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The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale

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THE ECONOMY AS A SYSTEM OF POWER AND ITS LEGAL BASES: THE LEGAL ECONOMICS OF ROBERT LEE HALE

WARREN J. SAMUELS*

I. INTRODUCTION	262
A. <i>Career of Robert Lee Hale</i>	263
B. <i>Aim and Thrust of Hale's Legal-Economic Analysis: An Introductory Summary</i>	267
C. <i>Origins of Hale's Thought</i>	268
II. THE ECONOMY AS A SYSTEM OF MUTUAL COERCION	276
A. <i>Freedom, Coercion and Power</i>	276
1. THE GENERAL PARADIGM	277
2. COERCION AND VOLUNTARY—VOLITIONAL FREEDOM	280
a. Use of the Term "Coercion"	280
b. Voluntary Freedom	284
c. Volitional Freedom	285
d. The Impact of Coercion upon Voluntary-Volitional Freedom	287
e. Liberty and Power	292
3. THE ECONOMY AS A SYSTEM OF GOVERNANCE	295
B. <i>The Market Economy as a System of Power</i>	302
1. THE ECONOMY AS A SYSTEM OF POWER	303
2. PRIVATE PROPERTY AS POWER	304
3. THE SYSTEM OF COERCION AS ASYMMETRICAL: INEQUALITY PER SE	307
4. POWER AND THE MARKET ECONOMY	309
a. Resource Allocation and Income Distribution as a Function of Mutual Coercion	310
b. Productivity and Mutual Coercion	313
c. Power and Competition	315
d. On the Organization and Use of the Human Labor Force	318
III. THE LEGAL BASES OF ECONOMIC COERCION	323
A. <i>The Economy as a Function of Law</i>	324
1. THE NECESSITY AND UBIQUITY OF GOVERNMENT (LEGAL) ACTION	326
2. THE SYSTEM OF MUTUAL COERCION AS A FUNCTION OF LAW	331

* Professor of Economics, Michigan State University. Grateful appreciation is acknowledged to Frank L. Ellsworth and Frank P. Grad, of the Columbia University School of Law, Harry M. Trebing, Institute of Public Utilities, Michigan State University, and, especially, to Mrs. Robert Lee Hale and Mr. Robert Lee Hale, Jr., for making available most liberally the private papers of the late Robert Lee Hale. References to these papers will be cited as Hale Papers, with the appropriate folder number and item number, where appropriate (e.g., Folder 40-4 at 4 indicates Folder 40, item 4, page 4). The papers are in the possession of Mrs. Hale, New Canaan, Conn., and are eventually to be deposited in the Law Library of Columbia University. Copies of the materials cited are also in the possession of the author.

a. The System of Mutual Coercion as Asymmetrical: Inequality as a Function of Law	333
3. RESOURCE ALLOCATION AND INCOME DISTRIBUTION AS A FUNCTION OF LAW	340
B. <i>Principle of the Use of Government</i>	344
1. POLITICAL EXTERNALITIES	347
C. <i>The Policy Character of Legal-Economic Interrelations</i>	350
IV. HALE'S NORMATIVE ANALYSIS	354
A. <i>Net Enlargement of Liberty in a World of Inequality and Private Government</i>	357
B. <i>Deliberative Legal-Economic Policy</i>	369

I. INTRODUCTION

Law is an instrument for the attainment of economic objectives and the economy is an object of legal control. The substance of that proposition is widely acknowledged and even more widely, if tacitly, followed. Although economists are increasingly concerned with the legal framework of economic activity and lawyers have long been concerned with the structure of economic organization and relations, no general model of the interrelations between legal and economic (i.e., market) processes has been developed which has found wide acceptance and application. Actually, such a model would have to be developed in terms of an even more general model of the fundamental social relations and forces in terms of which and within which both legal and economic forces and their interaction take place and accordingly may be understood. The complexities of such an analysis, encompassing many if not all the problems of theories of social control and social change, and the difficulties of specifying the social forces in both relatively neutral, yet meaningful, and general yet precise terms, among other factors, have precluded the generation of a widely acceptable and useful model.

This paper will present a systematic statement of the analysis of a lawyer-economist, Robert Lee Hale (1884-1969), whose research and writing over almost half a century specifically grappled with an understanding of the mutual impact of legal and economic processes and the terms and concepts to be used in furthering such an understanding. It is suggested that Hale's analysis, worked out painstakingly through many writings, made a major contribution both to the theory of economic organization and to the analysis of the legal factors in economic society.

In Hale's writings may be found: (1) a paradigm of the economy as a system of mutual coercion, predicated upon an understanding that *power* is the critical variable for an adequate comprehension of the organization and structure of the economic system and for the interrelation of legal and economic processes; (2) an approach to thinking about legal or political and economic interrelations constituting both a "logic of thought" and an approach to the interrelation of legal and economic processes; and (3) a deeply penetrating thrust of basic questions concerning such points as the nature and place of legal-economic decision making, the determination of rights of economic importance, the condi-

tions of realization of economic interests, the meaning of liberty and coercion, and ultimately certain central issues of policy, i.e., the structure and diffusion of the distribution of power, the role of the state in determining and changing the structure of private economic power, and the question, to which (or whose) interests should the state be responsive.

In the remainder of this section, I shall review the life, work and place of Hale, present an introductory summary of Hale's analysis, and briefly indicate certain of the sources of Hale's thought. In Part I, I shall summarize Hale's basic paradigm of the economy as a system of mutual coercion. In Part II, I shall summarize Hale's analysis of the legal bases of private coercive power. In this section I will present the conclusions of Hale's extensive analyses of common, statutory, administrative, and constitutional law as amplifications of his main theme of the legal foundations of the structure of private mutual coercion. In Parts I and II the discussion will primarily be of Hale's positive analysis. In Part III, I will summarize Hale's own normative analysis and the welfare-economic reasoning to which it is related. The separation of Hale's positive and normative analyses is difficult, first, because of the almost inherent tendency for his fundamental concepts and postulated and empirically grounded relations to be normatively and non-neutrally interpreted, and second, because of his own intertwining of positive and normative discussions. Thus, "coercion" is used by Hale as a completely neutral concept, but it is almost impossible for anyone to work with it totally unemotionally, and his fundamental and essentially neutral propositions about the economic role of law or the state are often conjoined with additional value premises, so as to result in presumptive mandates for affirmative government action. The separation can, however, be achieved, though the reader is cautioned that it requires a careful adherence to the relatively impassive and limited use of terms and relations advanced by Hale's positive analysis. My purposes throughout are to systematize Hale's analysis so as to make his insight and paradigms available to both economists and lawyers, to acknowledge and call attention to his contributions, and to stimulate further work on the conception of the economic system as a system of power and on the interrelation of legal and economic processes.

A. *Career of Robert Lee Hale*

Born on March 9, 1884 in Albany, Robert Hale received his pre-college education in New York, Connecticut and Germany. From Harvard he received his B.A. (1906), A.M. (1907), and LL.B. (1909). At Harvard he majored in economics, eventually serving as an assistant to Frank W. Taussig, the main pillar of orthodox economics in this country during the early decades of this century. After several years with a Chicago law firm and AT&T in New York City, Hale returned to school

at Columbia, receiving his Ph.D. in economics in 1918. He taught in the Economics Department at Columbia both before and after receiving his doctorate. In 1919 he began teaching in the law school at the invitation of the innovative Dean Harlan Fiske Stone. In 1922 he was officially granted a joint appointment, and in 1928 he transferred completely to the law school, from which he retired as professor emeritus in 1949, though he continued to teach into the mid-1950's. Hale died August 31, 1969.¹

Hale's research and teaching were concentrated in public utility law and in his unique course, *Legal Factors in Economic Society*, though he also taught labor and administrative law courses. His highly regarded² course, *Legal Factors*, was introduced in 1934 (though given experimentally during the preceding decade) and was organized around a number of his articles dating to the early 1920's.

In the field of public utility law, Hale enjoyed an excellent reputation as a brilliant and powerful analyst. He was best known as a critic of the fair-return-on-fair-value formula of *Smyth v. Ames*³ and of the concept of the public utility "category" as judicial rhetoric.⁴ He wrote extensively on the economic and legal theory of rate base valuation, rate structure, and rate level, often raising questions now treated in welfare economics. His work was extremely well received in the courts, in part, perhaps, through his friendship with Stone, Brandeis, Cardozo, Frankfurter, Hand, and Frank, among others. For example, Justices Black, Douglas and Murphy cited and paraphrased approvingly two of Hale's

1. The biographical information in this and the following paragraph is based in part on 4 J. DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION* 160-63 (1959) [hereinafter cited as DORFMAN] and 5 *id.* at 588; A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 324-25, 361 (J. Goebel, Jr., ed. 1955); 11 LAW ALUMNI BULL. 39 (Winter 1969).

2. A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 325 (J. Goebel, Jr., ed. 1955); E.L. BROWN, *LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE* 142 (1948) [hereinafter cited as BROWN]. Hale's course on *Legal Factors* was brilliantly complemented by Julius Goebel, Jr.'s *Development of Legal Institutions*. See W.C. Warren, *Julius Goebel, Jr. —An Appreciation*, 61 COLUM. L. REV. 1195 (1961). Hale would have agreed with Joseph Dorfman's tribute to Goebel for "insisting that the development of modern legal institutions rests in good part on the delicate interplay of law and economics in response to the requirements of a growing economy," which tribute applied equally to Hale himself. Dorfman, *Chancellor Kent and the Developing American Economy*, 61 COLUM. L. REV. 1290 (1961). See text at note 13, *infra*.

3. 169 U.S. 466 (1898).

4. Hale, *The "Physical Value" Fallacy in Rate Cases*, 30 YALE L.J. 710 (1921); Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209 (1922) [hereinafter cited as *Rate Making and the Revision of the Property Concept*]; Note and Comment, *Pseudo-Protection of Property in Rate Cases*, 24 MICH. L. REV. 166 (1925); Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York*, 34 COLUM. L. REV. 401 (1934); Hale, *The New Supreme Court Test of Confiscatory Rates*, 10 J. LAND & P.U. ECON. 307 (1934); Hale, *The "Fair Value" Merry-go-round, 1898-1938: A Forty-Year Journey from Rates-Based-On-Value to Value-Based-On-Rates*, 33 ILL. L. REV. 517 (1939); Hale, *Commissions, Rates, and Policies*, 53 HARV. L. REV. 1103 (1940); Hale, *Does the Ghost of Smyth v. Ames Still Walk?*, 55 HARV. L. REV. 1116 (1942); Hale, *Utility Regulation in the Light of the Hope Natural Gas Case*, 44 COLUM. L. REV. 488 (1944):

articles on valuation in their concurring opinion in the classic *FPC v. Natural Gas Pipeline Co.*⁵ His criticism of the rule of *Smyth v. Ames* has been described by James C. Bonbright as "urged most vigorously, and perhaps with the most telling ultimate effect on judicial thinking,"⁶ and Irston R. Barnes wrote that, "Professor Hale has presented the ultimate fallacy of the use of eminent domain principles in the regulation of utility rates with a clarity and acumen that is not to be found elsewhere in public utility literature."⁷ The author of over a score of articles on public utility regulation, Hale also published his dissertation, *Valuation and Rate-Making: The Conflicting Theories of the Wisconsin Railroad Commission, 1905-1917*,⁸ which became a classic. He also published with Young B. Smith and Noel T. Dowling, *Cases on the Law of Public Utilities*.⁹

Hale's writings of present importance consist of another score or so of major articles examining primarily but not exclusively legal materials, gradually evolving a theory of the economy as a system of mutual coercion and of the legal bases thereof, culminating in his *Freedom Through Law*,¹⁰ published after his retirement, but representing three decades of research and analysis. In connection with his course Legal Factors he also prepared an unpublished mimeographed collection of cases, materials, and notes for the use of his students, running through five editions, at its longest almost 800 pages.¹¹

Hale's work in the area of legal economics was acknowledged by both economists and legal writers, including among the former his colleague Wesley C. Mitchell.¹² Hale's work was summarized as pioneering legal economics by Joseph Dorfman in his monumental *Economic Mind*

5. 315 U.S. 575 (1942).

6. J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 164 (1961). See also *id.* at 33; *id.* at 183.

7. I. BARNES, THE ECONOMICS OF PUBLIC UTILITY REGULATION 402 (1942).

8. COLUMBIA UNIVERSITY, STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW No. 80, 1918.

9. 1st ed. 1926; 2d ed. 1936.

10. (1952) [hereinafter cited as FREEDOM THROUGH LAW].

11. R. HALE, LEGAL FACTORS IN ECONOMIC SOCIETY (1st ed. 1935, 2 vols.; 2d ed. 1937, 3 vols.; 3d ed. 1940, 2 vols.; 4th ed. 1946; 5th ed. 1947) [hereinafter cited as LEGAL FACTORS]. References below are to the third edition, the longest edition in terms of pages of which the subsequent editions are primarily condensations.

12. Mitchell, *Commons on the Legal Foundations of Capitalism*, 14 AM. ECON. REV. 240, 253 (1924) [hereinafter cited as *Commons*]; 2 TYPES OF ECONOMIC THEORY 736 (J. Dorfman ed. 1969). At least one reviewer of FREEDOM THROUGH LAW favorably compared it to John R. Commons' LEGAL FOUNDATIONS OF CAPITALISM (1924). Emerson, Book Review, 13 LAWYERS GUILD REV. 139, 140 (1953) [hereinafter cited as Emerson]. Commons and Hale were not only familiar with each others' work but corresponded occasionally. For example, Hale cites Commons' *Legal Foundations of Capitalism and Economics*, 34 YALE L.J. 371 (1925) in *Economics and Law*, THE SOCIAL SCIENCES AND THEIR INTERRELATION 131 n.1 (W.F. Ogburn and A. Goldenweiser eds. 1927) [hereinafter cited as *Economics and Law*], and Commons cited two articles by Hale in his LEGAL FOUNDATIONS OF CAPITALISM 91 n.1 (1924). See also Hale Papers, Folders 28, 29. Commons was, with Thorstein Veblen and Mitchel, a leader of Institutional Economics.

in American Civilization.¹³ Describing Hale's course, *Legal Factors*, one legal writer remarked that "[t]he most surprising feature of the course is the large emphasis given to the question of individual rights within an economic system that Professor Hale views as being shot through with coercion."¹⁴ The surprise evaporates when it is recognized (as will be seen in detail below) that, in Hale's view, it is precisely through the acquisition and exercise of individual or private rights that the system of private mutual coercion operates in a market economy. Thus, in a review of Hale's *Freedom Through Law*, Stanley D. Rose pointed out that "[i]n his great work on jurisprudence, Julius Stone discussed the contentions of the modern opponents of extended legal control who insist 'that society should rely as much as possible on spontaneous forces and as little as possible on coercion.'" To this argument [Stone] replied:

The issue is scarcely a clean cut one between legal intervention and non-intervention, for even at the height of *laissez faire* the role of the law is not passive and colourless. The law, even then, especially the law of property, crimes and contracts, provides an essential framework of compulsion reinforcing the economic bargaining power of the parties, and preventing intrusion contrary to law.

For this particular statement, Stone's sole reference is to an article by Robert Hale.¹⁵ Stone also maintained that, "[e]ven under a perfect *laissez faire* economy the law, and particularly the law of contracts and property, is intervening most powerfully to compel some men to fulfill what others claim from them, and to respect the claims of others to be free of intrusion."¹⁶ Here, too, Stone cited only Hale. An identical theme is stated by Felix S. Cohen, who cites in support another article by Hale, as well as a paper by his father, Morris R. Cohen.¹⁷ Elliott Evans Cheatham cited Hale's *Freedom Through Law* to echo Cardozo's *Paradoxes of Legal Science* on the legal paradoxes of "freedom and order, justice and liberty."¹⁸ Arthur S. Miller quoted Hale as an originator of the concept of "private government,"¹⁹ a notion basic to Hale's analysis. Finally we

13. (1959). See note 1 *supra*.

14. BROWN, *supra* note 2, at 142. Brown continues: "Property owners use coercion, but so do workers. All bargaining, in fact, is coercive." *Id.*

15. Rose, Book Review, 6 VAND. L. REV. 958 (1953) [hereinafter cited as Rose]. See J. STONE, THE PROVINCE AND FUNCTION OF LAW 780, 781 (1950) [hereinafter cited as STONE]. Jerome Frank, dissenting in *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949 (2d Cir. 1942), cited several articles by Hale in support of his argument that minimization of government interference was "not the actual practice, even when *laissez-faire* was in its zenith. . . ." *Id.* at 963. The case is discussed in note 32 on page 125 of *FREEDOM THROUGH LAW*. See also letter from J.N. Frank to R.L. Hale, April 23, 1946, in Hale Papers, Folder 13.

16. STONE, *supra* note 15, at 561.

17. F.S. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 80 n.22 (1933).

18. E. CHEATHAM, A LAWYER WHEN NEEDED 122, 124 (1963).

19. A.S. Miller, *Private Governments and the Constitution*, THE CORPORATION TAKE-OVER 138-39 (A. Hacker ed. 1964) [hereinafter cited as Miller].

may note that in his classic, *Social Control of Business*,²⁰ John M. Clark adopted the basic analysis of Hale's *Coercion and Distribution in a Supposedly Non-coercive State*.²¹

B. *Aim and Thrust of Hale's Legal-Economic Analysis:
An Introductory Summary*

As will be seen in detail below, Hale considered that the economic (i.e., market) and legal systems were mutually interdependent, that such mutual interdependence included the inescapable involvement of government in economic affairs, and, no less important and fundamental, that such mutual interdependence could be and indeed had to be comprehended and elucidated in terms of a structure and process of both liberty and coercion. Since government was fundamentally involved in economic processes, both economic and legal theory should be so developed as to reveal the basic elements and relations of that involvement. Also, since the basic character of the economy is its structure of liberty and coercion, the elements of legal involvement would have to be specified in terms of the economy seen as a system of mutual coercion, although not because legal action was uniquely labeled "coercive." The very operation of the market economy (in fact, all economies) was seen by Hale as coercive, such that there was coercion generic to even a supposedly noncoercive economic system.²² Hale concentrated upon "the role played by government in controlling the exercise of conflicting economic liberties through upholding or restricting the use of economic pressures,"²³ whether considered "intervention" or not, so as to create "an understanding of the effect of actual or possible legal arrangements on the various interests promoted or retarded thereby."²⁴ "[T]he system of legal controls, whether employed actively through imposing state obligations or more passively through affording protection for private economic pressures, determines the nature of the economic system,"²⁵ specifically the structure of private coercive power.

The two main thrusts of Hale's analysis are thus: (1) the conception of the economy as a system of power, and his accompanying model of the formation, distribution and operation of mutual coercion and (2) the inseparability of legal and economic processes, and his accompanying model of the legal bases of economic power. His analysis is preoccupied with the protection which the legal system, especially the courts, affords "to one man's economic liberty against the coercive power of other individuals

20. J.M. CLARK, *SOCIAL CONTROL OF BUSINESS* 111-12 & n.1 (2d ed. 1939). Clark also cited Commons' *LEGAL FOUNDATIONS OF CAPITALISM* (1924).

21. 38 POL. SCI. Q. 470 (1923) [hereinafter cited as *Coercion and Distribution*].

22. *Id.*

23. Emerson, *supra* note 12, at 139.

24. *Economics and Law*, *supra* note 12, at 131.

25. Emerson, *supra* note 12, at 139.

or of the government"²⁶ Since in Hale's view "every lawful economic power becomes a type of political power, and every economic inequality poses a question of political inequality,"²⁷ a critical nexus becomes the policy choices through which one interest is elevated against another through the application of "the basic rules which determine the relation of individual to individual, of individual to private power groups, and of individuals to government."²⁸ As a lawyer, Hale concentrated on the legal rules, but as a policy analyst he inevitably riveted his attention upon the choices made in the legal process, which were seen as choices of basic economic significance.

In effect, Hale argued, then, that one has to study the formation of the distribution of economic power because the economy *is* a structure of coercive power arrangements and relationships. Resource allocation and income distribution are nominally a function of the market, but the operation of the market—even under competitive conditions—is itself a partial function of the distribution of power, which, further, is a partial function of the operation of the legal system. Hale studied the legal bases of the structure of private economic power, with the problem of economic power—the different circumstances under which different individuals and subgroups in the population enter into and participate in economic activity—seen as an independent and distinct problem in its own right, and thereby the legal bases of resource allocation and income distribution through the legal determination of the structure of private participation.

C. *Origins of Hale's Thought*

It is exceedingly difficult and never really possible to establish conclusively the origins of a man's ideas. The substance and sequence of a man's reading is largely unknown; even more uncertain is any attempt to discern the dialectical reactions and play of his mind as he reads and thinks; and there is the exercise of imagination as well. In addition, certain readings teach or suggest new thoughts and ideas; some confirm and/or provide additional evidence supporting ideas already held; and still others articulate and give substance and specificity to what had been latent, only felt and not seen, or undifferentiated. And there is more than reading, of course; one's entire pattern of experience exercises an influence upon one's thoughts, both in direction and substance. The development of one's psyche must count for much. Notwithstanding the difficulties which a biographer would encounter in constructing an intellectual history, it is possible to establish certain interesting origins of Hale's analyses, several of which are particularly instructive.

26. FREEDOM THROUGH LAW, *supra* note 10, at 37.

27. Cahn, Book Review, N.Y. Times, Jan. 18, 1953, at 14, col. 1 [hereinafter cited as Cahn].

28. Emerson, *supra* note 12, at 139. This formulation accords with Frank H. Knight's understanding of the concept "theory of economic policy;" see his *Theory of Economic Policy and the History of Doctrine*, 63 ETHICS 276, 282 (1953), and W. SAMUELS, THE CLASSICAL THEORY OF ECONOMIC POLICY (1966) [hereinafter cited as SAMUELS].

First, Hale grew up intellectually under the influence of thinkers in both economics and law who made strenuous and generally successful efforts to treat fundamental issues, efforts which required them to delve into subject matter often considered extraneous by narrow definitions of the scope of their field. Hale seems to have been impressed by the possibility and attractiveness of getting to truly fundamental questions which could be then treated both positively and normatively, but, above all, explicitly. In this he was aided by the deep thrusts of such legal writers and teachers as Joseph H. Beale and Roscoe Pound, and by Justices Stone, Holmes, Cardozo and Brandeis, as well as Frankfurter. Perhaps Hale was most especially influenced by the thrust of Wesley H. Hohfeld's articulation of "fundamental legal conceptions." Hohfeld's work and its insight for understanding Hale, as well as the insight which it accorded Hale, will be examined a few paragraphs below.

Among economists, Hale was at Harvard during the time of Taussig and Carver, economists whose penchant for and success at asking fundamental questions about economic organization as a system of power accounted in no small degree for their eminence. Although both were much more politically and economically conservative than Hale, he appreciated the level and candor of their discourse, particularly that of Taussig. From Taussig, as Hale made explicit, he learned that wage and public utility rate setting by the state "involves settlement by public authority of the distribution of wealth."²⁹ From this it was easy to see the action of the public authority, which Hale would later call "state action,"³⁰ behind all wealth and income distribution through the ordinary determination and enforcement of property and contract rights—which ordinary law the statutory regulation of wages and/or public utility rates would suspend, set aside, or modify but which otherwise operated to partially govern wealth and income distribution.³¹ He also acknowledged

29. FREEDOM THROUGH LAW, *supra* note 10, at 460, 461.

30. Hale was one of the foremost exponents of the idea that enforcement of contract and property rights could be seen as a delegation of state power to private individuals and thus "state action," the germ of which Hale credited to Beale, FREEDOM THROUGH LAW, *supra* note 10, at 333, and which culminated in *Shelley v. Kraemer*, 334 U.S. 1 (1948). See also Hale Papers, Folder 95.

31. In notes dating back to the first world war, Hale wrote:
It has been customary to ignore the fact that the owner of property derives his income from the government's interference with others. . . .

However we may explain the persistence of the notion that our existing system of property rights implies no governmental interference with the distribution of wealth, that notion has now begun to lose its hold. . . . The need of protecting the public from the owner was first clearly seen in the case of the railroads, then of other public utilities. . . . No longer are we able to delude ourselves with the comfortable theory that private property is no special privilege. And no longer, on the other hand, do we seek the panacea of abolishing all special privileges. Like all special privileges of a pecuniary nature, we seek to allow income from ownership to the extent, and to the extent alone, that it conduces to some social purpose. . . . [W]e aim to measure the privilege by the end to which it is supposed to

Taussig's emphasis on non-competing groups as one source of approaching the subject of limitations upon alternatives in the market going beyond existential scarcity.³² From this it was possible to see the economy as a system of mutual coercion with differentially important powers of coercion acting as a function of inequality of position, including effective legal position, i.e., a system of advantage and disadvantage partially grounded in law.³³ In all these matters, Hale appreciated Taussig's realism and candor.³⁴

conduce. . . [and] to leave the owner so much income only as is thought socially desirable.

Hale Papers, Folder 24.

This functional analysis (without, in the case of Taussig, the normative element supporting reform) has its analog in Taussig's functional treatment of the leisure class, 2 F.W. TAUSSIG, *PRINCIPLES OF ECONOMICS* 275-77 (3d ed. rev. 1929), and possibly one source, and certainly support (acknowledged by Hale in Hale Papers, Folder 90-3 at 2) in R.T. Ely's social theory of property in his *Property and Contract in Their Relation to the Distribution of Wealth* (1914). In 1951, at the University of Chicago, Hale similarly argued that public utility rate regulation

cannot be intelligently solved without passing judgment on the desirable economic relationships between property owners in general and the rest of the community. Once that judgment is made, the question at once arises why the government should not readjust the relationships between the public and other property owners, not utility owners alone, whenever the present relationships seem to call for readjustment

Hale Papers, Folder 59-1 at 6.

32. *FREEDOM THROUGH LAW*, *supra* note 10, at 32-33.

33. Hale was undoubtedly also influenced by Taussig's emphasis upon the importance of an instinct of domination, which he felt extended throughout both political and economic affairs, though Hale nowhere generalizes about psychology in relation to power and coercion. See Samuels, *Taussig on the Psychology of Economic Policy*, 15 *INDIAN ECON. J.* 1 (1967).

34. *Political and Economic Review*, 9 *A.B.A.J.* 329, 330 (May 1923). Hale's *Coercion and Distribution*, *supra* note 21 was a review of T.N. Carver's *Principles of National Economy* (1921). Although Carver wrote Hale that the latter's review failed to choose "a representative case" (Letter from T.N. Carver to R.L. Hale, November 19, 1923, in Hale Papers, Folder 1), Roscoe Pound wrote to Hale that his critique of Carver was "not only characteristically acute, but seems to me entirely convincing" (Letter from R. Pound to R.L. Hale, November 14, 1923, in Hale Papers, Folder 1), after earlier having written that Hale's article, *Law Making by Unofficial Minorities*, 20 *COLUM. L. REV.* 451 (1920) [hereinafter cited as *Law Making by Unofficial Minorities*], showed "an unusual power" in looking "realities in the face, divesting them of their coverings of legal theory." Letter of R. Pound to R.L. Hale, May 20, 1920, in Hale Papers, Folder 4. Hale's own depth of reasoning, realism and candor were further praised by R.B. Gosh, for "showing up the absurdities in the existing window dressing" of laws and institutions (Letter from R.B. Gosh to R.L. Hale, May 2, 1922, in Hale Papers, Folder 6), and by J. Viner, writing like Gosh in praise of Hale's *Rate Making and the Revision of the Property Concept*, *supra* note 4, that "[he] fully appreciate[d] its acuteness of reasoning, its grasp of economic and . . . presum[ably] of legal principles, and its determined search for fundamental bases for the guidance of governmental action. . . ." Letter from J. Viner to R.L. Hale, September 23, 1922, in Hale Papers, Folder 6. Of interest also in this regard is A. Lawrence Lowell's reaction to Hale's *Law Making by Unofficial Minorities*. Then President of Harvard, Lowell wrote Hale:

Surely we have discovered, to the great surprise of its early advocates, that democracy means, in large part, the rule of minorities. On the other hand, those who have always claimed that minorities are usually right ought to rejoice; but the question arises, what minorities?

Letter from A. Lawrence Lowell to R.L. Hale, May 29, 1920 in Hale Papers, Folder 4. Compare, however, Douglas Maggs' reaction to Hale's *Commissions, Rates, and Policies*, 53

Second, Hale's work in public utility regulation accorded him direct opportunities to generate and test his ideas. He emphasized the fallacy of fair-return-on-fair-value, namely, that rates of return cannot properly be calculated independently of value, since value tends to be the capitalization of returns, and that protection of value determined independently of regulation would disable the power of regulation to control rates by assuring continuation of monopoly returns and the valuation based thereon (i.e., the specific error of applying eminent domain principles to police power cases). This also led Hale to appreciate that the economy is a structure of advantage and disadvantage with respect to the capacity to derive income and establish (protected) marketable value, and to seek the legal bases thereof.³⁵ With respect to rate making in general, Hale went beyond Taussig and perceived and argued that,

the search for a criterion of the reasonableness of rates leads logically to a search for a criterion of the reasonableness of the yield of property outside of the regulated field, as well as within it, and demands the formulation of the public economic policy in regard to the distribution of wealth throughout the economy and in regard to the desirability or undesirability of altering that distribution in specific respects by price regulation or corrective taxation.³⁶

Thus, Hale could generalize about the ubiquity of the courts' "passing judgment on the question how far it is true that the income derived from ownership is justifiable on grounds of public policy."³⁷ Hale argued that regulation of the level of wages, public utility rates, land values, etc., required reference to principles relating to the fact that law—even independent of "regulation"—governed both the capacity to derive income and "the channels into which industry should flow;"³⁸ and that what both ordinary law and "regulation" were doing was determining

HARV. L. REV. 1103 (1940), stating that he would "succeed eventually in forcing out into the open the hidden and therefore half-baked policy decisions which dictate results in this field." Letter from D. Maggs to R.L. Hale, June 4, 1940, in Hale Papers, Folder 16, which included the letter of a former student, Edward S. Godfrey:

I should like to tell you also how thoroughly I enjoyed your course—especially the book, which I read in entirety. Though I still hold some doubts as to whether or not it should be suppressed! It clears away vast stretches of underbrush, but I think you are still groping yourself to find what to plant in its place. The great Llewellyn can laugh at the fear of skepsis, but I think his critics have something there. I'm thinking of less extraordinary people, less informed, and of that infernal arbitrariness of choice that turns up after all your analysis. Truly I believe that if every one in the country took Legal Factors we should have a civil war.

But I really enjoyed it tremendously.

Letter from E.S. Godfrey to R.L. Hale, undated, in Hale Papers, Folder 40.

35. FREEDOM THROUGH LAW, *supra* note 10, at 462; and see references given in note 4 *supra*.

36. FREEDOM THROUGH LAW, *supra* note 10, at x. See text at note 29 *supra*.

37. Hale, *Decisions on Valuation and Rate Making: Discussion*, 14 AM. ECON. REV. 264, 265 (1924).

38. Hale, *Economic Theory and the Statesman*, in THE TREND OF ECONOMICS 193 (R.G. Tugwell ed. 1924) [hereinafter cited as *Economic Theory and the Statesman*].

the structure of private mutual coercion governing resource allocation and income distribution *pro tanto* through the market. Similarly, Hale considered that the public utility category question—the question of intensive regulation *per se*—led ultimately to the legal bases of the capacity to exert monopoly prices via exclusion and withholding, and, by inference, over *all* prices and *all* claims to income, including under competitive conditions (see below).

Third, that Hale could readily pursue such lines of inquiry is understandable. He grew up in a very politically conscious family environment, and in a period in which fundamental questions of socioeconomic and political policy were widely and openly discussed among both the educated and not so educated.³⁹ He wrote to his older brother, Matthew Hale, of his early concerns with and sensitivities to the distribution and structure of freedom, coercion, and opportunity, of his antipathy toward blind and unquestioning orthodoxy, and of his affection for pluralist democracy.⁴⁰ Early conflicts between organized labor and business, as will be seen below, were interpreted in terms of legally based relative coercive power. But it was probably the Georgian single-tax movement which first cemented his notions about the relations between income, property, coercive power, and law; his Papers amply document his vision as a young man of legally based rights to land rent as a source of withholding capacity, thus of coercive power, and thereby as a claim to income in the market.⁴¹ Income was a function of withholding or mutual coercive power, which in turn was a function of law (i.e., the legal apportionment of land or, by extension, of rights in general). This was extended to property in general, as well as to non-property based sources of coercive power, and echoes throughout almost all his writings—as will be amply evident in the pages to follow.

Hale thus found highly agreeable the famous essays by Hobhouse, Rashdall and Lindsay on the rights and duties of private property; in particular, Hobhouse's distinction between property for use and property for power gave structure and thrust to ideas which Hale had been developing for some time.⁴² Similarly, Herbert Croly's *Progressive Democracy*, among other things a spirited defense of Rooseveltian versus Wilsonian progressivism, supported Hale's growing belief in the desirability of extending the fruits of private property in a system of industrial and political democracy.⁴³ But of particular present importance was the deep level of an explicit, functional analysis of the institution of property—coupled with a reformist approach, to be sure—found in both books. This was the level of analysis on which Hale's own mind operated and the direction it took.

39. See generally S. FINE, *Laissez Faire and the General-Welfare State* (1956).

40. Letter from R.L. Hale to M. Hale, July 29, 1913, in Hale Papers, not in folder.

41. Hale Papers, Folders 24, 62.

42. L. HOBHOUSE, *PROPERTY: ITS DUTIES AND RIGHTS* 9-10 (1915).

43. H. CROLY, *PROGRESSIVE DEMOCRACY* (1914).

His style of inquiry was also abetted by the explicit consideration of coercive power found in leading labor cases of the period. Indeed, *Legal Factors* began with excerpts from Pitney's opinion in *Coppage v. Kansas*, including the following:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none⁴⁴

And it was no accident that in *Legal Factors* *Coppage* was followed by Hale's *Coercion and Distribution*. Hale was also impressed with certain of Brandeis' arguments. One of them, Brandeis' dissent in *Hitchman Coal & Coke Co. v. Mitchell*, contained the very germ of Hale's theory of mutual coercion:

It is also urged that defendants are seeking to "coerce" plaintiff to "unionize" its mine. But coercion, in a legal sense, is not exerted when a union merely endeavors to induce employees to join a union with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in a legal sense. The employer is free either to accept the agreement or the disadvantage. Indeed, the plaintiff's whole case is rested upon agreements secured under similar pressure of economic necessity or disadvantage. If it is coercion to threaten to strike unless plaintiff consents to a closed shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a closed non-union shop. The employer may sign the union agreement for fear that labor may not be otherwise obtainable; the workman may sign the individual agreement, for fear that employment may not be otherwise obtainable. But such fear does not imply coercion in a legal sense.⁴⁵

And there is Brandeis' dissent in *Truax v. Corrigan*, the thrust of which is identical to Hobhouse's distinction between property for use and for power, namely, that the purpose of employers in using the Sherman Act against labor unions was

not ordinarily to prevent property from being injured nor to protect the owner in its use, but to endow property with active,

44. 236 U.S. 1, 17 (1915), quoted in *LEGAL FACTORS*, *supra* note 11, at 1-2 and *FREEDOM THROUGH LAW*, *supra* note 10, at 10.

45. 245 U.S. 229, 264 (1917). See Hale Papers, Folder 80-1.

militant power, which would make it dominant over men. In other words, that, under the guise of protecting property rights, the employer was seeking sovereign power.⁴⁶

In *Freedom Through Law, Truax v. Corrigan* was one of a series of cases which Hale used to argue the existence of state action behind private coercive power.⁴⁷

Finally, of great value in understanding Hale's analysis and style or logic of reasoning is the paradigm of legal conceptions created by Hohfeld in his classic *Yale Law Journal* papers of 1913 and 1919. Hohfeld attempted to identify and distinguish, in the words of one of his interpreters, Arthur L. Corbin, "concepts that are 'fundamental' because they express the vitally important legal relations of men with each other in any judicial or governmental system."⁴⁸ Hohfeld's model of fundamental legal concepts, stated first in terms of *pairs of jural correlatives*, is as follows:

RIGHT:	one's affirmative claim against another, one's control over another's conduct
DUTY:	societal compulsion for, or obligation to, the benefit of another
PRIVILEGE:	absence of duty, i.e., exemption from another's right (i.e., from the duty owed that right)
NO-RIGHT:	absence of one's right or claim on another (and of any correlative duty on another's part)
POWER:	legal ability to alter legal relations
LIABILITY:	condition wherein one may have one's legal relations or position altered by another ⁴⁹
IMMUNITY:	exemption from legal power, i.e., from another's legal ability to alter one's legal relations or position
DISABILITY:	conditions wherein one lacks the power to alter another's legal relations or position ⁵⁰

The foregoing pairs are *correlative* in that each of the extended terms denoting someone's condition or position is necessarily accompanied by its corresponding indented term denoting another's condition or position

46. 257 U.S. 312, 368 (1921).

47. FREEDOM THROUGH LAW, *supra* note 10, at 327-33 *passim*.

48. A. Corbin, *Foreword* to W.N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS at viii (W.W. Cook ed. 1964).

49. Commons substituted the word *exposure* for *liability*. See *id.* at xiii, and Commons, *supra* note 12. Hale also occasionally used the word *exposure* to connote what Hohfeld meant by *liability*. *E.g.*, Hale Papers, Folder 39-14 at 2. Also see note 52 *infra*.

50. W.N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, 5, 36, 65 (W.W. Cook ed. 1964).

consequent to the position denoted by the extended term. These concepts may be expressed as a scheme of *jural opposites*:

right	privilege	power	immunity
no-right	duty	disability	liability ⁵¹

Each pair is *opposite* in the sense that each lower term denotes a condition or relation representing the negative or absence, hence opposite, of its corresponding upper term. Thus, with respect to the jural correlatives, a *right* implies a *duty*, while the absence of a *right*—its opposite—is a *no-right*. And while every *power* implies a correlative *liability* (or exposure), the opposite condition to a position of *power* is a condition of *disability*. Finally, the *no-right* logically implies a correlative *privilege*; and the *disability* logically implies a correlative *immunity*.

What is of present importance is not only that this paradigm expresses “vitally important legal relations of men with each other,” to again quote Corbin, but that it does so in a particular way. For its expression of relations is in terms of a structure of decision-making with positions of advantage and disadvantage, of a structure of mutually coercive capacity (or, generally, power—though not defined per Hohfeld; see below). Thus, with respect to the opposites *right* and *no-right*, one may have an affirmative claim over another, thereby controlling his conduct, or not, and with respect to the correlatives *right* and *duty*, one may have such a claim and such control, and the other is under societal compulsion or obligation to the benefit of the former. However approached, the individuals in question are not under symmetrical or equal bargaining conditions. With respect to *privileges*, *duties* and *no-rights*, one may have a *duty* to another owing to the latter’s correlative *right*, or one may have an exemption from another’s *right*, to wit, a *privilege*, such that *duty* and *privilege* are jural opposites, and the correlative of which *privilege* is the other’s *no-right*—again with asymmetry. Similarly, while some may have the *power* to alter legal relations, which *power* subjects others to a *liability* (or to which they are exposed), the *power* and the *liability* being correlative, one may, in jural opposition to what is otherwise one’s *power*, be *disabled* by virtue of another’s *immunity* from the one’s legal ability to alter his legal relations or position, the *disability* and *immunity* being correlative, and the positions once again being those of advantage and disadvantage. In the case of every pair of jural opposites and jural correlatives there is an underlying or implicit structure of advantage and disadvantage, of power and of exposure to power, with a consequent structure of mutual coercive capacity depending upon who has what *right*, what *privilege*, what *power*, and what *immunity* and, therefore, who (else) has what *duty*, what *no-right*, what *liability*, and what *disability*. Hale’s conception of the economy as a system of mutual coercion and his understanding of the legal bases thereof may be related

51. *Id.*

directly⁵² to Hohfeld's paradigm of fundamental legal relations, for those relations, like the relations in Hale's paradigm, represent a structure of legally grounded private economic power with asymmetrical elements and with the legal system partially responsible for the asymmetry. For, differential coercive power is a partial function of the fact, in Hale's view, that there is an unequal distribution of effective *rights, privileges, powers, immunities, duties, no-rights, liabilities, and disabilities*. What is relevant at this point, however, is that the system of mutual coercion embodied, albeit latently or implicitly in Hohfeld's paradigm is also embodied, but explicitly, in Hale's.

II. THE ECONOMY AS A SYSTEM OF MUTUAL COERCION

In this part, I shall summarize Hale's basic paradigm of the economy as a system of mutual coercion. Although Hale perceived that all decision-making processes were coercive (as he understood the meaning of coercion), the economy—and particularly the market economy of the United States—was the only such process which he analyzed. Accordingly, I shall demonstrate the coercive character of the economy and, by extension, all decision-making processes in general and the market economy in particular, including the asymmetrical structure of economic organization, all in terms of Hale's basic paradigm of freedom, coercion and power.

A. *Freedom, Coercion and Power*

Hale's approach to the interrelation of legal and economic processes and to the ordinary operation of the economy considered independent of, or abstracted from, the legal system requires strict adherence to his analytical structure encompassing a small set of concepts. As in the case of Hohfeld's attributions of meaning to terms, the meanings given to terms by Hale must be understood and followed as restricted by him in order to comprehend his general analysis. This is difficult; the terms tend to resist particular specification because, first, they have been given widely disparate and even contradictory meanings by a wide variety of authors, and second, they have widely varying applications or identifications in connection with particular real-world experiences. For example, what is coercion to one may be freedom to another, and so on, in the first case by definition and in the second, by sentiment, feeling, or per-

52. Hale used and praised Hohfeld's analysis but he did not attempt to rigorously state his own analysis in Hohfeldian terms, though he sometimes used or referred to Hohfeld's terminology for clarity or strength. See Hale, *Labor Law. Anglo-American*, in 8 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 669 (1932) [hereinafter cited as Hale, in *ENCYCLOPEDIA OF SOCIAL SCIENCES*]; Hale Papers, Folders 1 (Letter from A.T. Hadley to R.L. Hale, Nov. 12, 1923, and Letter from R.L. Hale to A.T. Hadley, Nov. 24, 1923), 30-1, 30-2, 58-3, 58-5, 91-5; Hale, *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 214 & n.16.

sonal identification. In this section, I shall first present the concepts comprising the structure of Hale's paradigm and then, in sequence, expand upon these and related concepts.

1. THE GENERAL PARADIGM

The concepts comprising the structure of Hale's paradigm are as follows:

- Freedom: Voluntary:* complete autonomy with the absence of constrained choice or limits to choice or behavior; in effect, choice governing the range of alternatives between which one will choose.
- Volitional:* circumstantially limited exercise of choice between alternatives or behavior.
- Coercion:* the impact of the behavior and choices of others (individually and/or in the aggregate) which limits one's freedom from voluntary to volitional; the unconditional and/or conditional withholding of alternatives.
- Power:* the means or capacity to coerce (whose reciprocal is exposure to others' coercive capacity), e.g., rights, wealth, position.
- Government:* those with the capacity to coerce (i.e., to affect behavior of choice), or those with the concentrated capacity to coerce; or the total system of mutual coercion.

Stated generally and very incompletely, an individual would have complete or *voluntary freedom* if, the physical constraints of nature being equal, he were unconstrained by others in any form as to his behavior and/or choices, but his freedom is lesser and only *volitional* because of the impact of others' behavior and/or choices. This impact of the behavior and/or choices of others is *coercion*, which may take many forms and is generally a matter of degree, but always affects the range and/or degree of possible realization and/or cost of alternatives. *Power* connotes the capacity to coerce and may be concentrated or diffused, and *government* connotes those with the capacity to coerce (i.e., to impose or effectuate constraints on choice). Hale's favorite, simple yet direct, illustrative example involves the hold-up man who says, "Give me your money or your life." According to Hale's terminology when one hands over one's money one is not acting *voluntarily*, but only *volitionally*, for one is choosing between alternatives imposed by another, whereas *voluntary freedom* would enable the individual to choose between alternatives of his own making, such as the added option of leaving or being

left unmolested. In this case, the hold-up man is *coercing* the victim when he denies him the opportunity or alternative to leave unmolested; the hold-up man has the *power* and for all practical purposes he is *governing* the victim. A different example involves the consumer having to surrender the price of the bread in order to purchase the loaf, and the baker or retailer having to surrender the loaf in order to have income. Both have alternatives but they are limited: the one may buy or not buy and starve, and the other may sell or not sell and perhaps starve also. Neither has voluntary freedom; both have volitional freedom because both are limited by the coercive capacity of the other, namely, the capacity to withhold the purchase price or loaf of bread, respectively. Each coerces the other by restricting the alternatives open to the other; each has the power to do so, and each is *pro tanto* governing the other. Another example would be that of Robinson Crusoe who has—again physical constraints on his options being equal—voluntary freedom in the absence of others (ergo in the absence of constraints imposed by others), save perhaps for the vestiges of habit and culture remaining internalized in his behavior. With the arrival of Friday, each one's freedom becomes volitional, each necessarily limiting by virtue of their interaction the alternatives open to the other. Each is therefore coercing the other through the mere presence and impact of his behavior and/or choices. It is a system of mutual coercion. If an employer-employee, or landholder-tenant (or worker), relationship should emerge, say, with still other comers to the island, then, as in our economy, the structure of mutual coercive capacity would tend to be skewed either toward the employers, as in a scarcity of employment opportunities, or toward the employees, as in a scarcity of workers. In the former case, the coercion upon the workers would tend to be more dominant and vice versa, but in both cases there is a structure of mutual coercion. Further, in *any* case where employment relations mean that the final product belongs to the employers, one could infer that the general structure of mutual coercion is skewed toward the employers, with the opposite case being one in which workers would hire owners of plants and equipment, with the final product belonging to the workers or their agents. Still another example would be one in which either governmental grants or private donations go to universities and students compete for positions, vis-à-vis one in which monies go to students through scholarships and the universities compete for students. In the former instance coercive capacity is skewed toward the universities and in the latter toward the students. In none of these examples and subcases is there voluntary freedom, except in the case of Crusoe alone on the island (*ceteris paribus* physical restrictions and his habits and culture); in each example involving more than one person, there is only volitional freedom, with the difference between the hypothetical voluntary freedom and actual volitional freedom being the impact of the sum of others' choices or behavior,

i.e., their coercion. In each case, those who coerce have power and in effect govern, whatever their titles and whether officially or unofficially, and, finally, the structure of coercive capacity is a variable, always involving mutual coercive relationships, with the net flow of impact going one way or the other.

In Hale's view, then, man in society is subject to a vast system and structure of governance, a system and structure in which power or the capacity to exert impact on others exists more or less widely diffused or concentrated, but where it is always more or less mutual, such that one's actual freedom is limited by the total impact of others, and, therefore, is volitional and not voluntary. In other words, the undefined freedom of alpha is limited more or less by the undefined freedom of beta and vice versa; the power of one is countered more or less by the power of the other, and the structure of relations is therefore mutually coercive: each limits the consequently volitional freedom of the other, more or less. These concepts of Hale's will now be explored in some detail. In the following major section I shall explore Hale's view of the *economy* as a system of mutual coercion.

This is an appropriate point to note, however, that in Hale's analysis, even so sketchily summarized, there are inherent two crucial points: the ubiquity of volitional freedom and the ubiquity of coercion. Almost all, indeed perhaps all, choice is constrained choice; each person is constrained by the coercive impact of the choices made by others, singly or through collective choice in all of its forms (market and nonmarket, for example). The problem which emerges, then, as the critical question of policy is *not* one of freedom versus coercion but of the *structure* of coercion (i.e., of mutual coercive capacity) and, therefore, of the *structure* of volitional freedom. The question is one as to which element of voluntary freedom will be limited by and sacrificed to which coercive element, and thereby changed to a volitional-freedom status, i.e., a problem of the *pattern* of volitional freedom and of its correlative *pattern* of coercion; in effect, *whose* freedom and therefore *whose* capacity to coerce. Since the total process is one of decision-making or choice, the ultimate problem is, *who chooses?* The twin principles of the choice character of all legal-economic questions, and specifically and ultimately of the choice character of the *structure* of legal-economic decision-making itself, comprise Hale's most fundamental point; that is, except for one which is implicit in this concept of choice. As put by his appreciative but concerned student, it is "that infernal arbitrariness of choice"⁵³ that is itself ubiquitous. Interestingly, Hale shared all of this with both "sociological jurisprudence" and "legal realism," namely, as Edward H. Levi put it, "the mechanism of legal reasoning should not be concealed by its pretense,"⁵⁴ of inevitability or finality. And Hale's view on

53. Letter from E.S. Godfrey to R.L. Hale, undated, in Hale Papers, Folder 40.

54. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1951).

law on this point was identical to that of Commons on economics. It was no accident that both were leaders in legal economics; nor was it an accident that both were reformers and, in their reformism and legal-economic realism, they disturbed conservatives both in and out of their professions; nor that both would have to confront the problem of balancing deliberative with nondeliberative choice—as will be discussed in the final part.

2. COERCION AND VOLUNTARY-VOLITIONAL FREEDOM

“Coercion” signified to Hale the impact upon one person or group of the choice(s) or participation in a decision-making process of others, the consequence of which is the transformation of what otherwise, hypothetically, would be voluntary freedom into volitional freedom or, more realistically, the transformation of one bundle of volitional freedoms into another. The impact itself is a function of “the relative power, latent or active, of various individuals and groups.”⁵⁵

a. Use of the Term “Coercion”

However, “coercion” tends to signify more than Hale intended it to. Indeed, Hale long felt that “coercion” was an infelicitous term and sought an alternative which would convey his limited and neutral intended meaning and nothing more. He considered and at times used “compulsion,” “pressure,” “force,” “influence,” “duress” (though this he generally used in the legal sense only), and even “oppression” (though this he generally used to refer to coercive impacts which were deemed intolerable by either the recipient or an independent observer). One of his best known articles used the term “coercion” and another, both “force” and “compulsion.”⁵⁶

The basic difficulty is that “the word ‘coercion’ frequently seems to carry with it the stigma of impropriety,” to the effect “that the coercive character of many innocent acts is so frequently denied.”⁵⁷ It is this “stigma of impropriety” which Hale’s use would reject. In calling conduct coercive, he maintains, “there is no implication that . . . [it] is improper, or that there is any feeling of hostility, or that one party has a greater power than the other, or that the power is irresistible.”⁵⁸

[C]oerciveness is not a ground for condemnation except when used in the sense of influence under pain of doing a morally unjustified act. And obviously to pronounce the pressure unjustified because it is an unjustified pressure is to reason in a circle.

55. *Law Making by Unofficial Minorities*, *supra* note 34, at 455.

56. *Coercion and Distribution*, *supra* note 21; Hale, *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 COLUM. L. REV. 149 (1935) [hereinafter cited as *Force and the State*].

57. *Coercion and Distribution*, *supra* note 21, at 471.

58. Hale Papers, Folder 91-5 at 17. See also *id.* 36-2.

Hence, it seems better, in using the word "coercion," to use it in a sense which involves no moral judgment.⁵⁹

[T]he word "coercive" as used here is intended only to imply that conduct performed (or abstained from) as the outcome of a bargain amounts to the foregoing of the exercise of one sort of liberty, not because one wishes to forego it, but because it is the only way to induce the other party to release a restraint on some other sort of liberty.⁶⁰

"Coercion" in the sense Hale intends is neutral, necessary,⁶¹ ubiquitous, and "not necessarily an evil," though there is a permanent necessity of guarding against felt "abuses."⁶² Hale agreed with C. Reinold Noyes as to the preferability of "some colorless and general term,"⁶³ but in the absence of a word clearly superior, felt that "it would be better to recognize that [the] word 'coercion' is neutral in its moral implications, using 'unjustifiable coercion' to describe that part which one has other grounds for condemning."⁶⁴ Condemnation as an *intended* inference, then, requires an *additional* moral premise to the meaning given by Hale to "coercion."

Moreover, "coercion" does not necessarily mean absolute or total control, but rather that there is some degree of impact or control, some degree of restriction upon alternatives.⁶⁵ The fact that options or alternatives exist does not preclude the existence of compulsion.⁶⁶ The existence of restriction is more important than either intent⁶⁷ or degree.⁶⁸ Thus, Hale often quoted Holmes: "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."⁶⁹ Hale's use of "coercion" generalized that point. And, while "coercion" may be used in connection with interindividual cases, wherein one individual coerces another, it may also be used, and indeed is generally and systematically used by Hale, to refer to *all* cases wherein restrictions are visited upon the alter-

59. *Coercion and Distribution*, *supra* note 21, at 476.

60. Hale Papers, Folder 91-5 at 18.

61. "While we have abolished slavery in this country, we cannot abolish all the economic pressures which compel men to work at tasks which may be uncongenial to them." FREEDOM THROUGH LAW, *supra* note 10, at 5. As will be seen below, Hale was quite perceptive concerning the role of institutionalized industrial discipline as part of the human use of the human labor force. His forte was in searching out the legal bases of that discipline.

62. Hale Papers, Folder 80-1 at 3.

63. Letter from C.R. Noyes to R.L. Hale, Aug. 15, 1939, in Hale Papers, Folder 17.

64. Hale Papers, Folder 36-2 at 1.

65. Hale, Book Review, 59 COLUM. L. REV. 821, 828 (1959) [hereinafter cited as Hale, Book Review].

66. Hale Papers, Folder 80-7 at II. 7-8.

67. *Id.* 39-2 at 1.

68. *Id.* 80-2.

69. *Union Pac. Ry. Co. v. Public Serv. Comm'n*, 248 U.S. 67, 70 (1918); FREEDOM THROUGH LAW, *supra* note 10, at 119; Hale, Book Review, *supra* note 65, at 827-28; *Force and the State*, *supra* note 56, at 150.

natives open to a person or group, including, that is to say, the case in which the source of the coercion is impersonally generalized in the relevant behavioral environment and cannot be specifically attributed to a particular person(s)—as in the case of common law or statutory rights and duties, market forces, etc. Coercion simply means that behavior and/or choice is controlled in some degree by another or others.⁷⁰

Coercion in the sense Hale used the term is truly ubiquitous: "Some sort of coercive restriction of individuals, it is believed, is absolutely unavoidable . . . ,⁷¹ and the power on which it is based ". . . permeates the entire economic system" ⁷² Such coercion is present even if unrecognized by law;⁷³ indeed, legal coercion itself is generally unrecognized in the status quo because it is unobtrusive and taken for granted.⁷⁴ All economic systems "are in reality permeated with coercive restrictions of individual freedom,"⁷⁵ both legal and nonlegal. There is compulsion or coercion, for example, "in every contract," but this "does not require that all contracts can be avoided on the ground of duress." There are necessarily the further questions as to the criterion by which any particular coercion (form or instance) is to be condemned as legal duress, and its application to the particular case.⁷⁶

If coercion (in Hale's sense) is ubiquitous, also ubiquitous is the subjective tendency of people to perceive certain acts as coercive and others as not, when in fact both sets are more or less equally coercive, or at least coercive per se by Hale's meaning. What is involved is that whatever is perceived as improper is called coercion. That which is not seen as improper is simply accepted, and may even be called liberty, which is to say, those exercises of power with which we agree or to which we do not object are seen as the unavoidable and perhaps even inalienable exercises of liberty. Those which we find objectionable or improper or evil are seen as exercises of coercion and deemed objects of avoidance and alienation, fit objects of restraint. This tendency in the use of the term coercion obviously requires the additional moral premise indicated above as requisite to the process of reducing coercion in general (per Hale) to acts deemed unjustifiable.

Thus, Hale emphasized the ubiquity of coercion, even though certain manifestations or instances are seen as proper, and thus not as (unjustifiably) coercive, and even though certain aspects of a bargaining situation or transaction are seen as coercive and others not.⁷⁷ This may be expanded and articulated in several ways. Hale pointed out, quoting

70. Hale Papers, Folder 91-4 at 2.

71. *Coercion and Distribution*, *supra* note 21, at 1.

72. *Force and the State*, *supra* note 56, at 199.

73. Hale Papers, Folder 91-3, at 3-4.

74. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 626, 628 (1943) [hereinafter cited as *Bargaining, Duress, and Economic Liberty*].

75. *Coercion and Distribution*, *supra* note 21, at 470.

76. FREEDOM THROUGH LAW, *supra* note 10, at 124-25 *passim*. See also *id.* at 306.

77. *Id.* at 310 *passim*.

Veblen, that the "standardization and constraint" embodied in the system of machine industry is not typically seen as coercive "in point of legal reality." "It does not exist *de jure*, but only *de facto*."⁷⁸ Moreover, there are certain methods of depriving persons of particular liberties or interests which are proscribed while "other methods no less effective in depriving them of these same interests are frequently tolerated."⁷⁹ Further, one might observe "only those aspects of liberty which are struck down by the statute, remaining blind to those aspects of it which are enlarged,"⁸⁰ just as one might observe only the restriction of alpha's liberty resulting from beta's action *or* only the exercise of beta's liberty and not the coercive impact on alpha. Thus, Hale maintained that Pitney was blind to the coercive action of employers in *Coppage v. Kansas*,⁸¹ seeing only that of the union.⁸² Culture, as well as interest, promote the perception of certain exercises of power *as* coercion and of certain other exercises *as* freedom. Thus, Hale pointed to cases in which bargaining power or its exercise is pronounced coercive and other cases in which the *restriction* of bargaining power is called coercive and the bargaining power itself is not.⁸³ He stated:

When one party gives up a right in order to induce another party to give up one of *his* rights (the exercise of which would be most harmful to the first party), there are cases stating that there is no coercion involved, and that any legislation designed to prevent the first party from losing the right in question, is unconstitutional.

On the other hand, there are cases in which the giving up of a right in response to the pressure of bargaining has been pronounced coercive, and the exercise of the pressure enjoined⁸⁴

Interestingly, "coercion" or "power" is often sensed or perceived only with respect to a *change* in relations,⁸⁵ particularly a change in relations which are perceived as normal or justified, the perception of "injury" thereto being likewise subjective.⁸⁶ But the distinction in all cases, as between, for example, different techniques with which competitors en-

78. Hale Papers, Folder 91-3 at 4.

79. *Freedom Through Law*, *supra* note 10, at 254.

80. Hale, *Labor Legislation as an Enlargement of Individual Liberty*, 15 AM. LAB. LEG. REV. 155 (1925) [hereinafter cited as *Labor Legislation as an Enlargement of Individual Liberty*].

81. 236 U.S. 1 (1915).

82. *FREEDOM THROUGH LAW*, *supra* note 10, at 72-73; Hale Papers, Folder 91-7 at 6.

83. Hale Papers, Folder 68-3 at 2 & 80-7 at 3-4.

84. *Id.* 57-2 at 1.

85. *Coercion and Distribution*, *supra* note 21, at 481.

86. Hale quoted from CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928) the latter's quotation from Hobhouse, that "[a]s experience of the social effects of action ripens and as the social conscience is awakened, the conception of injury is widened and insight into its causes is deepened." *LEGAL FACTORS*, *supra* note 11, at 618.

deavor to withdraw patronage from each other,⁸⁷ is a function of whatever is deemed by the courts (or whichever evaluator is acting) as "objectionable," and evaluation and selection is what is involved at bottom. "Popular judgment of social problems, therefore, is apt to be distorted by the popular recognition or non-recognition of 'coercion.'"⁸⁸ The normative or interested-party evaluation of certain acts as proper and others as improper (because "coercive") does not, says Hale, alter the coercive character of both acts when both have restrictive impact on someone's alternatives. In this latter sense, coercion is neutral and is to be differentiated from the results of different persons' unequal perception and identification of (unjustifiable) coercion.

b. Voluntary Freedom

There is, thus, a ubiquitous tension and interplay, as coercive capacity is juxtaposed to coercive capacity, with the result being a changing pattern of freedom and exposure to the freedom of others. The meaning of "freedom" to Hale is expressed in his juxtaposition of voluntary to volitional freedom, the difference between the two being a function of the role assigned to (mutual) coercion in his paradigm.

The concept of voluntary freedom in Hale's analysis is *not* a norm by which real-world restrictions on freedom are to be *judged*; real-world restrictions are inevitable, and no such norm is either intended or possible in Hale's limited use. Rather, the idea is one which dialectically throws into relief the meaning and ubiquity of volitional freedom and enables real-world restrictions to be *seen* rather than judged. Voluntary freedom, to Hale, would exist only in the absence of coerced choices in the selection of alternatives; it connotes "the absence of any coercion which keeps you from doing the one or compels you to do the other."⁸⁹ In the broadest sense, it appears to mean that one would have the capacity to determine without restriction the alternatives—and their respective trade-offs or relative prices—between which he will further choose. That is its affirmative statement, slightly modified; negatively, voluntary freedom is the absence of constraint or limitations upon choice. It suggests, in terms of an array of general practical situations, that one has a large number of alternatives between which one can choose, *or* no limit to the range of alternatives, *or* the absence of intolerable (i.e., high priced) alternatives, *or* the absence of external pressure or compulsion to keep from selecting one alternative or compelling selection of another, i.e., being forced to act contrary to one's preference or wish, *or* the absence of having to sacrifice one right, element of liberty, or interest, etc., in order to secure another through, say, interpersonal exchange or a

87. Hale, *Value and Vested Rights*, 27 COLUM. L. REV. 523, 526 (1927) [hereinafter cited as *Value and Vested Rights*].

88. *Coercion and Distribution*, *supra* note 21, at 475.

89. Letter from R.L. Hale to L.L. Fuller, Dec. 24, 1954, at 2, in Hale Papers, Folder 76.

similar transaction. It is the "absence of impediment to acting as you please;" it is "doing what you want."⁹⁰ In a word, it is complete and perfect *autonomy*.⁹¹

c. Volitional Freedom

As perfect autonomy, of course, voluntary freedom is purely hypothetical, an analytical construction or tool. The role of its use is to point to the fact and ubiquity of actions that are at once "*both compelled and volitional*. An act may be *volitional* without being *voluntary*."⁹² As Hale interpreted and extended or generalized Holmes' dictum on duress,⁹³ the fact that a choice is made does not mean that it was made without coercion or that the choosing person(s) had control over the terms of choice. It is precisely the absence of one's complete control over choice, that is, that one is limited to the exercise of choice between *available* alternatives, however disagreeable, that Hale signifies by *volitional freedom*. "When one foregoes the exercise of liberty by obligating oneself in a contract, one foregoes it under pressure, not voluntarily. The only voluntary feature is in the choice between two (or more) alternatives. . . ."⁹⁴ "This fact of choice, however, . . . does not exclude compulsion."⁹⁵ The choice of one alternative, and the restrictions inherent in it, is the price of release from some other restriction(s) upon liberty within the control of others inherent in some other alternative.⁹⁶ The magnitude of the loss or injury is partially a function of the number of alternatives available and their respective trade-offs, which is simply a matter of relative mutual coercive capacity.⁹⁷ The alternative chosen, with its restrictions, is not "voluntary . . . , but . . . the price of escape from damaging behavior of others."⁹⁸ This damaging behavior may well take the form of withholding, e.g., of goods or of employment, until conditions are satisfied or agreed to. "The penalty . . . in each case, may be light, but it is sufficient to compel obedience: in the form of choosing one alternative over another rather than suffering the greater loss . . ."⁹⁹ which means that the alternative chosen "is not in itself more unpleasant than the consequences to be avoided."¹⁰⁰ The difference between what is voluntary and the volitional character of such situations is to be found in the fact that social processes (as well as individual and group action)

90. Hale Papers, Folder 68-4 at 1.

91. *Id.* 79-1 at 1.

92. Hale, Book Review, *supra* note 65, at 827; see FREEDOM THROUGH LAW, *supra* note 10, at 113-14.

93. See text at note 69 *supra*.

94. Hale Papers, Folder 91-5 at 18.

95. *Id.* 89-4 at 1.

96. *Id.* 91-5 at 17, 19.

97. LEGAL FACTORS, *supra* note 11, at 594.

98. *Coercion and Distribution*, *supra* note 21, at 474.

99. *Id.*

100. *Id.* at 472.

“change the environment of people [i.e., their actual array of available alternatives and their respective trade-offs] whose consent to the change is not required.”¹⁰¹

The thrust of the foregoing is particularly interesting in the light of more recent developments in economic theory. First, Hale's analysis of the difference between voluntary and volitional freedom may be interpreted as extending the more or less conventional definition of economics, or at least microeconomics, namely, that economics is the study of the allocation of scarce resources which have alternative uses among plural ends. What Hale's analysis suggests is an even more fundamental existential scarcity in the sense of our inability (or relative inability) to satisfy competing values, rights, and interests to their utmost extent, and a consequent necessity to allocate volitional freedom because of the ubiquitous existence of coercion (or scarcity of voluntary freedom). Second, Hale's analysis supports the notion of a ubiquity of externalities, externalities having to do with costs and gains not accruing to the acting or choosing party, but rather thrust or visited upon others without an offer of escape from them. Every exercise of volitional freedom tends to restrict or change the volitional freedom of others, through the coercive impact on the alternatives open to others. This very important implication will be taken up again just below in our discussion of conditions and later in our discussion of Hale's principle of the use of government. Third, the logic of reasoning embodied in Hale's analysis is that of one taking more or less maximum advantage of one's available alternatives, given the pattern of relative coercive capacities with a consequent impact upon the ongoing but changing structure of relative coercive capacities. This may be juxtaposed to the logic of Pareto optimum reasoning, which emphasizes the voluntary agreement element in the exchange transaction between willing buyer and willing seller but which, contrary to Hale's analysis, takes for granted the structure of coercive capacities. Whereas Pareto optimum analysis abstracts from the structure of participation in the economy and concentrates upon the voluntary exchange agreement, with each party attempting to maximize within their available alternatives, Hale's analysis attempts, in effect, to join thereto an analysis of the fundamentally related processes governing that very structure of participation and the pattern of available alternatives. There is no unique Pareto optimum solution in the real world;¹⁰² it is a function of the array of legal rights and moral norms at work in the society which, in general, reinforces or restricts any one party's coercive capacity in the market place. The voluntary agreement is only volitional and is the result of the interplay of coercive market (and legal) forces. It is Hale's argument that the total economic process should be, and can be, examined produc-

101. LEGAL FACTORS, *supra* note 11, at 39.

102. Mishan, *Pareto Optimality and the Law*, 19 OXFORD ECON. PAPERS 255 (1967) [hereinafter cited as Mishan].

tively in terms of mutual coercion, and thus both voluntary and (realistically) volitional freedom, and, furthermore, the legal bases of relative coercive capacity. The reaching of (what is conventionally called voluntary but in Hale's terminology would be called volitional) agreements in Pareto optimum analysis is, to Hale, but a small, however distinctive and important, part of the relevant process of decision-making.

d. The Impact of Coercion upon Voluntary-Volitional Freedom

Hale further analyzed the process and mechanism through which coercion transforms voluntary freedom into volitional freedom. In so doing, he articulated types of restrictions upon choice, the role of withholding capacity, and the nature of constrained choice in terms of conditions. With respect to the types of restrictions on choice, Hale distinguished between those which unconditionally constrain the range of alternatives, i.e., those over which the individual or subgroup whose alternatives are thus constrained has no control, and those which conditionally constrain the choosing individual by affecting the structure of alternatives and trade-offs. In the case of the latter, he analyzed relative withholding capacity as the model of forces governing the price which must be paid (in one form or another) to secure the positive achievement of an alternative, that is, as the price of releasing another's withholding capacity; all of which may also be analyzed in terms of the imposition of conditions whose sanction is withholding capacity. "Any restriction," wrote Hale, "may be *complete* (effectively preventing exercise of liberty in a given direction) or *conditional* (permitting the exercise, but under handicap, which may consist of a new restraint on the exercise of liberty in some other direction)."¹⁰³ In the first category are what economists tend to include under the name of externalities, namely, "burdens which some members of a community impose on others unconditionally, without offering an opportunity to escape from them."¹⁰⁴ Hale's examples have now become classic: smoke, noise and congestion.¹⁰⁵ His point is that the enjoyment of certain benefits by some—the result of their volitional freedom—"[is] subsidized by very appreciable sacrifices imposed on other people,"¹⁰⁶ that is to say, the visitation of coercion upon the volitional freedom of the latter. His examples extend, however, to include a most heterodox one: the example of bank credit in the hands of certain businessmen who use it to bid resources away from consumers (including, especially but not only, fixed income

103. Hale Papers, Folder 83-5 at 1.

104. The man who conducted a business was supposed to be under a necessity to pay everyone whose sacrifices contributed to the production of his goods. On the other hand, the benefits which his production conferred on the community were supposed to be measured by the money which his customers would pay for them.

Hale Papers, Folder 93-1 at 2-3.

105. Hale Papers, Folders 93-1 at 4 & 93-6 at 23 *passim*. See also *id.* 93-3.

106. *Id.* 93-1 at 5-6.

people) and other businessmen, which, particularly at relatively full employment, has a direct coercive impact on consumers' and other businessmen's alternatives. This is not just the classic case of forced saving through inflation, in which the coercion is patent, but rather the more general case in which new money is made available to some and not others with the result that the former have a relatively greater impact on the allocation of resources (not to mention the distribution of income) and the latter find their alternatives and trade-offs (including their general consumer sovereignty, which is a form of volitional freedom) relatively further constrained.¹⁰⁷ This is true also, in part, even at less than full employment, because not all benefit from enhanced employment. In general, it amounts to coercion (in Hale's sense of the word) in the allocation of resources under all conditions.

In the second category of restrictions are the coercive effects of others' behavior and/or choices which are imposed conditionally, but which may be avoided by agreeing to the conditions imposed. These may take the form of compulsory requirements coupled with both volitional compliance and some form of sanction (Hale recognized different types of sanctions, each at least partially differentiated in terms of their degree of penalty),¹⁰⁸ or they may take the form of relative dependence upon others for one's means of living, requiring the consent of others to work or to invest capital (at some price, which is the relevant condition). In terms of withholding, workers may withhold labor as a sanction to compel desired wage payments; sellers of goods may withhold goods as a sanction to compel desired price payments, and, *inter alia*, employers may withhold money (i.e., employment) as a sanction to compel labor to cooperate or accept desired wages.¹⁰⁹ Thus, the owner of property can stipulate the conditions under which he will allow others to use it. Since use of said property without his consent is illegal, "[h]e can grant or withhold the privilege of making lawful use of his property, and can prescribe the conditions on which, alone, he will make that use lawful."¹¹⁰ (On the relevance of competitive conditions to withholding and coercion generally, see below).

The basic process through which coercive capacity is exercised is withholding or the threat of withholding; accordingly, the pattern of impact is a function of the structure of coercive capacity, which ultimately means the capacity to withhold in the market or other decision-making process. Relative withholding capacity—literally, to Hale, the capacity to withhold as a sanction—is the main source of restriction upon each person's or subgroup's alternatives. "Withholding of what another wants" as the "penalty for non-compliance" is the essence of bargaining

107. *Id.* 93-1 at 22 *passim*.

108. *Id.* 93-3 at 1.

109. *Id.* at 3.

110. *Id.* 80-4 at 7. See also *id.* 80-16, at 4-5.

power.¹¹¹ Withholding capacity means the "power to confer or withhold" and is the power to grant or agree conditionally.¹¹² Each participant attempts to exercise his withholding capacity to limit the voluntary freedom of others to volitional freedom in his favor; this is the coercive process. But it is more than an interindividual process: it is institutionalized and unobtrusive, but ubiquitous nevertheless. Withholding is the mechanism of jockeying for position; the process of mutual coercion is conducted through withholding; the pattern of effective (i.e., actual, volitional) freedom is both a result and a cause of relative withholding capacity. The capacity to withhold is a function of one's alternatives, and one's success in withholding governs one's future array of alternatives. It, in turn, is a function of one's own past alternatives; hence, coercion is a reciprocal or mutual process. Volitional freedom is not only both cause and consequence, it is both a tool of offense to coerce and a defense against coercion in a process of reciprocal reaction. He who has tends to get more, because of the additional coercive power, i.e., withholding capacity, he has now acquired. Power tends to beget power, but power must be seen as the means—largely through withholding and the imposing of conditions—of both establishing one's own alternatives and defending against the exposure which one has to others' freedom. That is to say, one has volitional freedom through withholding from others, including the market (the market itself being a function of the pattern of coercive capacity to which it gives continuing effect). This will be further discussed below, with respect to, first, liberty and power, and second, the market economy as a system of mutual coercion.

It may be noted in passing that just as our language and our feelings or sense of injustice may result in our considering a particular action as unjustifiably coercive, so too may our sense of injustice lead us to consider a particular act of withholding or threatened withholding as legal duress or extortion.¹¹³

Correlative to withholding are the conditions established which withholding operates to sanction, and which when met release withholding. Where the individual has a choice, the choice is his own *volitional* act.

111. *Id.* 39-26 at 2. *See also id.* 58-5, at 6.

112. *Id.* 69-1.

113. There are statutes making extortion of money a crime. And there are doctrines that in a civil action, one may recover money paid under duress, or avoid a contract made under duress. But all money is paid, and all contracts are made, to avert some kinds of threats. What are the peculiar earmarks which characterize some types of threat as "extortion" or "duress" in contradistinction to other types which the law regards as innocent?

Bargaining, Duress, and Economic Liberty, *supra* note 74, at 612-13.

The question came before the Court of Criminal Appeal in 1926, in *Rex v. Denver*, which held the attempted collection [of a fine imposed by a trade association on a member firm] to be a felony. "A person has no right," said the court, "to demand money . . . as a price of abstaining from inflicting consequences upon a man." Such a rule, of course, would make any sale of property, or any acceptance of a salary or wage, a felony. It is demanded as a price of abstaining from inflicting the unpleasant consequences of doing without the property or services.

Id. at 613. *See also* FREEDOM THROUGH LAW, *supra* note 10, at 312, *passim*.

But the individual must thereby volitionally accept conditions not voluntarily created because they are imposed by another or others. The imposition of that condition is the impact of coercion, however indirect, commonplace, or structured: "[A]n offer to pay is identical with a threat to withhold."¹¹⁴ It is only the fact that one takes "as a matter of course" the more-or-less enforced exclusion from access to resources or alternatives controlled by others (individually or on terms imposed through the market or directly or indirectly by law) "that creates the illusion that acceptance of a conditional offer of them is voluntary."¹¹⁵

Everyone who does anything for money [for example] is subjected to a greater or less degree of coercion to do the thing in question. He may have a constitutional right *not* to do it, in the loose sense of a right not to have the government impose on him a legal duty to do it. But this constitutional right he has to 'relinquish' in order to obtain the money. Generally, his constitutional right does not prevail to prevent this kind of compulsory "relinquishment." For he has no constitutional right to receive money either from the government or from other individuals, if they do not wish to pay it to him.¹¹⁶

And they will pay it to him only if he submits to their (even market regulated) conditions. Moreover, "[t]he power to impose these conditions varies with the importance to the non-owner of the things which the owner owns."¹¹⁷ The conditional withholding "would not be effective had the inducing party not possessed some degree of control over the [volitional] liberty of the other."¹¹⁸

Many a person signs a contract or engages in other conduct from which affirmative obligations flow in order to obtain money which he needs and which would otherwise be withheld from him. And as Justice Sutherland . . . remarked in *Carter v. Carter Coal Company*, speaking of an exaction in the form of a tax, "One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so as to avoid a term in jail."¹¹⁹

Meeting the terms or conditions of the other party(ies) is "the price of release from some other restriction of liberty within the control of those others."¹²⁰ One chooses his preferred alternative and thereby accepts the restraints inherent in the conditions he will meet.

Hale's "logic of thought" is now almost complete. His basic paradigm

114. FREEDOM THROUGH LAW, *supra* note 10, at 305.

115. *Id.* at 310.

116. LEGAL FACTORS, *supra* note 11, at 469.

117. *Id.* at 514.

118. Hale Papers, Folder 91-5 at 17.

119. *Id.* 93-6 at 43. On prices as private taxes, see below.

120. *Id.* 91-5 at 17.

is primarily articulated in terms of voluntary freedom, volitional freedom, coercion, withholding, and conditions. It involves economic choice in a context of constrained alternatives which Hale considered the result of the interplay of coercive capacities, through the "compulsions and counter-compulsions"¹²¹ of relative withholding power and the reciprocal imposition of conditions. The results do not take a completely "pre-determined pattern from the coercive powers which condition it,"¹²² since "[e]ach individual is subject to compulsion, in that he must make a choice between loss of one liberty or another,"¹²³ the results are also a function of the acts of will or choice on the part of the individuals and groups. Whatever the structure of coercive capacities, the process is at least a partially open and not a closed one. As to economic models which analyze constrained choice or maximization within a given power structure, or to those with repercussions on power structure not an explicit variable or factor, Hale added constrained choice as a feature of the power structure itself and a model of the developing power structure with which economic choice, more narrowly conceived, interacts. The logic of thought is one of choice in a context of mutual coercion, of choice between constrained alternatives, with the constraint a function of the (coercive) impact of others. The mechanism of withholding until one's terms are met (however those terms are determined), as a sanction to implement the imposition of those terms as conditions for (say) contracting, is the exercise of coercion which limits voluntary to volitional freedom. The converse of equilibrium prices (or simply the prices at which any given consumer buys) signifying marginal utility is their signification of marginal injury: "And the value of the goods (and presumably of the service of producing them) is simply an expression of the *harm* the consumers would suffer if they *were* withheld."¹²⁴

Hale's point is that decision-making must operate within coercive restrictions, some of which are taken for granted and others not, while some are seen as freedom and others as (impermissible) coercion, but that, in reality, freedom is volitional and not voluntary, and coercion is ubiquitous, however much certain constraints are psychologically internalized and identified with, and therefore accepted, and often not seen at all. One may speculate that of all the students of society, lawyers and economists are the most conscious of and sensitized to the existence of constrained choice—and Hale was both an economist and a lawyer. Perhaps this, too, was a factor in the genesis of his ideas.

Consequently, Hale's analysis provides for both personal subjective assessments and identifications of freedom and coercion *and* for a neutral objective basis of identification. It provides for subjective interpretations

121. *Id.* 93-1 at 29.

122. *Id.*

123. *Id.*

124. LEGAL FACTORS, *supra* note 11, at 605 (emphasis of "harm" added).

in its acknowledgment that a phenomenon may be seen as coercion by one, as freedom by another, and evaluated neutrally by still another. Also it provides for a neutral identification of coercion by establishing coercive capacities and impacts as part of a general model of voluntary vis-à-vis volitional freedom, without necessarily attaching the stigma of impropriety to what is a fundamental, necessary and ubiquitous phenomenon. Above all, it provides for the articulation of a model of economic decision-making which specifies both the free and the coerced elements in choice, to the potential (and actual¹²⁵) dismay of ideologues of all persuasions.

e. Liberty and Power

In Hale's view, freedom, or liberty, is complex and multifaceted, not only in that it has many sides, but also in that it is comprised of a number of component alternatives or, more accurately, sets of alternatives, and, also, in that volitional freedom is a function of the power base that underlies coercion, namely, the wherewithall to apply withholding as a sanction. The really critical characteristic of power, its asymmetrical distribution, will be examined below. But surely the following is clear: no wherewithall, no withholding; no withholding, no sanction; no sanction, no volitional freedom and no defense against others' coercive capacity. There is no absolute "freedom" or "liberty," but rather a pattern and a process of freedom *and* a pattern and process of coercion. The structure of liberty or freedom is an analog to the structure of mutual coercion. Freedom, like coercion, is relative, mutual and reciprocal, as is power. Neither the right of (or to) property nor the right to work assures that one will have either; both are subject to circumstantial limitations.¹²⁶ (See below.) Freedom must be understood in terms of the tension between voluntary and volitional elements, between individuals' volitional elements, between coercion and countercoercion, between relative power positions.

The theoretical logic of freedom is complex, and so also is the actual substance. It is composed of many seemingly incongruous and mutually exclusive elements. There is "freedom from" the restrictions imposed by others and there is "freedom to" effectuate restrictions upon others, and an inevitable tension. The property that is for use may also be for power over others.¹²⁷ Hale quoted Lincoln:

The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for freedom; but in using the same word we do not all mean the same thing. With some the word liberty

125. Ludwig von Mises, "Freedom is Slavery," 3 THE FREEMAN 410 (March 9, 1953); Hale Papers, Folder 76.

126. *Political and Economic Review*, 8 A.B.A.J. 707 (Nov. 1922).

127. LEGAL FACTORS, *supra* note 11, at 601.

may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name, liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny.

The shepherd drives the wolf from the sheep's throat for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act, as the destroyer of liberty, especially as the sheep was a black one. Plainly, the sheep and the wolf are not agreed upon a definition of the word liberty¹²⁸

Thus, as will be seen in great detail, there is freedom from governmental restraint *and* freedom from nongovernmental restraint, which may require the use of government so as to be protected from those restraints, for "actual social conditions . . . may condition a man's liberty irrespective of the law,"¹²⁹ and the ineluctable tension between the two. But government protection of one's freedom against another's imposition of restraint is the equivalent of the restraint of the other's freedom: the law which promotes the freedom and power of the one restricts the freedom and power of the other. The law of property will be seen below to be Hale's classic example.

That government action may be, and is, both a restriction and expansion of freedom, that government activism may be, and is, the affirmative exercise of power from one view and the proscriptive check upon power from another is a function, in Hale's analysis, of the nature of freedom itself. For freedom to Hale is the result of an interplay and tension between one's capacity to impose one's own conditions—will—and sanctions upon others *and* one's own capacity to resist the same imposed by others.¹³⁰ Economic and other liberties become the capacity or right to use one's bargaining power,¹³¹ and thus signify coercive impact upon others,¹³² but they are restricted by the requirements or conditions laid down by others, especially by those with superior coercive capacity,¹³³ as such are others' liberties. "One man's liberty . . . depends in large degree on his power to coerce other people,"¹³⁴ and since other people's liberty is a function of their power to coerce, interindividually

128. *Id.* at 24.

129. Hale Papers, Folder 58-3 at 1.

130. Anonymous, Book Review, *The Economist* 383 (Aug. 8, 1953). See also Hale Papers, Folders 76, 91-7 at 10, and 93-1 at 34.

131. Rose, *supra* note 15, at 959.

132. LEGAL FACTORS, *supra* note 11, at 24, 601; Letter from R.L. Hale to editor of THE FREEMAN, April 20, 1953, in Hale Papers, Folder 76; Hale Papers, Folder 83-6 at 1.

133. Hale Papers, Folder 80-16 at 1.

134. *Id.* 93-1 at 34.

freedom involves the play of coercive power against coercive power, such that, with respect to a single individual, freedom has its basis in both the power to impose on others and the power to resist others' impositions.

Hale includes among the coercive pressures the coercive restrictions upon rights and liberties by the market and by the prices which must be paid in the market: "Exaction of a price for any article restricts freedom to consume it."¹³⁵ That prices perform a rationing function is precisely equivalent to what Hale is arguing. To ration by requiring payment of the market price is to coercively restrain alternatives, most dramatically so in the case of an asymmetrical or unequal distribution of wealth, and thereby power, and it is the interplay of coercive forces, market pricing included, that is the analog to the structure of freedom.

It is not surprising, then, that Mortimer Adler, in his systematization of types of freedom and classification of writers on freedom, considered Hale as an exponent of what Adler calls "circumstantial freedom of self-realization," namely, of "a freedom which is possessed by any individual who, under favorable circumstances, is able to act as he wishes for his own good as he sees it."¹³⁶ In other words, freedom is volitional and not voluntary, being circumscribed in the interplay of coercive pressures.¹³⁷

In discussing liberty (or freedom) and power it has been difficult to proceed without entering into aspects to be taken up below, especially considerations expanding upon the subject of power. One additional point, however, which can be made clear at this stage is that if freedom is complex, reciprocal and circumstantial, it is also *subjective*. It has already been pointed out that formal legal liberty and actual effective liberty are not in Hale's view, the same thing;¹³⁸ just as de jure and de facto coercion are not coextensive,¹³⁹ the liberty that the law allows and the liberty that conditions permit may diverge, and diverge substantially, and, of present relevance, be seen differently. If liberty is contemplated only in terms of the one and not the other—in terms of only either de jure or de facto contexts—one will subjectively not perceive aspects of liberty

135. FREEDOM THROUGH LAW, *supra* note 10, at 294. See also *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 626; Hale, Book Review, *supra* note 65, at 826.

136. M. ADLER, 2 THE IDEA OF FREEDOM 5. See also 12, 50 *passim* (1961).

137. Interestingly, Adler also includes as exponents of this view such figures as Aquinas, Bentham, Burke, Dewey, Hayek, Hume, Kelsen, Knight, Laski, Mill, Pareto, Russell, Spencer, and Adam Smith; the list is interesting, in part, because it includes major figures on the "left" and on the "right," and in part also because of Knight's critical review of Hale's FREEDOM THROUGH LAW. Knight, Book Review, 39 VA. L. REV. 871 (1953). The difference between Hale and Knight lies not in their comprehension of the circumstantial character of liberty, but in Hale's relative eagerness and Knight's relative caution against and indeed general unwillingness to deliberately reform and to reform along egalitarian lines. In other words, their positive analysis is not fundamentally far apart, though their normative analysis diverges considerably. See below, for a discussion of deliberative versus non-deliberative social change in Hale's thought.

138. See text at note 129 *supra*.

139. See text at notes 77-88 *supra*.

falling into the other category. Moreover, liberty may be secured against one limitation at the expense of another limitation, only one of which may be seen as a limitation.¹⁴⁰ Some restrictions may not be recognized at all as sacrifices of liberty.¹⁴¹ Exercises of liberty stigmatized as criminal or coercive, or which are seen—however innocent in themselves—as restricting another and more important liberty of someone else, are not *seen* as liberty; conversely, certain liberties deemed worthwhile are protected and promoted, despite adverse consequences which their exercise visits upon others, and which are not seen as such at all or not very clearly.¹⁴² Some exercises of liberty are therefore perceived *as liberty* and others are perceived *as license*: “Those who insist on distinguishing the two terms mean by license nothing else but the sort of liberty which, in their opinion, ought to be curtailed.”¹⁴³ “This is an evasion because it must be evident that the laws which these persons favor at least restrict the liberty to commit what they call license. Like those who face the issue, they really favor restricting some liberties and not others, only they refuse to give the name liberty to those which they would restrict.”¹⁴⁴ The most immediate exercise of choice is the determination or identification of an act as liberty or license; here again is that “infernal arbitrariness of choice.” Liberty is basically subjective, its perception (as liberty or license, as liberty or coercion) being a function of one’s values¹⁴⁵ or one’s sense of the relative importance of competing liberties, rights, or interests.¹⁴⁶

3. THE ECONOMY AS A SYSTEM OF GOVERNANCE

Hale’s understanding of the meaning and ubiquity of coercion enabled, and perhaps even led, him to formulate a further conception with which his name has long been associated, namely, “private government.” The subtitle of *Freedom Through Law—Public Control of Private Governing Power*—points to that concept as central to the book, and Edmond Cahn, in his review of Hale’s book, reflected:

[T]hose who own economic goods exercise a kind of governmental power. Being entitled to retain their property or part with it as they choose, the owners like petty sovereigns can dictate terms and conditions their neighbors must perform in order to have access to the property. In this sense every lawful economic power becomes a type of political power, and every economic inequality poses a question of political inequality. Property so viewed is “private government.”¹⁴⁷

140. Hale Papers, Folder 93-5 at 8-9 & 57-9 at 8-9.

141. *Id.* 69-4.

142. *Id.* 57-9 at 4-5, 91-4 at 2, 93-5 at 4-5.

143. *Id.* 80-1 at 2 (notes).

144. *Id.* 93-5 at 4 & 57-9 at 4.

145. *Id.* 83-5 at 1.

146. *Id.* 93-5 at 6 & 57-9 at 6.

147. Cahn, *supra* note 27.

Hale means by government the system of power and pressure which has coercive impact on the resultant pattern of volitional freedom: "There is government whenever one person or group can tell others what they must do and when those others have to obey or suffer a penalty."¹⁴⁸ "Wherever we find some men compelling other men to obey them, there we find government."¹⁴⁹

One characteristic of governance is the unequal governing roles of different people, a result, in part, of their unequal power (see below). "Some . . . have a much greater degree of economic liberty and of economic governing power than others."¹⁵⁰ "In so far as people 'govern' others by attaching conditions to or exacting payments for the rendering of services, their governing power is of course greatly unequal."¹⁵¹ "[T]he power which one party to a transaction has over the other party may greatly exceed the power which the latter has to resist—may so greatly exceed it, in fact, as to justify us in referring to him who possesses it as 'governing' the other."¹⁵²

"Government," then, may be generalized to include all engaging in mutual coercion, i.e., ubiquitous withholding as a sanction to compel obedience or acceptance of conditions, regardless of source and regardless of degree, or it may be used to refer to those with concentrated power and positions of dominance, also regardless of source. With respect to the latter usage, these concentrations of power may be quite inconspicuous. Indeed,

[t]his invisible government is not a single, coherent unit. It is a cluster of different groups and persons who hold sway in different fields. . . . But when we find the great balance of power to preponderate in favor of one person or group in dealings with others, it is not inappropriate to refer to them as rulers and subjects, respectively.¹⁵³

Notwithstanding this dichotomy of usage, the concept of governance serves in Hale's analysis primarily, if not solely, to identify, to put into perspective, and to underscore the existence of the phenomenon of *private government*. In his view, the logical and substantive equivalent of the "universality of private coercion and counter-coercion"¹⁵⁴—the equivalent of the system in which we all have "some degree of control over other people's liberty"¹⁵⁵—is the system of private government, comprising "the all-pervading role of privately instituted government in the economic sphere."¹⁵⁶ In a totalitarian society, power is conspicuously

148. Hale Papers, Folder 93-1 at 32.

149. *Id.* 79-1 at 2; *cf. id.* 58-5 at 2.

150. FREEDOM THROUGH LAW, *supra* note 10, at ix.

151. LEGAL FACTORS, *supra* note 11, at 592.

152. Hale Papers, Folder 80-16 at 7.

153. *Id.* at 2.

154. *Id.* 89-1 at 8.

155. *Id.* 91-7 at 10.

156. *Id.* 93-1 at 33.

governmental; in a free society with a strong private sector, power is *pro tanto* private (ideologized as liberty, it is power nevertheless), but, said Hale, it is no less governmental in nature because it is private. Indeed, "[u]nless we were to establish a rigid communism . . . private governing power is an essential element in our social structure."¹⁵⁷ What makes private government government is that it has the same effects on volitional freedom as does public or official government; both the practical¹⁵⁸ and the legal¹⁵⁹ effects are indistinguishable. In both cases, one's array of alternatives are subject to the coercive impact of others: "Both in the world of production and in that of consumption, . . . some have much greater liberty than others, and some have much greater power to control the conduct of others by compulsory methods. Those who wield preponderant economic power over the liberty of others are, in every real sense, *governing*, just as are public officials."¹⁶⁰ "From the viewpoint of the person deprived of liberty, does it make any difference from what source the impairment of his liberty derives—political, economic or religious?"¹⁶¹

Thus, whether government is seen as generalized throughout the system of mutual coercion, or limited to those with concentrated power or positions of dominance, in either case, though especially the latter, to see as governing only those in official, public government positions may be to neglect important sources of coercive capacity, with substantially equivalent effect, located in the nominally private and nongovernmental sector. By failing to perceive the common element we tend "to overlook the existence of private government, which, unless restrained by law, is as capable in some circumstances of destroying individual liberty as is public government itself."¹⁶² Thus, as Cahn put it, Hale "oppose[d] the tyrannies of private government in the same spirit in which free men are wont to resist official tyranny."¹⁶³

However, two principles, one positive and the other normative, must be distinguished. Hale's central normative position, which will be further elaborated below, is to promote a rough equality of power, coercion and freedom. He thus argues that freedom, in the sense of a desirable pattern of volitional freedom, requires public government to serve as a check upon private government (and vice versa). But he also adopted the positive principle, the purely descriptive proposition, that volitional freedom is as much a function of private mutual coercion—the juxtaposition of private powers—as it is of private governmental versus public govern-

157. *Id.* 80-8 at 5. Thus, public government as a check on private government does not mean the abolition, but only the limitation of, the power of the latter. See *id.* 80-7 at 6.

158. *Coercion and Distribution*, *supra* note 21, at 471.

159. *Law Making by Unofficial Minorities*, *supra* note 34, at 453; LEGAL FACTORS, *supra* note 11, at 555.

160. Hale Papers, Folder 80-16 at 8.

161. *Id.* 58-3 at 3.

162. FREEDOM THROUGH LAW, *supra* note 10, at vii.

163. Cahn, *supra* note 27.

mental power, that is to say, that one's volitional freedom is as much a function of public government's check upon the power of other private governments¹⁶⁴ as of one's own countercoercive capacity. The critical policy question becomes *when* is a particular concentration of private governing power to be made subject to the countervailance of public government, which is to say, *who* shall have the critical powers of governance. If power is "safe" only when diffused and checked by other power, some of the diffusion and some of the checking capacity must derive from public government. Thus the very title of Hale's *Freedom Through Law* is at once *both* positive and normative: one's freedom *is*, as a matter of fact, what it is because of the checks which government puts upon others' freedom, and if one is to be free, government has to and *should* place checks upon the powers of others.¹⁶⁵ The problem is whose power is to be checked in who else's interest, including perhaps the interest of the checker.

The perception of "government," then, is as subjective and unequal as the perception of "coercion" and "freedom." Some restrictions on liberty and some promotions of liberty are seen as "governmental" and others are not.¹⁶⁶ Private government, even when it represents concentrated private power, is typically not seen as government:¹⁶⁷

We live . . . under two governments, "economic" and "political." In many matters of everyday life our liberty is restricted by requirements laid down by those who have superior economic power. These stronger persons are not called rulers, or

164. In this regard, Hale's analysis generalizes not only all government "regulatory" activity but all governmental determination of private rights as part of the system of mutual coercion and the pattern of freedom. (This will be discussed further below.)

Public utility regulation was seen by Hale as a device to correct "the evil results of unlimited property rights," Hale Papers, Folder 25-1 at 1, just as eminent domain was developed as a check on the power of the private owner's withholding capacity. *Id.* 93-6 at 19. See note 31 *supra*.

The positive principle may be stated as follows: "[W]hen one unofficial group gets to have what seems like too great a power to govern the lives of outsiders, we find attempts to have the unofficial government subjected to limitations imposed by the official government." *Political and Economic Review*, 9 A.B.A.J. 107, 108 (Feb. 1923). "Indeed one of the chief functions of government is to protect one individual against another." Hale Papers, Folder 89-1 at 5-6. "[M]uch of what the government does is for the purpose of preventing private individuals from harming other individuals or from threatening to harm them as a means of coercing their conduct." *Id.* at 7. "The ordinary law of the state, as distinguished from constitutional law, affords an individual protection against many adverse acts of other individuals." *Id.* 93-6 at 1.

165. "[W]hile the state is capable of destroying our liberties it is also essential to their very existence. We must rely on the state to restrain powerful private individuals from unduly restricting the liberty of weaker ones." *FREEDOM THROUGH LAW*, *supra* note 10, at 3. "[T]he choice of the channels into which industry should be made to flow ought not to be left to the whims of a comparatively few rich men to whom the government seems at present to have delegated the power so to choose." Hale, *The Concentration of Wealth: Discussion*, 7 AM. ECON. REV. 174, 175 (1917) [hereinafter cited as *The Concentration of Wealth*].

166. Hale Papers, Folder 58-3 at 3.

167. *Id.* 69-2 at 3 & 80-3; Hale, Book Review, 45 THE SURVEY 514 (Jan. 1, 1921), Folder 79.

governors, nor are their dictates known as laws or ordinances, however great the pressure which enforces obedience. The sway of economic superiors is not thought to be "government" at all, nor is "liberty" thought to be curtailed by it.¹⁶⁸

"To the conventional eye, . . . governing power is invisible save when exerted by public officials, wearing the authentic trappings of the political state."¹⁶⁹ The perception of government is a function of our definition of reality, of what is customary, including our sense of values or entitlement,¹⁷⁰ of judicial social philosophy,¹⁷¹ and of our psychological acceptance or rejection of certain rules or certain sources of rules and not others.¹⁷²

Whatever one's perception, private property and contract,¹⁷³ yield governing power, which governs through the issuance of orders by employers,¹⁷⁴ through control (ability to exclude and withhold) over natural resources,¹⁷⁵ and through the capacity to determine the legality of another's use of one's property.¹⁷⁶ Indeed, Hale quoted John Stuart Mill concerning how some developments in the law of property have been historically a function of motives to maintain and/or change the structure of social power, social power functioning for all practical purposes as government.¹⁷⁷ Moreover, private government may govern as effectively as public government: "Various private groups to which a man belongs may govern him quite as effectively as do organs of the official government."¹⁷⁸ "Thus both in scope and in efficacy many exertions of

168. Hale Papers, Folder 80-16 at 1. Elliott Cheatham quoted to Hale an excerpt from Hamilton (whom Cheatham called "the greatest secretary of the treasury before Mellon") in *The Federalist*, No. 79 (first paragraph) that, "[a] power over a man's subsistence amounts to a power over his will." Letter from E. Cheatham to R.L. Hale, April 14, 1932, in Hale Papers, Folder 57. And Taussig, writing to compliment Hale on the latter's article on the *Nebbia* case, *The Constitution and the Price System: Some Reflections on Nebbia v. New York*, 34 COLUM. L. REV. 401 (1934), stated his "feeling as to the lack of significance for economics in the distinction between public and private business." Letter from F.W. Taussig to R.L. Hale, May 19, 1934, in Hale Papers, Folder 10. The distinction applies to the question of a category affected with the public interest, as opposed to ordinary private enterprise, and not to the distinction between public and private government; however, one of the historical criteria for inclusion within the former "category" was concentration of economic power, or strategic market position, which was often juxtaposed to another, degree of consumer necessity, and to still another, the capacity to discriminate in price and service.

169. Hale Papers, Folder 80-4 at 9.

170. *Id.* 89-1 at 9.

171. Hale, in ENCYCLOPEDIA OF THE SOCIAL SCIENCES, *supra* note 52, at 672.

172. Letter from R.L. Hale to M. Hale, July 29, 1913, at 1, in Hale Papers, not in folder.

173. FREEDOM THROUGH LAW, *supra* note 10, at 366; LEGAL FACTORS, *supra* note 11, at 512A.

174. *Political and Economic Review*, 8 A.B.A.J. 707 (Nov. 1922); Hale Papers, Folders 58-5 at 2, 6, 7 & 57-5.

175. Hale Papers, Folders 24-4 & 90-4 at 1.

176. *Id.* 59-1 at 2-3, 91-5 at 7, 91-1 at 1, 83-2 at 2; *Coercion and Distribution*, *supra* note 21 at 472.

177. Hale Papers, Folder 58-7. See also Letter from W. Gardner to R.L. Hale, Dec. 31, 1935, in Hale Papers, Folder 68.

178. Hale Papers, Folder 56-1 at 17; see *id.* 80-1 at 8.

what is called economic power are indistinguishable from many exertions of what is recognized as political power."¹⁷⁹ Furthermore, differences in degree of governing power are not equivalent to differences between unofficial and official governing power: "Differences in the degree of governing power are significant, but the line between high and low degrees of governing power does not coincide with the line between official and unofficial exertions."¹⁸⁰ There may be "high degrees of private governing power as well as official power . . ."¹⁸¹ Moreover, as will be seen further below, private governing power will tend to have its externalities just like public governing power: "When a union succeeds in establishing a closed shop in an entire trade it is governing not only its own members but outsiders."¹⁸² Just as laissez-faire may signify "government by business men,"¹⁸³ via both their private governance and business control over public government, so too "[t]he union is a miniature government and its rule may at times become oppressive."¹⁸⁴

Hale's analysis includes the recognition that, "[l]ike all government power, that possessed by private individuals may at times be beneficial to the governed."¹⁸⁵ Each private governing power "may serve to promote a more needed liberty, by restraining a less vital one to interfere with it."¹⁸⁶ But, however much "private governing power may serve a useful purpose . . . [t]here is no guaranty . . . that it will always do so. Private, as well as public, governing power may be abused, and stifle the more essential . . . in order merely to gratify the whims of those who exert it."¹⁸⁷ The conclusion is that "[t]he individual liberty of the governed often demands some sort of protection against abuses of private governing power, analogous to the safeguards which our constitutional system furnishes against the abuse of official government. Such safeguards only the official government itself can furnish."¹⁸⁸ The argument that public government does and must serve as a check upon private government pervades Hale's writings, from his early articles to his *Freedom Through Law*, of which it is the main theme, through countless papers, both published and unpublished in between: "the important point that freedom from the power of the official government is no whit more precious than freedom from the power of the various organizations . . . [of private or

179. *Id.* 80-8 at 7.

180. *Id.* 58-5 at 7.

181. *Id.*

182. Hale, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES*, *supra* note 52, at 671.

183. Letter from R.L. Hale to G.J. Thompson, Nov. 4, 1944, in Hale Papers, Folder 40.

184. Hale, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES*, *supra* note 52, at 671. Hale quoted Stone that a union under the Railway Labor Act "is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power . . ." *FREEDOM THROUGH LAW*, *supra* note 10, at 348. *See also* Hale Papers, 91-7 at 9-10. The case is *Steele v. L. & N.R. Co.*, 323 U.S. 192, 198-99 (1944).

185. Hale Papers, Folder 57-9 at 10.

186. *Id.* 80-4 at 18.

187. *Id.*

188. *Id.* 57-9 at 10. *See also id.* 59-1 at 7-8.

unofficial government]."¹⁸⁹ "To preserve individual liberty, it is not enough to keep the state from crushing it; it is equally essential to invoke the power of the state to keep other individuals from crushing it."¹⁹⁰

Yet much of this recognized political power is not different, in kind or in degree, from much of the power that some individuals and private groups can lawfully exercise against other individuals. Those who wield this private power we have not subjected to responsibility to those against whom it is exercised, nor are they subjected to the same constitutional limitations which surround public officials.¹⁹¹

As already indicated, the role of private government is inherent in Hale's general paradigm of coercion: if government signifies the capacity to coerce or participation in coercion (in Hale's sense), then private participation in the economy is governmental in character. And if widespread volitional freedom is what is meant by a free society, and if volitional freedom emerges from the countervailing of power players, then such freedom requires a diffusion of power such that power will serve as a check on power. Each power has a dual significance: it is a power to be checked and it is a power with which to check. This is true of all power, private and public, and it is true of all government, official and unofficial. His argument is more basic than simply arguing for more "regulation," because the argument for more "regulation" is reduced to the (further) imposition of public government as a check on private government revising the extant pattern of checks, i.e., the public government is only changing the interests which it is protecting, or the powers which it is reinforcing, inasmuch as the status quo distribution of private rights and powers is itself a function of past government action—but more on this later.

One further point which recurs is that "infernal arbitrariness of choice." Hale undoubtedly exaggerated (as many have) the position of Adam Smith when he wrote that, "[a]ccording to the economics of Adam Smith . . . the person who wields power over the economic life of others has no interest inconsistent with the interests of those others." But Hale's main point, was that, "[u]nfortunately, modern study in economics reveals many a discrepancy between the real interests of those who exercise power and those who submit to it—whether that power is

189. *Political and Economic Review*, 9 A.B.A.J. 179 (March 1923). Thomas Reed Powell thus wrote to Hale that, "what you are proving is that freedom against the state does not leave you a free agent." Letter from T.R. Powell to R.L. Hale, June 24, 1939, at 2, in Hale Papers, Folder 17. Hale wrote to Arthur S. Miller, in response to a manuscript of Miller's, that "your main point is good, that *someone* should have power to limit private governing power." Letter from R.L. Hale to A.S. Miller, Sept. 13, 1959, in Hale Papers, Folder 72. Miller quoted Hale's *FREEDOM THROUGH LAW*, *supra* note 10, at 548, on the importance of governmental control of private power. Miller, *supra* note 19, at 138-39, and in *The Constitutional Law of the "Security State,"* 10 *STAN. L. REV.* 620, 653 (1958).

190. Hale Papers, Folder 91-4 at 2.

191. *Force and the State*, *supra* note 56, at 149.

exercised by business men or by labor unions."¹⁹² What Hale is again getting to is the question of *whose* "real interests" the total system of governance will promote, protect and effectuate. The presently important point, however, is that there is a system of governance in the economy, which includes private governments, and encompasses the entire system of mutual coercion.¹⁹³

B. *The Market Economy as a System of Power*

In the preceding section, I have spelled out Hale's general model of coercion, freedom, power, and governance. Schematic of the structure and process of interactional choice, and general enough to be applicable to any decision-making process, the conception of a system of mutual coercion (in Hale's sense of the term) was adopted and used by him to render meaningful his understanding of the economy as a choosing process and of the interrelation of legal and economic (i.e., market) processes. In this section, I shall attempt to summarize Hale's view of the economy, and the private market economy in particular, as a system of mutual coercion. Necessarily, the central focus will be on *power*, the wherewithall to sanction conditions in the process of mutual coercion from which is generated the pattern of volitional freedom, i.e., the wherewithall to effectuate one's choice with a consequent coercive impact upon the volitional freedom of others.

Hale's analysis, it should be pointed out, was by no means complete and may be unsatisfying for that reason; it is not a complete theory of power, even of power in economic affairs. One example of a line of inquiry which he did not pursue, but which is both relevant and important, concerns nonpropertyed bases of power, such as positions in organizations. Hale's response to this would likely be that ultimately even these were ensconced in property rights, and that in any case the analysis would be largely the same, though involving, perhaps, a greater analysis of the law of business organization. As a lawyer he was disposed to look to property rights, and during the decades when his basic ideas were

192. *Political and Economic Review*, 9 A.B.A.J. 179 (March 1923).

193. One further way in which Hale stressed the importance of considering the *entire* system of governance, and therefore private government, was in his criticism of anarchism as neglecting the threats to liberty coming from private power concentrations. He wrote his brother that "certainly the anarchist ideal of freedom from restraint is a very high one, the only difficulty being in the necessity of keeping you as free from the restraint of other individuals as from that of the government." Letter from R.L. Hale to M. Hale, July 29, 1913, at 3, in Hale Papers, not in folder. Later he wrote: "It is only the anarchist who can conceive of no possible curtailment of individual liberty except that imposed by the political state." Hale Papers, Folder 58-5 at 3. See also *id.* 81-2 at 4-5, 93-5 at 1, 57-9 at 1. Immediately after making the point quoted in the text at note 189 *supra*, Hale wrote: "Perfect freedom from restraint by the official government is attainable only under anarchy; and under anarchy, we might be even less free than now from restraint imposed by non-governmental groups and individuals." *Political and Economic Review*, 9 A.B.A.J. 179 (March 1923). The logic of mutual coercion or of governance is that the absence of coercion from one source does not imply coercion from another source.

developing, property rights were at the heart of public policy issues, and, together with the fourteenth amendment's due process clause, occupied the thoughts and theorizing of such legal-economic analysts as Commons, Walton Hamilton and Hale. Of course, too, the institution of (private) property was and is central to the American market economic system, and the law of property was and is an important ancillary to the Constitution, though it is not the Constitution per se. Nonetheless, there is more to the system of mutual coercion than formal property rights.

1. THE ECONOMY AS A SYSTEM OF POWER

What Hale was saying, of course, is that as much as the day-to-day operation of an economy is characterized by "voluntary" (volitional, to Hale) exchange transactions, and however great the analytical value of studying such exchange activity (as leading, e.g., to Pareto optimal solutions), *all* economies are systems of mutual coercion. As an analyst of the market economy, Hale felt this was especially true of that system; its conduct, too, had to be seen in terms of power and power play and the visitation of coercive impact. Although he was not a deep student of alternative economic systems,¹⁹⁴ he was cognizant of the relevance thereto of his paradigm of mutual coercion and volitional freedom. His preoccupation with the American type economy (in part as an American, in part as a common-law lawyer), coupled with his habit for time consuming meticulous work, and also with the astonished reactions of his colleagues, students and readers to his identification of the supposedly free economy as a coercive system—all led him to concentrate his attention on the market economy.

Fundamentally, said Hale, the economy, in many different but converging ways, is a system of power. It is a *Machtoekonomie*,¹⁹⁵ "a network of coercive pressures and counter-pressures of varying strength, each pressure consisting in the last analysis either of the power to lock or to unlock the bars which the law erects against the non-owners of each piece of property, or else of the power to withhold or not to withhold labor."¹⁹⁶ "The whole bargaining process, on which the price system and the market depend, is a system of mutual coercion of the different bargainers."¹⁹⁷ "In most business transactions, private individuals exercise some degree of control over the activities of each other;"¹⁹⁸ "each party exerts a certain degree of coercion against the other. . . ."¹⁹⁹ The market economy is a system of contending groups,²⁰⁰ a system of private

194. Hale did apply his analysis to Webb's *Constitution for the Socialist Commonwealth of Great Britain* in a short review. Hale, Book Review, 45 THE SURVEY 514 (Jan. 1, 1921).

195. *Law Making by Unofficial Minorities*, *supra* note 34, at 455.

196. *Economics and Law*, *supra* note 12, at 138. See also Hale Papers, Folder 93-1 at 28.

197. Hale Papers, Folder 59-1 at 3.

198. *Id.* 91-4 at 2.

199. *Id.* 90-2 at 3.

200. LEGAL FACTORS, *supra* note 11, at 613.

mutual coercion;²⁰¹ a structure of "coercion and counter-coercion,"²⁰² of "mutual control and submission,"²⁰³ of superior versus inferior economic power.²⁰⁴ It is permeated with coercion: free contract means that contract making is a field for the exercise of mutual coercive capacity.²⁰⁵ To the ubiquity of pressure generic to the industrial system is added the ubiquity of pecuniary pressure generic to the market economy.²⁰⁶ The utter necessity of coercive restrictions upon individual liberty should not obscure the fact that the system of "free" enterprise is "shot through with restrictions of liberty. . . ."²⁰⁷ Moreover, the coercive structure and consequences are quite diffused and complex: "The bargaining struggle, in short, is frequently not a struggle against the employer alone but against the consumer as well. The consumers include laboring men in other industries."²⁰⁸ Coercion based on power, in sum, is not only ubiquitous, it is the nature of the economic system. In the market system a wide (or relatively wide) diffusion of power leads to the regulation of private power by the market, but the market is also a vehicle through which private power may be exercised. Indeed, the regulation of private power is not really *by* the market but rather by the action of other power players *through* the market. The market only effectuates the power inputs which act or work through it. It is Hale's normative *and* positive proposition that a "free" economy requires a wide and *relatively* equal diffusion of power.

Hale's analysis of the economy as a system of power—which must be understood in terms of the paradigm developed earlier—will be elaborated upon as follows. I shall summarize first his view of private property as the most distinctive form of power in a market economy; second, inequality of coercive capacity insofar as it is grounded in an asymmetrical distribution of private property (subsequently discussing inequality grounded in law) and third, several of the specific ways in which it is meaningful, according to Hale, to speak of the economy as a system of power (even under competitive conditions), in which regard I shall develop some of the most powerful theorems deriving from his analysis.

2. PRIVATE PROPERTY AS POWER

If *coercion* is the impact of the behavior and/or choices of others and if *power* denotes the means or capacity to coerce, then it follows that,

201. Hale, *Economic Considerations in the Restatement and Clarification of the Law*, 10 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 50, 52-53 (1923) [hereinafter cited as *Economic Considerations*]. See also Hale Papers, Folders 91-1 at 2, 83-6 at 1, & 91-5 at 9.

202. *Political and Economic Review*, 9 A.B.A.J. 107, 108 (Feb. 1923).

203. *Political and Economic Review*, 10 A.B.A.J. 885 (Dec. 1924).

204. Hale Papers, Folder 80-16 at 1.

205. LEGAL FACTORS, *supra* note 11, at 555, 557; Hale Papers, Folders 91-3 at 3 & 91-5 at 4.

206. Hale Papers, Folder 91-3 at 3-4.

207. *Id.* at 2.

208. Hale, Book Review, 31 COLUM. L. REV. 916 (1931).

in an economic system in which the exercise of choice is grounded in and structured by private property, private property becomes the distinctive means whereby power is exercised and coercion visited. Hale's theory of property is that the structure of mutual coercion (that is, an individual's or subgroup's capacity to effectuate its own decisions and to defend against the impact of choices made by others), and therefore the structure of volitional freedom, are both a function of the distribution of private property. Property, said Hale, echoing Hobhouse, is not just for use, as in consumption; it is also, and more importantly, for power.²⁰⁹ Property is power, and its meaning is to be read in the complex structure of coercion, freedom, withholding and governance with which it is intimately connected. This was amplified and elaborated by Hale as follows.

First, and most generally, private property rights are loci of decision-making, and their distribution structures the decision-making process.²¹⁰ The owner of property, whether in the form of money or otherwise, but especially of industrial property, has, by virtue of his ownership, ". . . a certain amount of influence over the channels into which industry shall flow."²¹¹ Quite aside from the complicating factor of the separation of ownership and control (i.e., assuming de facto control is the equivalent of de jure ownership, or vice versa), to the extent that one has property one is enabled to participate in the economic decision-making process. Control over property, especially over capital goods,²¹² is power in the economy.

Second, and more specifically, property provides the capacity to exercise coercive impact upon others and the correlative ability to withstand the coercive capacity of others. This is true generally, and not just with respect to the relations between specific individuals, inasmuch as one's capacity to withhold, and thereby provide either a sanction for the conditions one wishes to impose on others (even impersonally) or a defense against the conditions which others are trying to impose, is a function of one's staying power and that, most directly, is a function of one's ownership of property. Property affords one a source of protection against the economic pressures of others, but it is also one source of economic pressure upon or against others.²¹³ The protection of one's private property rights signifies an actual or potential imposition of

209. *Economics and Law*, *supra* note 12, at 136-38.

210. *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 212, 214; *Value and Vested Rights*, *supra* note 87, at 525; *Coercion and Distribution*, *supra* note 21, at 488; *Labor Legislation as an Enlargement of Individual Liberty*, *supra* note 80.

211. *Coercion and Distribution*, *supra* note 21, at 490.

212. At one point Hale considered the argument that consumption is more equally distributed than capital ownership or wealth and that great inequality in the latter is unimportant in comparison. He questioned why, if that were true, vested industrial interests so strongly defended their positions, and how irrelevant must be "any dispute as to the title to any property." *The Concentration of Wealth*, *supra* note 165, at 175. See also text at note 356 *infra*.

213. FREEDOM THROUGH LAW, *supra* note 10, at 196.

restraint upon others. The distribution of such rights gives, *pro tanto*, substance and structure to the distribution of volitional freedom.

Third, and even more specifically, Hale argued that the power of property resides in the owner's capacity to determine whether any given use of his property is lawful or unlawful, which capacity thus enables him to impose terms on others as the price of rendering that use lawful. Private property, that is to say, enables private government.²¹⁴ The theme that power resides in the owner's ability to withhold his consent (and thereby make the use lawful) is one which pervades Hale's writings.

The argument is essentially as follows. Private property rights nominally give the owner control over his property; these rights have as their correlative the duties owed to the owner by others, i.e., by non-owners. The property may well be scarce and thus likely to command a price, but the structure of ownership—of rights and duties—means that the impact of scarcity varies as between owner and nonowner. "Moreover, since each person's liberty is restrained by legal duties which he owes to others, those others have it in their power to release him from these restraints, and because they have this power, they can induce him to give up some other liberty in exchange for that which he gains by release from these legal restraints."²¹⁵ "If one will not stipulate to accept the conditions imposed by a private owner, the state is prepared to deny him freedom to make use of the property in question."²¹⁶ "The primary interest promoted [by the property right] is the owner's bargaining power. Because he can determine whether the law shall render the use of his property by others lawful or unlawful, he is in a position to impose terms for rendering that use lawful."²¹⁷ Since "the same act must be permitted to the owner of the property and forbidden to others if property is to have any significance whatsoever,"²¹⁸ what makes the same act, otherwise unlawful, now lawful is the owner's consent, which consent must be purchased. The power of private property is the power to withhold; and the imposition of conditions is the price of consent to release withholding; it is "a power to release a pressure which the law of property exerts on the liberty of others."²¹⁹ Property for use yields property for power: the owner's consent is his participation in decision-making, and its exercise is part of the interplay of volitional freedoms.

Finally, it is already clear that the effect of private property upon freedom is both affirmative and negative. It is Hale's point that "property rights are part of a legal arrangement whereby the law curtails the liberty

214. *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 214; *Value and Vested Rights*, *supra* note 87, at 525.

215. LEGAL FACTORS, *supra* note 11, at 23.

216. FREEDOM THROUGH LAW, *supra* note 10, at 303.

217. *Economics and Law*, *supra* note 12, at 137.

218. FREEDOM THROUGH LAW, *supra* note 10, at 15.

219. *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 214. Hale's analysis is conducted in Hohfeldian terms.

of different individuals in different degrees"²²⁰ The volitional freedom of the owner is *pro tanto* expanded and that of the nonowner restricted. "If our own property is large, we have a relatively large field of liberty, [it is] otherwise if our property is small."²²¹ He who has small holdings, or none at all, is exposed to the decision-making power of the large holder, even when exercised through the competitive market. The rights of property are relative not only with respect to legal limitations thereon,²²² but also with respect to other property rights and to circumstances.²²³ One's freedom is accordingly extended or constrained depending upon one's *relative* property holdings. In all cases, private property signifies expansion of volitional freedom for some and restriction for others, especially the nonowners. In any particular controversy, the issue is once again not freedom per se but *whose* freedom, i.e., whose private property rights and whose exposure to or protection (immunity) from those rights. Private property is power and functions to structure the distribution of coercive capacity, and thereby volitional freedom; this is true whether the institution of property or any particular right or object of private property carries the stigma of impropriety or the badge of propriety.

3. THE SYSTEM OF COERCION AS ASYMMETRICAL: INEQUALITY PER SE

The particular form of power which Hale examined was private property. Its distinguishing empirical characteristic is the inequality of its distribution, which means that there is a basic asymmetry to the structure of mutual coercion.

It will be seen shortly that power is relevant even under competitive conditions. Let it be clear now that even if property were in some sense *equally* distributed, it would still be possible and necessary to analyze the structure and operation of mutual coercion. According to Hale, the bundle of rights conferred on each person by law (or, if one prefers, enjoyed by each person) is unique. "The privileges, rights, and duties of each person differ from those of every other person." Even if each individual's aggregation were in some sense to be rendered "equal," they would never be identical.²²⁴ Moreover, "[t]hese different rights and restrictions . . . [would] by no means [be] equal in their human or economic significance."²²⁵ While each person would be roughly equal in the aggregate of his rights, duties, etc., with respect to particulars he would still have a pattern of volitional freedom that was relative

220. *Economics and Law*, *supra* note 12, at 140.

221. *Political and Economic Review*, 10 A.B.A.J. 882, 885 (Dec. 1924).

222. LEGAL FACTORS, *supra* note 11, at 35; FREEDOM THROUGH LAW, *supra* note 10, at 239.

223. *Coercion and Distribution*, *supra* note 21, at 489.

224. FREEDOM THROUGH LAW, *supra* note 10, at 15.

225. *Id.* at 17.

to the volitional freedom of others, i.e., there would still be a pattern of freedom and exposure, a pattern of mutual coercion in which one part was here secure and there exposed, and vice versa.

Such equality is fictional and impossible (see below). But Hale was not writing of a hypothetical world or model; it is Hale's basic relevant point that in the real world people have, as a matter of empirical fact, unequal positions in their respective particular and overall capacities to exercise coercive impact. The structure of mutual coercion is asymmetrical and is so because power is unequally distributed, and in no small degree because of the inequality in the distribution of property. People do not have equal coercive power because their property holdings are more or less unequal and because this inequality does not allow equal withholding capacity. And unequal coercive impact means unequal volitional freedom.

One of the major thrusts of Hale's work was to establish that economic inequalities "are embodied in unequal legal rights."²²⁶ The legal bases of economic inequality, as part of the legal bases of economic coercion, will be developed in part II. The argument at this point is limited to the essentially empirical fact that economic power per se, largely in the form of private property ownership, is unequally distributed, with the result that, since people enter the market unequally situated, the system of mutual coercion is asymmetrical in its structure and, by inference, in the weighting assigned to components of resource allocation. This proposition, it should be clear, is a neutral, positive statement.

Hale acknowledged that "[t]hough our freedom to make use of material goods is restricted by the property rights and by the coercive bargaining of others, still, by virtue of our own property rights and our own bargaining power, we each have a far wider range of economic liberty than we would have in a regimented or totalitarian system."²²⁷ He immediately continued to argue that "[s]ome of us, however, have a much greater degree of economic liberty and of economic governing power than others."²²⁸ This is because

[t]he threats which can be made by some people are more serious than those which can be made by others, and therefore, in the results of the various transactions in which such threats are employed we find great economic inequalities—inequalities with respect to freedom from the necessity of doing disagreeable work and freedom to enjoy the good things of life.²²⁹

The reason is that people have unequal means—unequal relative power—with which to contest in the marketplace. Hale, then, accepted as a

226. *Id.* at 12.

227. *Id.* at ix.

228. *Id.*

229. *Id.* at 9-10.

matter of fact²³⁰ what Justice Pitney called "inequalities of fortune" to which private negotiating and contracting parties "are not equally unhampered by circumstances."²³¹

It is really unnecessary to elaborate. Suffice it to say that Hale pointed out the major sources of inequality of private economic power. These include unequal abilities—including unequal possession of faculties with which to render marketable services—unequal past achievements or luck, and unequal status with respect to the market value of productive services under one's command. Running through much of this is the unequal ownership of property, including land and opportunity for inheritance, but there is also the heavy impact of class structure and of noncompeting groups. Different individuals, therefore, have unequal withholding power, or unequal reservation demands, and, consequently, they also have unequal bargaining power.

4. POWER AND THE MARKET ECONOMY

The ideology of the market economy would have it that rights do not conflict, that a tranquil harmony of interests reigns, and that power is obviated by the market. It is the nature of ideology to rationalize. Orthodox economic theory (microeconomics) expounds the view that the market allocates resources and distributes income. It is the nature of theory to narrowly and efficiently limit the scope of its operative variables. It is however, Hale's point of view that rights and interests do conflict. It is also his view that the market does not work in a vacuum, but rather gives effect to whatever forces underlie demand and supply. The market allocates resources and, through factor prices, distributes income, but only within the existing distribution of wealth or power out of which arise the very market forces which the market only composes and gives effect to. One skewed distribution of property and power will result in a very different allocation of resources and pattern of factor prices from another skewed distribution, and both will be very different from that consequent to a roughly equal distribution of property and power. Even aside from the fact that the market is not perfectly competitive (it is essentially oligopolistic), Hale argued that it is simply irrelevant that economic theory adopts a (tautological) definition of competition in which the numbers of buyers and sellers are large enough so that no one exerts any influence on price. Power, said Hale, is not precluded or obviated by such a definition, even aside from its open-ended character, for even if such a definition applied, i.e., even if the market were competitive (however difficult it is to determine when the numbers are large enough), power would still act in and through the

230. *Id.* chs. 1-3; *LEGAL FACTORS*, *supra* note 11, ch. 7; Hale Papers, Folder 91-5 at 3.

231. *LEGAL FACTORS*, *supra* note 11, at 1; *FREEDOM THROUGH LAW*, *supra* note 10, at 10; *Coppage v. Kansas*, 236 U.S. 1, 17 (1915). On the "uneven distribution" of the "power to coerce," see Hale Papers, Folder 80-1 at 2.

market. The market may be interpreted antiseptically, but demand and supply forces are generated out of the system of mutual coercion and, therefore, from part of the network of power relations. Hale's penetrating analysis of the power dimension of the market economy resulted in the generation of theorems radically different from, but, because of the different scope of relevant variables entertained, not mutually exclusive of, those of orthodox economics.

a. Resource Allocation and Income Distribution as a
Function of Mutual Coercion

Hale was cognizant of the fact that, as orthodox economic theory maintains, prices trigger the allocation of resources and serve an incentive function in the process. But Hale was also aware that prices are coefficients of economic choice, and that as such they emanate from and register the structure and thrust of interactional choice and, ultimately, power. This being the case, what Hale saw was that resource allocation and income distribution, both of which are proximately and nominally governed by the price structure, are less immediately, but more importantly, a function of the structure of mutual coercion. His first major theorem on the functioning of the market is that prices and incomes are a function of mutual coercion. Prices comprise the mechanism for the allocation of resources and factor incomes, and they may be analyzed through relative demand and supply functions of curves, but, it is Hale's proposition, those relative demand and supply functions arise out of the system of mutual coercion.

Price, then, connoted to Hale a payment with which to overcome the pressure exercised through withholding or the threat to withhold (not sell), and as such any particular market price registers relative bargaining or withholding power brought to market: "Market values themselves . . . result from and register the mutual pressures exerted by buyers and sellers. The amount of pressure which each can exert is very unevenly distributed, with the result that some are economically strong, others economically weak."²³² Market prices, he stated, "reflect the relative force of the threats which buyers and sellers of goods or services can make;"²³³ transactions are bargains, and "[t]heir terms depend on the relative bargaining power of the parties. The market prices of goods and services, on which the degree of each person's economic liberties depends, register that relative bargaining power."²³⁴ Thus, "[t]he economic value of a service merely expresses what the person who renders it can induce others to pay him for doing so,"²³⁵ and "the value of the

232. FREEDOM THROUGH LAW, *supra* note 10, at 131.

233. *Id.* at 9.

234. *Id.* at 8. See also *id.* at 17, 19, 31, 129.

235. *Id.* at 30.

goods (and presumably of the service of producing them) is simply an expression of the harm the consumers would suffer if they *were* withheld."²³⁶ Indeed, "the market price is nothing else [*sic*] than the statement of the conditions which restrict [the individual's] liberty to consume."²³⁷ In this respect it is not only the case that high or low prices make for high or low economic power; it is also that "the payment of the market price is not an equally practical matter for all . . .,"²³⁸ since some are economically powerful and others economically weak to begin with. In Hale's version of a general economic equilibrium model, which he offered as a complement to that of orthodox economic theory, power is both cause and consequence; it is both an input and an output; the dynamics are the dynamics of power and power play; and price is an index of relative economic power.

Prices, then, are seen as a form of private tax, and incomes as the consequence of a private taxing power residing in private property. Hale pointed out that economic rent is dramatically a private tax²³⁹ and that, in a somewhat different sense, "many of the rich and idle are in effect taxing the rest of the community. . . ."²⁴⁰ But his general argument in this connection is that *all* prices resemble taxes, inasmuch as they too involve economic impediments and compulsion to pay, that is to say, as both prices and taxes function identically to restrict voluntary freedom to volitional freedom:

All prices, no matter for what services, are paid under the same compulsion as are sales taxes. In both cases the payment is made, if it is made at all, in order to avoid foregoing the thing bought and for no other reason. The fact that the seller may be rendering a *quid pro quo* goes only to justify the levy. It in no way proves that it is not compulsory.²⁴¹

The compulsion, it is to be remembered, is neutral in Hale's model. It is true of all taxes that they are paid to avoid an unpleasant alternative, such as jail in the case of the income tax, and it is true of all prices that the alternative is either to forego the good or service, or to steal and risk imprisonment. Prices are "private taxes on the use of things. . . ."²⁴²

Private property thus becomes the right to collect private taxes: "The interest primarily promoted by the ownership of business property

236. LEGAL FACTORS, *supra* note 11, at 605.

237. FREEDOM THROUGH LAW, *supra* note 10, at 6. The text continues: "He may not make free use of the goods in the market. His liberty to use them is not absolute. It is conditioned on his payment of the going price. *Id.* See also Hale Papers, Folder 90-2 at 5; *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 606 *passim*."

238. LEGAL FACTORS, *supra* note 11, at 714.

239. Letter from R.L. Hale to W.L. Fisher, Aug. 15, 1918, at 3, in Hale Papers, Folder 65. See also Folder 79-1 at 2.

240. Hale Papers, Folder 90-1 at 1.

241. *Id.* 79-1 at 1-2. See also LEGAL FACTORS, *supra* note 11, at 436-37.

242. Hale Papers, Folder 93-1 at 9.

is not the interest in personal unmolested use thereof, but in collecting income from consumers by the threat to withhold from them the use or the fruits of it."²⁴³

Not only prices, but incomes—through factor prices and against an active background of unequal property ownership—are a function of mutual coercion. "As I see it," wrote Hale, "all incomes are the result of coercion held in check by counter-coercion."²⁴⁴ In *Coercion and Distribution* his main theme, verbalized in the title, was that income distribution was a function of coercion even in a supposedly noncoercive state. He maintained therein that "the income of each person in the community depends on the relative strength of his power of coercion, offensive and defensive."²⁴⁵ "The distribution of income, to repeat, depends on the relative power of coercion which the different members of the community can exert against one another. Income is the price paid for not using one's coercive weapons."²⁴⁶ One, of course, may need income, but that is simply a factor in one's own coercive capacity. Thus, "[t]he gross incomes of property-owners are obtained by coercion of the customers; their labor by coercion of the workers. The wages of the latter are obtained [from] the counter-coercion of the employers."²⁴⁷ "The result is a network of coercive pressures and counter-pressures of varying strengths These pressures are what enable each person to obtain such share as he can of the goods produced by the industrial system."²⁴⁸ Wealth is also a function of relative power.²⁴⁹ As in the case of prices, income and wealth are both independent and dependent variables in Hale's general equilibrium system of mutual coercion based on relative (but changing) power positions and relations.

However if income and wealth are a function of bargaining power, "[t]he bargaining power under existing legal arrangements cannot be justified by showing that it results in incomes proportionate to bargaining power."²⁵⁰ This would obviously be circular reasoning. By a similar

243. *Political and Economic Review*, 9 A.B.A.J. 107 (Feb. 1923). The text continues: Other and more vital interests are promoted indirectly, in so far as the income which the owner collects functions as an incentive to productive effort on his part. On the other hand, the interests defeated by modern property rights are no longer merely the less vital interests which were formerly defeated; they are the more vital interests in working independently of others' control; for under a developed system many people without property have to submit to control if they are to be permitted by law to eat food, wear clothes or enjoy shelter.

Id. See also Hale Papers, Folders 90-4 at 1 & 93-1 at 10; *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 214.

244. Hale Papers, Folder 62-1 at 7.

245. *Coercion and Distribution*, *supra* note 21, at 477.

246. *Id.* at 478.

247. *Political and Economic Review*, 10 A.B.A.J. 752 (Dec. 1922).

248. *Economics and Law*, *supra* note 12, at 138; see also *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 214.

249. *Law Making by Unofficial Minorities*, *supra* note 34, at 455.

250. *Economics and Law*, *supra* note 12, at 138; *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 625-26. The point is restated later in the same article: "[I]n fact the property rights are part of a legal arrangement whereby the law curtails the liberty of

token, the only difference between the conventional charging of a price and the repudiated and illegal extortion under duress is the attribution of moral impropriety to certain acts of withholding and not to others.²⁵¹ In general, "[w]e rely on the bargaining process to serve the conflicting interests of individuals in securing a share of the collective output of society, and also to serve their common interest in the creation of that collective output."²⁵² These bargains both originate in and lead to "vast differences in the economic positions of different persons"²⁵³

But while there is no explicit legal requirement that one enter into any particular transaction, one's freedom to do so is nevertheless circumscribed. One chooses to enter into any given transaction in order to avoid the threat of something worse—threats which impinge with unequal weight on different members of society. The fact that he exercised a choice does not indicate lack of compulsion.²⁵⁴

Moreover,

[t]he fact that transactions do not deviate from normal market values does not necessarily indicate that there is a fair relation between the respective bargaining powers of the parties. *The market value of a property or a service is merely a measure of the strength of the bargaining power of the person who owns the one or renders the other, under the particular legal rights with which the law endows him, and the legal restrictions which it places on others.* To hold unequal bargaining power economically justified, merely because each party obtains the market value of what he sells, no more and no less, is to beg the question.²⁵⁵

This brings us to the next two theorems of Hale, which explain the relations between power and market productivity and between power and competition. These theorems, particularly the latter, further establish the fundamental power basis of Hale's paradigm of the economy as a system of mutual coercion.

b. Productivity and Mutual Coercion

One of the central thrusts of orthodox neo-classical economic analysis is that the demand for factors of production is primarily a function of

different individuals in different degrees, and the justifiability of the particular arrangements depends on the justifiability of the economic results rather than the reverse." *Id.* at 140. See also FREEDOM THROUGH LAW, *supra* note 10, at 393, quoted in the text at note 365 *infra*; *Coercion and Distribution*, *supra* note 21.

251. See text at footnote 133.

252. *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 605; on extortion, see *id.* at 611. "The person who exercises the power gains access to a certain part of the wealth produced by others. At the same time, he is himself compelled to contribute to the production of wealth and thus add to the amount to which others can obtain access." FREEDOM THROUGH LAW, *supra* note 10, at 31.

253. *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 605.

254. *Id.* at 606.

255. *Id.* at 625-26 (emphasis added).

their respective marginal productivities. Some economists have gone further and argued that productivity governs not only factor demand but factor price, but while that is probably incomplete, and at least controversial, it is true that "productivity" remains the major concept in orthodox distribution theory.²⁵⁶ Hale, however, goes beyond productivity as the single and independent, and therefore critical, element in factor pricing and factor income distribution.

According to Hale, productivity in the sense typically employed by economists, namely, value productivity, emerges within the structure of relative bargaining power or mutual coercion, such that productivity is itself at least partially a function of power and, further, that factor prices reflect the admixture of both relative power and relative efficiency. No man said Hale "literally produces his fortune. He acquires it by a complex set of bargaining transactions, in which he may or may not have incidentally contributed much to the production of other goods, from the proceeds of which he acquires the wealth which he enjoys."²⁵⁷ Hale agreed that "there is something in the productivity theory . . .,"²⁵⁸ namely, the combined effect of efficiency and consumer preference, but he argues that what is typically called

the "productivity" of each factor means no more nor less than . . . coercive power. It is measured not by what one actually is producing, which could not be determined in the case of joint production, but by the extent to which production would fall off if one left and if the marginal laborer were put in [one's] place —by the extent, that is, to which the execution of his threat of withdrawal would damage the employer. Not only does the distribution of income depend on this mutual coercion; so also does the distribution of that power to exert further compulsion which accompanies the management of an industry.²⁵⁹

Value productivity measures the damage inflicted by withholding.

Hale accepted the inference from marginal productivity theory that "raising the wage by compulsion to a point higher than each man's labor is worth will necessarily diminish the demand for that class of labor and cause unemployment . . .,"²⁶⁰ but it is his point that this is part of the total

256. For a critique of productivity theory, see M. BLAUG, *ECONOMIC THEORY IN RETROSPECT* 444-46 (rev. ed. 1968).

257. Hale Papers, Folders 93-1 at 34 & 93-6 at 54.

258. Letter from R.L. Hale to H. Rottschaefer, Nov. 5, 1925, at 3, in Hale Papers, Folder 3. Rottschaefer had earlier written Hale that "a complete theory of distribution" would have to account for both productivity and power factors. Letter from H. Rottschaefer to R.L. Hale, Oct. 14, 1925, at 1, in Hale Papers, Folder 3. Hale responded that the productivity theory "is not inconsistent with my theory that all incomes are derived by some sort of pressure exerted by their recipients on the rest of the community. That pressure, as I see it, sometimes depends for its effectiveness on how much the exorter of it can 'produce'; and is sometimes conditioned on his actually doing the producing." Letter from R.L. Hale to H. Rottschaefer, Nov. 5, 1925, at 3, in Hale Papers, Folder 3.

259. *Coercion and Distribution*, *supra* note 21, at 477.

260. *LEGAL FACTORS*, *supra* note 11, at 696.

process of mutual coercion; the converse involves the pressure brought by employers which tends to reduce wages below marginal productivity. Factor prices do not result simply from productivity-based factor demands; they arise from bargaining and mutual coercion; productivity, as meted out by money wages, is a function of power. Hale's is a bargaining power theory of distribution in which market prices of factors reflect not only relative productive efficiency and relative consumer demand, but also differential withholding capacity, which, in turn, is a function of differential arrays of alternatives and their respective opportunity costs.²⁶¹ Hale was so much aware that value productivity and actual factor prices were partially functions of power relations that he suggested, in a letter to Learned Hand, that the aim of legal policy should be to so adjust the laws of property "that a person could only collect in business the value of any services rendered,"²⁶² that is, benefit only from productivity based upon one's efficiency and not one's withholding capacity, e.g., not through the ownership of land and natural resources or the maintenance of positions of concentrated private power. This suggestion presents the apparent difficulty of providing no independent determination of the value of services rendered, but Hale saw that price in the market will always be a function of mutual coercion, even where power is roughly equally distributed. It is clear that Hale understood the market system to be so structured that one's value productivity, per se, partially reflects relative market power, and that orthodox marginal productivity functions must be seen as partially generated by power relations. Hale's theorem, then, is that productivity in the market, as it is conventionally understood, is a partial function of relative power and arises out of mutual coercion.²⁶³

c. Power and Competition

As already indicated, the traditional competitive assumption in economic theory is generally taken by economists and others to signify the absence of market power: where by definition no one has an influence upon market price, no one, then, has market power. Power is command

261. *Id.* at 592.

262. Letter from R.L. Hale to L. Hand, Oct. 27, 1912, in Hale Papers, Folder 62.

263. Hale appears to have never completely satisfied himself on the relation between productivity theory and his coercion analysis. He is not alone in this, inasmuch as productivity theory remains in a wholly unsatisfactory state to this day, as does distribution theory generally. In Hale's case it is partially explained by his preoccupation with legal materials after his transfer to Columbia Law School. Hale was familiar with the work of Gustav A. Kleene, who had a distribution theory which incorporated both traditional productivity and time preference theories with power factors and which was basically a power theory of distribution. *Economics and Law*, *supra* note 12, at 139 n.1. Hale Papers, Folder 93-1 at 21ff; Kleene's analysis received sympathetic treatment (albeit reluctantly given) from Taussig. See 3 DORFMAN, *supra* note 1, at 431-32. Hale also did not probably fully appreciate that Carver was an advocate of revising the power structure within which productivity was generated so as to result in a more equitable—but also efficient—distribution of income. See Hale-Carver correspondence, in Hale Papers, Folder 1. See note 34 *supra*.

over price in the market. Hale accepted this assumption but contended that it does not go far enough in its perception of power and the field of power. His argument is that power acts through the market even under competition where no one has command over price. Obviously, his context of relevant effects—the field of power—goes forward beyond price per se to resource allocation and income distribution, and thus backward beyond market structure to the structure of social power which profoundly conditions the operation of the market.

To begin with, Hale's analysis parallels orthodox analysis of non-competitive conditions and the analysis of industrial concentration.²⁶⁴ Price is commanded directly by power—it is an instrument of power play—and the terms of adhesion or standardized contracts are imposed.²⁶⁵ Hale stated:

We have seen that in all the many instances in which competition fails to keep the value of the right to own property . . . down to the level of the contribution made toward the production of the output by those who paid for the construction of the equipment, some persons are empowered by their property rights to exact from the rest of the community more money than their contributions toward production are worth in the market. The economic inequalities of the property rights do not conform to inequalities in the value of services rendered.²⁶⁶

Imperfect competition means power active in the market. Oligopolists are clearly power players.

The genius of a competitive marketplace, then, is that it does provide limitations upon property rights and the power underlying mutual coercion. Competition may require private property, but competition functions to check the power of property owners.²⁶⁷ Notice, however, this means that market competition becomes a regulatory system through which voluntary freedom is restricted to volitional freedom, or one pattern of volitional freedom is converted to another. "The person who pays does so only because he will otherwise be deprived of the use of that for which he pays."²⁶⁸ The "numerous alternatives" which competition provides allow "for greater variety of choice, though [that] does not refute the proposition that [one] is at last driven to sacrifice some liberty in order to acquire . . ."²⁶⁹ the liberty to consume the product thus acquired. The paradigm of freedom and coercion applies to competi-

264. See Hale Papers, Folders 91-2 at a & 90-1 at 9.

265. Hale's 1943 article on *Bargaining, Duress, and Economic Liberty* was one of a symposium of papers on "Compulsory Contracts in Theory and Practice," 43 COLUM. L. REV. 567 (July 1943).

266. FREEDOM THROUGH LAW, *supra* note 10, at 26.

267. *Coercion and Distribution*, *supra* note 21, at 489; LEGAL FACTORS, *supra* note 11, at 752; FREEDOM THROUGH LAW, *supra* note 10, at 50; Hale Papers, Folders 91-5 at 12-14 & 82-2 at 5.

268. Hale Papers, Folder 58-5 at 2.

269. *Id.* at 30.

tive conditions. Moreover, because of unequal circumstances, "[t]he payment of the market price is not an equally practical matter for all, any more than an equally practical burden is imposed on all when the law in its majestic equality forbids rich and poor alike to sleep under the bridge or on the park benches"270 Thus, "[a] drop in the price of a commodity may extend the freedom to use it to a group hitherto barred, while a steep rise in price may annul such a freedom for all but a relatively [sic] few."²⁷¹ Competitive prices, far from being devoid of coercive impact, serve directly as governors of volitional freedom. Moreover, they are coercive in genesis as well. Not every one is in a market position to be a seller or buyer to begin with: many a poor person would prefer to be in a position to own a business regulated by competition. The price "may be reasonable and the amount may be controlled by market conditions over which no single . . . [seller] has any influence; but the fact remains that, for whatever reason, . . . [the seller] is in a position to collect"²⁷² the price.

This brings us to the heart of Hale's argument. It is Hale's view that "competition," as used in economic theory, applies only to the structure of the particular market within which buyers and sellers compete, in which equilibrium price and quantity are regulated by demand and supply. Competition thus has to do with market structure and demand and supply and not, says Hale, with the power structure within which the market, even when competitive, operates. For power, in Hale's view, exists not only in noncompetitive markets, but also governs the relative participation of buyers and sellers in all markets. A competitive product market is not the same thing as a socioeconomic system in which power is diffused; one can have the former without the latter, and the presence of the former should not obscure the absence of the latter. The very position of the seller qua seller and of buyer qua buyer is a function of their status in the larger power structure. Competition is important in taking the edge off market power, but it cannot overcome the structure of advantage and disadvantage originating in class structure and non-competing groups, and in the unequal distribution of property and wealth, perhaps obscured by the corporate veil.²⁷³ Competition, where present, deals only with one aspect of power; it does not get to the power structure on which the market rests. Indeed, argues Hale, power generated by class structure, unequal property and wealth distribution operates *through* the competitive market. No one may have command over price, but the concentrated control of property and wealth has its impact on the structure of demand and supply. Those with "contractual and property rights of great magnitude" are able to work through the market, even unconcertedly, to more readily effectuate the conditions which they

270. *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 213.

271. Hale, Book Review, *supra* note 65, at 326.

272. Hale Papers, Folder 58-5 at 2.

273. *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 608.

prefer to impose upon others.²⁷⁴ Even though prices may be regulated by demand and supply, such private power operating through the market will have its effects upon the liberty and property of others.²⁷⁵ There is a difference, in other words, between a competitive market with one pattern of unequal property ownership and one with another pattern, and between both of these and a market with a pattern of substantial equality of wealth and opportunity; the difference extending to the allocation of resources and factor pricing (and therefore income distribution) arising under each. With resource allocation through the price mechanism under strictly competitive conditions a function of dollar "votes" in the market, unequal dollar vote holdings mean unequal impact on resource allocation and income distribution, which means, in Hale's model, that power in the form of wealth works through the competitive market in effectuating its coercive impact. This is one of Hale's most subtle and important theorems. Coercion is unobtrusively exercised through the market; the market gives primary effect to the conditions which those with power desire to impose. This is the case notwithstanding the fact that in the real world the market is not fully competitive and concentrated power has even more opportunity to be exercised. Resource allocation and income distribution are a function of mutual coercion operating through the market, whether the market is competitive or not.

d. On the Organization and Use of the Human Labor Force

Bertrand de Jouvenel, in his classic study *On Power*, articulated a powerful argument:

Whoever does not wish to render history incomprehensible by departmentalizing it—political, economic, social—would perhaps take the view that it is in essence a battle of dominant wills, fighting in every way they can for the material which is common to everything they construct: the human labour force.²⁷⁶

There is no evidence that Hale was familiar with de Jouvenel's analysis—he would surely have quoted him if he had been²⁷⁷—and he likely

274. Hale Papers, Folder 91-7 at 11. See also *id.* 58-5 at 3.

275. *Id.* 91-2 at b.

276. B. DE JOUVENEL, *ON POWER* 177 (1948).

277. On a card of notes left in Hale's copy of Bernard Shaw's *THE INTELLIGENT WOMAN'S GUIDE TO SOCIALISM AND CAPITALISM* (1928), Hale listed a "quotable paragraph on compulsory labor under capitalism," from pp. 357-58. Part of the paragraph is as follows:

What governments do at present is to reduce the mass of the people by armed force to a condition in which they must work for the capitalists or starve, leaving the capitalists free from any such obligation, so that capitalists can not only be idle but produce artificial overpopulation by withdrawing labor from productive industry and wasting it in coddling their idleness or ministering to their vanity. This our Capitalist Governments call protecting property and maintaining personal liberty; but Socialists believe that property, in that sense, is theft, and that allowable personal liberty no more includes the right to idle than the right to murder.

The thrust of the paragraph is much the same as that of de Jouvenel's. Hale does not seem to have actually quoted the paragraph in any of his writings, published or unpublished.

would not have agreed with some of his other central themes. Nevertheless, one of Hale's major theorems was this: that encompassed within the system of mutual coercion was the development of institutions utilizing coercive instruments to organize, discipline and use the human labor force. In analyzing the logic and role of labor unions, for example, Hale did not simply juxtapose collective to individual bargaining, but went deeply into the *wage system*, which is the modern world's distinctive mode of organizing and disciplining the industrial work force.

According to Hale, there is a system of labor discipline in all economies, agricultural and industrial, feudal and capitalist, as well as socialist, and in all types of modern economic systems whatever their nomenclature. The fact of the system of pressure, he argued, is more important for his analysis than the particular institutional methods of organizing and disciplining labor.²⁷⁸ But he was most interested in the system of coercion manifest in the modern system of wage labor. In the wage system, "[f]or the great majority the only way to acquire the liberty to consume enough for a livelihood lies through obtaining purchasing power from employers."²⁷⁹ For the majority, however wide the choice as to the type of occupation they can enter, since they have "no independent income, the choice of not entering *any* occupation is denied . . ."²⁸⁰ "[O]ne who does not own sufficient property or money must resort to some other expedient in order to gain the freedom to enjoy either the necessities or the luxuries of life."²⁸¹ Thus, "[i]n the ordinary case a man without money has no other recourse than to accept a job. He must work for another as the price of obtaining freedom to eat. . . . [T]he requirement that he must work is a compulsory one since whether or not he regards the work as an evil, if he does not perform it he must incur a worse evil."²⁸² There is, therefore, a fundamental and systemic compulsory element in the workers' need to work for others at a wage under capitalism or, for that matter, under any modern industrial system.

Hale was familiar with the development of the wage system, including, for example, the long process of evolving a landless working class during the demise of feudalism and the beginning of the urban and industrial labor market on an extensive scale.²⁸³ But more conspicuous, because more current, and more important, because clearly deliberate, were contemporary developments in Africa which Hale described through excerpts in his *Legal Factors*.²⁸⁴ Through these Hale pointed to the

Incidentally, the notes also call attention to a discussion reducing to property for use vis-à-vis for power from page 102.

278. *Political and Economic Review*, 8 A.B.A.J. 752 (Dec. 1922).

279. Hale Papers, Folder 91-5 at 12.

280. *Id.* 93-1 at 30.

281. *Id.* at 11.

282. *Id.* at 12.

283. LEGAL FACTORS, *supra* note 11, at 128, 132; Hale, *Political and Economic Review*, 10 A.B.A.J. 51, 52 (Jan. 1924).

284. LEGAL FACTORS, *supra* note 11, at 129-34.

enforced creation of a wage system and labor market as an intentional result of African land policy imposed by colonial powers, through the imposition of money taxes on natives coupled with the alienation of land to Europeans, with the result "that natives, lacking the basis for an independent economic existence, must accept European employment."²⁸⁵ As for reform along egalitarian lines, "those who need native labor . . . will fight to the uttermost . . . any proposal to make the native areas so large and so fertile that the economic pressure is reduced which now drives large numbers of natives into the white man's labor market."²⁸⁶

In the modern system, the main institutional instrument is the law of property, coupled with the unequal appropriation of land and accumulation of capital. Hale quoted Justice Pitney's statement in a decision upholding the "yellow dog" contract that "the vast majority of persons have no other honest way to begin to acquire property, save by working for money."²⁸⁷ But it is the law of property to begin with—coupled with the unequal distribution of property ownership—which coerces the non-owner to work for wages for the owner of property (or else starve): "The combination of the restraints contained in the law of property, with other circumstances, is usually sufficient to make it necessary for the worker to work."²⁸⁸

Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation. . . . It is the law of property which coerces people into working for factory owners²⁸⁹

To be prohibited from eating except on condition of performing certain work is in practice equivalent to being ordered more directly to do that work. That is precisely what our law of property does to the propertyless man; it forbids him to do those things without which he cannot eat, unless he can get the consent of some owners of food or the owners of land on which he can produce his own food, and it does not order them to give their consent.²⁹⁰

"The legal restraints on [the workers'] conduct whereby the property

285. *Id.* at 131, quoting R.L. BUELL, FORCED LABOR: ITS INTERNATIONAL REGULATION 414-15 (Foreign Policy Ass'n Info. Serv., vol. V, no. 22, Jan. 8, 1930).

286. LEGAL FACTORS, *supra* note 11, at 129, quoting R.F.A. Hoernle, *Politics in South Africa*, 13 THE NEW REPUBLIC 147 (Dec. 8, 1917). For current policies with the same or similar purpose, see P.M. Boffey, *Japan: A Crowded Nation Wants to Boost its Birthrate*, 167 SCIENCE 960 (Feb. 13, 1970), and articles on South Africa in N.Y. Times, April 5, 1970, at 12 (city ed.) and NEWSWEEK, April 27, 1970, at 40.

287. FREEDOM THROUGH LAW, *supra* note 10, at 10 and LEGAL FACTORS, *supra* note 11, at 1, quoting *Coppage v. Kansas*, 236 U.S. 1, 14 (1915).

288. *Political and Economic Review*, 8 A.B.A.J. 707, 708 (Nov. 1922).

289. *Coercion and Distribution*, *supra* note 21, at 473.

290. *The Concentration of Wealth*, *supra* note 165, at 279-80. See also Hale Papers, Folder 59-1 at 2-3.

rights of all the various property owners are protected, constitute the indirect sanction which drives them into the employ of the particular factor owner."²⁹¹ "The employer's power to induce people to work for him depends largely on the fact that the law previously restricts the liberty of these people to consume, while he has the power, through the payment of wages, to release them to some extent from these restrictions."²⁹² The law of property typically²⁹³ does not compel the worker to work for any particular employer, but the result of the system of coercion is "an indirect coercion to work in *some one's* employ,"²⁹⁴ which is at the heart of the wage system. The wage system, subtly to be sure, is thus part of the total system of governance in the real-world version of Hale's paradigm of mutual coercion.

The right to work, then, is not complete; it is not a right held against any other person, or imposing on anyone a duty to employ. The worker does not have the right to work in the factory without the consent of the owners. If the workers had such a right the system would be quite different. Hale thus quoted President Harding to the effect that "a free American has the right to labor without any other's leave," and commented that to so argue "is to insist on a doctrine which involves the dangerously radical consequences of the abolition of private ownership of productive equipment or else the equally dangerous doctrine that everybody should be guaranteed the ownership of some such equipment."²⁹⁵ "[I]f the worker has indeed the right to work without the consent of the owners of factories, then the owners have no power to enforce discipline in the plants"²⁹⁶

Hale was thus very much aware that the so-called "right to work," free of union compulsion, was a right that could exist only within a broader framework of coercion, whose structure it was the object of unionization to change and the object of the "yellow dog" contract to maintain. Despite his own sympathies for unions, Hale was typically quite neutral in his positive analysis. The existing law of property, he stated, orders the workers

to work just as effectively as would any anti-strike law, the penalty for disobedience being starvation; and the choice of work open to him is often very small. . . . To deprive him of the right to strike . . . would not turn otherwise free labor into slave

291. *Value and Vested Rights*, *supra* note 87, at 525.

292. *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 627.

293. FREEDOM THROUGH LAW, *supra* note 10, at 193-96 and *Political and Economic Review*, 8 A.B.A.J. 752 (Dec. 1922), discuss situations in which the choice is narrower.

294. *Economics and Law*, *supra* note 12, at 137-38.

295. *Political and Economic Review*, 8 A.B.A.J. 638, 639 (Oct. 1922). The text later goes on to say: "[I]f every free American did indeed have a right to work without any other's leave, then the owners of productive property would be in no position to own the products and sell them at a profit." *Id.*

296. *Political and Economic Review*, 8 A.B.A.J. 707 (Nov. 1922).

labor; it would unless safeguarded deprive him of one means of bettering his conditions and his pay.²⁹⁷

Moreover there is the absolute need for a system of discipline to promote production: "Without some kind of compulsion to produce we might conceivably revert to barbarism . . . ,²⁹⁸ but, of course, the "compulsion [is] tempered by a degree of counter-coercion,"²⁹⁹ for "the workers can as a rule exert sufficient counter-coercion to limit materially the governing power of the owners."³⁰⁰ But the countercoercion is still within the existing wage system. Indeed, the system also disciplines the property owner:

[W]hile the system of property does compel the propertyless to work, they might be still worse off without the institution, for it also furnishes the incentive for much useful work on the part of owners, work which increases the supply of commodities and lowers their prices, making even those lowest down in the social system perhaps better off than they would be in the absence of that incentive.³⁰¹

"[J]ust as some people are required to work if they would obtain money, so other people are required to pay money if they would secure the benefits from other people's work. The employer's factory would have no value to him unless numerous people operated it."³⁰² "His factory is valueless unless he can obtain labor. The more numerous the gateways through which [people] can obtain money, and the more desirous the keepers of these gateways to obtain the labor, the more wages are the various owners likely to pay for their labor."³⁰³

But one of Hale's most pregnant themes is that the system of mutual coercion is skewed in favor of the property owner, such that he gains successorship to the title of the products jointly produced. The worker is forced to abandon his potential property rights in the product in exchange for the job and its wages; the finished product becomes the property of the factory owner or employer. Such an arrangement is as much taken for granted as the holding of a job as a source of a claim to income in the modern world; both are part of the wage system. Under different legal arrangements and/or circumstances, there could be a different pattern of mutual coercion and a different organization of the human labor force, and possibly a different disposition of title.³⁰⁴ But as matters stand, "[t]he right of ownership in a manufacturing plant" in-

297. *The Concentration of Wealth*, *supra* note 165, at 280.

298. *Political and Economic Review*, 8 A.B.A.J. 752 (Dec. 1922).

299. *Id.*

300. *Coercion and Distribution*, *supra* note 21, at 473.

301. *The Concentration of Wealth*, *supra* note 165, at 280.

302. Hale Papers, Folder 93-1 at 12.

303. *Value and Vested Rights*, *supra* note 87, at 525.

304. *Political and Economic Review*, 8 A.B.A.J. 752 (Dec. 1922); *Political and Economic Review*, 10 A.B.A.J. 259 (Dec. 1924).

cludes an Hohfeldian "power to acquire all the rights of ownership in the product."³⁰⁵ It is conventional that "[o]nce the products of his factory are produced, . . . they [are] treated as the factory owner's property,"³⁰⁶ for since the owner has the power to deny use of his property, a power which the law will generally enforce "at his pleasure," the worker cannot work in the plant "without first getting consent; and that consent is frequently attainable only on condition of abandoning all claim to title in the product."³⁰⁷ The law treats as owner of the finished product the property owner, because he has been able to induce all others, through his withholding capacity,

to relinquish to him all claims to ownership of the goods in whose production they have participated. Each of these other participants rendered his contribution to production at the sacrifice of some part of his property rights or some part of his liberty to make other dispositions of his time, because only in this way could he acquire the money with which to purchase a certain amount of freedom (which the law would otherwise deny him) to enjoy goods produced by other people.³⁰⁸

The "worker's abandonment of any property right in the product"³⁰⁹ is the only way in which he can get to use the equipment of the owner, "and frequently, in times of unemployment, that consent cannot be obtained at all."³¹⁰

There is a system of mutual coercion independent of unequal wealth and power; introduction of that inequality means a skewed structure of mutual coercion and a consequent skewed allocation of resources and distribution of income. Consideration of the principle of the organization and use of the human labor force in a wage system underscores the systemic genesis and quality of mutual coercion. What it further underscores is the fundamental legal bases of the system of mutual coercion. It is the law of property, coupled with the unequal distribution of ownership, which, Hale showed, structures the organization and use of the human labor force. We shall now consider the second part of Hale's legal-economic analysis: his theory of the legal bases of the structure of power.

III. THE LEGAL BASES OF ECONOMIC COERCION

Not surprisingly, Hale believed that there are fundamental legal bases of economic coercion, inevitable legal involvement in economic

305. *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 214.

306. *Value and Vested rights*, *supra* note 87, at 526.

307. *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 212.

308. Hale Papers, Folder 90-2 at 2.

309. *Political and Economic Review*, 8 A.B.A.J. 638, 639 (Oct. 1922).

310. *Id.* "People who cannot find jobs have no freedom to bargain for wages, and without wages they have very little freedom to consume." *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 628.

activity. It was Hale's contention not only that the economy can be profitably examined and understood as a system of mutual coercion, but also that the economy, whether seen as a system of mutual coercion or not, has important legal elements, so that it is possible, and indeed necessary, to study the legal bases of economic power. Hale argued that the economy, fundamentally, is at least partially a function of what the law makes it to be, that, notwithstanding the obtrusiveness of increasingly deliberate political guidance of the market economy, there has been and is a vast and neglected realm of hitherto generally unobtrusive legal participation, and that much of it lies behind what is nominally seen (and studied by economists and extolled by ideologists) as simple private economic activity. Indeed, he argued in this connection that legal coercion is often and largely unrecognized in the status quo and that legal participation is both ubiquitous and inevitable. Moreover, he traced how the structure of mutual coercion is in part a function of law, including, specifically, that inequality in the asymmetrical system of mutual coercion is a partial function of law. He thus inferred that not only are resource allocation and income distribution a function of mutual coercion, but also, since mutual coercion is a partial function of law, that resource allocation and income distribution are a partial function of law, quite aside from whatever role(s) is attributed to the market. Furthermore, having argued that the results of the operation of the market are a partial function of the operation of the legal system, he inquired into the problem of the economic interest groups using the legal system (government) for the attainment of their own objectives, and elicited, from both experience and analysis a principle of the use or control of government. In other words, if government or legal activity is ubiquitous and inevitable, i.e., if government is available for use, the critical question becomes that of which interests will use government or will be supported by it. Finally, Hale argued that the basic substance of legal-economic interrelations, is a matter of policy, contrary to philosophies and ideologies and interest group rationalizations that pretend or would have it seen as precluded or given and final—that that “infernal arbitrariness of choice” is not only truly ineluctable, but is the basic characteristic of legal-economic affairs. Ergo, who chooses? Stated differently but to the same effect, the system of interrelations between legal and market processes is an open-ended general equilibrium system: the economy is a partial function of law and the legal process is itself a partial function of economic use. The structure and operation of private government is partially a function of the structure and operation of public or official government, and, vice versa, official government is an object of use by private government.

A. *The Economy as a Function of Law*

It is an interesting phenomenon that those who are libertarians and contemplate the market as the primary device to achieve libertarian goals,

through reliance on the market as a substitute for and check upon government, tend to denigrate government action involving change (or certain changes) and, more important here, to ignore the fundamental legal-governmental involvements in the existing scheme of things, including the market. Whereas, those who are libertarian and contemplate government as a device—perhaps the primary device—to achieve libertarian goals, through the use of government as a check on private power, tend to see in government a panacea for problems they want corrected and, more important here, to emphasize the fundamental legal-governmental involvements in the existing scheme of things, including the market. What the former obscure, the latter focus upon—fundamental and already existing legal involvement—and what the former denigrate, the latter obscure—the use of government, ergo, the question of who is to use government. But a purely positive analysis, if that be possible, would have to recognize and work with the facts, and the facts, Hale's positive analysis maintains, include fundamental legal involvement in the system of economic coercion. (As will be seen below, Hale was quite aware that government was not to be considered an independent or external force; that is, that the question of who uses government had to be squarely faced. He did not see government as *deus ex machina*.) *Coercion and Distribution*, the first really major article by Hale which developed his legal-economic theories, did not just attempt to demonstrate that coercion, and distribution as a function of coercion existed in a supposedly noncoercive state, but that the very structure of mutual coercion, as well as its outcomes, are a function of government action. In it, moreover, Hale was trying to be positivistic; thus, he wrote the editor of *Political Science Quarterly*: "Perhaps it may help to clarify some of the discussion about 'coercion,' and perhaps not. It doesn't seem to me particularly 'radical,' whatever that term may mean. At least one could accept all its conclusions and reconcile them with a plutocratic system."³¹¹

It was an implication of laissez-faire, to which Hale was objecting, namely, the implication that the economy could exist without government and that absent certain improper government activities there would be laissez-faire. This implication, which was typically drawn even when it was stipulated that government would protect property, Hale saw as obscuring the fundamental participation by government in economic affairs, and obscuring also the question of who would use government for which purposes, which is also the question of whose property rights would government secure. It was his view that laissez-faire erred in taking into account only certain aspects of government as government, and not others, which would, by taking the latter for granted, allow a court to conclude that a statute was unconstitutional by "observing only those aspects of liberty which are struck down by the statute, remaining

311. Letter from R.L. Hale to P.T. Moon, Sept. 4, 1923, in Hale Papers, Folder 86. See also letter from R.L. Hale to L.L. Fuller, Dec. 24, 1954, at 6-9, in Hale Papers, Folder 76.

blind to those aspects of it which are enlarged,³¹² when in fact both aspects of liberty are antecedently already, at least in part, a function of government. Laissez-faire does not mean no government, but really governmental indifference to the effects of artificial (meaning artifactual) coercive restraints partly grounded in government itself.³¹³

1. THE NECESSITY AND UBIQUITY OF GOVERNMENT (LEGAL) ACTION

What Hale first insisted upon is the fact of the almost universal failure to acknowledge the extant economic role of government, with respect to both its ubiquity and its necessity. In the so-called free market economy, he said, there is "more coercion, and government and law . . . [playing] a more significant part, than is generally realized."³¹⁴ Such a situation "is not governmental laissez-faire, though conventionally described as such."³¹⁵ In other words, while certain freedoms (volitional freedom elements) are in fact both determined and curtailed by law, they are not seen as such. Certain actions, such as the coercion exercised through the law of property, are so taken for granted that we do not see them for what they are: government per se. "We're so used to this restraint on our liberty that we are hardly conscious of its existence. And if it is called to our attention we complacently think it applies to us all equally."³¹⁶ But the role of government is vast even under a theoretical laissez-faire regime, and, as will be seen below, it does not and cannot apply to all equally. To overcome the neglect of the fact of the actual economic role of government was long one of Hale's motivations in his legal-economic work.

The thrust of his affirmative argument, then, is the ubiquity and necessity of government or legal action. It was precisely this point, it will be remembered, for which Stone and Cohen cited Hale.³¹⁷ As Rose, who quoted Stone on Hale, put it, *Freedom Through Law* was the "full statement of this theory of law as the activating principle of our economy . . ."³¹⁸ This emphasis is a leitmotif of all of Hale's writings on legal economics: "As a result of governmental and private coercion under what is mistakenly called *laissez faire*, the economic liberty of some is curtailed to the advantage of others, while the economic liberty of all is curtailed in some degree."³¹⁹ "[T]he courts have been blind to the fact that much of the private power over others is in fact delegated by the state, and that all of it is 'sanctioned' in the sense of being permitted. This power permeates the entire economic system . . ."³²⁰

312. *Labor Legislation as an Enlargement of Individual Liberty*, *supra* note 80, at 155.

313. Hale Papers, Folder 39-26 at 2. See also *id.* 90-4 at 1-2.

314. *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 603.

315. Hale Papers, Folder 91-2 at b.

316. *Id.* 56-2 at 2.

317. See text at notes 15-17 *supra*.

318. Rose, *supra* note 15, at 958.

319. *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 626.

Private activity thus determines largely the course of economic life. Our individual aptitudes, energies and tastes have much to do with the economic role which each of us plays, and with the shaping of the economic environment which surrounds us. But they are not the sole determining factors. Even were the government to confine its functions to those which Adam Smith would have it perform, the economic activity of private individuals would still be largely determined by government. Private individuals act, in their bargaining, within the limits set by law, as well as those set by other private individuals. The government's function of protecting property serves to delegate power to the owners to bargain more effectively with others. Were the result merely to enable each to withhold the products of his own labor, or those which other producers had transferred to him in return for his services, thus enabling him to acquire the equivalent in value of what he had produced, even then it would be by virtue of government that he would be able to acquire this equivalent. Government would be pursuing a definite economic policy of distributing wealth according to the value of each person's activities, and rejecting alternative policies of distributing it according to sacrifice or according to needs. But the protection of property rights—the delegation of the power to withhold material wealth from others—is not confined to rights in things which the owner has himself produced or acquired by exchange from those who have produced them. Property rights are protected in things which no one at all has produced, such as land and natural resources, and in things whose producers are no longer living. One who acquires property by inheritance . . . does not acquire the property in exchange for the products of his own activities. In extending property rights to land and to the things whose former owners have died, the law is pursuing a different economic policy from that of distributing wealth to those who have produced its equivalent in value. Whatever policies the law pursues in deciding how land shall originally pass into private ownership, or what disposition shall be made of the property of the dead, will have a determining effect on the future course of private bargaining. For the law is dealing to the private players the hands with which they are to proceed with the game of bargaining. Yet, unless all land is to be publicly owned, and all property to go to the state when the owner dies, the state must perforce exercise this significant influence in economic affairs. And if all land and all the property of decedents *were* to pass to the state, the state would exercise a still more significant influence.³²¹

In enforcing contract and property rights the state is restricting the liberty of those who have incurred contractual

320. *Force and the State*, *supra* note 56, at 199.

321. *LEGAL FACTORS*, *supra* note 11, at 656.

obligations and of nonowners. When the owners are in a position to require nonowners to accept conditions as the price of obtaining permission to use the property in question, it is the state that is enforcing compliance, by threatening to continue to forbid the use of the property unless the owner's terms are met. When the state threatens to withhold other privileges unless its own terms are met, its enforcement of the terms by this threat is sometimes recognized as state compulsion, subject to the limitations of the Fourteenth Amendment—as in those cases in which it has been stated that a state may not condition the grant of a privilege on “the relinquishment of a constitutional right.” It is just as much governmental action when the conditions are formulated by a private owner, to whom the state, in the routine enforcement of property rights, has delegated the power to formulate them.

Only in extreme cases, however, does the Supreme Court recognize the role played by the state. If that role were fully recognized, the dogma of the nondelegability of legislative power would have to be overhauled. So, too, would the dogma of unconstitutional conditions; for owners can frequently insist that others, as a condition of acquiring or using property, must pay them money, or render them services, or do other acts which the state could not constitutionally compel them to do by direct sanctions. To hold such state implementation of property rights unconstitutional would leave little of the whole system of bargaining on which we largely rely, both for calling forth the efforts essential for the collective production of goods and for each individual's acquisition of such liberty as he may attain to consume material goods once they have been produced.³²²

These long excerpts hopefully show the subtleties of Hale's argument. The concept of “state action,”³²³ for example, is but an emanation of Hale's more general analysis of the legal bases of the economic system. The line between private and public may well be nonexistent except in the imagination nurtured by ideology, interest, and habit.

Government, or the legal process broadly contemplated as a form of social control, is thus necessary and inevitable. “While governments can shut their eyes to the consequences, they cannot avoid meddling with economic matters.”³²⁴ Whether it is through taxation³²⁵ or through expenditures,³²⁶ government cannot avoid an economic influence. But even more fundamental is the role of government in structuring the distribu-

322. FREEDOM THROUGH LAW, *supra* note 10, at 380.

323. *Id.* at 368.

324. *Political and Economic Review*, 8 A.B.A.J. 638 (Oct. 1922).

325. Hale Papers, Folder 59-1 at 4-5; LEGAL FACTORS, *supra* note 11, at 426, 436, 437; FREEDOM THROUGH LAW, *supra* note 10, at 239.

326. Letter from R.L. Hale to L.L. Fuller, Dec. 24, 1954, at 9-10, in Hale Papers, Folder 76.

tion of private power. It is a "common mistake," wrote Hale to suppose that the ongoing

statutory restrictions on property rights constitute the essence of the relation of government to property and industry. Far more fundamental is the relation which government bears to industry even in the absence of these restrictions. The right of property is itself a product of government activity in restraining the activities of non-owners³²⁷

Such statutory restriction also means expansion of someone else's freedom; but more basic is the fact that government is not thereby intruding into a situation in which it had hitherto been absent, but rather, it had been involved already and is now only changing the interests which it is supporting.³²⁸ As Hale saw it, "the government is accountable for the economic relations between groups, no matter what it does. Its rules, the rules of law, determine who owns what."³²⁹ Of the person who pleads that the laws of economic life—e.g., supply and demand—should be allowed to work unhampered by government, Hale asked:

[W]hat is this law of supply and demand? Is it not a description of how prices are fixed in the process of exchange? And what, strictly speaking, are exchanged? Legal titles to land and chattels, as a rule. And to say I have legal title to a thing is but a short way of saying that the law stands ready, at my initiative, to interfere with anyone else who touches that thing, but not with me. This means government action. How, then,

327. *Id.* at 79.

328. [C]onscious attempts of government to alter the economic pattern have been thought to involve the introduction of coercion into a sphere where complete freedom prevailed before.

This illusion was further fostered by the reasoning of the English classical economists, beginning with Adam Smith in 1776, who sought to establish the conclusion that the most desirable economic results ensued when the government took no steps to modify the results of the bargaining process. The state, in this view, should preserve order, protect property and enforce contracts. But, in hewing to the line of these proper functions, it should let the economic chips fall where they might. They could be counted on, without political guidance, to fall where they would do the most good.

These writers did not observe that in enforcing property rights, the government was in fact intruding into the picture by delegating to the owners power to exact conditions for legal release of the freedom of the nonowners to use the necessities of life. Still less did they observe that even when a man exacted conditions for not withholding his own services, he was exacting them by compulsion, and was thus bringing to bear a power of government derived, not in this case from the political state, but from his own ability to withhold.

Id. 93-1 at 31. While Hale is here correctly reflecting the conventional (and ideological) interpretation of the classical economists, it is not an accurate description of the theory of the classicists themselves. See SAMUELS, *supra* note 28. Indeed, the statement quoted in the text at note 321 *supra* is textual introduction to material from John Stuart Mill's perceptive statement of the role of property and the relation of the state to property rights. See LEGAL FACTORS, *supra* note 11, at 657-60. Hale introduced the Mill material by saying that "[e]ven at the height of Adam Smith's influence, John Stuart Mill . . . was aware that the state must perform functions, and make decisions of economic policy, other than the simple ones contemplated by the advocates of *laissez faire*." *Id.* at 656.

329. Hale Papers, Folder 59-1 at 1.

is it possible for the law of supply and demand to work "unhampered by Government?"³³⁰

We shall see below that the one case which Hale found to be perhaps the most instructive on legal-economic interrelations, *Miller v. Schoene*,³³¹ served to emphasize the basic legal involvement in the structuring of mutual coercion through the legal selection between claimants to private rights. Thus, the "normal" exercise of liberty³³² actually and inevitably involves "wholesale" government participation "in the form of the protection of property [and other] rights."³³³

From this analysis Hale concluded that, given the fact of the already existing and necessary economic role of government, state activity, even state activism, is not *statism*, unless that term is to be used in a grossly misleading way. He was quite insistent that

[t]here is no *a priori* reason for regarding planned governmental intervention in the economic sphere as inimical to economic liberty, or even to that special form of it known as free enterprise. We shall have governmental intervention anyway, even if unplanned, in the form of the enforcement of property rights assigned to different individuals according to legal rules laid down by the government. It is this unplanned governmental intervention which restricts economic liberty so drastically and so unequally at present.³³⁴

He wrote to Lon L. Fuller:

My analysis . . . leads me to conclude that governmental coercion accounts for the distribution of economic freedoms when the government takes no steps to modify the results of the market as well as when it takes such steps. "Statism" is involved in the system misnamed *laissez faire* as much as in a system where economic inequalities are consciously mitigated.³³⁵

Thus, he concluded the first chapter, "Economic Liberty and the State," of *Freedom Through Law* with the argument that "[f]urther state intervention to alter the distribution of rights and liberties, to the advantage of those whose liberty [has been previously] most restricted as a result, in part, of state action cannot be properly described as 'statism' in any obnoxious sense." This is the case, he maintained, even though "[t]here may . . . be good reasons of policy against disturbing" the existing distribution of liberties.³³⁶ As he had said in *Coercion*

330. *Political and Economic Review*, 8 A.B.A.J. 707 (Nov. 1922).

331. 276 U.S. 272 (1928).

332. *Labor Legislation as an Enlargement of Individual Liberty*, *supra* note 80, at 156.

333. *Economic Theory and the Statesman*, *supra* note 38, at 224.

334. *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 628.

335. Letter from R.L. Hale to L.L. Fuller, Dec. 24, 1954, at 13, in Hale Papers, Folder 76.

336. *FREEDOM THROUGH LAW*, *supra* note 10, at 12.

and *Distribution* three decades earlier, changing the distribution of rights and liberties

would neither add to nor subtract from the constraint which is exercised with the aid of government. It would merely transfer the constraining power to a different set of persons. It might result in greater or in less actual power of free initiative all round, but this sort of freedom is not to be confused with the "freedom" which means absence of governmental constraint.³³⁷

As he had written in some notes, "[t]o get perspective, we must see the effect of these [changes] in [the] context of preexisting restraints, legal and extralegal."³³⁸ It is on reasoning such as this that he based his argument, a blend of positive and normative reasoning, that

[t]he only appropriate safeguards against abuse of private governing power would be intervention of the recognized *political* state in the *economic* sphere. It is intervention by the political state that largely accounts for the governing power of private rulers in the first place. Further intervention might curb abuses of their power, if it could be so devised as not to result in worse ones.³³⁹

2. THE SYSTEM OF MUTUAL COERCION AS A FUNCTION OF LAW

Hale's next major theorem on the economy as a function of law has been, of necessity, anticipated above quite frequently, and is directly implicit in his argument that government is necessary and ubiquitous because of its fundamental involvement in the adjudication and other determination of private rights. "It assigns, as well as enforces, legal rights."³⁴⁰ Inasmuch as these private legal rights constitute no small part of the wherewithall with which people engage in mutual coercion, Hale maintained that the actual system and structure of mutual coercion is a direct, albeit partial, function of the legal system. It is, indeed, precisely because the structure of mutual coercion *is* a function of law, that Hale affirmed the absence of any descriptive accuracy in the laissez-faire ideology and asserted the importance of studying directly—and not taking for granted or obscuring—the interests and coercive capacities supported by law. While many individuals' position in the market is conspicuously a function of their energy and enterprise, as well as their good fortune, for most people, most of the time, their market position of freedom and exposure to the freedom of others depends upon the legal weapons at their disposal. Their coercive capacity for both defensive and offensive purposes is directly tied (however unobtrusively or in

337. *Coercion and Distribution*, *supra* note 21, at 478.

338. Hale Papers, Folder 83-5 at 3.

339. *Id.* 80-16 at 6.

340. Letter from R.L. Hale to L.L. Fuller, Dec. 24, 1954, at 11, in Hale Papers, Folder 76.

ignorance) to the legal actions which they can—or can threaten to—bring successfully.³⁴¹ Productivity in the market (i.e., one's ability to command exchange value in the market) as a function of power, for example, is, thus, very much dependent upon one's legal status.

Throughout all of Hale's legal-economic writings, then, he was preoccupied with the ways in which the structure of mutual coercion, and therefore the structure of volitional freedom, is a product of legal action, both obtrusive and unobtrusive. As Emerson put it, Hale expanded upon "the role played by government in controlling the exercise of conflicting economic liberties through upholding or restricting the use of economic pressures."³⁴² Thus, Hale insisted that "[i]n passing on all . . . questions of labor law the courts frequently determine very delicate questions as to the extent and manner in which the distribution of economic power may be altered through the pressure of bargaining between employers and employees."³⁴³ As with the struggle between labor and capital, so throughout the market, always epitomized by the role of property and contract law, "[o]ne endowed with contractual and property rights of great magnitude has power to force others to conform to some of the conditions he may lay down as the price of relaxing the control his rights give him over their liberty."³⁴⁴

In all such cases, particular legal rights and duties are created at the initiative of private individuals. But they are created (or modified or extinguished) by virtue of the power of mutual coercion (in the form of pre-existing rights) vested by the ordinary law in the two contracting parties. . . . When the rights and privileges which one party possesses are vastly superior in strategic importance to those possessed by the other . . . , the other party may in effect be compelled to submit by contract to almost any terms imposed by the stronger party. That is, the weaker party, whose previous legal restrictions are intolerable, may incur new restrictions as the price of escape from the old.³⁴⁵

This is the case, it will be remembered, not only when markets are so imperfect that the two parties are facing each other directly in a test of strength (as in duopoly), but also in the competitive market where the results of the operation of the market are a function of, and skewed by, the different legal rights and privileges of the parties. Notice, too, the dynamics of Hale's model: given the particular legal rights at any point in time, the mutual coercive capacity allowed thereby enables the

341. Hale, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES*, *supra* note 52, at 670-71.

342. Emerson, *supra* note 12, at 139. *See also* Rose, *supra* note 15, at 958-59; T. Broden, Book Review, 28 *NOTRE DAME L. REV.* 435 (1953) [hereinafter cited as Broden].

343. Hale, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES*, *supra* note 52, at 671.

344. Hale Papers, Folder 91-7 at 11.

345. *Law Making by Unofficial Minorities*, *supra* note 34, at 452.

coercive creation of new rights, which alter the structure of mutual coercion, which further alters the generation of new rights.

a. The System of Mutual Coercion as Asymmetrical:
Inequality as a Function of Law

But if the structure of mutual coercion, and therefore of volitional freedom, is a function of law, it tends to follow that, since those structures are marked by inequality, then the inequality may be at least a partial function of law. Yet this inference flies in the face of the conventional belief or principle that all enjoy legal equality or equality before the law. Hale long maintained that the maxim of equality before the law notwithstanding, inequality *was* produced by law, and not only as an empirical fact, but also as a necessary phenomenon. Equality before the law was to Hale simply impossible. One's contracting position is not free and devoid of status (as in the argument contained in Maine's logic of from status to contract), but rather is a partial function of one's rights and duties, and, while rights impose duties, they are not equally distributed; different individuals have different legal status by virtue of the operation of law. The very first paragraph of *Coercion and Distribution* maintains that

the systems advocated by professed upholders of *laissez-faire* [sic] are in reality permeated with coercive restrictions of individual freedom, and with restrictions, moreover, out of conformity with any formula of "equal opportunity" or of "preserving the equal rights of others." Some sort of coercive restriction of individuals, it is believed, is absolutely unavoidable, and cannot be made to conform to any "Spencerian formula."³⁴⁶

Hale's argument is so important and so eloquently stated as to warrant quotation in detail. It is important, that is, not because the paradigm of mutual coercion depends on it, but because inequality, and particularly inequality as a function of law, is the main empirical characteristic of the extant American, and any, economic system, and because, also, to the extent that this inequality is necessary, the paradigm of mutual coercion is inevitably marked by it.

Hale's argument was elaborately stated in his 1927 essay *Economics and Law*:

It is often asserted that the policy back of the institution of property (hence the policy against any but the most imperatively necessary statutory modifications thereof) is the policy of equality before the law. If this means that all have the same legal rights and duties it is clearly untrue in anything but name,

346. *Coercion and Distribution*, *supra* note 21, at 470.

. . . for the duty not to trespass is a duty the content of which is different for each person. And to say that these different duties of each person are equal is meaningless, unless it be specified in what respect they are equal. Certainly they are not equal in economic significance. They are at most equal in the sense that any one who can show the existence of a right will get the same sort of legal protection as will any one else who can show the existence of the same sort of right in himself. But in that sense of the word, they would remain just as equal after any proposed statutory modification of property as they were before. In fact, it would be difficult to conceive a legal system on which that sort of equality could not be predicated. Even in feudal times any one who could show that he had the rights of a lord could get just as favorable treatment as any one else who could show he had the same rights.

Frequently, however, it is maintained that the unequal property rights are the outcome of the equal application of equal rules governing the acquisition of titles. Any one may acquire property by producing it or by voluntary contractual transfer, it is said; to put statutory restrictions on the terms which persons may incorporate in their contracts would be to disturb this equality of the opportunity to acquire property with all its incidents; it would be to revert from contract to status as the basis of our legal relationships. But the opportunity to acquire property by production is not equal unless all are equally at liberty to produce it; and he who owns no raw materials or apparatus is guilty of trespass if he produces without the consent of some one who does own them. And there never was a time when all had approximately equal property rights in the means of production. As for the opportunity to acquire property by contract, here again there is no equality, since the man who starts with valuable property rights has a greater opportunity to acquire more than does he who starts without much property. There never was a time when all started with the same. . . . Equality before the law, then is not consistent with unequal property rights. And equal property rights would be almost an impossibility. . . . But the social and economic policy which requires the continuance of a large degree of the inequality inherent in our property system does not preclude all modifications of that inequality. In fact, it may require many.³⁴⁷

Hale's basic point, then, is that formal legal equality must be juxtaposed to the actual inequality in the ownership of whatever is given the legal status of property, and that the dynamics of the system involve no time in which such ownership was (say, originally) equally distributed. Opposition to statutory revision of property rights, he argued, "assumes

347. *Economics and Law*, *supra* note 12, at 135-36.

the preexisting common-law equality of personal liberty and property rights. And it is this assumption which breaks down on examination. There is no equality before the law, there never has been, and it is difficult to conceive how there could be."³⁴⁸ "The law of property both restricts and liberates everyone, but not to an equal degree . . ."³⁴⁹ "The benefits conferred by these rights are not equal in any important sense. They are equal at most in the sense that the manner of their enforcement may be the same, if even this is true."³⁵⁰ The critical matter is the unequal distribution of property: "Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others."³⁵¹ "The owner of commercially valuable property gets a much greater degree of 'liberty' than does the propertyless man whose liberty to use that property is denied."³⁵² "The facts are that 'liberty' in the sense of legal restraint is not accorded to all alike and cannot be as long as property is not equally distributed—an obviously impractical condition."³⁵³ Economic inequalities . . . are embodied in unequal legal rights.³⁵⁴ As was often his practice, he stated the argument in terms of employee-employer relations:

In what respect is the "right" of the employee to terminate the employment relationship "equal" to the "right" of the employer to do so? Are they equal in their consequences to the other party? Can the employee, by quitting, inflict as severe a loss on the employer as the employer can inflict on the employee by discharging? If not, do the respective "rights" of employer and employee give them equal control over each other?³⁵⁵

In other words, the right to quit and the right to fire appear symmetrical, but because of unequal legal assignment of property rights, their economic significance is asymmetrical. Again, the argument is elaborated in terms of property and contract rights:

348. *Labor Legislation as an Enlargement of Individual Liberty*, *supra* note 80, at 157. "[E]very person is at the same time an owner of some and a non-owner of other property. Hence the institution of ownership constitutes for everyone both a curtailment of some sort of liberty and an enlargement of some other sort of liberty." *Id.* at 157. But the distribution of ownership is unequal. "Hence, whatever protection the Constitution affords to property serves to protect those who have property . . . though perhaps at the expense of those who have less property." FREEDOM THROUGH LAW, *supra* note 10, at 196.

349. *Labor Legislation as an Enlargement of Individual Liberty*, *supra* note 80, at 157. To say that the law must not materially restrict the normal exercise of personal liberty or property rights except as incidental to some other and paramount object, is, then, a contradiction in terms, if by "normal" is meant "equal," for property rights themselves restrict the equal exercise of personal liberty, including liberty of contract.

Id. at 158.

350. *Id.*

351. *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 627-28.

352. *Political and Economic Review*, 8 A.B.A.J. 752 (Dec. 1922).

353. *Political and Economic Review*, 10 A.B.A.J. 882, 884 (Dec. 1924). See also *id.* at 885.

354. FREEDOM THROUGH LAW, *supra* note 10, at 12.

355. LEGAL FACTORS, *supra* note 11, at 633.

[T]here is not a single income-yielding property right . . . which can be enjoyed on equal terms by *everyone*. To speak of equal rights of property is ridiculous. Is the right of property of some unemployed tramp equal to the right of property of the owner of the La Salle Hotel? If all have equal property rights, why are the courts so occupied with disputes over the title to property?

Perhaps it is meant that all have equal rights to acquire property? But what is the nature of a "right to acquire property?" It is not an enforceable right.³⁵⁶

Thus, he spoke of the "fallacy in the assumption that all . . . have equal rights or equal practical opportunities of acquiring property."³⁵⁷ Hale wrote to John P. Frank:

We don't have equal rights. Each of us has his own unique set of property and contract rights, and they aren't equal in any significant sense. The law permits certain acts to be done by the owner of property, and holds the same acts illegal if done by anyone else; and the law plays a part in assigning the unequal property rights to different persons. I don't see how this can correctly be called equality before the law. The law simply *can't* treat all equally.³⁵⁸

The nuances being subtle, let us examine some further statements on this matter by Hale, even at the risk of further repetition of some points. Notice, for example, the implications he drew from the difference between formal equality and actual inequality, or from *de jure vis-à-vis* *de facto* rights, in terms of abstract *vis-à-vis* concrete rights:

The premise of legal equality . . . [is] in fact fallacious, for legal rights, privileges and duties depend on property rights and these depend on the law. Each person has a legal duty not to infringe any other person's property rights, a privilege to use what he himself owns and a right to exclude everyone else therefrom except on his own terms. These statements, however, are empty abstractions until it is specified to what particular objects the property rights of each attach; when it is so specified the specious equality disappears. . . . The respective legal rights of A and B are equal only in the most formal and empty sense. . . . The ultimate economic position of each person is not so rigidly predetermined at birth as in the feudal system, but the law still imposes vastly unequal handicaps.³⁵⁹

356. *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 212.

357. *Id.* at 213.

358. Letter from R.L. Hale to J.P. Frank, Dec. 8, 1949, at 1, in Hale Papers, Folder 42. See also *FREEDOM THROUGH LAW*, *supra* note 10, at 15; the second chapter is entitled "The Legal Bases of Economic Inequality."

359. Hale, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES*, *supra* note 52, at 667-68.

In the original manuscript of this article, too long for publication in full, the following lines continued this argument:

Many of these legal inequalities serve a useful purpose, as in furnishing incentives to productive activity, useful even to the least favored. But useful or not, it is difficult to see how there can be said to be equality in that part of the law which imposes on each the duty not to infringe the unequal property rights of each of the others.³⁶⁰

Also,

when the law says it is your duty not to use "my" property, or any other property except what is "yours," you cannot tell what is forbidden you until you learn what the law makes "your" property and what it makes the property "of others." Your duty not to take "my" property, and my right not to have you take it, are entirely meaningless unless the law has already apportioned specific property rights to me. . . . Any such complete statements of the respective legal duties and rights of different persons in respect to property would disclose the inequality with which the law applies to different persons. It is only when the law is stated incompletely, as requiring everyone to desist from the unauthorized use of anyone else's property, that the illusion of equality before the law is produced.³⁶¹

Hale drew the further conclusion that since inequality is both inevitable and a function of law, then "[n]o particular set of inequalities . . . can be said to be the necessary result of the existence of private property and of (otherwise) free contract."³⁶² Just as there is no unique Pareto optimum, and just as whatever Pareto optimum emerges will be a partial function of the state of the law,³⁶³

[a]s there is no one set of inequalities that must necessarily flow from property and contract, it cannot be asserted dogmatically that a statutory rearrangement of the existing inequalities will necessarily involve more restriction on liberty and more impairment of property rights than the reverse. It may merely have the effect of weakening the liberty and property of the more favored to strengthen the liberty and property of the less favored.³⁶⁴

Thus, in *Freedom Through Law's* discussion of "the power to restrict one liberty in order to expand another," Hale agreed that it is true that certain

360. Hale Papers, Folder 48-1 at 4-5.

361. *LEGAL FACTORS*, *supra* note 11, at 605.

362. *Labor Legislation as an Enlargement of Individual Liberty*, *supra* note 80, at 160.

363. *Mishan*, *supra* note 102.

364. *Labor Legislation as an Enlargement of Individual Liberty*, *supra* note 80, at 160.

inequalities were the result of the coexistence of "the right of private property and the right of free contract." But they were not the "necessary" or "inevitable" results. Property acquired by government grant or by inheritance is not acquired as a result of freedom of contract. Had government pursued a different policy for the assignment to private ownership of natural resources or the distribution of decedents' estates, the coexistence of private property and freedom of contract would have resulted in quite a different pattern of economic inequalities. Under such circumstances that different pattern would have been quite as "inevitable" a result of private property and freedom of contract, as the present pattern was under existing circumstances.³⁶⁵

This is true not only of land and inheritance, but of all rights enforced by government.

Hale's argument that inequality is a function of law goes much deeper than the stipulation that unequal distribution of property (and other rights) means unequal legal status. There is also the subtle, but vastly important, asymmetry (and therefore inequality) between the respective legal statuses accorded to those with established rights and to those with established duties, or to those with elements of volitional freedom and to those exposed to such elements:

There are many, however, who would alter the bargaining process in this way or in that, in the belief that the market itself can be changed, either directly or indirectly, in such a way that those who are now economically weak may have more freedom from the pressures exerted by the strong, and greater protection for their money or other property from the bargaining power of the strong. When any such belief becomes embodied in legislation, however, we encounter a curious paradox. The legislation gives protection to the liberty and property of some persons against the coercive acts of others. Against such coercion, since it is not recognized as stemming from government, the Constitution by itself affords no protection. But this coercive power of the others is part of the liberty and property which the Constitution does protect against governmental action, and the legislation which curtails it is undeniably governmental action. Therefore, while those who are deprived of liberty or property by the coercive power of other private persons can make no appeal at all to the Constitution for protection, those who deprive them of their liberty or property can invoke it, in the very name of liberty and property, to preserve their power to deprive others of these same things.³⁶⁶

365. FREEDOM THROUGH LAW, *supra* note 10, at 393. The words quoted by Hale are from Justice Pitney's opinion in *Coppage v. Kansas*. See *id.* at 391-92.

366. *Id.* at 132. A similar inequality was found by Hale in the operation of common law on labor-capital relations:

Thus, not only does the assignment of common law rights result in legally protected economic inequality, but also the Constitution reenforces the protection of established rights—to the asymmetrical disadvantage of those whose coercive capacity is thereby injured—in such a way as to further legal and economic inequality. The distribution of coercive capacity is skewed in favor of those whose claims against others are given legal status *first*: their coercive position is protected against governmental and private infringement, while those who are thereby coercively disadvantaged are not similarly protected against them. Those who get that protection first and those who do not have constitutionally unequal protection of their “liberty” and their “property.” Again, it is the particular rights which count and not the “right of property” in the abstract; property rights mean *established* rights, and those have a status in law superior to those not yet recognized—legal advantage. (The state action doctrine would, in Hale’s view, enable the extension of constitutional protection to those rights not yet recognized, because private legal rights are a function of state action, thereby overcoming the problem of whose rights were secured by law first. Indeed, the very fact that they were secured by law first is the effective basis of the invocation of constitutional protection: they are the result of state action. But the problem would inevitably remain as to who would have which rights, which coercive capacity, which freedom and which exposure to the freedom of others. The state action doctrine only enables the broader consideration of claims to relative rights.)

This is a convenient point at which to acknowledge—and all that we can really do here is to acknowledge—the legal materials with which Hale documented his analysis. Most of Hale’s writings in legal economics dealt with legal materials, which is to say that he based his argument that the structure of private power is a function of law (and other arguments) on detailed examinations of common law and constitutional law doctrines and decisions. It is the holdings in these cases which he used to show how, whatever the legal doctrine or constitutional clause invoked or interpreted, there is judicially determined advantage or disadvantage in bargaining position, often under the color of legal equality. Thus, much of *Freedom Through Law* and his other writings, including the collection of materials in *Legal Factors*, are an attempt to substantiate and illustrate his arguments by examining and analyzing such areas as

By refusing to apply the prima facie tort doctrine (the doctrine that intentional infliction of damage is actionable unless justified to non-feasance, by treating the termination of an employment relationship as non-feasance, while treating a combination to terminate it as affirmative conduct, except when the combination is by the officers of a corporation hidden behind the corporate fiction, the law has worked out to put more obstacles in the way of the bargaining power of employees than of employers.

LEGAL FACTORS, *supra* note 11, at 96. This type of subtle intrusion of legal inequality is documented throughout both *FREEDOM THROUGH LAW*, *supra* note 10, and *LEGAL FACTORS*, *supra* note 11. See the following paragraph in the text.

the following: prima facie tort, *damnum absque injuria* and tort law generally, contract impairment, unconstitutional conditions, involuntary servitude, public utility rates, state action, wage and hour legislation (protective labor legislation) and labor relations legislation and law, property rights, privileges and immunities, due process of law (substantive and procedural) and equal protection of the law, the law of combinations, harmful nonfeasance and conspiracies, duress, judicial review, police power (including vis-à-vis eminent domain), nondelegability of legislative power, federalism, and so on. The purpose of this essay is to present Hale's analyses of the economy as a system of power and the legal bases thereof. It is not possible, nor is it desirable, to survey in detail his analyses of common and constitutional law—but his evidentiary materials were primarily those bodies of law, and his theories and arguments were distilled, insofar as they are presented here, from his analyses of those materials.

3. RESOURCE ALLOCATION AND INCOME DISTRIBUTION AS A FUNCTION OF LAW

Another major theorem of Hale's analysis, also already anticipated, is that insofar as resource allocation and income distribution are a function of mutual coercion, and inasmuch as mutual coercion is a partial function of law, then resource allocation and income distribution are a partial function of law. This stands in marked juxtaposition to the mainstream of orthodox economics (though not institutional economics) which, largely taking the legal system as a given, concentrates upon the market element in their determination. More elaborately stated, but still in summary form, Hale's arguments are as follows: that wealth distribution is a partial function of law; that income distribution is a partial function of law, largely because both wealth distribution per se and the structure of mutual coercion (which itself is a partial function of wealth distribution) are generally a partial function of law; and that the allocation of resources is also a partial function of law, including therein the ideas that relative costs, risk distribution and the relative realization of economic interests are all a partial function of the law. In sum, if the basic economic problems of resource allocation and income distribution (Hale had almost nothing to say on the third problem of the determination of aggregate income, or macroeconomics) are resolved in a market economy *through* the price mechanism, the resolutions are partially *what* they are—and in Hale's view this meant in no small part, however indirect—because of the state of the law. Although most of Hale's writings dealt with legal materials and commentators, the neglect of the role of the law in these matters by orthodox economic theory, attributable to a narrow definition of the scope of relevant variables and to the varying

ideological component of orthodox economic theory,³⁶⁷ was quite evident to him.

No small amount of the foregoing has been to the effect that, in the system of bargaining which characterizes the market economy, "all . . . [the] pulling and hauling by various people to whom the law gives power accounts for the distribution of wealth among people."³⁶⁸ Hale put it more elaborately but still succinctly:

Most of our present distribution of wealth is the result of the relative power, latent or active, of various individuals and groups. The power itself is derived in part from the law's more or less blind and haphazard distribution of favors and burdens, in the shape of powers over others and obligations to others.³⁶⁹

Thus, as Hale wrote in a manuscript dating from 1914-1915, "[o]ur whole distribution of wealth is quite obviously the result of our laws—not solely of the laws, but such that if the laws were different so would also be the distribution."³⁷⁰ His reasoning was in large part that since much or most of wealth has market value because of the state's assignment and enforcement of property (and other) rights, then it is perfectly obvious that the distribution of wealth is a partial function of the law, e.g., of property, both in general and in detail. Wealth is (or tends to be) power; and wealth is a matter of property and other rights, which are a function of law.³⁷¹

367. "Thoroughgoing *laissez-faire* has long since been repudiated by economists, but economic theory of the present day has developed out of the older *laissez-faire* theory." *Economic Theory and the Statesman*, *supra* note 38, at 224.

368. Hale Papers 59-1 at 3-4. See also FREEDOM THROUGH LAW, *supra* note 10, at ch. 2; *Economics and Law*, *supra* note 12, at 137-39; Letter from R.L. Hale, to M. Hale, July 29, 1913, at 5, in Hale Papers, not in folder; *Political and Economic Review*, 8 A.B.A.J. 638 (Oct. 1922).

369. *Law Making by Unofficial Minorities*, *supra* note 34, at 455. In his review of Hale's FREEDOM THROUGH LAW, *supra* note 10, Harvey C. Mansfield wrote that, according to Hale, "the state is the necessary partner in the establishment of every individual in his unique and unequal estate, rich or poor, and in every decision by which he comes to terms with those who can help him to what he wants or those who can get what they want by driving him toward what he seeks to avoid. . . ." Mansfield, Book Review, 287 THE ANNALS 189 (May 1953).

370. Hale Papers, Folder 49-1 at 1.

371. Hale concluded the second chapter of *Freedom Through Law*, on the legal bases of inequality, with the mandate that "[s]ince inequality in wealth results from inequalities in the coercive bargaining power of the different members of the community and since the bargaining power of each individual is conditioned by his legal rights and duties as defined by the courts, it becomes pertinent to inquire into the protection which the courts afford to one man's economic liberty against the coercive power of other individuals or of the government—whether in proclaiming rules of the common law or in giving authoritative interpretation to the provisions of the Constitution." FREEDOM THROUGH LAW, *supra* note 10, at 37. The second part of *Freedom Through Law* thus surveys and analyzes common law adjustments of conflicting economic liberties; the third part, the protection which the Constitution affords to economic liberty and equality; and the fourth part, political processes for adjusting conflicting liberties. See also *id.*, at chs. 5, 10, *passim*; Emerson, *supra* note 12, at 139. Thirty years earlier, Hale had written: "Ownership is an indirect method whereby

With the distribution of wealth a partial function of law and with the structure of mutual coercion a function of law, then it also follows that the distribution of income is a partial function of law. Income in the market is derived from prices received from the sale of goods and services, and "the bargaining power to exact a price for the use of property stems from the state's restriction of the liberty of nonowners to make unauthorized use of the property."³⁷² This is true not only of income from property, but also of income from labor. Generalizing, Hale stated that "some men have law-given rights over others which enable them to collect large incomes from the community, others have law-given rights which enable them to collect little or nothing at all."³⁷³ As has been discussed in considerable detail earlier, one's ability to derive income in the market is a function of one's coercive capacity, and that varies between the owner and the nonowner, between the large and the small owner, and from circumstance to circumstance, including market conditions. Such is the case not only in general, but in the details of the legal-rights-based capacity to exert coercive pressure in and across particular markets, for, it is "[t]hese pressures . . . [which] enable each person to obtain such share as he can of the goods produced by the industrial system."³⁷⁴ It is the main argument of several of Hale's writings that distribution is a partial function of coercion and coercion a partial function of law. With legal inequality as inevitable, and with property ownership actually unequal, it was not surprising to Hale that the distribution of income is unequal.

Not only is the distribution of income, and of wealth, a partial function of law but so are the allocation of resources and the structure of production. Relative scarcity Hale saw to be a partial function of relative bargaining power and, in turn, a partial function of law.³⁷⁵ Scarcity conditions are partially conditioned by law, such that

[w]hile the same legal and constitutional arrangements will produce varying economic patterns if people's tastes and abilities vary, the fact remains that the powers of compulsion which

the government coerces some to yield an income to the owners." *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 214.

372. FREEDOM THROUGH LAW, *supra* note 10, at 295. "But it is government which makes payment of a price for an article compulsory, in precisely the same way in which it makes payment of a tax levied on the consumer [compulsory]." *Id.* at 294.

373. *Economic Theory and the Statesman*, *supra* note 38, at 215. "The income derived by the company which charges the price above cost, or for that matter the income collected by any property owner, is not something created by that owner, but something squeezed out of others by a law-made pressure." *Id.* "It is through the mechanism of the legal restraints on the activities of non-owners that [the owner] is enabled to collect the income." *Economic Theory and the Statesman*, *supra* note 38, at 52. See also FREEDOM THROUGH LAW, *supra* note 10, at 19; *Value and Vested Rights*, *supra* note 87; *Political and Economic Review*, 8 A.B.A.J. at 707, 752, 753 (1922); Hale Papers, Folders 24-5 at 1 & 83-4.

374. *Economics and Law*, *supra* note 12, at 138.

375. FREEDOM THROUGH LAW, *supra* note 10, at 8, 9; *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 625.

the law grants or permits to each individual have a determining effect likewise on the pattern, which would be different if the legal arrangements were different, even though the tastes and abilities of the people were the same.³⁷⁶

No clearer statement of the general equilibrium type relationships between some of the variables encompassed within orthodox microeconomic theory and the variables contemplated by Hale in his analysis of the legal bases of economic power could be expected.³⁷⁷ Elsewhere, Hale considered that relative business costs are a partial function of law³⁷⁸ (some of this insight must have been gleaned from his analysis of public utilities), and the distribution of risk he also found dependent on the law.³⁷⁹ Indeed, his discussions of tort law are replete with implications drawn as to how legal limits on the liberty or power to visit injury extend throughout the realm of economic affairs,³⁸⁰ from buyer-seller relations in general to labor-capital conflict in particular.

Hale's argument is stated in a broader context in textual material in the *Legal Factors*:

Private activity thus determines largely the course of economic life. Our individual aptitudes, energies and tastes have much to do with the economic role which each of us plays, and with the shaping of the economic environment which surrounds us. But they are not the sole determining factors. Even were the government to confine its functions to those which Adam Smith would have it perform, the economic activity of private individuals would still be largely determined by government. Private individuals act, in their bargaining, within the limits set by law, as well as those set by other private individuals.³⁸¹

The market allocates resources in response to the interplay between volitional freedoms based on relative power or mutual coercion. It is more or less customary to think in terms of dollar votes in the market; in this regard Hale wrote: "The owner of every dollar has, *by virtue of his law-created right of ownership*, a certain amount of influence over the channels into which industry shall flow."³⁸² Consumer sovereignty,

376. Hale Papers, Folder 93-1 at 30.

377. "[T]he situation is far more complicated than has generally been assumed" in economics. *Economic Theory and the Statesman*, *supra* note 38, at 225. See *Mishan*, *supra* note 102.

378. *Value and Vested Rights*, *supra* note 87, at 524-27; *Economic Theory and the Statesman*, *supra* note 38, at 215-16.

379. FREEDOM THROUGH LAW, *supra* note 10, at 53, 100 *passim*; *Economics and Law*, *supra* note 12, at 132.

380. See FREEDOM THROUGH LAW, *supra* note 10 (especially chs. 5, 9, 10, 11); LEGAL FACTORS, *supra* note 11, at 18, 621, 752; *Value and Vested Rights*, *supra* note 87, at 526; Broden, *supra* note 342, at 439.

381. LEGAL FACTORS, *supra* note 11, at 656.

382. *Coercion and Distribution*, *supra* note 21, at 490 (emphasis added). "It must be obvious that the individuals with the most dollars exercise the most control over the

then, is but part of the picture: Consumers are sovereign only to the extent that the legal authority permits or enforces between them. The Smithian analysis of the play of self-interest requires a supplementary legal-economic analysis of the legal factors governing the relative possibilities which different individuals have to give effect to, and thereby realize their self-interest. The realization of economic interests in the market depends upon, in part, the relative inhibitions and promotions produced by the law.⁸⁸³ The market, and its allocation of resources and distribution of income, operates within the evolving set of legal rights, duties, privileges, immunities, etc., and in no minor way gives effect to the power based thereon.

B. *Principle of the Use of Government*

A further thrust of Hale's analysis arises from his demonstration that the issue with respect to government is not whether government participates in the system of mutual coercion or not, but rather *which* or *whose* interests it will support, whether the interests will be alpha's or beta's, whether they will be broadly or narrowly based, and whether the interests already supported or the new interests claiming legal support are favored. Given that government will inevitably and ubiquitously play such a structuring role, Hale's next theorem, stated in the form of a question is: Who will use government as a source, ratifier or general supporter or reinforcer of private coercive power? In other words, every economic system inevitably comprises the problem of control of the government. Hale's analysis makes it abundantly clear that the state (government or law) is not something exogenous to economic life, but rather, that law is a dependent as well as independent variable, that the realization of economic interests is a function of government, and that the role of government is also a function of economic interests, that is, of those interests which are able to get into a position to use government.

In 1914 Hale had a lengthy exchange of letters with his brother-in-law, Thomas Reed Powell, already on the faculty of political science at Columbia University, in which they discussed, among other things, Hale's germinating plans for a volume on the political laws of the distribution of wealth.⁸⁸⁴ Powell perceived and articulated to Hale that its

channels. . . . A less pressing need of a rich man will have more influence over the channels than will many a more pressing need of a poor man." *Id.* at 491; *cf. id.* at 492, 493. See also Hale Papers, Folder 59-1 at 3. On the allocation of resources as a function of private property, see *id.* 39-23 at 2 & 59-1 at 6.

383. *Value and Vested Rights*, *supra* note 87, at 524; *Economics and Law*, *supra* note 12, at 131, 133-34.

384. Letter from T.R. Powell to R.L. Hale, Aug. 31, 1914, at 2, in Hale Papers, Folder 61. Earlier Powell wrote,

That is a most interesting subject for a volume which you have outlined. I have often wondered why no one had made an examination of the common law of property and contract from the standpoint of economics. I understand that Ely [see note 31, *supra*] has in preparation a voluminous work on the subject. The

main thrust would be "that the method of distribution is the result of legal and political factors quite as much as the result of bargaining power, or perhaps, to put it more accurately, that a most important element in bargaining power is *control over the politically-made laws of distribution*."³⁸⁵ This is echoed in a letter to Hale from John L. Sweeney a quarter century later, in which Sweeney, having read a manuscript by Hale,³⁸⁶ discussed Hale's theory of the competition for legal rights.³⁸⁷ And this is precisely what Hale had in mind:³⁸⁸ that there is a competition for "control over governmental machinery;"³⁸⁹ that this competition took the form, in part, of a conflict between right and left for the control of government (on which subject he quoted Conant);³⁹⁰ that what was involved was a scramble for the control of government and of the processes of leadership selection in society, whereby superior individuals and classes—superior in terms of the rules imposed by those who get to control government and the leadership selection process itself—[quoting Kenneth Burke] "[came] to the fore and molded the

economists for the most part seem to treat the rules of law which have developed as fixed data, like the need for food and clothing.

Letter from T.R. Powell to R.L. Hale, Aug. 1, 1914, at 1, in Hale Papers, Folder 61. In the later letter, Powell also wrote, "Perhaps your point is that the economists fail to make clear the coercive element in the system of distribution in existence—with which criticism of them I agree." Letter from T.R. Powell to R.L. Hale, Aug. 31, 1914, at 3, in Hale Papers, Folder 61. *Coercion and Distribution*, note 21 *supra*, nominally a review of Carver, allowed exposition to ideas developed at least a decade earlier.

385. Letter from T.R. Powell to R.L. Hale, Aug. 1, 1914, at 1, in Hale Papers, Folder 61 (emphasis added).

386. Hale Papers, Folder 80-4.

387. Letter from J.L. Sweeney to R.L. Hale, Nov. 25, 1940, in Hale Papers, Folder 75.

388. The argument that since mutual coercion is a function of law, differential coercive capacity depends upon the use of the state by the one party against the other, is most subtly expressed in the following:

Under such extreme circumstances it is literally true that the company can make rules which the inhabitants will be forced by the governmental authorities to obey—rules which, in their legal effects, are indistinguishable from governmental acts. Under extreme circumstances of an opposite sort, a labor union might be able, quite lawfully, to perform what in effect are governmental acts. It is not a case of plural sovereignty, for the stronger party is not using *his own* force, but is relying on the courts and other state agencies, first to exert pressure on the weaker to submit "voluntarily" to his terms, and then to enforce those terms after submission.

Law Making by Unofficial Minorities, *supra* note 34, at 453. In a letter to the editor of the Boston Journal, Hale wrote:

The I.W.W. is doubtless wrong in its underlying philosophy; but the reason it has such a hold is because it can point to so many instances of lawlessness on the part of employers in time of strikes and can insist that as the employers and those government officials who are subservient to them do not obey the law in dealing with strikers, there is no reason why strikers should be handicapped by obeying it.

The only way to combat this argument is by protesting vigorously against any lawlessness being used against strikers.

Letter from R.L. Hale to Editor of the Boston Journal, May 26, 1913, at 1, in Hale Papers, Folder 63. A third of a century later, using language voiced by Franklin D. Roosevelt, Hale wrote that a "more complete analysis" of the interrelation between legal and economic processes "will reveal that the power of the 'economic royalists' springs from an unequal distribution of political power . . ." Hale Papers, Folder 80-5 at 1.

389. *Coercion and Distribution*, *supra* note 21, at 493.

390. LEGAL FACTORS, *supra* note 11, at 626.

policies of the state to their liking. And this class would so guide the educative, legislative and constabulary functions as to perpetuate their privileges."³⁹¹ The critical problem of democratic theory is whether the people were in fact to rule or whether an elite would do so.³⁹² Thus, speaking from the vantage point of a long-established American family, Hale wrote: "We have classes all right (even if some individuals manage to shift from one class to another), but *we like to kid ourselves with the thought that we of the favored class don't want anything from the government except to be let alone.*"³⁹³ It is the favored class, of course, which has the primary benefits of government support, benefits which are considered a part of the normal and proper state of affairs. Hale quoted Morris R. Cohen:

When fervid patriots denounce free seeds to farmers as socialism and see no objection to subsidies to ship owners, when individualism is held compatible with high protective tariffs but not with minimum wage legislation, it is as clear as a pike staff that the popular use of the words individualism and socialism denotes nothing beyond an emotional explosion of approval or disapproval, depending on whose ox is gored.³⁹⁴

The sole chapter in the concluding part of *Freedom Through Law* is entitled "Economic Liberty in a Democracy" and shows the impact of many Legal Factors course outlines, almost all of which have a section on the control of government.³⁹⁵ On the very first page of the first chapter, entitled "Economic Liberty and the State," Hale pointed to the great

391. *Id.* at 615.

392. FREEDOM THROUGH LAW, *supra* note 10, at 543-44, 549; Broden, *supra* note 342, at 437 n.11. Thus, Hale wrote: "Much depends upon the persons who control the government and their motives." FREEDOM THROUGH LAW, *supra* note 10, at 541. Some years earlier, in an outline entitled "The Coercive Framework of Economic Society," the sixth and last section went as follows:

VI. FACTORS MOTIVATING CONDUCT OF GOVERNING GROUPS

- A. Self-interest—Corruption, Ambition etc.
- B. Knowledge or Ignorance.
 - 1. Experts in government service.
 - 2. Familiarity with local needs or local law.
 - 3. Familiarity with more remote factors in problems.
- C. Traditions, Prejudices and Ideals.
 - 1. Sacred writings and doctrines.
 - 2. Discriminatory loyalties.
 - a. To party or political machine—gratitude.
 - b. To class or race.
 - c. To local or national interests in preference to more distant ones.
- D. Ideal of Impartiality and Equality Before the Law.
 - 1. Statements of the ideal.
 - 2. Incompatibility with existing facts.
 - 3. Question of desirability of the idea.
- E. Non-Discriminatory Regard for Human Welfare.
- F. Concern With General Quality of Civilization.

Hale Papers, Folder 39-12 at 5.

393. Hale Papers, Folder 56-2 at 1 (emphasis added).

394. *Political and Economic Review*, 9 A.B.A.J. 329 (May 1923). See also FREEDOM THROUGH LAW, *supra* note 10, at 320.

395. Hale Papers, Folder 47.

dilemma of the state: "[W]hile the state is capable of destroying our liberties it is also essential to their very existence."³⁹⁶ The problem is, in no small part, a question of who will use government: Will it serve the already strong or will it restrain the already strong in the protection of the weak? Hale's normative injunction was that. "[W]e must rely on the state to restrain powerful private individuals from unduly restricting the liberty of the weaker ones."³⁹⁷

1. POLITICAL EXTERNALITIES

One further aspect of Hale's analysis of the use of the state involves what we may call "political externalities"—consequences, either beneficial or adverse, visited upon people other than the political decision makers. This concept, though he did not so label it, is directly derived from his basic coercion analysis, discussed earlier: coercion has to do with the impact of behavior and choices of some individuals upon others, i.e., the creation of externalities. The structure and substance of the externalities coercively visited in any particular case will depend upon (a) the total structure of decision-making, i.e., who is within the jurisdiction of the acting government, as well as the structure of decision-making within government, i.e., who is using government, and (b) the actual state of the law, i.e., the actions taken by the state together with their distinctive impact. The earlier discussion of private and public governments suggests that the scope of political externalities extends beyond the domain of official government, and includes the externalities generated by private governments, both generally and as concentrated private economic power (which enables the inclusion of the conventionally understood private-sector externalities within Hale's more general analysis).

The problem of the use of government arises, then, in two ways: first, with respect to who within the governmental jurisdiction uses government to who's gain or detriment within the jurisdiction in question, and, second, with respect to the visitation of coercive impact or political externalities on those outside of the governmental jurisdiction. Expressed differently, the problem arises, first, with respect to the impact any decision-making organization or individual has on others, and second, with respect to who within any decision-making organization uses it, with impact on others in and/or out of it. In still others words, externalities are generated within any decision-making organization (e.g., government, private or public) by the decision-making power structure therein, with some externalities visited upon others within the organization and some externalities visited upon others without it.

Thus the basic problem of political or constitutional theory arises: *if* government should be responsive to those who are *affected* by it, not

396. FREEDOM THROUGH LAW, *supra* note 10, at 3.

397. *Id.*

just those who happen to "comprise" it (i.e., either the population under its jurisdiction or the formal owners if a corporation *or* the status quo power structure, either official or unofficial), then the fact of political externalities implies potential extension of either representation of interests in government and/or of area of jurisdiction. This extension does not necessarily expand the authority of the government thereof (though the possibility of such expansionism exists) but internalizes the consideration of the political externalities which it creates, in effect (presumably) to check the authority of the hitherto status quo, imperfectly representative, government. This logic is manifest in many reform movements; the classic historical example is political democracy, and contemporary examples include black power, student power, and the attempts to secure consumer or "public" representation on boards of directors of corporations. Hale's main domestic example was industrial democracy: "[T]he power to govern a plant is the power to affect in some degree the interests of outsiders, who cannot very well be given representation in the government of the plant."³⁹⁸

Of particular interest to Hale was the problem of international political externalities. He pointed to international conflicts of interests³⁹⁹ in a nation-state system in which "we have competing claims to jurisdiction, or to partial jurisdiction, by bodies none of which are perfectly representative."⁴⁰⁰ In numerous outlines he listed the extraterritorial effects of government boundaries, illustrating the economic significance of political boundaries and the impingement upon outside, unrepresented, interests.⁴⁰¹ He wrote:

National sovereignty means the power of any government to impair the interests of foreigners (by changes in the tariff, in shipping rates, in property rights, etc.), limited only by fear that foreign governments will retaliate. The practice of coercion and counter-coercion frequently produces unsatisfactory results, even when it does not lead to war.⁴⁰²

Decisions about sugar tariffs, for example, involving the protection of the American sugar beet industry against the importation of Cuban sugar (Hale was writing this in 1922-23), involved choices made "by a body"—the American Congress—"which very doubtfully represented the interests of the American consumers, and which did not even purport to represent the interests of Cubans."⁴⁰³ The international system of coercion and counter coercion is but a more-or-less special case of the general system of mutual coercion in human society. The coercion may

398. *Political and Economic Review*, 8 A.B.A.J. 707, 708 (Nov. 1922).

399. *Economics and Law*, *supra* note 12, at 140-42.

400. *Political and Economic Review*, 10 A.B.A.J. 882, 886 (Dec. 1924).

401. Hale Papers, Folders 30-5 at 5-6, 36-4 at 5-6, 39-23 at 5-7, & 57-4 at 3-4.

402. *Political and Economic Review*, 9 A.B.A.J. 107, 108 (Feb. 1923).

403. *Id.*

be unconditional, in which case the externally imposed adversity cannot be prevented through payment of a price, or it may be conditional, in which case the one party may be able to buy off the other, choosing the "less irksome of . . . [two] restraints, . . . parting with the liberty which is less important to it."⁴⁰⁴ The payment may be determined through a market for goods and services or through a political negotiating market; in both cases it is a function of relative coercive capacity.

As suggested above, the presence of externalities, political and otherwise, will tend to be a function of the structure of decision-making, that is, of who is within the jurisdiction and representational scope of the acting government or decision-making group. Here Hale specified in an outline the problem of obstacles to control when government fails to represent many of those affected,⁴⁰⁵ whether formally within its jurisdiction or not. Elsewhere he thought that "true democracy as to such affairs is unattainable until the remote time" when jurisdictions are perfectly representative, this logically requiring—in international affairs—"an international legislative body."⁴⁰⁶ But, as also suggested above, and generic to much of Hale's analysis, political externalities are a function of the state of the law, that is, of the particular actions taken by the state having an impact on the visitation of injury—which is to say all state actions, since all promote the freedom (coercive capacity, ergo injury-visiting power) of some and restrict the freedom of others. In another outline, Hale indicated examples of costs privately imposed upon others which depend upon the state of the law: oil and water laws, quasi-nuisances, high buildings and congestion, physical injuries to workmen (workmen's compensation laws) and to outsiders, etc.⁴⁰⁷ In this matter Hale anticipated by many years a recent suggestion that "externalities ought to be defined as discrepancies between alternative legal and social arrangements."⁴⁰⁸

In sum, the problem of political externalities means that the question of the use of government is extremely complex. Such is the case whether the externalities are between decision-makers and decision-takers within or between political units, whether the externalities are between different states of the law, and whether the government in question is private or public. At its base, however, it is clear that there rests the problem of whose interests will the political authority in question support or, more accurately, be used to support. The determination of those supported interests *pro tanto* determines the structure and substance, or impact, of externalities both within and without the decision-making organization.

404. Hale Papers, Folder 68-2 at 4.

405. *Id.* 58-1 at 3.

406. Letter from R.L. Hale to H. Strauss, July 24, 1939, at 1, in Hale Papers, Folder 84.

407. Hale Papers, Folder 57-2 at 2.

408. M.L. Kafoglis, *Marriage Customs and Opportunity Costs*, 78 J. POL. ECON. 421, 423 (1970).

C. *The Policy Character of Legal-Economic Interrelations*

What does it mean to argue that the economy has its legal bases, and that the legal process is used by economic interests? Since these are fundamental theses of Hale's, his answer to this question must be stated directly. In his view, for the economy to have its legal bases means that any *choice* exercised, or policy made, in the legal process has its impact on the structure, operation and results of the market economy; and for the legal system to be used by economic interests means that the legal system is an instrument for the effectuation of *choices* exercised, or policies made, by economic interests. The ubiquity of choice, or policy, is correlative to the ubiquity of coercion.⁴⁰⁹ What Hale's student perceived as that "infernal arbitrariness of choice" was one of the most profound lessons which Hale was endeavoring to instill in his students, as well as his readers: the presence of the element of pure choice, of preference and taste, in all economic and legal decision-making and policy. And one suspects that Hale's reaction to his student's comment was to pause and reflect upon those aspects of the human condition and psyche which make it difficult for man to accept existential uncertainty and make him eager to accept the artifactual and artificial as natural. A perceptive historian of economic thought, who is also one of the leading theoreticians of the place of existential uncertainty in economic affairs, has recently written that theory, like religion, serves deep needs of the human spirit—to put minds at rest.⁴¹⁰ And it was precisely Hale's objective to shake out the lethargy, inertia and pretense from the spirit and intellect of his students, as Socrates before him. To Hale the law was the means and not the end; it was not something simply to be venerated as an ultimate accomplishment, but something to be critically evaluated. Hale was not so much questioning the status quo as he was asserting—an even more fundamental matter—the view that man made the status quo through his acts of choice. Whereas social control—and law is, of course, a prime force for social control—normally functions to instill a belief in the naturalness and inevitability, as well as the propriety—the "is" quality together with

409. See Letter from W. Gellhorn to R.L. Hale, May 21, 1940, in Hale Papers, Folder 16; Letter from T.R. Powell to R.L. Hale, July 18, 1914, at 1, in Hale Papers, Folder 61.

410. All we can seek is consistency, coherence, order. The question for the scientist is what thought-scheme will best provide him with a sense of that order and coherence, a sense of some permanence, repetitiveness and universality in the structure or texture of the scheme of things, a sense even of that one-ness and simplicity which, if he can assure himself of its presence, will carry consistency and order to their highest expression. Religion, science and art have all of them this aim in common. The difference between them lies in the different emphases in their modes of search. . . . The chief service rendered by a theory is the setting of minds at rest. . . . Theory serves deep needs of the human spirit: it subordinates nature to man, imposes a beautiful simplicity on the unbearable multiplicity of fact, gives comfort in the face of the unknown and unexperienced, stops the teasing of mystery and doubt which, though salutary and life-preserving, is uncomfortable, so that we seek by theory to sort out the justified from the unjustified fear. Theories by their nature and purpose, their role of administering to a "good state of mind," are things to be held and cherished. Theories are altered or discarded only when they fail us.

G.L.S. SHACKLE, *THE YEARS OF HIGH THEORY* 286, 288-89 (1967).

the "ought" quality—of the status quo, Hale was emphasizing that the economy and the law were not given, but were rather what man, through his multifarious institutions of choice, had made them. As already suggested, the theory of the choice, or policy, character of the legal-economic decision-making process comprises Hale's most fundamental point: the structure of coercion, and thus of effective choice, and of the legal rights which support the power of coercion, are all a function of *choice*.⁴¹¹ The decisions made are a function of the decision-making structure, and that structure becomes the critical, if not always conspicuous, policy issue.

Nowhere is this choice, or policy, character more evident than in Hale's work on public utility regulation, which it literally pervades. While courts and commissions were seeking to avoid "confiscatory" rates, Hale argued that the issue was not *whether* there would be confiscation but *how much* confiscation there would be; the remaining amount, or proportion of the existing value, he wrote, "is a question of policy to be pricked out gradually by the decisions of the courts."⁴¹² He rejected the appraisal approach to public utility rate-making (and therefore the valuation problem of *Smyth v. Ames*) as ignoring the underlying necessity of choice in regulation.⁴¹³ Reconciliation of the two principles, that of protecting the consumer against extortionate rates and that of protecting the owners against confiscation of value, was impossible; what always took place was judicial determination of *how much* confiscation (i.e., how much reduction of value through reduction of monopoly earnings) should be allowed.⁴¹⁴ The courts, he wrote to Louis Brandeis in 1922 have ever been "tempted to evade the real question of public policy involved";⁴¹⁵ their use of the conflicting rules simply masked the choices they were making in setting or approving valuations for rate-making purposes. Twenty years later he wrote Richmond Weed on precisely the same point and, as clearly as one could possibly do so, articulated the pure choice character of rate-making. If Godfrey's insight into Hale's theorem of the "infernal arbitrariness of choice" requires verification, here it is:

Legislative bodies have always had a great deal of power over private interests, subject only to the vague test of arbitrariness applied by the courts in fields other than rate regulation. And in some fields, the courts do not even apply that test. For

411. FREEDOM THROUGH LAW, *supra* note 10, at *x*.

412. Letter from R.L. Hale to J. Rellstab, Oct. 15, 1921, in Hale Papers, Folder 5.

413. Letter from R.L. Hale to G. McAneny, June 8, 1921, in Hale Papers, Folder 5.

414. Letter from R.L. Hale to Justice M. Pitney, Nov. 10, 1921, in Hale Papers, Folder 5.

415. Letter from R.L. Hale to L. Brandeis, April 3, 1922, in Hale Papers, Folder 6. Donald R. Richberg wrote to Hale: "Of course you and I can readily agree that the whole effort to find a value as the basis for an earning power is a solemn farce . . ." Letter from D.R. Richberg to R.L. Hale, June 7, 1921, in Hale Papers, Folder 5. Msgr. John A. Ryan wrote to Hale that, under the confiscation analogy of the rule of *Smyth v. Ames*, "[t]he sole function of the regulating authority is to maintain the *status quo!*" Letter from J.A. Ryan to R.L. Hale, Oct. 6, 1944, in Hale Papers, Folder 40.

instance, the question is not even raised in court whether a particular increase or reduction of the protective tariff is arbitrary—yet it may affect investor interests as adversely as rate regulation. I don't think we can have any absolute guaranty of fair treatment, whether we leave it to the court or to other bodies. Certainly the Supreme Court has been pretty arbitrary in the past in reading its own economic views into the Constitution, particularly in this field. I think *Smyth v. Ames* has permitted utilities to be pretty arbitrary, and, on the other hand, has failed to protect investors with reference to the amount they actually invested (which is not measured by reproduction cost). *Somebody must in the nature of things have power to act arbitrarily—the company, the legislature, the commission or the court.* I find it hard to predict in whose hands the power is least likely to be abused.⁴¹⁶

By "arbitrary," Hale meant, essentially, the exercise of pure choice—preference and taste; i.e., decisions not unequivocally grounded.

The choice, or policy, character of public utility regulation was generalized by Hale to the whole system of volitional freedom: the choice of liberties, of which to restrict and which to promote, becomes the ubiquitous problem of legal (and perforce economic) policy.⁴¹⁷ "The search for liberty," Hale wrote, "calls for an understanding of what specific liberties conflict with another [sic] and calls also for a preference among conflicting liberties."⁴¹⁸ Such a preference is an act of choice: "[W]hen some have economic power to coerce others, the state is under the necessity of making a choice between . . . one class of liberty and that of the other."⁴¹⁹ Legislation protecting liberty "usually involves making a choice between conflicting liberties, enhancing those deemed more vital at the expense of those deemed less so."⁴²⁰ And, also, [t]he choice is not between more freedom and more restraint; it is between different freedoms for different persons.⁴²¹ What is characteristic of public utility regulation and of liberty in general is also characteristic of the structure of inequality,⁴²² of relative rights, of subsidies,

416. Letter from R.L. Hale to R. Weed, June 3, 1942, in Hale Papers, Folder 12 (emphasis added). Hale quoted from *Sharpless v. Mayor of Philadelphia*, 21 Pa. Stat. 147, 161-62 (1853): "The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best a great deal must be trusted to the discretion of those who administer it." LEGAL FACTORS, *supra* note 11, at 332.

417. See Hale Papers, Folders 57-3, 57-9 at 2, 4, 6; Letter from R.L. Hale to L.L. Fuller, Dec. 24, 1954, at 2-3, 6, in Hale Papers, Folder 76.

418. Hale Papers, Folder 80-16 at 24.

419. *Id.*, 83-1 at 1. The language paraphrases that of *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928), quoted in text at note 424 *infra*.

420. Hale Papers, Folder 91-7 at 13.

421. *Id.* 91-2 at c.

422. *Id.* 62-1 at 7.

and of torts, namely, choice and policy. In the case of torts, for example, some exercises of private coercion are held tortious and others not; inherent in choice:

The courts . . . have developed . . . the *prima facie* tort theory, according to which there is a *prima facie* presumption that the intentional infliction of damage or economic loss on the employer is illegal; but the presumption can be rebutted by showing a justification. This usually takes the form of proving that the defendants were attempting to promote some reasonable and not too remote interest of their own: in deciding what sort of interest is reasonable and not too remote *the courts must face an issue of policy*.⁴²³

Miller v. Schoene was undoubtedly Hale's favorite court case, because of its clear and direct statement of his thesis. The case involved the constitutionality of a Virginia statute endeavoring to protect apple orchard owners against the effects of a cedar rust disease which did not adversely affect the red cedar tree (which was its temporary host) but did destroy the fruit of the apple tree. The statute provided for the condemnation and destruction of afflicted red cedar trees in proximity to apple orchards. Speaking for a Court which unanimously upheld the statute, Justice Stone, Hale's former dean, wrote:

On the evidence we may accept the conclusion of the Superior Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less of a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked.⁴²⁴

This "necessity of making a choice" Hale found ubiquitous. "The Court spoke in terms of protecting one form of property against another form of property, but its reasoning is equally applicable to the protection of one form of individual liberty against destruction at the hands of persons

423. Hale, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES*, *supra* note 52, at 669 (emphasis added). See also Hale Papers, Folder 68-4 at 1.

424. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of the apple growers may not be shifted to cedar owners by ordering the destruction of their property, for it is obvious that there may be, and that there is, a preponderant public concern in the preservation of the one interest over the other. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

Miller v. Schoene, 276 U.S. 272, 279-80 (1928) quoted in *FREEDOM THROUGH LAW*, *supra* note 10, at 399.

exercising a conflicting liberty."⁴²⁵ Moreover, "[w]ithin wide limits, a state may choose which of various forms of liberty or property are to be preserved in preference to conflicting forms."⁴²⁶ And there is no calculus of decision with which to resolve conflicts of interests and claims; choices must be made.⁴²⁷ Hale's theory of the legal bases of economic power is not only a theory of the economic consequences of legal action, but also of the participation by, and use of, the legal process in the making of economic choices.

IV. HALE'S NORMATIVE ANALYSIS

Robert Hale devoted much of his intellectual life to efforts at seeing through the complications of law and economics and their interrelations, especially the barriers to objective analysis posed by the identification of particular exercises of will as freedom and of others as coercion depending upon one's point of view and/or cultural heritage. He was able to erect a model or paradigm of mutual coercion, volitional freedom, and power which would objectively identify the panoply of forces without prejudice—or with as little prejudice as the use of language would allow. He was thus able to construct a model of the economy as a system of power, of the mutual, though asymmetrical, sanctioning of coercive impact yielding effective social decision-making. He was also able to identify fundamental legal bases or factors in economic society and relate them to the problems of freedom, inequality, and governance in a model which incorporates both official and unofficial—public and private—governments. Encompassed therein are positive and normative theories of democracy, social control and social change, a positivist theory of the economic power structure and process, and a positivist theory of the economic roles of public government. His work was in the traditions of legal realism and sociological jurisprudence in law and institutionalism in economics, and in marked juxtaposition and contradiction to (though not mutually exclusive of) analytical jurisprudence and neo-classical economics. From the perspective of an economist it is particularly interesting to learn that Hale was favorably compared with John R. Commons, a co-leader, with Thorstein Veblen and Wesley C. Mitchell, of institutional economics. Among other favorable comparisons, we might note that Hale's analysis of freedom and coercion parallels that of Max

425. Hale Papers, Folder 93-5 at 7. See also *id.* 83-1 at 1 & 80-4 at 22-23; *Force and the State*, *supra* note 56, at 200-01.

426. FREEDOM THROUGH LAW, *supra* note 10, at 399.

427. The arrangements are susceptible of great alteration by governmental bodies, and governments are concerning themselves more and more with them. Important interests are affected by the shape that these arrangements shall take. It is difficult to measure the interests, and even if they could be measured, there are no simple rules for determining how conflicts between them should be settled. *Coercion and Distribution*, *supra* note 21, at 493.

Weber, particularly in its treatment of power, formal versus actual freedom, and the role and use of the state in economic affairs.⁴²⁸

On both normative and positive grounds Hale challenged circular acquiescence in, and failure to deeply analyze, status quo legal and economic arrangements: economic and legal analysis studying and justifying results on the basis of arrangements, and arrangements on the basis of results,⁴²⁹ was not intellectually meaningful to Hale; it smacked of rationalization. Although he was concerned, as was Roscoe Pound for example, that legitimate expectations be legally protected, he was aware that the real issues were as to whose or which expectations were legitimate and of recognizing new ones,⁴³⁰ and that these were open questions. He must have appreciated the statement in I.L. Sharfman's congratulatory letter on the publication of his *Labor Legislation as an Enlargement of Individual Liberty*, where Sharfman stated: "The source of the entire difficulty, I believe lies in the fact that the accepted reasoning assumes that all existing relationships are necessarily sound and wise and hence are presumptively entitled to the protection of law."⁴³¹ Legal and economic analysis which simply took the status quo for granted would tend to cast luster on that very status quo—circular acquiescence, intentional or otherwise.

In this section I want to summarize what has been generally implicit and occasionally explicit throughout the foregoing: the elements of Hale's normative position. It is my feeling that Hale's positive analysis, namely, his theory of the economy as a system of power and his theory of the legal bases thereof (the "legal factors in economic society"), stands on its own and represents a significant contribution to a difficult and complex subject matter. Hale's normative position is in the tradition of progressivism. It supports a widespread diffusion of power and governance, and governmental rearrangements of rights to accomplish those goals; it seeks, in other words, a broader-based participation in capitalism and in government, that capitalism and the state should not be only the playthings of a business elite and their supporters. Both the state and the market should reflect the interests of the masses and not just or primarily the classes. Hale was a product of his time, when the conflict between labor and capital and the dominance of business interests in

428. See 2 M. WEBER, *ECONOMY AND SOCIETY* 729-31 (G. Roth & C. Wittich eds. 1968). For comparisons of Hale with Commons, see Letter from C.E. Troxel to R.L. Hale, Oct. 6, 1944, in Hale Papers, Folder 14; Letter from H.L. Elsbree to R.L. Hale, April 14, 1942, in Hale Papers, Folder 55. See also Letter from R.L. Hale to B.H. Levy, Aug. 2, 1949, in Hale Papers, Folder 25; Emerson, *supra* note 12, at 140.

429. *Economics and Law*, *supra* note 12, at 138, 140; *FREEDOM THROUGH LAW*, *supra* note 10, at 393.

430. *Coercion and Distribution*, *supra* note 21, at 489; *LEGAL FACTORS*, *supra* note 11, at 760-61.

431. "If men of your type continue hammering long enough, the light may dawn even upon the judicial mind." Letter from I.L. Sharfman to R.L. Hale, May 21, 1925, in Hale Papers, Folder 20.

governing circles seemed to exhaust the practical problems of legal-economic relations.

More specifically, Hale's normative position called for the rearrangement of the structure of volitional freedom, through rearrangement of the structure of legal rights, to secure what he called a net enlargement of liberty, greatly modifying but by no means eliminating inequality. His basic welfare-economic logic and general normative position resembles that of the late English economist Arthur Cecil Pigou, the founder of a major tradition or school of welfare economics.⁴³² Both Hale and Pigou were ameliorist, but both (and especially Hale) saw the need to get down to the revision of the fundamental legal rights serving as the basis of economic weaponry. Further, and most important here, just as Pigou's welfare mal-distribution (of income) theory would have maximized utility by redistributing income to where the marginal utility of income to each individual is equal (whether or not it would have equalized money income), Hale would have followed the logic of net enlargement of liberty, rearranging volitional freedoms (through rearranging relative rights) so long as a net enlargement of total liberty ensued. That both marginal utility and net enlargement, which is based on utility-type valuations of relative importance, are subjective and incommensurable is a serious operational difficulty. But the subjective character of marginal utility has not prevented welfare economists from developing the logic of welfare maximization using marginal utility, and Hale's analysis has advantages that policy makers and analysts actually must (in some manner) weigh in determining the relative importance of conflicting liberties when they have to select between them. At any rate, Hale's normative analysis of rearrangement along inequality-correcting lines is articulated in terms of his principle of net enlargement, a principle which is essentially neutral and positivist in construction and which follows from his analysis of liberty.

Hale's relatively egalitarian posture is also manifest in his call for the development of legal restraints on private government—as a check on power—similar to those already developed with respect to public government. Both the positive and normative principles involved have already been developed. The problems of the use of the power of alpha as a check on the power of beta, and vice versa, the possible misuse of power by either, and the evaluation of which power player is or is likely to require checking, are the central unsolved issues in this analysis. But they are unsolved in all other theories as well, and it is at least Hale's credit that he points to the way the problem is resolved in practice—through political assessment of the relative importance of the uses to which the power is to be put and their opportunity costs as well as actual abuses, in sum, the evaluative process, which becomes the critical component of the political process. The further problem, of course, is that

432. Hale's analysis, like Pigou's, may have been derived from Alfred Marshall's theory of consumer surplus. See Hale Papers, Folder 80-14 at 4.

evaluative decisions will be a function of the extant structure of power and will tend to reenforce it. That is part of the general equilibrium character of the economy and polity as power or decision-making processes. The fact of such problems is why, for example, Hale devoted time and space in his course and his writings to the problems of "political guidance."⁴³³

What Hale wanted was reform within the market system. It should not be inferred that public ownership might have seemed to Hale the solution for several problems. Far from that, Hale recognized that public ownership would only rearrange or restructure the problems of liberty and governance, replacing old inequalities with new ones, and creating incentive and adjustment problems as well. Indeed, public ownership was undesirable in and of itself, since he applauded private property and the market for their actual (and even greater potential) contribution to the spread of volitional freedom.⁴³⁴ Also contrary to what one might expect, Hale recognized that complete equality was both impossible and undesirable given the world and mankind as they are and are likely to be.

Notwithstanding this cautious and conservative reformism, the thrust of Hale's argument was the deliberative revision of established arrangements, doing away with unjust institutions⁴³⁵ and replacing them with something better. Hale's was a Platonic emphasis on reform; thus, he wrote:

Any system of legal rights and duties is to be judged, as Dean Pound has pointed out, by comparing the interests promoted with those defeated by that system. A legal system which secures a satisfactory balance of interests under one set of conditions may secure a highly unsatisfactory balance when conditions change. This may call for a readjustment of rights, duties, privileges, etc.⁴³⁶

What his analyses did not do—and he nowhere said that they did—was to provide a formula by which the "right" readjustments and rearrangements could be determined independently of human social choice. The *policy* character of legal-economic problems and interrelations was what he insisted upon, and he found ideologies uncongenial in no small part because they served to obscure, distort, and bias the fact and process of choice.

A. *Net Enlargement of Liberty in a World of Inequality and Private Government*

Perhaps the fundamental externalities are generated by and ensconced in the relative character of rights: the rights of alpha are rela-

433. LEGAL FACTORS, *supra* note 11, at ch. 9; FREEDOM THROUGH LAW, *supra* note 10, at chs. 12-17; Hale Papers, Folders 30, 39, 47, 82, 83.

434. FREEDOM THROUGH LAW, *supra* note 10, at ix.

435. Letter from R.L. Hale to M. Hale, July 29, 1913, at 1, in Hale Papers, not in folder.

436. *Political and Economic Review*, 9 A.B.A.J. 107 (Feb. 1923).

tive, or reciprocal, to those of beta, and the freedom of alpha is relative, or reciprocal, to that of beta; and for one to have or be given a right or element of volitional freedom is for the other to have imposed on him a duty or exposure. As a consequence, when one acts, coercive impact is visited upon the other. Fundamental legal policy must choose whose rights or freedom to sacrifice and whose to benefit. The choice will be made, according to Hale, on the basis of balancing counter-interests,⁴³⁷ selecting between liberties of lesser and greater importance,⁴³⁸ avoiding the more serious restrictions in favor of the lesser ones,⁴³⁹ choosing the beneficial or more essential freedom over the pernicious or less essential one,⁴⁴⁰ picking the one regarded more, as opposed to less, vital,⁴⁴¹ and so on. There must be a judgment of policy, of valuation, of relative importance. Hale quoted Holmes' *Privilege, Malice, and Intent*:

The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue.⁴⁴²

There is an ineluctable necessity to determine "which freedom is the more worth preserving,"⁴⁴³ of so choosing between competing claimants to freedom as to increase "the sum total of worthwhile individual liberty."⁴⁴⁴ This requires a marginal-analysis type judgment but is ultimately based on conceptions—subjective and not always disinterested—of social importance, indeed, of civilization itself, and includes, as was seen earlier, subjective conceptions of the range of injury,⁴⁴⁵ so as to balance relative hardship as well as freedom. Hale's principle of net enlargement of liberty asserts, then, that the lesser liberties should be restricted in favor of the greater liberties,⁴⁴⁶ thus creating net enlargement of liberty, a maximization of liberty.

Like utility analysis in economic theory, this is largely, if not entirely, a formal analysis. Just as utility analysis simply postulates and takes for granted the utility valuations of consumers, Hale's net-enlargement analysis postulates some social—e.g., legislative and/or judicial—determination of lesser and greater importance in each case (as in the conflict between red cedar and apple trees). There is still the

437. Hale Papers, Folder 24-1 at 3.

438. *Id.* 50-1 at 1-2.

439. *Id.* 58-5 at 3.

440. *Id.* 90-2 at 1.

441. *Id.* 57-9 at 5.

442. FREEDOM THROUGH LAW, *supra* note 10, at 75, quoting Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 8 (1894).

443. Hale Papers, Folder 91-7 at 5-6.

444. *Id.* 91-4 at 2.

445. LEGAL FACTORS, *supra* note 11, at 618.

446. Hale Papers, Folder 93-5 at 5.

fundamental Benthamite problem of which is to be maximized, the number or percentage of those who are to enjoy liberty or the intensity of liberty of those most largely benefited."⁴⁴⁷ Any practical theory must come to grips with that problem: Hale's solution is a limited but affirmative egalitarianism.

Hale's net-enlargement logic is firmly derived from his general analysis of freedom and law. "Every law," he wrote, "deprives someone of liberty in some degree"⁴⁴⁸ But, "[a]ny legal restraint which diminishes one person's liberty to harm another may thereby enlarge that other's liberty."⁴⁴⁹ "A law which by restricting one liberty gives birth to a more essential one results in a net enlargement of individual liberty."⁴⁵⁰ Thus,

it is a fallacy to assume that every attempt by the state to control and to revise the economic results of bargaining involves a net curtailment of individual liberty. It may or may not do so. If the liberty of those whom it restrains is less vital than the liberty which those persons would themselves restrain, then state intervention may spell a net gain in individual liberty.⁴⁵¹

Legislation protecting some of the interests in liberty and property against assaults by other such interests, would then be seen in many cases to be making a net increase in the protection to the interests taken as a whole, and to be, instead of a violation of the constitutional provisions, a fulfillment of their spirit.⁴⁵²

Hale's classic presentation of his analysis was in his 1925 article, *Labor Legislation as an Enlargement of Individual Liberty*, in response to which Alvin Johnson wrote him: "I wish you were on the bench"⁴⁵³ Roscoe Pound's response was:

[Y]ou put the matter exactly. If we are going to go on a notion of a maximum of free individual self assertion as the end of law, we must see to it that we maintain liberty in the concrete and that we do not sacrifice concrete liberty to the exigencies of abstract liberty. Your proposition with respect to "a net impairment of liberty" seems to me to put the matter exactly.⁴⁵⁴

In *Labor Legislation as an Enlargement of Individual Liberty* he argued that equality before the law is impossible so long as the "law of property both restricts and liberates everyone, but not in an equal degree;"⁴⁵⁵

447. The text paraphrases O.H. TAYLOR, *A HISTORY OF ECONOMIC THOUGHT* 134 (1960).

448. *FREEDOM THROUGH LAW*, *supra* note 10, at 239.

449. *LEGAL FACTORS*, *supra* note 11, at 25.

450. *FREEDOM THROUGH LAW*, *supra* note 10, at viii.

451. *Id.* at 4.

452. *Force and the State*, *supra* note 56, at 200.

453. Letter from A. Johnson to R.L. Hale, June 15, 1925, in Hale Papers, Folder 20.

454. Letter from R. Pound to R.L. Hale, May 18, 1925, in Hale Papers, Folder 20.

455. *Labor Legislation as an Enlargement of Individual Liberty*, *supra* note 80, at 157.

that no particular set of inequalities is the necessary result of the institutions of private property and free contract; and that, therefore,

it cannot be asserted dogmatically that a statutory rearrangement of the existing inequalities will necessarily involve more restrictions on liberty and more impairment of property rights than the reverse. It may merely have the effect of weakening the liberty and property of the more favored to strengthen the liberty and property of the less favored.⁴⁵⁶

This neutral principle of net enlargement, because it opens the door to rearrangement, is anathema to anyone who believes that the only property interests with which the law ought to concern itself are the already protected ones, whose premise is that given expression by Sharfman, quoted in the text, *supra* at note 431. But Hale felt that property and liberty had to be interpreted in terms of the entire system of property interests and of liberty, which includes those whose interests were disadvantaged by virtue of their having little or no property and little or no volitional freedom.

At about the same time that Hale wrote the article on labor legislation he also wrote the following for his short-lived column in the *American Bar Association Journal*:⁴⁵⁷

The effect of the complex of legal restraints which go under the name of "property rights" may be to compel certain majority groups to obey the behests of certain minority groups, either as to working or as to payments made for food, clothing and shelter. Much of the legislation which reaches the Supreme Court under the due process clause is legislation designed to promote "liberty" quite as much as to curtail it. It is aimed to make a majority more free from the control of these conditions by a minority; and in so doing it subjects the minority somewhat more to control by the majority who benefit by the legislation; for in all economic arrangements there is a certain amount of mutual control and submission. As a rule, even where the aim is successful, the minority still retains more "liberty" than the majority—both in the sense of more factual control over their own lives, and in the sense of less legal restrictions on their conduct, for there usually remains to each member of the minority in question a larger field within which he is not thwarted by property duties than there is to each member of the majority; and the minority still as a rule retains, man for man, greater property rights than does the majority. Before the legislation "property rights" were equal only in the sense that all owners of property had the same procedural methods for enforcing their unequal substantive rights, and in the sense that all had a "right to acquire" property. The effect of the legisla-

456. *Id.* at 160.

457. On the reception of his column see Hale Papers, Folders 7, 74.

tion, if successful, would be to condition somewhat the protection of some of the more important property rights, thus partly compensating by one sort of inequality for a greater inequality in the substantive rights, and to equalize somewhat the possibility of deriving any concrete benefit from the equal but highly abstract "rights to acquire." The legislation, if really calculated to accomplish its purpose, deprives some persons of their interests in liberty and property not on behalf of some totally different and less vital interest of the majority, but on behalf of the promotion of the same kind of interest in substantial liberty and property in the persons of those who very likely have previously, and even subsequently, less legal protection of these interests that do the minority.⁴⁵⁸

The way in which society maximizes freedom is through the logic of net enlargement, based upon judgments of relative importance as between the competing freedoms. In social decision-making, the logic of net enlargement is what best describes the determination of relative rights, even when it is abused because it is invoked to rationalize a choice based upon interest. But whatever the mode of determining relative importance, the policy choice is the major element. And, the determination being complex, the choice is not always egalitarian: "In cases of conflict, it is not necessarily better that the interests of a majority be promoted than those of a minority. It depends on the importance of the respective interests."⁴⁵⁹ What is involved is "a qualitative, not a mere quantitative judgment."⁴⁶⁰ "Opinions will differ as to the relative importance of the different conflicting liberties concerned;"⁴⁶¹ but the law must "subordinate the interests of some individuals to what are regarded as the more important interests of other individuals."⁴⁶² It is a question of which individuals or which interests—whose interests—are to be promoted, and of who determines it. In some cases, legislation may extend economic liberty on the extensive, as opposed to the intensive, margin: "By reducing some of the liberty which the economically strong possess in superfluity, it adds to the economic liberty of those who most need it."⁴⁶³ But while it typically is a matter of balancing and selecting between the liberties of different individuals or classes of individuals,⁴⁶⁴ it is also a matter of balancing and selecting between the different liberties of the same individual.⁴⁶⁵

Incidentally, Hale was aware that the normal exercise of the police power (and other powers, with the exception of eminent domain) in-

458. *Political and Economic Review*, 10 A.B.A.J. 882, 885 (Dec. 1924).

459. *Id.* at 884.

460. Letter from R.L. Hale to L.L. Fuller, Dec. 24, 1954, at 3, in Hale Papers, Folder 76; *cf. id.* at 13.

461. Hale Papers, Folder 80-16 at 24.

462. *Id.* 93-5 at 2.

463. *Id.* 90-2 at 5.

464. FREEDOM THROUGH LAW, *supra* note 10, at 381, 537, and ch. 12.

465. *Id.* at 389.

volves the creation and destruction, or modification, of property rights without compensation. He was thus aware of the broad problem of compensation for vested rights lost through social legislation.⁴⁶⁶ This is a topic ranging outside the limits of this discussion, but it is relevant to call attention to his view that, "[w]e have as yet devised no practicable system for compensating those whose special interests in scarcity will be sacrificed to the general interest in abundance. Unless and until we can do so, we shall probably have strong political obstacles to an economy of abundance."⁴⁶⁷

The principle of net enlargement is a neutral principle; it quite formally tries to structurally depict the evaluative decision, with the substantive determination in each case considered a function of the choosing parties' assessment of relative importance. It should be clear, however, that the pronounced thrust of Hale's own normative position is relative egalitarianism. He was in favor of legal support for a wider, rather than a narrower, range of interests, for (to use the title of the last chapter of *Freedom Through Law*) economic liberty in a democracy, meaning by democracy an economy and a state—a social system—responsive to the needs and wishes of the masses as well as the classes. In notes commenting upon Lincoln's first inaugural address, Hale wrote that "[t]he equality which we value demands that our government and its laws serve the interests of all classes of persons, rather than subordinating the liberties of some to the interests of others."⁴⁶⁸ He maintained that political processes—the political processes out of which legal rights develop—must be used to furnish the appropriate means for extending rights of economic significance to individuals and groups and to areas where they have hitherto been lacking so as "to make liberty more widespread."⁴⁶⁹ He believed "that many forms of social legislation interfere with individual liberty only for the preservation of a more important form of individual liberty,"⁴⁷⁰ but that "the outcome . . . [is] not . . . more governmental interference than [there is] now with individual liberty; it . . . [is only] a change in the form of our present incidence of paternalism."⁴⁷¹ He stated that "we should have more liberty where it is most needed:"⁴⁷² "The greatest problem facing those who appreciate the blessings of individual liberty and private property is the problem of utilizing the political state to make these blessings accessible to those now barred from them."⁴⁷³ Government intervention already "restricts

466. *Value and Vested Rights*, *supra* note 87, at 523-24, 528-29.

467. *FREEDOM THROUGH LAW*, *supra* note 10, at 8.

468. Hale Papers, Folder 58-4 at 3.

469. *Id.* 91-7 at 13.

470. *Id.* 93-5 at 7-8.

471. *Id.* 56-2 at 4.

472. *Id.*

473. *Id.* 80-4 at 1-2. "Totalitarianism does not solve the problem. Democracy has not yet solved it, for we have made but a beginning in subordinating private economic governing power to the democratic control of the political state." *Id.*

economic liberty so drastically and so unequally at present,"⁴⁷⁴ that, "[r]ecognition of the essentially political character of private governing power would simply lead us to recognize that shifts in its incidence could be made by law without necessarily violating our canons of individual liberty or equality before the law."⁴⁷⁵ This could be done by modifying the system of private property so that individuals would "more equally" bear the work and share the fruits.⁴⁷⁶ The pattern of restriction and expansion of liberties—of volitional freedoms—already a function of law, can be made more tolerably equal than at present. Individual liberty can be promoted by law along the extensive margin, albeit at some cost to the intensive margin, the justification being the superfluity of relative freedom already enjoyed by the advantaged, and without the basic role of government being changed. "The economically powerful" are far more advantageously situated than the economically weak, and their power and liberty "conflicts with the liberties of those whom they control."⁴⁷⁷ Given their relative advantage, restrictions on their "less vital liberties" should be developed to release the "more vital liberties" of the disadvantaged "from the trammels imposed by others."⁴⁷⁸ Hale thus concluded *Freedom Through Law* with

[t]he hope . . . that public officials, with the approval of the voters, may manage to devise methods to distribute wealth more widely without checking its production or so regimenting its producers as to discourage their productive activities. In this way it is believed that under our system of government, the liberty of individuals can be greatly expanded where its expansion is most called for.⁴⁷⁹

The state, in other words, should be used to redress and restructure the economic inequalities which "are embodied in legal rights which the government enforce[s]."⁴⁸⁰ Institutionally produced and abetted inequality is unjust and should be corrected; the state should not be "dealing unequal hands to the players."⁴⁸¹

But Hale was aware that "[c]omplete equality of opportunity, like complete liberty for everyone, cannot be attained. Specific inequalities of opportunity can be removed, with the result as a rule of creating others."⁴⁸² Not only is inequality inevitable, but many inequalities are

474. *Bargaining, Duress, and Economic Liberty*, *supra* note 74, at 628.

475. Hale Papers, Folder 58-5 at 5.

476. Hale, *Some Phases of the Minimum Wage: Discussion*, 7 AM. ECON. REV. 279, 280 (1917) [hereinafter cited as *Some Phases of the Minimum Wage*].

477. Hale Papers, Folder 80-4 at 3-4.

478. *Id.* at 3.

479. *FREEDOM THROUGH LAW*, *supra* note 10, at 550.

480. *Id.* at 11.

481. *Id.* at 12.

482. *LEGAL FACTORS*, *supra* note 11, at 615.

If "equality of opportunity" is to be our goal, we have to select the particular opportunity that we desire to equalize. And some inequalities of opportunity we may wish to preserve. . . . It may be that a system which confers greater economic

justified; he emphasized his appreciation of how strong a defense can be made, though perhaps not a conclusive defense, of the continuance of most of the inequalities once they are frankly recognized.⁴⁸³ His main caveat was the question of incentives, which he felt limits the capacity to promote greater equality by the method of legal rearrangement of liberties. The rule should be in favor of equality except where inequality is in the interest of the poor: "To the extent that the governing power of the strong in fact promotes the welfare of the weak, to that extent the inequality would seem justified even to one who is as solicitous of the welfare of the weak as he is of the strong."⁴⁸⁴ "Invisible governing in the economic world, by private citizens, may be far better than no governing at all, even for those near the bottom of the scale."⁴⁸⁵

To require the rich to burn up their surplus wealth would bring about greater equality, at the expense of the liberty of the rich, and without a compensating enhancement of the liberty of the poor. Likewise, even liberating the poor from control by the rich may, in some circumstances, indirectly diminish the liberty of the poor even more than it enhances it. For instance, if the effect of lessening the control would be to lessen the incentive of able men to engage in production of wealth to such a degree that famine resulted, then the liberty of the poor to eat would be curtailed to a more significant degree than their liberty to disregard orders is enlarged.⁴⁸⁶

But not all inequalities are defensible in terms of the incentive argument: "[T]he fact remains that differences in industry and thrift and differences in ability do not by any means account for the more important economic inequalities."⁴⁸⁷ Rights to natural resources in particular have erected formidable positions of advantage.

Nevertheless, the promotion of the extensive margin of liberty must be limited by the threat of disincentives. "[T]here is a large element of truth in the proposition that many of the inequalities of income serve the useful function of stimulating production in such a way as to benefit others as well as the producers."⁴⁸⁸ Only "[i]n so far as legislation of this type does not materially reduce the incentive to produce," does it

opportunities on those capable of rendering greater services in production, confers benefits on those less capable, by reason of the greater total output of wealth in which the less capable may share, though unequally. . . . But the case against any particular economic inequality is not conclusively demonstrated by showing it to be the outcome of inequality of opportunity. Nor are economic inequalities to be defended on the ground that they result from *equality* of opportunity; for this they do not.

Id. at 616.

483. *Political and Economic Review*, 9 A.B.A.J. 329, 330 (May 1923).

484. Hale Papers, Folder 93-5 at 10.

485. *Id.* 80-16 at 10.

486. *Id.* 80-1 at 5.

487. *Id.* 93-6 at 55.

488. *Coercion and Distribution*, *supra* note 21, at 482.

extend economic liberty.⁴⁸⁹ "A certain degree of inequality of property rights seems essential if the pecuniary incentives to production are to be maintained."⁴⁹⁰ Thus,

in many cases, to withdraw . . . large incomes might so lessen the incentive to investment and production that, with the consequent lessening of the common stock of produce, the workman's share might be less even than before. Economic study is revealing more and more cases, however, where such would not be the case, and judicious experimenting will doubtless reveal still more. This is true to a considerable extent of incomes from inherited property, from monopolies and from increments of land value. The government, by seizing a large share of such incomes, could increase the opportunities of the poor without checking any of the selfish incentive to production held out to the rich.⁴⁹¹

"[I]f the wages are pushed beyond a certain limit, the impairment of the incentive of the capitalists may before very long react unfavorably on the laborers themselves."⁴⁹² Indeed, he argued that the fallacy of the wages fund doctrine

is the same as that underlying communism. It ignores the fact that some incomes above the average serve as incentives to the production of more total wealth; hence the reduction of such incomes, while it would give the poorer classes a greater *proportion* of the total income than now, would in all probability give them smaller *absolute* amounts, because of the reduction of the total.⁴⁹³

Caution is to be the watchword, then; the incentive argument is powerful; while not conclusive, ignoring it is dangerous. In *Freedom Through Law* Hale gave perhaps the best statement of his general position:

Even legislation which tends to equalize wealth may diminish the economic liberty of those who have least if it is so unwisely

489. Hale Papers, Folder 90-2 at 5.

Any legislative modification of property rights in the direction of equalization is not, then, so much a curb on liberty, as it is a removal of a curb, unless it interferes with the incentive to production. If it does not, then it promotes the liberty of the non-owners—in precisely the same sense as that in which it limits the freedom of the owners—in the sense, that is, of freedom from those obstructions to the power of choice and to the power of self-assertion which accompany a limitation of income.

Economic Considerations, *supra* note 201, at 53.

490. *Political and Economic Review*, 9 A.B.A.J. 39 (Jan. 1923).

[W]hile the system of property does compel the propertyless to work, they might be still worse off without the institution, for it also furnishes the incentive for much useful work on the part of owners, work which increases the supply of commodities and lowers their prices, making even those lowest down in the social system perhaps better off than they would be in the absence of that incentive.

Some Phases of the Minimum Wage, *supra* note 476, at 280.

491. Hale Papers, Folder 80-11 at 2.

492. *Political and Economic Review*, 9 A.B.A.J. 179.

493. *Political and Economic Review*, 8 A.B.A.J. 752, 753 (Dec. 1922).

drawn that it decreases greatly the total output of society. All legislation which effects economic changes will be restrictive of some liberties. If it accentuates economic inequality it will, unless it causes a sufficient increase of the total output of society, reduce the liberty of the least fortunate while enhancing that of the more fortunate. If it mitigates inequality it will reduce the liberty of the more fortunate, and it may, by reducing production, diminish the liberty of all. If wisely drawn, on the other hand, it may greatly increase the liberty of those whose freedom is now the most restricted.⁴⁹⁴

Inequality, then, is inevitable and necessary, and partially a function of the law, but, with a cautious eye on the structure of incentives, the pattern of inequality can be made more tolerable and more just. Although he offered no programme and no formula for inequality-moderating legal innovations and rearrangements, Hale, as we have seen, did stress the importance of using public, or official, government as a check on private government, particularly concentrations of private power many of which existed with government support if not largesse. As the title and subtitle of his *magnum opus* put it, freedom is achieved *through* law, through public control of private governing power. One can no more eliminate coercion than inequality: the economy *is* a system of power and therefore of mutual coercion. Hale's normative position is rather this: the political process must develop legal restraints or checks upon the power of private governments similar to those already developed as checks upon the power of official government. Since our volitional freedom is in some sense as much a function of private-government coercion as of official-government coercion, any system which incorporates checks upon the latter and fails to develop checks against the former allows those without means to be exposed to the domination of private power, even when that power is indiscriminately exercised through the impersonal market. "To put legal limits on the liberty of those who have superior private governing power . . . would not only bring about great equality of governing power; it might also result in a net enhancement of liberty."⁴⁹⁵ It is difficult to be conclusive about this, but it appears that Hale's concern about greater equality, or restructuring the pattern of inequality, has as its main thrust not equality per se but the protection against otherwise unchecked private governing power. Hale's concern is more against concentrated power than in favor of economic equality; though it is the case that in his model, since the pattern of volitional freedoms is a function of mutual coercion which in turn is a function of power, it would follow that moderating the extremes of power concentrations would tend to bring about a great parity of power and, thereby, of volitional freedom. A rough parity, perhaps, but not equality, was his goal. Perhaps the heart

494. FREEDOM THROUGH LAW, *supra* note 10, at 542-43.

495. Hale Papers, Folder 80-1 at 4.

of his message is contained in a statement which Hale quoted from the installation address of Dwight David Eisenhower as president of Columbia University:

As General Eisenhower said . . . , a danger to freedom arises "from too great a concentration of power in the hands of any individual or group: The power of concentrated finance, the power of selfish pressure groups, the power of any class organized in opposition to the whole. . . . Any one of these, if allowed to dominate, is fully [as] capable of destroying individual freedom as is excessive power concentrated in the political head of the state."⁴⁹⁶

What Hale's prescription largely calls for, it seems, is the correction of the gross disparities of power, both within the market and without it, in the form of rights and wealth acquired through legal inequality and otherwise, which he felt would create more acceptable, though still unequal, arrays of opportunities and a wider distribution of benefits. Competition is a check on private power, but since it operates within the larger power structure it is not enough. But Hale would have neither replaced competition with totalitarian control nor created a tyranny of enforced equality. Yet he would have used the state to bring about net enlargements of freedom by checking private power and rearranging legal rights—as by the social legislation which he saw passed during his lifetime—all the time moving toward a strengthening of the extensive margin of freedom, but with cautious regard that sacrifice of the intensive margin not lead to retrogressive disincentive effects or further, though different, tyrannies. He saw no revolution or radical change in the use of the law. "Some protections against governing power of private persons have been developed in this country."⁴⁹⁷ "The ordinary law of the state, as distinguished from constitutional law, affords an individual protection against many adverse acts of other individuals."⁴⁹⁸ What he supported was further use of the state—particularly through legislation—to further promote the extensive margin of liberty, to change the interests supported by the state. What he would not have done would be to have allowed those who already had achieved positions of advantage with the aid of the state to prevent a similar use of law to assist the presently disadvantaged. All this is anathema to those who fail to see the workings of the state in the status quo private power structure and to those who see revision or state activism in the interests of the disadvantaged as "socialism." But it was Hale's normative position, and, while it remains distinctly separable from his (and its supporting) positive analysis, it does characterize the thrust of most traditional American reform movements from the end of the Civil War to mid-twentieth century civil rights

496. FREEDOM THROUGH LAW, *supra* note 10, at 4.

497. Hale Papers, Folder 80-8 at 8.

498. *Id.* 93-6 at 1.

efforts. It is a philosophy not of class eradication but of expansion. What was said of Commons is also true of Hale:

Commons is thus the father of a labor struggle theory which is not a class struggle theory in the Marxian sense. It is not a struggle by the rising group to liquidate the old class or to raze the social structure which the latter controlled, but essaying instead to add to the old edifice new and spacious wings to serve as the dwelling places of the customs of the rising class.⁴⁹⁹

In terms of his own analysis, Hale argued that

democracy offers the best hope for a solution. The solution does not necessarily call for the elimination of private economic power, only for its being made responsible to the political state, which in turn is responsible, under a democracy, to the majority of those whom it governs. Protection of weak and unpopular minorities may call for some constitutional limitations on the democratic power of the majority. But if these limitations are interpreted by courts which identify curtailment of a minority's economic governing power with oppression of that minority, then the problem of making liberty and property more accessible to the majority will remain unsolved. The democratic political state will be rendered impotent to afford to the many freedom from the unlimited governing power of the few.⁵⁰⁰

This statement reflects the constitutional issues of economic policy of his times, but it is of profound importance in understanding Hale that he defines as his problem that "of making liberty and property more accessible to the majority . . ."

In all these matters Hale was trying to get a handle on and satisfactorily resolve some fundamental problems, particularly those of liberty versus equality and equality versus hierarchy. From the conservative and/or elitist viewpoint he was radical and subversive. From the viewpoint of the far left he was going only halfway, unwilling to leave the system. More important, Hale believed the promise of the American dream, and his thought came up against the intractable problems burdening the American, and all other experiences.

499. S. Perlman, in *THE DEVELOPMENT OF ECONOMIC THOUGHT* 411 (H.W. Spiegel ed., 1952).

500. Hale Papers, Folder 80-4 at 2. "It is not the automatic working of the Constitution, but only affirmative intervention of the government in economic affairs, that can secure to the underprivileged any reasonable degree of liberty from those restraints which they find the most oppressive." *Id.* at 23.

We do not get this sort of discussion, however, if we ignore all the invisible but effective restraints on freedom; if we assume, with Herbert Hoover, that "economic liberty" is endangered only by legal limitation of the power of the strong to control the activities of the weak; if we characterize every presidential argument for a more equal distribution of liberty as an attempt to stir class against class. *Id.* at 24. The language of many of these quotations from Hale reflects the mode of reasoning and argument of earlier times, which is what partially makes them so interesting. I have particular reference to discussion in terms of the "strong" and the "weak."

B. *Deliberative Legal-Economic Policy*

I have already demonstrated, as one of Hale's most fundamental themes, the policy character of legal-economic interrelations. It is only because of the choice and artifactual nature of law and economics that that "infernal arbitrariness of choice" (to again quote Hale's student) arises at all. But what made choice distinctive in Hale's teaching and writing was his insistence that problems of legal-economic policy ought to be confronted directly and deliberatively and not left to the hidden judgmental determinations of invisible private governments or, for that matter, inconspicuous official governmental determination, which would then masquerade as the product of either custom, the system, the market, or inevitable social forces. This is surely a critical position by Hale, for it remains to this day an unsettled question as to how much policy consciousness and how many open-ended choices a (large) society can handle during any period of time and, further, is consistent with stability or order. Conservatives stress the danger to order from too much policy consciousness, the inability of an organic society to absorb too many major changes; liberals stress the danger to order from not undertaking continuing self-vitalizing critique and needed reforms, and emphasize also the system's ability to handle and adapt to basic institutional revisions; and radicals tend to stress the need for change and to either dismiss the threat to order or accept it as a necessary, if not desirable, price of change. It is an indication of Hale's conservatism that he felt that the types of change which he contemplated were only a continuation and extension of the status quo, and as such would not, and perhaps could not, result in disorder. In any event, his main point was the deliberative confrontation with problems of choice.

In a manuscript written during World War I, Hale pointed to Taussig's *Principles* as an example of how "[e]conomics . . . has begun to question the institution of property at every point . . . ;" and how sociological jurisprudence, "led by Dean Pound, has come to see the need of judging rules of law by their sociological, if not yet by their economic, consequences. But much still remains to be done," he wrote, "in subjecting every detail of our legal system, as well as every proposed correction thereof, to a searching and constructive economic criticism."⁵⁰¹ A decade and a half later, in a letter to Elliott Cheatham discussing his course *Legal Factors*, Hale wrote:

The chief object I see in the course is to make lawyers aware of the legal conditioning of our economic society; when aware of this, the next step is to make them realize that the question of the maintenance or the alteration of our institutions must be discussed on its pragmatic merits, not dismissed on the ground that they are the inevitable outcome of a free society; then they must be acquainted with some of the types

501. *Id.* 80-10 at 7.

of judgments that must be passed—judgments first as to the efficacy of particular means to desired ends and as to other possible results of adopting those means, then, second, judgments as to what ends are desirable—value judgments.⁵⁰²

And almost two decades later, at a University of Chicago conference in 1951, he queried: "We have unconscious control already, and the question is, should we make it more conscious?"⁵⁰³ Thus, in his 1922 classic article *Rate Making and the Revision of the Property Concept*, he argued that "[i]f property is not revised methodically by its friends, it is likely to be revised unmethodically by its enemies, with disastrous results." He called for the courts to "repudiate the metaphysics" which had misled the commissions and mired the courts in utility regulation, and for a candid examination of the functions of ownership, not only in the public utility area, but in private property generally, with the ultimate purpose "to work out a body of law for the revision of property rights where they need revision, and for their preservation where they need preserving" "The result might be radical," he cautioned; but "if so it would be because on a piecemeal and candid review, many of the incidents of property would prove themselves to be without justification."⁵⁰⁴ Hale's attitude was explicitly one of openness toward all such questions,⁵⁰⁵ and his emphasis upon deliberative evaluation and open rearrangement echoed the teaching of Taussig, whose words Hale quoted in this connection:

The dogma of an unrestricted right of property, and the belief in the expediency of the exercise of that right without a jot or tittle of abatement have been shaken beyond repair. The rights of property must prove themselves on examination in each particular case, and submit to modification where a balance of gain for the public can be reasonably expected.⁵⁰⁶

"The days of dumb acquiescence in privilege are gone. Privilege and station can show a reason for their existence only through service."⁵⁰⁷ Thomas Reed Powell understood Hale's point of view perfectly well when he wrote Hale in 1914 that judges:

of course attribute a certain rightness to the general system

502. Letter from R.L. Hale to E.E. Cheatham, Nov. 2, 1933, at 1, in Hale Papers, Folder 57. Hale's policy strategy is similar to that of Knight in the latter's review of *Freedom Through Law*. Knight, Book Review, 39 VA. L. REV. 871, 871-72 (1953); see note 137 *supra*.

503. Hale Papers, Folder 59-1 at 4. "There may be cases where it is better not to have anybody use his own judgment as to whether the results will be good or bad. . . . But, after all, in most things where the government's activity is going to have an effect, it seems wiser to take some account of the probable results." *Id.*

504. *Rate Making and the Revision of the Property Concept*, *supra* note 4, at 216.

505. Letter from R.L. Hale to L.L. Fuller, Dec. 24, 1954, at 14, in Hale Papers, Folder 76.

506. *Political and Economic Review*, 10 A.B.A.J. 51 (Jan. 1924).

507. *Political and Economic Review*, 9 A.B.A.J. 329, 330 (May 1923).

which they see in operation. I hardly think we can expect them to be revolutionists. My objection to many panaceaists is that they fail to give due regard to the existing system as a fact to be reckoned with. My objection to their opponents is that they fail to recognize how far that system is the product of human will and how far it is within human control. That's why I shall welcome your *magnum opus* on "The Political Laws of the Distribution of Wealth."⁵⁰⁸

Before that *magnum opus* came, and it took four decades, Hale developed his analysis not only in his series of legal-economic articles, but in the field of public utility law, and it was with respect to Hale's work in that field that Douglas Maggs wrote Hale: "[Y]ou will succeed eventually in forcing out into the open the hidden and therefore half-baked policy decisions which dictate results in this field."⁵⁰⁹ In the eventual *magnum opus* Hale proceeded to demonstrate the decisions of economic policy or economic structure which are typically unobtrusively made in common and constitutional law. In *Freedom Through Law* Hale practiced the deliberative policy analysis which he had taught generations of Columbia law students. His refusal to accept the status quo on its own terms alone led him to analyze the forces out of which it developed and not merely take them for granted non-deliberatively. Hale's positive analysis, however well it may stand independently, was nourished by that message; his normative posture was the motivating force behind his positive analysis. Yet it is a tribute to the power and capacity of his deliberative policy analysis that his theories of the economy as a system of power and the legal bases thereof stand independent of his values, for Hale considered his legal-economic analysis an attempt at providing just such a basis for open deliberative evaluation.

508. Letter from T.R. Powell to R.L. Hale, Aug. 31, 1914, at 2, in Hale Papers, Folder 61.

509. Letter from D. Maggs to R.L. Hale, June 4, 1940, in Hale Papers, Folder 16.