Allen K. Yu\**

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## I. INTRODUCTION

High quality legal services, in both civil and criminal matters, are beyond the financial reach of many people.<sup>1</sup> This poses a challenge to the legitimacy of civil, democratic societies founded on the notion of equal justice. In parts of Europe, access to counsel (at least in theory) is already being accepted as a right in both civil and criminal matters.<sup>2</sup> In the United States, legal aid, at least in the civil context, continues to be considered more a charity than a right.<sup>3</sup> This Article explores the commons movement as a potential model to broaden legal access. With minimal financial and capital requirements, commons can make a dramatic impact on the way legal resources are accessed, including in countries like the United States.

By “commons movement,” this Article refers specifically to the modern computer commons movement that first arose in the 1950s and that exists today in various manifestations, including open source and Internet social networks.<sup>4</sup> A commons is a virtual community of like-minded individuals who band together to create and share a common public good deemed important to the community.<sup>5</sup> Common

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1. A recent study reports that the legal needs of California’s low-income population alone is underserved by some \$394 million. Nancy McCarthy, *\$394 Million ‘Justice Gap’ Plagues Legal Services*, CAL. B. J., March 2007, at 1, 1, available at [http://www.calbar.ca.gov/state/calbar/calbar\\_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/March2007&sCatHtmlPath=cbj/2007-03\\_TH\\_01\\_justice-gap.html&sCatHtmlTitle=Top%20Headlines](http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/March2007&sCatHtmlPath=cbj/2007-03_TH_01_justice-gap.html&sCatHtmlTitle=Top%20Headlines).

2. See Earl Johnson, Jr., *Justice and Reform: A Quarter Century Later*, in *THE TRANSFORMATION OF LEGAL AID* 9, 10–11 (Francis Regan et al. eds., 1999).

3. See *id.* at 11–13.

4. For a brief introduction to Internet social networks, see HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* (MIT Press 2000) (1993); Wikipedia, *Social Network*, [http://en.wikipedia.org/wiki/Social\\_network](http://en.wikipedia.org/wiki/Social_network) (as of Feb. 20, 2007, 17:00 GMT).

5. For a classical, formal articulation of public goods, see Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954). A “common good” is a public good or a “common pool resource” “that is shared by a community of producers or consumers.” Ronald J. Oakeron, *Analyzing the Commons: A Framework*, in *MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY* 41, 41–42 (Daniel W. Bromley et al. eds., 1992). For a good introduction to the economic framework of commons, see ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); GLENN G. STEVENSON, *COMMON PROPERTY ECONOMICS* (1991). For a general background on commons, see SUSAN J. BUCK, *THE GLOBAL COMMONS: AN INTRODUCTION* (1998); *THE QUESTION OF THE COMMONS* (Bonnie J. McCay & James M.

public goods can include software, information, creative works, or forums for the exchange of ideas. When properly organized and harnessed, commons can help to democratize access to scarce resources on a scale rarely seen before.<sup>6</sup> For example, when corporations began privatizing computer operating systems and software as proprietary corporate assets, bands of computer enthusiasts, believing that software and information should remain public goods, joined together to create open, free versions of software, operating systems, and common library routines. Today, just as the original computer community created commons versions of software, various other types of commons and social networks are creating public goods in areas as diverse as standard reference works (e.g., Wikipedia), community social bookmarks (e.g., del.icio.us), professional collaboration forums (e.g., Bioinformatics Organization), user reviews (e.g., Epinions.com and Amazon.com user review databases), and collaborative patent reviews.<sup>7</sup> There is no reason to believe that the legal community, properly organized and harnessed, cannot democratize legal access by making legal aid a common resource.

In the industrialized West, particularly the United States, the indigent traditionally depend upon three channels to obtain legal services. These channels are local legal aid bureau aid chapters, government agencies like the Legal Services Corporation (“LSC”), and private attorneys who take on cases on a pro bono basis.<sup>8</sup>

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Acheson eds., 1987); Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 LAW & CONTEMP. PROBS. 111 (2003); YES!, Summer 2001, available at <http://www.futurenet.org/default.asp?ID=77>.

6. See, e.g., Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002).

7. See Wikipedia, <http://en.wikipedia.org> (last visited Mar. 2, 2007); Social Bookmarking, <http://del.icio.us> (last visited Feb. 26, 2007); Bioinformatics Organization, <http://bioinformatics.org> (last visited Feb. 25, 2007); Robert D. Hof, *The Power Of Us: Mass Collaboration on the Internet is Shaking up Business*, BUSINESSWEEK, June 20, 2005, at 74, available at [http://www.businessweek.com/magazine/content/05\\_25/b3938601.htm](http://www.businessweek.com/magazine/content/05_25/b3938601.htm) (discussing how social networks have transformed the business landscape, enabling “[t]hings that would normally just dissipate in the air as social gestures [to] become economic products”); Chana R. Schoenberger, *The Opiners*, FORBES, Sept. 4, 2000, available at <http://members.forbes.com/global/2000/0904/0317085a.html> (discussing how users on Epinions.com and other user generated review sites happily generate economically valuable content for next to nothing); Beth Simone Noveck, “Peer to Patent”: *Collective Intelligence, Open Review, and Patent Reform*, 20 HARV. J. L. & TECH. 123 (2006).

8. Unlike European governments, the U.S. government does not provide grants for the poor to purchase legal service from the private sector. France and Spain have formal fee structures by which lawyers are compensated by the government for legal aid cases on a per-case basis. See Anne Boigeol, *The French Bar: The Difficulties of Unifying a Divided Profession*, in LAWYERS IN SOCIETY: THE CIVIL LAW WORLD VOL. 2, 258, 280 (Richard L. Abel & Philip S.C. Lewis eds., 1988); Carlos Viladés Jene, *The Legal Profession in Spain: An Understudied but Booming Occupation*, in LAWYERS IN SOCIETY: THE CIVIL LAW WORLD VOL. 2, *supra*, at 376. In contrast, the indigent in the U.S. cannot retain private lawyers of their choice who will then be reimbursed by the government. Instead, they are restricted to seeing a special subset of lawyers, such as those at the LSC. The LSC was created in 1974 with bipartisan support. LSC: What is LSC?, <http://www.lsc.gov/>

This system is often inadequate and under-resourced.<sup>9</sup> That the system is under-resourced is not surprising given the widespread perception of legal access as a charity instead of a right.<sup>10</sup> As a private charity, legal aid is often inadequate, as even the most dedicated private pro bono attorneys must balance the needs of indigent clients against the needs of their private practices.<sup>11</sup> As a government benefit, legal aid too often gets short-changed, perhaps because the indigent are often too politically weak to push for adequate funding of legal aid programs.<sup>12</sup> It is thus critical to find innovative approaches to enhance legal aid sources without significant commitment of private or government resources. The commons model offers one such approach.

## II. AN OVERVIEW OF THE COMMONS PHENOMENON

Commons projects spanning a variety of disciplines share two key characteristics: open collaboration and open sharing. Open collaboration is the cooperative participation by members of a community to create a good or resource; open sharing is the making of the good or resource freely available to all.<sup>13</sup> Commons existed long before computers. Examples include government publications, public libraries, public streets, public harbors, and public lighthouses.<sup>14</sup> This Part gives

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about/lsc.php (last visited Feb. 26, 2007). The mission of LSC is to “promote equal access to justice in our Nation and to provide high quality civil legal assistance to low-income persons.” LSC: Mission Statement, <http://www.lsc.gov/about/mission.php> (last visited Feb. 26, 2007). Today, LSC chapters “serve every county and congressional district in the nation, as well as the U.S. territories.” LSC: What is LSC?, *supra*. For a history and overview of the Legal Services Corporation, see Raymond H. Brescia et al., *Who’s in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 *FORDHAM URB. L.J.* 831, 832–40 (1998).

9. For example, LSC offices are consistently under-resourced. See Johnson, *supra* note 2, at 32. For articles on funding shortfalls, see Daniel Cox, *State of Affairs: Texas and Illinois*, *EQUAL JUSTICE*, Summer 2003, <http://www.ejm.lsc.gov/EJMIssue5/stateofaffairs.htm>; Eric Kleinman, *Making the Case for \$415 Million*, *EQUAL JUSTICE*, Fall 2002, <http://www.ejm.lsc.gov/EJMIssue3/OurView/OurView.htm>; David Whelan, *Judicial Profile: Big State, Big Crisis, Big Leadership*, *EQUAL JUSTICE*, Spring 2003, [http://www.ejm.lsc.gov/EJMIssue4/judicialprofile/judicial\\_profile.htm](http://www.ejm.lsc.gov/EJMIssue4/judicialprofile/judicial_profile.htm). The amount by which public defenders are under-resourced is even more notorious. See, e.g., Death Penalty Information Center, *Death Penalty Representation*, <http://www.deathpenaltyinfo.org/article.php?did=896&scid=68> (last visited Feb. 26, 2007).

10. See Johnson, *supra* note 2, at 11–13.

11. See Sacha Pfeiffer, *The Pro Bono Dilemma*, *BOSTON GLOBE*, Mar. 5, 2006, at D1, available at [http://www.boston.com/business/articles/2006/03/05/the\\_pro\\_bono\\_dilemma](http://www.boston.com/business/articles/2006/03/05/the_pro_bono_dilemma).

12. See *id.*

13. For example, in open source software, the sharing of knowledge has sometimes been referred to as “open knowledge” while communal based collaborations have been referred to as “open teamwork.” See *OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION* 28–33 (Chris DiBona et al. eds., 1999), available at <http://www.oreilly.com/catalog/opensources/book/toc.html>; STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE* 62–63 (2004).

14. For analyses of the economic basis of commons using a paradigmatic example, see H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 *J. POL. ECON.* 124 (1954); Anthony Scott, *The Fishery: The Objectives of Sole Ownership*, 63 *J. POL. ECON.* 116 (1955). For Hardin’s famous critique of the sustainability of commons,

an overview of the modern, computer-based commons phenomenon, tracing some of its history, features, and recent manifestations.

#### A. *The Hackers' Movement*

A commons-based philosophy prevailed in the beginnings of the computer industry.<sup>15</sup> The groups of enthusiasts who undertook the coding of software for the first computers came to see themselves as guardians of the budding information revolution infrastructure. This core group of enthusiasts — Jedi-like in their computer skills and dedicated to optimizing and protecting the nascent computer system — were referred to in the community as “hackers.”<sup>16</sup> Systems were set up so that “hackers” could openly and freely make fixes and patches to the communal product. On the one hand, hackers often competed against each other, routinely breaking into each other’s systems in a game to best each other and to showcase their own skills. On the other hand, hackers also collaborated and freely shared code and knowledge, enabling each to learn from each other and to implement ever more robust systems.

As the importance of computers grew, organizations began to enforce industrial management practices, prioritize software, erect security protocols, and clamp down on the free-wheeling computer culture.<sup>17</sup> Many computer enthusiasts rebelled, forming communities that promoted the original vision of the computer revolution — that information and software best serve society when they are public goods.<sup>18</sup> These groups collaborated to create alternative, open versions of the software that corporations sought to make proprietary.<sup>19</sup> Using rhetoric such as “all information should be free” and “access to

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see Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). For more recent scholarship on commons in the real world, see *MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY* (Daniel W. Bromley et al. eds., 1992); *OSTROM*, *supra* note 5; *NIRMAL SENGUPTA, MANAGING COMMON PROPERTY* (1991); *ROBERT WADE, VILLAGE REPUBLICS* (1994).

15. See generally STEVEN LEVY, *HACKERS: HEROES OF THE COMPUTER REVOLUTION* (1984).

16. The word “hacker” originated among the MIT computer labs of the 1960s, where the word “hack” described “tweaking” systems, not breaking into systems. See Wikipedia, *Hacker Definition Controversy*, [http://en.wikipedia.org/wiki/Hacker\\_definition\\_controversy](http://en.wikipedia.org/wiki/Hacker_definition_controversy) (as of Feb. 21, 2007, 19:10 GMT).

17. See LEVY, *supra* note 15, at 119–21, 124; WEBER, *supra* note 13, at 24–25.

18. See WEBER, *supra* note 13, at 46–47, 103, 144–45; see also LEVY, *supra* note 15, at 56, 65 (giving examples illustrating the hacker culture of sharing source codes). For a famous criticism, see William Henry Gates III, General Partner, Micro-Soft, *An Open Letter to Hobbyists* (Feb. 3, 1976), <http://www.blinkenlights.com/classiccmp/gateswhine.html> (proclaiming to hackers and open source programmers: “As the majority of hobbyists must be aware, most of you steal your software.”).

19. See WEBER, *supra* note 13, at 20–53 (generally briefing the early history of open source); see also *id.* at 94–95 (discussing how the open source movement began to mature in the 1990s).

computers . . . should be unlimited and total,” these rag-tag groups of computer programmers preached a strong libertarian ideology.<sup>20</sup> When Richard M. Stallman started the “free software” movement, the first of the free and open-source software movements, he adopted the “cooperative spirit” and principles of the Hacker Ethic as the core values of his endeavor.<sup>21</sup> The open source and subsequent commons movements spawned by the original hackers would eventually also play critical roles in shaping the Internet as an open standard system freely available to all instead of a closed, proprietary system controlled by a privileged few.<sup>22</sup>

### B. The Open Source Movement

Open source is one of the most successful commons movements ever created.<sup>23</sup> Its key strength is that it harnesses the abilities of many.<sup>24</sup> The open source movement began as a grassroots movement early in the growth of the software industry, when many in the programming community, believing that software and information should be openly and freely developed and shared as public goods, reacted

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20. LEVY, *supra* note 15, at 27; *see also* PEKKA HIMANEN ET AL., *THE HACKER ETHIC AND THE SPIRIT OF THE INFORMATION AGE* (2001).

21. Tom Chance, *The Hacker Ethic and Meaningful Work*, at 8 (Aug. 3, 2005) (unpublished M.A. Philosophy candidate essay, University of Reading), <http://opensource.mit.edu/papers/chance.pdf>; *see also* HIMANEN ET AL., *supra* note 20, at vii; ERIC S. RAYMOND, *Homesteading the Noosphere*, in *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* 65 (rev. ed., 2001), available at [http://www.firstmonday.org/issues/issue3\\_10/raymond/index.html](http://www.firstmonday.org/issues/issue3_10/raymond/index.html).

22. For a good history of the origins of the Internet, see generally JANET ABBATE, *INVENTING THE INTERNET* (1999); TIM BERNERS-LEE & MARK FISCHETTI, *WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR* (1999); KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* (1996). For the role the hacker community played in the development of the Internet, see for example Chance, *supra* note 21, at 4 n.2, observing that “[t]hrough governments and corporations undoubtedly had a role to play, most of the people working on technologies like TCP/IP and the World Wide Web were and remain self-identified hackers.” *See also* A Computer Geek’s History of the Internet, <http://web.archive.org/web/20060405203045/www.wbglinks.net/pages/history> (last visited Mar. 18, 2007). Hackers themselves are not shy about their role in developing computers and the Internet. *See, e.g.*, Welcome to Hacker’s World!, <http://www.webspawner.com/users/hackjob> (last visited Apr. 6, 2007) (“Just so you know, hackers are NOT the people that cause trouble on the Internet. Hackers CREATED the Internet! WE are the ones who make things and keep other things in line.”).

23. For a general introduction to the open source movement, see GLYN MOODY, *REBEL CODE: LINUX AND THE OPEN SOURCE REVOLUTION* (Penguin Books 2002) (2001); DiBona et al., *supra* note 13. Note that in this Article, no real distinction is made between so-called “free software” and “open source software.” However, for those interested in this discussion and debate, see Raymond, *supra* note 21, at 69 and Richard Stallman, *Why “Open Source” Misses the Point of Free Software*, <http://www.gnu.org/philosophy/open-source-misses-the-point.html> (last visited Apr. 6, 2007).

24. The famed coder Eric Raymond once remarked, “Given enough eyeballs, all bugs are shallow,” to describe how community efforts can be leveraged to solve many of the most complex and intractable problems. RAYMOND, *supra* note 21, at 30.

vigorously to corporations' efforts to make software proprietary.<sup>25</sup> They formed virtual communities linked by computers where software was a public good created by and for users.<sup>26</sup> The words "open source" refer to the fact that not only is the compiled binary program freely shareable ("open"), but the "source" code in which the program is written is also shareable. The sharing of source code is important because it not only enables others to use the code, but also enables other programmers, including potential competitors, to learn the secret workings of a program and to modify the program for their own use. Today's powerful open source movement is responsible for creating some of the industry's most cutting-edge software, including Linux, Apache Webserver, MySQL, and OpenOffice. Open source products are so well regarded that they now routinely challenge proprietary flagship products from deep-pocketed blue chip companies such as Microsoft, Oracle, and IBM in the open marketplace.<sup>27</sup> Open source software increasingly powers much of the Internet today.<sup>28</sup>

### C. Today's Myriad Commons Movements

The desire to create public commons versions of important resources also exists in diverse fields outside of software.<sup>29</sup> One of the most visible recent movements is the Wikipedia project.<sup>30</sup> In reaction to the lack of freely accessible basic reference resources, a group of volunteers formed an encyclopedia commons project to create

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25. For examples of open source projects, see The Apache Software Found., <http://www.apache.org> (last visited Mar. 9, 2007); DARWIN, <http://developer.apple.com/opensource/overview.html> (last visited Mar. 9, 2007); FreeBSD, <http://www.freebsd.org> (last visited Mar. 9, 2007); Free Software Found., <http://www.fsf.org> (last visited Mar. 9, 2007); GNU, <http://www.gnu.org> (last visited Mar. 9, 2007); Jabber, <http://www.jabber.org> (last visited Mar. 9, 2007); Linux, <http://www.linux.org> (last visited Mar. 9, 2007).

26. Eric von Hippel provides theoretical and empirical support for the benefits of user-driven innovation communities in software and other markets. See Eric von Hippel, *Innovation by User Communities: Learning from Open-Source Software*, 42 MIT SLOAN MGMT. REV. 82 (2001).

27. See, e.g., Charles Ferguson, *How Linux Could Overthrow Microsoft*, TECH. REV., June 2005, at 64, available at <http://www.technologyreview.com/Infotech/14504>. In fact, many companies like IBM and Sun Microsystems have embraced open source and even spun off open source versions of previously proprietary products. See, e.g., Laurie J. Flynn, *Chief Says Sun Plans to Offer Open-Source Version of Java*, N.Y. TIMES, May 16, 2006, at C7; Jordan Robertson, *Sun Makes Java Technology Open-Source Project*, USATODAY.COM, Nov. 13, 2006, [http://www.usatoday.com/tech/news/2006-11-13-sun-java-open\\_x.htm](http://www.usatoday.com/tech/news/2006-11-13-sun-java-open_x.htm).

28. See WEBER, *supra* note 13, at 6.

29. The democratizing effect of the commons movement is so broad that Time Magazine named "You," the people who generate and share online content for user-generated forums such as YouTube and MySpace, as the "Person of the Year" for 2006. Lev Grossman, *Time Person of the Year: You*, TIME, Dec. 25, 2006, at 38, available at <http://www.time.com/time/magazine/article/0,9171,1569514,00.html>.

30. See Wikipedia, Community Portal, [http://en.wikipedia.org/wiki/Wikipedia:Community\\_Portal](http://en.wikipedia.org/wiki/Wikipedia:Community_Portal) (last visited Mar. 7, 2007).

Wikipedia, a free online encyclopedia.<sup>31</sup> Like open source software, Wikipedia is a public good resource created by a community of consumers, the readers, for a community of consumers. Anyone on the Internet can access the encyclopedia for free, and anyone can create and modify entries. Started in 2001, the English version of Wikipedia had already grown to over 1,600,000 articles by early 2007.<sup>32</sup> In about six years, the project has grown to encompass some 119 languages.<sup>33</sup> Plans are underway to provide hardbound copies for distribution in developing regions where access to the Internet is limited.<sup>34</sup> Other interesting examples of non-software commons movements are community-edited search indexes such as the Open Directory Project<sup>35</sup> and del.icio.us.<sup>36</sup> Unlike popular search engines like Google or Yahoo!, which use computers or professional editors to index and categorize information on the Web, indexes like Open Directory and del.icio.us, have users mark and categorize information themselves, in essence providing a user-edited search engine.<sup>37</sup> Unlike proprietary commercial knowledge bases such as Lexis or Westlaw, indexes like the Open Directory Project and del.icio.us are not centrally controlled and edited by a single company; instead, they are constructed and maintained by a vast, global community of volunteer “editors.”

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31. Wikipedia, Wikipedia:About, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Mar. 9, 2007). Wikipedia can be accessed at [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page).

32. Wikipedia, Statistics, <http://en.wikipedia.org/wiki/Special:Statistics> (last visited Feb. 22, 2007). Wikipedia reached 1,000 articles around February 12, 2001, and 10,000 articles by September 7 of the same year. In the first year of its existence, over 20,000 encyclopedia entries were created — a rate of over 1,500 articles per month. On August 30, 2002, Wikipedia grew to 40,000 entries. It consisted of over 500,000 English accounts by October 15, 2005. Wikipedia, *History of Wikipedia*, [http://en.wikipedia.org/wiki/History\\_of\\_Wikipedia](http://en.wikipedia.org/wiki/History_of_Wikipedia) (as of Mar. 4, 2007, 05:48 GMT).

33. Wikipedia, Multilingual Coordination, [http://en.wikipedia.org/wiki/Wikipedia:Multilingual\\_coordination](http://en.wikipedia.org/wiki/Wikipedia:Multilingual_coordination) (last visited Mar. 13, 2007) (listing 119 languages with active Wikipedias). Wikipedia is published in at least 250 languages today. Wikipedia, *List of Wikipedias*, [http://meta.wikimedia.org/wiki/List\\_of\\_Wikipedias](http://meta.wikimedia.org/wiki/List_of_Wikipedias) (as of Feb. 22, 2007, 09:30 GMT) (listing all languages in which Wikipedias are published).

34. Paul Holmes, *Wikipedia May Go to Print, Says Founder*, USATODAY.COM, Oct. 31, 2005, [http://www.usatoday.com/tech/news/2005-10-31-wikipedia-paper\\_x.htm](http://www.usatoday.com/tech/news/2005-10-31-wikipedia-paper_x.htm). Wikipedia founder Jimmy Wales has said,

I have always viewed the mission of Wikipedia to be much bigger than just creating a killer website. We're doing that of course, and having a lot of fun doing it, but a big part of what motivates us is our larger mission to affect the world in a positive way.

It is my intention to get a copy of Wikipedia to every single person on the planet in their own language. It is my intention that free textbooks from our wikibooks project will be used to revolutionize education in developing countries by radically cutting the cost of content.

*Wikipedia Founder Jimmy Wales Responds*, SLASHDOT, July 28, 2004, <http://interviews.slashdot.org/article.pl?sid=04/07/28/1351230&tid=146&tid=95&tid=11>.

35. Open Directory Project, <http://dmoz.org> (last visited Feb. 22, 2007).

36. See *supra* note 7 and accompanying text.

37. See *supra* note 7 and accompanying text.



An example of a less well-known but nevertheless interesting commons project is a citizen journalism project in South Korea called OhmyNews.<sup>38</sup> OhmyNews is pioneering a new method of news reporting that bypasses traditional news organizations, which members see as opaque, restrictive, and biased.<sup>39</sup> Instead of relying on traditional news resources, it depends on its readers to be its eyes and ears. Users submit stories to OhmyNews, and editors then select the stories that will be published for all to read for free. Other examples of citizen journalism commons include Slashdot<sup>40</sup> and Kuro5hin.<sup>41</sup> Slashdot follows a similar user-submitted, editor-evaluated model but with a strong focus on technology news. It also provides a comments section in the style of an Internet forum attached to each article through which users submit comments or carry on discussions. Kuro5hin follows a user-submitted model for general articles but an editor-submitted model for news items. However, unlike traditional news, authors may seek feedback from users before officially publishing their articles. In Europe, politically-based communities such as TheyWorkForYou.com<sup>42</sup> and TalkEuro.com<sup>43</sup> focus on scrutinizing local, national, and international political news. In the United States, projects like Congress.org aim to provide resources such as town hall based forums to promote candidate-citizen discourse.<sup>44</sup> Virtual political communities like these could one day serve as virtual forums to spawn and nurture powerful grassroots political movements.<sup>45</sup>

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38. See OhmyNews International, <http://english.ohmynews.com> (last visited Feb. 18, 2007); see also, Hong Eun-taek, *Welcome to 'Citizen Journalism: Theory and Practice,'* OHMYNEWS INT'L, May 21, 2006, [http://english.ohmynews.com/articleview/article\\_view.asp?article\\_class=8&no=292915&rel\\_no=1](http://english.ohmynews.com/articleview/article_view.asp?article_class=8&no=292915&rel_no=1) (describing citizen journalism).

39. The concern that the sources of information in modern society are too few and too concentrated is not new. In 1987, John Fiske coined the term "semiotic democracy" to illustrate what would be lost if mass media held undue control over society. Fiske described how a small group of actors in the mass media holds tremendous power over how we view life, society, and our environment by controlling what we are exposed to and by defining the language and symbols we depend on to understand our lives. John Fiske, *TELEVISION CULTURE* 236 (Routledge 1999) (1987); see William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 193 (Stephen R. Munzer ed., 2001); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 *CARDOZO ARTS & ENT. L.J.* 215, 233 (1996).

40. Slashdot, <http://slashdot.org> (last visited Feb. 23, 2007).

41. Kuro5hin, <http://www.kuro5hin.org> (last visited Feb. 23, 2007).

42. TheyWorkForYou.com, <http://www.theyworkforyou.com> (last visited Mar. 1, 2007).

43. Talkeuro, <http://talkeuro.com> (last visited Mar. 1, 2007).

44. Congress.org, <http://www.congress.org/congressorg/home> (last visited Mar. 9, 2007).

45. Political commons are not a new idea. In the United States, "public commons" are public places in cities and towns where people have traditionally gathered to discuss issues, debate ideas, and forge solutions to social problems. They spread civic ideals, foster political debates, and cultivate skills of deliberation, negotiation, and advocacy. See Lew Friedland & Harry Boyte, *The New Information Commons: Community Information Partnerships and Civic Change* (2000) (Ctr. for Democracy & Citizenship working paper), available at <http://www.publicwork.org/pdf/workingpapers/New%20information%20commons.pdf>.

Another interesting commons project is Creative Commons, which encourages and facilitates the sharing of creative works, including music, video, and text, through flexible copyright licenses.<sup>46</sup> The project assumes that the traditional approach to copyright often hampers access without awarding authors meaningful extra protection. Members learn how to select licenses that protect their interests without unnecessarily impeding public access. An interesting outgrowth of Creative Commons is Science Commons, a project which aims to promote discourse in science through open access to scientific knowledge, data, and tools.<sup>47</sup> Members are encouraged to share scientific data and to collaborate with others. Similarly, a group of scientists affiliated with CAMBIA, a nonprofit biotechnology research group in Australia with a mission to provide free scientific tools, recently adopted an open source license for its patented procedures to transfer genes into cells.<sup>48</sup> Examples of other open science commons include the Public Library of Science,<sup>49</sup> which aims to create an international library of scientific and medical literature that is openly available as a public resource; the Budapest Open Access Initiative,<sup>50</sup> which aims to make research articles from all fields freely available on the Internet; the Ensembl Genome Browser,<sup>51</sup> which aims to provide a public forum for sharing gene data and software tools related to eukaryotes; and the National Center for Biotechnology Information,<sup>52</sup> which aims to create a public resource of molecular biological information and tools.

The Internet social networking phenomenon represents one of the latest variants of the commons. Consider YouTube,<sup>53</sup> a website that has created a virtual community where users can access and share video content online. Community members also tag and rank each others' videos, creating a user-edited search index ranked in accordance with the community's taste. The community thus creates two important public goods: a video content library and a search index. As communities like YouTube mature, it is not outrageous to imagine that they will someday produce not just snippets of videos but also

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46. Creative Commons, <http://creativecommons.org> (last visited Feb. 23, 2007).

47. Science Commons, <http://www.sciencecommons.org> (last visited Feb. 23, 2007).

48. See *The Triumph of the Commons*, THE ECONOMIST, Feb. 12, 2005, at 61.

49. Public Library of Science, <http://www.plos.org> (last visited Feb. 24, 2007).

50. Budapest Open Access Initiative, <http://www.soros.org/openaccess> (last visited Feb. 24, 2007).

51. Ensembl Genome Browser, <http://www.ensembl.org> (last visited Feb. 24, 2007).

52. National Center for Biotechnology Information, <http://www.ncbi.nlm.nih.gov> (last visited Feb. 24, 2007).

53. YouTube — Broadcast Yourself, <http://www.youtube.com> (last visited Feb. 24, 2007). In its recent sale to Google, YouTube netted some \$1.65 billion for its founders and investors, primarily because of the potential for advertising targeted to the community members. See, e.g., Tom Lowry & Robert D. Hof, *Smart Move or Silly Money 2.0?*, BUSINESSWEEK ONLINE, Oct. 12, 2006, [http://www.businessweek.com/technology/content/oct2006/tc20061012\\_597662.htm](http://www.businessweek.com/technology/content/oct2006/tc20061012_597662.htm).

more comprehensive products, including news, music videos, and feature-length movies that rival those from CNN, MTV, or Walt Disney. In the process, these communities may also create one of the most extensive and comprehensive human-edited catalogues of multimedia content in the world.

#### *D. The Commons Movement in the Legal Arena*

Given the successful application of the commons model to a large variety of other fields, there is no reason to doubt that the commons model can be similarly applied to the legal field, and particularly to broaden access to legal resources. In fact, the commons phenomenon has already made a beachhead in the legal arena. For example, the website Groklaw already provides legal information and educational materials that users can freely access and distribute.<sup>54</sup> Another project, the Australian Law Wikipedia, aims to harness volunteers from the legal profession to create a comprehensive public domain database of Australian legal knowledge.<sup>55</sup>

In the United States, the Openlaw project at Harvard Law School's Berkman Center for Internet and Society comes closest to a full-fledged law-related commons project.<sup>56</sup> It is an experimental project that taps the community at large to help the Berkman Center advocate high profile intellectual property cases. The goal is to develop a community that can help the Berkman Center "develop arguments, draft pleadings, and edit briefs in public, online. Non-lawyers and lawyers alike are invited to join the process."<sup>57</sup> While it has the elements of open sharing and collaboration that constitute the basic foundation of a commons, Openlaw may not be a bona fide commons project because its work product is arguably not a public good.<sup>58</sup> It is arguably primarily a tool for the Berkman Center to enlist resources to promote its private agenda, and not necessarily a resource for the greater public to consume.<sup>59</sup> Nevertheless, the viability of Openlaw

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54. Groklaw — Digging for Truth, <http://www.groklaw.net> (last visited Feb. 24, 2007) (providing articles under the Creative Commons license agreement). The site is not a bona fide legal commons in two ways: (1) little if any actual legal work is offered and performed, and (2) users do not participate in contributing the editorial content. However, it is a license commons in the sense that authors join to "donate" some of their work to the public.

55. See Wikipedia, Wikipedia:WikiProject Australian Law, [http://en.wikipedia.org/wiki/Wikipedia:WikiProject\\_Australian\\_Law](http://en.wikipedia.org/wiki/Wikipedia:WikiProject_Australian_Law) (last visited Mar. 14, 2007). This is really a Wiki commons with a focus on legal issues. By contrast, as discussed in the following Part, a legal aid commons envisioned in this Article involves the rendering of actual legal services to clients as a public good.

56. Openlaw — Home, <http://cyber.law.harvard.edu/openlaw> (last visited Feb. 24, 2007).

57. *Id.*

58. *Cf. supra* text accompanying notes 13–14.

59. One may argue that the public policy arguments developed by Openlaw are a public good, but arguments generally should probably not be said to be a public good, since their actual benefit to the public is open to debate.

serves as an important validation that a commons-type movement can thrive in a legal context.

*E. Legal Aid Commons: A Virtual Law Firm Encompassing the Entire Professional Society*

A legal aid commons can offer a radical and major alternative for delivering legal services to the indigent.<sup>60</sup> Currently, to obtain services, an indigent person must go to a traditional legal aid institution such as the LSC or to private practitioners offering reduced rates or free services. A legal aid commons would create a virtual law firm potentially made up of the entire community of pro bono attorneys to serve indigent clients.

In one version, the legal aid commons would serve the indigent indirectly, by bolstering the resources of public service practitioners.<sup>61</sup> Such a legal aid commons would allow public service practitioners to “outsource” pieces of their work to the commons as needed. The public service attorneys would take on the role of lead or managing attorneys, directing and dividing up work to “virtual associates” in the legal aid commons in much the same way that a partner manages and distributes work to associates in a private law firm. The public service attorneys would continue to interact with clients and take ultimate responsibility for their cases. However, by delegating a large portion of the substantive legal work, traditional public service practitioners would be able either to serve more indigent clients or to offer indigent clients more sophisticated and comprehensive legal services.

A second and more ambitious model of the legal aid commons would feature direct interactions between the indigent and the commons community. An indigent client could directly access the commons, perhaps through a web portal, and submit requests for legal services. Every member of a commons community would see and have the opportunity to reply to the stream of requests. The member who eventually takes on the work would then act as the lead attorney, interact with the client directly, and take ultimate responsibility for the case, distributing assignments to the commons as needed.

Critical to the success of both models of legal aid commons is the feasibility of unbundling. “Unbundling” refers to the process of dividing up a case that would otherwise take up too many resources for one individual attorney or small law firm to handle, distributing the pieces to members of the commons to carry out, and assembling the piecemeal work products into a coherent whole that moves the case for-

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60. *See supra* text accompanying note 8.

61. “Public service practitioners” or “public service attorneys” herein refer to the attorneys who traditionally interact directly with the indigent. These include public defenders, legal aid workers, and private pro bono attorneys.

ward. Like all managerial processes, unbundling involves transaction costs. For example, the lead attorney must learn to manage the process effectively, by communicating, coordinating multiple attorneys, and spotting problems in the work product efficiently. Unbundling also implicates many other issues related to the practice of law, including the management of confidentiality, conflicts, and liability in a large virtual community.<sup>62</sup>

The unbundling process described here is quite different from the traditional unbundling process discussed in the legal aid context. Traditional unbundling is a front-end process where work is administratively divided between the client and the working attorney in an attempt to lower legal costs.<sup>63</sup> The client will often take on the more time-consuming but less legally intensive parts of case, such as gathering information and completing basic paperwork, thereby freeing the attorney to focus on more technical or legally challenging aspects of the case. In the commons model here, the unbundling process refers to a back-end process where substantive legal work is divided among working attorneys. Front-end unbundling thus differs from back-end unbundling in that the former divides administrative tasks while the latter divides substantive legal work.

The rest of this Article explores the commons model as a potential model for enhancing the delivery of legal aid. The next Part discusses the basic dynamics and components making up a successful commons project. The following Part applies those insights to the legal aid context and discusses the opportunities and challenges that may arise from application of such a model.

### III. ANATOMY OF A COMMONS COMMUNITY

The commons phenomenon composed of virtual communities linked by modern electronic communications represents a relatively recent, powerful way of mobilizing significant resources to produce public goods at little to no capital costs. These commons projects benefit society by democratizing access to many formerly hard-to-access resources.<sup>64</sup> This Part discusses some key characteristics and features of such commons.

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62. See *infra* Part III.B.

63. See, e.g., Robert Cohen & Richard Zorza, *Legal Aid Society of Orange County Pilots Harvard Law School Plan for Access to Justice*, ORANGE COUNTY LAW., Dec. 2005, at 50.

64. See GEOFF MULGAN ET AL., WIDE OPEN: OPEN SOURCE METHODS AND THEIR FUTURE POTENTIAL 21–22 (2005).

*A. Powerful Non-Monetary Incentives*

One of the key features of commons is their capacity to mobilize and tap into the talents of entire communities at relatively low capital cost.<sup>65</sup> Most members of a commons project contribute as unpaid volunteers. Instead of financial rewards, members rely on alternative non-monetary incentives.<sup>66</sup> The motivations for individuals to participate in commons can be diverse, including a sense of duty and the opportunities to contribute to a commonly shared goal, to participate in a forum for networking, and to develop skills and careers.<sup>67</sup>

## 1. Commonly Shared Goals and Vision

Commonly shared goals constitute a powerful non-monetary incentive to participate in commons. Commons offer members a unique opportunity to contribute to the creation of a public good resource that they deem important — from software, scientific tools, and reference materials, to literature and art.<sup>68</sup> Some commons projects offer additional incentives besides creating public goods. For example, besides aiming to build a public reference resource, members of the Wikipedia movement also share the goals of quality, reliability, and neutrality.<sup>69</sup> Their vision is to create a public resource that is not only free but also excellent. To institute and implement that vision of excellence, Wikipedia has set up a comprehensive process for members to comment on and edit out perceived biases or other deficiencies in its entries.<sup>70</sup>

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65. *See id.* at 16–17, 21 (describing how volunteers working on Wikipedia and Linux do so mostly for non-monetary reasons and how the open source model is challenging the traditional “baseline assumption [that] most major projects, technological or otherwise” require great capital expenditures).

66. *See id.* at 21.

67. *See, e.g.*, James Bessen, *Open Source Software: Free Provision of Complex Public Goods*, in *THE ECONOMICS OF OPEN SOURCE SOFTWARE DEVELOPMENT* 57–82 (Jürgen Bitzer & Phillip J.H. Schröder eds., 2006), *draft available at* <http://www.researchoninnovation.org/opensrc.pdf>; Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 50 *J. INDUS. ECON.* 197, 213–23 (2002), *available at* <http://turingmachine.org/opensource/papers/lerner2002.pdf>; Jean-Michel Dalle & Nicolas Jullien, ‘Libre’ Software: Turning Fads into Institutions? (2001), <http://opensource.mit.edu/papers/Libre-Software.pdf>.

68. The theme of commons elevating individuals from mere passive consumers to active, responsible, and self-aware citizens ready to make a difference is often repeated. *See* David Bollier, *The Missing Vocabulary of the Digital Age: The Commons*, *COMMON PROP. RESOURCE DIG.*, June 2003, at 1.

69. *See* Wikipedia, *Wikipedia:Overview FAQ*, [http://en.wikipedia.org/wiki/Wikipedia:Overview\\_FAQ](http://en.wikipedia.org/wiki/Wikipedia:Overview_FAQ) (last visited Mar. 10, 2007).

70. For example, “flags” may be used to single out entries for a variety of reasons, including issues relating to biases, quality, and accuracy. *See* Wikipedia, *Wikipedia:Editorial Oversight and Control*, [http://en.wikipedia.org/wiki/Wikipedia:Editorial\\_oversight\\_and\\_control](http://en.wikipedia.org/wiki/Wikipedia:Editorial_oversight_and_control) (last visited Jan. 30, 2007).

To motivate efficiently, it is important for a commons to articulate a sharp, single vision. A multi-faceted vision can sometimes strain a commons's message and cause. Wikipedia's emphasis on quality in addition to accessibility illustrates the potential conflicting goals of open collaboration and quality control. Wikipedia has suffered a recent bout of scandals concerning allegedly libelous statements in the wiki entries.<sup>71</sup> To better exercise control over content, the Wikipedia commons may have to restrict the access of those who edit entries. Such restrictions, however, hamper Wikipedia's original vision of encouraging grassroots contribution and freedom of expression. Fortunately, so far the threat of lawsuits does not seem to have dampened the spirit of open contribution at the Wikipedia commons. The reputation of the wiki encyclopedia also remains strong. A *Nature* study carried out soon after the scandals arose found that, on average, the quality of Wikipedia's scientific entries were approximately as good as those of the venerable *Encyclopædia Britannica*.<sup>72</sup>

## 2. Prestige, Status, and Networking

The drive to develop status within the community can be another very powerful incentive to motivate member contribution.<sup>73</sup> One major reason for individuals to join a commons is to get credit for making a difference to a cause.<sup>74</sup> Depending on the commons, prestige may be built through formal or informal peer review processes, or both.<sup>75</sup> With formal processes, someone (typically someone of higher seniority, a collaborator, or a peer) will officially evaluate a member's submitted work products. An aggregate of these reviews will determine a member's prestige in the community. With informal processes, members' reputations spread by word of mouth, often from colleagues with whom they have worked. Words from colleagues who already have a prestigious reputation can carry extra weight. Other informal

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71. See, e.g., Wade Roush, *Wikipedia: Teapot Tempest*, TECH. REV., Dec. 7, 2005, [http://www.technologyreview.com/Blogs/wtr\\_15974,292,p1.html](http://www.technologyreview.com/Blogs/wtr_15974,292,p1.html). Many familiar with the commons movement suggest that injured parties should simply correct Wikipedia entries in the true spirit of commons.

72. Jim Giles, *Internet Encyclopaedias Go Head to Head*, 438 NATURE 900 (2005).

73. See Daniel Stewart, *Social Status in an Open Source Community*, 70 AM. SOC. REV. 823, 826 (2005).

74. See LEVY *supra* note 15, at 100; Lerner & Tirole, *supra* note 67, at 218.

75. For a good introduction to the peer review process in the context of open source, see Martin Michlmayr et al., *Quality Practices and Problems in Free Software Projects*, 2005 PROC. FIRST INT'L CONF. ON OPEN SOURCE SYS. 24, available at [http://opensource.mit.edu/papers/michlmayr\\_hunt\\_probert-quality\\_practices\\_problems.pdf](http://opensource.mit.edu/papers/michlmayr_hunt_probert-quality_practices_problems.pdf); Anthony Senyard & Martin Michlmayr, *How to Have a Successful Free Software Project*, 2004 PROC. 11TH ASIA-PAC. SOFTWARE ENGINEERING CONF. 1, available at <http://opensource.mit.edu/papers/senyardmichlmay.pdf>.

processes may include the winning of accolades and awards within forums.<sup>76</sup>

Prestige within a commons is not only a useful reflection of one's contribution but can also enhance one's influence, responsibility, and visibility in a community.<sup>77</sup> Prestige can also translate to real world opportunities. In open source communities, for example, programmers have often significantly increased their real world marketability by doing good work and earning prestige (or notoriety, as the case may be) in open source projects.<sup>78</sup>

### 3. Skill Improvement and Intellectual Challenge

The opportunity to learn valuable skills and participate in intellectually challenging projects is another powerful incentive to volunteer in a commons.<sup>79</sup> For many in the original hacking community, it was the intellectual challenge of hacking, rather than the goal of producing a public good, that motivated them to participate. Many contribute today to gain practical skills (e.g., writing and research skills) or visibility. Reviews, carried out by colleagues who are not directly competing with each other for salary or bonuses, can be objectively honest and helpful, further providing invaluable and refreshing opportunities to grow.<sup>80</sup>

#### *B. Unbundleability of Projects*

Underpinning the potential success of commons is the issue of unbundleability of legal tasks. Commons projects must be amenable to division of labor where cases are divided into bite-sized assignments manageable enough for individual members of the commons to carry out. As touched upon earlier,<sup>81</sup> in the legal framework the process would involve dividing the case into pieces, distributing the pieces to members of a commons, collecting the piecemeal work products from the members, and assembling the work products into a coherent whole that can move the project forward. In executing these processes, one must ensure that the transaction costs of unbundling do not exceed its benefits. For example, the manager must ensure proper communications between attorneys and spot potential problems in the

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76. See, e.g., Eric S. Raymond, The Open Source Awards, <http://www.catb.org/~esr/not-the-osi/awards.html> (last visited Feb. 18, 2007).

77. See MULGAN ET AL., *supra* note 64, at 21.

78. See WEBER, *supra* note 13, at 141-42; Eric Lee Green, Economics of Open Source Software, <http://badtux.org/home/eric/editorial/economics.php> (last visited Feb. 18, 2007).

79. See, e.g., MULGAN ET AL., *supra* note 64, at 20; WEBER, *supra* note 13, at 137-38.

80. For a discussion of the many private incentives for joining an open source movement, see HIMANEN, *supra* note 20.

81. See *supra* Part II.E.



work product. If the work required for coordinating and running the unbundling of legal aid projects exceeds the utility of unbundling, then legal aid commons will not be an efficient public resource for delivering legal aid.<sup>82</sup>

Projects are amenable to piecemeal developments that typically undergo incremental improvements.<sup>83</sup> Encyclopedias, for example, tend to develop incrementally, growing and evolving one paragraph, one entry at a time. Projects like Wikipedia are thus amenable to the commons approach. Similarly, software development is amenable to the commons model because best practice software projects are built one module at a time, with each module small enough to be created or maintained by one individual.<sup>84</sup> However, not all projects are easily unbundable.<sup>85</sup> For example, the resources of a commons would probably not have produced the theory of relativity when what was required was the individual genius of an Einstein.

An arguable weakness of the commons method is the seeming incompatibility of incremental improvements with the kind of unplanned creative inspiration that characterizes many successful innovations.<sup>86</sup> Solving legal problems often requires creativity and resourcefulness. While the limits of the commons approach are still open to debate, it is not disputed that commons movements have proven to be a surprisingly resilient and powerful force in producing a wide diversity of important work product, from software to literature. There are many reasons to be hopeful that this approach would apply

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82. Cf. *infra* notes 100–03 and accompanying text (describing the costs of unbundling in engineering problems). In the software industry, the observation that adding human resources to projects does not always result in a net positive productivity gain is often referred to as “Brooks’ Law.” See FREDERICK P. BROOKS, *THE MYTHICAL MAN-MONTH: ESSAYS ON SOFTWARE* (1975); Eric S. Raymond, *How Many Eyeballs Tame Complexity?*, <http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/ar01s05.html> (last visited Apr. 10, 2007); WEBER, *supra* note 13, at 61, 65.

83. See, e.g., MULGAN ET AL., *supra* note 64 (describing how big projects like Linux and Wikipedia are often founded upon small, cumulative contributions).

84. See WEBER, *supra* note 13, at 110 (discussing the rewriting of the Apache server code early in its history “to improve the modularity of the code so distributed development in an open source process could proceed more efficiently”); *id.* at 172 (noting that the “key characteristic of technical design for managing complexity is ‘source code modularization’”); *id.* at 173 (asserting that one of Linus Torvalds’ most important decisions was “to re-design Linux’s early monolithic kernel into a set of independently loadable modules for Linux 2.0 [to] reduce organizational demands on the social and political structure for managing people”); Andrea Bonaccorsi & Cristina Rossi, *Why Open Source Software Can Succeed*, 32 RES. POL’Y 1243, 1247 (2003) (noting that “the key to the success of the Linux Open Source is its modularity”). For a general micro-business perspective, see C.Y. Baldwin and K.B. Clark, *Managing in the Age of Modularity*, 75 HARV. BUS. REV. 84 (1997). For a general macro-economic perspective, see Gary S. Becker & Kevin M. Murphy, *The Division of Labor, Coordination Costs, and Knowledge*, 57 QUART. J. ECON. 1137 (1992). For an engineering best-practice perspective, see BERTRAND MEYER, *OBJECT-ORIENTED SOFTWARE CONSTRUCTION* (2d ed. 2000).

85. See *infra* notes 100–03 and accompanying text.

86. See MULGAN ET AL., *supra* note 64, at 26.

successfully to endeavors in other fields as well, including the legal arena.<sup>87</sup>

### C. Unique Management Structure

#### 1. Low Barriers to Entry

Commons movements characteristically feature lower barriers to entry than do traditional companies or enterprises.<sup>88</sup> Traditional organizations focus on front-loaded recruitment and promotion procedures to weed out all but the most qualified. Hence, the pedigree of a lawyer plays an important role in recruiting at major law firms. Commons projects take a more back-loaded approach, where almost all who are interested are allowed to participate. All are given a chance to shine. Newcomers, however, start with more menial tasks, with their work subsequently scrutinized through stringent peer reviews.<sup>89</sup> With favorable reviews, newcomers can begin to gain significant responsibilities and influence.<sup>90</sup> Future leaders are then culled from members with significant prestige earned through favorable peer review.

#### 2. Surprisingly Central Management

Despite the grassroots origins of the modern commons movement and the important role peer review plays in the development of commons, commons management is not as laissez-faire as its egalitarian culture might suggest.<sup>91</sup> In most commons, a core leadership provides “general direction and ethos, assigns tasks and acts as an editor, approving changes to the [work product as needed].”<sup>92</sup> However, a variety of management styles and structures do exist within commons.<sup>93</sup>

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87. See WEBER, *supra* note 13, at 189.

88. See *id.* at 63 (discussing the low barrier to entry in open source).

89. See *id.* at 63–64 (discussing the importance of stringent review in open source).

90. See MULGAN ET AL., *supra* note 64, at 16–18.

91. See WEBER, *supra* note 13, at 171–72 (observing that while technologies do reduce the cost of communications and collaborations, the complexity that arise from managing virtual projects nevertheless demand that some governance structure must be evolved); Bonaccorsi & Rossi, *supra* note 84, at 1246–47 (“[M]ost successful Open Source projects, far from being anarchical communities, display a clear hierarchical organisation.”).

92. See MULGAN ET AL., *supra* note 64, at 18; see also Roy T. Fielding, *Shared Leadership in the Apache Project*, 42 COMM. ACM, April 1999, at 42, 42 (“Unlike most open-source projects, Apache has not been organized around a single person or primary contributor.”); Tere Vadén, Intellectual Property, Open Source and Free Software 1, 5, <http://opensource.mit.edu/papers/vaden.pdf> (last visited Mar. 26, 2007) (“Participation in free and open source development is voluntary, communities often centre around a charismatic leader, reputation, respect and ‘karma’ are sought.”).

93. See WEBER, *supra* note 13, at 89–93; Kevin Crowston & James Howison, *The Social Structure of Free and Open Source Software Development*, 2 FIRST MONDAY 10, (2005) [http://www.firstmonday.org/issues/issue10\\_2/crowston](http://www.firstmonday.org/issues/issue10_2/crowston).

Some commons depend on charismatic leaders while others do not.<sup>94</sup> The Linux movement, for example, has a charismatic leader, Linus Torvalds, who plays an important role in setting the vision of and motivating the community. The Apache Foundation, in contrast, is a commons organization that functions without a single charismatic leader and is an example of a leadership structure based more around an organization than a personality.<sup>95</sup> The process by which leadership is selected and later transitioned also differs from organization to organization.<sup>96</sup> Leadership selection in some organizations is based heavily on peer review (discussed above) while in others it is accomplished through less transparent processes controlled by the core inner leadership.<sup>97</sup>

#### IV. TOWARDS A LEGAL AID COMMONS

The previous Part discusses some of the features, challenges, and opportunities that commons offer. This Part discusses in more detail how those features, challenges, and opportunities apply to the legal context and, more specifically, to the legal aid commons envisioned in this Article.

##### *A. Harnessing the Power of Many*

The American Bar Association (“ABA”) currently recommends that each attorney devote forty hours to pro bono work per year. One problem with pro bono assignments is that real life cases rarely come in manageable, “bite-size” pieces. Even when forty-hour assignments do appear, many attorneys do not have forty-hour chunks of free time at a moment’s notice. Another challenge with pro bono assignments relates to the difficulty in matching cases to people and resources. Every assignment demands a particular set of skills and time resources; every attorney brings unique capabilities, interests, and availability. Matching the right people, resources, and cases together within the constraints of real life workloads is not trivial.

A legal aid commons as envisioned here, built upon advanced information tools, offers a platform that can tackle many of these challenges. If implemented correctly, a legal commons will match clients

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94. MULGAN ET AL., *supra* note 64, at 19.

95. Roy T. Fielding, *Shared Leadership in the Apache Project*, 42 COMM. OF THE ACM, Apr. 1999, at 42. *See generally* The Apache Software Foundation, <http://www.apache.org> (last visited Feb. 18, 2007).

96. *See* Crowston & Howison, *supra* note 93.

97. *See* Bonaccorsi & Rossi, *supra* note 84, at 1247 (“As [an open source] project grows, the authority of the project leaders (core development group) arises naturally from a bottom up investiture as a result of the contributions to the commonly agreed goal.”); *see also* WEBER, *supra* note 13, at 91, 105, 162–64, 180, 187.

to the right resources in the community for their needs, enabling cases to be assigned so they can be accomplished in a timely and dependable fashion.

### *B. Powerful Non-Monetary Incentives*

Since members of commons contribute services for free, powerful non-monetary incentives must exist for a legal aid commons to thrive. Many of the powerful non-monetary incentives that have proven invaluable in non-legal commons should prove equally helpful in motivating legal aid commons as well.

#### 1. Commonly Shared Goals and Vision

One of the main reasons for members to join commons is to rally around commonly shared goals and visions. This should play to the strength of legal aid commons because universal, well-articulated goals and visions should not be hard to find for an endeavor like legal aid. Without adequate legal access, equality and justice cannot be served.<sup>98</sup> The legitimacy of democratic societies — not to mention that of the legal profession — suffers. The opportunity to enhance legal aid is a notion that ought to inspire and motivate outstanding professionals to contribute.

In addition, commons can also promulgate and leverage more specific goals and visions to further invigorate membership participation. For example, sub-communities might form to focus on clients in a particular location or with particular issues.<sup>99</sup> Some members may prefer to focus on clients living in a particular city. Others might choose to focus on the types of cases involved, such as landlord-tenant disputes or capital punishment cases. Others might prefer to focus on providing legal services to worthwhile nonprofit organizations.

#### 2. Skill Improvement and Intellectual Challenge

A legal aid commons community also offers substantial opportunities to hone one's skills, including legal research, brief writing, evidence gathering, client counseling, and litigation strategy. To compete for talent and resources, lead attorneys within the commons will strive to divide up cases into assignments that are rewarding and challeng-

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98. Justice Barbara Durham of the Washington State Supreme Court, for example, has noted, "Equal access to the justice system is the cornerstone upon which our democracy and the rule of law rest." PERKINS COIE, 2003 PRO BONO ANNUAL REPORT 6.

99. In the open source context, this sometimes happens as existing communities form new sub-communities to pursue different visions and goals through a process called "forking." See WEBER, *supra* note 13, at 12, 64–65, 95–99, 143, 159–60, 168–71.

ing. In this way, the commons can provide stimulating and challenging opportunities for attorneys to develop skills in areas to which they might not otherwise be exposed. For example, a patent lawyer might expand his IP practice into copyright by helping budding artists protect their work; a corporate transactions lawyer could expand his skills by advising on the formation of a nonprofit organization; a junior lawyer might take on the entire asylum case of an immigrant with whom she shares common bonds of nationality, birth place, or religion.

### 3. Prestige, Networking, and Learning

A legal aid commons community also offers a unique forum for members to develop reputations and networks that are transferable to the real world. Like commons in other areas, a legal commons can be a forum where like-minded professionals network, develop skills, and advance careers. Networking opportunities in a legal aid commons can exist in many forms. Interactions can occur between public service attorneys, between member attorneys, between public service attorneys and member attorneys, and in the more ambitious second model, between indigent clients and member attorneys. Networking opportunities in commons collaborations often occur through repeat encounters that lead to substantive work products, allowing for more substantive relationships than those allowed by chance social meetings.

The opportunities for members of legal aid commons to develop their reputations are significant. In the real world, the opportunity to assess the legal capabilities of lawyers is often limited because the practice of law rarely occurs in an open, transparent way. Many cases settle, and clients and settlement terms demand confidentiality. The commons offers an opportunity for lawyers across diverse geographical regions to work together and review one another's work in substantive ways. While reputations developed through client word of mouth might better gauge a lawyer's ability to interact with clients, reputations developed in commons will speak more to a lawyer's legal skills, knowledge, acumen, and perhaps even ethics and integrity.

The reputation developed in commons also provides a valuable means for learning through substantive critique and feedback. Freed from daily workplace politics, the peer reviews that one gets in commons can be refreshingly more transparent and substantive. Feedback can come from multiple levels. In a legal aid commons where only the public service attorneys assign and delegate work, substantive reviews will come mostly from these public service attorneys. However, in a more comprehensive commons where all members may deal directly with clients and assign work, review can come from any of a number

of attorneys. Depending on the specific culture of the legal aid commons, reviews can be carried out formally, informally, or both. Formal review might involve the assignment of a score aggregated from a member's formal written reviews. Informal reviews might be based on a mixture of word of mouth reputation, accolades, awards, legal results for clients, and elements of formal reviews.

### *C. Leadership Grooming*

Very few aspects of an organization define it as much as the process involved in the grooming and transitioning of leadership. A vigorous leadership grooming process will go a long way toward creating a long-lasting, stable organization that can define, redefine, and invigorate itself. The same is true of commons leadership. The leadership grooming process for legal aid commons should be made as transparent and as fair as possible, geared to select and produce the best leadership.

There are many ways by which the initial leadership of a legal aid commons may be chosen. Some possibilities include: a leadership selected by an existing subcommittee of the ABA, a leadership selected by the public service attorneys' bar, a leadership made up of the founding members of the legal aid commons envisioned here, or a combination of the above. As the head of a startup organization, the initial leadership will be heavily involved in strategic decisions — such as setting visions, defining goals, and selecting metrics for measuring progress — as well as the details of operations — such as handling the review and feedback process, resolving disputes, and running fundraising. In leading a grassroots organization, the leadership must aim to strike a balance between running an organization efficiently and harnessing the power of the commons by delegating work. All members must feel that they have a real stake in the process and a real opportunity to make a difference. The leadership should give the review and feedback process as much independence as possible, even though, at least initially, the leadership may unavoidably be heavily involved. As the commons matures, learning to let go and let the grassroots develop will be absolutely critical. The creation of a transparent grooming process to select and develop the next generation of leadership will also go a long way toward building a vital commons for the long term.

The leadership transitioning process should be based, at least in part, on the candidate's reputation and status within the commons, informed by colleague feedback and reviews. In general, though, the process is unlikely to be, nor should it be, based wholly on peer reviews. The requirements of leadership are quite different from those of an independent contributor. In addition, not all great independent

contributors would like to be in leadership roles. Many members, including those who take senior positions within the commons, have neither the time nor interest to lead it. Leaders are also often made while in positions of leadership. It would thus be myopic to limit the selection of great leaders to great independent contributors only. However, community reputation is an important factor in grooming leaders because effective leaders must be in touch with the community. Members without good reputations will have difficulties making that kind of connection. Given these observations, leaders should be selected in a special election, with candidates culled from those with a minimum threshold of “status” in the commons and other attributes relating specifically to leadership potential. The degree to which this process is controlled by the general membership, the current leadership, or a combination is an interesting question not discussed here.

#### *D. Management Style*

While the range of management structures of commons projects is generally diverse, successful commons are typically centralized. The management structure of a legal aid commons, like most other successful commons, will probably also be relatively centralized. Given the nature of commons as volunteer-based organizations, a centralized management is important to help channel their potentially chaotic grassroots energy. A centralized structure will also enhance the ability of the leadership to communicate vision and goals, make key strategic decisions, implement policies, and run the daily affairs of the commons, including arbitrating potential conflicts within the organization.

#### *E. Democratization and Reinvigoration of the Legal Profession*

The back-loaded approach to recruitment in commons provides a marked counterpoint to traditional recruitment and career paths of legal professionals. Commons would create an alternative path for many qualified people to rise in the profession, even if they lack the resumé that typically grants access to large law firms. This path would not only provide fresh opportunities for budding lawyers but would also energize the profession’s elite echelon by bringing in new members who formerly would have been excluded. A legal commons, with its focus on the back-loaded approach to professional development, can thus democratize not only legal access for the indigent, but also the recruiting and leadership grooming process for lawyers, reinvigorating the legal profession in the process.

## V. OPEN ISSUES IN CREATING A LEGAL AID COMMONS

The previous Part, informed by observed characteristics of other commons, discusses what a legal commons might look like. This Part discusses some unique issues that might challenge the creation of a legal aid commons.

### *A. Unbundling Issues*

Unbundling refers to the division of tasks into piecemeal assignments, the distribution of assignments to be completed by separate individuals simultaneously and independently of each other, and the re-aggregation of the work products from the separate individuals back into a coherent whole. The feasibility of unbundling legal tasks will be a key factor in the success of legal aid commons. If legal aid projects cannot be unbundled easily into piecemeal tasks that an average volunteering attorney with average time and resources can take on, legal aid commons will have only a superficial impact. However, if legal aid projects can be effectively unbundled, a legal aid commons can be harnessed to access vast, previously untapped resources to deliver legal aid services to the indigent.

The unbundling of workflow is not a new concept. From an engineering perspective, however, most tasks in the world are not easily unbundlable; instead, only a special class of tasks are readily divided and processed in parallel. Making unbundling worthwhile will require identifying the type of work that can be feasibly divided. When Henry Ford invented the modern assembly line used in mass production, part of his genius lay in identifying the car manufacturing process as a task that can be effectively divided, allowing him to design and create factories where such divisions were efficiently implemented.<sup>100</sup> In computing, dividing up general work into concurrent tasks is a difficult process,<sup>101</sup> which partly explains why until recently there have been few general-purpose multi-core or multi-chip personal computers on the market. On the other hand, many specialized applications have been parallelized with great success, as exemplified by the desktop

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100. See Wikipedia, *Henry Ford*, [http://en.wikipedia.org/wiki/Henry\\_Ford](http://en.wikipedia.org/wiki/Henry_Ford) (as of Feb. 25, 2007, 13:51 GMT).

101. In general, it is not easy to ensure that the costs of dividing and assembling these general tasks are always low enough to warrant the employment of parallel processing. See Wikipedia, *Parallel Computing*, [http://en.wikipedia.org/wiki/Parallel\\_computing](http://en.wikipedia.org/wiki/Parallel_computing) (as of Feb. 25, 2007, 16:39 GMT) (“Parallel programming can only be applied to problems that are inherently parallelizable, mostly without data dependence.”). For example, engineers continue to have trouble writing software that breaks general computing tasks into parallel bits to be processed by multiple cores in a processor. See, e.g., Cliff Edwards, *Intel Builds the Fastest Chip Ever*, BUSINESSWEEK.COM, Feb. 12, 2007, [http://www.businessweek.com/technology/content/feb2007/tc20070211\\_730122.htm?chan=technology\\_technology+index+page\\_more+of+today%27s+top+stories](http://www.businessweek.com/technology/content/feb2007/tc20070211_730122.htm?chan=technology_technology+index+page_more+of+today%27s+top+stories).



Search for Extra-Terrestrial Intelligence (“SETI”),<sup>102</sup> graphics acceleration, weather and pollution simulations, and certain genetic search algorithms.<sup>103</sup>

In general, unbundling is effective only where the transaction costs involved in dividing up, distributing, and later re-aggregating the work are less than the savings achieved by distributing and delegating the work. Whether this can be done in a legal aid setting touches on issues that are central to the nature of the practice of law. Can tasks in the practice of law, such as identifying and developing legal issues and legal cases, be feasibly divided, distributed, and analyzed separately and independently by a team of arm’s-length professionals distributed across the nation? If so, are they amenable to efficient execution in an open commons environment where interacting members may be complete strangers located half a world apart? One might argue that it is one thing to unbundle a software or encyclopedia project and quite another to unbundle a legal case. It is relatively easy to unbundle software projects because software is already widely designed in components that are anticipated to be independently implemented and assembled from packages coded by programmers in different locales. Similarly, it is relatively easy to unbundle encyclopedia projects because encyclopedias are made up of entries that individuals can complete independently. However, legal work often depends on an intimate understanding of an amalgamation of facts and issues that are difficult to categorize and divide *ex ante*; such work has been traditionally approached as an opaque, monolithic whole. On the other hand, while legal cases may be more difficult to divide up than software or reference projects, many cases today are not carried out by individuals. A form of unbundling already takes place in law firms when partners divide up assignments for associates or other partners to carry out.

Another facet of unbundling relates to the availability of advanced workflow and information technologies needed to tackle legal work collaboratively on a large scale. An advanced computer system that can lower the transaction costs associated with unbundling projects would be immensely useful. Such a system should electronically track cases and dockets and provide for efficient electronic communications among members as well as for sharing and distributing documents. A system that keeps an updated profile of attorney resources and interests would also be helpful. Such a system would make it easier to match and assign projects to the attorneys with the most fitting resources, skills, interests, and schedules. A top-notch security and

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102. SETI at Home, <http://setiathome.ssl.berkeley.edu> (last visited Mar. 2, 2007).

103. See Wikipedia, *Embarrassingly Parallel*, [http://en.wikipedia.org/wiki/Embarrassingly\\_parallel](http://en.wikipedia.org/wiki/Embarrassingly_parallel) (as of Feb. 22, 2007, 17:33 GMT) (describing various processes that have been shown to be amenable to unbundling).

network system would be needed to ensure that, notwithstanding the scale of information sharing, information is distributed in a secure and confidential manner. For a legal aid commons to work effectively, a system that allows for some sort of automatic and efficient conflict checking, based on an attorney's profile and past work history, would be very helpful. An engagement profile associated with every member and automatically updated with every engagement can go a long way towards enabling this functionality.

It is the author's belief that nothing fundamental to the practice of law renders unbundling legal work unfeasible. With open attitudes and appropriate technologies, commons can be leveraged to greatly democratize and liberalize legal access for the indigent as never seen before.

### *B. Confidentiality, Liability, and Information Security*

The legal profession has long recognized the importance of confidentiality in attorney-client relationships.<sup>104</sup> This sensitivity is well justified. Confidentiality exists in part to maximize the effectiveness of attorneys by allowing their clients to be as open as possible with them. The sensitivity regarding confidentiality is magnified in a forum like the commons, given the unprecedented amount of sharing, both in terms of the number of people working on a case and the amount of information distributed and shared. It is critical that, as cases are unbundled and distributed, attorneys pay particular attention to how confidential information is passed along. Depending on the nature of the cases involved, assigning attorneys may need to unbundle cases with an eye not just toward efficiency or project appeal, but also toward confidentiality, dividing up projects along lines that enable them to pass information along only on a need-to-know basis.

The concerns of attorney malpractice liability, especially joint and several liability, may also complicate the process of unbundling. By participating in projects where many professionals collaborate in handling a case, lawyers and law firms risk joint and several liability for the malpractice of fellow collaborators.<sup>105</sup> Few lawyers and law firms would be willing to expose themselves to liability for the potential incompetence of collaborators, especially those with whom they have had little traditional contact. To facilitate the establishment of a legal aid commons, the rules of liability imputation should be clarified and narrowed for the legal aid context without jeopardizing professional

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104. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002), available at [http://www.abanet.org/cpr/mrpc/rule\\_1\\_6.html](http://www.abanet.org/cpr/mrpc/rule_1_6.html).

105. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 58 (2000) (noting that principals of law firms are jointly and severally liable for wrongful acts or omissions of other principals or employees under some circumstances).

responsibility to clients. In addition, the clear delimitation of responsibilities and tasks in the process of unbundling projects can help. For example, assigning attorneys should clearly articulate the scope and expectation for each assignment as they distribute them. Similarly, contributing attorneys should clearly communicate the scope and understanding of each assignment when they return the work product.

As touched on earlier, technology can play an important role in managing confidentiality. A legal aid commons information system should allow assigning attorneys to divide, distribute, and track assignments easily and effectively. An information system should electronically deliver all information needed for the assignment (but no more) and help attorneys keep track of a docket of assignments in the commons to avoid missing deadlines. As information is passed along in a legal aid commons, the system will ensure that personal and confidential information is not compromised.<sup>106</sup> The workflow process and the technology infrastructure of legal aid commons must be designed and implemented to minimize the unnecessary exposure of private client information. In sum, while an important goal of a legal aid information system is the efficient division of work to be distributed to the commons, the system may need to constrain workflows for non-efficiency concerns such as attorney liability and client confidentiality.

### C. Conflicts Checks

Since one of a lawyer's foremost responsibilities is to be "a zealous advocate" for the client, it is not surprising that the profession has prescribed complex and comprehensive rules regarding conflicts of interest.<sup>107</sup> Such concerns have a large impact on the daily practice of law. For example, an attorney must clear conflict checks before taking on a new client. Conflict plays such an important part in the practice of law that one of the largest impediments to large law firm growth today is the increasing difficulty of taking on a new client (especially a corporate client) without causing conflicts with existing clients.<sup>108</sup>

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106. See MULGAN ET AL., *supra* note 64, at 26.

107. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8 (2002), available at [http://www.abanet.org/cpr/mrpc/rule\\_1\\_7.html](http://www.abanet.org/cpr/mrpc/rule_1_7.html) and [http://www.abanet.org/cpr/mrpc/rule\\_1\\_8.html](http://www.abanet.org/cpr/mrpc/rule_1_8.html).

108. See, e.g., Jeanne Greeley, *Law-Firm Mergers That Work*, MASSLAWYERWEEKLY.COM, April 22, 2002, <http://www.masslawyerweekly.com/100ma2002.cfm> (discussing the problem of large client conflicts where "'Coke and Pepsi' conflicts can often derail a merger" between two law firms); William Henderson, *Second Look at the Second City*, LEGALAFFAIRS.ORG, Nov./Dec. 2005, [http://www.legalaffairs.org/issues/November-December-2005/review\\_henderson\\_novdec05.msp](http://www.legalaffairs.org/issues/November-December-2005/review_henderson_novdec05.msp) (noting that "at major Chicago firms . . . approximately one-third of all proposed clients had to be referred outside the firm because of conflicts between the interests of the proposed clients and of existing clients").

Since a legal aid commons could be considered to be a virtual mega-firm whose members consist of the entire bar, traditional conflict rules, if applied to commons, would render legal aid commons infeasible.

One potential solution is to have smaller commons. Commons can be broken up into smaller communities based on specialties such as family law or practical considerations like geographic location. However, breaking up commons reduces the efficiency of scale offered by large commons.<sup>109</sup> Further, smaller commons do not really solve the problem since, given the potentially large client base, legal aid commons will eventually accumulate conflicts that prevent them from taking on additional clients. Traditional law firms may sometimes work around conflict rules by getting waivers from clients, but such steps will be formidable for commons given the large number of clients, large number of attorneys, and sensitivity of volunteer projects to large overhead costs. In the corporate world, corporations sometimes try to hire law firms for relatively small matters to conflict the law firm out of representing competitors in future potential lawsuits. These limitations could fatally reduce the effectiveness of commons. What happens if a party refuses waiver? Where would an indigent client go when he or she is conflicted out?

A better solution is to create a new set of conflict rules for legal aid commons. The current set of ABA conflict rules was created before World War II for small private law firms. The nature of small partnerships, it was reasonable to presume that members would learn about and discuss each other's cases. It made sense to impute a single lawyer's position of confidentiality to the law firm as a whole. However, in a legal aid commons, where an entire bar may be expected to participate and where interactions occur formally, virtually, and at arm's length, it may not make as much sense to enforce traditional rules of conflicts. Further, in a commons, the client's personal information can often be "secluded" during the unbundling process. The typical attorney does not have knowledge beyond the information specified in an assignment and is often far removed from direct knowledge of the case and/or client. Given the factors that reduce traditional concerns over conflicts and the great promise that a legal aid commons holds, it is reasonable to create a new set of conflicts rules designed for a commons-based legal aid organization. Rule 6.5 of the Model Rules of Professional Conduct is a good start, and something like it, but much more comprehensive, should be formalized specifically for legal aid commons.<sup>110</sup>

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109. The larger a commons is, the larger and more diverse set of people, skills, and resources it can harness to tackle legal problems.

110. MODEL RULES OF PROF'L CONDUCT R. 6.5 (2002), *available at* [http://www.abanet.org/cpr/mrpc/rule\\_6\\_5.html](http://www.abanet.org/cpr/mrpc/rule_6_5.html) (exempting lawyers working under the aus-

*D. Incentives and Compensation*

In law, perhaps more than in any other field, reputation can represent hard currency in the business. Many lawyers crave high visibility work because it can help them or their firms garner business. One problem for commons is whether individual lawyers can be incentivized to work on relatively small, discrete, non-glamorous legal projects. While some law firms prefer to take on high visibility pro bono work for recruiting and client-relations purposes, the Author believes that a vast majority of lawyers who take on pro bono cases do so out of a sense of duty and professionalism. If so, the discrete nature of the work should not deter participation by a vast majority of bar members.

Another incentive issue relates to questions of compensation. While commons members generally participate in commons without pay, the issue of compensation is important for commons because it is conceivable that the commons system as envisioned here can be gamed for personal gain.<sup>111</sup> What is to prevent, for example, a swamped, for-profit private attorney from submitting work from his personal practice to the commons and getting free labor? A similar question also applies, though less dramatically, to the public service attorneys themselves. Public service attorneys often charge a nominal fee to serve indigent clients. With a commons at their beck and call, public service attorneys will be able to take on additional work, presumably increasing their income. Should public service attorneys be allowed to keep all of the extra income gains they have realized for themselves, be required to share some of it with the commons, or have to return part of it to their clients by reducing their nominal fees? It is important to ensure that the resources of the commons are reserved for the indigent public and are not hijacked by a dishonest few. If any segment of the profession is allowed to profit from the work of the legal aid commons, the legitimacy and vitality of the commons suffers, creating low morale and perhaps ultimately destroying its very foundations.

## VI. CONCLUSION

The commons phenomenon in the technological and Internet arena offers an interesting and exciting model that can be harnessed to help broaden legal access in ground-shaking ways. The success of

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pices of a program sponsored by a non-profit organization or court from the usual conflict of interests rules unless the lawyer actually knows of the conflict). Unless a state has adopted something like Rule 6.5, lawyers are required to keep and check against a list of all prior clients, which is expensive and time consuming.

111. For examples of problems arising from those appropriating commons resources for private gain in open source, see WEBER, *supra* note 13, at 108, 112, 178, 181.

such a project depends in large part on the feasibility of back-end unbundling as an approach to legal cases. Unbundling touches on many issues related to the practice of law as well as the running of a large organization. This Article discusses some of the issues relating to transaction costs, volunteerism incentives, malpractice liability, client confidentiality, and attorney conflicts associated with a legal aid commons. Emphasis has been placed especially on the organization-building, technological, motivational, and legal ethics aspects of such an endeavor. The discussion here is meant to be general. The hope is to spur additional discussion that takes us closer to realizing a legal aid commons. High-tech commons have unleashed a powerful informational and organizational revolution that is democratizing the world as never before. This revolution has renewed the viability and vitality of creating and maintaining community-based public good resources in many contexts. It may now be time to seize upon this unprecedented opportunity to broaden and democratize legal access, improving the lives of many indigent citizens, on a scale never before thought possible.