

Necessity Knows No Borders: the Right of Necessity and Illegalized Migration

Alejandra Mancilla

1 Introduction¹

“Necessity breaks through the ties of all laws,” Seneca famously claimed.² Since ancient times, indeed, moral philosophers and legal theorists have conceptualized the idea of an exceptional moral prerogative of individuals to engage in otherwise wrongful acts in order to survive. Throwing the cargo overboard in the middle of a storm to prevent the ship from sinking, or feeding on human flesh on the brink of famine are classic examples. A more contemporary one is that of a hiker who ends up caught in the middle of a mountain storm and must break into someone else’s cabin in order to save himself from the cold.³ Unforeseeable, one-off situations of emergency that can affect anyone (and that are mostly naturally caused) have been thus thought to be the paradigmatic cases of necessity.

Instead, in this article my starting point is a broader conception of the right of necessity, which I think may be read into some medieval and early modern authors. In accordance with this conception, those who are subject to an ongoing state of need, like chronic deprivation, may help themselves to someone else’s property in order to get out of their plight – regardless of whether the deprivation was naturally caused or man-made.⁴ Thus, the English canonist Alanus Anglicus (*fl. c.1190–1210*) claims that “the poor man did not steal because

1 Many moral and political theorists prefer not to use the terms “illegal migration” or “illegal migrant” given the negative connotations that they carry. See, for example, Joseph Carens, *The Ethics of Immigration* (New York: 2013). For my part, I choose to use the term “illegalized” precisely to highlight the mismatch between what the law accepts and forbids, and what should be morally permissible if we accept that basic human rights exist. I thank Alex Sager for suggesting this term.

2 Quoted in Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: [1625] 2005), 2.2.6, 435.

3 Joel Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” *Philosophy & Public Affairs* 7:2 (1978): 93–123.

4 My interpretation of the right of necessity thus differs from those considered in the Introduction, as well as in chapters 1, 3 and 4 of this volume.

what he took was really his own *iure naturali* – which could mean either ‘by natural right’ or ‘by natural law’. Laurentius Hispanus (1180–1248) says that when the poor man takes what he needs, it is “as if he used his own right and his own thing”, while the Italian canonist Hostiensis (1200–1271) writes that “one who suffers the need of hunger seems to use his right (*ius suum*) rather than to plan a theft”.⁵ In none of these cases is it suggested that the right of necessity only applies to one-off situations, and none of them explicitly rules out the right of the chronically deprived to seek a remedy to their situation. While these medieval authors understood the right of necessity as a retreat to the state of common use, in early modern times Samuel Pufendorf gives an argument for the right of necessity based on the importance of self-preservation. In a society where no provisions are made to sustain the poorest and the charity of those who can afford it is not enough to meet the demands of the needy, Pufendorf asks, “must he therefore perish with famine? Or can any human institution bind me with such a force, that in case another man neglects his duty towards me, I must rather die, than recede a little from the ordinary and the regular way of acting?”⁶ The question is rhetorical and the answer is negative: the needy may take the resources required without incurring the guilt of theft. This might at first sight seem to contradict Pufendorf’s duty-based morality and his emphasis on societal order, but it can also be interpreted as a seminal account of why the welfare state is required: in order to prevent people from claiming necessity time and again in order to satisfy their needs, a structure has to be set that prevents people from falling in dire need in the first place. If there is no such structure, however, Pufendorf’s reasoning seems to allow for the possibility that those chronically deprived may invoke necessity.

The narrow understanding of the right of necessity was and is mostly accepted by common law and civil law systems. In the Model Penal Code and the common law of the US and the UK, for example, necessity is generally defined as a form of compulsion that works as an exculpatory reason when a person confronted with two evils avoids the greater one, which must be naturally caused.⁷ The broad understanding that I am proposing here, however, has been mostly rejected by legal systems then and now: whereas the starving hiker who breaks into the mountain hut may be excused from eating the last remaining spaghetti in the pantry, chronically deprived people are rarely excused (let alone,

5 Quoted in Brian Tierney, “Origins of Natural Rights Language: Text and Contexts, (1150–1250),” *History of Political Thought* 10 (1989): 615–646, 641–642.

6 Samuel Pufendorf, *Of the Law of Nature and Nations*, trans. Basil Kennet, 4th ed. (London: [1672] 1729), 2.6.5, 207.

7 Joshua Dressler, “Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits,” *California Law Review* 62 (1988): 1347.

justified) from taking some sausages and cheese from the local supermarket. On the contrary, they are charged with theft and punished accordingly.⁸

And yet, should this be so? Moreover, if necessity breaks through the ties of all laws, should it not also break through all borders? To answer these questions, in section 2 I expound the idea of a right of necessity of the chronically deprived, and say something about its form and content, its justification and the conditions for its exercise. I claim that, if we grant that property rights are founded upon and limited by the fulfillment of the basic rights of individuals, a minimal demand upon the former is that they in fact secure the latter: it would be as irrational for individuals to comply with rules that threaten their own subsistence as it would be unreasonable for others to require such compliance. In section 3, I discuss whether the right of necessity may be understood not just as a prerogative to take, use and/or occupy someone else's property, but also as a prerogative to enter into someone else's territory. What I aim to defend here is thus not just the right of migrants in desperate need of rescue from sinking boats in the middle of the sea, or from overloaded trucks in the middle of the desert. I doubt that anyone would deny that right, which arguably fits the narrow version of necessity presented above. What I aim to defend, more broadly, is the right of necessity of all those who successfully or unsuccessfully cross borders in an illegal way, to put an end to their lives of chronic deprivation by resettling in a different country on a permanent basis. In section 4 I address some objections in principle and practice to this proposal, and conclude in section 5.

Two clarifications are in place before proceeding. The first clarification regards the context within which I defend this approach. Confronted with the daunting data on global poverty and inequality, moral and political philosophers in the last decades have asked what duties well-off countries and individuals have toward the worst off. These duties can be standardly divided into two categories: on the one hand, the duties of assistance to help those we can (regardless of any responsibility we may have for their plight); and the duties of justice, founded on the conviction that the well-off are somehow harming the worst off (where the scope of harm can go from plainly violating the latter's basic human rights to failing to fulfill them).⁹ An only recently addressed gap

8 See Jeremy Waldron, "Why Indigence Is Not a Justification," in *From Social Justice to Criminal Justice*, eds. William C. Heffernan and John Kleinig (Oxford: 2000). For an exception, see "Italian Court Rules Food Theft 'Not a Crime' if Hungry," *BBC News*, 3 May 2016, at <http://www.bbc.com/news/world-europe-36190557> (18.10.2019).

9 A well-known account of our duties of assistance toward the world's needy is offered by Peter Singer, *The Life You Can Save* (Melbourne: 2013). For a justice-based account, see Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd ed. (Malden, M.A.: [2002] 2008).

in this discussion has been the question of what the needy may do by themselves and for themselves in a scenario where the well-off blatantly continue to fail in their duties of assistance and/or justice.¹⁰ What motivates this article, accordingly, is this question applied to the phenomenon of illegalized migration for subsistence reasons.

The second clarification regards the limits of my argument. In my view, the right of the individual in chronic need to cross borders and settle down in a new country where she can have her basic subsistence rights met is not merely a privilege, which might have to be exercised against the privilege of the potential receiving state to keep her out. Instead, it is a privilege compounded with a claim of non-interference against others to let her freely proceed.¹¹ The duty of states (and individuals in that state) to let the needy enter is thus what may be minimally demanded from them. This principle should thus be seen as an in-built limitation of the right of states to control the movement of individuals across their borders, and an absolutely minimal moral foundation upon which any theory seeking to justify such control should be built.¹² Although I think there are powerful reasons to defend even more open borders, I will not argue for that here.

2 The Content and Form of the Right of Necessity, Its Moral Justification, and the Limits of Its Exercise

Hereinafter I understand the right of necessity as the right that someone in need has to take, use and/or occupy the material resources required to secure her self-preservation. The content of the right are those things that one directly needs to stay alive (air, water, food, elements for basic health care, and protection in the form of clothing, shelter and energy), but it may also include the means to obtain them. Thus, if the needy person cannot access the resource needed, but may access those things that indirectly serve to acquire the resource (for example, money), then she may permissibly aim for the latter.¹³

¹⁰ See, for example, Monique Deveaux, "Poor-Led Social Movements and Global Justice," *Political Theory* 46:5 (2013): 698–725, and David Gwilym Blunt, "Illegal Immigration as Resistance to Global Poverty," *Raisons Politiques* 69:1 (2018): 83–98.

¹¹ Hereinafter I use the terms "privilege" and "claim" in the Hohfeldian sense. See the next section for an explanation of their meaning.

¹² For a historical discussion, see Annabel Brett, *Changes of State* (Princeton: 2011).

¹³ A more detailed elaboration of the arguments offered in this section can be found in Alejandra Mancilla, *The Right of Necessity: Moral Cosmopolitanism and Global Poverty* (London: 2016), chapters 4 and 5.

Regarding the form of the right, I understand it as a privilege plus a claim of non-interference against others. In Hohfeldian terms, A has a privilege to φ if A has no duty not to φ . For the case in point, this means that the needy person has no duty not to help herself to someone else's property. That privilege alone, however, is weak, because it says nothing about what B, C and others may or may not do against A accomplishing her goal. Thus, the needy person's privilege to take B's food, for example, may well collide with B's privilege not to let A take it. That is why A's privilege must be supplemented by a claim of non-interference against others to let her φ . Because claims, as opposed to privileges, have correlated duties, for the case in point this means that A may claim B's property while B has a duty not to interfere with A. Thus, when someone exercises her right of necessity, others (including the owner of the targeted resources) may not block her actions – A is morally protected to φ .¹⁴

The right of necessity manifests the limits of property rights, required to make the latter acceptable for those subject to them. This idea rests on two assumptions. The first is that every human being has a basic right to subsistence, and the second is that one of the main functions of property rights is to secure everyone's basic right to subsistence. For a system of property rights to be acceptable to those who are subject to its rules, then, guarantees must be given to them that – at the very least – their basic right to subsistence will be met. Conversely, if a system of property rights does not provide that minimal guarantee, individuals may not be forced to follow its rules.

Three conditions must be met for individuals to justifiably exercise their right of necessity.¹⁵ The first is that the need must be basic. As spelled out above, this means that it is of a kind that has to be fulfilled for the person to subsist. The second condition is that the exercise of this right must not violate other equally important moral interests. This condition blocks two kinds of cases: one, where the needy claims her right against someone equally needy or almost as needy in the same relevant respect; the other, whereby exercising her right the person jeopardizes other equally important moral interests, such as other people's or her own security or liberty rights. The rationale of this condition is that one may not impose a duty of non-interference against others so demanding that abiding by this duty would endanger the same kind of basic interests that were trying to be protected. By asking duty-bearers to end up

14 Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *The Yale Law Journal* 23:1(2013): 16–59. It must be pointed out that Hohfeld's analysis focuses on legal rights, but many moral theorists (whom I join) see his work as illuminating also for the analysis of moral rights.

15 I say "justifiably" to imply that ~~the exercise of~~ the right in these situations is morally justifiable, and not just excusable.

in a similar situation to the one that was trying to be remedied, the principle would be self-defeating. Finally, the right of necessity is a last resort that applies when other paths of action have been unsuccessful. These might include looking for a job or some other source of income, appealing to the relevant authorities, seeking help from individuals or institutions, and so on and so forth. These other paths of action should be reasonable in the sense that they should be pursued only if there is a likelihood of success, and only if they are not overly taxing for the agent – for example, by forcing agents into prostitution or by making them accept enslaving working conditions in exchange for a survival wage.

The point of recognizing this right, as said above, is not to turn its unfettered exercise into the complement (or solution) to imperfect human institutions. Rather, the challenge posed by the acknowledgement of this right is to design property rules, and their supporting institutional framework, in such a way that necessity claims only arise in one-off, exceptional hiker-in-the-storm-like scenarios, because everyone stands above a minimal material threshold in their daily lives.

3 Claiming a Place to Be

Some might argue that exercising the right of necessity as I have presented it, and the consideration it must be given when designing property rules and the institutional framework sustaining them, may be acceptable within a closed society. Enlarging the umbrella of necessity might make sense in tightly-knit, religion-abiding communities, where neighbors know each other and peer pressure to fulfill one's charitable duties, or the sheer fear of burning in hell for all eternity are strong enough motives for beneficent action. However, the objector might continue, lacking these circumstances this broad understanding of the right of necessity does not apply. Put differently, there is no right of necessity thus understood across communities' borders; there is no such thing as a "cosmopolitan" or "transnational" right of necessity.

On the contrary, I submit that such an application of the right of necessity must be allowed. The underlying assumption is that the global context as it exists today constitutes a coercive order ~~which~~ determines the possibilities of individuals to have their basic subsistence rights met.¹⁶ Insofar as this order creates and maintains institutional processes that keep some individuals in

¹⁶ For two different versions of how the current global order ~~comes~~ about and why we are all co-participants in it, see Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd ed., (Malden, M.A.: [2002] 2008), and Iris Marion Young,

a state of chronic deprivation, these individuals ought not to be constrained by its rules and may exercise their right of necessity in order to survive. The corollary of this is that correcting the institutional structure in such a way that claims of necessity become truly exceptional should be the goal and joint enterprise of all co-participants at the global level. While this does not happen, however, we should not expect individuals to sit down and perish out of regard for those rules. The implication of this is that there are many instances in the world today where acts like pickpocketing, shoplifting, squatting and occupying land should be deemed morally permissible, regardless of whether the right-holder and the duty-bearer are co-citizens or not.

But even if one accepts that someone in need has the right to take, use and/or occupy someone else's property in the ways suggested above, one might still question the moral prerogative that someone in need may have to settle down in someone else's territory to make a living in the long term. It might be argued that there are at least two morally relevant differences between the two types of scenario. For one thing, taking someone else's property is paradigmatically a one-off act, where the needy person gets the resources required for her immediate use and consumption. Settling down on someone else's territory, on the contrary, is not a transient act, but one sustained into the future. Therefore, it generates a permanent rather than a fleeting demand on the potential duty-bearers. For another thing, settling down in someone else's territory generates other duties toward the needy agent apart from the mere duty not to interfere while she exercises her right of necessity. By establishing herself in a new country, the person becomes connected to the other members of that society in a way in which they were not connected before. Even if one accepts that we are all loosely co-participants in one global order, it is pretty clear that we are also much more ~~tightly~~ co-participants in our own domestic orders, and that the latter imposes responsibilities ~~to one another~~ that the former does not. Because of this, it might be thought, the right of necessity of individuals does not require states to accept them on a long-term basis. It would be too demanding both for states and for their citizens to bear this burden.¹⁷

In ~~reply~~ to the first point, even though it is true that the paradigmatic cases of necessity are those where the agent consumes the resources immediately, rather than on a prolonged basis, it must not be forgotten that part of what is basic for one's subsistence is a place to be. This is why squatting in empty

"Responsibility and Global Justice: A Social Connection Model," *Social Philosophy and Policy* 23:1 (2006): 102–130.

17 For an argument along these lines, see Michael Blake, "Immigration, Jurisdiction, and Exclusion," *Philosophy & Public Affairs* 41:2 (2013): 103–130.

buildings and occupying unused land for subsistence agriculture fall under the umbrella of necessity proposed above, even though they are long-term rather than fleeting acts. The same logic should apply when the needy person is located in a place that cannot provide even the minimal material conditions for subsistence. In these cases, it seems right to say that the person may find another place where her basic needs can be met, even if this place lies across a political border.¹⁸

As for the second point, it is true that becoming part of a different community will tie subsistence migrants to other members of that community in a special way, and generate between them duties that may indeed be more extensive than those owed to other fellow human beings. What is problematic is to argue that, because of this, states are free to prevent people from entering or to deport illegalized subsistence migrants. To see why, it must be recalled that we live in an international order where all individuals are born into states; states that we did not choose and ~~which~~ can promote as much as they can hinder our life prospects.¹⁹ For such a coercive system to be acceptable for those subject to it (that is, all human beings on earth), minimal safeguards must be provided to guarantee that we are free not only to opt out from a domestic order that is not fulfilling its minimal duties toward us – either because it refuses to do so, or because it is negligent, or simply because it can't – but also to opt for a different one where our basic needs can be met. The basic right to subsistence, in other words, should be an in-built limitation to territorial rights. Currently, on the contrary, states do recognize the right of individuals to exit their country of origin, but they do not recognize the duty of other states to let those individuals in.²⁰ In practice, this often turns the individual's right to exit into a bare, toothless privilege that clashes against the effective exercise of the state's privilege to deny entry or expel those who illegally entered.

18 Even Grotius, who seems to defend the narrow reading of the right of necessity, claims that “a fixed abode ought not to be refused to strangers, who being expelled from their own country, seek a retreat elsewhere.” See Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: [1625] 2005), 2.2.16, 447. Pufendorf, meanwhile, claims that “it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted, who are driven on the coasts by necessity, or by any cause that deserves pity and compassion.” See Samuel Pufendorf, *Of the Law of Nature and Nations*, ed. Basil Kennet (London: [1672] 1729), 3.3.9, 245. These people, according to Pufendorf, should be let in, even on a permanent basis if required.

19 From a purely economic perspective, studies have shown that citizenship alone explains 60 per cent of a person's income. See Branko Milanovic, *The Haves and the Have Nots* (New York: 2011).

20 See UN General Assembly, *The Universal Declaration of Human Rights*, Resolution 217 A, A/RES/217(3)A (10 December 1948), Article 13.

Having said this, most states in the world do recognize as part of their duties the acceptance of individuals whose basic rights are endangered. Since 1951, 145 states have signed the Geneva Convention Relating to the Status of Refugees. There, a *refugee* is defined as a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.²¹

Those falling under the definition of refugee have good reason to fear that they will be seriously harmed or even killed if they stay in their place of residence. Another way to say this is that refugees are those who are forced to leave their countries or places of permanent residence on grounds of self-defense. Because their lives are at stake, states guarantee to them a safe haven while the threat persists. Many have argued, however, that limiting the definition of a refugee only to those who fear persecution leaves out an important and growing category of migrants. These are migrants who leave their places of residence because they fear an existential threat to which they cannot find remedy within their countries of origin.²² This existential threat need not only be a direct threat against their lives and bodily integrity, but may also consist in serious deprivations of their basic socio-economic rights.²³

²¹ UN General Assembly, *Convention Relating to the Status of Refugees* (28 July 1951), Article 1, 14.

²² Alexander Betts calls them *survival migrants* and defines them as those who “cannot get access to a fundamental set of rights in his or her country of origin and so (as a last resort) needs to seek those rights in another country (...) persons who are outside their country of origin because of an existential threat for which they have no access to a domestic remedy or resolution.” See Alexander Betts, “Survival Migration: A New Protection Framework,” *Global Governance* 16 (2010): 361–82, 365.

²³ To use Henry Shue's typology of basic rights, one could say that the Refugee Convention places limits on the territorial rights of states for the sake of protecting the basic security rights of individuals and, to some extent, their liberty rights. What is missing is a limit on the right of states to control their borders when what is at stake are basic subsistence rights. See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed. (Princeton, NJ: [1980] 1996). For an argument defending the rights of subsistence migrants, see Michael Dummett, who claims that “all conditions that deny someone the ability to live where he is in minimal conditions for a decent human life ought to

From a basic rights' perspective, then, the duties of states toward those who leave their countries of origin or habitual residence on self-defense grounds should be extended to those who leave their countries of origin or habitual residence on self-preservation or subsistence grounds. Self-preservation or subsistence is, after all, as basic a right as self-defense. If states and their citizens have committed themselves to respect all (and not just some of) the basic rights of all human beings, this much follows.²⁴

4 Objections

The objections to the idea of extending the right of necessity from a right to take, use, and/or occupy someone else's property to the right to enter and settle down in someone else's territory can be divided into those that contest the principle itself, and those that contest the effects that its application would have.

4.1 *Contesting the Principle*

4.1.1 It Undermines Important Rights of the Territorial Agent

This objection can take different forms, depending on how territorial rights are conceptualized and defended. A full account of these conceptualizations would go far beyond the scope of this article, so in what follows I succinctly present four positions that support the right of states to control borders and exclude "outsiders". These are liberal nationalist positions and theories of territorial rights founded on specific features, such as the political self-determination of the collective, the freedom of association, and the right to decide toward whom to incur special responsibilities. For liberal nationalists, who understand states as representatives of the will of the nation, controlling borders is a

be grounds for claiming refuge elsewhere". See Michael Dummett, *On Immigration and Refugees* (London: 2001), 37.

24 This is not the place to discuss whether the best way to bring about the fulfillment of the basic right to subsistence of these migrants is by stretching the definition of refugees set by the *Geneva Convention*, or by creating a separate legal instrument acknowledging that people may cross borders when their basic right to subsistence is endangered. The important point to make is that, one way or another, states ought somehow to fulfill the duty to let them in. Looking at the world today and especially at how developed states are in fact behaving toward illegalized immigrants (and even toward those that clearly fit the narrow category of refugees), one might fear, however, that this proposal might be too optimistic. For one example, see the growing number of detainees in Libyan Migrant Detention Centers considered to be the gatekeepers of the European Union (Lorenzo Meloni and Amanda Sakuma, "Damned for Trying," *MSNBC*, at <http://www.msnbc.com/specials/migrant-crisis/libya> (18.10.2019)).

key part of the territorial package. By controlling borders, nations can be selective about who gets in and who does not, according to how they understand their collective project. If the state had no selecting rights, on the contrary, the national identity and culture would be jeopardized.²⁵

Instead of assigning to nations the role of territorial agents, one can also think of the latter as any group united by a joint project of political self-determination. To realize their conception of how they want to organize themselves, these groups need jurisdictional authority and, as an extension, control over who enters and who does not. As Margaret Moore explains, there are both relationship-independent and relationship-dependent reasons why border control is important for the political collective. Among the first type, demographic balance (which will be influenced by the kind and number of migrants that one lets in) determines all sorts of policies that impact one's way of life – like education, health care and welfare services. Among the second type, Moore mentions “the right to determine what ‘the self’ is ... [that is] the composition of the polity”.²⁶

A third defense of the right to control borders is based on the idea that the members of a given state have the right to associate freely. In order to exercise this right meaningfully, they therefore need to be able to decide who may become a long-term member of the polity and who may not.²⁷

A fourth way of defending border control is in terms of the rights of the members of the political collective to decide to whom they want to bear special responsibilities. Insofar as the entry of new migrants limits the freedom of the community's members (by imposing on them new responsibilities), the latter should be entitled to determine the number and kind of migrants that they are willing to accept.²⁸

While all these positions justify the right of states to control borders, however, they all recognize that individuals whose basic rights are unfulfilled should be given special consideration. That is, they all admit that the right of states to decide who may enter and who may remain in their territory is not absolute and may be overridden by other rights if the circumstances require it. In the specific case of subsistence migrants, Miller and Wellman recognize that there is a disjunctive duty of states either to let subsistence migrants in, or to ensure that their subsistence rights are met in the place where they live.

25 See David Miller, *Strangers in Our Midst* (Cambridge, M.A.: 2016).

26 Margaret Moore, *A Political Theory of Territory* (New York: 2015), 197.

27 Christopher Heath Wellman, “Immigration and Freedom of Association,” *Ethics* 119:1 (2008): 109–41.

28 Blake, “Immigration, Jurisdiction, and Exclusion.”

In Wellman's words, "global poverty requires wealthy states to either export aid or import unfortunate people (*sic*)."²⁹ Moore, meanwhile, favors redistribution of wealth from developed to developing countries, and development aid as a means of satisfying the basic needs of people outside one's borders. She recognizes, moreover, that there might be cases where states have a duty of rescue to give automatic entry to some migrants – specifically, climate refugees from sinking islands.³⁰ Blake, finally, admits that despite the right of states to exclude, "we [members of individual states] are not entitled to use force to exclude individuals who want to enter our jurisdiction when they come from jurisdictions that do not adequately protect their rights."³¹ This leads Blake to the conclusion that states collectively ought to bear the duty of receiving and distributing those migrants among themselves.

In short, all these theories recognize that the fulfillment of the subsistence rights of outsiders creates duties on states to either help them out wherever they are, or to receive them under a shared scheme of co-operation. What is missing in them is an explicit answer to the following question: what are those outsiders whose subsistence rights remain unfulfilled morally permitted to do when neither their own state nor other states have complied with these duties? I assert that, if they want to keep their theories consistent, they should give the following answer: such individuals should be let in without interference.

4.1.2 Self-Defeating

One way in which a moral principle can be self-defeating is if it requires the agent to do something that will make her end up in a worse situation than that which she is trying to remedy.³² With regard to the case at hand, one might object that, by accepting all the needy people that claim a right to refuge within their territory, the members of the receiving country could end up being seriously disadvantaged or "swamped" by outsiders to the point that the locals end up living "under siege".³³ Because the state has a duty first and foremost toward its own citizens, subsistence migrants should only be allowed on the condition that this does not happen. Indeed, if what one wishes to endorse

29 Wellman, "Immigration and Freedom of Association," 129.

30 Moore, *A Political Theory of Territory*, 211.

31 Blake, "Immigration, Jurisdiction, and Exclusion," 127.

32 Jan-Christoph Heilinger, "The Moral Demandingness of Socioeconomic Human Rights," in *The Philosophy of Human Rights Contemporary Controversies*, eds. Jan-Christoph Heilinger and Gerhard Ernst (Berlin: 2012), 198.

33 Rajeev Syal, "British Towns Being 'Swamped' by Immigrants, Says Michael Fallon," *The Guardian*, 26 October 2014, at <https://www.theguardian.com/uk-news/2014/oct/26/british-towns-swamped-immigrants-michael-fallon-eu> (18.10.2019).

is a principle for correcting grave injustices, the principle itself should not be unjust. At the extreme, one could think of a scenario where accepting the principle proposed here would make the receiving population as disadvantaged as the migrants themselves. Surely, a state should be allowed to stop letting them in way before reaching that point. Otherwise, the principle would be implausibly over-demanding.

To answer this objection, one has to recall the second condition of the right of necessity, namely, that one may only justifiably exercise it if by so doing one does not violate other equally important moral interests. In the very unlikely case that all the inhabitants of a country fell just above the necessity threshold as a result of letting the needy in, then future claimants should direct their claims against others. The right of necessity as has been conceptualized here is not the Hobbesian “right of nature”, a bare privilege to anything to be exercised by force against anyone, but a minimal claim upon all other co-participants in an order that is supposed to guarantee the fulfillment of at least basic human rights. Furthermore, one should point out that the duties of states toward subsistence migrants (and, for that matter, toward any individual whose basic rights are unfulfilled), are not monolithic, but come in different kinds. In regard to the case at hand, the receiving states have an immediate duty to accept subsistence migrants, very much like a Samaritan duty to relieve immediate need. But this is just the first step toward recognizing their plight and securing their rights in the long term. The most important mediate duty to be fulfilled is that of states collectively distributing responsibilities among them in connection to subsistence migration.³⁴ Ultimately, the final duty of states regarding this matter should be to turn the very phenomenon of subsistence

34 A recent, but not yet implemented reform to the *Dublin Regulation* (2003) goes along these lines, although it still limits the definition of refugee to that of the *Geneva Convention*, leaving out potential subsistence migrants. The *Dublin Regulation*, designed to establish the criteria and mechanisms to distribute asylum applications among European Union countries, has so far established that the member states where asylum seekers first enter the European Union should be responsible for examining their application. In October 2017, however, the European Parliament’s Civil Liberties Committee gave the first approval to modify it on two main scores: first, to abolish the requirement that the receiving countries are responsible for examining all the asylum requests; and second, to introduce an automatic and permanent relocation system throughout all countries, ensuring a fairer sharing of responsibility and avoiding cases where countries are under “disproportionate pressure”. See “European Parliament gives first OK to Dublin Reg Reforms,” *Ansamed*, 19 October 2017, at: http://www.ansamed.info/ansamed/en/news/sections/politics/2017/10/19/european-parliament-gives-first-ok-to-dublin-reg-reforms_aeb09bf1-b6cb-4442-a523-796abf2693a2.html (18.10.2019). However, increased hostility toward migrants and a stronger emphasis on border control has kept the reform from entering into force. See Luigi Achilli, “Why Are We Not Reforming the Dublin Regulation yet?”

migration into an oddity rather than a normal occurrence. This is tied to the minimal moral goal of fulfilling the basic rights of everyone, everywhere.³⁵

4.1.3 Too Minimal

A different worry goes in the opposite direction and questions the principle for being too minimal: if all it demands is that people have their subsistence needs met, then keeping them in detention centers or even imprisoned would seem enough. But this ignores their right to work, to social benefits, to permanent residency and, eventually, citizenship. I do not have the space to address this point fully, but a short answer is that there are other weighty moral reasons that could be invoked to argue for these rights. To give one example, productive rights – i.e. to their “abilities to provide for themselves, take charge of their lives, and raise their own prospects as well as the prospects of those around them”³⁶ – have been defended as basic rights, and therefore should arguably be part of the “starting package” of migrants.

4.2 *Contesting the Application*

4.2.1 Unfair

Another objection states that the “necessity knows no borders” principle is unfair in two ways. First, it is unfair to the most easily “targetable” receiving countries and, second, it is unfair to those individuals who are in need but have no chance of actually exercising their right of necessity – for example, because they are in remote areas, or because moving away from where they are is too taxing for them.

Regarding the first objection, it already happens in the world today that countries receiving the largest number of subsistence migrants are not the wealthiest or best suited to receive them, but rather neighboring countries in poverty or conflict-ridden areas.³⁷ However, concluding from this that migrants

Euractiv, 25 October 2018, at: <https://www.euractiv.com/section/justice-home-affairs/opinion/why-are-we-not-reforming-the-dublin-regulation-yet/> (18.10.2019).

35 For the sake of space, I focus here on the duties of states, but this does not exempt individuals from also having duties regarding this issue. For an account, see Alex Sager, “Reflections on Resisting Migration Injustice,” American Political Science Association Annual Meeting (Washington, D.C.: 2019).

36 Bas Van der Vossen and Jason Brennan, *In Defense of Openness: Why Global Freedom Is the Humane Solution to Global Poverty* (New York: 2018), 111.

37 The most recent massive exodus is that of 4,8 million Syrians who have fled their war-torn country in the last six years to find refuge in Lebanon, Jordan, Turkey, Egypt, and Iraq. In comparison, only one million have sought asylum in Europe, see “The Syrian Refugee Crisis and its Repercussions for the EU,” Syrian Refugees, at: <http://syrianrefugees.eu/> (18.10.2019). It could be pointed out, of course, that Syrians fit the category of refugees

exercising the right of necessity of subsistence should be denied by these countries is wrong-headed. Instead, the conclusion should be that coordinated action among potential duty-bearers should be demanded from receiving countries, so that integration of the new inhabitants to their territories is fairly shared among them.³⁸ By turning subsistence migrants away from their territories, what states are doing is placing the burden on the wrong shoulders.

Regarding the second objection, the worry is that those crossing borders illegally are “jumping the queue” and therefore harming the neediest asylum seekers, stuck for years waiting in far-away, overseas camps.³⁹ But this objection is confused. To acknowledge that those who illegally cross borders for subsistence reasons should be let in by the receiving countries is not to deny the duties that the international community has toward people in need who are unable to exercise their right of necessity. States’ approach to the fulfillment of subsistence rights should not be a matter of either-or, but of both-and.

under the Geneva Convention more than the category of subsistence migrants that I am discussing. A more clear-cut case of subsistence migrants entering developing, neighboring countries is the nearly half million Somalis who have fled to Kenya since 1991. See “Welcome to Europe! A Comprehensive Guide to Resettlement,” International Catholic Migration Commission Europe, 2013, at: http://www.resettlement.eu/sites/icmc.tttt.eu/files/ICMC%20Europe-Welcome%20to%20Europe_.pdf (18.10.2019). Adopting an inclusive policy, the Kenyan government has accepted all of them, regardless of the cause of their plight. The cost, however, has been that thousands have remained for years in overcrowded refugee camps, under so-called “humanitarian containment”. See e.g. Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (New York: 2013), 135–159.

38 Even though Italy is far from being one of the countries most targeted by subsistence migrants, it is one of the most affected in Europe, so it is no surprise that this fair-share argument keeps getting invoked in their case. In 2017, 118,914 people arrived on its coasts, leading the United Nations High Commissioner for Refugees, Filippo Grandi, to affirm that “Italy is playing its part in receiving those rescued and providing asylum to those in need of protection (...) But this cannot be an Italian problem alone. It is, first and foremost, a matter of international concern.” See Alexandra Zavis and Ann M. Simmons, “Europe’s Migrant Crisis Threatens to Overwhelm Italy, Even as Flows to Greece Dry Up,” *Los Angeles Times*, 4 July 2017, at: <http://www.latimes.com/world/europe/la-fg-italy-migrants-20170704-htmlstory.html> (18.10.2019). Regarding the migrant flow to the US from Mexico and Central America, it hit a record in 2018 when 688,000 people were apprehended by the Border Patrol. See Astrid Galvan, “By the Numbers: Migration to the US-Mexico Border,” *AP News*, 25 July 2019, at: <https://www.apnews.com/cbba8ede5436460ab4f792f981ee32e2> (18.10.2019).

39 Jason Thomas, “Is There a Front Door, and are ‘Boat People’ Jumping the Queue?” *SBS*, 23 July 2015, at: <https://www.sbs.com.au/news/explainer/there-front-door-and-are-boat-people-jumping-queue> (18.10.2019).

4.2.2 A Slippery Slope

In the well-known case of *London Borough of Southwark v Williams* (1971), a group of homeless Londoners occupied an empty building owned by the local council, arguing that they had nowhere else to go. They were, however, promptly evicted and condemned by the judicial authorities. The reasoning behind such a decision, as Lord Denning famously put it, was that “if hunger were once allowed to be an excuse for stealing, it would open a door through which all kinds of disorder and lawlessness would pass [...] If homelessness were once admitted as a defense to trespass, no one’s house could be safe. Necessity would open a door that no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry.”⁴⁰ Similarly here, if the right of necessity of subsistence migrants were accepted, one might think that the numbers of people trying to move across borders to settle in richer countries would explode. Thousands, nay, millions of economic migrants in search of a better standard of living would attempt to relocate. This would end up making everyone worse off.

The evidence supporting this claim, however, is uncertain. The fear that accepting subsistence migrants to cross borders freely would trigger a worse state of affairs than what we have at present ignores, in fact, that most people prefer to stay where they are rather than resettle. Moreover, even if accepting subsistence migrants had the side-effect of increasing migration in general, it would still be an open question whether this should be seen as a worsening rather than an improvement. The tacit assumption of this objection, to wit, that migrants are a burden rather than a benefit for the receiving countries, needs to be supported by much more conclusive empirical data for it to gain traction.⁴¹

40 “*Southwark London Borough Council V Williams: CA 1971*,” Swarb.co.uk, at: <http://swarb.co.uk/southwark-london-borough-council-v-williams-ca-1971/> (18.10.2019).

41 Two reports suggesting that migrants are a positive contribution to the economy of the receiving country are: Amy Maxmen, “Migrants and Refugees are Good for Economies,” *Nature*, 21 June 2018, at: <https://www.nature.com/articles/d41586-018-05507-0> (18.10.2019), which claims that refugees and migrants searching for safe havens and opportunities benefit their host nations’ economies within five years of arrival; and Ian Goldin, “Immigration is Vital to Boost Economic Growth,” *Financial Times*, 9 September 2018, at: <https://www.ft.com/content/f1ca7b14-b1d6-11e8-87e0-d84e0d934341> (18.10.2019), which states that in the United Kingdom, immigrants are twice as likely as British-born individuals to start their own business, and that in the United States of America, migrants found about 30 per cent of all businesses, even though they are just 14 per cent of the population. A third finding says that in high-income OECD countries, migration usually has a positive, but limited effect, while in developing countries it is unlikely to have any effect on factors linked to economic growth. See OECD, “Immigrants’ Contributions to

5 Conclusion

I have suggested that understanding the right of necessity as a corollary of the basic right to subsistence should remind theorists (and, hopefully and more importantly, policy-makers and citizens in general) that the holders of basic rights are not passive recipients of whatever others choose to do on their behalf.⁴² Contrary to their portrayal as people patiently expecting to be aided by someone, individuals who are in need may do many things in order to get out of their deprived situations – things that might lead to disorder and disruption while an institutional mechanism for avoiding these deprivations at the global level does not exist. So far, on the contrary, it seems that the implication of the universal acknowledgement of the basic right to subsistence has not been followed through, or has been conveniently ignored.

Recognizing that individual migrants whose subsistence rights are unmet have a moral right to cross borders should lead to rethinking the different categories of correlated duties that states have toward these migrants. First and foremost, there is an immediate duty to let in without interference those in need. Second, there is a mediate duty to coordinate action among states and create the requisite institutional channels and responses so that the whole process becomes more equitable both for migrants and for states. This might be done, for example, through compensatory arrangements toward receiving states, or through the relocation of migrants among them if needed. Third and most importantly, there is a final duty not to create conditions under which people may exercise their right of necessity to cross borders while at the same time being incapacitated from so doing – because they are denied entry, or because they cannot even make it to a safe haven in the first place. Positively stated, this final duty is the duty of states to guarantee at least basic material resources to all those who are subject to their authority, so that the right of necessity to cross borders for subsistence reasons eventually disappears. In a world where millions will be forced to relocate due to sea-level rise, flooding, and other extreme climate events, thinking through these duties is not just of theoretical interest, but of urgent practical importance.⁴³

Developing Countries' Economies: Overview and Policy Recommendations," 2018, at: <https://www.oecd-ilibrary.org/docserver/9789264288737-4-en.pdf?expires=1565537810&id=id&accname=guest&checksum=4FFC21932848925A9DD7B25645D369C5> (18.10.2019).

42 For one such characterization, see Onora O'Neill, "Rights, Obligations and Needs," in *Necessary Goods*, ed. Gillian Brock (Boston: 1998), 95–112.

43 Baher Kamal, "Climate Migrants Might Reach One Billion by 2050", *ReliefWeb*, 21 August 2017, at: <https://reliefweb.int/report/world/climate-migrants-might-reach-one-billion-2050> (18.10.2019).

Bibliography

Edited Texts and Translations

Grotius, Hugo, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: [1625] 2005).
 Pufendorf, Samuel, *Of the Law of Nature and Nation*, trans. Basil Kennet, 4th ed.
 (London: [1672] 1729).

Modern Sources

- Achilli, Luigi, "Why Are We Not Reforming the Dublin Regulation yet?" *Euractiv*, 25 October 2018, at: <https://www.euractiv.com/section/justice-home-affairs/opinion/why-are-we-not-reforming-the-dublin-regulation-yet/> (18.10.2019).
- Ansamed*, "European Parliament gives first OK to Dublin Reg Reforms," 19 October 2017, at: http://www.ansamed.info/ansamed/en/news/sections/politics/2017/10/19/european-parliament-gives-first-ok-to-dublin-reg-reforms_aeb09bfi-b6cb-4442-a523-796abf2693a2.html (18.10.2019).
- BBC News, "Italian Court Rules Food Theft 'Not a Crime' if Hungry," 3 May 2016, at: <http://www.bbc.com/news/world-europe-36190557> (18.10.2019).
- Betts, Alexander, "Survival Migration: A New Protection Framework," *Global Governance* 16 (2010): 361–82.
- Betts, Alexander, *Survival Migration, Failed Governance and the Crisis of Displacement* (New York: 2013).
- Blake, Michael, "Immigration, Jurisdiction, and Exclusion," *Philosophy & Public Affairs* 41:2 (2013): 103–130.
- Blunt, David Gwilym, "Illegal Immigration as Resistance to Global Poverty," *Raisons Politiques* 69:1 (2018): 83–98.
- Brett, Annabel S., *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton: 2011).
- Carens, Joseph, *The Ethics of Immigration* (New York: 2013).
- Deveaux, Monique, "Poor-Led Social Movements and Global Justice," *Political Theory* 46:5 (2018): 698–725.
- Dressler, Joshua, "Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits" *California Law Review* 62 (1988): 1331–1386.
- Dummett, Michael, *On Immigration and Refugees* (London: 2001).
- Feinberg, Joel, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy & Public Affairs* 7:2 (1978): 93–123.
- Galvan, Astrid, "By the Numbers: Migration to the US-Mexico Border," *AP News*, 25 July 2019, at: <https://www.apnews.com/cbba8ede5436460ab4f792f981ee32e2> (18.10.2019).
- Goldin, Ian, "Immigration is Vital to Boost Economic Growth," *Financial Times* 9, September 2018, at: <https://www.ft.com/content/fica7b14-b1d6-11e8-87e0-d84e0d934341> (18.10.2019).

- Heilinger, Jan-Christoph, "The Moral Demandingness of Socioeconomic Human Rights," in *The Philosophy of Human Rights: Contemporary Controversies*, eds. Jan-Christoph Heilinger and Gerhard Ernst (Indianapolis: 2012), 185–208.
- Hohfeld, Wesley Newcomb, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *The Yale Law Journal* 23:1 (2013): 16–59.
- International Catholic Migration Commission Europe, "Welcome to Europe! A Comprehensive Guide to Resettlement." 2013, at: http://www.resettlement.eu/sites/icmc.ttp.eu/files/ICMC%20Europe-Welcome%20to%20Europe_0.pdf (18.10.2019).
- Kamal, Baher, "Climate Migrants Might Reach One Billion by 2050," *ReliefWeb*, 21 August 21, at: <https://reliefweb.int/report/world/climate-migrants-might-reach-one-billion-2050> (18.10.2019).
- Mancilla, Alejandra, *The Right of Necessity: Moral Cosmopolitanism and Global Poverty* (London: 2016).
- Maxmen, Amy, "Migrants and Refugees are Good for Economies," *Nature*, 21 June 2018, at: <https://www.nature.com/articles/d41586-018-05507-0> (18.10.2019).
- Meloni, Lorenzo and Amanda Sakuma, "Damned for Trying," *MSNBC*, at: <http://www.msnbc.com/specials/migrant-crisis/libya> (18.10.2019).
- Milanovic, Branko, *The Haves and the Have Nots* (New York: 2011).
- Miller, David, *Strangers in Our Midst* (Cambridge, M.A.: 2016).
- Moore, Margaret, *A Political Theory of Territory* (New York: 2015).
- OECD, "Immigrants' Contributions to Developing Countries' Economies: Overview and Policy Recommendations," 2018, at: <https://www.oecd-ilibrary.org/docserver/9789264288737-4-en.pdf?expires=1565537810&id=id&accname=guest&checksum=4FFC21932848925A9DD7B25645D369C5> (18.10.2019).
- O'Neill, Onora, "Rights, Obligations and Needs," in *Necessary Goods*, ed. Gillian Brock (Boston: 1998), 95–112.
- Pogge, Thomas, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd ed. (Malden, M.A.: [2002] 2008).
- Sager, Alex, "Reflections on Resisting Migration Injustice," American Political Science Association Annual Meeting, Washington, D.C.: 2019.
- Shue, Henry, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed. (Princeton, NJ: [1980] 1996).
- Singer, Peter, *The Life You Can Save* (Melbourne: 2013).
- Swarb.co.uk, "Southwark London Borough Council V Williams: CA 1917," at: <http://swarb.co.uk/southwark-london-borough-council-v-williams-ca-1971/> (18.10.2019).
- Syal, Rajeev, "British Towns Being 'Swamped' by Immigrants, Says Michael Fallon," *The Guardian*, 26 October 2014, at: <https://www.theguardian.com/uk-news/2014/oct/26/british-towns-swamped-immigrants-michael-fallon-eu> (18.10.2019).
- Syrian Refugees, "The Syrian Refugee Crisis and its Repercussions for the EU," at: <http://syrianrefugees.eu/> (18.10.2019).

- Thomas, Jason, "Is There a Front Door, and are 'Boat People' Jumping the Queue?" *SBS*, 23 July 2015, at: <https://www.sbs.com.au/news/explainer/there-front-door-and-are-boat-people-jumping-queue> (18.10.2019).
- Tierney, Brian, "Origins of Natural Rights Language: Text and Contexts (1150–1250)" *History of Political Thought* 10 (1989): 615–646.
- UN General Assembly, Convention Relating to the Status of Refugees, July 28, 1951.
- UN General Assembly, Resolution 217 A. *The Universal Declaration of Human Rights*. A/RES/217(3)A, December 10, 1948.
- Van der Vossen, Bas and Jason Brennan, *Defense of Openness: Why Global Freedom Is the Humane Solution to Global Poverty* (New York: 2018).
- Waldron, Jeremy, "Why Indigence Is Not a Justification," in *From Social Justice to Criminal Justice*, ed. William C. Heffernan and John Kleinig (Oxford: 2000), 98–113.
- Wellman, Christopher Heath, "Immigration and Freedom of Association," *Ethics* 119:1 (2008): 109–41.
- Young, Iris Marion, "Responsibility and Global Justice: A Social Connection Model," *Social Philosophy and Policy* 23:1 (2006): 102–130.
- Zavis, Alexandra and Ann M. Simmons, "Europe's Migrant Crisis Threatens to Overwhelm Italy, Even as Flows to Greece Dry Up," *Los Angeles Times*, 4 July 2017, at: <http://www.latimes.com/world/europe/la-fg-italy-migrants-20170704-htmistory.html> (18.10.2019).