

“A Shadowy Sort of Right”: The *Ius Necessitatis* and Catholic Moral Theology

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For Brian and Elaine

IN 2016, A RULING OF ITALY’S highest court made international news by throwing out the conviction of Roman Ostriakov, a homeless man from Ukraine.¹ Ostriakov’s crime was attempting to take approximately five dollars’ worth of cheese and sausage from a store in Genoa without paying for it. The court provided the following rationale for its ruling: “The condition of the defendant and the circumstances in which the merchandise theft took place prove that he took possession of that small amount of food in the face of the immediate and essential need for nourishment, acting therefore in a state of need.” Therefore the theft, the court concludes, “does not constitute a crime.”² According to Massimo Gramellini’s explanation of the ruling in an op-ed in *La Stampa*, the court effectively ruled that “the right to survival prevails over that of property”—a view which,

¹ “Italian Court Rules Food Theft ‘Not a Crime’ If Hungry,” *BBC*, May 3, 2016, www.bbc.com/news/world-europe-36190557; Nick Squires, “Stealing Food If You Are Poor and Hungry Is Not a Crime, Italy’s Highest Court Rules,” *The Telegraph*, May 3, 2016, www.telegraph.co.uk/news/2016/05/03/stealing-food-if-you-are-poor-and-hungry-is-not-a-crime-italys-h/; Cristiana Moisescu, “Stealing Food out of Necessity ‘Not a Crime,’ Italian Court Rules,” *CNN*, May 3, 2016, www.cnn.com/2016/05/03/europe/food-theft-italy. Thanks to William Whelan for first alerting me to the Ostriakov case.

² Quoted in Gaia Pianigiani and Sewell Chan, “Can the Homeless and Hungry Steal Food? Maybe, an Italian Court Says,” *New York Times*, 3 May 2016, www.nytimes.com/2016/05/04/world/europe/food-theft-in-italy-may-not-be-a-crime-court-rules.html. See Benjamin Soloway, “Stealing Food if You’re in Need is Not a Crime, Italian Court Finds,” *The Chicago Tribune*, 3 May 2016, www.chicagotribune.com/news/ct-stealing-food-not-a-crime-20160503-story.html; Mary Elizabeth Williams, “Hunger Shouldn’t Be a Crime: This is What a Humane Response to Food Insecurity Looks Like,” *Salon*, May 4, 2016, www.salon.com/2016/05/04/hunger_shouldnt_be_a_crime_this_is_what_a_humane_response_to_food_insecurity_looks_like/.

he added, in the US would be akin to “blasphemy.”³

The Ostriakov case is not the only one in which need has been invoked in such a manner. Ostriakov took cheese and sausage. But in recent judgments of the Constitutional Court of Colombia, the defendants’ need of land has led to judicial protection of it as a source of livelihood for the community of Las Pavas, whose members occupied unused land beginning in 1997 in order to cultivate it to feed themselves. As a result of their occupation, the community has been repeatedly intimidated and harassed, including by paramilitary groups, and their crops have been destroyed. Two private palm-oil companies claiming ownership of the land sought to evict them forcibly in 2009, relying on the National Police and the mobile riot police squad to do so. Two years later, the Constitutional Court found these actions illegal because they failed to take into account the community’s claim on the land—a claim based upon need. The court then ordered the Colombian government to reopen the process begun in 2006 to have that claim acknowledged legally, declaring that the community cannot be evicted until this process has been finalized. Upon returning, one of the community leaders, Misael Payares, said: “We are very happy, because without land we are nothing. It’s not just about working on the land; we want to restore our territory, environment, and culture. This is what we are fighting for.”⁴

Drawing on cases like those of Ostriakov and Las Pavas, legal scholars Eduardo Peñalver and Sonia Katyal have recently argued not only for recognizing such acquisitive actions as just, but also for broadening the legal doctrine of necessity—a doctrine which permits nonowners to trespass upon and in some cases appropriate the property of others in order to avoid grave harm—beyond the bare minimum to stave off starvation or exposure. In its traditional formulation, this doctrine justifies situations in which someone takes what she needs from another’s surplus. In our own day, many of the activities engaged in by the homeless—activities like public camping, sleeping on a blanket or in a vehicle, loitering, and begging, all of which are increasingly criminalized by local governments throughout the US—would also cohere with this broader understanding of necessity.⁵

³ Massimo Gramellini, “Il diritto di avere fame,” *La Stampa*, 3 mayo 2016, www.lastampa.it/opinioni/buongiorno/2016/05/03/news/il-diritto-di-avere-fame-1.34996997/.

⁴ www.abcolombia.org.uk/constitutional-court-opens-way-restitution-rights-las-pavas-community/. See also Hilal Elver, Report of the Special Rapporteur on the Right to Food, *Access to Justice and the Right to Food: The Way Forward*, submitted to the Twenty-Eighth Session of the Human Rights Council, January 12, 2014, no. 19.

⁵ Eduardo Peñalver and Sonia Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Property* (New Haven: Yale University Press, 2010), 135–138, 152–156. See also Matt Ford, “Homelessness is Not a Crime,” *The New Republic*, May 10, 2019, newrepublic.com/article/153875/homelessness-not-crime.

However, as the case of the homeless makes especially apparent, the doctrine of necessity recognized in US law is so constrained by qualifications and exceptions that it has become functionally inoperative in cases of dire economic necessity. Consequently, while US courts do recognize the necessity defense, they tend to interpret it narrowly, restricting its application to exceptional circumstances such as natural disasters, with several courts categorically rejecting its applicability to cases like those of Ostriakov or Las Pavas, in which defendants act out of economic need. But why, Peñalver and Katyal ask, should cases of economic disaster be treated as different from cases of natural disaster?⁶

What interests me about the Ostriakov and Las Pavas cases is not just the contrast with the US criminal justice system's response to similar cases, but the rationale the Italian and Colombian courts invoked in their rulings—the application of the so-called *ius necessitatis* or law of necessity defense to cases of extreme need. In what follows, my purpose is to show how this rationale draws upon a much older—and admittedly neglected—tradition of moral-theological reflection about need, law, property, and theft, one that is preserved in Catholic social teaching. While it is commonplace, especially in our day, to encounter arguments that Christianity underwrites private property rights and “free” markets,⁷ this older tradition understands such defenses as based upon a fundamental misunderstanding of what property is and what it is for, which is to meet the needs of all people, because creation is a common gift from God. On this basis, claims of need take precedence over claims of private property. Rather than threaten property, cases like the above safeguard it by reminding Christians that there is nothing we possess that we did not receive (1 Corinthians 4:7).

The Ostriakov and Las Pavas cases have been hailed as a victory for justice and lauded as a humane response to hunger and need. They have also been derided as a license to thief, and a threat to property and law. Missing in much of the discussion of these cases and others like these is any recognition of the rulings' relationship to this older tradition of reflection on the *ius necessitatis* within Catholic moral theology and the theological moorings of that law.⁸ This essay is therefore an attempt to provide for this lack. Its aim is to resuscitate the *ius necessitatis* by rearticulating its theological rationale, as well

⁶ Peñalver and Katyal, *Property Outlaws*.

⁷ See, for instance, www.acton.org, www.libertarianism.org, and www.tifwe.org.

⁸ For an exception in this regard, see Frank Weathers, “Italian Supreme Court Knows When Stealing Food Is Lawful,” *Patheos*, May 3, 2016, www.patheos.com/blogs/yimcatholic/2016/05/breaking-italian-supreme-court-knows-when-stealing-food-is-lawful.html.

as to show how it is preserved in Catholic social teaching, especially in relation to what *Gaudium et Spes* calls the common or universal destination of created goods.

What follows consists of three main parts. The first provides a sketch of this tradition of moral-theological reflection as it emerged within early Church and medieval thought, while the second examines its preservation in Catholic social teaching. The third and final part suggests what taking this moral-theological tradition seriously would involve in our own day, when the claim of need not only continues to be minimized and dismissed but is also increasingly criminalized.

IUS NECESSITATIS

The charge of thievery in the cases mentioned above seems straightforward, even commonsensical. A shop owner has items that Ostriakov needs but is unable to purchase, so Ostriakov attempts to take them in secret. The people of Las Pavas begin to settle upon and then cultivate land for which they have no legal title. Many countries, including the US, view these and similar actions as unjustified and respond by punishing what they deem to be transgressions.

As mentioned above, the Italian and Colombian courts did not hold such views. Instead, they invoked an older strand of moral-theological reflection according to which the charge of thievery is more complicated—for at least two reasons. The first is because this older strand privileges the claim of need above all other claims upon created goods. The use of created goods to meet the needs of all takes priority over the private appropriation of those same goods. In Gramellini's words, the right to survival prevails over that of property. What is more, the whole rationale of private appropriation, at least as this tradition understands it, is meant to ensure that the needs of all are met, including the needs of those who privately appropriate goods. Being part of the "all" legitimizes possession. At the same time, as we shall see, that possession is fundamentally shaped by an orientation to the "all." In this view, to return to Gramellini's formulation, the right to survival and the right to property are not mutually exclusive rights. The very articulation of the right to property—at its most fundamental level—aims at ensuring the survival of the many and must therefore bend to that reality.

The second reason the charge of thievery is more complicated relates to the fact that this older strand of moral-theological reflection recognizes two distinct forms of thievery: the unjust taking of created goods (the kind of taking normally criminalized), as well as the unjust retention of created goods. In other words, it is not just those who take sausage and cheese from stores or those who occupy and cultivate land to which they have no legal title who are potentially guilty of theft. For this tradition, those like the owners of shops or landholders who possess the world's goods but fail to share them with the needy are

also potentially guilty of theft. Basil the Great memorably articulates this view:

Who are the robbers? Those who take for themselves what rightfully belongs to everyone. ... Is not the person who strips another of clothing called a thief? And those who do not clothe the naked when they have the power to do so, should they not be called the same? The bread you are holding back is for the hungry, the clothes you keep put away are for the naked, the shoes that are rotting away with disuse are for those who have none, the silver you keep buried in the earth is for the needy.⁹

Informing Basil's understanding of robbery is the theological claim that creation is a gift given by God "for the benefit of all in common." The problem with the rich fool in the Lukan parable (which Basil is commenting in his homily)—whose land produces so abundantly that he decides to tear down his barns and build bigger ones (see Luke 12:16–21)—is not that he possessed land, nor that his land produced a banner harvest. Rather, it is that he failed to acknowledge the commonality of the gift he had been given, a failure that can best be seen in the exclusivity of his possession. "From God comes everything beneficial: fertile soil, temperate weather, plenty of seeds, cooperation of the animals, and whatever else is required for successful cultivation," Basil explains. "But human beings [like the rich fool] respond with bitter disposition, misanthropy, and an unwillingness to share."¹⁰ John Chrysostom therefore gets to the heart of the matter in one of his homilies on Luke 16 (on Dives and Lazarus) when he says, "This is also robbery: not to share one's possessions."¹¹

Courts of law might never be able to adjudicate the unjust retention of which Basil and Chrysostom speak. The rich fools of the world might continue to regard their land and its harvests for the benefit of themselves alone, and the Lazaruses might continue to sit and die outside the gates of the rich. But according to this tradition of moral-theological reflection, there is a higher court of law to which human beings are ultimately accountable. "We must obey God rather than any human authority" (Acts 5:29), and obedience to God entails acknowledgement that creation is a common gift.

We can begin to get a handle on this tradition of moral-theological reflection by turning to the emergence of the *ius necessitatis* in the

⁹ Basil the Great, "I Will Tear Down My Barns," in *On Social Justice*, trans. C. Paul Schroeder (Crestwood, NY: St Vladimir's Seminary Press, 2009), 69–70.

¹⁰ Basil the Great, "I Will Tear Down My Barns," 69, 60.

¹¹ John Chrysostom, "Second Sermon on Lazarus and the Rich Man," in *On Wealth and Poverty*, trans. Catherine P. Roth (Crestwood, NY: St Vladimir's Seminary Press, 1981), 49.

discussions of medieval canonists and theologians around the twelfth century. For them, the *ius necessitatis* is that law according to which those in extreme need can legitimately take the surplus goods of others to sustain themselves or their dependents—the kind of desperate act famously depicted in Victor Hugo’s *Les Misérables*, in which an unemployed Jean Valjean takes a loaf of bread to feed himself, his sister, and her seven children.¹² While *ius necessitatis* explicitly emerges for the first time during these discussions, it is important to observe that this law—or something like it—is implied in the views of Basil and Chrysostom I have just sketched. For instance, Basil is concerned with those who unjustly retain more food, clothing, shoes, and money than they need, labeling them thieves. If, as he says, the goods retained *belong* to those in need, how should we regard the taking of what belongs to them? That is the question of the *ius necessitatis*, raised by the grammar of this moral-theological tradition.

Explicit articulation of the *ius necessitatis* emerged in discussions by medieval canonists and theologians as they considered the issue of property and its relation to natural law. Many of the early Christian sources Gratian gathers for inclusion within the *Decretum*—the great collection of canon law—seem to critique the abuses of the wealthy and the exploitation of the poor, along with the very idea of private property. Consider the following statements, which Gratian attributes respectively to Clement of Rome and Ambrose of Milan, that by natural law: “The use of all things ought to be common to all” and “no one may call his own what is common.”¹³

Statements like these seem to provide *prima facie* evidence of the illegitimacy of private property in light of the gift of creation, which God has given for common use. Given the clear imperative of common use, how can anyone claim created goods as their own? At the same time, how do we understand the fact that scripture seems to condone some form of private possession? To return to the examples above, the problem with the rich fool and Dives seems not to be *that* they have possessions. The men are not condemned for possessing created goods but for refusing to share them. Along these same lines, in Gratian’s day, both canon law and civil law recognized the legitimacy of private property.¹⁴ These were questions that required resolution.

Setting the problem of the legitimacy of private property aside for a moment, another and closely related difficulty has to do with the

¹² Nina Martyris, “Let Them Eat Bread: The Theft that Helped Inspire *Les Misérables*,” *NPR*, March 20, 2017, www.npr.org/sections/thesalt/2017/03/20/520459332/let-them-eat-bread-the-theft-that-helped-inspire-les-miserables.

¹³ Quoted in Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, MI: Eerdmans, 1997), 71–72.

¹⁴ Tierney, *The Idea of Natural Rights*, 60–61.

multiple senses of the term “natural law” as employed by Gratian throughout the *Decretum*. For instance, does natural law refer to an original condition that was once valid but subsequently passed away and now no longer obtains? Or is it an intrinsic and enduring feature of God’s gift of creation for humankind’s use? For this reason, it soon became commonplace for Decretists and others to distinguish between multiple senses of natural law.¹⁵

Various solutions were proposed to the problem of property. For our purposes, the twelfth century canonist Huguccio provided an especially important solution that helped resolve the apparent tension between private property and the claim that creation is a gift God gives to humankind in common. As Brian Tierney observes, prior to Huguccio, the usual response to the problem of property was that common property was an original condition no longer valid after the introduction of human and divine positive law.¹⁶ Despite this, the claims of Basil and Chrysostom, as well as those Gratian attributes in the *Decretum* to Clement of Alexandria and Ambrose of Milan, still persisted and provoked. These voices suggest that common property was not obsolete but an enduring feature of the gift of creation. Huguccio’s response to this conundrum is to argue that: “[b]y natural *ius*, that is in accordance with the judgment of reason, all things are common, that is, they are to be shared with the poor in time of need. For reason naturally leads us to suppose that we should keep only what is necessary and distribute what is left to the needy.”¹⁷ The phrase that Huguccio uses in this passage—common, that is, to be shared (*communis ... id est communicanda*)—will be reiterated repeatedly in later discussions.

Notice how Huguccio argues for the commonality of property by appeal to natural law, but also how he understands this commonality as a permanent feature binding upon all property. As Tierney explains Huguccio’s view, “private property was itself a social institution involving obligations to others. *Property could and should be private and common at the same time.*”¹⁸ It is private in that it belongs to a person, to be possessed and administered by her. Because she is included within the community of common use, she may legitimately take what she needs for herself and her dependents. But property is common because social claims always inhere to it. All that a person possesses is given to her and to humankind as a whole for common use. God gives property not only to meet her own needs but those of

¹⁵ Tierney, *The Idea of Natural Rights*, 60; Brian Tierney, *Medieval Poor Law* (Berkeley: University of California Press, 1959), 30–31.

¹⁶ Tierney, *The Idea of Natural Rights*, 71.

¹⁷ Quoted in Tierney, *The Idea of Natural Rights*, 72; see also 139.

¹⁸ Tierney, *The Idea of Natural Rights*, 72, emphasis mine.

everyone—and above all, those who presently lack the world’s goods. On this construal, all property—even private property—involves essential social obligations. To anticipate the much later language of Pope Pius XI in *Quadragesimo Anno* (1931), all ownership, as well as all economic activity based upon it, has a “social character” (nos. 49, 101). In the language of Pope John Paul II’s address during the Third General Conference of the Latin American Bishops at Puebla, Mexico (1979): “All private property involves a *social mortgage*” (*sobre toda propiedad privada grava una hipoteca social*).¹⁹ In this way, for Huguccio and those who followed him in this line of thought, the claim that all things are common (because creation is a gift meant to benefit all) continued to impinge and place demands upon even personal possession of property.

Notice also that Huguccio’s solution relies upon a distinction between ownership and use: *that* a person possesses property must be distinguished from *how* a person possesses it. Created goods belong to a person in the sense that she is in possession of them—she personally holds and administers them. They are, after all, in her hands. But the created goods are not hers in the sense that they are hers alone to use in whatever way she wants; they are meant for common use, and she must help facilitate it. She must open her hands and share what she has, because what she has in her hands is not for her alone. She must, therefore, always look for ways to include others in the use of what she has been given. Huguccio’s solution thus coheres with while at the same time develops the view we saw in Basil, for whom those who have the world’s goods but fail to share them are like thieves. The basic theological grammar Huguccio assumes is that once a person’s needs and the needs of those who depend upon her have been met, her surfeit belongs to others, especially the poor. As Pope Leo XIII later puts the point in his encyclical *Rerum Novarum* (1891): “It is one thing to have a right to the possession of money [and property] and another to have a right to use that money as one wills. ... But, when what necessity demands has been supplied, ... it becomes a duty to give to the indigent out of what remains over” (no. 22).²⁰

¹⁹ Pope John Paul II, *Address at the Opening of the Third General Conference of the Latin-American Bishops*, Puebla, México, January 28, 1979, www.vatican.va/content/john-paul-ii/en/speeches/1979/january/documents/hf_jp-ii_spe_19790128_messico-puebla-episc-latam.html, III.4, emphasis in original.

²⁰ In the same passage, Leo does say that “what necessity demands” includes “one’s standing,” which should be “fairly taken thought for.” There are disagreements about this within the moral-theological tradition we are considering. As Catholic social teaching develops, maintenance of social standing drops out of consideration as a legitimate criterion and “the measure of the needs of others,” as John XXIII puts it, becomes primary. For more on this topic, see Matthew Philipp Whelan, *Blood in the*

By articulating the relationship between private property and the common gift of creation in this way, Huguccio and those like Thomas Aquinas who followed him not only resolved some of the difficulties surrounding how to understand the relationship between private property and natural law's claim that the use of all things ought to be common to all. They also effectively decoupled the claim of commonality from particular configurations of economic life, for instance, from the communal ownership practiced by those Christians described in the book of Acts and the monastic communities modeled upon them. On Huguccio's terms, even possessors of private property can participate in the common destination of created goods, a view that coheres with scripture's recognition of the legitimacy of some form of private possession. Once again, the problem with the rich fool and Dives is not that they have possessions, but the use they make of them. More precisely, they are condemned for their failure to acknowledge that what they possess also belongs to others, especially those who lack what they need. To be sure, communal ownership remains an important, even preeminent, witness to God's purpose for creation, which is to meet the needs of all. But communal ownership is not the only witness. Holders of private property can also testify to creation's common character. Shop owners and landholders can recognize the injustices of a given property regime and the exclusion of many from what is theirs, responding with justice and mercy to those like Ostriakov and the people of Las Pavas, and working to ensure that they, too, have access to what belongs to them.²¹

Until now, we have been considering the grammar of creation as a common gift from the perspective of those in possession of the world's goods, because this is the context within which discussion of the *ius necessitatis* emerges. We have been examining how, for this moral-theological tradition, it is incumbent upon possessors to learn to see their possessions for what they are, namely, given for common use. Above all, those who have the world's goods must learn to acknowledge the claim of the needy upon those goods as a matter of justice. The obligation to share reflects, strictly speaking, what is *owed* to others, what *belongs* to them. It is not primarily an act of supererogation for wealthy shop-owners to give food to the hungry man or a wealthy landholders to relinquish some of their for land the

Fields: Óscar Romero, Catholic Social Teaching, and Land Reform (Washington, DC: Catholic University of America Press, 2020), 85–139.

²¹ Along these lines, Peñalaver and Katyal write that property lawbreaking can have a “communicative power,” by which they mean that it can help us “to reimagine our relationships with the material world and with each other,” while also providing “an informal forum for airing conflicts over resources between owners and nonowners, which the law can eventually shift to accommodate” (*Property Outlaws*, 26).

landless; it is an act of justice. In Pope Pius XII's words in *Sertum Laetitiae* (1939), charity certainly helps, but it is justice that must guide.²²

But what about the other perspective? Are those without the world's goods to wait patiently to receive what is theirs in justice? What happens when what is their due does not arrive? Might they justifiably take what belongs to them? If so, in the name and under the protection of what law? We saw above that these questions, while not raised explicitly by Basil or Chrysostom, are implied by the grammar of the moral-theological tradition out of which they speak. Basil, for instance, states that the goods retained by the wealthy *belong* to those in need. In what sense—precisely—do they belong to the needy? Tierney reports that twelfth-century Decretists distinguished between duties and rights. While it was certainly recognized that the rich had a duty to those in need, this did not necessarily imply that those in need had a right to the goods in question.²³

Leo XIII suggests something similar in the passage quoted above from *Rerum Novarum*, in which he distinguishes between possession and use, and says that it is a person's duty to give her surfeit to those in need. Leo goes on to identify the duty in question not with justice ("save in extreme cases") but with charity, which means, he explains, it is "a duty not enforced by human law." In Leo's view, then, the identification of the duty with charity does not lessen its force, for "the laws and judgments of men [sic]," he insists, "must yield place to the laws and judgments of Christ the true God," who exhorts his followers to perform such duties (no. 22). Rather, this identification simply means that the duty in question falls within the purview of a person's conscience and the moral suasion of the Church, and is not a matter of legal enforcement by civil authorities. A person should give what she has in excess, but she cannot be compelled to do so.

One important way these questions were framed in the late twelfth century was in terms of whether those in extreme need who took another's goods were guilty of the sin of theft. As Tierney observes, debates about these matters typically turned to the mind of the agent. By definition, theft requires taking something from an owner who is unwilling to relinquish it. Thus, Huguccio reasons, the poor person is not guilty of theft because "he believes or should believe" in the owner's willingness to relinquish possessions in the face of need. The needy person, then, has a right to such goods, but in Tierney's words, it is still "a shadowy sort of right, based only on an unprovable hypothesis about the state of the mind of the needy person."²⁴

Although Huguccio did not argue for a natural right of the needy

²² Pope Pius XII, *Sertum Laetitiae*, no. 34.

²³ Tierney, *The Idea of Natural Rights*, 70–71.

²⁴ Quoted in Tierney, *The Idea of Natural Rights*, 71.

to the surfeit of the rich, his understanding of the relationship between private property and the common gift of creation certainly pressed that issue. Writing in the late-twelfth century, Ricardus Anglicus advances the discussion considerably when he interrogates the category of thievery in light of cases of extreme need. “Since by natural *ius* all things are common, that is to be shared in times of need,” he explains, the person in extreme need who takes what she needs “is not properly said to thief.”²⁵ To return to the cases of Ostriakov and Las Pavas, Ricardus Anglicus’s terms permit us to pose the question: are they even thieves? In the media coverage surrounding Ostriakov, all sides agree that he is. The disagreement concerns whether his thievery is justified. “Can the homeless and hungry steal food?” one prominent headline asks. “Maybe, an Italian Court Says.”²⁶ But notice that Ricardus Anglicus’s own position is significantly different. For him, those in need are not properly said to steal because, strictly speaking, they do not take what belongs to *others*; they take what belongs to *them*—what is meant to be shared, especially in times of need.

Above we saw that while the rich had a duty to those in need, questions persisted regarding whether this entailed the needy had a right to the goods in question. Ricardus Anglicus’s position suggests that the poor do indeed have a natural right to the goods in question. And circa 1200 CE, this is effectively what Alanus argues: those in need do not steal because they take what is their own *iure naturali*—by “natural right” or “natural law.” Others began to adopt this view, increasingly asserting that those in need had an assertible right. Laurentius, for instance, writes that when a person took what he needed, it was “as if he used his own right and his own thing.” Soon after, the *ius necessitatis* entered the mainstream of medieval jurisprudence.²⁷ As Thomas Aquinas will later argue in the *Summa theologiae*: those in need take what “necessity has made common,” what has become their own by reason of their need.²⁸ If the need is manifest and urgent, it is lawful for people to take another’s property, either in the open or in secret. Also, like Ricardus Anglicus, Thomas adds that it is inaccurate to describe such actions as theft or robbery.²⁹ As Marcus Lefebvre explains, what Thomas is suggesting is that “a particular human system of distribution [of the world’s goods] may be ... resolved back into the primitive state of undifferentiated community in the case of blatant and extreme necessity.”³⁰

²⁵ Quoted in Tierney, *The Idea of Natural Rights*, 73.

²⁶ Pianigiani and Chan, “Can the Homeless and Hungry Steal Food?”

²⁷ Quoted in Tierney, *The Idea of Natural Rights*, 73.

²⁸ ST II-II q. 66, a. 7, sed contra; ad. 2.

²⁹ ST II-II q. 66, a. 7, resp.

³⁰ ST II-II q. 66, a. 7, note a.

It is important to stress that for this moral-theological tradition, the commonality in question does not pertain to an original condition that has now been superseded and no longer obtains, nor does commonality mean that all property law is suspended and anarchy reigns. The fundamental point is that this tradition is making a claim about what property is, what possessing it entails, and what law and policy regarding property is meant to do, which is to facilitate common use.³¹ In the case of the *ius necessitatis*—perhaps counter-intuitively—it is precisely the *circumvention* of the property arrangements secured by positive or customary law that helps to bring into clear relief the commonality of the gift of creation.

Yet, as Tierney points out, while this moral-theological tradition holds that those in need have a right to the goods of others, in another sense this right remains a shadowy one. As Tierney explains, “The situation is not wholly satisfactory from the point of view of the person in want; the secular judge would probably hang him,” because “none of the established forms of legal action covered this kind of case.”³² Huguccio’s perspective on this question is similar to Leo XIII’s: “Many things are owed that cannot be sought by judicial procedure,” Leo writes, “such as dignities and dispensations and alms ... but they can be sought as something due mercifully for the sake of God and piety.”³³ In this connection, it is worth noting that alongside the formal judicial procedures, through which, as Huguccio says here, alms cannot be sought, there existed another mechanism known as “evangelical denunciation,” in which bishops at that time could hear such cases and provide remedies. Beginning around 1200, canonists argued that those in need could avail themselves of such mechanisms, and that bishops could even compel—by excommunication, if necessary—the wealthy who refused to relinquish their surfeit.³⁴ Despite these mechanisms, as we will see in the following section, while the *ius necessitatis* continues to be preserved by the Catholic social teaching tradition, the right in question remains shadowy because of its complex and oftentimes fraught relationship to positive law.

CATHOLIC SOCIAL TEACHING

My treatment of the law of necessity has been admittedly cursory, leaving aside many complexities and questions. Moreover, I cannot

³¹ For insightful discussions of Franciscan approaches to these questions, see Giorgio Agamben, *The Highest Poverty: Monastic Rules and Form-of-Life*, trans. Adam Kotsko (Stanford: Stanford University Press, 2013); Michael F. Cusato, OFM, “Highest Poverty or Lowest Poverty?: The Paradox of the Minorite Charism,” *Franciscan Studies* 75 (2017): 275–321.

³² Tierney, *The Idea of Natural Rights*, 74.

³³ Quoted in Tierney, *The Idea of Natural Rights*, 74.

³⁴ Tierney, *The Idea of Natural Rights*, 74; Tierney, *Medieval Poor Law*, 67–89.

deal here with the additional complexities and questions related to the transmission of this teaching over the course of subsequent centuries. René Laurentin, for instance, has argued that it gradually grew obscure in modernity, because of the pressures of capitalism and forms of economic life that prioritize individual appropriation, and construe the common good as a secondary effect of that appropriation. “The doctrine on [exclusive] private property,” Laurentin writes, “moved into first place and seemed to be basic, primary, and absolute.”³⁵ These developments obscure belief that creation is a common gift and its implications for property, including the *ius necessitatis*.³⁶ Nevertheless, the moral-theological tradition we have been examining persists. There are legal scholars, such as Peñalver and Katyal, who are trying to resuscitate its legal implications.³⁷ Yet another place we see the persistence of this tradition is in Catholic social teaching.³⁸

Pope Leo XIII draws on this tradition in *Rerum Novarum*—the so-called Magna Carta of Catholic social teaching³⁹—when he states near the beginning of the encyclical that “the fact that God has given the earth for the use and enjoyment of the whole human race can in no way be a bar to the owning of private property” (no. 8). While this statement may seem counterintuitive, even contradictory, it is precisely because Leo assumes the moral-theological tradition that we have been examining as axiomatic that he sees no need for further

³⁵ René Laurentin, *Liberation, Development, and Salvation* (Maryknoll, NY: Orbis Books, 1972), 96–101. Laurentin traces this misconception of private property across the encyclical tradition until the “restoration of the obscured message” in Pius XII’s 1941 radio address. To my mind, Laurentin misunderstands how the designation “private property” in Catholic social teaching is not univocal, which is why Leo does not see the common gift of creation and private property as incompatible. Additionally, Laurentin’s concern is with the reversal in “the normal order of expository thought,” which he thinks should first insist upon the common purpose of creation and private ownership as a derivation. However, in Leo’s thought, Laurentin discerns the prioritization of private property and the treatment of the common destination “in second place, on a secondary plane,” as if it were merely “an invitation to owners to use private property well.” Thus, Laurentin writes, “the common purpose doctrine passed from the first to the second rank, and then into the background; and in that way it was devalued, minimized, and distorted.” While I disagree with this characterization of Leo’s position in *Rerum Novarum*, Laurentin’s overarching point is an important one and captures the trajectory of Catholic social teaching.

³⁶ See Laurentin, *Liberation, Development, and Salvation*, 99–100.

³⁷ Another is Jeremy Waldron, who writes: “Nobody should be permitted ever to use force to prevent another man [sic] from satisfying his very basic needs in circumstances where there seems to be no other way of satisfying them” (*Liberal Rights: Collected Papers, 1981–1991* [Cambridge: Cambridge University Press, 1993], 240–41).

³⁸ This point receives fuller treatment in Whelan, *Blood in the Fields*, 85–250.

³⁹ See Pius XI, *Quadragesimo Anno*, no. 39. Subsequent commentators will speak of *Rerum Novarum* in similar terms as the foundational document of modern Catholic social teaching.

elaboration. What becomes clearer as the encyclical proceeds is that Leo regards the property-related institutions as internal to and derivations of God's giving of the earth for common use. Leo assumes these institutions play an essential role in mediating common access to the gift, and that they must constantly be strengthened in this regard. In this way, God elicits and enables creaturely participation in God's giving of the common gift of creation. As Matthew Habiger convincingly argues, Leo understands property and its associated institutions to be a "derived principle," by which Habiger means that property derives from and is essentially subordinated to God's gift of the earth for the use and enjoyment of the whole human race.⁴⁰

In the much-discussed initial sections of the encyclical, Leo famously argues for property as a natural right, rooting property in human beings' rational nature (no. 6). On this view, access to property is constitutive of human flourishing. However, in considering this right, many commentators fail to see Leo's argument for property in relation to what he calls "the misery and wretchedness pressing so unjustly on the majority of the working class," a misery and wretchedness, it is important to add, clearly tied to the dispossession of the working class (nos. 3–4). For Leo is not just arguing against socialism in *Rerum Novarum*; he is arguing against the exclusivist account of property associated with the emerging capitalist order, which abolished property for many. Indeed, Leo frames the whole encyclical in terms of the injustices of capitalism, the condition of the dispossessed streaming into the cities, and how their lack of property makes them particularly vulnerable to exploitation. When seen from this vantage point, Leo's argument for the natural right to property is an argument for the natural right of *all* people to property, especially those deprived of access to it by the emerging capitalist order. A distributive concern underlies his articulation of the right in question, which is precisely why, as Leo goes on to argue later in the encyclical, "The law should favor ownership, and its policy should be to induce as many as possible of the people to become owners" (no. 46).

That Leo's understanding of property derives from the theological conviction that creation is a common gift emerges with even greater clarity later in the encyclical, in the passage already mentioned, where Leo distinguishes between possession and use.⁴¹ In relation to

⁴⁰ Admittedly, Habiger thinks Leo is not as clear as he could be on this point, writing that "Leo does not closely differentiate between the principle of private property and the more fundamental principle of the common use of all material goods. The source he draws upon [ST II-II q. 66, aa. 1, 2] is clear about this distinction, but that is not reflected as clearly in *Rerum Novarum*." Habiger, *Papal Teaching on Private Property (1891–1981)* (Lanham, MD: University Press of America, 1990), 32–33.

⁴¹ In distinguishing between possession and use, Leo draws on the passage in the *Summa Theologiae* where Thomas writes of a "twofold competence in relation to material things." The first, which Thomas calls the power to procure and dispense,

humankind's common destiny, the "only important thing" about possessions, Leo writes, "is to use them aright" (no. 21). What does this mean? Leo quotes the passage of the *Summa Theologiae* where Thomas explains right use in this way: people should not consider material possessions as exclusively theirs but "as common to all, so as to share them without hesitation when others are in need" (no. 22). Notice that this understanding of property differs quite strikingly from classic early modern accounts, in which possession of property is understood to be both individual and absolute, with the owner exercising complete control over access, use, and disposal.⁴² In contrast, right use of property for Leo always involves acknowledging that possessors are members of a community of common use. The paradigmatic expression of this acknowledgement is returning what they have in surfeit to those who lack what they need.⁴³

In articulating his account of property and possession, Leo inherits and works within an older tradition of moral-theological reflection. While it is beyond the scope of the present essay to do justice to this topic, Catholic social teaching as it develops over the course of the twentieth century takes up and preserves this approach. Within this tradition, appeal to the *ius necessitatis* occasionally, but dramatically, rises to the surface.

Perhaps the most important of these appeals can be found in *Gaudium et Spes* (1965), the Second Vatican Council's Pastoral Constitution on the Church in the Modern World, one of the most authoritative documents of the Church's social teaching. The relevant passage reads:

God intended the earth with everything contained in it for the use of all human beings and peoples. Thus, under the leadership of justice

correlates with what Leo has already said about property in the encyclical, which is that it is not only legitimate for people to possess things as their own, but it is even necessary to do so. This is how Thomas explains the second competence, what he calls use: "Now with regard to [use], no man is entitled to manage things merely for himself, but as common, so that he is ready to share them easily with others in the case of necessity" (ST II-II q. 62, a. 1, resp).

⁴² Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press 1988), 137–252; Jedediah Purdy, *The Meaning of Property: Freedom, Community, and the Legal Imagination* (New Haven: Yale University Press, 2010), 40–43.

⁴³ This moral-theological grammar raises many additional questions about what is the "need" beyond which we have a duty to give what remains as a surplus. These questions are beyond the scope of this essay and call for much more extensive reflection. Two important guides in that regard are Charles C. Camosy and David Cloutier. See Camosy, *Peter Singer and Christian Ethics: Beyond Polarization* (Cambridge: Cambridge University Press, 2012) and Cloutier, *The Vice of Luxury: Economic Excess in a Consumer Age* (Washington, DC: Georgetown University Press, 2015).

and in the company of charity, created goods should be in abundance for all in like manner. Whatever the forms of property may be, as adapted to the legitimate institutions of peoples, according to diverse and changeable circumstances, attention must always be paid to this universal destination of earthly goods. In using them, therefore, man [sic] should regard the external things that he legitimately possesses not only as his own but also as common in the sense that they should be able to benefit not only him but also others. On the other hand, the right of having a share of earthly goods sufficient for oneself and one's family belongs to everyone. The Fathers and Doctors of the Church held this opinion, teaching that men are obliged to come to the relief of the poor and to do so not merely out of their superfluous goods. If one is in extreme necessity, he has the right to procure for himself what he needs out of the riches of others. Since there are so many people prostrate with hunger in the world, this sacred council urges all, both individuals and governments, to remember the aphorism of the Fathers, "Feed the man dying of hunger, because if you have not fed him, you have killed him," and really to share and employ their earthly goods, according to the ability of each, especially by supporting individuals or peoples with the aid by which they may be able to help and develop themselves (no. 69).

This passage is a concise articulation of the major claims of the moral-theological tradition we have been considering, both from the perspective of those in possession of the world's goods, as well as from the perspective of those who are not in possession of them. The passage begins with the belief that creation is a common gift, given for the common use of all peoples, and before going on to specify its implications for property and the duties holding it entails. In terms of the formulation that property owners should see their possessions "not only as [their] own but as common," *Gaudium et Spes* cites the passage discussed above from *Summa Theologiae*, as well as Leo's rendering of it in *Rerum Novarum*.

The last part of the passage is particularly pertinent, because it proceeds to argue in unmistakable terms for the enduring moral force of the *ius necessitatis*. To return to the questions I posed above, what happens when those in need do not receive what is theirs? Are they to wait patiently for it? Or might they justifiably take what they need? The answer given by *Gaudium et Spes* is simple and straightforward: in cases of extreme necessity, people can indeed by right secure what they need from the surfeit of others. This is an unambiguous reiteration of Anglicus, Laurentius, and Aquinas's belief that the needy have a natural right to this surfeit, and that those who assert their right do not steal. In such cases, the violation of prevailing property arrangements reveals the character of God's creation, which is too often obscured by sin. Those who assert their right to others' property show what property is *for*, underscoring property's derived status, as well as the

primacy of the principle of common use. Moreover, though *Gaudium et Spes* does not say so explicitly, the Pastoral Constitution's moral-theological grammar seems to entail Basil's understanding of a twofold account of thievery: unjust taking and unjust retention of created goods. While *Gaudium et Spes* does not explicitly use the language of thievery, it does use the language of murder, attributing a kind of violence to the failure to attend to those afflicted with hunger.⁴⁴

Above we examined the emergence of the law of necessity in medieval theology, and we see it carried forward into our own day in *Gaudium et Spes*. However, numerous questions remain. While the document invokes the *ius necessitatis*, there is no mention of the perils of its enactment within property regimes that do not recognize—or are even antithetical to it. One reason Peñalver and Katyal argue to extend the necessity defense to cover cases of poverty and economic disaster is precisely because of the marginal status of the moral-theological tradition within which the *ius necessitatis* is intelligible.

Questions remain for still other reasons. Above we also saw Leo argue, as *Gaudium et Spes* does, that it is a person's duty to give her surfeit to those in need. But Leo goes on to say that, except in extreme cases, this duty is not enforceable by law. It is not the normal role of governments to take the excess property from some and redistribute it to others.⁴⁵ On Leo's view, the duty to distinguish between what is sufficient and what is superfluous is best left to people themselves. However, it follows from this that the *ius necessitatis* is a law set apart from the actual laws and policies of states, as well as from the actions of civil authorities. All of this raises crucial questions: How best to catechize people to understand and enact this duty? Who is responsible for this catechesis? What happens if the responsible parties fail and the duties are neglected? What counts as extreme cases?

In Catholic social teaching, one important example of such an extreme case is *Gaudium et Spes*'s argument for agrarian reform, which shares the underlying rationale of the *ius necessitatis*. Several paragraphs after the passage just cited, we read of a situation similar to Las Pavas. In many places in the world

There are large or even extensive rural estates which are only slightly cultivated or lie completely idle for the sake of profit, while the

⁴⁴ See Matthew Philipp Whelan, "'You Possess the Land that Belongs to All Salvadorans': Óscar Romero and Ordinary Violence," *Modern Theology* 35, no. 4 (2019): 659–661.

⁴⁵ To be clear, Leo does think that governments have a role in the proliferation of property through law and policy (no. 47). Therefore, he seems to assume a distinction between facilitating access to property and expropriating/redistributing property. Relatedly, he does not consider what the former looks like in conditions of scarcity.

majority of the people either are without land or have only very small fields, and, on the other hand, it is evidently urgent to increase the productivity of the fields. . . . Indeed, insufficiently cultivated estates should be distributed to those who can make these lands fruitful; in this case, the necessary things and means, especially educational aids and the right facilities for cooperative organization, must be supplied. Whenever, nevertheless, the common good requires expropriation, compensation must be reckoned in equity after all the circumstances have been weighed (no. 71).

This is not the first time that the Catholic social teaching tradition calls for agrarian reform, but it is one of the most significant instances of it—a call, I should add, that continues to be reiterated into the present, by Pope Emeritus Benedict XVI⁴⁶ and now by Pope Francis.⁴⁷

What is significant for our purposes is that this call is effectively a response to situations like that of Las Pavas, where people who are landless or land-poor need land to farm, while at the same time, there are large tracts only slightly cultivated or left uncultivated. *Gaudium et Spes* does not address specifics, especially cases in which people occupy and use land because of need. But the Pastoral Constitution does clearly address the fact that laws and policies like agrarian reform are one possible response, the underlying rationale of which is to enable people to have the land they need, land that belongs to them. Expropriation of land for the common good shares in the theological grammar of creation as a common gift insofar as law and policy recognize the fact that people’s need for land to farm has effectively made the land their own—though admittedly, neither the Pastoral Constitution, nor the laws and policies themselves, use this language.

Notice also how in the case of Las Pavas, there already is what we might call a kind of agrarian reform taking place “from below,” enacted through the actions of ordinary people to meet their needs; in this case, by occupying and cultivating unused land titled to others.⁴⁸ As Peñalver and Katyál argue, cases like these underscore the “redistributive value” such actions can have. In occupying land only

⁴⁶ *Caritas in Veritate*, no. 27.

⁴⁷ See Whelan, *Blood in the Fields*, 87, 305–312. In his *Address to the Participants in the World Meeting of Popular Movements* (October 28, 2014), www.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141028_incontro-mondiale-movimenti-popolari.html, Pope Francis says, “I know that some of you are calling for agrarian reform in order to solve some of these problems, and let me tell you that in some countries—and here I cite the *Compendium of the Social Doctrine of the Church*—‘agrarian reform is, besides a political necessity, a moral obligation’ [no. 300].”

⁴⁸ The phrase “agrarian reform from below” comes from Peter Rosset, Raj Patel, and Michael Courville, eds., *Promised Land: Competing Visions of Agrarian Reform* (Oakland: Food First, 2006), 9.

slightly cultivated or unused, occupiers are quite literally taking from another's surplus. These actions generate redistributive value by redistributing land from where it is less to more needed. Indeed, Peñalver and Katyal observe that property law often recognizes this redistributive value in doctrines like adverse possession, which permit forced transfers of property under certain circumstances.⁴⁹ Relatedly, property lawbreaking can also have what Peñalver and Katyal call crucial "informational value," communicating to a wider public, for instance, that aspects of the extant property regime are obsolete, unjust, or illegitimate—a communication that may in fact lead to calls for change, such as, in this case, by enacting agrarian reform.⁵⁰

Catholic social teaching's support for agrarian reform has been characterized by some as thievery, a characterization that stems from the widespread Christian tendency to defend unrestricted private property rights and capitalism. Along these lines, Walter Block and Guillermo Yeatts have criticized the Pontifical Council for Justice and Peace's *Toward a Better Distribution of Land: The Challenge of Agrarian Reform* (1997) for condoning "theft." "The Ten Commandments," they explain, "prohibit not only robbery, but even coveting the property of others."⁵¹ However, this characterization misconstrues the moral-theological tradition we have been examining, because it overlooks how the belief that creation is a common gift entails unjust retention—to which Catholic social teaching's call for agrarian reform is a response—is itself a form of theft.

Archbishop Óscar Romero of San Salvador gave voice to this view when he said to the oligarchs of El Salvador in 1980 that they "possess the land that belongs to all Salvadorans" (*están poseyendo la tierra que es de todos los salvadoreños*) and himself advocated agrarian reform in order to rectify the situation.⁵² Pope John Paul II said something similar in a 1979 address in the Mexican state of Oaxaca. Addressing the "leaders of the peoples" and the "powerful classes," the pope proceeded to tell them that they "keep unproductive lands that hide the bread that so many families lack" (*que tenéis a veces improductivas las tierras que esconden el pan que a tantas familias*

⁴⁹ Peñalver and Katyal, *Property Outlaws*, 18, 127, 143, 183.

⁵⁰ Peñalver and Katyal, *Property Outlaws*, 18, 127, 143, 183.

⁵¹ See for instance Plínio Corrêa de Oliveira, *Reforma agrária: Questão e consciência* (São Paulo: Editora Vera Cruz, 1960). Corrêa de Oliveira founded the Brazilian Society for the Defense of Tradition, Family, and Property (TFP), which continues to be vocal in its defense of private property—a defense which, it claims, is based on Catholic social teaching. See Walter Block and Guillermo Yeatts, "The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's *Toward a Better Distribution of Land: The Challenge of Agrarian Reform*," *Journal of Natural Resources and Environmental Law* 15, no. 1 (1999–2000): 41–42.

⁵² See Whelan, "You Possess the Land that Belongs to All Salvadorans."

falta).⁵³ In keeping more land than they could possibly use, they keep what belongs to others—a thievery embedded in the landscape. More recently, in his 2013 apostolic exhortation *Evangelii Gaudium*, Pope Francis cites John Chrysostom’s words: “Not to share one’s wealth with the poor is to steal from them and to take away their livelihood. It is not our own goods which we hold, but theirs” (no. 57). Earlier that same year, Francis remarked: “Remember well, whenever food is thrown away it is as if it is stolen from the table of the poor, from the hungry!” (*Ricordiamo bene, però, che il cibo che si butta via è come se venisse rubato dalla mensa di chi è povero, di chi ha fame!*)⁵⁴

In critiquing social teaching’s support for agrarian reform, Block and Yeatts appeal to the Ten Commandments. However, the actual treatment of the seventh commandment (“Thou Shall Not Steal”) in the *Catechism of the Catholic Church* begins not with a defense of property rights as typically understood by property law, but with the common destination of created goods, from which the whole exposition on property and possession follows. “The right to private property, acquired by work or received from others by inheritance or gift,” the *Catechism* states, “does not do away with the original gift of the earth to the whole of mankind. The universal destination of goods remains primordial” (no. 2403).⁵⁵

In its treatment of these matters, the *Catechism* even mentions the *ius necessitatis*, stating: “The seventh commandment forbids *theft*, that is, usurping another’s property against the reasonable will of the owner. There is no theft if consent can be presumed or if refusal is contrary to reason and the universal destination of goods. This is the case in obvious and urgent necessity when the only way to provide for immediate, essential needs (food, shelter, clothing...) is to put at one’s disposal and use the property of others [citing *Gaudium et Spes*, no. 69]” (no. 2408). This point is crucial, and once again, considerably complicates the charge of thievery, because the *Catechism* joins figures like Anglicus, Alanus, and Aquinas in insisting that unjust retention is a form of theft, and that when those in extreme necessity take from the superabundance of others, there is, strictly speaking, no thievery. Those in need have a right to the goods in question; their need has made the goods their own.

⁵³ Pope John Paul II, *Apostolic Journey to the Dominican Republic, Mexico, and the Bahamas*, Cuilapan, Mexico, January 29, 1979, www.vatican.va/content/john-paul-ii/en/speeches/1979/january/documents/hf_jp-ii_spe_19790129_messico-arciv-oaxaca.html.

⁵⁴ The spontaneous remark only appears in the Italian. See Papa Francesco, *Udienza Generale*, Piazza San Pietro, 5 giugno 2013, www.vatican.va/content/francesco/it/audiences/2013/documents/papa-francesco_20130605_udienza-generale.html.

⁵⁵ The *Compendium of the Social Doctrine of the Church* patterns its own approach accordingly, even explicitly endorsing agrarian reform (nos. 171–184, 300).

Although the *Catechism* only mentions food, shelter, and clothing, the ellipses suggest that those are not the only created goods in view. Returning to the question of agrarian reform, what about land? What is the best way to describe what the landless and land-poor are doing when they occupy and cultivate land that belongs to others?⁵⁶ Mario Losano poses this question in his book, *La función social de la propiedad y latifundios ocupados: Los sin tierra de Brazil*, characterizing the Landless Workers Movement (*Movimento dos Trabalhadores Sem Terra*) of Brazil as a contemporary application of the law of necessity. Are these workers occupying land on the basis of a law of need more basic than positive law regarding property, testifying to the primordially of the common destination of goods?⁵⁷ Or are they lawless invaders, robbing property that belongs to others? As Losano notes, the difference between these descriptions, and the possible responses they occasion, is significant.⁵⁸

CONCLUSION

In this essay, I have argued that Catholic social teaching preserves a moral-theological tradition which continues to appeal to the *ius necessitatis*. Yet, while social teaching continues to preserve and appeal to this law, there is still a great deal of circumspection with respect to it—a notable hesitancy, that is, to stand by that articulation, be in solidarity with those who assert it, and assume the risks of so doing. Thus, while the law of necessity endures, the right in question, as I have also argued, continues to be a shadowy one.

We especially see this shadowiness in the case of martyrs like Óscar Romero. In El Salvador, like in many other countries in Latin America and elsewhere during the twentieth century, the *campesinado* or peasantry underwent, in Jeffrey L. Gould and Aldo A. Lauria-Santiago's words, "an agonizing decomposition,"⁵⁹ which produced landlessness and migration. Within these countries, people increasingly turned to squatting—settling upon and cultivating land for which they had no legal title. On the basis of the moral-theological

⁵⁶ See Matthew Philipp Whelan, "Jesus is the Jubilee: A Theological Reflection on the Pontifical Council for Justice and Peace's *Toward a Better Distribution of Land*," *Journal of Moral Theology* 6, no. 2 (2017): 224.

⁵⁷ Gerald Schlabach raises a similar question in "The Nonviolence of Desperation: Peasant Land Action in Honduras," in *Relentless Persistence: Nonviolent Action in Latin America*, ed. Philip McManus and Gerald Schlabach (Philadelphia: New Society, 1991), 64–77.

⁵⁸ Mario Losano, *La función social de la propiedad y latifundios ocupados: Los sin tierra de Brazil* (Madrid: Dykinson, 2006), 137–138.

⁵⁹ Jeffrey L. Gould and Aldo A. Lauria-Santiago, *To Rise in Darkness: Revolution, Repression, Memory in El Salvador, 1920–1932* (Durham, NC: Duke University Press, 2008), 3.

tradition we have been examining, Romero defended such actions, but he also advocated that the law and policy of the Salvadoran state ameliorate the situation through agrarian reform. As Romero explained in one homily regarding a standoff between squatters and landowners in Azacualpa, Chalatenango, “I know that those who are occupying lands ... are respecting private property. They only want an agreement that enables them to have a place to plant and give food to their families.”⁶⁰ They are trying to meet, as he put it in one of his pastoral letters, “the vital necessity of subsistence.”⁶¹

Yet, this defense was an important reason why Romero was—and continues to be—controversial in El Salvador and beyond. Growing up, many in El Salvador heard stories of Romero as a “*guerrillero* [guerilla] dressed as a priest,” who sided with criminals and permitted the poor to steal from the hard-earned wealth of the rich⁶²—stories repeatedly told by fellow Catholics and even endorsed by bishops. As José Luis Escobar Alas, the archbishop of San Salvador, readily admits in his 2017 pastoral letter, the Church in El Salvador failed to stand in solidarity with Romero and so many others like him. “I want to recognize—as I must out of justice, truth, and charity,” Escobar Alas writes, “that we in the Archdiocese have crossed the threshold of the third millennium without having acknowledged all the men and women who were victims of persecution, torture, repression, and who were ultimately martyred for following Christ and incarnating the Gospel in this country,” “giv[ing] their lives for the love of Christ personified in the poor,” especially the landless.⁶³

During the 1980s, the US government justified the extraordinary expansion of its support of the Salvadoran military by depicting El Salvador as the front line of a civilizational war with communism. Against the opposition of the United States Conference of Catholic Bishops, many prominent US Catholics argued in favor of these policies precisely on the basis of anti-communism.⁶⁴ They not only disregarded the elasticity of the category of communism and the reasons Romero and others like him might be so accused. These

⁶⁰ Monseñor Óscar A. Romero, *Homilias*, vol. 1 (San Salvador: UCA, 2005), 408.

⁶¹ Monseñor Óscar A. Romero, “La Iglesia y organizaciones políticas populares,” in *La voz de los sin voz: La palabra viva de Monseñor Óscar Arnulfo Romero*, ed. Rodolfo Cardenal, Ignacio Martín-Baró, and Jon Sobrino (San Salvador: UCA, 1986), 99.

⁶² Luis López-Portillo, “El Salvador, Divided by Its First Saint,” *Public Radio International The World*, May 21, 2015.

⁶³ José Luis Escobar Alas, *Ustedes también darán testimonio, porque han estado conmigo desde el principio*, II Carta Pastoral (San Salvador: Arzobispado de San Salvador, 2017), nos. 3, 160.

⁶⁴ Todd Scribner, *A Partisan Church: American Catholicism and the Rise of Neoconservative Catholics* (Washington, DC: Catholic University of America Press, 2015), 137–92.

prominent Catholic anti-communist voices further reinforced the notion that Christianity underwrites private property and capitalism, casting the moral-theological tradition Romero drew upon even further into the shadows.

Why, then, does the law of necessity remain such a shadowy one, even within a tradition that bears it into the present? One reason is that, while social teaching holds as crucial that people distinguish between what is sufficient and what is superfluous, it also argues that it is not the normal role of governments to take and redistribute people's property—notwithstanding extreme cases like agrarian reform, or more ordinary ones like paying taxes.⁶⁵ Consequently, the *ius necessitatis*, in some sense, stands apart from and is not adjudicable by the actual laws and policies of states.

Another reason is that there continues to be a great deal of confusion regarding what Catholic social teaching actually teaches about property and how this teaching stands in considerable tension with commonplace understandings of that term, especially in places like the US, a land which tends to regard unrestricted private property as sacrosanct. Even among Catholics, there remains a truly remarkable failure to see that social teaching's account of property and its associated institutions is shaped, at the most basic level, by the belief that creation is a common gift, given by God for common use, along with the radical implications of that belief for the organization of our social and economic life together.

A final reason the law of necessity remains shadowy brings us into more contested territory. When *Rerum Novarum* and the subsequent social teaching tradition argue for the proliferation of property—the expansion of stable and secure access of the dispossessed, the landless, and the indigent to property, encouraging them, in Leo's words, to hope for “a share in the land” (no. 47)—the preference is clearly for that proliferation to occur by way of the law and policy of states. As Leo says, *laws* should favor ownership and *policies* should help as many as possible to become owners. Later teaching continues to emphasize this point, calling upon law and policymakers to realize it. The teaching on agrarian reform that begins to emerge in the 1940s is an extension of that call.

But what happens in situations in which people increasingly misunderstand their duties to one another and the common destination of creation? What happens when laws and policies do not sufficiently favor ownership or enable sharing in the land but, instead, further undermine it? Since Leo wrote *Rerum Novarum* in 1891, property ownership has clearly not proliferated in our world. One glaring

⁶⁵ *Compendium of the Social Doctrine of the Church*, no. 355.

symptom of this fact is the enormous growth of informal settlements throughout the world. Known by many names—slums, squatter settlements, *favelas*, *poblaciones*, shacks, *barrios bajos*, bidonvilles, etc.—they are a global phenomenon. According to one study by the UN, fully a quarter of the world’s urban population lives within them—a percentage that is only expected to increase.⁶⁶

For our purposes, these settlements are significant, not only because of their inhabitants’ lack of access to basic goods like clean water and sanitation, sufficient space to live, and structurally sound shelters, but also because they are synonymous with the inhabitants’ insecure tenure over their homes and the lands on which they are built. To use more loaded language, these settlements are “illegal.” As Robert Neuwirth explains in his book *Shadow Cities*, the overwhelming majority of those who live in such places “are simply people who came to the city, needed a place to live that they and their families could afford, and not being able to find it on the private market, built it for themselves on land that wasn’t theirs.”⁶⁷ Inhabitants live outside the protections of the laws and policies of states—part of the informal or shadow economy. As a consequence of that status, inhabitants face the constant threat of eviction or even violence.

Closer to home, as Brian Goldstone has recently argued, in the US there is a growing phenomenon of what he calls the “working homeless.”⁶⁸ “For a widening swath of the nearly seven million American workers living below the poverty line,” he writes, “a combination of skyrocketing rents, stagnant wages, and a lack of tenant protections has proved all but insurmountable. Increasingly, this is the face of homelessness in the US: people whose paychecks are no longer enough to keep a roof over their heads.”⁶⁹ Notably, this phenomenon often occurs in the wealthiest, fastest growing cities—New York, Washington, DC, Seattle, Los Angeles, Charlotte, San Jose, Nashville, Atlanta, and elsewhere—places where it is precisely those workers helping to generate the wealth and sustain the economic growth who are being expelled from those cities due to the lack of affordable housing. At the same time, the support once offered through the laws and policies of the government—for instance, through public housing, Section 8 vouchers, and other federal programs that invest in low-income housing—is being eroded.

⁶⁶ United Nations Task Team on Habitat III, *Informal Settlements* (no. 22), Habitat III Issue Papers, 31 May 2015, 2–3.

⁶⁷ Robert Neuwirth, *Shadow Cities: A Billion Squatters, a New Urban World* (New York: Routledge, 2005), 256–257.

⁶⁸ Brian Goldstone, “The New American Homelessness,” *The New Republic*, August 21, 2019.

⁶⁹ Goldstone, “The New American Homelessness.”

To address this reality, Goldstone notes that groups like the Housing Justice League in Atlanta are working to develop a “new language.” “Is safe and stable housing a luxury conferred only on those rich enough to afford it? Or is it a basic right, no less fundamental than literacy or access to food and medicine?” Goldstone asks, echoing the group’s concerns.⁷⁰ My contention in this essay has been that this new language and its claims of justice can be nourished by a much older one.

One of the hopes of Leo and his successors was that the proliferation of property might begin to address the inequalities of the modern world, and in Leo’s words, bridge the “gulf between vast wealth and sheer poverty,” bringing “the respective classes ... nearer to one another” (*Rerum Novarum*, no. 47). What happens when inequality only mounts and the gulfs between people only grow wider? What about when the whole problem of how the dispossessed, landless, indigent might have stable and secure access to property is dealt with inadequately by law and policy—or worse, ignored or even exacerbated? As many homeless advocacy groups in this country have been arguing for some time now, the laws and policies of local governments have increasingly responded to the homeless by criminalizing their efforts to survive, as well as initiatives trying to serve them, for instance, by increasing restrictions on food sharing programs.⁷¹

The focus of Catholic social teaching is especially upon the obligations of those in possession of the world’s goods, as well as those who have the power to shape law and policy, which is important and must continue to be insisted upon. However, we must not neglect that the teaching also has important implications for the prerogatives of those deprived of the world’s goods. The teaching’s moral-theological grammar presses us to ask: Must those deprived of the world’s goods wait upon the wealthy to be converted or upon laws and policies to be changed, in order to receive what is theirs? What about when their need makes it impossible to wait and compels them to sleep in public because they have nowhere else to go? When they simply take from a store because they are hungry? When they begin to cultivate an abandoned plot to which they possess no title because they have neither land nor work? When they migrate without the requisite legal documents because changes in the climate have made it impossible to earn a livelihood where they are? In what ways and under which circumstances are these actions defensible? When such actions are criminalized, as they increasingly tend to be, who is willing

⁷⁰ Goldstone, “The New American Homelessness.”

⁷¹ National Coalition for the Homeless, *The Criminalization of Efforts to Feed People in Need*, Washington, DC, October 2014; Ford, “Homelessness is Not a Crime.”

to help make them intelligible in light of a higher law? It would seem well past time for Catholic moral theologians, as heirs to this tradition, to take on this responsibility. **M**

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