

The Progressive
Assault on
Laissez Faire



ROBERT HALE AND THE
FIRST LAW AND
ECONOMICS MOVEMENT

Barbara H. Fried

THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE

*Robert Hale and the First
Law and Economics Movement*

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P R E F A C E

This book is a study of the work of Robert Lee Hale (1884–1969), a major figure in both the American Legal Realist movement and the looser association of institutional and progressive economists writing in the first part of the twentieth century. The book describes and assesses the lasting importance of Hale's contributions to legal theory and the nascent field of law and economics. Using Hale's work as a focal point, it also looks more generally at the progressive assault on laissez-faire constitutionalism and neoclassical economics from the 1880s through the 1930s.

Although Hale's work was highly regarded by many of his own contemporaries in both law and economics, it fell into relative obscurity after the 1940s. The sole exception was a thoughtful article in the early 1970s by the economic historian Warren Samuels, the first and (to date) only substantial study of Hale's work.¹ The last fifteen years have seen a substantial revival of interest in Hale, largely spurred by legal scholars in or sympathetic to the Critical Legal Studies movement, who have rightly identified Hale's writing as the logical precursor to their own work, and as the culmination of many of the most important strands of Realist thought.² Even among Hale enthusiasts, however, only a small portion of Hale's work is widely known. Moreover, it is fair to say that Hale remains unknown to a large number of scholars in legal theory, law and economics, political philosophy, and intellectual history, to whom his work is potentially of great interest. That is a significant loss. Even though among the least well-known of the Legal Realists and institutional economists, Hale produced over his lifetime a substantial body of work that represents, in many respects, the best of both fields.

Several recent intellectual developments make the current revival of interest in Hale's work particularly timely. The first is the resurgence in philosophical and legal circles of libertarian defenses of the minimal state, in the work

of such figures as Robert Nozick, Eric Mack, Jeffrey Paul, and Richard Epstein, and the burgeoning literature on coercion since publication of Nozick's 1969 article on the subject.³ Drawing on his extensive knowledge of law, economics, and political theory, Hale developed one of the most profound and elaborated critiques of libertarianism offered to date. Indeed, Hale's analysis of both coercion and natural property rights theory, along with the appropriate treatment of scarcity rents under a Lockean theory of entitlement, provides an uncannily close counterpoint to Nozick's arguments in *Anarchy, State and Utopia* and other works.

The second development is the emergence in the mid-1970s of what has aptly been called "the second great law and economics movement." The movement, which has grown to be a dominant force in legal academia, has developed largely unaware of the work of the institutional economists who made up the *first* great law and economics movement from the 1880s to the 1930s. Although preoccupied with a somewhat different set of concerns, the institutionalists offered a foundational analysis of the legal underpinnings of economic life that remains an important commentary on, and corrective to, the work of their successors. That is particularly true of Hale, whose work—alone among the institutionalists—reflects a sophistication about both law and economics that ranks it with the best of contemporary writing in the area.

Finally, as previously suggested, Hale's work is of enormous importance to contemporary legal scholars writing in what might loosely be termed the critical tradition, most notably the Critical Legal Studies movement. Along with law and economics, Critical Legal Studies has emerged as one of the more significant developments in legal scholarship in the past two decades, generating interest far beyond legal circles. Many of the best-known articles in the field have drawn explicitly on Hale's work. To that extent, the work is of obvious interest as a precursor to current thought. But only a small fraction of Hale's work has found its way into the literature. The balance—some of it never published—reveals a much more elaborate argument concerning the public roots of private rights than can be gleaned from his best-known articles taken alone, and one that should be of even greater interest to those writing in the critical tradition, and their critics.

In other respects, this project is an anachronistic one, or is at least swimming against the tide of recent historiography of the period. Recent accounts have tended to stress the conservative undercurrents in progressive politics; the progressive strains in the work of key conservative legal figures like Stephen Field, David Brewer, Christopher Tiedeman, and Thomas Cooley; and the relatively limited impact of laissez-faire ideology on judicial and legislative

decisions in the height of the so-called laissez-faire period in American constitutional law. The argument of this book returns to a simpler time, in which progressives were progressive, conservatives were conservative, and the two sides were joined in battle over the state's right to intervene in economic affairs. My aim in reverting to a more traditional picture of American politics of the period is not to take issue with the revisionist view that the motivations of key players on both sides and the consequences of their acts were far more complex than conventionally portrayed. Rather, my aim has been to re-create faithfully the political landscape as its major antagonists would have described it. Legal Realism and institutional economics were both born in opposition to laissez faire. In that historical context, Hale et al. would have had no trouble identifying Tiedeman, Field, et al. as the enemy, and vice versa. That it turns out that they were less far apart than they thought at the time would come as a (perhaps not unpleasant) surprise to both sides. But one can make sense of the progressive response only by understanding that they did not see it that way at the time.

Finally, a related note about terminology. What to call the positive, state liberalism that united the British New Liberals, Social Democrats, and other left-leaning social reformers in the years from the 1880s to the 1930s has proved something of a dilemma. The term "progressive" having become rife with embarrassments, contemporary historians have variously termed it "democratic collectivism," "progressive liberalism," and "welfare state liberalism."⁴ Following James Kloppenberg's lead, for ease of exposition, I have reverted to the old-fashioned term "progressive."⁵ I do not mean thereby either to limit inquiry chronologically to the Progressive Era, or to take sides in the debates about whether progressivism constituted a coherent political movement or whether many of the traditional progressive reform programs had a decidedly conservative cast.⁶ For purposes of this book, "progressive" should be understood to refer broadly to that group of left-liberal social theorists and reformers from the 1880s to the 1930s who believed that the state had a critical role to play, through progressive tax and transfer programs, labor legislation, and other welfare measures, in promoting a social welfarist vision of the common good.⁷

This book is a long time in coming. Among the many pleasures of finishing it, chief is having the opportunity at long last to acknowledge (if not retire) the numerous debts I have incurred in the process. I am grateful to the Columbia University Archives, which houses Hale's professional papers, the Harvard Law School Library, and the Library of Congress, for permission

to consult and cite from Hale's correspondence and other papers. Special thanks go to the magnificent staff at the Stanford Law School library—in particular Dave Bridgman, Andy Eisenberg, and Paul Lomio—for their tireless and resourceful help. I have been privileged to work at an institution that has generously supported me throughout this process, materially and spiritually, and I am deeply grateful to Dean Paul Brest for his many efforts on both fronts. Research on the book was supported by grants from the Claire and Michael Brown Estate and the Deane Johnson Fund for Excellence in Teaching and Research.

Over the years, I have been blessed with a wonderful group of (extended) colleagues, who have contributed to this and other projects in immeasurable ways. Bob Gordon first piqued my interest in Hale's work almost ten years ago, in a casual hallway remark. His presence in these hallways is greatly missed. I am most grateful to Ian Ayres, Barbara Babcock, Joe Bankman, Guyora Binder, Markus Dubber, Lawrence Friedman, Bob Gordon, Tom Grey, Mark Kelman, Bob Rabin, Peggy Radin, Deborah Rhode, Dorothy Ross, John Henry Schlegel, Bill Simon, Rob Steinfeldt, Kathleen Sullivan; participants in faculty workshops at Buffalo, Columbia, Stanford, and Yale law schools; and three anonymous readers for Harvard University Press, for reading and commenting on various portions of the manuscript over the years. I have benefited from the able research assistance of a number of Stanford law students, including Alison Aubry, Frances Cook, Kim Hazelwood, Olga Hartwell, and Eric Pierson. I owe more indirect debts to Morton Horwitz and Frank Michelman, who—as teachers of mine many years ago at Harvard Law School—gave me my first inkling of the deeper possibilities of legal thought. Above all, thanks go to Joe Bankman and Mark Kelman, who have both been unstinting in their time and enthusiasm for this and other projects. Their critical judgment, (blessedly) corrupted by affection, has helped make my intellectual life at Stanford a very happy one.

My greatest personal debt is to Joe, for a thousand reasons too obvious or ineffable to name. This book is for him, and in memory of his dear, sweet dad, Jack.

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INTRODUCTION

In 1886, Christopher Tiedeman, a young law professor at the University of Missouri, published his famous treatise on the *Limitations of Police Power*.¹ Writing against the backdrop of increasing social unrest—"Socialism, Communism, and Anarchism," in Tiedeman's unsubtle formulation—he intended the treatise to show that the democratic majority's power to interfere in economic matters was severely constrained by a constellation of individual rights protected under the federal and state constitutions.² Chief among them, Tiedeman argued, were the individual's rights to liberty and to property, both enshrined in the due process clause of the Fourteenth Amendment.³ Neither right, he conceded, could be without limits in a civilized society. But the limits could not exceed the legitimate police power of the state, which by human and natural law was "confined to the detailed enforcement of the legal maxim, *sic utere tuo, ut alienum non laedas*"—so use your own as not to injure others.⁴ Tiedeman confidently construed "injury" for these purposes to encompass only that narrow band of conduct traditionally prohibited by criminal and tort law, together with a handful of other timeless offenses against the body politic, like having women run barrooms, billiard saloons, or other public resorts.⁵ Among the things most assuredly not included, Tiedeman argued, was the right "to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours daily he shall labor," to tell any man what he may charge for his wares or the use of his money, or any other manner of laws meant to promote greater economic security or equality.⁶

In the same year, the renowned economist John Bates Clark published an article entitled "The Moral Outcome of Labor Troubles."⁷ The article contained the first glimmerings of his "marginal productivity" theory of distribution, which was not fully articulated until three years later. Not coincidentally,

the article also marked the turning point in Clark's intellectual life from an outspoken critic of capitalism to one of its most influential champions.⁸ Marginal productivity theory predicted that in a competitive market, each factor of production (labor, land, and other forms of capital) would be paid an amount exactly equal to the value of its marginal product. The theory, like Tiedeman's argument for limited police powers, was developed against the backdrop of increasing attacks from the left on the distributive justice of the market (including until very recently from Clark himself). Its relationship to those attacks was unmistakable. Although offering the theory as purely descriptive, from the start Clark took pains to underscore what he took to be its normative implications. What it implied, Clark argued, was that absent monopoly or other extreme interferences with its normal operations, the market would automatically reward labor and capital in proportion to the value each had generated, which Clark took to mean (self-evidently) in proportion to their just deserts. "To every man his product, his whole product and nothing but his product," as Clark put it in 1890.⁹ That result, Clark argued, refuted dispositively not only Marxian theories of exploitation but all others as well. Initially presented in muted form, Clark's argument had developed into a full-blown apologetic for the distributive justice of unregulated capitalism by the publication of *The Distribution of Wealth* in 1899.¹⁰

Both Tiedeman's and Clark's arguments had considerable influence in their time. Together they forged what many contemporaries took to be a powerful rights-based defense of economic laissez faire. Tiedeman's constitutional argument for limited government was institutionalized in various state and federal court decisions limiting the permissible scope of economic regulation in the name of freedom of contract and private property.¹¹ Clark's philosophical argument for laissez faire had a more complicated fate. Few mainstream economists explicitly defended Clark's thesis, deeming its premises more properly in the realm of politics or philosophy than the science of economics. But his thesis had enormous appeal to a popular audience, shoring up a widespread intuition, going back at least to John Locke, that each person is entitled to the fruits of her labor, and by extension to whatever the market will pay her for relinquishing them.¹²

Beginning in the 1890s and continuing through the 1930s, progressive academics in law and in economics mounted parallel assaults on economic laissez faire. Two key objectives united the two camps of this "first great law and economics movement," to borrow Herbert Hovenkamp's apt phrase. The first objective was to show that Tiedeman's constitutionally protected sphere of economic life, like Clark's moral market, was constituted by a

regime of property and contract rights that were neither spontaneously occurring nor self-defining, but were rather the positive creation of the state. What the state had made in one form, one was nudged to conclude, it could remake in another. Second, the particular configuration of contract and property rights embraced by late nineteenth- and early twentieth-century Anglo-American law had produced a distribution of wealth that was hard to square with any obvious intuitions of justice. What the state could remake, it therefore should. Robert Lee Hale, the principal subject of this book, was a key figure in both camps. His work constitutes perhaps their most important intellectual bridge.

Hale was trained both as a lawyer (LL.B., Harvard, 1909) and as an economist (M.A., Harvard, 1907; Ph.D., Columbia, 1918). Although a common marriage of interests in contemporary academia, it was unusual in Hale's time, and one that uniquely positioned him for what he took on as his central task: to educate lawyers, judges, and economists to the role of positive legal entitlements in shaping what were supposed the "natural" rights of ownership and the "natural" laws of distribution in a laissez-faire economy. His project immersed him in deconstructing the details of law, for which he had an impressive, Holmesian talent. But as Hale noted, he was more interested in political theory than in law, viewing law merely as the vehicle for allocating political power.¹³ Hale's dissertation, published in 1918, marked the beginning of a lifelong interest in government regulation of public utilities as a model for the public control of all private property.¹⁴ After a brief teaching stint in the Columbia economics department, Hale joined the faculty of Columbia Law School in 1919 at the invitation of the then Dean, Harlan Fiske Stone. Hale came initially under a joint appointment with the economics department and then full-time from 1928 until his retirement in 1949. His primary teaching was in the area of public utilities regulation and in a highly regarded course that he developed over many years called Legal Factors in Economic Society. The materials Hale prepared for the course, which were brilliant and quirky, offer the most comprehensive picture of Hale's legal philosophy. They formed the basis of his final work, *Freedom Through Law*, published in 1953.

During his lifetime, Hale wrote two books and about sixty articles, reviews, and commentaries, as well as leaving behind numerous unpublished manuscripts and course materials. He wrote in four principal areas: coercion, property rights, public utility rate regulation, and the normative implications of neoclassical economic theory. He is probably best known today for the first area, as a result of three widely cited and formative articles redescribing "free market" exchanges as a network of coercion.¹⁵ The bulk of Hale's

writing, however, was in the second and third areas—the general theory of property rights, and the theory as applied to the problem of public utility rate regulation. In addition to his dissertation and a leading casebook, *Cases on the Law of Public Utilities*, coauthored with two colleagues at Columbia, Hale wrote some twenty-five articles and reviews critiquing the Supreme Court's efforts to confine the scope and precedential significance of the government's power to regulate public utilities. In the area of economic theory, Hale wrote one article for publication as well as several unpublished manuscripts critiquing the claim that an "unregulated" market economy automatically achieved distributive justice (John Bates Clark's point) as well as allocative efficiency (that is, the allocation of resources to their most valuable uses).¹⁶

The division of Hale's work into distinct areas, however, is somewhat arbitrary and misleading. His arguments in the areas of coercion, property rights, and the distributive justice of the market not only share common themes. They are analytically dependent on one another, forming parts of a larger, comprehensive argument, developed over many years in his *Legal Factors* materials, detailing the legal conditioning of economic life.

Hale's intellectual preoccupations were, in many respects, typical of progressive social thought in the years from the 1880s to the 1930s. He shared with a wide range of humanists and social scientists of his time a methodological hostility to formalism, a preference for the inductive over the deductive method, and a belief that the overriding obligation of political life was to maximize collective welfare rather than to protect individual rights. Like John Dewey, Walter Lippmann, Herbert Croly, and other leading pragmatic social reformers of his time, Hale believed that the proper role of government was instrumental—to better the conditions of its citizens—and that in service to that end, government should be pushed to make its decisions both more conscious and more scientific. The main body of Hale's work—an assault on the twin bulwarks of classic liberalism, liberty interests and property rights—grew out of a long tradition of progressive thought. That tradition was sharpened for American progressives from the 1880s to the 1930s by the Supreme Court's invocation of both as constitutional bars to economic regulation. Like many economists of the nineteenth and early twentieth centuries, Hale believed that "[t]he paramount question of political economy to-day is the question of distribution."¹⁷ His particular critique of the distributive justice of the market drew on a long tradition of leftist thought, originating with the early socialists, cast within the classical economic tradition. That tradition was transmuted by Henry George and the land-tax movement in the light of Ricardian economics, and finally reworked by the Fabian socialists, New Liberals, and others in the wake of the marginalist revolution

in economics. His critique of the traditional liberal view that government held a monopoly on coercion was indebted to a complex web of leftist and progressive ideas, including the socialist attack on the coerciveness of labor contracts, Thomas Hill (T. H.) Green's "positive" conception of liberty, and the rise of the new sociology of Albion Small, Lester Ward, and others, stressing the interdependence of social life. Finally, Hale's argument that government power, rather than necessarily adding to private coercion, might actually ameliorate it, was advanced by most proponents of greater "social control," from T. H. Green to the supporters of the Wagner Act and other New Deal labor legislation.¹⁸

His closest intellectual ties, not surprisingly, were to the principal groups of progressive academics writing in economics and law respectively during those years: the institutional economists and Legal Realists. Hale's push to expose the legal underpinnings of the market can be seen as part of the larger project of the institutionalists to understand the social institutions that condition economic life. Those who were engaged in that project included Thorstein Veblen, Henry Carter Adams, Wesley Mitchell, Richard Ely, Edmund James, John Commons, Edwin Seligman, Simon Patten, Herbert Davenport, John Maurice Clark, Rexford Tugwell, Clarence E. Ayres, and Walton Hamilton. His attention to the details of those legal underpinnings—in particular private property and free contract—was central to the project of a number of Realists to show the social contingency of so-called natural rights. The work of Morris Cohen, Felix Cohen, Walter Wheeler Cook, Leon Green, Karl Llewellyn, Walton Hamilton, and Herman Oliphant, among others, comes to mind. Finally, Hale's choice to focus on public utility rate regulation was typical of his times as well. Historical accident had made railroads and public utilities the primary battleground for the legislatures and the courts to work out the appropriate limits of government control of private property. As a result, many of the most interesting progressive economists and legal theorists writing in the first part of the century turned their attention at one point or another to what may seem to contemporary eyes as the rather arcane field of public utilities regulation.

Hale's substantive agenda for political reform was also (at least in its broad outlines) typical progressive fare. He was, as he put it, centrally concerned with "the proper distribution of income," by which he and other progressives meant principally its redistribution from rich to poor.¹⁹ Like many of his progressive colleagues, that concern grew partly out of utilitarian commitments and partly out of egalitarian ones, a philosophical tension substantially resolved for progressives by the Edgeworthian hypothesis that, all other things being equal, aggregate welfare would be maximized by an egalitarian

distribution of wealth.²⁰ His notion of "proper" was, above all else, to create a decent standard of living for the working classes by raising their earning and spending power. As he stated simply in an early article, that goal would be accomplished by "adjustment of the worker's relations with those to whom he pays his dollar . . . [and] with those from whom he earns it."²¹ The first half of that agenda immersed Hale in the Progressive-Era obsession with monopolies and other structural imperfections in the market that yielded supernormal returns to producers. The second half immersed him in the Progressive-Era obsession with labor relations. His solution in both areas was also typical progressive fare, although it was closest in its specifics not to the trust-busting or prounion wings of American progressivism, but to the British New Liberals.²² In the area of consumer contracts, Hale supported efforts to curtail, through price controls and taxation, the power of corporations to extract a price in excess of a "fair return" on their investments. In the area of labor relations, he embraced what historians of the period would now describe as both corporatist and statist versions of liberal reforms, supporting the Wagner Act and other (corporatist) legislative and judicial efforts to increase the portion of the "national dividend" that was extracted by labor by boosting the bargaining strength of unions in private negotiations, as well as direct (statist) legislation mandating wages, hours, and other terms of employment.²³ More generally, he strongly supported that "quintessential progressive reform," a progressive tax-rate structure, the surplus from which would be used to finance government welfare programs to assure a social minimum for all citizens.²⁴

As with many left-leaning social reformers of his time, it is not hard to detect a strong socialist influence on both the rhetoric and the substance of Hale's political agenda.²⁵ Hale's preoccupation with surplus value, like his preoccupation with the coerciveness of the private bargains by which it was distributed in the market, had obvious cognates in socialist theory. Moreover, the rhetoric of positive freedom that infused Hale's and other early twentieth-century progressives' writings echoes earlier socialist and proto-socialist demands that "equal rights" must mean, at root, "equal means" to rights. But, again like most of his fellow progressives, Hale stopped short of advocating absolute equality of incomes or widespread government ownership of private property. He chose instead to steer what has been aptly termed "a middle way" between programmatic socialism and the possessive individualism of nineteenth-century laissez-faire liberalism.²⁶ Herbert Croly put it thus: "A democracy dedicated to individual and social betterment is necessarily individualist as well as socialist. . . . There are two indispensable economic conditions of qualitative individual self-expression. One is the

preservation of the institution of private property in some form, and the other is the radical transformation of its existing nature and influence."²⁷

The progressives' motives for hewing to the middle way were complicated. In part, the choice reflected a genuine and surprisingly strong commitment to individual autonomy, but a commitment updated to reflect a new and more complex world of social interdependence. In this respect, the progressives stood apart not only from traditional Marxist socialists but from the Christian socialists and other communitarian idealists as well. They were Lockean individualists, but of a sort unrecognizable to traditional liberals, insisting on both a functional definition of autonomy and a more exacting separation of individual and social contributions to the social product. In part, the choice reflected the pragmatic, utilitarian belief that some degree of inequality was necessary to maintain incentives for productivity. Finally, the choice was pragmatic in a more personal sense, reflecting the high personal and professional cost of being labeled a socialist. Mindful of that cost, many progressives went out of their way to avoid prescriptions that smacked of class warfare and to distance themselves from some of the particulars of labor's cause. As discussed later, among the attractions of the particular prescription offered by Hale and others—what I have termed progressive rent theory—was that it framed the case for redistribution, at least formally, in nonclass terms.

In other areas, Hale stood on the more radical fringe of progressive politics. A reserved, intensely private man, Hale was a strong, behind-the-scenes activist in a number of politically explosive causes. Hale was part of a small committee of law professors and lawyers who worked during the summer of 1927 to reverse the conviction of Sacco and Vanzetti. Throughout the summer of 1927, Hale carried on an impassioned correspondence with his former teacher, A. Lawrence Lowell, head of the commission appointed by Massachusetts governor Alvan T. Fuller to review the convictions, in a futile attempt to persuade Lowell to recommend reversal of the convictions.²⁸ Two years later, he contributed to a collection of articles edited by Karl Llewellyn a scathing critique of the bullet testimony that had been crucial to the pair's conviction.²⁹ Throughout his adult life, Hale was also a strong supporter of racial equality long before such a position became popular. To that end, he assisted in litigating a number of important early desegregation cases and in developing the expansive theory of state action that underlay the landmark civil rights decision in *Shelley v. Kraemer*. In addition, he was a lifelong gadfly in his private correspondence, attacking establishment pieties on a wide range of matters from free speech for radicals to union-busting activities.³⁰