Book Review (reviewing G.E. Hale & Rosemary D. Hale, Market Power: Size and Shape under the Sherman Act (1958))

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our knowledge, than by accepting a philosophy of law, such as Professor Friedrich's, derived from highly subjective sources and rejecting the possibility of a more objective knowledge along the lines of the natural sciences.

Professor Friedrich's book is essentially a reasoned elaboration of Western political development within the framework of the predominant modern philosophical view. It is challenging, persuasive and deserving of the most careful consideration by everyone concerned with preserving individual liberty and the democratic process in this time of their greatest trial.

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The Hales have written one of the few worthwhile books in the trade regulation field. It is an excellent and reliable guide to the doctrines, the reasons given in support of the doctrines, and to the cases in the area of market power. This area is hard to define. The Hales are not always consistent as to its boundaries. In general, they are discussing the problem of monopoly and not the problem of conspiracy. But their eyes wander frequently, so that we get their views on such matters as intracorporate conspiracies, allocations of territories, and something of patent license arrangements. In part, the uncertain boundaries no doubt are due to the growth of so much of the book through separate law review essays, but another explanation is the seamless web which the Hales remind us is the character of antitrust law. In the area of its principal emphasis, the book suffers from an inadequate exploration of the history, impact and probable future importance of Section Seven of the Clayton Act. But this is only to say that the book already requires a supplement which, it is hoped, the authors are now preparing in a manner as workmanlike as the present volume.

The Hales have written a work of theology, and what they have described or constructed does not always please them. They usually remain even-tempered about it all, although there are a few indications of indignation, such as when they refer to moral muddlement (which they are against), or when they conclude with a recommendation, which might be thought to involve some desperation, that Section Two of the Sherman Act should be repealed in favor of a limitation upon the over-all size of business enterprise. But these indications of indignation or desperation are exceptions from the patient examination of almost everything that anyone—lawyer or economist—has said in print in the reputable secondary materials on the monopoly problem. And briefs and congressional hearings are drawn upon also. The result is an amazing collection of rationalizations for different positions, and at times the presentation of the
views of economists whose suggestions as to economic theory would not stand
the scrutiny of their betters—but we can’t be sure who the betters are—and
whose pronouncements in any event it is to be hoped won’t have much to do
with the development of antitrust law. This is to say that the Hales have en-
larged the stream of economic literature which may now be referred to in legal
circles, and, with due regard for the quality of the stream, this may not be an
unmitigated service. Yet perhaps we should not complain that the Hales have
been so diligent, and at times they do give us the benefit of their own view—or
perhaps I only read this into what they have written—that so much of this
learning doesn’t really make much difference.

In any event, after their arduous, often brilliant, always careful and objec-
tive exploration, the Hales conclude: “On the whole . . . the impression of the
previous chapters is that those who enforce the antitrust laws sail on largely
uncharted seas” (p. 396), and “[s]ince we regard efforts to improve our economy
through enforcement of Section 2 of the Sherman Act as something like trying
to repair a watch with a steam shovel, we should prefer to abandon that legis-
lation” (p. 404). The abandonment is to be in favor of “a limitation upon
wealth”; that is, upon absolute corporate size apparently without restriction
to monopoly power or effect.

Appreciation of the high quality of what the Hales have written does not
require agreement with their conclusions. The Hales have admirably described
a large portion of the wonderful world of antitrust—a world in which common
phrases are exalted into legal doctrines with the assumption that a supporting
science somewhere (whether it be law or economics is not clear) justifies the
usage; a world in which inconsistent doctrines grow under the impact of hard
cases and changes in view; a world, in short, of case law extended. The result is
a responsive and pliable instrument, reflecting, to be sure, our own ignorance,
yet at least to some extent saving us from our ignorance through the nega-
tive value of filling up a void otherwise too inviting for more harmful regulatory
schemes, such as, I fear, the limitation upon wealth which they suggest.¹ In
portraying this world, the Hales have written a jurisprudence which is a genuine
contribution to the literature of the law. And in laying bare, in a patient and
perceptive way, the shallowness of our thought, they have brought to the law
of monopoly the likelihood of a higher quality of self criticism, which should
raise the level of investigation and make it possible for the future of the anti-
trust law to reflect the high quality of their performance.

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¹ The Hales do say: “If, however, the choice is between public utility type regulation (or
outright socialization) and enforcement of existing statutes, our choice is clearly to continue
our efforts, however wobbly, to destroy monopoly” (p. 405).

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