

The Harm Principle and Corporations

Abstract

In this paper, I defend what may seem a surprising view: that John Stuart Mill's famous harm principle would, if taken to be what justifies government action, disallow the existence of corporations. My claim is not that harmful activities of currently existing corporations warrants *their* losing corporate status according to the harm principle. The claim, rather, is that taken strictly, the harm principle and the legal possibility of incorporation are mutually exclusive. This view *may* be surprising—and I do not at all mean to attribute it to Mill—but if I am right, it *should* be obvious. It should also encourage us to think more about the nature of the markets within which business occurs.

In the first section, I layout the view that follows from accepting the harm principle. In the second section, I explain the basic nature of legal incorporation. In the third section, I lay out the brief, but I think decisive, argument that the endorsement of the harm principle (as understood in the first section) is necessarily opposed to legal incorporation. I consider objections in the final section.

The basic argument presented is simple: if the only justification for state action is rectification or prevention of harm, there is no justification for the corpus of corporate law as that law is state instituted for reasons not having to do with harm. This is not to deny that the corporate model of the firm provides great benefit—by reducing costs that make goods and services less expensive for everyone (while also enriching a small group). Much of this benefit, however, could be established without state intervention. Importantly, though, the failure to make that benefit possible is not a harm as that term is used in the harm principle.

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I. What follows from the Harm Principle²

John Stuart Mill's harm principle reads: "The sole end for which mankind are warranted,

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individually or collectively, in interfering with the liberty of action of any of their number is self-protection ... the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (Mill 1859, 9). Importantly, this is not the principle *primum non nocere*—first, do no harm. It does not merely mandate that we not harm others, but indicates that doing harm to others is *(the only) warrant for interference*. In other words, it sets a normative limit to toleration such that all *must* be tolerated *except* that which is harmful. While Mill ends up allowing interferences for other reasons, we can (and, I think, should) take the harm principle more seriously than he does himself.³ We can take it as a necessary condition for interference. Doing so means endorsing the claim that harm and only harm justifies ending toleration by any agent, state or otherwise, and *pro tanto* permits interference. This allows the most extensive liberty that should be provided in society. No one denies that harm is *prima facie* good reason for interference. As no one wants to be harmed, we all want this limit to others’ liberty and should accept it on our own activities.

It is important that the limit just specified is determined by *harm* and not mere hurts. To clarify: harms, for our purposes, are *wrongful setbacks to interests*—not *mere hurts*, which are setbacks to interests but not wrongful. (In his magnum opus, Joel Feinberg argues that this is the way harm is best understood in the harm principle.)⁴ Jack’s tripping on a stone in his path and thus skinning his knee is, in the ordinary case, a hurt, but not a harm. While Jack surely has an interest in not skinning his knee, if we assume—what is reasonable—that no one wronged Jack but that the stone just happened to be in the wrong place causing him to fall, with no one at fault, there is no wrongfulness and thus no harm understood as a wrongful setback to interests. With no harm, there is no reason for interference. Put simply, we don’t think Jack has a justified complaint against anyone with whom we could or should interfere. By contrast, if you take Jill’s

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laptop computer without her permission and claim it as your own, you wrongfully set back her interests in the computer, she is justified in complaining, and interference with you to rectify the situation is likely warranted. Similarly, if Albert stabs Charles in order to satisfy his (Albert's) desire to see blood, Charles is justified in complaining and interference with Albert is warranted to rectify the situation. Jack is hurt but not harmed. Jill and Charles are both harmed.

According to the harm principle, interference is permitted in the latter cases but not the former.⁵

Many, of course, want the government to interfere in more instances than would be permitted if the harm principle were taken as providing the sole warrant for interference. They would allow that interference is permissible for reasons other than (i.e., in addition to) the prevention and rectification of harm. I do not here defend (but assume) the insistence that it is *harm alone* that justifies interference (or the corresponding extensive liberty that insistence would allow)—that is a task for another time.⁶ I agree, of course, that the desire to be generous and help others is notable and to be encouraged, but am not inclined to think it can be part of public policy.⁷ In any case, to assume requiring aid is permissible where no harm is present is to beg the question against the view I am discussing here, according to which, only harm provides warrant for interference⁸—indeed, for *any government actions*. Even the mere instituting of laws requires interference—for the funds necessary to determine, record, or promulgate the laws.⁹

If the only justification for government action is the prevention or rectification of harm, the only acceptable laws are those that are needed to prevent or rectify harm. In a regime accepting this, there would be no laws regarding prostitution, pornography, homosexuality, same-sex marriage, smoking, stem cell research, assisted suicide, or euthanasia. These would all be tolerated. (If any particular instance of these causes harm,¹⁰ interference would be warranted—but that is true of bike-riding, driving a car, and everything else.) Of course, for any

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state to have the ability to prevent or rectify a harm, it likely must have a taxation program to pay for police and military to prevent harms where possible and to rectify harms that are not prevented.¹¹ Indeed, courts and other institutional means of harm prevention and rectification also may be used. Criminals in such a society—those who commit serious harms¹²—must be interfered with in order to prevent them from committing further harms and to provide rectification of harms done. Courts would also be necessary for cases where it is unclear whether a harm has been committed or if it is unclear who is responsible for the harm. Two parties may each think themselves harmed by the other and we need an impartial party to determine which, if either (or both), is correct. Overall, this sort of state has a government limited to certain minimal activities, a government that might be considered libertarian in nature. It may be ever-present to ensure justice, but constrained in that role to act only to prevent or rectify harm.

To be clear: the harm principle indicates when interference with individual behavior is warranted, but not when it is required—nor what sort of interference should be used. The warrant is something more than mere permission. When X is warranted, it is permitted and there is reason to X, but X is not required. X being warranted means there is *pro tanto* reason for X. Absent any (weighty enough) countervailing reasons, when X is warranted, X should occur. But there are often countervailing reasons. To take a simple example, if I caused you a minor harm—say I slap you across the face—it may not be that I should be arrested or even approached if, for example, I flew to another country immediately after slapping you. What I did would have been a harm and interference is thus permitted, but not required. The costs of interference can reasonably be taken into account by the authorities. Often, we ignore *de minimis* harms though we recognize them as harms.¹³

II. Legal Incorporation

There are a variety of types of business firms. The most simple is sole proprietorship. Sole proprietorship firms (and partnerships) have owners who are fully responsible for the firm's activities. Legally incorporating a firm allows an owner to limit her liability for the firm's activities. If an incorporated firm is sued, for example, its owners are responsible for nothing more than their investment in the firm. To take a simple example, imagine that Bill is the majority stock-holder in ABC Corporation but takes no part in running ABC. If ABC Corporation is found guilty of dumping toxic waste and ordered by a court to pay \$10 million, Bill's assets are unlikely to be used to settle that debt, even if ABC Corporation has only \$3 million in assets and Bill has \$200 million and all of that is due to his accumulation of stock dividends from ABC Corporation.¹⁴

"Limited liability" is a major benefit to owners. It is not, though, the only advantage of the corporate model. Whereas limited liability relieves individual investors of liability for the debts of the corporation, it is "entity shielding" that prevents the corporation from being liable for the debts of its investors.¹⁵ Take an example similar to that just used. Jay is the majority (say 51%) share-holder in DEF Corporation and is the CEO of DEF. If Jay gambles and loses so that he has a debt of \$10 million, DEF Corporation's funds will not be attached to any settlement against Jay even if he has no savings and DEF Corporation has cash reserves of \$200 million.¹⁶

To be clear, there are variations in the ways firms are incorporated. Limited liability and entity shielding, though, are basic and normal elements of incorporation.

The corporate model is generally thought valuable as it promotes business activity. Legal incorporation (government granting of corporate charters),¹⁷ allows individuals to work together with limited liability and entity shielding, thus allowing for the collection of capital needed for

long-term projects. The main justification for such a system is that it significantly reduces transaction costs, making business more efficient so that more goods and services are produced than otherwise would be possible.¹⁸ With more production, more people can lead good lives.

There are often, of course, economies of scale in business. Firms A and B might each be able to produce 1000 widgets per day at \$3/per unit, but a single firm producing 10,000 widgets per day may get discounts on the purchase of the raw materials needed to produce those widgets and may be able to invest in machinery that produces widgets faster and with less waste than either A or B could afford, thus getting the cost of production down to \$2/per unit. The owner of firm A might dream of producing 10,000 widgets a day. As a sole proprietor, he can borrow money to buy the machinery, he can take on a partner with money to invest, or he can incorporate and sell shares of his firm. Selling shares of the firm without limited liability laws would be difficult, as investors would not want to risk their other assets. (Similarly, without entity shielding, he would risk having to pay the debts of those investors.)

The owner of A could, without a legal system of incorporation, set up all contracts to limit the liability of investors, but this would require that all contracts include verbiage such that those signing the contracts—presumably customers, suppliers, and employees of the firm—agree not to hold the investors liable for the firm's failures. The owner may not have used any contracts before, or may have used simpler contracts. A lawyer would have to be paid. Some potential customers, suppliers, and employees, might balk at signing the contracts. Put simply, without legal incorporation, limiting the liability of investors becomes more expensive for any firm and without limiting that liability, attracting investment becomes less likely.¹⁹ Much of what is said here about limited liability may hold for entity shielding,²⁰ which would also involve the investor renegotiating contracts she had with others prior to her investment in firm A (unless

she had the foresight to include the necessary clauses in her previous contracts). Hence, a legal system of incorporation reduces transactions costs and allows firms to produce more with lower costs by not requiring them to develop sophisticated and detailed contracts limiting the liability of investors and protecting them from debts incurred by those investors. The contractual verbiage is rendered unnecessary because, essentially, it is written into the law.

III. The Argument

Systems of legal incorporation have benefits: they allow less expensive production of goods and services that benefit everyone. They are not always harmless. To see this, consider cases of involuntary creditors. Say I am injured by the activity of a corporation (perhaps hit by a corporate-owned truck or made sick by corporate-produced pollution).²¹ If the corporation's assets are not sufficient to compensate me for the injury, I would likely remain uncompensated.²² This holds even if the corporation's stocks are 100% owned by a single individual who has assets far greater than the cost of my health care but is not responsible for the management of the firm.

The point in this paper, though, is not about harms that corporations might cause. I take it as given that if the Hurter Corporation is guilty of some activity that results in my becoming incapacitated, it can be made to compensate me; if Hurter does not have the requisite assets, it may be forced into bankruptcy. The same is true if an individual does me harm. That Hurter may not be able to fully compensate me for my injury is not significantly different from Joe's not being able to fully compensate me for my injury. (Except of course that Hurter, unlike Joe, may have owners with deep pockets.)

The argument here is *not* about the harms corporations might do and that would justify interference. The argument here is, rather about the justification for the very existence of

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corporations. The argument is simple. Recall from the first section that according to the harm principle, the only justification for government action—including the institution of laws—is the prevention or rectification of harms. Here is the argument:

1. The only justification for government action—including the institution of laws—is the prevention or rectification of harms, understood as wrongful setbacks to interests.
2. Corporate law does not prevent or rectify harms.
3. There is no justification for corporate law.
4. With no corporate law, there could be no corporations.
5. There ought to be no corporations.

Let us look at this a bit further. Some will, of course, challenge the veracity of premise 1, but as already indicated, I do not defend it here; it is the point of this paper to show that it is incompatible with the existence of corporate law, not to show that we should accept it.²³ So I move to premise 2.

Premise 2 seems clear; while corporate law might—as indicated in the previous section—provide benefits, it does not (and is not intended to) prevent or rectify harms. Considering a firm a legal (corporate) person is to confer upon its owners the benefit of dealing with others (persons and firms) as a person rather than as a set of people with a nexus of relations.²⁴ Founders of, investors in, and employees of, corporations fare better (at least potentially) because of corporate law; indeed, anyone who purchases the goods or services provided by the corporation potentially does better since the costs of production—and hence, the costs of the product—are lowered. But none of this is a matter of preventing or rectifying harms—wrongful setbacks of interests.

Premise 3 follows directly from premises 1 and 2 and the conclusion (5) follows directly from premises 3 and 4. That leaves premise 4.

As indicated in the previous section, much of the benefit of limited liability could be duplicated without a specific body of law instituted by a government. When I speak of corporations, however, I am referring to business entities that are incorporated by law, not by a

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network of contractual arrangements executed without a pre-established separate legal framework. Without a separate legal framework for corporate law, there are—analytically—no corporations. Premise 4 stands. Of course, this leaves the possibility of large firms that build clauses into all of their contractual arrangements so as to limit the liability of investors and shield the firm from the debts of those investors.²⁵ That is not a problem. The problem with corporations, if we take the harm principle as seriously as suggested here, is neither their size nor their attempts to limit liability or shield themselves from debts. The problem is with government action to make that easier; it is government provision of aid to some that is unjustified by the harm principle. Of course, it may well be that as a contingent matter, without corporate law, we would have only firms significantly smaller than those currently in existence. The argument stands nonetheless.

IV. Worries

A. No Corporate Law, No Contract Law

The first objection that is worth considering is that if adhering strictly to the harm principle rules out the possibility of a corpus of corporate law, it also rules out contract law—which we surely want to maintain. Instituting contract law is not, the claim goes, responding to a harm. It is, we are meant to think, merely a benefit to those who are in position to enter contracts. The problem with this view is that everyone (of age) is in a position to enter contracts and, moreover, that in its simplest form, contract law *is* a matter of protection—i.e., it is a means of preventing harm.²⁶

That everyone is in a position to enter a contract is clear when we recognize that employees as well as employers, renters as well as landlords, consumers as well as producers,

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etc., enter contracts. It is, of course, true that in our society contracts are written in such a way that most cannot be expected to understand them, but that is an objection to the existing legal system, not to having a system of contract law.²⁷ Contracts should be understandable to anyone that is party to them. This is necessary for the consent given to be fully voluntary.

Contract law accords with the harm principle. Interfering to enforce compliance with a voluntarily accepted contract protects both parties to the contract from harm—and provides no other benefit with any necessity. If, for example, Cody voluntarily agrees to rent an apartment from Maria for \$1000/month (signing a lease to that effect), but then refuses to pay Maria, she would have her interests wrongly set back—she would be harmed. Legal enforcement of the contract thus serves to prevent harm (or rectify it if Cody leaves but is later made to compensate Maria). Similarly, should Maria try to have Cody removed for reasons not specified in their contract, it would protect Cody—who would otherwise have *his* interests wrongfully set back by Maria refusing to honor the contract. Neither Maria nor Cody is given any benefit, other than protection from harm, by contract law. Contract law—again, in simple form—accords with the harm principle.

B. Reduced Welfare without Corporations

Though the argument presented in the section III is valid, some may take it to be a sort of *reductio* of the view that the only justification for state action is the prevention and rectification of harm as the view expressed in premise 1 requires.²⁸ As already hinted, they might suggest that absent corporate law (and corporations), we would lack the accumulation of capital that makes large scale investment and production possible and that this means a society endorsing this view would be unable to sustain a population of any significant size.²⁹ This may be the most

significant objection to the view presented here.

It may well be that a society wherein the government takes no actions that are not justified by the harm principle strictly understood will be one with only small scale markets. In such a society,³⁰ there would be small communities within which individuals can walk to each other and bring labor, capital, goods, and services. A society of such small communities would allow for trade with those near enough to one another and as individuals accumulate wealth, they would be free to decide—individually or with neighbors—to improve the nearby infrastructure and extend their market. Perhaps, over time, this could grow enough for a mass economy. I do not know if this is the case, but it's not clear we should be concerned.

On the one hand, we might simply accept polities with small scale communities, recognizing that in local markets with limited numbers of participants, limited goods and services bought and sold, and limited profits, accumulations of capital are unlikely to be sufficient to fund extensive infrastructure. If the sort of accumulations of capital present without government encouragement via corporate law would allow for national growth, it plausibly would be slow. On the other hand, though, it may be that government intervention to provide corporate law is unnecessary for a large-scale economy. The New York Stock Exchange, after all, began as a voluntary organization,³¹ without government aid, and could *possibly* have sustained a national capital market without legal interventions. This may or may not be likely, but we need not be concerned about it either way. If it could work, we allow for the efficient benefit of large and efficient firms without government assistance to create them. I suspect the bigger worry centers on being *unable* to have mass production that creates efficiencies benefitting everyone.

How worrisome is the prospect of only small-scale economies? It is perhaps true that in such a system, people would remain poor longer than they have in our world (with corporate law). Still, we should note that this would be accompanied by fewer harms. We would have conditions vastly different from what we have historically seen.³² Consider that if the Dalit in India (i.e., the so-called “untouchable” class) had always been allowed to trade as they pleased, their situation would undoubtedly be better than it actually was. They might not have attained great wealth (without the ability to use corporate law), but their plight would be better nonetheless. That is, strict adherence to the harm principle might mean lower levels of welfare because of less production of consumer goods due to the lack of benefits corporations provide, but may nonetheless be better for many—likely including the least well off. Moreover, even with a smaller economic system, greater economic freedom might be beneficial for the poor as they would be free to seek to improve their income without intervention and as private charity might thrive given the lower taxes and (possibly stronger communal bonds) that would be present when government activity is limited to what is justified by the harm principle. Thus, we might have more egalitarian distributions of income and wealth even if without *large accumulations* of wealth.

So far, the objection has centered around the idea that the first premise in the argument *must be wrong* because corporations are too valuable, but has not provided a better claim about what justifies government action. The most likely proposal, I think, is something like a weak “benefit to others principle,”³³ allowing for government action when doing so can benefit individuals, without setting back the interests of others. That is, some would claim that government activity that is Pareto optimal is permissible even when no harm is prevented or

rectified.³⁴ (Those making this suggestion would likely accept a modified harm principle that allows that while harm justifies interference, it is not alone in doing so.)

One response to this objection invites recognition that law is coercive and so cannot be Pareto optimal—as the presence of coercion means someone is made worse off. But whether law must be coercive is a difficult question we do better to avoid here.³⁵ So assume some law need not be coercive. In particular, assume corporate law is not coercive. Indeed, some would suggest everyone wants (perhaps because everyone benefits from) corporate law. If that were the case, instituting corporate law would plausibly be a Pareto optimal move: at least some would be made better off and none would be made worse off. My interlocutor here might, then, accept corporate law by rejecting the harm principle in its strict form—presumably still accepting that preventing and rectifying harm provides warrant for interference, but insisting that some benefit does as well. The problem with this move is that it opens the door to significantly more government activity than some of us, perhaps the same thinkers who seek to defend corporate law, are happy with. (Those happy with extensive government activity might rest their case here; perhaps oddly then, welfare liberals ought to endorse our system of corporate law or something like it while libertarians ought to reject it.)

Accepting that benefiting others is a justification for government instituting corporate law requires accepting that it is justification for other institutions that benefit others—a universal demogrant comes to mind, for example—unless it can be shown that those other institutions, unlike corporate law, are not Pareto improvements. Endorsing corporate law because it creates tremendous benefit, or does so efficiently, is accepting a particular consequentialist justification for government interference (a justification contingent upon empirical facts rather than principle). To maintain consistency, then, advocates of this move would either need also to

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approve of government aid to individuals *or* show that such aid would *not* have a similar benefit. There is at least some evidence, though, that providing everyone a Basic Income Guarantee (also called an Unconditional or Universal Basic Income, or a Guaranteed Annual Income) to all individuals is an efficient way to create tremendous benefit.³⁶

Given that taxation would be necessary to provide a Basic Income Guarantee, it may seem obvious that this cannot be Pareto optimal even if it does provide extensive benefit. (This is not the reply, mentioned above, that *all law is coercive*.) Taxation, after all, leaves some *prima facie* worse off than they were. Things are not as clear here as it may seem. We must realize that (a) even instituting bodies of law (like corporate law) will involve some taxation and (b) whether anyone is really made worse off will depend on what the baseline is. Some argue that government activity improves everyone's life; Liam Murphy and Thomas Nagel, for example, suggest that "if literally all government benefits were taken into account... we would notice that almost no one suffers a net burden from government."³⁷ On their view, though, far more government activity would be allowed than just the instantiation of corporate law.

The theoretical quandary for someone who wants to limit government activity to providing corporate law but not other things people like Murphy and Nagel think should be provided, is to offer a principled explanation for the difference. One way to try to answer this quandary is to show that the former is Pareto optimal while the latter is not. As already indicated, I am skeptical that this will work. I know of no other way to defend the one while rejecting the other and so conclude that given commitment to the harm principle as strictly as suggested here, we ought to reject, rather than accept, both. I recognize that some would prefer to approve of a weak benefit-to-others principle in addition to a less strict version of the harm principle.

C. The Argument Proves Too Much

A different worry is that the argument presented proves too much—or rather, that it can be generalized too far. Government does a lot—like provide schools—that is not obviously about harm prevention or rectification. All such activity may seem to be ruled out on the view I discuss. The obvious response here is that this is an objection to taking the harm principle as strictly as I have suggested and not an objection to the argument that takes that principle as its first assumption. This paper is not intended to offer a defense of that assumption; it is intended to show only that accepting it means rejecting corporate law and hence corporations. A second response here has also been noted above; this is to argue that schools (and other goods that government might be thought justified in providing) do help prevent or rectify harms—perhaps by helping those who have been wrongfully disadvantaged to attain a better life. I will not, though, seek to defend that claim.³⁸

D. Extremes Lead to Extremes

One final worry is straightforward. Some may wonder why they should be at all concerned about the argument I present since I begin with an undefended and extreme premise. That is, few would accept the harm principle in completely unadorned fashion as I suggest here, so providing a valid argument from that premise to a rejection of corporate law and corporations will not seem like an important accomplishment. There are three responses to this objection. First, if one had any antecedent reason to think there was something wrong with the corporate model, they now have some reason to take on the harm principle as the only principle justifying government action. This strikes me as significant. Secondly, and perhaps more importantly, I do

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think the harm principle can be defended as the only principle justifying government action. I have not provided that defense here, but see my 2014 and 2018. Finally, in many discussions of business ethics, there is an overly simple assumption that the business world must be taken as it is; my intention is to challenge that. Put differently, while it is important that business ethicists talk about any number of particular issues *within* business—and especially corporate—ethics, we can and should do more. We should seek to defend best practices within businesses and, just as importantly, how law should structure the markets within which business occurs.³⁹ An understanding of what corporations are and alternative structures that might be possible would be extremely useful. As it stands, students of business ethics often seem oblivious to these issues. This paper might help change that. If it encourages defense of the corporate model as it exists, that too would be a welcome addition to the literature.

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NOTES

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² This section is adapted from my 2017, 826-828. Importantly, I do not claim that Mill himself reads the harm principle as strictly as is discussed here. I spell out my view in my *Toleration and Freedom from Harm* (Routledge, 2018).

³ I defend this view in view in my 2018 and my *Toleration* (Polity, 2014).

⁴ The four-volume *The Moral Limits to the Criminal Law* (see, e.g., Feinberg 1984, p. 36). On Feinberg's view, the harm principle is only part of the core of liberal thinking.) Recent thinkers argue against Feinberg's understanding of harm being in Mill's work (see Jacobson, Miller, and Turner). I put this aside as I am not interpreting Mill. Ben Bradley argues that the existing definitions of harm are a "mess" so "it should be replaced by other more well-behaved concepts" (Bradley, 391). His treatment of Feinberg's definition is, though, unsatisfying (see, in particular, footnote 10, page 395). I defend a modified Feinbergian understanding of harm in my 2018 but cannot include that defense here.

⁵ Some would suggest we understand harms in terms of rights violations. I eschew rights talk as I have no theory of rights. What I say throughout should be compatible with all philosophical accounts of rights on offer. I suspect, though, that we do best to talk about rights violations when someone has a justified complaint because an interest of theirs has been set back. For "harming as right violating" (see Feinberg 1984, 109-114). For this reason, I am sympathetic to theories of rights that take rights to be a species of normative constraints. For two different accounts I am sympathetic to, see Mack 2000 and Rainbolt 2006.

⁶ See my 2014 and 2018.

⁷ Government imposed "generosity" requires coercion to collect the needed resources and what is transferred with coercion is not transferred *generously*. Generosity requires willing and knowing agreement on behalf of the provider; forcing assistance will, at best, result in acquiescence, not generosity. Moreover, if a government were successful in its policies of "generosity"—e.g., aiding the poor—it would reduce the opportunities for individuals to develop the virtue. Put simply, we do not act generously when we are forced to give. Of course, some argue that taxation for redistribution is a matter of justice, but again it would beg the question to assume that government is meant to interfere to help where there is no harm.

⁸ For our purposes, we can understand "interference" to be any act that has the effect of impeding or preventing (even partially) an agent from doing as they wish, intend, or will. That is, it is hindrance or obstruction. Importantly, some instances of interference will be wrongful and thus harms; while interference may be permitted as a response to harm, wrongful interference is not. On the view discussed here, only interference to prevent or rectify harm is ever warranted. Hence, on this view, interference to gather the resources to provide aid where no harm is present is wrongful.

⁹ Even if these are paid for with voluntary donations, if the laws are effective, they coerce. (See footnote 35 below.) Some will argue that there can be government actions—for example, the institution of what H.L.A. Hart calls "secondary rules" (essentially, the rules that apply to the rules that apply to citizens)—that are not interferences of any sort and so compatible with the view that harm alone justifies interference. Insofar as these are a necessary part of a system of preventing and rectifying harm, though, they do not provide a counter-example.

¹⁰ There will be disputes about when harm exists in these sorts of cases. I assume here that in cases of genuinely consensual prostitution, e.g., there is no harm, but I am not here taking any further stand on the issue. In particular, I realize that what counts as consensual in these cases can be rather difficult to clarify.

¹¹ I ignore the possibility that voluntary payments (whether directly for state services or as charitable donations) could suffice. I also ignore the possibility of anarchism. I do not deny the theoretical possibility of anarchic states, but such would not permit corporations as I will understand them below (in accord with the general legal understanding)—because anarchic states have no state law and hence no state corporate law. The possibility remains of a self-funding law—i.e., one wherein the institution, promotion, and guarantee of the law is paid for by those who benefit from it. I admit to having less of a problem with this myself, but it still not justified by the harm principle.

¹² I mean to narrow the definition of criminals to include only those who commit serious harms since on this view, interference is only permitted to prevent or rectify harms. The intension of the term here is the same as in any other society: those who break the law. The extension is much narrower since there are fewer laws, making fewer acts—only those that cause serious harms—illegal.

¹³ Douglas Husak's discussion of inchoate offenses and the use of criminal law to reduce risks of harm may be of interest to readers (see his 2008, 159-177). Husak offers "four distinct principles to limit the authority of the state to punish persons who engage in conduct that creates the risk of harm" (161).

¹⁴ The "corporate veil" can be pierced. Bill's assets might be attached to the settlement if, for example, he were found responsible for ABC Corporation's acts. If, though, Bill has had no active role in ABC for years, his private assets are not likely to be touched even if he owns 51% of all shares in ABC.

¹⁵ See Hansmann, Kraakman, and Squire 2006. Also important is what David Ciepley (2013) calls "asset lock-in" which prohibits an investor from taking assets of the corporation. Armour, Hansmann, and Kraakman call this a rule of liquidation protection and see it as part of a strong form of entity shielding, which they consider to be part of the legal personality of a corporation (see Chapter 1 in Kraakman, Armour, Davies, Enriques, Hansmann, Hertig, Hopt, Kanda, and Rock. Note that to parallel the term "entity shielding," Armour et al also indicate that limited liability is a form of "owner shielding" (ibid, 9). While the one shields the firm from the debts of owners, the other shields the owner from the debts of the firm. Together entity and owner shielding amount to asset partitioning (ibid, 10). Armour et al see legal personality and limited liability as two of five basic elements of corporations; the other three are the transferability of shares, delegated management with a board structure, and investor ownership (ibid 5-16).

¹⁶ As with Bill (footnote 14 above), there are ways the Corporations assets could be attached to a settlement. The default, however, is that they are not. Of course, Jay's shares in DEF could be used to satisfy his debt; his ownership of DEF would transfer. Although that might mean the person Jay was indebted to is made whole, that person might prefer not to have to sell the shares. In any case, that the shares would be transferred makes the Jay case less problematic, I think, than the Bill case. This may be why limited liability seems more problematic than entity shielding.

¹⁷ According to the "grant" theory of the corporation, "A corporation is an artificial being ... existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it" (John Marshall's decision in *Dartmouth College v. Woodward*, 17 U.S. 518; 4 L. Ed. 629; 1819 U.S. LEXIS 330; 4 Wheat. 518). This is not currently the most accepted theory of the corporation, but for a convincing defense of the view that it is the best such theory, see Ciepley op cit. According to Ciepley, this view means corporations are neither private individuals nor reducible to a "web of contracts" among individuals.

¹⁸ It reduces transaction costs through limited liability and entity shielding as well as default contract provisions (see Armour et al, op cit, 20-21) making unnecessary a large web of bi- and multi-lateral contracts.

¹⁹ It is also unclear how to limit the liability of investors to those who are not customers, suppliers, or employees. (See note 21 below.) Still, the default contract provisions corporate law creates clearly help.

²⁰ Armour et al claim that entity shielding, along with authority rules (indicating who runs firm), and procedure rules (who can determine when the firm's contracts are not abided by and can sue on behalf of the firm, etc.)—that together make up the legal personality of a corporate firm—cannot "feasibly be replicated" by contract. They suggest other elements of corporate status can (op cit, 8; the "feasibility" qualifier is removed at 19). See footnote 15 above. Interestingly, "[l]imited liability did not become a standard feature of the English law of joint stock companies until the mid-19th century, and in ... California shareholders bore unlimited personal liability for corporation obligations until 1931" (op cit, 9, ftn 25).

²¹ Armour et al: “The compelling reasons for limited liability *in contract* generally do not extend to limited liability *in tort*—that is, to persons who are unable to adjust the terms on which they extend credit to the corporation, such as third parties who have been injured as a consequence of the corporation’s negligent behavior. Limited liability to such persons is arguably not a necessary feature of the corporate form, and perhaps not even a socially valuable one” (Op cit, 11). In the text, I call these involuntary creditors. For more, see Kraakman et al, chapter 5. But see next footnote.

²² See Hansmann and Kraakman 1991.

²³ That said, I am inclined to think we should accept it and am inclined to think libertarians in particular ought to accept it for reasons that will be clear in the last section. David Brink rejects the idea that a proper Millian understanding of the harm principle is libertarian (2013, 186).

²⁴ See Armour et al, Op cit, 9.

²⁵ If, per footnote 20 above, Armour et al are correct that legal personality *cannot* be replicated by contract, then entity shielding would *not* be possible without corporate law. In any case, even if limited liability can be, the costs of a firm doing business would be higher. Transaction costs would be higher.

²⁶ Putting this point differently, we do not need legislation to have contracts; individuals can make up a contract on their own. If one party failed to lift up to the agreement without consent of the other party, this would seem to be a wrongful setting back of the other party’s interests—a harm—and thus permit interference according to the harm principle. This is why state interference to uphold contracts is permissible, though state interference to create a system of corporate law is not. To be clear, this holds for multiple party contracts as well, so if possible, firms would be permitted to mimic the benefits of corporate law using only contracts and then state interference to uphold those contracts would be permissible.

²⁷ Just as this paper is about the incompatibility of the harm principle and corporations that exist due to the corpus of corporate law, not firms that happen to be large and engage in many contracts.

²⁸ I say “sort of a reductio” rather than a reductio as no logical contradiction is involved; the thought rather is that the consequences of the assumption are so bad as to warrant rejecting it (or its action-guiding force).

²⁹ The problem may be worse as the view expressed in premise 1 does not allow for the provision of even public goods that are not necessary for harm prevention or rectification. Roads that make the transportation of goods possible, for example, would not be built by government agencies if they could not be justified by their relation to harm. (Armour et al seem to consider corporate law itself a public good. (Op cit, 20.)) Of course, (a) it is disputable whether roads and such *are* public goods and (b) it may be that roads and other goods usually provided by governmental bodies in contemporary society help with harm prevention and rectification. Jethro Lieberman provides some arguments in favor of something like (b) (see his 2012, especially 117-118). Perhaps some would argue that corporations help with harm prevention and rectification (I am skeptical.) The more likely response here, I think, is that although not having corporate law (and thus corporations) would not mean creating harms, it would mean leaving people in far less good situations than they are or would be in with corporations and that such is immoral. Those making such an argument might interestingly invoke legal moralism (of some form). This, of course, is to deny premise 1.

³⁰ This might be a state similar to Rawls’ ideal of a property-owning democracy or Jefferson’s ideal agrarian regime. I would suggest, though I won’t here defend the claim, that the provision of corporate law fosters what Rawls calls systems of welfare-state capitalism rather than in what he calls property-owning democracies (see 2001, 139).

³¹ It began in 1792, when 24 New York City stockbrokers signed the “Buttonwood Agreement” (https://www.theice.com/publicdocs/ICE_at_a_glance.pdf, accessed 22 December 2014); for more, see Wener and Smith 1991, esp. Chapter 2.

³² I do not deny that we have greater material wealth due to reduced transaction costs and the lower marginal costs of production that corporate law allows. There simply are smaller percentages of people living in poverty than ever before. (Of course, there are also higher rates of suicide and depression.)

³³ See my 2014, 63 ff. The principle first appears in Feinberg’s 1984, 27. As noted in note 29 above, appeal might instead be made to a form of legal moralism. See my 2014, 75ff.

³⁴ Of course, if in providing benefit to some, the government set back the interests of others, it risks harming those others and thus risks running afoul of the harm principle itself. Interference in such a government's actions, then, would be justified according to the harm principle. This is why the benefit to others principle here is thought of as Pareto efficient and not Kaldor-Hicks efficient. (This may also raise questions of state legitimacy.)

³⁵ See Hart 1961, esp. 20-26. Still, if a particular law or set of laws is not coercive, one might wonder why it must be law at all—i.e., if people want to abide by the rules in question, one would not think they must be instituted or supported by government. This may be an example of what is called a stag hunt problem in game theory (see Skyrms 2004).

³⁶ For some work on the possible efficiency of such a program, see Bryan (2005), Pressman (2005), Widerquist and Lewis (2006), Ackerman, Alstott, and Van Parijs (2006), as well as the journal *Basic Income Studies*.

³⁷ Murphy and Nagel 2002, 15.

³⁸ See footnote 29 above.

³⁹ This is a question of *predistribution*, as is the proper shape of property rights.