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John R. Commons, Wesley N. Hohfeld  
and the Origins of Transactional Economics

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**Abstract** - The aim of this paper is to provide an assessment of John R. Commons' adoption of Wesley N. Hohfeld's framework of jural opposites and correlatives in order to construct his transactional approach to the study of institutions. Hohfeld's influence on Commons, it is argued, was both positive and negative. On the one hand, Commons, followed Hohfeld and recognized that such concepts as property and inheritance actually represent an aggregation of numerous types of legal relations. Hohfeld's schema provided a powerful rhetorical and analytical tool whereby these highly abstract conceptions could be reduced to a limited number of primary elements. Moreover, Hohfeld's schema appeared to be consistent with Commons' general methodological and psychological commitments. On the other hand, Commons' forging of "transaction" as the elementary unit of economic analysis can be seen as an attempt to go beyond Hohfeld. Commons was in fact unsatisfied with Hohfeld's bi-lateral treatment of jural relations and with his neglect of the role played by state officials in enforcing transactions and, in so doing, in promoting specific individual interests as collective public policies.

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## John R. Commons, Wesley N. Hohfeld and the Origins of Transactional Economics

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“One may well question the logic of attempting to bend all economic behavior into such a concept [transaction]. The difficulties lead Commons to invent whole series of new categories which are likely to impress the novice who is not familiar with them; but the reviewer feels that these categories contain little in the way of new reason or substance. *The ideas usually are not unique, the categories are not very suggestive and most of them represent a rather slavish imitation for economics of the legal categories outlined in Hohfeld’s Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays.*” (Atkins 1935, 475: emphasis added).

### *The issue*

Oliver Williamson’s praise of John Roger Commons as the great precursor of transaction cost economics is quite well known among interpreters of institutionalist thought and methodology. According to Williamson, Commons correctly pointed out that the process of norm formation emerges as an evolving set of working rules based on reasonable solutions to everyday transaction among conflicting parties. In the process of dealing with each other, individuals bend and mold the customs, modify the judicial gloss on the law, and help to create the very rules that govern their economic relationships. For this reason, and disregarding some relevant differences between the two theoretical frameworks, Williamson concluded that “his general approach and many of the institutional phenomena which were of concern to Commons are the same as those dealt with here [*Markets and Hierarchies*].” (Williamson 1975, 3, 254; 1986; 1996)<sup>1</sup>. In a more recent contribution, Williamson (2005) insists on the affinities between many features of Commons’ institutionalism and his own transaction cost framework. This time, however, he adds a critical remark. Despite its appeal, he argues, Commons’ study of transactions is not without its weakness. At issue is the nexus between Commons and Wesley Newcomb Hohfeld’s analysis of rights and duties. In Williamson’s words: “Commons turned to W. H. Hohfeld’s system of ‘fundamental legal concepts’ to implement his ideas [...]. The resulting effort to interpret transactions and ongoing concerns with the use of juridical reasoning resulted in an elaborate taxonomy, but a predictive theory of contract and organization and a follow-on empirical research agenda did not materialize.” (Williamson 2005, 3 n5).

Williamson’s remark, albeit relegated in a footnote, deserves our attention. Strangely enough, in fact, apart from brief comments and passing references, the relationship between Hohfeld and Commons in terms of intellectual history has received little consideration in the secondary literature<sup>2</sup>. This is even more surprising, we may add, given the direct impact Hohfeld’s thought had on two other leading American institutionalists of the time: Robert Lee Hale (1922; 1927), and, to a lesser extent, John Maurice Clark (1925a; 1925b; 1926)<sup>3</sup>. The aim of this paper is to provide an assessment of Commons’ reading of Hohfeld and to analyze, in some detail, Commons’ adoption of the framework of jural opposites and correlatives to

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<sup>1</sup> There have been several comparisons of Commons’ work with that of Williamson. See, among others, Medema (1992), Ramstad (1996), and Kemp (2006).

<sup>2</sup> Gonce (1975, 85), for instance, merely observes that Commons’ taxonomy of the eight fundamental legal relations “[was] devised on the basis of the ideas of Wesley H. Newcomb, a noted twentieth-century law professor.” Pagano (2007) dwells into the relationship between Hohfeld and Commons in some detail, but he does so more for theoretical/analytical purposes than in historical perspective.

<sup>3</sup> On the relationship between Hale and Hohfeld see Samuels (1973) and Fried (1998).

demonstrate the corresponding legal relations between individuals and between the individual and the state. It should be pointed out that this work does not make a thorough examination of Commons' institutional economics: his work is reviewed here only to the extent that it sheds light on the primary discussion<sup>4</sup>. Accordingly, our emphasis will mainly, albeit not exclusively, be on the *Legal Foundation of Capitalism* (1924) – the work which more cleanly demonstrates Hohfeld's influence on Commons' thought. Also, given the central focus of this paper on the Commons-Hohfeld relationship, Commons' earlier works such as *The Distribution of Wealth* (1893) and a *Sociological View of Sovereignty* (1899-1900), albeit containing some traces of an embryonic treatment of the concept of transaction as a transfer of rights, will be not taken into consideration here. The paper is organized as follows. The first section briefly examines and assesses Hohfeld's system of jural relation. The second and third sections deal with Commons reading of Hohfeld and his attempt to reinterpret his system of jural relations within a transactional framework. These two sections mainly focus on Commons' *Legal Foundations of Capitalism* (1924). The fourth section deals with the evolution of interpretation and use of Hohfeld's schema in Commons subsequent works – especially *Institutional Economics* (1934). The fifth section offers a digression on Commons' relations to behaviorism. The final section presents a conclusion.

### *Hohfeld's Model of Jural Relations*

It has been said that Hohfeld's great contribution to legal thought was in removing analytical jurisprudence from its misty heights of intellectual abstractions and to ground it squarely within the practical world of the lawyer and judge (Cook 1919)<sup>5</sup>. In two celebrated essays published in 1913 and 1917, respectively, in the *Yale Law Journal*, Hohfeld significantly changed the direction of the debate on legal relations<sup>6</sup>. There, Hohfeld sought to remove the ambiguity and inadequacy of terminology surrounding the words "rights" and "duties." He lamented the fact that

"One of the greatest hindrances to the clear understanding, the decisive statement, and the true solution of legal problems, frequently arises from the express or tacit assumptions that all legal relations can be reduced to 'rights' and 'duties,' and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, 'future' interests, corporate interests, etc." (Hohfeld 1913, 28).

More specifically, Hohfeld (1913, 30) pointed to the indiscriminate use of the word rights to "cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense."

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<sup>4</sup> For a more comprehensive treatment of Commons' institutionalism see, among others, Biddle (1990), Ramstad (1990), Rutherford (1983), and Vanberg (1997). See also the two classic review articles by Wesley Clair Mitchell (1924; 1935) of Commons' *Legal Foundations of Capitalism* (1924) and *Institutional Economics* (1934).

<sup>5</sup> Wesley Newcomb Hohfeld was born in Oakland, California, in 1879 into an artistic and intellectual family circle. A brilliant student in high school in San Francisco and at the University of California, Berkeley, where he received the gold medal for scholarly achievement, Hohfeld early demonstrated an intensity and acuity that would mark his entire career. He went directly from college to Harvard Law School, entering in 1901. He graduated *cum laude* in 1904, after serving on the editorial board of the prestigious *Harvard Law Review*. After a year of practice in San Francisco, at the end of which he was proffered but refused a partnership, he accepted appointment to the faculty of Stanford Law School. In 1914 he moved to the Yale Law School, where he held the position of Southmayd Professor of Law until the time of his death. The breadth of Hohfeld's legal scholarship was remarkable. Between 1909 and 1917 he published thoroughly researched and incisive articles on corporate law, the conflict of laws, the law of trusts, and the relation between law and equity. At the time of his premature death at the age of thirty-nine, he was preparing to publish casebooks on trusts, the conflict of laws, and evidence. For a more complete biography of Hohfeld see Wellman (2000).

<sup>6</sup> In 1919, one year after Hohfeld's death, Yale University Press published the two articles as a small volume edited by Walter Wheeler Cook entitled *Fundamental Legal Conceptions, As Applied in Judicial Reasoning, and Other Legal Essays*. The volume included some of Hohfeld's intended changes to the original *Yale Law Journal* articles and reprinted Cook's article on "Hohfeld's Contributions to the Science of Law" (1919) as an introduction. The volume has been republished in 2001 with a new introduction by Nigel E. Simmonds.

To provide greater clarity and precision in legal jargon, Hohfeld proposed a paradigmatic taxonomy that captures four different uses of word right: 1) right (in the Hohfeldian sense); 2) privilege, 3) power; and 4) immunity. He argues that a legal relation always involves two persons and that a right, privilege, power, or immunity is always linked to a correlative (duty, no-right, liability, and disability). Hohfeld displays the four relations in a table of correlatives:

| Jural Correlatives |           |           |            |
|--------------------|-----------|-----------|------------|
| Right              | Privilege | Power     | Immunity   |
| Duty               | No-right  | Liability | Disability |

Table 1

A person with a Hohfeldian right against another person (who is under a duty) has a claim if the other does not act in accordance with the duty, while a person with a privilege may act without liability to another (who has a no-right). A person with a power is able to change a legal relation of another (who is under a liability). A person with an immunity cannot have a particular legal relation changed by another (who is under a disability)<sup>7</sup>. These legal concepts can also be arranged into a table of opposites. For example, if a person has a privilege of performing an act vis-à-vis another person, it also implies that she/he does not have a duty to that person with respect to the act.

| Jural Opposites |           |            |           |
|-----------------|-----------|------------|-----------|
| Right           | Privilege | Power      | Immunity  |
| No-right        | Duty      | Disability | Liability |

Table 2

Some contemporary commentators (Simmonds 2001; Nyquist 2002), have pointed out that the two legal relations on the left side of Hohfeld's table of correlatives (right/duty and privilege/no-right) form a grid that focuses on a current state of affair, while the relations on the table's right side (power/liability and immunity/disability) form a second grid that describes both a current state of affairs and a potential future state. This distinction is strictly related to Hohfeld's own conception of power. In Hohfeld's words, a power exists where "a given legal relation may result [...] from some superadded fact or group of facts which are under the volitional control of one of more human beings." (Hohfeld 1913, 44). Following Andrew Halpin (1997, 44), this may be expressed in more formal terms by saying that A has a power in relation to B (who, in turn, is under a liability), where: (i) A may do (has the "volitional control" over) something ("some superadded fact or group of facts") and; (ii) a legal relation of B results. The first feature reflects the idea that the law deals with actual *behavior* rather than mere states of the mind: "if A wishes to execute a power to change B's legal position, it is not enough that he makes the decision to do so, he must express the decision by some act [...]." (Halpin 1997, 44). The second feature, is a *potential* legal relation contingent upon the exercise of a determined course of action or event.

One of the main reasons for the appeal of the Hohfeldian vocabulary of rights and duty is that it stroke a responsive chord on jurists because it reveals the adversarial context of assertions and denial of rights. Hohfeld's analysis was phrased in purely analytical terms. This implies that his dissection of different kinds of what he calls jural relations contained no direct implication for policies. No wonder, therefore, that he has sometimes been thought of as a legal formalist without relevance for policies and social engineering. The opposite, however, is true. As noted by Nigel E. Simmonds (2001, xii, n10), "Hohfeld intended [...] not

<sup>7</sup> The closest approximation to explicit definitions of the terms in Hohfeld's scheme can be found in the following passage: "A right is one's affirmative claim against another; and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relations." (Hohfeld 1913, 55). A few practical example may help to better illustrate Hohfeld's relations: 1) a party to a binding contract has a *right* to the other party's performance; 2) since flag burning is protected speech, a person has a *privilege* to burn a flag; 3) the state of Massachusetts has a *power* to call me to jury duty; 4) I have an *immunity* from being called to jury duty in Rhode Island. The examples are taken from Nyquist (2002, 240).

to resolve questions such as those which would interest the formalist, but to provide the fundamental analysis which he saw as an essential prerequisite to the resolution of such questions.” Clear concepts do not guarantee proper policy debates, but without clear concepts policy debate is impossible.<sup>8</sup>

This explains, we suggest, the success of Hohfeld among certain streams of American institutionalism<sup>9</sup>. In this connection legal historian Morton J. Horwitz observes that “[Hohfeld’s analytical jurisprudence] contributed to the subversion of absolute property rights and substituted a vision of property as a social creation.” (Horwitz 1992, 154)<sup>10</sup>. Such a “vision,” we add, was consistent with the institutionalists’ reformist effort to adjust the private property/free contract legal regime to the social and economic changes associated with the rise of large-scale industrial enterprise. Let me indulge in two lengthy quotations. In 1918, implicitly referring to Hohfeld, John Maurice Clark wrote:

“The prestige of Blackstone still rest upon the law and perpetuates the idea that rights are something with an independent existence somewhere in the universe, which courts have merely to discover with more or less accuracy. Leading thinkers have but lately broken away from this idea, and it may still be regarded as orthodox. The newer conception, not yet supreme among jurists themselves, has certainly not had time as yet to permeate economic doctrines in all those subtle implications whose dependence on the theory of legal rights is not obvious to any but a searching scrutiny. Hence we still lack correct and adequate analysis of the true nature of the dependence of objective production on this half-realized system of order (legal, customary, or ethical) within which it does its work.” (Clark 1918, 143-44).

A few years later, in a more explicit Hohfeldian jargon, Hale provided a reconceptualization of the institution of property as a delegation of state power to private citizens:

“The right of ownership in a manufacturing plant is, to use Hohfeld’s terms, a *privilege* to operate the plant, plus a *privilege* not to operate it, plus a *right* to keep others from operating it, plus a *power* to acquire all the rights of ownership in the products. The analysis is not meant to be exhaustive. Having exercised his power to acquire ownership of the products, the owner has a *privilege* to use them, plus a much more significant *right* to keep others from using them, plus a

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<sup>8</sup> Introducing his 1913 article, Hohfeld himself clarified his intent, affirming that “If [...] the title of this article suggests a merely philosophical inquiry as to the nature of law and legal relation, -- a discussion regarded more or less as an end in itself, -- the writer may be pardoned for repudiating such a connotation in advance. On the contrary [...] the main purpose of the writer is to emphasize certain oft-neglected matters that may aid in the understanding and in the solution of practical, everyday problems of the law.” (Hohfeld 1913, 20).

<sup>9</sup> The question relating to Hohfeld’s influence to the legal thought of his time is a rather complex and articulated one, which cannot but briefly be discussed here. According to Horwitz (1992, 155) Hohfeld’s analytic scheme seemed to have had an “electrifying influence” on two of his Yale Law School colleagues, Walter Wheeler Cook and Arthur L. Corbin, “who were struggling to break out of the prevailing orthodoxy of right discourse in their respective fields, conflict of laws and contracts.” Still quoting from Horwitz (1992, 155-156), Cook’s devastating attack of the Hitchman Coal Case (1918), published shortly after Hohfeld’s tragically premature death in the *Yale Law Journal* represents “the only extant example of the application of Hohfeldian analysis to an actual legal system.” N. E. H. Hull (1997), also mentions Cook and Corbin as those who “imposed the Hohfeldian categories to Yale students,” but, differently from Horwitz, emphasizes the role played by Karl Levellyn – defined as “Hohfeld’s most enthusiastic devotee” – in integrating the Hohfeldian approach within the emerging Realist movement (1997, 102). Finally, Hohfeld’s 1913 article was hailed by Fred Shapiro (1991) as one “The most cited articles from the Yale Law Journal.” Unfortunately, Shapiro does not provide any data about the trend over time of Hohfeld’s quotations.

<sup>10</sup> Albeit particularly influent among institutionalists, Hohfeld was far from being the only figure proposing a vision of property rights as a social creation. Other important sources of influence can be individuated in Roscoe Pound’s sociological jurisprudence, and, more generally, in the teachings of the German historical school. As to the latter, replying to a questionnaire sent in 1906 by Henry W. Farnam asking “in what respects you are conscious of having been influenced in your thought or methods by German economists,” Commons replied: “Indirectly through Professor Ely at Johns Hopkins, directly more by Austrians.” Farnam Family Papers, Series II, box 248, folder 3289, Sterling Memorial Library, Yale University.

power to change the duty thereby implied in the others, into a privilege coupled with rights. This power is a power to release a pressure which the law of property exerts on the liberty of the others. If the pressure is great, the owner may be able to compel the others to pay him a big price for their release; if the pressure is slight, he can collect but a small income from his ownership. In either case, he is paid for releasing a pressure exerted by the government—the law. The law has delegated to him a discretionary power over the rights and duties of others.” (Hale 1922, 214 quoted in Horwitz 1992, 164)

What the older conception of ownership hid was the role that private property played in structuring social relationships. On the contrary, what Hohfeld succeeded to show was that property rights can best understood not from the perspective of the non-social relationship between persons and things but from the vantage point of how ownership affects relationships among individuals, and between individuals and the state (Clark 1918; Commons 1925).

### *Commons on Hohfeld: Some Preliminary Considerations*

Hohfeld’s schema of jural correlatives and opposites first appeared in his 1913 *Yale Law Journal* Article. The first edition of John B. Andrews and Commons’ *Principles of Labor Legislation* – published three years later – includes a general discussion of the nature of rights, but contains no reference to Hohfeld’s article.

Commons’ first explicit and articulate discussion of Hohfeld’s schema of jural relations appeared in 1924, within the pages of *Legal Foundations of Capitalism*<sup>11</sup> The most unequivocal endorsement of Hohfeld’s approach, however, is to be found in Commons’ essay on “Law and Economics” published the following year in the *Yale Law Journal* (Commons 1925). There, in a passing comment, the Wisconsin institutionalist affirmed:

“Here, it seems to me, the analysis made by professor Hohfeld, of legal rights, duties, liberties, and exposures, is of universal application to all going concerns. His is practically an analysis of the way in which the common practices of any going concern control the individual members of that concern and hold them to the conduct necessary to preserve the existence of the concern. For, as stated by Professor Corbin [1919], these rules affirm what the individual member may expect that he ‘can, cannot, may, must or must not do,’ in so far as the superior interest of the concern are deemed to be at stake. These principles are just as applicable to the shop rules of an industrial concern, or to the ethical rules of the family or any of the many cultural concerns, as they are to the supreme political concern. The difference reside mainly in the sanctions brought to bear upon the individual and in the technical meanings and more elaborate manipulation of the words as used by the lawyers. In the political concerns the sanctions are physical coercion or physical immunity, and in the others the sanctions are wages, rents, interest, profits, jobs, and other economic and cultural gains or losses.” (Commons 1925, 375).

Commons thus believed that Hohfeld’s analysis of complex legal positions in terms of his fundamental legal conceptions would enable the social scientist to make accurate and illuminating generalizations about the behavioral organization of any kind of “going concern.” In spite of such an enthusiastic comment, however, Commons’ acceptance of Hohfeld was by no means uncritical.

First of all, Commons criticized Hohfeld for being inconsistent in his use of “opposites,” and himself suggested other possible opposites for Hohfeld’s conceptions. The charge of inconsistency concerns a vacillation between opposite in the sense of negation, and opposite in its “dialectical” interpretation as suggested by Kocourek (1920). “But instead of rejecting Hohfeld’s analysis,” – Commons conceded – “its

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<sup>11</sup> In the preface of *Legal Foundations of Capitalism*, Commons listed Arthur L. Corbin – as mentioned above, a figure deeply influenced by Hohfeld – among those from whom he had received “important criticism and assistance.” (Commons 1924, xxxvi). Corbin (1921, 226) defined himself as “one who worked side by side with Hohfeld, discussed matters with him daily, and approved of most of his results [...]”

logic and accuracy will be retained if we substitute the quantitative term 'limits' for the 'indeterminate' opposites." (Commons 1924, 93). Each set of jural relation would be so interpreted as being mutually limiting, rather than logically contradicting. Accordingly, the defendant's liberties would become the limits imposed on the plaintiff's duties, and *vice versa*: "[...] duty and liberty vary inversely to each other, the duty increasing as the liberty diminishes, and the duty diminishing as the liberty (or privilege) increases" (Commons 1924, 96). The emphasis is now placed on the quantitative/limiting aspect of behavior involved in each jural relation, rather than in the logical consistency of its internal relational structure.

Still on a purely terminological ground, Commons adopted the word "liberty" whereas Hohfeld used "privilege." Commons pointed out that, as a general legal opposite of duty, the expression liberty is to be preferred, since the term privilege is used in law to refer to those situations where the existence of a duty which is present in the standard case is negated by a particular legal defense or unique circumstance<sup>12</sup>. Also, the term liberty appears to be more consistent than privilege with its economic meaning and implications: "Legally, the term liberty means absence of duty, or rather the limit of duty, and is therefore identical with Hohfeld's enlarged meaning of 'privilege.' *But, economically, liberty means choice of opportunities, or choice of two degrees of power in acting.*" (Commons 1924, 94: emphasis added).

Finally, coherently with his "limiting" interpretation of jural opposites, Commons substituted the quantitative term "exposure" for Hohfeld's "no-right:"

"A similar observation applies to Hohfeld's term 'no-right,' used by him to signify the absence of right. But the absence of right may be either Kocourek's dialectical denial of a right in toto, or a limit placed on the quantity of behavior claimed as a right. The former meaning (denial, negation) is appropriate when we speak of an 'absolute' right, as no-right at all, a concept of nothing, in that it refers to the relation of man to nature, and, of course, therefore contains no ethical dimensions [...]. For this reason we shall substitute the 'behavioristic' term 'exposure' for the dialectical term 'no-right' employed by Hohfeld [...]." (Commons 1924, 97).

So far, these linguistic changes do not signal any substantial conceptual departure from Hohfeld's approach. However, as will appear more evident below, they can be considered as a first step towards Commons' main intent, namely, the reframing of Hohfeld's system of jural relations within his own transactional economics framework.

### *Commons, Hohfeld and Transactional Economics*

Commons introduced and defined the term "transaction" in chapter IV of his *Legal Foundations of Capitalism* (1924) – the same chapter which contains the discussion of Hohfeld. Evidently, we may reasonably conjecture, Commons considered the two topics to be epistemologically related. Commons conceives the transaction to be the fundamental unit of social organization and to involve the transference of some form of legal rights. According to Commons:

"A transaction, then, involving a minimum of five persons, and not an isolated individual, *nor even only two individuals*, is the ultimate units of economics, ethics and law. It is the ultimate but complex relationship, the social electrolysis, that makes possible the choice of opportunities, the exercise of power and the association of men into families, clans, nations, business, unions and other going concern. The social unit is not an individual seeking his own pleasure: it is five individuals doing something to each other within the limits of working rules laid down by those who determine how disputes shall be decided." (Commons 1924, 68-69: emphasis added).

Thus, a jural relation – rather than a bi-lateral relationship as suggested by Hohfeld – in Commons' view becomes a multi-lateral form of relationship with five parties involved: the buyer (B) and seller (S) who

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<sup>12</sup> Such as the privilege of a witness not to answer or incriminate himself is the negation of the standard duty of witnesses to testify when called or subpoenaed.

are actually engaged in the transaction, the next best alternatives for each (B' and S'), and the state or its representatives.<sup>13</sup> Interestingly, Commons pointed out a parallel between the inclusion among the participants to a transaction of the best two potential opportunities available (B' and S'), and the "Austrian" conception of opportunity cost, as the sacrifice forgone by choosing one option over an alternative one that may be equally accessible (Commons 1924, 67).<sup>14</sup>

A clear divergence between the two authors' perspectives emerges in this connection. In fact, for an American legal realist such as Hohfeld it was quite natural to assume that the practical significance of legal conceptions is shown most clearly in their application to court cases. And since every legal action involves a confrontation between *two* legal adversaries (a plaintiff and a defendant) the legal position of any person subject to the law must consist in that party's legal position *vis-à-vis* some potential legal adversary.

Commons' intent, on the other hand, was different. To avoid any possible ambiguity, he clearly distinguished Hohfeld's "pragmatic" approach from his own "social-economic point of view."<sup>15</sup> Commons wished to draw attention to the pervasive relationality underlying economic behavior which is reflected not only in the structure of working rules, but in the structure of key legal concepts. For Commons to have a legal liberty means that one is the beneficiary of a state practice or rule of nonintervention. Legal liberties are nothing less (or more) than state authorizations to choose between several available courses of action, without regard to the welfare of others: "[t]he field of authorized liberty is the field where behavior is unrestrained or uncompelled by authority." (Commons 1924, 99). Put it differently, one of the main implications of Commons' analysis – which is only latent in Hohfeld's – was to underscore the extent to which the state is responsible for structuring social and economic relations, even in nominally non-interventionist legal orders.

This difference in perspective is best revealed by analyzing in some detail Commons' adoption and reframing of Hohfeld's system of jural relations within his transactional approach. Commons started from Hohfeld's table of correlatives, amended by the terminological changes discussed above, and transformed it into a taxonomy of transactions. The first step is to discuss what Commons calls "ethical" or "unauthorized" transactions. In this "primitive" kind of transactions, Commons writes, "a right seems to have been none other than the wished-for act of an external superior power imposing a fear on other persons, while the duty is the fear itself." (Commons 1924, 85). The consequence, as shown in Table 3, is that with unauthorized transactions a potential lack of coordination of expectations may emerge, since the limits and extent of intervention by the "external enforcer" of these ethical norms could be conceived differently according to each individual's own convictions and expectations.<sup>16</sup>

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<sup>13</sup> "[T]he five parts necessary to the concept of a right are: the first party who claims the right; the second party with whom the transaction occurs; the 'third' parties, of whom one is the rival or competitor of the first party, the other is the rival or competitor of the second party; and the fifth party who lays down the rules of the concern of which each is an authorized member." (Commons 1924, 88).

<sup>14</sup> The Austrian influence on Commons is particularly manifest in his early *The Distribution of Wealth* (1893), where, as its author wrote in a later reappraisal, "I 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." (Commons 1924, xxxv). See also note 10 above.

<sup>15</sup> The latter, he wrote, is the standpoint that "Takes into account questions of value and economy, namely, What is the public purpose underlying the particular working rule or law asserted or denied? What are the quantitative limits of the parties and the nation? How important relatively are the contending interests that will be affected by the law or the decisions conforming to the law, and how intense and extensive are the convictions, belief, hopes, and fears that favor or disfavor one rule of action as against another?" (Commons 1924, 92).

<sup>16</sup> "There is, however, a difficulty with these ethical mandates. They are mental processes and therefore as divergent as the wishes and fears of individuals. Hence when they emerge into action they are individualistic and anarchistic. They are unrestrained in action by an actual earthly authority to whom each party yields obedience. The wish of one that he had a divine or natural right to a certain behavior of another may not coincide with the fear of the other that he is bound by a divine or natural duty to behave with exactly that amount of performance, avoidance of forbearance. There is thus the chance of a lack of correspondence, a failure to correlate the wish of one with the fear of the other." (Commons 1924, 85-86).

| Unauthorized transactions (ethical) |          |         |
|-------------------------------------|----------|---------|
| Correlatives                        |          |         |
| Limits                              | Right    | Duty    |
|                                     | Exposure | Liberty |

Table 3: adapted from Commons (1924).

Then Commons passes on to analyze what he terms “authorized” and “authoritative” transactions. Here the connection with Hohfeld’s taxonomy becomes more explicit. The left side of Hohfeld’s jural relations defines “authorized transactions,” while the left side refers to “authoritative transactions.” For the purpose of our discussion here is only important to note that authoritative transactions are hierarchical in nature, while authorized transactions are not. This does not imply that authorized transactions do not ever involve legal power, but simply that power is not “built” into the nature of the transaction. As Commons put it:

“The important difference to be noted between these authoritative transactions and the previously mentioned authorized transactions consists in the fact that here the subject person is not permitted to choose any alternative when once the superior person has decided. There is no bargaining between citizen and official, no power to withhold service or property, the psychological aspect of the transaction being that of command and obedience, whereas in the authorized transactions it was partly command and obedience, partly persuasion or coercion.” (Commons 1924, 107).

| Authorized transactions |          |         |
|-------------------------|----------|---------|
| Correlatives            |          |         |
| Limits                  | Right    | Duty    |
|                         | Exposure | Liberty |

Table 4: adapted from Commons (1924).

| Authoritative transactions |           |            |
|----------------------------|-----------|------------|
| Correlatives               |           |            |
| Limits                     | Official  | Citizen    |
|                            | Immunity  | Disability |
|                            | Liability | Power      |

Table 5: adapted from Commons (1924).

The main divergence with Hohfeld’s original schema lies in the fact that Commons reinterpreted the right side of the correlatives as jural relationships between citizens and government officials who are responsible for enforcing the transaction. According to Commons’ table of authoritative transactions, the citizen’s power to have his right enforced by law is correlative to the official’s liability to perform the enforcement; this liability, or responsibility, finds its limit in the official’s immunity from being called into action, which, in turn, is correlative to the citizen’s disability to have her/his claims enforced by the official authority.<sup>17</sup>

<sup>17</sup> Commons expressed the concept in transactional terms: “Hence, every legal right, that is, every authorized transaction, has two opposite parties burdened each by his correlative duty. The legal right of B is the legal duty of B’ S, or S’, and the legal right of B is also the duty of officials to enforce the duty of B’, S or S’. The legal duty of B’, S or S’, the versus, is identical with his liability that the official will perform his legal duty in affording a remedy. Likewise, the

The last step for Commons was to “merge” the two kind of transactions, and to redefine the enforcement process so to include also the relationships between officials of different hierarchical order.

| Limits and reciprocals | Correlatives and equivalents |                       |                    |           |
|------------------------|------------------------------|-----------------------|--------------------|-----------|
|                        | Official                     | Citizen               | Citizen            | Official  |
|                        | Power                        | Right (Power)         | Duty (Liability)   | Liability |
|                        | Disability                   | Exposure (Disability) | Liberty (Immunity) | Immunity  |

Table 6: adapted from Commons (1924).

Commons illustrates the jural relations involved in table 5 as follows:

“Official immunity is the *limit* of official liability, and this is correlative and equal to the disability of other officials in the exercise of power to hold this official responsible. This disability of officials is therefore equivalent to a disability of the citizen to require officials to protect his rights, and hence is identical with his exposure, which now we find to be none other than the limit of his legal capacity, or power, where begins his legal inability, incapacity, incapability, in short, his disability. This, in turn, is the exactly equal immunity of officials which now becomes the equivalent immunity of citizens, identical with their liberty, which in turn is the limit of their duties.” (Commons 1924, 113).

By recognizing that the determination of legal rights depends on the enforcement of duties of noninterference, Commons is still on the Hohfeldian “track,” but with an important element of novelty. Commons made explicit the role of the enforcing authority in structuring transactions, and subjected its relationships with the citizens to the same logic that governs jural relationships. No doubt, in the Hohfeldian schema, the potential plaintiff has the legal power to set the process of legal enforcement in motion, but can the plaintiff be said to impose any legal constraint all by herself or himself? Using Hohfeld’s own conceptual apparatus, Commons showed that the plaintiff is in the position of legal constrainer only because of her or his power to take legal action in a court of law. Any constraint she or he can impose is via judicial holding against the defendant.

#### *After the Legal Foundations of Capitalism*

Commons’ *Institutional Economics* was published in 1934, ten years after *The Legal Foundations of Capitalism*. During this decade, his epistemological approach to the study of transaction presents both elements of continuity and some relevant aspects of novelty. The major methodological features contained in the first section of Institutional economics were anticipated in two essays appeared in 1931 and 1932 respectively (Commons 1931; 1932a; see also Commons 1932b). As far as continuity is concerned, Commons persisted to adhere to his broad “transactional” approach as outlined in 1924 and reiterated his intellectual debt to Hohfeld for his analysis of jural relations (Commons 1932a, 14). The aspects of novelty deserve instead careful examination. First of all, Commons abandoned, albeit only partially, the distinction between authorized and authoritative transactions and introduced a tripartite classification into bargaining, managing, and rationing transactions. According to Commons,

“These three units of activity exhaust all the activities of the science of economics. Bargaining transactions *transfer ownership* of wealth by voluntary agreement between legal equals. Managerial transactions *create wealth* by commands of legal superiors. Rationing transactions

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legal right of B, the dominus, is equal to his ‘power’ to set the machinery of justice in motion and thus to hold officials to their responsibility.” (Commons 1924, 111).

apportion the burdens and benefits of wealth creation by the *dictation* of legal superiors.” (Commons 1934, 68: emphases in original).

Commons’ taxonomy of transactions is quite familiar to modern readers and needs no further comment here. What is important to point out, however, is Commons’ repeated emphases on the fact that, compared to bargaining transactions, the last two forms of relationship – managing, and rationing – explicitly introduce authorized power into the transactional framework<sup>18</sup> and involve a different kind of “negotiatonal” psychology by the transacting agents: “the psychology of persuasion, coercion, or duress in bargaining transactions; the psychology of command and obedience in managerial transactions; and the psychology of pleading and argument in rationing transactions.” (Commons 1934, 106). Put it differently, adopting Commons’ 1924 terminology, bargaining transactions would correspond to authorized transactions, while managing and rationing would substantially fall into the category of authoritative transactions.

The second, and more relevant, aspect of novelty is that Commons reframed the relationships implied by his transactional analysis into what he termed a “formula of economic and social relations.” By the word “formula” he meant a precise analytical category which springs from the inherent possibilities and limitations of thought, as human beings try to understand and come to terms with the world in which they live.<sup>19</sup> This is to be constructed by abstracting the outstanding features from some institutional complex and organizing these into a coherent structure of behavioral relations. The ideality of a “formula” lies in its simplification and aloofness from detail: it will be free from the detailed complexity of the actuality to be analyzed with its aid. As this kind of analytical tool emphasizes the essential traits of a situation considered as a whole, Commons emphasized its holistic nature: “However simple or complex the formula, it is always a mental picture of a relation between the parts and the whole.” (Commons 1934, 97). Commons remarked certain similarities between his “formula” and Max Weber’s “ideal typical” constructions, but also emphasized a different level of abstraction, since “the formulae of transactions and concerns [...] starts with actual behavior instead of with the several feelings or ‘spirits.’” (Commons 1934, 97).<sup>20</sup>

But the aspect which more concerns us here is that Commons saw his formula of economic and social relations as an extension of Hohfeld’s table of jural relations. As he put it in explicit terms:

“These changes in the meanings of the economic equivalent of property as assets and liabilities have made necessary a deeper analysis of the meaning of the terms ‘rights’ as used in jurisprudence. This analysis was materially advanced by Professor Hohfeld of the Yale School in 1913, and by the Yale Law faculty in the development of Hohfeld’s analysis. On the basis of their analysis the following formula is constructed showing a correlation of collective, economic, and social relations, under the jurisdiction of the Supreme Court, and in so far as they apply to the three types of transactions concerned with economic quantities. The ‘social relations’ are derived from Hohfeld’s ‘legal relations,’ but are enlarged to include economic and moral concerns, as well as the State—his political or legal concern. The ‘economic status’ is the correlated economic

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<sup>18</sup> For example: “[M]anagerial and rationing transactions are, in law and economics, the relation of a superior to an inferior. In the managerial transaction the superior is an individual or a hierarchy of individuals, giving orders which the inferiors must obey, such as the relations of a foreman to worker, or sheriff to citizen, or manager to managed. But in the rationing transactions the superior is a collective superior or its official spokesman. These are of various kind, such as a board of directors of a corporation, or a legislature, or a court of law, or an arbitration tribunal, or a communist or fascist government, or a cartel, or a trade union, or a taxing authority, which prorates among inferiors the burdens and benefits of the concern.” (Commons 1934, 59).

<sup>19</sup> “Still more complex than a principle is a Formula, constructed by the mind to investigate a relation between the parts and the whole. It reaches its amazing triumph in the pure mathematics of imaginary lines and numbers. Other mental formulae which we construct are: the relations of buyers and sellers to a transaction in which they participate; the relations of transactions themselves to the going concern of which they are parts; the relation of the individual to society, of the citizen to the Commonwealth; and so on in an endless variety.” (Commons 1934, 97).

<sup>20</sup> In this connection, see our considerations below of the relationship between Commons and behaviorism.

assets and liabilities; the ‘working rules’ are individual action as controlled, liberated, and expanded by collective action.” (Commons 1934, 77).

In order to better understand the inherent logic of this formula is necessary to start with a concise review of Commons’ analytical vocabulary. According to Commons, the three kinds of transactions described above are brought together in a larger unit of economic analysis, which he named a “going concern.” A going concern is the institutional perimeter within which transactions take place: examples of going concerns are the family, the church, the labor union, the corporation, the professional association, all the way up to the state. Each transactions taking place within a going concern is, in turn, governed by a more or less formally defined set of “working rules.” Working rules are prescribed behavioral patterns which govern the actions of each participant to a transaction, defining, at the same time, expectations about “what the participants can, must, or may do as controlled, liberated, or expanded by collective action.” (Commons 1934, 91). Accordingly, Commons defines an institution as “collective action in control of individual action.” (Commons 1934, 69).<sup>21</sup> Collective action enforces the working rules which govern transactions *via* different kinds of formal and informal sanctions – Commons speaks of legal, moral and economic sanctions – and, in so doing, coordinate the private purposes of the single individuals with the “collective will” of the going concern of which they are members.<sup>22</sup>

This brief excursion over the fundamentals of Commons’ institutionalism allows us to read his general formula in clearer terms.

| Formula of Economic and Social Relations |                   |                 |                 |  |                 |                 |                   |                   |
|--|-------------------|-----------------|-----------------|--|-----------------|-----------------|-------------------|-------------------|
| Collective Action                        | Working Rule      | Economic Status | Social Relation | Transactions                           | Social Relation | Economic Status | Working Rule      | Collective Action |
| Power                                    | Can               | Security        | Right           | Bargaining<br>Managing                 | Duty            | Conformity      | Must,<br>Must not | Liability         |
| Disability                               | Cannot            | Exposure        | No-Right        | Rationing of<br>economic<br>quantities | No-Duty         | Liberty         | May               | Immunity          |
| Immunity                                 | May               | Liberty         | No-Duty         |  | No-Right        | Exposure        | Cannot            | Disability        |
| Liability                                | Must,<br>Must not | Conformity      | Duty            |  | Right           | Security        | Can               | Power             |

Table 7: adapted from Commons (1934)<sup>23</sup>

Commons maintained the left side of Hohfeld’s original table of jural correlatives in order to establish the “social relations” stated in terms of right, duty, no-right, and no-duty. The right side of Hohfeld’s table – the one involving “power” – now defines the forms of “Collective Action” which, in turn, describe the individual’s position with respect to the going concern’s enforcing authority. Each “social relation” is also linked to a correlative “working rule,” enforced by collective action, and expressed in

<sup>21</sup> Commons was aware of the inherent heterogeneity of institutionalism at his time and asserted that “the difficulty in defining a field for the so-called Institutional Economics is the uncertainty of meaning of the word institution.” (1934, 69). Accordingly, he had introduced his 1934 volume by frankly admitting that his views “may or may not fit other people’s ideas of institutional economics.” (1934, 1). In this connection Commons resulted, so to speak, prophetic. Many figures, more or less directly affiliated with the movement, wrote unsympathetic reviews of *Institutional Economics*. Labor economist Paul F Brissenden from Columbia University, for instance, described the book as “full of theories of value, transactions, and ‘going concerns,’ but almost empty of institutions.” (Brissenden 1935, 751). See also Atkins (1935), Copeland (1936), and Lerner (1935).

<sup>22</sup> In order to make this point more forcefully, in 1936 Commons introduced the distinction between institutions and institutes: “All economic theories distinguish between activity and the objects created by activity. A familiar instance is ‘production’ and ‘product.’ So with institutional economics. The distinction can be fixed by the term ‘institution’ and ‘institute.’ The institution is collective action in control of individual action. The institutes are the product of that control. What are usually named institutions are more accurately named institutes. The institutes are the rights, duties, liberties, even the exposure to the liberty of others [...]” (Commons 1936, 247, n14).

<sup>23</sup> A closer look at table 7 would reveal some further terminological changes made by Commons. The correlative of “no-right” (Hohfeld’s privilege) is now “no-duty,” while in 1924 he used the term “liberty”. In the 1934 table, “liberty” denotes the “economic status” associated with “immunity” from collective action.

behavioral terms: can, cannot, may, must and must not. Commons, referring again to Hohfeld, makes the point as follows:

“We can distinguish, as elaborated from the analysis and terminology of the Hohfeld’s school of law, four different volitional aspects of these commands [Collective Action], each of which gives rise to a collective capacity or the incapacity of the opposite party in a dispute. If the court or arbiter orders the defendant to perform a service, to pay a debt, or to avoid interference with the plaintiff, then the auxiliary verbs ‘must’ or ‘must not’ are directed towards the defendant. Correlatively this means that the plaintiff has the ‘power’ or ‘ability’ to call upon collective action to aid him in enforcing his will upon the defendant who must or must not. The power is, volitionally, designated by the auxiliary “can.” (Commons 1934, 80).

Finally, Commons adds a further column, which indicate what he defines as the “economic status” defined in terms of expectations associated to each social relation. A right – enforced by the power to call upon collective action – establish “security” of expectation for the individual who has that right, and correlatively, impose “conformity” to those expectations by the other participants to the transactions (who are under a duty). If the enforcing authority confers the individual immunity from collective action, then this individual possesses the “liberty” to pursue certain courses of actions, while the other participants are “exposed” to the consequences of the exercise of that liberty (i.e., are under a “disability” to call upon the enforcing authority). (Commons 1934, 81).

Commons’ universal formula of Economic and Social relations still shows the general influence of Hohfeld’s table of jural relations. If compared to the taxonomic structure of the *Legal Foundations*, however, this influence appears somewhat mitigated. We have already pointed out that Commons’ purposes in amending the Hohfeld’s system was to make explicit and provide a system for describing the role of the state in every transaction. By formally connecting the specific social relation of the individual (and his “economic status”) to the collective action of the enforcing authority, Commons was now trying to be more explicit in reframing Hohfeld’s analysis as a “formula” that facilitates thinking about how the state has in the past and can in the future promote certain private purposes – which when promoted and enforced by the state become public purposes – through its role in creating and altering the limits within which each transaction takes place<sup>24</sup>. Interestingly, Commons had already made clear this specific point in the final section of his 1924 volume:

“Thus within this moving framework of power, disability, liability and immunity, determined, as it goes along with the limits of the working rules and necessitated by the scarcity of resources, the will of the individual is the collective will in action. His private purposes are public purposes to the extent that ‘the public’ through the determining powers of its instruments, the officials who exercise that power, both bring the collective power to his aid and protect his immunity from the exercise of that power. His private purposes are contrary to public purposes to the extent that the same actors hold him liable to the will of others, and are indifferent to public purposes to the extent that they expose him to the immunity of others.” (Commons 1924, 365).

To put it differently, Commons’ formula was not simply a mere exercise in formalism, devised to show a coherent body of social and economic relations, and to be applied mechanically. The formula had to be understood in the light of its ineludible policy implications. This in turn had important consequences on the role of the social scientist in interpreting such a formula. As Commons put it in 1934:

“Yet, the pure theory in economics cannot be identified with that in physical science, because physical materials have no purposes, rights, wills, rights, or interest. The economist is himself a part of the purposeful subject-matter of his science. This may not appear until he is forced by a

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<sup>24</sup> On this specific issue see the enlightening discussions in Biddle (1990) and Ramstad (1990).

crisis to choose between conflicting interests; then his pure theory is perhaps found to contain the assumptions which directed his choice.” (Commons 1934, 103)

In Commons’ view – and this was one of his lifelong themes – the social scientist needs to make a judgment about the policies served by a specific duty, i.e., about the interest it was intended to protect, before he can identify the right to which it is correlative.

#### *Commons and Behaviorism: A Digression*

Commons introduced his *Legal Foundations of Capitalism* (1924, xxxv: emphases added) by affirming that “[t]he aim of this book is to work out an evolutionary and *behavioristic*, or rather *volitional*, theory of value.” This claim appears rather ambiguous since from a strictly Watsonian point of view, the terms “behavioristic” and “volitional” should be considered as mutually exclusive. One of the main tenets of behaviorism since its early formulations was in fact the expunction of human intentionality and purposefulness from scientific discourse. Such an ambiguity have led to different interpretations of the psychological foundations of Commons’ institutionalism. David Seckler, for instance, places Commons in the “humanistic – i.e. anti-behaviorist – wing of institutionalism, arguing that “his common-sense ground of interpretation led him directly to the role of purpose as the driving factor in human behavior [...]” (1975, 127). In later years, other interpreters have substantially adhered to Seckler’s position (Rutherford 2000; Asso and Fiorito 2004).

In a recent contribution, Geoffrey M. Hodgson has offered a different – albeit not necessarily contrasting – interpretation. According to Hodgson, Commons adopted certain features of behaviorism but rejected others. Specifically, Commons approved a conception of science that was “consistent with positivism,” and “endorsed the behaviorist abandonment of any attempt to explain what lies beyond human motivation.” (2003, 554). In order to support his claim, Hodgson quotes a passage from the *Legal Foundations* where Commons asserts that “Science deals with probabilities and superficialities,” rather than with the explication of causal mechanisms. (Commons 1924, 82: quoted in Hodgson 2003, 554). However – Hodgson immediately continues (2003, 554) – contrary to the behaviorist “dogma,” Commons stressed the importance of volition and deliberation. “[A] coordination of the fields of law, ethics and economics” – Commons affirmed unequivocally – “cannot be accomplished without including the concept of human purpose-” (Commons 1924, 127).

It is our contention that Commons’ adoption of the Hohfeldian paradigm as discussed above provides a possible key to interpret such an apparently incoherent attitude towards behaviorism. First of all, it is necessary to understand exactly what Commons meant by behaviorism. The following passage is particularly enlightening:

“The word ‘behaviorism’ has been appropriated by those who treat the individual in purely individualistic fashion as a physiological and anatomical mechanism [...]. But, in economics, the individual is a participant in transactions and a member of going concerns. Here he is not so much his physiology, his ‘glands,’ and ‘brain patterns’ that interest us – it is whether he performs, forbears, or avoids, as a whole personality. The recent ‘behaviorism’ has done much in child psychology and advertising, but not much in the behaviorism of going concerns. Here it is that the will means individual and collective action in three physical and economic dimensions – performance, avoidance, forbearance – a kind of behavior unknown to any physical science and only incipient in the biological sciences, but capable of being analyzed and measured like electricity or gravity, in terms peculiar to itself.” (Commons 1934, 640-41).

Commons believed that the behavioristic attempt to expunge intentionality and consciousness was mistaken.<sup>25</sup> Whereas Watson and his disciples approached the act from an “external” point of view and

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<sup>25</sup> More precisely, it was mistaken in so far as economics, and social science in general, was concerned. As Commons wrote in a passage following the one quoted in the text: “In getting from the will because it is ‘metaphysical,’ the ‘behaviorists’ jump over from the external behavior of the will to the internal behavior of metabolism, thinking that

attempt to ignore consciousness, Commons attempted to interpret consciousness functionally, by explicating the role it plays in the course of human conduct. Commons followed John Dewey, in resisting the then modern trends toward materialism and reductionism in science which threatened to erase the naturalistic conception of mind (Alexa and Ramstad 1997). Again following Dewey and the pragmatists, Commons contended that consciousness is a process involving uncertainty and the transformation of indeterminate events into ones subject to human control (Biddle and Samuels 2007). Beliefs and intentions refers to actions performed on things that change their relationship to one another and in turn affect other people's behavior. This feature of consciousness makes mind contextual and dependent on the *meaning* and significance attributed to a situation in its entirety.<sup>26</sup> "Behavioristic" judgment grounded in sensory-motion functions is not denied, but it is interpreted as a way to detect and discriminate among qualitative and quantitative features of situations that affect the behavioral capabilities – performance, avoidance and forbearance – of the participants to a transaction.<sup>27</sup>

To put it differently, Commons conceived behaviorism not as the negation of the will in favor of a mechanical view of human conduct, but rather as the possibility of reducing human volition into its primary elements so that it could be "analyzed and measured like electricity or gravity." But human volition, for Commons, was not separable from human expectations. What informs choice, Commons argued, are the expectations of what each option might bring as a possible consequence – mainly in terms of other people's behavior. Consider, in this connection, what he wrote about the nature of legal relations:

"Since a duty imposed creates a corresponding equivalent right, the creation of rights is the creation of duties. And the legal relation of right and duty existing between two persons is therefore none other than an expectation of a dependable rule of conduct, a 'prediction,' in the words of Corbin [1919, 163-164], 'as to what society, acting through its courts or executive agents, will do or not do for one and against the other.'" (Commons 1924, 90).

Each party in a transaction formulates expectations as to how the state officials will react to potential moves made by himself and the other participants, and acts on the basis of these expectations. It was in this effort to cope with the "expectational" dimension of human purpose, that Commons found Hohfeld's conceptual apparatus an inspiring example. Commons thought that the possibility of subdividing traditional legal concepts into more precise conceptions would allow a clearer understanding of the framing of expectations within a transaction. Hohfeld's jural relations define the stylized patterns which channel human volition in a legal transaction, and, once the specific form of relation has been established, identify the complete set of expectations as to how each participant to the transaction will behave. Consider, in this regard, what Corbin wrote in his defense of Hohfeld against Kocourek's (1920) criticism:

"Rules of physics and rules of law are alike in that they enable us to predict physical consequences and to regulate our actions accordingly. When the physical event that we are predicting is the conduct of a state agent, executive or judicial, acting for society, the rule that we are applying in

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they have left no metaphysical gap between the will as one kind of behavior and physiology as a supposed similar kind of behavior. But there is an impossible gap. They are not continuous. Only by metaphysics—or rather by metaphor—is the gap filled. The lesson of other sciences would say that this metaphorical jump should not be made. *Treat the individual will, we should say, as a whole in its in its own behavioristic dimensions, and let the physiologists and the anatomists treat the insides of the organism as another whole.*" (Commons 1934, 641: emphasis added).

<sup>26</sup> "Habits are the sub-conscious setting of body, nerves, and brain on the basis of past experience and ready to set off in accustomed directions when touched by stimulus from outside. 'Habit is energy organized in certain channels' [Dewey 1922, 76]. When habits emerge on the threshold of consciousness they seem to be the intuitive or instinctive sense of fitness or unfitness leading the actor to choose without thinking. *When checked and balanced by that hesitating process that we call 'thinking,' it is because a mental habit of acting on words and symbols intervenes between the impulse from without and the physical response to the impulse. If a 'meaning' is identified with these words and symbols we call that meaning an 'idea.'*" (Commons 1924, 349: emphasis added)."

<sup>27</sup> On the meaning and analytical significance of the terms "performance, avoidance and forbearance" as the behavioral dimensions of a transaction in Commons see Ramstad (1990).

called a rule of law; and with respect to the expected action of societal agents, our relations to our fellow men are commonly called legal (or jural) relations." (Corbin 1921, 227).

In addition, it should be pointed out that Hohfeld's analytical approach appeared to be coherent with Commons' behavioristic conception of science: "At the very outset it seems necessary to emphasize the importance of differentiating purely legal relations from the physical and mental facts that calls such relations into being." (Hohfeld 1913, 20). Hohfeld was interested in exploring the "common lowest denominator" of legal relations, rather than the patterns lying behind the formation of human behavior. Hohfeld's analytical schema of jural relations was behavioristic to the extent that he tried to connect legal symbols to the human behavioral relationships they described. Hohfeld did not believe in abstractions called "rights" and "duties." He insisted that they be defined in relation to human beings, their actual purposeful actions, and their expectations. In this connection, Commons' behaviorism owes more to Hohfeld than to Watson.

### *Conclusions*

Hohfeld perceived his highly abstract "fundamental" jurisprudence as the handmaiden to the new functionalism that sought "a more comprehensive, coordinated and synthetic consideration of the underlying psychological, ethical, political, social and economic causes and purposes of the various branches and specific rules of the law [...]" (Hohfeld 1914, 102). Not surprisingly, therefore, Commons found in Hohfeld an influential source of inspiration in his attempt to build a comprehensive framework for his analysis of the intricate relationship between the economic and legal dimensions of modern capitalism. Hohfeld's influence on Commons, however, was both positive and negative. On the one hand, Commons, followed Hohfeld and recognized that such concepts as property and inheritance actually represent an aggregation of numerous types of legal relations. Hohfeld's schema provided a powerful rhetorical and analytical tool whereby these highly abstracts conceptions could be reduced to a limited number of primary elements. Moreover, Hohfeld's schema appeared to be consistent with Commons' general methodological and psychological commitments. On the other hand, Commons' forging of "transaction" as the elementary unit of economic analysis can be seen as an attempt to go beyond Hohfeld. Commons was in fact unsatisfied with Hohfeld's bi-lateral treatment of jural relations and with his neglect of the role played by state officials in enforcing transactions and, in so doing, in promoting specific individual interests as collective public policies. To identify the actual operations of a legal system with what takes place in the courtroom was to omit most of what makes the pervasive constraint by a legal system real. For an institutionalist like Commons, Hohfeld's legal realism was not realistic enough.

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