COMMONS ON THE LEGAL FOUNDATIONS OF CAPITALISM[1]

I

John R. Commons is a bewildering person. To him we owe the *Documentary History of American Industrial Society*, and a dozen books upon that great group of issues which we call the labor problem. To him we credit a leading part in those social experiments for which his state is famous—experiments in taxation, industrial relations, minimum wages, and, if he gets his way again, unemployment insurance. From his pupils, now counted by the hundreds, we hear of the restless pioneer who is ever leading his classes away from the familiar fields to the tangled frontier of knowledge where they can scarce keep from getting lost. And from time to time we come upon some brief article in which this historian, reformer, teacher turns theorist and tries to reshape the concepts of orthodox economics so that they may square with the teeming facts of his rich experience.

This last role has always had a peculiar fascination for Professor Commons. Trained as he was in the eighties at Johns Hopkins—those old days when his teacher, Professor Ely, was a militant champion of the historical school—eager as he has always been to get at "facts" and to put schemes "over," we might have expected Commons to be disdainful of economic theory. On the contrary he cherishes a deep interest in, a certain reverence for, the letter of the law as laid down in the sacred books and in their progeny. No economic investigation is ever complete in his eyes until it is tied into a system of concepts related organically to the reinterpreted concepts of the theorists.

To one with this bent toward the use of elaborate logical constructions in the interpretation of human behavior, the methods by which courts of law treat economic problems must be congenial. And what was congenial to him proved to be a necessary part of Professor Commons' work. In many of his historical studies and in all of his reformist campaigns, Commons had to consider what the judges had decided or what they would decide under given circumstances. The study of legal precedents became as much his business as the making of economic analyses. His seminar attracted judges as well as members of the legislature. Gradually he came to have a knowledge of legal history and theory probably unrivaled among American economists. Indeed, all his multifarious activities as writer, teacher, and citizen gradually focused around a problem in which the economic and the legal phases are intertwined.

That problem is the theme of the *Legal Foundations of Capitalism.* Professor Commons tells us in the preface that he began writing

[1] *Legal Foundations of Capitalism,* by John R. Commons. (New York: The Macmillan Company. 1924. Pp. x, 394.)

this book when he was a graduate student, thirty-five years ago. He has been working on it ever since. It holds the key to all his excursions into fields where economists are supposed to have no proper business. To understand Commons' career, to understand the book, to grasp its importance as a contribution to knowledge, we must know its history.

In his first book, *The Distribution of Wealth*, published in 1893, Professor Commons made a premature effort to combine economic and legal concepts. As he puts it, he "tried to mix things that will not mix—the hedonic psychology of Böhm-Bawerk, and the legal rights and social relations which he had himself analyzed and then excluded from his great work on the psychological theory of value." This mixture might not be satisfactory, yet his practical activities as a social reformer sustained the conviction in Professor Commons' mind that some way of mixing the two elements must be found. In drafting bills for legislative committees in Wisconsin, he had to face both the economic and the legal theories involved in labor problems and in the regulation of public utilities. If the bills which he and his associates wished to see passed were to be sustained by the courts, the drafts must be made constitutional. That made necessary a study of court decisions and the court decisions which concerned him centered in an economic problem. Most of the crucial issues hung upon the question, "What do the courts mean by reasonable value?"

Commons and his students turned to the economic treatises for help. But they could not "find much in the writings of economists except those of Professor Ely that threw light on the subject." The Wisconsin reformers were puzzled; but the Wisconsin reforms were pressing. So Professor Commons and his associates acted like practical men—they did what they wanted to do without waiting for a scientific validating of their program.

> From the court decisions it seemed that anything "reasonable" would be sustained, and so we had to use the words reasonable value, reasonable safety, reasonable wage, and fix up reasonable conduct for public officials and private citizens, whether we knew what it meant or not.

Commons, however, was not the man to let matters remain in this state. Whether his immediate reforms were sustained by the courts or not, he wanted an answer to his question about reasonable value. Society needs a theory of reasonable value quite as much as reformers need to know what the courts will hold to be reasonable. So he kept thinking about this intellectual problem while he was persuading Wisconsin to try one new experiment after another. Presently he saw that Veblen's criticism of various economic schools contained a valuable suggestion—"an evolutionary theory of value must be constructed out of the habits and customs of social life." With that clue he made a fresh attack upon what seemed to him the essential materials concern-

ing social customs—namely, the decisions of the courts. With his students he began

> digging directly out of the court decisions stretching over several hundred years the behavioristic theory of value on which [the judges] were working.

Side by side with this study of the court decisions Commons and his pupils re-read their own classics, and "tried to reconcile the economists from Quesnay to Cassel with the lawyers from Coke to Taft." This effort led to a new puzzle—the problem with which the courts were dealing seemed to differ more than the language suggested from the problem of the economists. Eventually Professor Commons and his students found that what they were really working upon in following the court decisions "was not merely a theory of Reasonable Value but the Legal Foundations of Capitalism itself."

When this idea had become clear, all the materials collected both from the courts and from the economists began to fall into order. The present volume deals

> only with concepts derived from the decisions of the English and American courts, but with an eye on the concepts of leading economists from the Physiocrats to modern times. Another volume is in contemplation reviewing these theories of the economists and leading up to practical applications of a theory of Reasonable Value to current problems.

From this account of its theme and history combined with our previous knowledge of Professor Commons' work, it is clear that the *Legal Foundations of Capitalism* must be an important book. Every reformer who uses the method of legal enactment is concerned with the problem of reasonable value. So, too, is every lawyer, and every value theorist, whether he calls himself on economist, an engineer or a philosopher. Moreover, everyone interested in modern history is concerned with the development of capitalism. But, however much they may be interested in the theme, most readers will find the book difficult. Professor Commons is a brilliant expositor when he has mastered his materials, and this book he has rewritten time and again. Yet his originality as a thinker makes difficulties for him as a writer: original ideas are by definition unfamiliar and so hard to make clear. Any one who has worked thirty-five years on a theme which is not part of our common stock of knowledge is certain to work himself more or less out of touch with readers. And all books which lie on borderlands cover some territory that is strange to most of their readers. Economists will find the legal distinctions difficult, lawyers will be puzzled by the economic theory, few historians have patience with any sustained analysis, and I fear many reformers will find everything strange except a few wrong-headed legal decisions which they know only too well. Ten years hence the book is likely to have more readers who enjoy and profit by their perusal than it will find this year.

Under these circumstances the chief use of a review is to facilitate the reader's attack upon the book itself. That, rather than evaluation or criticism, is the aim of the following pages. Indeed the time is not yet ripe for passing judgment upon the value of Professor Commons' results. A book like this is judged ultimately by the work it sets other men to doing. Everyone who deals with economics owes it to himself to see what use he can make in his own thinking of Professor Commons' ideas.

II

The "substance of Capitalism," as distinguished from the Feudalism out of which it developed, is "production for the use of others and acquisition for the use of self" (p. 21). Of course production and acquisition imply human activity, natural resources, ownership. The legal foundations of capitalism were laid by the judges who validated and enforced those ideas and practices relating to property and liberty which are involved in business enterprise.

With this view of his subject, Professor Commons has two tasks to perform. On the one hand he must find by analysis what ideas and practices relating to property and liberty are implicit in business enterprise. On the other hand he must sketch the process by which the ideas and practices relating to property and liberty which prevailed under feudalism have been converted into the very different ideas and practices which prevail under capitalism.

Permeating both the analysis and the history is a conviction that the decisions of the courts are of paramount importance. Professor Commons sees economic evolution as a process in which new forms of behavior keep cropping up in response to new needs or new opportunities: the all-important matter is the selection made among these candidates for social survival. That matter is attended to (rather tardily) by the courts. By deciding what ideas are valid and what practices are lawful, the courts promote the spread of ideas and practices which they consider good and the repression of variants which they consider bad. One may say roughly that the role played by natural selection in Darwin's biology is played by judicial selection in Commons' scheme of economic evolution.

Concerning the analytic phase of this view, only a word will be said for the moment, and that word will be cryptic. As "the ultimate unit of economics, ethics and law," under capitalism we must take not one man balancing sacrifices and satisfactions, nor two men bartering nuts for apples, but a transaction involving a minimum of five persons—the two parties directly concerned, two more parties representing the next best alternatives open to the bargainers, and a judge (pp. 66, 68). Of course, the judge has his share in the billions of transactions which

are never brought before him no less than in the few transactions which are litigated. For, whether we are aware of the fact or not, our behavior in all business transactions is molded and standardized by that long line of judicial decisions which binds our American courts of today to dim medieval precedents.

Professor Commons takes up the analytic side of his problem first. I shall reverse the order and consider first his sketch of how capitalism evolved out of feudalism.

III

Capitalism as "production for the use of others and acquisition for the use of self" is concerned with the exchange values of things rather than with their use values. Hence Capitalism rests upon a more fundamental institution—money economy. Under Feudalism, on the contrary, use values dominated economic life; there was little exchanging, and that little was mainly barter.

Neither property nor liberty were clear-cut concepts in feudal times.

> William the Conqueror and his lawyers did not distinguish his property from his sovereignty . . . The soil belonged to him by right of conquest, and the people were his subjects . . . The primitive mind could with difficulty comprehend anything but physical objects and individual persons and, indeed, in this it but reflected the facts. In an age of violence the will of powerful individuals was the government, and in an age of serfdom and villeinage physical control over persons was scarcely distinguishable from exclusive holding of land and movables . . . The subject had no enforceable *right* either to lands or liberties [for] the monarch could . . . withdraw them or change their terms at will (pp. 214-216).

Out of this inchoate situation the idea of property in land gradually evolved by differentiating the governmental rent of land from the economic rent. This process could not have been effected without the use of money. The king succeeded in converting the feudal services owed by his chief tenants into money payments, in depriving these tenants of their bands of retainers, and in building up a standing army of his own. This much was accomplished by the time of Henry VII. But the various aids, benevolences, reliefs and so on which the king derived from his chief tenants remained somewhat arbitrary, and it was not until 1660 that all the dues were commuted into fixed and regular sums. In that year a parliament controlled by landlords abolished military tenures, and substituted a perpetual excise on the drink of the people for the benefit of the crown. Thus sovereignty was separated from property; "pecuniary taxes became the governmental rent of land, and landed property became assimilated to the law of business freedom and security, so that, eventually, like movables, it could be bought and sold in expectation of its money values" (p. 221).

Meanwhile the liberty of the subject was being evolved by similar

gradual stages. In the eleventh century there were local customs and every lord held his court for his own tenants; but there was no common law of the realm. That bulwark of liberty grew from the beginning made when Henry II sent out his circuit judges to hold court in the counties. Later, these royal courts began to protect tenants against their landlords, taking cases out of the landlords' courts, and refusing to recognize local customs which they held to be oppressive. Commutation of labor services into money dues had an integral part in this process of clarifying and standardizing the rights of the small man quite as much as in the process of separating sovereignty from property. Commutation gave the tenant control over his own time, and a chance to choose what he liked best among the alternatives offered in his market. "The first and most perfect instrument of economic liberty is money" (p. 271).

But this instrument of liberty made trouble for its freedmen. In the sixteenth century came the great rise of prices, and the landlords were businesslike enough to threaten wholesale evictions of tenants and increase of rentals. To protect the masses against these changes new courts were created to which even the villeins had access, and these courts adopted the rule that a lord could not at will alter the customs attached to lands held by a particular tenure. In short, the law of copyhold tenure was gradually assimilated to the law of free tenure. "Thus," Professor Commons sums up, "in the end, the common-law courts were able to become the people's courts, protecting the free and even the servile tenant against his landlord in his possession of land and his rent bargain" (p. 222).

While these developments were in progress among the rural population, capitalism had begun its career among the traders and later among the artisans of the towns.

> The gilds were the spots, here and there, where capitalism had its origin. Surrounded by feudal landlords [the gildsmen] obtained immunity as small peddlers and artisans only by obtaining from a feudal superior privileges which enabled them to act as units and to make and enforce their own by-laws (p. 226).

With the transition from barter to money economy the gilds grew rapidly in numbers, scope and power. It was inevitable that in the course of their growth these beneficiaries of special privileges—the offspring of the prerogative—would come into conflict with the common law.

This clash began at the end of the sixteenth century and resulted in "the business revolution of the seventeenth century"—a revolution which paved the way for the political, agricultural and industrial revolutions which followed (p. 47). In 1599 the King's Bench declared

that a by-law of the Merchant Tailors of London was "against the common law" because it constituted a monopoly and so was "against the commonwealth"—a bold stand for the court to take since the by-law was authorized by an early charter which had been confirmed by successive kings and parliaments. The court took a similar position in the case of Monopolies in 1602, in the case of Dr. Bonham who had been imprisoned in 1608 as a medical practitioner not licensed by the chartered physicians, and in the case of the Ipswich Tailors, who in 1615 sought to drive out a man who had not served the seven years' apprenticeship required by their articles.

> Thus [says Professor Commons] the common-law courts accomplished, in the case of the gilds, what they had accomplished in the case of the barons. They abolished the private jurisdictions with their private courts, and the way was thenceforth open for them to build up, for the Kingdom, a common law of the price-bargain, just as they had built up a common law of the rent-bargain. The business man now, like the Yeoman and copy-holders, could have his customs inquired into by the King's justices, and his rights and privileges asserted against private jurisdiction of both gilds and barons. Capitalism entered upon its offensive stage, intent on controlling the government whose aid it had petitioned during its defensive period (p. 228).

The work of abating special privileges having been accomplished for the time, the courts had to take over the constructive task of working out common rules of fair competition and enforcement of contracts. In so doing they adopted for the whole realm many of the regulations devised by the gilds whose private authority they were abolishing. As early as 1580 the courts enforced a claim for damages against the use of a competitor's name in business (the first of the trade-mark cases), and in 1620 they enforced a contract for the sale of a going business (the first of the good-will decisions). So too the judges enforced the rules regarding bills of exchange which had been built up by the informal piepoudre courts of earlier days.

With the further growth of capitalism, the courts had to go far beyond this process of making old regulations into common law. Indeed the resources of the common law itself, even as widened by Mansfield with principles drawn from other sources, proved inadequate to the demands, and the eighteenth century saw a great expansion of equity jurisdiction.

> The common law was able to deal effectively only with physical things and to punish *after* the event—equity deals with the most intangible values, for it commands directly, *before* the event, the very performance, avoidance or forbearance on which value depends (p. 234).

Some such judicial process was required "in order to create those intangible property rights of modern business which have made the transition from physical property to intangible property."

Professor Commons then reviews the process by which the courts validated business practices which were implicit in the pursuit of gain by investment for profit. The promissory note was slowly legalized in the sixteenth century by extending protection against trespass on body, lands or goods to protection against the violation of a promise. Later the courts recognized that the promises of one person to another were themselves commodities that could be bought and sold. Thus they created negotiable instruments and laid the foundation of modern credit. But here the legislature had to intervene. "As late as 1704, Chief Justice Holt refused enforcement of the promissory notes of the goldsmiths of London, payable to bearer on demand" (p. 251), and an act of parliament was passed to clear the way for the modern bank note. Meanwhile the negotiability of bills of exchange *among merchants* had long been recognized, and in 1689 this limitation was removed by forbidding an acceptor who was not a merchant to bring out that fact. These steps establishing the assignment and negotiability of contracts ushered in a new epoch, because they brought a low rate of interest and a rapid turnover of capital.

> Capitalism could scarcely survive on a 10 per cent or 20 per cent rate of interest and a turnover once or twice a year. It has survived on a 3 per cent to 6 per cent rate of interest and a turnover three to five times a year . . . Ten per cent a year on capital turned over once a year means an overhead cost of obtaining capital ten times as great as 5 per cent a year on capital turned over 5 times a year (p. 253).

While the courts were thus coöperating in the development of the instruments of capitalism they presently found themselves recognizing that ownership had extended from property in physical things to property in expected profits from business dealings. One of Chancellor Hardwick's opinions shows that by 1743 the expectation of profits had become assimilated to the older notion of ownership so closely that the executor of an estate must account for the value of the good-will in a business. And this view was presently worked out definitely in the law of copyright and of patents.

A similar development in the concept of property and the associated concept of liberty occurred in American law. But here the lag between business practice and legal theory was longer than in England. When the legislature of Louisiana granted to a corporation a monopoly to maintain a slaughterhouse in New Orleans, the other butchers contended that the statute deprived them of their property and their liberty without due process of law. The majority of the Supreme Court in upholding the statute denied that "liberty" as used in the Constitution means the right to buy and sell, and held that "property" has its old common law meaning of physical things held exclusively for

one's own use. The minority of the court gave quite different definitions:

> A man's "calling," his "occupation," his "trade," his "labor," was property, as well as the physical things he might own; and "liberty" included his "right of choice," his right to choose a calling, to choose an occupation or trade, to choose the direction in which he would exercise his labor . . . "Property is everything which has exchangeable value." . . . and liberty [is] the right to realize that exchangeable value on the labor market (pp. 12, 13).

The Slaughter House cases were decided in 1872. Eighteen years later in the Minnesota Rate case the Supreme Court held that the reasonableness of a rate imposed by a legislature is a proper question for judicial investigation, because under the guise of regulating rates a legislature may take away property without due process of law. This position, says Professor Commons, means that the court in 1890 adopted the minority opinions of 1872. For they were now treating expected earning power as property. So too the definition of liberty given by the minority in 1872 was adopted by the whole court in the Allgeyer case of 1897:

> the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; . . . to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned (p. 17).

Thus the logic of capitalism, as recognized by the courts, "unites property and liberty in an identical concept" (p. 22).

In this logic of capitalism one important type of bargains—those concerned with the purchase of labor—was found to present peculiar difficulties, difficulties which have made it impossible to assimilate wage contracts with contracts of other kinds.

> What [the laborer] sells when he sells his labor is his *willingness* to use his faculties according to a purpose that has been pointed out to him . . . He sells his good-will. But . . . this promise has no exchange value (p. 284).

For the law provides no adequate remedy for breach of the promise to stay on the job. The laborer's body cannot be held as security, nor is it often feasible to levy upon his property, particularly since statute laws have exempted so much of the wage-earner's typical possessions from execution.

> Hence, the free laborer is employed at will—no obligation arises on the part of the employer to keep him, and no obligation on the part of the laborer to continue at work. Under no ordinary circumstances can the laborer be enjoined from quitting work, nor the employer from dismissing him. And, under no ordinary circumstances can either obtain damages for

failure to fulfill his [*sic*] promise. The labor contract therefore is not a contract, it is a continuing implied *renewal* of contracts at every minute and hour (pp. 284, 285).

As it stands, this situation is anomalous from the legal viewpoint. It has been made more anomalous still by the rise of labor organizations, which have tried to thrust themselves as third parties at interest into the private negotiations between employers and their individual employees. Professor Commons points out how difficult it is for the courts to adjust their theories to these modern customs.

The capitalist system has been built up, as we have seen, on the enforcement and negotiability of contracts, and it is as difficult for the lawyer of today to appreciate the custom of employer and employee in breaking labor contracts as it was for the lawyers of the Sixteenth and Seventeenth Centuries to authorize the custom of merchants in enforcing promises and buying and selling them. While the violation cannot be penalized against either the employer or the employee, yet the theory that it is unlawful rises up on occasion to penalize or enjoin third parties who induce the violation, although the only effective liberty of the wage-earner is the alternative opportunities offered by those third parties (p. 303).

Meanwhile the rise of labor organizations and their intervention in bargaining between employers and men have been forced by the pressure which capitalism puts upon wage-earners. Industrial government is built on economic coercion; its extreme penalty is poverty.

And consequently, what may be distinguished as the common law of labor springing from the customs of wage-earners, as distinguished from that historic common law springing from the customs of merchants and manufacturers, consists in those practices by which laborers endeavor to achieve their ideals through protection against the economic power of employers (p. 304).

The reasons and precedents are on the side of business, and the liberty and power demanded by labor is as contrary to precedent as the liberty and power demanded by business was contrary to the precedents of feudalism or the King's prerogative or the special privileges of gilds or the common law of agricultural England (p. 307).

"Apparently," Professor Commons concludes, "a 'new equity' is needed—an equity that will protect the job as the older equity protected the business." And he is hopeful that such an equity is arising through a repetition of the old process. In their dealings with each other employers and organized labor are gradually building up new and tentative customs which recognize restraints on free competition for jobs in the interests of fair competition, which check personal discriminations, and which give labor an influence upon management. Statute law has joined in the process by instituting safeguards against long hours, inadequate wages, industrial diseases, accidents and unemployment. In their turn and in their deliberate way the courts are taking cognizance of these new customs which are becoming prevalent

in industry and are beginning to make these customs the basis of a new common law of employment.

IV

From this historical review of the rise of capitalism we now turn back to Professor Commons' analysis of the ideas implicit in that scheme of economic organization.

To start again from the beginning: The "substance of Capitalism," as distinguished from Feudalism, is "production for the use of others and acquisition for the use of self." Production for others and acquisition for self involve the denizens of a capitalistic state in a never-ending round of transactions with each other. The unit of behavior under these conditions is not an individual pondering his problems alone. Nor is it merely two individuals dealing with each other. It is rather two individuals dealing with each other, each conscious of alternative deals which he may make with some other person, and conscious also that at need he can invoke a court to see that the deals are made and carried out according to the current rules of law. Hence Professor Commons' dictum quoted above: The ultimate unit of economics, ethics and law is a transaction involving a minimum of five persons.

On this fundamental point economic theory made a wrong start. The physiocrats, Adam Smith and Ricardo, took a commodity as their ultimate scientific unit. Then the hedonists shifted to a feeling of pleasure or pain. Neither line of analysis has value except as it contributes toward the understanding of a transaction. In this respect the judges have given the right lead.

> While the economists start with a commodity or an individual's feelings towards it, the court starts with a transaction. Its ultimate unit of investigation is not an individual but two or more individuals—plaintiff and defendant—at two ends of one or more transactions. Commodities and feelings are, indeed, implied in all transactions, yet they are but the preliminaries, the accompaniments, or the effects of transactions. The transaction is two or more wills giving, taking, persuading, coercing, defrauding, commanding, obeying, competing, governing, in a world of scarcity, mechanism and rules of conduct (p. 7).

Suppose that economics rectifies this error and makes "a transaction" its "ultimate unit." What changes will follow? How will the problem of economics be altered? How will its method of attack be shifted? How will its *modus vivendi* with other social sciences be affected?

When the economist deals with transactions it becomes clear to him that he is concerned primarily with the relations of man to man. The relations of man to nature remain of crucial importance to society as

a whole—think, for example, of the dependence of the national dividend upon the state of the arts. But the "substance of Capitalism" (production for others and acquisition for self) means that what every citizen gets for himself depends less on his efficiency in controlling nature than on his efficiency in dealing with others. Our transactions are concerned largely with natural resources and their products; but the transactions themselves are dealings between men; and it is these transactions which concern the economist.

With this shift in the primacy of problems comes a shift in the principles of explanation appealed to by theorists. When economists defined their specialty as "the science of wealth," they readily adapted to their uses the principles of mechanism to which Sir Isaac Newton had given such prestige. Then Malthus with his studies of the pressure of population upon subsistence made a large place in all social theorizing for the principle of scarcity. The recognition that economics is a science of transactions does not invalidate the principle of mechanism or the principle of scarcity, any more than it eliminates commodities or feelings. But it raises another principle of explanation to equal rank, namely the principle of working rules. For one of the outstanding features of transactions is the implicit (if not actual) participation of the judge. And of course most transactions are affected also by ethical, conventional, or business rules which have not been embodied in the law. To these working rules we must go for an understanding of transactions quite as much as to mechanical forces or to scarcity. Indeed mechanism and scarcity play their part in shaping transactions largely under the guise of standard working rules.

A third effect of changing the scientific unit from commodities or feelings to transactions is to emphasize the human will. The commodity theorists found the domain of economic law, not in man's capricious will, but in an established order of nature. The hedonic theorists studied the two sovereign masters, pain and pleasure, under whose governance mankind is placed: as Bentham said, it was "for them alone to determine what we shall do." But the theorist who studies transactions finds human willing to be the very essence of his problem—the transaction *is* two or more wills acting on each other.

With this emphasis upon the will comes a clearer conception of its nature. The law books, to be sure, keep the conception formulated by John Locke—that introspective potency in us which shapes our choices we know not how. But the scientific student of transactions sees that he is concerned with "the will-in-action, and the will-in-action is the faculties-in-action" (p. 79).

> . . . the will is not an empty choosing between doing and not doing, but between different degrees of power in doing one thing instead of another. The will cannot choose nothing—it must choose something in this world of

scarcity—and it chooses the next best alternative. If this alternative is a good one, then the will is free, and can be induced only by persuasion. If the alternative is a poor one, or if there is no alternative, then the will is coerced. The will chooses between opportunities, and the opportunities are held and withheld by other wills which also are choosing between opportunities, and these opportunities are limited by principles of scarcity (pp. 303, 304).

On the study of transactions there can be built up either a behavioristic or a volitional theory of economics. A behavioristic theory aims to take account of all the numberless factors which objective observation finds in the transactions. Its appropriate method is the presentation and analysis of statistical data, including correlations, lags and the like relations among them. A volitional theory is simpler. It recognizes that the human will

does not pay attention to *all* the complementary factors, but selects out that limiting factor which can be controlled and whose control can thereby be employed to guide the other factors at a distance in space and time (p. 375).

What is true of the practical man is true also of the theorist:

From a behavioristic standpoint many thousands, even millions of factors, must be taken into account in order to explain the phenomena of political economy. . . . . But from the violitional standpoint, at any particular moment or circumstance, the economist, and indeed also the psychologist, deals with what for him is the set of limiting factors in accomplishing the further purpose which he deems worth while (p. 378).

A volitional theory, of course, is less concerned with " 'efficient causes' flowing from the past to the present," than with " 'final causes' originating in the purposes and plans for the future and guiding the behavior of the present" (p. 2). It recognizes the large role played by anticipation in behavior, and with anticipation of an uncertain future the need of caution in the present. Indeed Professor Commons holds that

from the individual standpoint, value is the principle of anticipation and cost is the principle of caution (p. 379).

One more point is essential. A theory of transactions recognizes that men do not deal with each other merely as individual citizens; they are organized in groups political, industrial and cultural. A citizen belongs to many of these groups and his weal is affected by what happens to any of them in their dealings with each other as well as in their dealings with himself. These groups are "going concerns." They differ widely in physical, economic, and moral power. Hence the possibilities of oppression are far greater than the physiological differences among individuals would suggest. Economic history, as we have seen, is in large part the record of struggles among these going concerns, and of struggles within them for control of the working rules which each going concern develops as it grows. Economic reform, in

turn, is the task of adapting the powers of the going concerns, their internal organization and their working rules to the changing purposes of men within the limits set by scarcity and mechanical forces.

To enter into the detailed discussion of transactions and going concerns which follows would take much space, and a condensed summary would not register. But from the bare statement already given of its leading points, the sagacious reader can grasp the character of Professor Commons' contribution to economic theory. That contribution belongs to the institutional type of economics, the type represented in Germany by Sombart, in England by Mr. and Mrs. Webb, in America by Veblen and many of the younger men.[2] Much light has been thrown by these writers and others upon the origin and working of capitalism, but Commons carries the analysis further along his chosen line than any of his predecessors. Into our knowledge of capitalism he has incorporated a great body of new materials which no one else has used adequately, and these materials he has presented in a way that should enable others to adapt them to their own purposes. His work has the solidity which belongs to studies of actual experience. All in all, his book bids fair to prove one of the largest contributions made in this generation toward the construction of an economic theory that really illuminates the behavior of men. And this contribution will doubtless bulk larger still when we see the volume which Professor Commons has in preparation applying the theory of reasonable value to current problems.

V

Such is the best account I can give of Professor Commons' book. In justice to the book I should add that this account is far from adequate. I have passed over in silence the subtle and elaborate analysis of the chapters on transactions and going concerns, and I have done scant justice to the final chapter on public purpose. Indeed at every point readers will find that Professor Commons offers more than I have indicated. To many, the discussions I have omitted will seem not less pregnant than the discussions I have sketched. But that is inevitable. What one can get out of an original contribution is limited by what he brings to it. If what I have been able to appropriate encourages or facilitates study of the book by others, this review will serve its purpose.

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[2]For recent examples, see John Maurice Clark's *The Economics of Overhead Costs* (1923), and the papers by Morris A. Copeland, Robert L. Hale, Sumner H. Schlichter and Rexford G. Tugwell in *The Trend of Economics* (1924).