

THE ESCAPE PLANS OF MILL AND JEFFERSON:
WHY THE LAW MUST DO MORE FOR
WORKERS

Stephen Nayak-Young

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2014.335
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

THE ESCAPE PLANS OF MILL AND JEFFERSON: WHY THE LAW MUST DO MORE FOR WORKERS

Stephen Nayak-Young*

ABSTRACT

A familiar trope in both scholarly writing and folk wisdom suggests that so long as workers are free to choose from among some reasonable set of options, the law should avoid regulating these options to the greatest extent possible. In this Article, I examine the similar “escape plans” proposed by John Stuart Mill and Thomas Jefferson as putatively sufficient legal intervention to relieve the plight of wage workers. My focus differs from that of Professor Justin Schwartz, who offers, in a recent paper, a detailed and cogent discussion of the reasons why Mill’s prediction, in particular, for the “probable futurity” of workers turned out to be so inaccurate. Instead, I concentrate on the normative question whether either Mill’s or Jefferson’s proposal could have satisfied the demands of justice if it had come to pass. I conclude that no matter how attractive a given “exit option” might appear to its proponents, the law cannot, merely by making the option available to workers, sidestep its obligation to regulate wage labor and other working relationships and ensure that they are just for all concerned.

* Postdoctoral Fellow in Law and Philosophy, UCLA School of Law; Ph.D. (Philosophy), University of Michigan (2014); M.A. (Philosophy), University of Toronto (2008); J.D., Harvard Law School (2000). I am grateful to Elizabeth Anderson, Pamela Brandwein, Daniel Jacobson, Brendan Maher, Radha A. Pathak, Alex Sarch, Nils-Hennes Stear, and Peter Stris for their advice and encouragement.

Table of Contents

I. Introduction	303
II. Mill on the “Co-operative Principle”	305
A. Mill’s Arguments for Cooperative Firms	305
B. Three Observations	310
III. Jefferson and the American Frontier	313
IV. Problems with the Prescriptions	315
V. Exit Options	321
VI. Two Intuitions	325
VII. Conclusion	330

I. INTRODUCTION

In a particularly ambitious chapter of his seminal *Principles of Political Economy*, titled “On the Probable Futurity of the Labouring Classes,”¹ John Stuart Mill predicted that in the foreseeable future wage workers would—and importantly, should—be increasingly likely to join together in cooperative firms in order to escape oppressive wage-labor relationships. Mill also argued that the move to cooperative firms would provide substantial benefits to the cooperating worker-managers themselves,² as well as to society as a whole.³ However, Mill’s prediction seems to have been dismally inaccurate, and in a recent paper, Professor Justin Schwartz explores the interesting and important question of why Mill turned out to be so wrong on this point.⁴ In his paper, Schwartz examines the explanations offered by three leading analysts of worker cooperatives—namely N. Scott Arnold, Henry Hansmann, and Gregory Dow—argues that each analyst’s account is problematic in one or more respects, and then presents his own proposed explanation for cooperative firms’ failure to thrive to anywhere near the extent that Mill predicted they would.⁵

¹ JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* 752 (W.J. Ashley ed., Longmans, Green & Co. new ed. 1909, rprt. 1915) (1848).

² *Id.* at 789 (“From the progressive advance of the co-operative movement, a great increase may be looked for In the first place, the class of mere distributors, who are not producers but auxiliaries of production, . . . will be reduced to more modest dimensions.”).

³ *Id.* at 789–90 (“It is scarcely possible to rate too highly this material benefit, which yet is as nothing to compared with the moral revolution in society that would accompany it: the healing of the standing feud between capital and labour; the transformation of human life, from a conflict of classes struggling for opposite interests, to a friendly rivalry in pursuit of a good common to all; the elevation of the dignity of labour; a new sense of security and independence in the labouring class; and the conversion of each human being’s daily occupation into a school of the social sympathies and the practical intelligence.”).

⁴ Justin Schwartz, *Where Did Mill Go Wrong?: Why the Capital-Managed Firm Rather than the Labor-Managed Enterprise Is the Predominant Organizational Form in Market Economies*, 73 OHIO ST. L.J. 219 (2012); see also Justin Schwartz, *Voice Without Say: Why More Capitalist Firms Are Not (Genuinely) Participatory*, 18 FORDHAM J. CORP. & FIN. L. 963, 967 (2013) (exploring the related questions “[w]hy have the few capitalist firms that do give workers real say not become, through competition and imitation[,] the prevalent organizational form? Why does authoritarian hierarchy persist as the main form of enterprise organization even in firms with some form of employee participation?”) (citing Armen E. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950), reprinted in ARMEN ALCHIAN, *ECONOMIC FORCES AT WORK* 15, 25, 28–30 (1977)).

⁵ Schwartz, *supra* note 4, at 223–24 (citing, *inter alia*, N. SCOTT ARNOLD, *THE PHILOSOPHY AND ECONOMICS OF MARKET SOCIALISM: A CRITICAL STUDY* 1–49 (1994); N. Scott Arnold, *Market Socialism*, 6 CRITICAL REV. 517, 534–36 (1992); HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 89–98 (1996); GREGORY K. DOW, *GOVERNING THE FIRM: WORKERS’ CONTROL IN THEORY AND PRACTICE* 236–38 (2003)).

Professor Schwartz's discussion of Mill's unrealized prediction for workers' "futurity" is clearly a valuable contribution, but my focus differs from that of Professor Schwartz, who concentrates on Mill's *prediction* and the reasons for its inaccuracy. I engage in a critical evaluation of the normative merits of Mill's *prescription* for workers. That is, Mill not only predicted that workers would be *likely* to form cooperatives but also argued that workers had at least a prudential—and perhaps also a moral or aesthetic⁶—duty to eschew wage labor in favor of realizing their productive energies through worker-managed cooperative firms.

Moreover, as one reads Mill's discussion, it becomes clear that he believed that once a given society's legal system creates and maintains the institutions and laws necessary to permit the formation of such cooperative firms, it has done all for workers that justice requires. In other words, Mill held that once the law offers workers an alternative to—i.e., an "escape" or "exit option" from—the indignity and poverty of wage labor, this will satisfy the law's duty of justice to alleviate the plight of workers. This normative conclusion is, I will argue, a serious mistake that is regrettably common in social, political, and legal thinking.

For example, it is interesting to compare Mill's view to that of his near-contemporary Thomas Jefferson. Like Mill, Jefferson was appalled by workers' increasing reliance on wage labor, but Jefferson, like Mill, had an "escape plan" in mind for the laboring classes.⁷ Jefferson's plan relied on the availability of land on the vast American frontier: he was confident that legal provisions providing for the prospect of staking valid claims on free plots of land offered workers an appealing alternative—indeed, all that justice required—to the wage labor that was becoming increasingly prevalent in the nascent U.S. industrial labor market.⁸ Jefferson, like Mill and many of their nineteenth century contemporaries, disapproved of wage labor on the grounds that it was a degrading way to earn a living, both for those who performed such labor and the society that relied upon it.⁹ Jefferson's position

⁶ Mill's theories of the aesthetic virtues require a great deal of exegesis and are, in any case, beyond the scope of this paper. For my purposes, I will merely point out that it is widely acknowledged that Mill emphasized the importance of living a life of aesthetic as well as moral value much more than most other Utilitarians, especially his contemporaries.

⁷ However, he was probably unlike Mill in being relatively unconcerned about the plight of the wage workers themselves, since his primary focus was on what was good or bad for the nation as a whole.

⁸ See, e.g., THOMAS JEFFERSON, 4 THE WORKS OF THOMAS JEFFERSON 84 (Paul Leicester Ford ed., G.P. Putnam's Sons 1904) (1782).

⁹ *Id.* at 86 ("[L]et our work-shops remain in Europe. It is better to carry provisions and materials to work-men there, than bring them [here], and with them their manners and principles. The loss by the

also resembles Mill's in that he strongly believed that his favored alternative to wage labor—i.e., staking a claim on the frontier and working the land—would both further the interests of workers and contribute to the moral quality of the nation.¹⁰

Sadly, neither theorist's prescription truly panned out, and to this day, the dominant form of work in England, the U.S., and other Western democracies continues to be the sort of wage labor that both Mill and Jefferson abhorred. In Parts II and III of this paper, I will describe these thinkers' respective proposals and their arguments in support of their desirability. In Part IV, I will aim to identify what is problematic about these two thinkers' similar prescribed solutions to the problems associated with the move to an industrial wage-labor economy in the nineteenth century. Finally, in Parts V and VI, I will argue that the most serious normative problem with the sort of approach favored by Mill and Jefferson is that it mistakenly assumes that so long as the law provides an alternative to wage labor, it can then justly leave wage labor relationships in an unregulated, Dickensian state. In other words, I contend that even if either Mill's or Jefferson's predictions *had* been more accurate, we should not follow their reasoning and conclude that the law would have therefore done all for workers that justice requires. Instead, we must eschew the tempting thought that policymakers need not engage in the messy and difficult task of regulating the workplace. No alternative "escape" from wage labor that the law could create, facilitate, or encourage would make it just to relegate wage laborers to a *laissez-faire*, unregulated "race to the bottom."

II. MILL ON THE "CO-OPERATIVE PRINCIPLE"

A. *Mill's Arguments for Cooperative Firms*

In Book IV, Chapter I, of his *Principles of Political Economy*,¹¹ Mill argued that the essential distinction between the "civilized" and the "savage" person is the

transportation of commodities across the Atlantic will be made up in happiness and permanence of government. The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body.").

¹⁰ *Id.* at 85–86 ("Those who labour in the earth are the chosen people of God . . . whose breasts he has made his peculiar deposit for substantial and genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth. Corruption of morals in the mass of cultivators is a phaenomenon of which no age nor nation has furnished an example. . . . [G]enerally speaking the proportion which the aggregate of the other classes of citizens bears in any state to that of its husbandmen, is the proportion of its unsound to its healthy parts, and is a good enough barometer whereby to measure its degree of corruption.").

¹¹ MILL, *supra* note 1, at 695. (Book IV is titled *Influence of the Progress of Society on Production and Distribution*, and Chapter I bears the title *General Characteristics of a Progressive State of Wealth*.)

former's superior "capacity for co-operation."¹² Mill explained that although humans in a "rude state of society" possess many adaptive abilities that more civilized humans lack, they are not so capable of seeing the advantages of long-term planning and engaging in cooperative endeavors.¹³ In the same passage, Mill suggested that the possibility for cooperation offers the best hope for progress and improvement in modern industrial societies.

In Chapter VII of Book IV,¹⁴ Mill advanced a compelling discussion of what would and should happen in the future of work relations—titled "On the Probable Futurity of the Labouring Classes"—in which he predicted, firstly, that workers' increasing access to the franchise, education, and the freedom to choose how they will arrange their working lives will eventually lead to a proliferation of worker-owned and managed cooperative firms.¹⁵

In this chapter, although Mill initially appears principally concerned with *predicting* the probable nature of future working relationships, it becomes clear that he also strongly *prescribed* and *endorsed* the move toward the predominance of this form of cooperative association, which he argued would be in the best interests of workers and society as a whole. Mill offered three main arguments in support of this prescription.

First, Mill argued that the standard model of industrial production, in which capitalists employ wage laborers, is damaging to the interests and character of both the employers and the workers they employ. Mill begins by noting the widespread agreement that "the state of the labouring people" was not "what it ought to be," and then describes two opposing theories one might entertain as to the best means to address this problem. The first of these he called the theory of "dependence and protection"—i.e., the paternalistic view that the poor should be dependent on the rich, who would willingly and charitably offer their "protection." He referred to the second, opposing theory as that of "self-dependence," according to which the poor

¹² *Id.* at 698.

¹³ *Id.* at 698–99.

¹⁴ *Id.* at 752.

¹⁵ *Id.* at 772–73 ("The form of association, however, which if mankind continue to improve, must be expected in the end to predominate, is not that which can exist between a capitalist as chief, and workpeople without a voice in the management, but the association of the labourers themselves on terms of equality, collectively owning the capital with which they carry on their operations, and working under managers elected and removable by themselves.").

would become increasingly reliant on their own efforts and capabilities to attain better lives for themselves.¹⁶

Although Mill recognized the appeal—to the rich, at least—of the idealistic notion that the wealthy and powerful would gladly and reliably provide the sort of guidance and protection for the laboring classes envisioned by the theory of dependence and protection, he rejected this notion as an obvious fantasy, asserting that “[a]ll privileged and powerful classes, as such, have used their power in the interest of their own selfishness, and have indulged their self-importance in despising, and not in lovingly caring for, those who were, in their estimation, degraded, by being under the necessity of working for their benefit.”¹⁷

From Mill’s derisive tone throughout this discussion, we can reasonably infer that he agreed that the laboring classes are thusly “degraded” by their dependence upon the wealthier classes. However, he emphatically denied the possibility of improving the lot of the working poor by an increased emphasis on protection by the rich. Moreover, Mill contended that whether or not the rich could be induced to act in the best interests of the poor, the ever-increasing access to education and expansion of political rights that is characteristic of progressive societies would bring about changes in the laboring classes, which would lead them to reject any scheme of paternalistic “protection.”¹⁸

Mill clearly approved of the increasing independence and autonomy of the laboring classes, but he did not blame all the ills of the wage-labor relationship on the employers.

¹⁶ *Id.* at 753 (“According to the former theory, the lot of the poor, in all things which affect them collectively, should be regulated *for* them, not *by* them. They should not be required or encouraged to think for themselves, or give to their own reflection or forecast an influential voice in the determination of their destiny. . . . The relation between rich and poor, according to this theory (a theory also applied to the relation between men and women) should be only partly authoritative; it should be amiable, moral, and sentimental: affectionate tutelage on the one side, respectful and grateful deference on the other. The rich should be *in loco parentis* to the poor, guiding and restraining them like children.”).

¹⁷ *Id.* at 754.

¹⁸ *Id.* at 756 (“Of the working men . . . it may be pronounced certain, that the patriarchal or paternal system of government is one to which they will not again be subject. That question was decided, when they were taught to read, and allowed access to newspapers and political tracts; when dissenting preachers were suffered to go among them . . . when they were brought together in numbers, to work socially under the same roof; when railways enabled them to shift from place to place, and change their patrons and employers as easily as their coats; when they were encouraged to seek a share in the government, by means of the electoral franchise. The working classes have taken their interests into their own hands, and are perpetually showing that they think the interests of their employers not identical to their own, but opposite to them.”).

Instead, Mill held that employer and worker are equally likely to behave inappropriately or inefficiently within traditional wage-labor relationships. Mill seemed to consider it unacceptably authoritarian for employers to dictate job requirements to their employees in minute detail, but he nonetheless assumed that most wage workers will not work without stern and constant supervision, since he held that they were typically unwilling to do an honest day's work for honest pay.¹⁹

Although Mill recognized that workers get much less out of the arrangement than do their employers, he also believed that the wage-labor relationship brings out the worst in both employer and the employed.

Second, Mill argued that the move to cooperative associations would lead to an improvement in productive efficiency. However, he has a particular notion of "improvement" in mind, as he argues that to aim at "the mere increase of production" is to embrace a "false ideal of human society." Instead, a society should focus its efforts on realizing the two desiderata of "improved distribution, and a large remuneration of labour." In other words, once a society reaches a certain level of aggregate production, "neither the legislator nor the philanthropist need feel any strong interest" in further increases in production, "but, that it should increase relatively to the number of those who share in it, is of the utmost possible importance."²⁰ Accordingly, Mill's conception of what is desirable for society seems to be motivated by some markedly egalitarian intuitions. Although he was interested in discovering the ways in which we, as a society, can be more productive, his main concern in this regard—at least, as evidenced in this chapter—was to ensure that whatever is produced can be shared by more and more members of society. For example, Mill argued in support of the desirability of industrial production as follows:

Labour is unquestionably more productive on the system of large industrial enterprises; the produce, if not greater absolutely, is greater in proportion to the labour employed: the same number of persons can be supported equally well with less toil and greater leisure; which will be wholly an advantage, as soon as

¹⁹ *Id.* at 761 ("The total absence of regard for justice or fairness in the relations between the two, is as marked on the side of the employed as on that of the employers. We look in vain among the working classes in general for the just pride which will choose to give good work for good wages; for the most part, their sole endeavor is to receive as much, and return as little in the shape of service, as possible.").

²⁰ *Id.* at 752.

civilization and improvement have so far advanced, that what is a benefit to the whole shall be a benefit to each individual composing it.²¹

Although the advantages of industrial production can be partially realized in standard capitalist enterprises employing wage laborers, Mill argued that cooperative industrial firms would be even more productive. Since workers in a cooperative enterprise would have a share in the profits and thus a direct interest in the firm's success, they would be motivated to work more diligently and make their firms more productive.²²

This increased production would, in turn, result in improvements in Mill's proposed desiderata of increased distribution of income and wealth throughout society and a large remuneration of labor, since workers in cooperative associations would share in their highly productive firms' profits. As I will discuss in Section IV below, Mill's confidence in this competitive advantage has proven to be largely misplaced, but his view was reasonable at the time, as he based it on some compelling contemporary examples of successful cooperative firms.²³

Third, Mill argued that the changes in society that would accompany the increasing predominance of cooperative firms—both those changes that make such cooperation possible and those brought about by the prevalence of cooperative associations—would be extremely beneficial for society as a whole. Whereas wage labor tends to bring out the worst traits in both employers and the employed, cooperative associations would foster communal relations among all members of society.²⁴

²¹ *Id.* at 762.

²² *Id.* at 789 (“The other mode in which co-operation tends, still more efficaciously, to increase the productiveness of labour, consists in the vast stimulus given to productive energies, by placing the labourers, as a mass, in a relation to their work which would make it their principle and their interest—at present it is neither—to do the utmost, instead of the least possible, in exchange for their remuneration.”).

²³ *Id.* at 765–72 (citations omitted).

²⁴ *Id.* at 762–63 (“[I]n the moral aspect of the question, which is still more important than the economical, something better should be aimed at as the goal of industrial improvement, than to disperse mankind over the earth in single families, each ruled internally, as families now are, by a patriarchal despot, and having scarcely any community of interest, or necessary mental communion, with other human beings [I]f public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured.”).

Accordingly, Mill concluded that both capitalists and workers would benefit from the move to cooperative firms—or at least those in which workers have some share in the firm’s profits. More importantly, Mill forecasted even more significant moral and social improvements as a consequence of the widespread adoption of the cooperative principle.²⁵

B. Three Observations

Mill’s optimistic forecast for the future of labor and society is appealing, and his arguments may well strike us as *prima facie* persuasive, but it would be worthwhile to clarify of what Mill does and does not aim to persuade us. In particular, we should note that although Mill’s arguments for the social value of cooperative associations might seem to support the notion that society should *only* permit the incorporation of democratic workplaces—i.e., those in which workers have at least some influence over the management of the firm and/or share in the firm’s profits—this is clearly *not* what Mill had in mind. Instead, Mill advocated competition between traditional capitalist firms and cooperative firms and predicted that the competitive advantage afforded by the diligence of workers who are directly interested in their cooperative firms’ success will eventually result in the predominance of such firms.²⁶

In this passage, Mill suggested both that the move to the predominance of cooperative associations will be a contingent outcome of competitive market processes and that the *universal* adoption of cooperative ownership and management would not be a requirement of justice. Later passages in this chapter confirm this reading, as Mill argues, in opposition to “Socialist writers,” that competition is “indispensable to progress,” such that “every restriction of it is an evil, and every extension of it, even if for the time injuriously affecting some class

²⁵ *Id.* at 791 (“Eventually, and in perhaps a less remote future than may be supposed, we may, through the co-operative principle, see our way to a change in society, which would combine the freedom and independence of the individual, with the moral, intellectual, and economical advantages of aggregate production; and which, without violence or spoliation, or even any sudden disturbance of existing habits and expectations, would realize, at least in the industrial department, the best aspirations of the democratic spirit, by putting an end to the division of society into the industrious and the idle, and effacing all social distinctions but those fairly earned by personal services and exertions.”).

²⁶ *Id.* at 790–91 (“[I]t will be desirable, and perhaps for a considerable length of time, that individual capitalists, associating their work-people in the profits, should coexist with even those co-operative societies which are faithful to the co-operative principle. . . . When, however, co-operative societies shall have sufficiently multiplied, it is not probable that any but the least valuable work-people will any longer consent to work all their lives for wages merely; both private capitalists and associations will gradually find it necessary to make the entire body of labourers participants in profits.”).

of labourers, is always an ultimate good.”²⁷ Moreover, Mill also implied that even in the ideal future he envisioned, there would still be some—i.e., “the least valuable work-people”—who work for wages in non-cooperative firms. This would not be possible if a state’s business organization or other laws made workplace democracy mandatory, so Mill neither predicted nor required a society in which traditional wage labor is legally precluded. Accordingly, it seems likely that Mill would strongly resist any suggestion that states should make workplace democracy mandatory via regulation rather than letting market processes determine the relative successes of capitalist and cooperative firms, even if the continued existence of traditional wage labor relationships would be detrimental to the interests of some workers.

It is also noteworthy that Mill repeatedly expressed contempt for those workers who would choose to work for wages instead of taking advantage of the option to form or join cooperative ventures to their fates on the hired labor market. In addition to the above-cited passages in which Mill claimed that hired laborers are too selfish and unprincipled to “give good work for good wages”²⁸ and suggests that in the future, only “the least valuable work-people” will work for “wages merely,”²⁹ Mill also suggests that only those who lacked “understanding” and virtue would forgo the cooperative option in favor of wage labor.³⁰

Similarly, Mill argued elsewhere that “there can be little doubt that the *status* of hired labourers will gradually tend to confine itself to the description of work-people whose low moral qualities render them unfit for anything more independent.”³¹

It is striking that Mill, who demonstrated great concern for the plight of “the labouring classes” and optimism for their potential, also expressed such disdain for any who would choose to work as hired laborers despite having the option to form or join cooperative associations. What could be the source of Mill’s condescension,

²⁷ *Id.* at 793.

²⁸ *Id.* at 761.

²⁹ *Id.* at 791.

³⁰ *Id.* (“Associations like those which we have described, by the very process of their success, are a course of education in those moral and active qualities by which alone success can be either deserved or attained. As associations multiplied, they would tend more and more to absorb all work-people, except those who have too little understanding, or too little virtue, to be capable of learning to act on any other system than that of narrow selfishness.”).

³¹ *Id.* at 763–64.

and why did he think it a sign of “low moral quality” or a lack of understanding and virtue for a worker to eschew cooperative labor? We will return to this question later, but for now, note that since most workers still do not work in cooperative associations, Mill’s remarks imply that most of us are foolish, selfish, and vicious, unless he could appeal to some alternative explanation for our refusal to embrace the cooperative principle.

Finally, given that Mill did not advocate making workplace democracy mandatory, what, if anything, did he think the state should do to enable and/or encourage the formation of cooperative associations? Mill noted that “[h]itherto there has been no alternative for those who lived by their labour, but that of labouring either each for himself alone, or for a master.”³² However, recent “necessary alterations in the English law of partnership were obtained from Parliament,”³³ which were sufficient to afford the laboring classes an alternative:

Until the passing of the Limited Liability Act, it was held that [cooperative associations] would have been impossible in England, as the workmen could not, in the previous state of the law, have been associated in the profits, without being liable for losses. One of the many benefits of that great legislative improvement has been to render partnerships of this description possible, and we may now expect to see them carried into practice.³⁴

Of course, this change in the law only removed one significant obstacle to the feasibility of cooperative associations, and as Mill recognized, cooperative firms face significant financial challenges, as workers who wish to form them often find it difficult to secure sufficient capital to equip their fledgling enterprises with tools and facilities.³⁵

Mill noted that in the case of some early French cooperative firms, “loans of capital were made to them by the republican government,” but he seemed to regard this as unnecessary, since these associations are “in general by no means the most prosperous.”³⁶ Indeed, instead of arguing that governments should take steps to

³² *Id.* at 763.

³³ *Id.* at 783.

³⁴ *Id.* at 771.

³⁵ *Id.* at 773–76.

³⁶ *Id.* at 774.

make capital more available to workers—e.g., by intervening in capital markets in their behalf or by offering government-sponsored loans to cooperatives—Mill seemed to hold that it is best for all concerned if the workers succeed *in spite* of the fiscal challenges they face.³⁷

Mill proceeded to give several accounts of contemporary cooperative associations that had succeeded through such laudable feats of “labour and privation.” Given his approbation of these efforts and his above-quoted comments that competition is “indispensable to progress” and “always an ultimate good,”³⁸ it seems that Mill did not hold that the state is morally required to do anything more to encourage cooperative firms than to render them *possible* by removing any existing legal impediments to their creation and feasibility.

III. JEFFERSON AND THE AMERICAN FRONTIER

A few decades earlier, in the “New World,” Thomas Jefferson and other framers of the U.S. Constitution were developing and arguing for a view that is interestingly comparable to Mill’s proposed “escape plan” for wage workers, which I described in the preceding section. On this Jeffersonian view, government intervention on behalf of workers would be unnecessary because the vast American frontier offered the option of freehold plots of land for any wage worker who was dissatisfied with the job offers available in the open labor market. If employers paid too little or demanded too much, workers could simply decline the proffered jobs and stake their claims on the frontier. One happy result of this availability of land, on this view, would be improved terms of employment for those workers who chose to work for employers—since workers had the bargaining power afforded by the option to withhold their labor and depart for the frontier; employers would not find any willing workers if the terms and conditions of employment they offered were truly terrible. Furthermore, where this option is available, we can conclude

³⁷ *Id.* at 773–74 (“[M]any working people [have resolved to] free themselves, at whatever cost of labour or privation, from the necessity of paying . . . a heavy tribute for the use of capital; that they would extinguish this tax, not by robbing the capitalists of what they or their predecessors had acquired by labour and preserved by economy, but by honestly acquiring capital for themselves. . . . The capital of most of the [French] associations was originally confined to the few tools belonging to the founders, and the small sums which could be collected from their savings, or which were lent to them by other workpeople as poor as themselves. . . . [T]he most striking instances of prosperity are in the case of those who have had nothing to rely on but their own slender means and the small loans of fellow-workmen, and who lived on bread and water while they devoted the whole surplus of their gains to the formation of capital.”).

³⁸ *Id.* at 793.

that those who accept wage labor have freely chosen to do so, and that government intervention on their behalf would therefore be neither necessary nor justified.³⁹

Jefferson expressed this view with a combination of resistance to governmental intervention, a celebration of independence, and a particular fondness for the virtues he associated with agrarian living. Jefferson argued that the European reliance on industrial manufacturing to provide jobs and economic growth is regrettable and should not be repeated in America:

In Europe the lands are either cultivated, or locked up against the cultivator. Manufacture must therefore be resorted to, of necessity, not of choice, to support the surplus of their people. But we have an immensity of land courting the industry of the husbandman Those who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue Dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition. This, the natural progress and consequence of the arts, has sometimes perhaps been retarded by accidental circumstances: but, generally speaking the proportion which the aggregate of the other classes of citizens bears in any state to that of its husbandmen, is the proportion of its unsound to its healthy parts, and is a good enough barometer whereby to measure its degree of corruption. While we have land to labour then, let us never wish to see our citizens occupied at a work-bench, or twirling a distaff.⁴⁰

³⁹ HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 21 (1993) (“If, as the framers argued, the market was essentially harmonious and liberty loving, and if the almost endless access to the freehold on the American frontier ensured that those who might happen to find themselves in pockets of dependency would always be able to escape these conditions and become free and independent citizens, then there was little justification for allowing the government to intervene in the conflicts that arose among groups competing in a free market.”).

⁴⁰ JEFFERSON, *supra* note 8, at 85–86. Years later, Jefferson clarified his intended meaning in the foregoing passage in a January 4, 1805, letter to manufacturing proponent and pamphleteer John Lithgow as follows:

I had under my eye when writing, the manufactures of the great cities in the old countries . . . with whom the want of food and clothing necessary to sustain life, has begotten a depravity of morals, a dependence and corruption, which renders them an undesirable accession to a country whose morals are sound. . . . As yet our manufactures are as much at their ease, as independent and moral as our agricultural habits, and they will continue so as long as there are vacant lands for them to resort to; because whenever it shall be

Jefferson's reliance on the liberating potential of the frontier is, I suggest, interestingly analogous to Mill's endorsement of cooperatives. Both thinkers believed that the increasing prevalence of wage labor was problematic in many ways, and each believed he had found an attractive alternative that would minimize or eliminate the problems associated with wage work. Both emphasized the evils of "dependence" and the virtues of "self-dependence," and they were opposed to all but the most minimal forms of government intervention in the market. Like Mill, Jefferson did not hold that his favored alternative to wage labor should be made mandatory—i.e., he did not envision a society in which wage work was prohibited—but he expected the availability of freehold land to draw the majority of workers to the frontier, forcing employers to offer good wages and working conditions if they hoped to hire any of the remaining laborers.

IV. PROBLEMS WITH THE PRESCRIPTIONS

Unfortunately, neither of the alternative options Mill and Jefferson respectively prescribed was quite the panacea they predicted. In the case of Jefferson's "immensity of land" on the boundless frontier, the problem was obvious: land is finite. It is perhaps unsurprising that Jefferson could imagine otherwise, as he was strongly influenced by John Locke's theory of property right,⁴¹ which seems to rely on assumptions of boundless land and other resources—despite the fact that Locke lived and wrote in *England*.⁴² Locke argued that it is fair to appropriate non-owned property for one's private use and benefit so long as one leaves "enough and as good" for others to appropriate:

Nor was [the] *appropriation* of any parcel of *land*, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his inclosure for himself: for he that leaves as

attempted by the other classes to reduce them to the minimum of subsistence, they will quit their trades and go to laboring the earth.

Id. at 86–87 n.1. See also GILLMAN, *supra* note 39, at 25 (“[M]any took faith in the belief that the problem could be handled without direct government interference in group or class conflict by simply improving access to the freehold for dependent laborers and promoting free-trade policies that would provide markets for industrious farmers and cheap goods for consumers. As Benjamin Franklin put it, ‘no man who can have a piece of land of his own, sufficient by his labour to subsist his family in plenty, is poor enough to . . . work for a master.’”) (citing DREW MCCOY, *ELUSIVE REPUBLIC* 51, 68 (1996)).

⁴¹ SAMUEL BOWLES & HERBERT GINTIS, *DEMOCRACY AND CAPITALISM* 47 (1986).

⁴² England is not a large country, especially with respect to land area.

much as another can make use of, does as good as take nothing at all. No body could think himself injured by the drinking of another man . . . who had a whole river of the same water left him to quench his thirst: and the case of land and water, where there is enough of both, is perfectly the same.⁴³

Locke provided an encouraging and vindicating apologetic for those who wish to appropriate land with a clear conscience, but sadly, whenever some amount of a finite resource such as land is appropriated, there is *always* and *necessarily* “the less left for others.” Moreover, if several appropriators take the best available plots of land, the remaining land is clearly *not* “as good” as what was taken. Although these are obvious criticisms of Locke—and the obvious response on Locke’s behalf is that we cannot charitably read him as holding that land and water are *literally* infinite—we might be somewhat willing to excuse Jefferson for imagining that the truly, inconceivably *vast* American frontier was somehow inexhaustible. But he was wrong nonetheless.

As Samuel Bowles and Herbert Gintis explain, the inspiring possibilities Jefferson envisioned for the frontier “proved to be ephemeral,” for “abundant land proved to be a temporary blessing. The vistas opened up by ‘free soil’ were to be quickly shuttered, ironically by the very same vibrant commercial expansion that Jefferson had sought to promote.”⁴⁴ Huge tracts of land were claimed by railroad companies, and rapacious land speculators tied up much of the remaining “freehold.” By the early 19th century, the “safety valve” of the frontier already seemed out of reach.⁴⁵

Labor activist and organizer Orestes Augustus Brownson offered a similar analysis in 1840:

⁴³ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 21 (C.B. Macpherson ed., Hackett Publishing Co., 1980) (1690). Of course, rivers are not inexhaustible resources, either.

⁴⁴ BOWLES & GINTIS, *supra* note 41, at 49.

⁴⁵ GILLMAN, *supra* note 39, at 43–44 (As workers’ advocate George Henry Evans wistfully observed in 1834, “[I]and speculation kept [workers] from taking up vacant land near by or in the West. If they could only get away and take up land, then they would not need to strike. Labor would become scarce. Employers would advance wages and landlords would reduce rents.”) (citing John R. Commons, *Horace Greeley and the Working Class Origins of the Republican Party*, 24 POL. SCI. Q. 478 (1909)).

The wilderness has receded, and already the new lands are beyond the reach of the mere laborer, and the employer has him at his mercy There must be no class of our fellow men doomed to toil through life as mere workmen at wages.⁴⁶

Sadly, Evans and Brownson were right in thinking that American workers were at the mercy of employers, but their dreams—like Jefferson’s—of the liberating possibilities of the frontier were never realized. According to Bowles and Gintis, by the late 19th century, “the evolution of the U.S. class structure had reduced the number of owners of productive property to roughly a third of the population.”⁴⁷

Nonetheless, it is worth noting that although the possibility of homesteading receded significantly, it never entirely disappeared. The federal Homestead Act of 1862 was not repealed until 1976, and some U.S. states still offer free plots of land to those who are willing to build on and improve them, albeit in areas that are very difficult to farm.⁴⁸ Does the current availability of free land in South Dakota or Kansas increase the bargaining power of the wage worker in Michigan or Pennsylvania? I suspect it does not. Did it in Jefferson’s time? Perhaps it did, to some extent, but only for those who were both willing and able to succeed in the difficult business of claiming, clearing, and cultivating a plot of land on the frontier. In any case, I will assert here that, *contra* Jefferson, farming is not for everyone.

Turning now to Mill’s prescription, we should first note the apparent advantage of his view in comparison with those of Locke and Jefferson. While the latter two thinkers seemed to mistakenly rely on an endless supply of a finite resource, Mill suggested an alternative for workers that is, in principle, inexhaustible. So long as there is work to do and demand for the products of that work, workers can choose to form or join cooperatives; pool their labor, capital, and ideas; and reap the benefits of their cooperative endeavors. Of course, these intrepid workers must still overcome the obstacle of breaking into a market system dominated by capitalist producers and succeeding in competition with them. However, Mill was content that cooperative firms would enjoy a decisive

⁴⁶ *Id.* at 44 (citing Orestes Augustus Brownson, *The Laboring Classes* (1840), reprinted in *SOCIAL THEORIES OF JACKSONIAN DEMOCRACY: REPRESENTATIVE WRITINGS OF THE PERIOD 1825–1850*, at 301, 309 (Joseph L. Blau ed., Liberal Arts Press 1954)).

⁴⁷ BOWLES & GINTIS, *supra* note 41, at 49.

⁴⁸ See, e.g., John Ritter, *Towns Offer Free Land to Newcomers*, USA TODAY, Feb. 9, 2005, at 1A.

competitive advantage because of the “vast stimulus given to productive energies, by placing the labourers, as a mass, in a relation to their work which would make it their principle and their interest” to work as hard as possible for the firm’s success.⁴⁹

Mill correctly predicted that cooperatives would be more difficult to manage, but he did not foresee the full significance of the problems that cooperatives typically face. Professor Henry Hansmann, who has written extensively about the advantages and disadvantages of cooperative businesses,⁵⁰ offers lukewarm support for Mill’s optimism by citing substantial empirical evidence “suggesting but not confirming that there may be modest productivity gains from partial or full worker ownership.”⁵¹ However, these modest gains are mitigated, in most cases, by substantial costs of ownership, which Hansmann groups under the headings of (1)

⁴⁹ MILL, *supra* note 1, at 789–90. Nonetheless, Mill tempers his enthusiasm with a few caveats:

But to attain, in any degree, these objects, it is indispensable that all, and not some only, of those who do the work should be identified in interest with the prosperity of the undertaking. Associations which, when they have been successful, renounce the essential principle of the system, and become joint-stock companies of a limited number of shareholders, who differ from those of other companies only in being working men; associations which employ hired labourers without any interest in the profits . . . are, no doubt, exercising a lawful right in honestly employing the existing system of society to improve their position as individuals, but it is not from them that anything need be expected towards replacing that system by a better. Neither will such societies, in the long run, succeed in keeping their ground against individual competition. Individual management, by the one person principally interested, has great advantages over every description of collective management. Co-operation has but one thing to oppose to those advantages—the common interest of all the workers in the work.

Id. at 790.

⁵⁰ Hansmann’s discussion concerns firms with what he defines as “direct employee ownership,” i.e., “in which ownership of the firm is entirely in the hands of some or all of its employees.” Henry Hansmann, *Employee Ownership of Firms*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW 43 (Peter Newman ed., Stockton Press 1998).

⁵¹ *Id.* at 44 (citing J. BLASI & D. KRUSE, THE NEW OWNERS: THE MASS EMERGENCE OF EMPLOYEE OWNERSHIP IN PUBLIC COMPANIES AND WHAT IT MEANS TO AMERICAN BUSINESS (1991); *but see* Schwartz, *supra* note 4, at 231 (“A review of eleven economic studies of the effect of worker decision making on productivity in labor-managed firms found that the ‘relationship was positive in seven cases, negative in two, and zero in two.’”) (citing GREGORY K. DOW, GOVERNING THE FIRM: WORKERS’ CONTROL IN THEORY AND PRACTICE 43, 183 (2003)) (citing Chris Doucouliagos, *Worker Participation and Productivity in Labor-Managed Firms and Participatory Capitalist Firms: A Meta-Analysis*, 49 INDUS. & LAB. REL. REV. 58, 58–77 (1995)).

raising capital, (2) risk-bearing, and (3) collective decision-making. Mill anticipates each of these, to some extent, and he appears to understand the first two costs of ownership reasonably well.⁵²

However, if Hansmann's analysis is accurate, Mill failed to appreciate the substantial limitations imposed by the costs associated with collective decision-making, which Hansmann summarizes as follows:

Employees' interests can diverge concerning many aspects of a firm's operations. Most obviously, employees are likely to differ among themselves concerning the relative wages they are to be paid. Likewise, employees may differ concerning working conditions, the kind and amount of work each is assigned, and—when things go poorly—which jobs are to be eliminated and who is to be laid off These and other differences of interest among a firm's employees are likely to grow, moreover, as the division of labour and diversity of tasks within a firm increase The resulting costs . . . appear to play a crucial role in determining when and where employees participate in firm governance, suggesting strongly that these costs commonly dominate the other costs and benefits of employee ownership surveyed here.⁵³

As a result, Hansmann notes that “[i]t is very rare to see a cooperative in which ownership is shared by a group . . . that exhibits any substantial diversity,” and “[t]his suggests, in turn, that homogeneity of interest among investors of

⁵² MILL, *supra* note 1, at 752. With respect to capital, *see id.* at 774, some of which is cited in text. With respect to risk-bearing, *see id.* at 790–91, in which Mill notes:

Unity of authority makes many things possible, which could not or would not be undertaken subject to the chance of divided councils or changes in the management. A private capitalist, exempt from the control of a body, if he is a person of capacity, is considerably more likely than almost any association to run judicious risks, and originate costly improvements. Co-operative societies may be depended on for adopting improvements after they have been tested by success, but individuals are more likely to commence things previously untried.

See also Robert Mayer, *Is There a Moral Right to Workplace Democracy?*, 26 SOC. THEORY & PRAC. 301, 324 (2000) (noting that “[e]ven staunch proponents [of workplace democracy] like Samuel Bowles and Herbert Gintis admit that ‘the major weakness of the democratic firm [is] its tendency to engage in insufficient levels of risk-taking and innovation’”) (quoting Samuel Bowles & Herbert Gintis, *A Political and Economic Case for the Democratic Enterprise*, in *THE IDEA OF DEMOCRACY* 375, 377 (David Copp, Jean Hampton & John Roemer eds., 1993)).

⁵³ Hansmann, *supra* note 50, at 45–46.

capital, rather than risk-bearing or even the need to accumulate capital, may be the real reason that modern economies are so heavily dominated by investor-owned firms.”⁵⁴

We might respond, on Mill’s behalf, that Mill clearly *was* aware of the crucial importance of ensuring that workers share common interests in cooperative associations, as he holds that this would be their sole competitive advantage over capitalist firms. However, Mill argued that this advantage could be realized so long as the associated workers were all “identified in interest with the prosperity of the undertaking” and “the common interest of all the workers in the work.”⁵⁵ In practice, it appears that although these shared interests are necessary, they are far from sufficient for the success of a cooperative firm.

As Hansmann outlined in the above-cited passage, worker-owners also tend to have many *unshared* interests and face considerable challenges in agreeing upon the appropriate wages to be paid for differing tasks, skills, and experience, the kind and amount of work each worker must perform, and all the myriad decisions necessary for running a successful business. If Hansmann is correct that cooperative firms require extreme homogeneity in order to function successfully, this requirement seems not only to limit the number of cooperative associations that could be formed from a heterogeneous population, but also to discourage the fostering of individuality among workers, which Mill would presumably considered singularly unappealing.

Moreover, as the above-described difficulties illustrate, co-managing a cooperative enterprise is extremely difficult work that requires a particular set of skills and abilities. Managing a business—much like farming on the frontier—is not for everyone. Not everyone is able to do that sort of work effectively, and—perhaps more importantly—not everyone wants to do it. Managing a business often involves relentless worries and nagging problems, and many workers would rather simply perform their tasks, pick up their paychecks, and not give a further thought to work after they leave for the day. Are such people necessarily weak-minded and lacking in virtue—as Mill suggested—if they would refuse to endure the stress of

⁵⁴ Henry Hansmann, *Cooperative Firms in Theory and Practice*, 4 FIN. J. BUS. ECON. 387, 395 (1999); see also Henry Hansmann, *Worker Participation in Corporate Governance*, 43 U. TORONTO L.J. 589, 596–97 (1993) (“No matter how large the potential benefits of worker ownership may seem in any given setting, it rarely appears if the workers who would share ownership have diverse interests in the firm The other costs associated with worker ownership—in particular, poor diversification of risk and the difficulty of assembling capital—do not appear to be particularly serious.”).

⁵⁵ MILL, *supra* note 1, at 790.

co-managing a firm in order to further the cooperative principle? We will return to this question in Section VI.

V. EXIT OPTIONS

Jefferson and Mill argued, respectively, that the frontier and the cooperative association could solve the problems they associated with wage labor. In part, they were impressed by the virtues they saw in their prescriptions, and just as importantly, they thought it best to limit the extent to which government intervened in competitive market processes. Mill and Jefferson thought such intervention would be unnecessary, since most workers would opt for the superior careers they prescribed, but they were wrong. What resonance, if any, could this nineteenth-century error have for those of us who are concerned about the oppressive nature of wage labor in the twenty-first century?

First, we should note that although Jefferson and Mill were incorrect about the extent to which the availability of their prescribed options would empower workers and improve their lives, they did correctly realize—and may have been somewhat ahead of their time in doing so—that *some* sort of empowerment was a necessary component of a meaningful “exit option.” In contrast to their insight in this regard, the fantasy that workers and employers could negotiate fair bargains “at arm’s length” was very influential in the nineteenth century, and its hold on our imagination persists today. For example, it is still relatively common to find interlocutors who would glibly respond to arguments concerning the desirability of, say, minimum wage regulations as follows: “If they don’t want to accept a job at that rate of pay, they don’t have to; nobody’s holding a gun to their heads.” This is correct, so far as it goes. However, the mere *absence* of armed coercion falls far short of offering a meaningful choice to workers whose only alternatives are to accept demeaning work for poverty-level wages or starve.

To their credit, Jefferson and Mill each recognized that merely ensuring that workers are formally or legally entitled to the “exit option” of withholding their labor—e.g., by eliminating slavery and serfdom—does little to improve their bargaining position if they are otherwise without the means of subsistence. In other words, we might think that the “gun to their heads” is the brute fact that they will die if they cannot obtain the food, shelter, medical care, and other goods they need to live. This fact belies Locke’s blithe assertion that the man who encloses land does no injury to the rights of others on the grounds that “there was never the less left for others because of his enclosure for himself: for he that leaves as much as

another can make use of, does as good as take nothing at all.”⁵⁶ Although Locke did not advocate—and probably did not foresee—the excesses of the enclosure movements and their consequences for the poor of Europe, it is clear that each piece of property appropriated from what had been “the commons” incrementally divested humankind of what they had theretofore considered their birthright, namely, the right and ability to acquire their means of subsistence from the land.

Thomas Paine argued, based on the widely accepted belief that the earth was originally owned in common by all humankind,⁵⁷ that those who have profited most from the enclosure movements and other causes and consequences of the move from “primitive” to “civilized” forms of life owe a “ground rent” to those whose material circumstances have been worsened by this move:

Civilization . . . has operated two ways: to make one part of society more affluent, and the other more wretched, than would have been the lot of either in a natural state [T]he first principle of civilization ought to have been, and ought still to be, that the condition of every person born into the world, after a state of civilization commences, ought not to be worse than if he had been born before that period Cultivation is at least one of the greatest natural improvements ever made by human invention But the landed monopoly that began with it has produced the greatest evil. It has dispossessed more than half the inhabitants of every nation of their natural inheritance, without providing for them, as ought to have been done, an indemnification for that loss, and has thereby created a species of poverty and wretchedness that did not exist before.⁵⁸

We need not accept Paine’s assertion that the earth was or is owned in common to feel the force of his argument. Indeed, if we instead accept what Professor Elizabeth Anderson calls the “egalitarian point of view” that all “property

⁵⁶ LOCKE, *supra* note 43, at 21.

⁵⁷ THOMAS PAINE, 3 THE WRITINGS OF THOMAS PAINE 329 (Moncure Daniel Conway ed., G.P. Putnam’s Sons 1895) (1797) (“It is a position not to be controverted that the earth, in its natural uncultivated state was, and ever would have continued to be, *the common property of the human race*. In that state every man would have been born to property. He would have been a joint life proprietor with the rest in the property of the soil, and in all its natural productions, vegetable and animal.”); *see also* LOCKE, *supra* note 43, at 21 (“God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated.”).

⁵⁸ PAINE, *supra* note 57, at 328–31.

rights are artificial, *all the way down*,”⁵⁹ we have just as much reason to reject any given artificial arrangement of property rights that is manifestly unjust. On either view of the source of property rights, we can endorse Paine’s objection to arrangements in which some citizens become outlandishly wealthy and powerful by exploiting the advantages of living in civilized society, while others are left to suffer the indignities of poverty and homelessness or afforded no better option than that of trading abject obedience for borderline subsistence.⁶⁰

If workers still had the right to “live off the land,” they would have the robust “exit option” of withholding their labor and living in the commons until the available job offers were more to their liking. Jefferson’s prescription to depart for the frontier approximates an attempt to return this option to the people—or at least, to the freeborn white male people—but it was not sustainable in the face of the class struggles and resulting consolidation of land, wealth, and power in 19th century America.⁶¹ Moreover, as Mill recognized, however much we may yearn to return to a simpler time, “a people who have once adopted the large system of production, either in manufactures or in agriculture, are not likely to recede from it.”⁶² Similarly, Paine argued that the greatly increased populations that have resulted from modern agriculture and production methods could not be sustained if many people attempted to live off the land.⁶³

Furthermore, as I argued in the preceding section, not everyone would want to go “back to nature” or take up a freehold and become a farmer. Remaining in the “civilized” state of production and agriculture while adopting measures to move to a more egalitarian distribution of income and wealth could offer significant advantages to every member of society. Indeed, we can recognize that workers

⁵⁹ Elizabeth S. Anderson, *How Should Egalitarians Cope With Market Risks?*, 9 THEORETICAL INQUIRIES IN LAW 239, 242–43 n.4 (2008).

⁶⁰ I borrow the phrase “trading obedience for subsistence” from Professor Elizabeth S. Anderson, who has used the phrase in discussions with me.

⁶¹ See BOWLES & GINTIS, *supra* note 41, at 49.

⁶² MILL, *supra* note 1, at 752.

⁶³ PAINE, *supra* note 57, at 328–29 (“It is always possible to go from the natural to the civilized state, but it is never possible to go [back]. The reason is, that man in a natural state, subsisting by hunting, requires ten times the quantity of land to range over to procure himself sustenance, than would support him . . . where the earth is cultivated. When, therefore, a country becomes populous by the additional aids of cultivation, art and science, there is a necessity of preserving things in that state; because without it there cannot be sustenance for . . . its inhabitants. The thing, therefore, now to be done is to remedy the evils and preserve the benefits that have arisen to society by passing from the natural to . . . the civilized state.”).

need some sort of meaningful “exit option” without falling back on the radical “exit” of removing oneself from one’s community and familiar mode of life and depositing oneself on an unimproved plot of land somewhere on the lonely frontier. A just society would make it possible for workers to find dignified ways to work for their means of subsistence without having to resort to the extreme measure of abandoning their communities.

Returning to our would-be employee with a Dickensian job offer and no *actual* gun to her head, if she consents to work for sub-poverty wages, does her consent foreclose the possibility of making a claim of justice on her behalf? As Professor Robert Mayer notes, “only Thomas Hobbes believes that coerced contracts are valid,” while “[t]he rest of us think that consent must be voluntary in order to create binding obligations.”⁶⁴ Does the absence of an *overt* threat suffice for voluntary consent? As jurist Learned Hand argued, justice might require us to intervene whenever leverage of *any* kind gives one party to a putative contract an unfair advantage:

For the state to intervene to make more just and equal the relative strategic advantages of the two—parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force. At one time the law did not try to equalize the advantages of fraud, but we have generally come to concede that the exercise of such mental superiority as fraud indicates, has no social value, but the opposite. It may well be that the uncontrolled exercise of the advantages derived from possessing the means of living of other men will also become recognized as giving no social benefit corresponding to the evils which result.⁶⁵

Although Mill and Jefferson recognized the important truth in this passage, namely, that we have reason to “make more just and equal” the relative bargaining power of capitalists and workers, they hoped that legislation could be avoided by pointing to the empowering nature of their respective prescribed “exit options.” To their credit, they did not ask us to accept that *any* voluntary choice is justifiable based on consent alone. Instead, the Mill-Jefferson view seems to suggest that so

⁶⁴ Robert Mayer, *Is There a Moral Right to Workplace Democracy?*, 26 SOC. THEORY & PRAC. 301, 318 (2000).

⁶⁵ Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 506 (1908).

long as an agent has at least one good option available to her, it is morally unobjectionable to permit her to choose a relatively bad option. Since workers could form cooperatives (according to Mill) or take up a freehold on the frontier (according to Jefferson), and these are *good* options, neither the worker nor anyone else can have any moral complaint if the worker chooses instead to accept, say, a job in a factory or coal mine.

VI. TWO INTUITIONS

The Mill-Jefferson view, as I have described it herein, seems to trade on the apparent appeal of two intuitions, and in this final section, I will critically examine these intuitions and argue that neither carries much normative weight. The first intuition is the notion that so long as we, as a society, provide a sufficiently attractive option for workers, we do not owe them anything further. For example, suppose you work 100-hour weeks in a coal mine, for which you receive barely enough pay to provide for your subsistence. In addition, your supervisor sexually harasses you, and you are developing black lung. Nonetheless, your job is the best you can find. You describe your situation to me, and I am so deeply moved that I immediately offer you *the job of your dreams*.

What is the significance of this offer? Before I make the offer, your situation inspires sympathy and seems to cry out for justice, but once you receive the offer, you are to be envied, are you not? After all, you now have an offer to take up the *job of your dreams*. What more could you want, and how could anyone suggest that you deserve more? And if you chose, for some unfathomable reason, to turn down my offer and return to the coal mines, who would have any sympathy for you? It would be difficult to make a compelling claim of justice on your behalf if you deliberately turned down a *great* opportunity in favor of your miserable life in the coal mines.

In response, we should first ask how good an option needs to be in order to rule out any further claims of justice on behalf of those to whom the option is available. That is, even if we accept the intuitive force of the “job of one’s dreams” hypothetical sketched in the preceding paragraph, we need not accept that it extends to anything significantly less attractive than the job of one’s dreams. For example, if you were a lifelong resident of Boston and someone offered you an otherwise fantastic job in New Mexico, do you deserve nothing more than what the local labor market offers, no matter how dismal, if you were unwilling to leave your family, friends, and hometown to accept the “fantastic” job offer? Mill and Jefferson argued that their proposed options are so good that no sensible or virtuous person could turn them down, but as we saw in Section IV, these options are *not* universally appealing. Not everyone has the necessary skills to be a frontier farmer or to co-manage a cooperative firm, and not everyone would consider either option sufficiently attractive to embark upon it. The latter point seems especially

important with respect to the intuitive pull, if any, of the “job of one’s dreams” hypothetical. If someone offered you the job of *my* dreams, and you did not share my enthusiasm for it, you would not think the offer had much normative significance.

Moreover, we should be suspicious of the intuition to the extent that it relies upon considerations of *pity* and *envy*. In the hypothetical sketched above, when you tell me about your miserable job in the coal mines, my sympathy for your *pitiable* situation inspires me to offer you a great job. Once I do so, your situation becomes *enviable*, and I suggested that this might lead us to think that justice would not require any further claims on your behalf. Perhaps we *would* feel this way about people who turn down what we perceive to be fantastic job offers, but this seems reflective of something other than our intuitions about justice.

To the extent that we aim at a more just society, we would not want to offer better options to workers languishing in miserable jobs out of *pity*, but because our abandoning them to their fate would show insufficient concern for their interests. As Anderson argues, “[p]ity is incompatible with respecting the dignity of others. To base rewards on considerations of pity is to fail to follow principles of distributive justice that express equal respect for all citizens.”⁶⁶ Similarly, we would err if we thought we owed you nothing further once you received my great job offer because you were thenceforth to be *envied*.⁶⁷

The obvious implication of the foregoing discussion for the Mill-Jefferson view is that their respective prescriptions would need to be *extremely* good before we would be willing to say that we have done all that justice could possibly require, at least with respect to the provision of career opportunities. Since their proposed “exit options” turned out to be a great deal less feasible, attractive, and empowering than they predicted, we can readily conclude that the mere possibility of freehold farming and cooperative labor—both of which still “empower” workers today—do not carry much normative weight. It seems likely that Mill, at least, would concede that such considerations constitute a serious—if not decisive—objection to his prescription. Although Mill often seems scornful of workers who would fail to see the attractiveness of cooperative labor, he is fundamentally committed to equal concern for the interests of all:

⁶⁶ Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 306 (1999).

⁶⁷ *Id.* at 307 (“Envy’s thought is ‘I want what you have.’ It is hard to see how such wants can generate *obligations* on the part of the envied. To even offer one’s own envy as a reason to the envied to satisfy one’s desire is profoundly disrespectful.”) (emphasis added).

Now, society between human beings, except in the relation of master and slave, is manifestly impossible on any other footing than that the interests of all are to be consulted. Society between *equals* can only exist on the understanding that the interests of all are to be regarded equally.⁶⁸

Accordingly, although Mill incorrectly thought that forming or joining cooperative firms would be more universally feasible for workers than it has proved to be in practice, we should view his error in this regard as principally factual rather than normative. If he had fully understood *all* the obstacles workers face in forming cooperatives, he would almost certainly have revised his normative conclusions about the intelligence and virtue of people who eschew cooperative labor in favor of wage labor. In other words, if he had learned that society's standing offer to workers to form cooperatives was not as fantastic as he initially thought it was, he would have insisted that the interests of all—including wage workers—be considered.

The second intuition upon which the Mill-Jefferson view arguably trades is the suggestion that certain kinds of work or modes of working require and nurture virtues that are especially valuable to society, and that we should only encourage and reward those who engage in these particularly valuable and praiseworthy sorts of work. Jefferson made his evaluative commitments especially clear when he claims that “[t]hose who labour in the earth are the chosen people of God,” and this probably motivates his desire to rely on this as the sole liberating option for those who might otherwise accept positions as hired laborers. Since reliance on manufacturing work leads to dependence and moral decline, why do anything to make such jobs more tolerable? If we permit the unrestricted labor market to conduct its customary race to the bottom, more workers will take the laudable option of farming on the frontier.

Similarly, Mill not only argued that it is in workers' interests to form cooperative associations, but also implies that workers have a positive *obligation* to improve society by advancing the “cooperative principle.” He asserts that “in the moral aspect of the question . . . something better should be aimed at as the goal of

⁶⁸ JOHN STUART MILL, UTILITARIANISM (1863), *reprinted in* UTILITARIANISM AND OTHER WRITINGS 251, 285 (Mary Warnock ed., 1962); *see also* JOHN STUART MILL, THE SUBJECTION OF WOMEN 82 (Longmans, Green & Co. 4th ed. 1878) (1869) (“Though the truth may not be felt or generally acknowledged for generations to come, the only school of genuine moral sentiment is society between *equals*. The moral education of mankind has hitherto emanated chiefly from the law of force, and is adapted almost solely to the relations which force creates. In the less advanced states of society, people hardly recognise any relation with their *equals*.”) (emphasis added).

industrial improvement” than the economic prosperity of individuals and their families. Instead, “if public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured.”⁶⁹ Although we might agree that these are laudable and desirable goals, we might hesitate to concede Mill’s further assertion that *only* those who work in cooperatives *deserve* success:

Associations like those which we have described, by the very process of their success, are a course of education in those moral and active qualities *by which alone* success can be either deserved or attained. As associations multiplied, they would tend more and more to absorb all work-people, except those who have too little understanding, or too little virtue, to be capable of learning to act on any other system than that of narrow selfishness.⁷⁰

Which, exactly, are these “moral and active qualities”? If all Mill had in mind is the willingness to perform “an honest day’s work for honest pay,” few would challenge him, but he was well aware that the formation and management of cooperative enterprises requires not just hard work, but entrepreneurial initiative and intelligence. To the extent that Mill implied that only those who are sufficiently intelligent and entrepreneurial deserve to be rewarded for their efforts, we should resist this seeming elitism.

We see further hints of the value judgments underlying Mill’s view in his strong approval of those cooperative associations which flourish “at whatever cost of labour or privation,” without loans from capitalists or their government.⁷¹ We, too, might marvel at the pluck and determination of workers who succeed in cooperative endeavors against all odds, but our approval of their success should not lead us to conclude that only those who are capable of succeeding in a similarly impressive manner *deserve* success. Mill’s view is probably not quite *that* extreme, but it is clear that he is at least somewhat persuaded that it is good for humans to be prodded and enticed to do what is best for them:

⁶⁹ MILL, *supra* note 1, at 762–63.

⁷⁰ *Id.* at 791 (emphasis added).

⁷¹ *Id.* at 773 (“So long as this idea [of worker-owned cooperatives] remained in a state of theory . . . it may have appeared . . . incapable of being realized . . . unless by seizing on the existing capital, and confiscating it for the benefit of the labourers But there is a capacity of exertion and self-denial in the masses of mankind, which is never known but on the rare occasions on which it is appealed to in the name of some great idea or elevated sentiment.”).

It is the common error of Socialists to overlook the natural indolence of mankind; their tendency to be passive, to be the slaves of habit, to persist indefinitely in a course once chosen. Let them once attain any state of existence which they consider tolerable, and the danger to be apprehended is that they will thenceforth stagnate; will not exert themselves to improve, and by letting their faculties rust, will lose even the energy required to preserve them from deterioration.⁷²

This may simply reflect my own dissimilar value judgments, but I do not apprehend any particular “danger” in the prospect of workers attaining a “state of existence which they consider tolerable.” For one thing, workers who are content to labor in relatively simple jobs will not necessarily “stagnate,” as they could pursue educational, artistic, recreational, and family activities outside work. Many such workers view their jobs as little more than sources of the means to support themselves and do what they really enjoy—once they leave work for the day, they do not give it another thought until the following morning. What could be wrong with this familiar view of the value of work?

Mill put his cards on the table, so to speak, in a letter to his friend and correspondent Thomas Carlyle, in which he aimed to explain his idiosyncratic utilitarian commitments:

Though I hold the good of the species (or rather of its several units) to be the *ultimate* end, (which is the alpha & omega of my utilitarianism) I believe with the fullest Belief that this end can in no other way be forwarded but by . . . each taking for his exclusive aim the development of what is best in *himself*.⁷³

This passage may elucidate what Mill meant by the “selfishness” of workers who refuse to form or join cooperative firms. Such endeavors require workers to display intelligence, entrepreneurial spirit, and stirring feats of “labour and privation,” all in furtherance of both the “co-operative principle” and increased productivity in society. In contrast, Mill saw working for wages to obtain the means of subsistence as “selfish” because it aims only at one’s own needs and those of one’s dependents. When there is no cooperative alternative available, this sort of “selfishness” is not blameworthy, but when it becomes feasible for workers to form cooperatives,

⁷² *Id.* at 793.

⁷³ JOHN STUART MILL, XII THE COLLECTED WORKS OF JOHN STUART MILL 207–08 (Francis E. Mineka ed., Routledge & Kegan Paul 1963) (1834).

thereby benefiting society as a whole, *all* workers—except, of course, those “whose low moral qualities render them unfit”⁷⁴—have a positive duty to do so.⁷⁵

VII. CONCLUSION

Again, we might share Mill’s approval of the traits of being active and intelligent, but we need not approve so heartily that we refuse to recognize the contributions of those who either are not “*as* active and *as* intelligent as other people” or who do not choose to focus all their powers of activity and intelligence on their “day jobs.” Many workers who are not particularly motivated or intelligent—or who do not have the opportunity and/or inclination to apply these traits at work—can nonetheless perform valuable roles within productive endeavors that are conceived, initiated, and managed by others. We might not find these “role players” as impressive as the entrepreneurs who define their roles, but justice undeniably requires us to recognize and reward these workers’ contributions.

This points to what may be the most important lesson we can draw from Mill’s flawed prescription for workers’ “futuraity.” Because of his near-exclusive focus on the traits that he particularly admires, Mill seemed significantly to overvalue the contributions of entrepreneurs as compared to those of non-managerial workers. As I argued above, Mill’s proposal would be unappealing to many workers because it would require them to become co-managers of firms. Not everyone wants to perform managerial tasks and have managerial responsibility, and we would need a very compelling reason to impose such work on the unwilling. According to Mill, the reason that everyone should be an entrepreneurial co-manager is that this would make society more productive, keep workers from “stagnating,” and force them to “exert themselves to improve” and develop what is best in themselves. But it is especially challenging to be a co-manager of a cooperative firm, since it is so difficult to reach consensus when every member of the firm has an equal vote. Simply put, the problem with Mill’s proposal is that it requires “too many chiefs; not enough braves.” Accordingly, one reason to be wary

⁷⁴ MILL, *supra* note 1, at 763–64.

⁷⁵ Mill’s views on the value of competition are also telling in this regard: “To be protected against competition is to be protected in idleness, in mental dulness; to be saved the necessity of being as active and as intelligent as other people; and if it is also to be protected against being underbid for employment by a less highly paid class of labourers, this is only where old custom, or local and partial monopoly, has placed some particular class of artizans in a privileged position as compared with the rest; and the time has come when the interest of universal improvement is no longer promoted by prolonging the privileges of a few.” *Id.* at 793–94.

of placing disproportionate value on managers and entrepreneurs is that we do not need very many of them. Indeed, if everyone were involved in management, firms might well be hopelessly difficult to run.

Another reason to question the extent to which Mill values entrepreneurs—and he is not alone in overvaluing them, as the increasingly bloated salaries of CEOs and upper management demonstrate—draws on Thomas Paine’s complaint about what we lost when we left “the state of nature” and ceased to enjoy common ownership of the earth. On the one hand, we can acknowledge that entrepreneurs are impressively “active” and “intelligent.” After all, their predecessors were able to entice us out of the state of nature with their ambitious plans to enclose and improve land, thereby expanding its productive capacities tenfold. But, on the other hand, we should be just as aware that entrepreneurs were *also* the insufferable busybodies who have thrust us into the modern world of 90-hour work weeks, the perceived obligation to be “productive” at all times, ludicrously wealthy privileged classes, and crushingly impoverished “underclasses.”

Accordingly, in response to Mill and others who profess unmitigated admiration of ambitious entrepreneurs, we should insist on greater restraint. We should value and reward entrepreneurs to the extent that their ambitious schemes benefit society as a whole—including those members of society who clean the entrepreneurs’ executive bathrooms and keep their production lines running; but we should just as surely resent and refuse to reward entrepreneurs to the extent that they have only enriched themselves, and—in the apt words of Thomas Paine—“thereby created a species of poverty and wretchedness that did not exist before.”⁷⁶

⁷⁶ PAINE, *supra* note 57, at 331.