

THE PRISONERS OF STARVATION, OR *NECESSITAS* *DAT LEGEM*

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Abstract In 1961, the same year that Fanon's *Wretched of the Earth* appeared, Gilles Couvreur, a Jesuit, published *Les Pauvres ont-ils des droits* [Do the poor have rights?]. Couvreur's work offered a carefully researched examination of the debates within canon law particularly in the twelfth and thirteenth centuries concerning the right of those who are starving to steal food. At the heart of these debates is the question of whether the appropriation of food that is the property of another, under circumstances of extreme need, constitutes theft (albeit a theft whose criminality is immediately nullified by the law itself) or whether in such circumstances the legal status of property itself is suspended, in which case the taking of food can no longer be understood as theft. Finally, I examine the legal maxims "need has no law" and "necessity [or need] makes law," often cited in the period under consideration, to show how the concept of property was subordinated to the imperative of life in a way that appears unthinkable today.

Keywords food, hunger, property, exception, necessity, theft

Debout les damnés de la terre

Debout les forçats de la faim

L'internationale

In France in 1961 two books appeared within a few months of each other. They were undoubtedly conditioned by the same events and, more importantly, offered powerful critiques of the established order that converged in certain important respects. The critiques, however, were composed in registers so fundamentally different that their political and theoretical commonalities have remained until now almost completely illegible, or would have remained illegible had anyone ever thought to compare them. From the moment of their publication, the struggles in France and elsewhere, whose intensity only increased in the years that followed, propelled them along radically divergent trajectories: one book became an international success, read and reread, commented upon and contested, translated into more than a dozen languages; the other has remained confined to a tiny scholarly world whose interests to all appearances have little relevance to the conflicts and tragedies of the last century. It lies buried in an obscurity from which, even now, it cannot easily be extracted.

The first, Frantz Fanon's *Les Damnés de la terre* (*The Wretched of the Earth*) published by the newly established Éditions Maspéro, a publisher firmly rooted in the currents of resistance to the Algerian War (and in anti-colonialist and anti-racist movements internationally), spoke directly to and of the present.¹ It was as if Fanon, following Sartre's injunction in 'What is Literature', sacrificed the abstraction expected of a work whose importance will be felt beyond its time, to the urgency of the conjuncture whose genocidal violence had simply moved from Europe back to the colonies where it had begun.² Sartre was right in his controversial preface, to see Fanon's last work as a discourse about the European that is not addressed to him and which interpellates him as an eavesdropper who will try in vain to comprehend what he has overheard.³ Fanon's work is not a discourse on the right to rebel and thus on the conditions under which rebellion can be considered just or unjust. Rather, it is an attempt to articulate the philosophy immanent in the forms of struggle through which anti-imperialist movements sought to free themselves from the deadly grip of Western civilisation. What Fanon attempts to capture is the meaning of that moment when obedience to the law, specifically the regime of rights, requires individuals to expose themselves to death at the hands of those endowed with and able to enjoy the right to govern or the exclusive right of ownership. What is at stake in *Les Damnés de la terre* is not human dignity, nor even the recognition (Hegel's *Anerkennung*) that is central to *Peau noire, masques blancs*. Instead, Fanon's last work arrives at the disturbing conclusion that the central problem of politics from the perspective of the colonised is nothing more or less than their continued existence in the face of what Achille Mbembe has called the 'necropolitical order'.⁴ This is the world, only too familiar to us today, in which entire populations are abandoned to starvation, and in which survival itself becomes a de facto violation of the law that demands that property rights (including the ownership of food and water supplies) and national sovereignty (the right to exclude those who do not possess citizenship rights) be respected at any cost, including that of the lives of those made destitute by war or climatic events. And nowhere was the imperative to protect property exercised with more violent abandon than in the European colonies and post-colonies.

The second book, published that same year by the small Catholic press, Editions SOS, was an only slightly embellished version of the author's doctoral thesis, and bore the intimidating title *Les Pauvres ont-ils des droits? Recherches sur le vol en cas d'extrême nécessité depuis la Concordia de Gratien (1140) jusqu'à Guillaume d'Auxerre (1231)* [*Do the poor have rights? An inquiry into theft in the case of extreme necessity from Gratian's Concordia (1140) to William of Auxerre (1231)*]. Its author, a Catholic priest and member of the Jesuit order, Gilles Couvreur, would later join the ranks of *les prêtres ouvriers* or worker priests who followed the proletariat into the factories, not so much to preach the 'Good News' or imitate the poverty of those who worked for little more than bare subsistence, as to share their hardship by becoming one of them. The author

1. Frantz Fanon, *Les Damnés de la terre*, Paris, Maspéro 1961.

2. Jean-Paul Sartre, *What is Literature?*, (trans) Bernard Frechtman, New York, Philosophical Library 1950.

3. Jean-Paul Sartre, 'Préface,' Fanon, *Les Damnés de la terre*, Paris, Maspéro 1961, pp17-36.

4. Achille Mbembe, 'Necropolitics,' *Public Culture*, Volume 15, Number 1, Winter 2003, pp 11-40.

5. Jim House and Neil Macmaster, *Paris 1961: Algerians, State Terror and Memory*, Oxford, Oxford University Press 2006.

6. Gilles Couvreur, *Les Pauvres ont-ils des droits? Recherches sur le vol en cas d'extrême nécessité depuis la Concordia de Gratien (1140) jusqu'à Guillaume d'Auxerre (1231)*, Rome, Libreria Editrice dell'Università Gregoriana 1961. (Hereafter *Les Pauvres*).

of *Les pauvres* was soon to toil alongside Muslim immigrants and accompany them to the *bidonvilles* or shanty-towns that surrounded French cities. He would observe, and choose to share, their hunger. He would also observe what he could not share: the daily violence and racist hatred directed against them, which on 17 October, 1961 took the spectacular form of a massacre of hundreds of Algerian demonstrators in the heart of Paris.⁵ Rather than directly denounce the horrors and injustices of a dying colonialism both in France and in its colonies and former colonies, Couvreur sought to inscribe in the institutional memory of the Church (and thereby of Europe itself) a moment, all but forgotten, that is only from the most superficial view unrelated to the wretchedness of Fanon's 'wretched of the earth'. It is the moment at which the great jurists of medieval Christian Europe, the Canonists, Decretists and Decretalists, who had both recovered Roman jurisprudence and sought to assemble the rulings of earlier Christian authorities into a coherent and consistent body of law, came to agree that the destitute in a condition of dire need could legitimately take what was necessary to their existence, even if it was the property of another.⁶ It is to this consensus (arrived at from very different starting points and justified in different ways) that his title refers.

Couvreur thus chose to articulate in the guise of learned commentary on a medieval controversy concerning the right of the destitute to go on living, the principle, often passionately asserted, what the poor, not simply the allegorical figures who populated the parables of the gospels, but the increasing numbers of the landless and homeless, the starved and the half-starved, through the magnitude of their suffering and their resistance, succeeded in imposing as a moral and quasi-legal right: the priority of their right to existence over the rights of ownership. From this controversy, eight centuries before the appearance of *Les Pauvres ont-ils des droits?* there emerged a critique of a notion whose pertinence to our own time cannot be doubted: a conceptualisation of economic order and the form of property it requires. Above all, there developed a will to interrogate and examine in minute detail the emerging concepts of the *dominus* or proprietor who is exempted from any legal responsibility to those who cannot pay for the necessities of life, and a legal or quasi-legal definition of property right that immunises the owner against the claims of the poor, irrespective of the magnitude of their need or his surplus. It is important to note that the terminology concerning property and ownership in the great debates of the latter half of the twelfth and the first half of the thirteenth centuries is almost exclusively drawn from Roman law: most commonly *dominium* and *dominus*, rarely *possessio*, with little or no mention of the complexities of feudal notions of property. The conceptual precociousness of these debates confers upon them an uncanny familiarity that allows them to speak to us directly.

In part, Couvreur's detour through a medieval debate on the right of the desperately poor to steal was a strategic choice imposed by his position in the church at a time, before the changes introduced by Vatican II, when

fears of internal communist influence were at their height and the mass radicalisation that arose from the increasing opposition to the Algerian war pushed sectors of the church to the left.⁷ But the controversy he examined was not a mere pretext: on the contrary, his detailed reconstruction of the theological and legal positions in the disjunctive synthesis they form makes visible the currents of thought that, if gradually and unevenly, had finally to be rendered invisible in order to allow the emergence, or rather the imposition, of the specific hierarchy of law, property and life that characterises modernity. Such a strategy, of course, involves the risk that it will be ignored by precisely the audience it hopes to move and thus without effect. But perhaps we underestimate both the work and the strategy immanent in it. In the face of the Algerian war, its unrelieved violence and carefully engineered starvation, Couvreur chose to intervene by fashioning the theological and political materials that he gathered together into an untimely work whose meaning could be disclosed only in a time other than its own, a time whose hour has perhaps only now arrived.

7. Etienne Fouilloux, 'Intellectuels Catholiques et guerre d'Algérie,' *La guerre d'Algérie et les intellectuels français*, Paris, Éditions complexes 1991.

But what allows us to link Fanon to Couvreur, given that the work of the former spoke to millions of rebels and revolutionaries round the world, while that of the latter seemed to have been written *sub specie eternitate*, and thus with a serene indifference to its historical moment, as if it were a pure exercise in scholarship that could be relevant only to historians of Canon law? Couvreur's decision to examine a particular controversy over a ninety-one year period (1140-1231), the dates of which were placed conspicuously, perhaps ostentatiously, on the book's cover, seemed almost to have been designed to deter readers, or at least lull them into disregarding the threat that the book poses to their - and our - political/conceptual order. Indeed, Couvreur's work is unsparing: it contains nothing that would help orient the reader in the face of the arguments and counter-arguments concerning the question of theft in cases of extreme necessity or need. More seriously, apart from a single and somewhat ambiguous paragraph at the beginning of the work, Couvreur makes no attempt to suggest the ways in which these debates might be relevant to the great struggles of 1961-1962 in France or, for that matter, what relation these debates from the twelfth and thirteenth centuries had to the histories that followed them, the histories of sovereignty, property right, criminality and criminal law. It is hardly surprising, then, that *Les Pauvres ont-ils des droits?* fell almost immediately into obscurity, cited less than twenty times in the twenty years that followed its publication. What common ground could there be between Fanon's denunciation of 'Western values' and Couvreur's cautious excavation and reconstruction of theological and legal artefacts from eight hundred years earlier?

There are a few signs to be found in Couvreur's text. But identifying and deciphering them is not easy, given that the passages that might be construed as referring to the present are characterised by a constitutive ambiguity that not only allows them to be read in opposing ways, but prevents them from

8. By 'the material form of the right to have rights,' I refer not to Hannah Arendt's famous formula but to what the socialist jurist Anton Menger called the 'Urrecht' to what is necessary to mere existence, without which all other rights, whether human or civil, are meaningless. Anton Menger, *The Right to the Whole Produce of Labour*, (trans) M.E. Tanner, London, Macmillan 1899, p29.

9. Proverbs 6:30-31: 'Do not despise a thief if he steals to satisfy his hunger'.

10. Rebecca Solnit, 'Looters and the Lessons of Katrina,' *LA Times*, 29 August 2010. It is worth noting, as I will discuss in greater detail later, that the theft of goods other than food, which could be sold to obtain food and other necessities, was widely accepted by the participants in the debates examined by Couvreur.

11. Todd Gray, *Looting in Wartime Britain*, London, Mint Press 2009.

12. Michele Estrin Gilman, 'The Poverty Defence', *University of Richmond Law Review*, Vol. 47 (2013), 495-548. As I was writing this essay, *la Suprema Corte di Cassazione*, Italy's highest court, set aside the conviction of a man earlier found guilty of the theft

being reduced to either (or any) of their possible meanings. We need read no further than the book's title to find an example: written in the present tense, the question, 'Do the poor have rights?', as opposed to something like 'The rights of the poor' or even 'the question of the rights of the poor,' creates an equivocity, and more importantly a certain doubt, that cannot be entirely eliminated even by the historical specificity imposed by the subtitle '*Recherches sur le vol en cas d'extrême nécessité depuis la Concordia de Gratien (1140) jusqu'à Guillaume d'Auxerre (1231)*' (An inquiry into theft in the case of extreme necessity from Gratian's *Concordia* (1140) to William of Auxerre (1231). Further, the subtitle not only fails to address the question of rights in general or in some a priori sense, but addresses a particular right, the right to steal in cases of extreme necessity, that most European states ceased to regard as legitimate in the seventeenth or eighteenth century. It is at this point that the strategic function of the historical specificity of the subtitle begins to work. Couvreur incites us to ask if such a right might once have existed, and, if so, whether it was once defended with the same assurance with which it is today routinely dismissed as an absurdity, as if, elevated to the level of principle, such a right could only lead to the destruction of the rule of law and thus civilisation itself. Couvreur's reference in the subtitle to Gratian's *Concordia Discordantium Canonum* or *Decretum* (as it is commonly known in English), a compendium of canon law governed by the principles of coherence and consistency, undercuts the assumption that the right to steal is a contradiction in terms, a right to violate the principle of right and thus an assertion derived from faulty or even irrational premises. It is not simply his commitment to the church that leads Couvreur to turn away from millenarian sects or heretical movements, and instead to the need to demonstrate the recognition of such a right within canon law itself and to recover the diverse arguments and objections that led to the establishment of this right in a form so durable that it would take five centuries to abolish it or simply empty it of practical significance.

But to recover what amounts to the material form of the right to have rights, that is, life, requires a clear understanding of the degree to which the right of the destitute to steal what is necessary to their survival has been forgotten and perhaps rendered unthinkable.⁸ When, just over ten years ago, Hurricane Katrina destroyed large parts of the city of New Orleans, it left conspicuously intact the generalised conviction that the destitute individual, without the means to purchase, or the opportunity to receive through donation, the food and water required for survival, who takes what is owned by another, no matter how urgent his need for nourishment or water may be, is guilty of theft. Further, the very natural disaster that produced or exacerbated the needs of the poor and led to a declaration of a state of emergency by the governor of Louisiana, not only did not mitigate the crime of theft of food and water (as dire need did both in scripture⁹ and in canon law), but made theft under such conditions all the more heinous in the eyes of the public.

The governor's declaration of a policy of 'shoot to kill' (applied to looters in a city without potable water), a policy implemented under the conditions of the state of emergency, was widely regarded as perfectly just.¹⁰ While the use of extra-judicial force to stop looting during a state of emergency in which food cannot be legally acquired by those without it, enjoys the greatest support in the US, even nations such as Britain (in the Second World War) have imposed the penalty of death on looters, irrespective of what was looted or why, during states of emergency.¹¹ In fact, throughout the world, looters are shot and killed by agents of the state, usually, but not always, during states of emergency when legal restraints on the use of deadly force are suspended. In this sense we could say that the experience in New Orleans was not only not an anomaly, but the logical conclusion of centuries of opposition to the very notion that Couvreur has excavated, namely, that in cases of urgent need the destitute have a right to steal what is necessary to their survival, if, that is, the act can legitimately be considered theft at all. Today, at least in US courts, necessity or need, however, life-threatening, is not a legitimate defense in cases of theft, even if the arguments arrayed against it in the handful of cases in which the right to steal was invoked are strikingly vague and allusive, little more than invocations of 'law' or 'property' whose obviousness excludes any need for explanation.¹²

The repertoire from which the arguments against the necessity defence in cases of theft, larceny and forgery were drawn is itself organised around a contradiction. On the one hand, it is argued that in societies as advanced as ours, food, potable water and medicines are always available to those who need them, an argument that requires the systematic exclusion of the mass of evidence to the contrary, no matter how detailed or irrefutable. In fact, one of the first uses of the argument that no one need go hungry in an advanced society with its ample provisions for the poor is found in Matthew Hale's posthumously published *HISTORIA PLACITORUM CORONÆ*, written just prior to the food shortages of the 1690s and nearly sixty years before one of the largest famines in the history of the British isles (1740-41), as if the argument made its appearance as a kind of pre-emptive and a priori denial of the very possibility of acute food shortages.¹³ On the other hand, confirming the underlying cynicism of this position, is its second line of defense: although there cannot be urgent, life-threatening need in a society such as ours, if (or when) urgent need does arise, the taking of necessities remains theft and thus a punishable crime. Who can say with any certainty that, even in the midst of a generalised crisis, a particular individual who has gone without, say, water for forty-eight hours and has no prospect of obtaining it by legal means, is really in physical danger? After all, individuals react differently to dehydration and cannot be considered reliable judges of the severity of their own condition. This is especially the case when such judgments are offered as a justification for the crimes of theft or looting. Individuals cannot be allowed to make judgments that justify a violation of the law as serious as theft and appealing

of four Euros worth of bread and cheese and sentenced to six months in jail, declaring that he had in fact committed no crime. The decision was immediately and widely reported not only in Italy but internationally. Commentators, above all in the English language media, regarded with some concern, what Italian legal scholar, Maurizio Bellacosa, called the 'novelty' of the decision. According to the court, the defendant's actions did not constitute a crime, because '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 [*in stato di necessità*]' (Gaia Pianigiani and Sewell Chan, *Can the Homeless and Hungry Steal Food? Maybe, an Italian Court Says*, *New York Times*, May 3, 2016. Referring to the same case, Massimo Gramellini wrote in his column in *La Stampa*, 5 May, 2016, that 'in America', the court's privileging of the right of survival over property right would seem like '*bestemmia*' (a word that could be translated as either 'blasphemy' or 'absurdity'), while in Italy it will conjure up fears of 'proletarian expropriation'.

13. Matthew Hale, *HISTORIA PLACITORUM CORONÆ*, London, E. and R. Nutt and R. Gosling 1736, p53.

14. George R. Wright, *Does the Law Morally Bind the Poor*, New York, New York University Press 1996.

15. On the case of France before the twentieth-century, see Joseph Fabisch, *Essai sur l'état de nécessité*, Lyon: Paul Legendre 1903; Virginie Berger, 'Le vol nécessaire au XIXème siècle. Entre réalité sociale et lacune juridique, une histoire en construction', *Revue d'histoire de l'enfance 'irrégulière'* [online],

to a general rule about human beings and their physiological requirements tells us nothing about a particular case.¹⁴ It is important to note that the scepticism about individuals' assessments of the degree of danger they face in justifying or excusing acts of theft, does not carry over to the category of justifiable homicide. In the latter case, especially in a surprising number of states in the US today (which we might regard as the purest expression of this tendency) the faith in the ability of an individual to assess the degree of danger posed by other people approaches the threshold of a *de facto*, if not *de jure*, immunisation of the person who believes or says he believes that he is in mortal danger.

Couvreur, for his part, does not cite a single argument from modern law, French or otherwise, concerning the inadmissible right to steal in the case of extreme necessity.¹⁵ In fact, there is no need to do so: he has organised his exposition with all the precision necessary to impress upon the reader what had to be forgotten for modern jurisprudence, at least insofar as it concerns the doctrine of a right to steal food and water in order to go on living, to impose the principle of the primacy of property over life, without acknowledging or perhaps knowing that it has done so. That the killing of looters is just and right appears obvious to all but a very few in the US today. To read Couvreur is to be given the knowledge necessary to question the obviousness of the obvious, the network of presuppositions that could have arisen only on the basis of the exclusion of the positions of all the parties involved in the medieval controversy. To gauge the difficulty his approach must confront, we might examine the note Couvreur appends to the first sentence of the book's first chapter, one of the very few acknowledgments of the work's contemporaneity:

We know how many contemporary authors, struck by the heretofore unknown situations that have occasioned great conflicts, crises and upheavals, have insisted on the unprecedented and unique character of these concrete situations. Thus, some, struck by the exceptional character of revolutionary wars, are tempted to think that in a subversive war, it is not possible to urge fidelity to traditional moral norms (cf. Jean Perrin, *Rester des hommes en Algérie*, 1957) (*Les Pauvres*, p1).

At first glance this passage may very plausibly be read as a critique of Fanon (similar, in fact to that of Hannah Arendt), but such a reading may only be sustained by isolating it from what follows, that is, the entire web of textual readings and arguments of which the book itself is composed. His reference to 'situations of exception' in the sentence that precedes the note leaves little doubt that the reference here is to the conduct of the French in Algeria and the succession of states of exception (*l'état d'urgence* and *l'état de siège*) that set aside legal restraints on the violence determined to be necessary to the restoration of the rule of law. But more importantly, the note invokes 'traditional moral

norms,' without any explanation of what this phrase means: can what follows, that is, the book itself and its detailed excavation of the starving man's right to steal be understood as an attempt to recover a traditional moral norm? From Couvreur's perspective, the state of exception, decreed from above, appears as nothing more than the formal re-enactment of the forgetting of the right to subsistence. It removes any legal limit on the violence that may be applied to 'looters' without regard to the urgent need that drives them to risk their lives for a small quantity of food or water. It is thus clear that Couvreur is not appealing to a well-known set of Christian norms, even as a set of precedents from which a right to steal might somehow be derived. In fact, the problem of theft in the case of extreme necessity calls into question the very notion of an original moral foundation, recalling the terms of Althusser's critique, articulated less than five years after the publication of Couvreur's book, of the concept of origin: 'The function of the concept of origin, as in original sin, is to summarise in one word what has not to be thought in order to be able to think what one wants to think'. Is it really traditional morality, Christian or otherwise, that modern thought must not think in order to think what it wants to think? Couvreur suggests that, on the contrary, it is the inescapable absence of this morality, as if it had always already been revoked by the operation of necessity which deprives the words in which the law exists, the very words of the commandments, of an original and final meaning.

Accordingly, it is useless to search for the origins of the right of the starving person to steal in antiquity or early Christianity:

Nothing permits us to assert that the medieval authors found the doctrine of the innocence of the thief impelled by hunger already constituted in the heritage of their predecessors (*Les Pauvres*, p5).

On the contrary, a review of the *Penitentials*, an extensive historical record of sins and the acts of penance prescribed to the sinner, reveals that while the church recognised in practice a distinction between the mere theft of food and the theft of food by reason of necessity, requiring for the former penance that was longer in duration and greater in intensity than for the latter, nowhere is it recorded that the condition of starvation renders the thief who steals food innocent of any crime. But neither did it occur to any of those whose judgments were recorded to impose or advocate the imposition of the penalty of death by the secular authorities, as was typically prescribed by common law for theft of anything worth more than a very small amount of money in Medieval Europe (*Les Pauvres*, pp 46-49). There were, of course, scattered assertions of 'the innocence of the thief impelled by hunger,' but the major rupture which marked a reversal of values only occurred in the twelfth century. The sudden theoretical problematisation of property and property rights, the existence of which was once understood as the necessary consequence of the introduction of sin into the world, combined with a transformation

of the notion of poverty itself, were not solely derived from scripture or the reappropriation of the church fathers. It was rather the reverse that was true: the doctrine emerged at a time of famine, disease and revolt that not even the safety-valve of the Crusades could diminish and which sent jurists in search of the means to immunise the destitute from the accusation of theft. Couvreur notes that England experienced twelve serious famines during the thirteenth century, the most severe of which, in 1235, killed 80,000 people (p14). At the same time, the struggle of the lords to extract higher rents and longer service led to landlessness, poverty and vagabondage. It was the spirit of anger and desperation that led a section of the clergy to seize words and phrases and, tearing them out of their original scriptural or legal contexts, to inscribe new meanings on them.

There is perhaps no more important example of this than a group of Roman aphorisms, which initially described inevitable states of fact over which law had no power, but which reappeared in the Gratian's *Decretum* (1140) as legal principals or norms: *Necessitas non habet legem, sed ipsa sibi facit legem* (Because necessity has no law, it can itself make law), *Quod non est licitum lege, necessitas facit licitum*, (Necessity renders lawful that which was unlawful) and *Necessitas excusat* (Necessity excuses).¹⁶ As Couvreur notes, these statements re-emerged in the debates over the question of whether it was permissible to celebrate the Mass in an unconsecrated place if necessity made it impossible to do otherwise, 'but Canonists soon used it as a general principle (*règle*) of law in the case of theft as in other domains' (*Les Pauvres*, p.67).¹⁷ While Gratian did not directly suggest the application of the notion of necessity to theft in cases of starvation, he nevertheless opened the way to such an application by the inclusion of a statement he mistakenly attributes to Saint Ambrose (340-397): 'Feed anyone who is dying of hunger. For if you are able to feed him and do not do so, you have murdered him' (*Pasce fame morientem. Quisquis enim pascendo hominem servare poteris, si non paveris, occidisti*).

In this way, Gratian, whose aim was to reconcile the apparently discordant judgments that together made up canon law, in fact established a divergence in the approach to the phenomenon, increasingly common in his time (the twelfth century), of those faced with starvation. On the one side, it is to those who are not starving, particularly the rich, with their large surpluses, that both agency and responsibility for the lives of the destitute are imputed by the law. This was for a time the dominant view, undoubtedly because, at least in part, it left the legitimacy of property, irrespective of the severity of the subsistence crisis, intact. But it placed the poor in the position of waiting for the bounty of the rich, their only satisfaction knowing that in the case of their death, the rich man who could have helped but did not, might be charged with murder or, more realistically, left to the judgement of God. On the other side, as hunger, homelessness and the diseases that followed became more common, there emerged a questioning of property itself, the conditions of and limits on the ownership of the necessities of life, above all, food, as well

16. See also Seneca the elder, *Controversiae IV*, 'Necessity is the law of the moment. Is anything illegal which is done on the law's behalf?' (*necessitas est lex temporis. Quicquam non fit legitime pro legibus?*) and Pollibius Syrus (85-53 BCE), *Sententiae*, 'Necessity makes law but acknowledges none' (*Necessitas dat legem, non ipsa accipit*). See also Joseph Fabrisch, *Essai sur l'état de nécessité*, Paris: Paul Legendre, 1903 and Philippe-Jean HESSE, UN DROIT FONDAMENTAL VIEUX DE 3 000 ANS: L'ÉTAT DE NECESSITÉ, *Droits fondamentaux*, no. 2, janvier - décembre 2002.

17. Giorgio Agamben, *The State of Exception*, (trans) Kevin Attell, Chicago, University of Chicago Press 2005. (Hereafter *Exception*).

as the rights of those who are starving if the failure of the rich to do their duty has placed them in immediate danger. If, under these circumstances, they take surplus food that belongs to another, does the act constitute theft? Can those who are in danger of dying take what is necessary to their survival from those who are, and will not, be, even as a consequence of the removal of their property, in any such danger, be condemned (by canon law to do penance or by common law to suffer the amputation of an appendage or the loss of life)?

HUNGER AND PROPERTY: TWO TENDENCIES

At this point, it is clear that words themselves, under the pressure of economic and political forces, become a terrain of struggle between antithetical meanings. Necessity, property and even law become contested territory in the struggle between rich and poor. The antagonistic positions are not always clearly demarcated, nor are their effects necessarily different or opposed. We can, however, provisionally identify two tendencies, both of which develop unevenly, converging at times only to diverge again, driven by internal conflict that was itself a continuation of the struggle outside, the war that was waged merely to go on living.

The first tendency is marked by the effects of the difficulty (which clearly increases with time) of simultaneously defending a constellation of concepts at the centre of which is property, and the lives of the poor whose survival in times of 'extreme necessity' is incompatible with the right of the proprietor to dispose of his surplus as he sees fit. Under such conditions, the very meaning of property (other than property in land which tended to be regulated by a complex combination of feudal and pre-feudal laws and customs), not only as a legal concept, but in its logical and perhaps metaphysical senses began to fracture under the weight of crises and resistance, if not revolt. Could the fruits of the earth given by God to all mankind be legitimately withheld from the destitute by their owner on the grounds of his ownership alone? Did the proprietor have the right as owner to sell his wheat at the highest price he could find or withhold it from the market altogether until the price rose to the level he regarded as its maximum, even if a significant part of the population could not pay that price? Was the proprietor immunised, that is, released from the responsibility of the *munus*, the shared sacrifice that made community (*communitas*) possible? The initial impulse of theologians and legal scholars was to save the institution of *dominium* from the owners themselves who were increasingly abandoning their duty to the poor. The founding theological reference here was Augustine: not only to his defence of private property as a bulwark against the covetousness and greed that entered the world with the first sin, but his very explicit declaration that the surplus of the rich cannot be justly taken from them against their will, even with the aim of distributing this surplus to the poor.¹⁸ The idea of violating

18. Augustine,
Contra Mendaciam,
1.7.18

the prohibition against theft that is both a direct commandment by God and a universal principle of human law, to alleviate corporeal suffering appeared untenable. The solution lay in finding the means to place a part or, under certain circumstances, all of the rich man's surplus at the disposal of the poor without challenging his *dominium* over it.

Such a solution would require great ingenuity even from those skilled in casuistry. The first line of attack concerned the duty of the rich. The failure of the rich to take immediate measures to prevent their fellows from dying of starvation could no longer be regarded simply as a misfortune of the latter. Gratian had rescued from oblivion and thus made available the passage attributed to St. Ambrose cited above: 'Feed anyone who is dying of hunger. For if you are able to feed him and do not do so, you have murdered him'. While the poor man who steals what is necessary to his continued existence, or risks his own life to obtain food for a sick parent or child who is in danger of perishing without it, is guilty of theft and liable to punishment, the rich man who withholds food from an individual who later dies of starvation is to be held responsible for the death he could have prevented and therefore guilty of the far worse crime of murder. Couvreur notes how perplexing Gratian's rehabilitation of this doctrine proved to be for the Canonists: was the application of the category of murder to the rich man's indifference to the poor to be taken literally? But the assault, directed less against the legal definition of property than on the conduct of the proprietor, had just begun. Has not the rich man, by withholding from the destitute individual the food without which he and perhaps his dependents cannot survive, placed before the poor the choice of stealing or dying? And if so, unless we believe like Cicero that an honourable man would prefer death to the dishonour of committing a theft,¹⁹ we must conclude that he who is able to feed the starving man by virtue of the surplus he possesses but fails to do so is at the very least complicit in the theft, if not its primary cause, in that his actions have helped create the state of need. Had he done his duty to the poor as he has been commanded to do by God, there would have been no reason for theft.

But the partisans of this perspective did not simply concentrate their efforts on the duties of the rich; they also sought ways to indemnify the poor or at least grant them dispensation after the fact for acts necessary to their survival but contrary to the law. Even if the participation of the rich man by virtue of his abandonment of those in dire need in the crime itself could not exactly exculpate those who committed theft, the ingenuity with which certain scholars were able not only within the law, but using its own terms, to protect those who stole to save their own lives or the lives of those they were duty bound to defend is striking. Couvreur notes that variants of a single hypothetical case were debated in London, Paris and Rome at the end of the twelfth century: cannot a man in all justice steal food to feed his starving father, to whom he owes filial piety, and who will die without it (*Les Pauvres*, p9-11)? Some scholars responded with the familiar argument that it is not

19. Cicero, *De Inventione*, I, 11, chapter 58.

permitted to commit sin in order to obtain a good and that it is repugnant to the respect owed to one's father to give him what has been stolen from another.²⁰ An obscure figure, Maître Martin, a lecturer in Paris about whom little is known, left a written record of his determined rejection of this view in the form of two arguments. First, because the man who steals to feed his starving father is not guilty of possessing or profiting from the stolen goods, he cannot be guilty of theft, on the condition that he later makes restitution (an allusion to Proverbs 6:30-31). Second, as long as the 'thief' made a thorough attempt to obtain the owner's permission to take the food his father needs, but was unable to find him or his heirs, taking the food under conditions of extreme necessity cannot be considered theft.

20. Pierre de Poitiers, *Sententiae* 2.16.

These arguments may appear surprising to many present-day readers, but they were thoroughly grounded in Roman law (see the Digest of Justinian, lxxvii, 2-*de Furtis*) and its far more restrictive understanding of theft (*furtum*) in assessing cases in which individuals take something over which another individual has *dominium*. Martin's argument in fact served to inspire one of the most passionate advocates for the poor at the end of the twelfth century, Huguccio of Pisa (d. 1210), to take the argument one step further. What if the starving pauper succeeds in finding the owner of the food he (or his ailing father) requires to go on living, but the owner explicitly refuses to grant him permission to take what is necessary for his survival? The proprietor of the food might at this point be condemned for his failure to do his duty to his fellows; he might even be judged guilty of murder if anyone were to perish as a result of his refusal. But what of the pauper? How can he justly take the food refused to him by its rightful owner, above all, if he can be sure that the owner will be duly punished by the proper authorities for his crime: is the pauper now condemned to acquiesce in his and his father's death whether he does so, following the advice of Cicero, out of honour, or because he cannot bring himself to violate God's own commandments and commit what remains an illicit act?

Huguccio's solution to this problem is quite extraordinary and merits some discussion:

When someone acts out of necessity, he does not commit theft, in that he supposes, or ought to suppose, that the owner has given his permission' (*Si quis per necessitatem nec comittit furtum, quia aut credit, aut debet credere dominium esse permissurum*).²¹

21. Huguccio, *Summa Decretum*, Couvreur, 84-85.

Huguccio thus preserves the law but only by turning it against itself, carrying out what is in fact a revocation of the proprietor's dominium over the things he owns by crediting him with, or imputing to him, a will the existence of which the *dominus* himself does not recognise, to fulfil his duty to the poor. In this way, the starving man by taking food from the owner who perversely refuses to give it to him voluntarily, saves the owner from both the sin and the crime he would have been guilty of committing had the theft not occurred. This is

obviously directly opposed to the sense of imputation developed by Kant six hundred years later, namely the attribution of responsibility to an individual who must be treated as, or rather as if, he were the *causa libera* or free cause of his actions in that he can be regarded as the sole author of the act for which he may then be held accountable. Huguccio offers instead the possibility that the pauper by imputing to the proprietor the will and intention to give him what the proprietor, according to the *munus* required of him, owes the pauper, and further by demonstrating the owner's just intention by taking the food he has requested, interpellates him as a just individual who has done his duty (by means of his agent, the pauper, whose actions must be credited to the account of the owner). In this way, both the pauper and the proprietor are saved by the former's taking what is necessary to his subsistence, the one from starvation and the other from criminality and sin.

Thus, we see in this tendency an attempt to preserve property right even in the state of need (*necessitas*), if only in a formal sense, as if its purpose were, by emphasising (and multiplying) the obligations of the proprietor to the starving, obligations that were legally enforceable, to defend the notion of property. The owner who refused to fulfil these obligations not only exposed himself to a legal complaint by the poor, but would be supplanted by the persona the law demanded him to be, he who consented to grant the poor access to his surplus in times of crisis.

Was the second, opposing, tendency then a rejection of law altogether, an approach according to which the solution to the unequal and, in a crisis, fatal distribution of food was the state of exception in which law as such is suspended (but only for the duration of the emergency) and the poor will take what they need from a supply that in the space of the exception belongs to no one? And we must be clear that 'belonging to no one' does not have the same significance as 'belonging to everyone,' if 'belonging' is understood as something more merely having something in one's possession without any privileged or exclusive/exclusionary relation to it. Such a solution, far from giving rise to a Hobbesian state of nature, that is, a condition of disorder and the war of every man against every other man, in this historical period rendered the poor, insofar as they took what was necessary to their survival, an instrument of divine providence and the means by which the order or equilibrium disturbed by war, famine or drought would be restored.

The second tendency may be differentiated from the first, above all, by the shift from the obligation of proprietors to the right of the destitute. In part there is an increasing distrust of the rights granted to the owners of the stock of food, given their inability or unwillingness to distribute their surpluses even in the case of famine. But from this fact, which occasioned outrage among the canonists, came the realisation that laying obligations upon the rich (with or without earthly penalties) in no way guaranteed that they would in fact open their granaries to save the poor from death by starvation. In essence, a position that relied on preaching to or, as time went on, threatening them with

eternal damnation or acts of penance, simply abandoned the hungry to the vagaries of the proprietor's conscience. The only effective way to distribute the necessities required to allow the poor to survive in a condition of dire need was 'to authorise the destitute themselves to take what was necessary to save their lives' (*Les Pauvres*, p110). Even here, though, the legality of property was not necessarily called into question: Huguccio advanced an argument similar in form to the case of the starving man unable to find the proprietor of a supply of food. In this case, a pauper may not be able to find a magistrate to issue a legal order, a *condictio ex lege*, that is, a manner of enforcing an obligation in the case that there is no prescribed penalty for a failure to fulfil it (p118). The necessity of taking the food that belonged to another was compared to self-defence and just war, cases in which one is permitted to engage in what would otherwise be an illegal action when there exists an immediate threat to one's life. Thus, by the end of the thirteenth century, there had emerged a general sense that in cases of dire need it was both legal and just for the destitute to take another's property without permission. It was inevitable that property right itself would be called into question.

It was precisely in this conjuncture, around the beginning of the thirteenth century, that the pronouncements of Basil the Great (330-379), who himself lived through a time of famine and drought in the Eastern empire, took on a renewed significance. The sermons that had earlier appeared as exhortations to the rich to use their wealth to relieve the sufferings of the poor, began to seem as if Basil had in fact proposed a radical reconceptualisation of property, especially as it was understood in Roman law. Indeed, few of his commentaries so directly and dramatically spoke to these concerns as the following:

Now, someone who takes a man who is clothed and renders him naked would be termed a robber; but when someone fails to clothe the naked, while he is able to do this, is such a man deserving of any other appellation? The bread which you hold back belongs to the hungry; the coat, which you guard in your locked storage-chests, belongs to the naked; the footwear mouldering in your closet belongs to those without shoes. The silver that you keep hidden in a safe place belongs to the one in need. Thus, however many are those whom you could have provided for, so many are those whom you wrong.²²

22. Basil, 'In Divites'.

What is striking in this well-known passage is not simply the obligation laid upon those who are able to help the poor, nor even the criminalisation of the failure to carry it out, as if the rich by withholding their surplus have hidden what no longer rightfully belongs to them. More important is the fact that Basil does not declare a nullification of property necessitated by a state of need, but rather reconceptualises property per se, especially property in those consumable goods, above all, food, that are necessary for survival, in order to destabilise the categories based on Roman law. To understand exactly how Basil does this, it is necessary to examine the text of his sermon, whose

specific characteristics cannot easily be rendered in English. The line ‘the bread which you hold back belongs to the hungry’ exhibits a construction that will be repeated three more times in the sentence, in relation to a coat, shoes and silver. First, we should note that the terms Basil uses to designate the form or mode by which the rich man (to whom Basil has addressed his sermon) owns or simply ‘has’ food or a coat, only secondarily denote possession. In the case of bread, the verb in the original Greek (Τοῦ πεινῶντός ἐστιν ὁ ἄρτος, ὃν σὺ κατέχεις) is κατέχω, which suggests, apart from possessing or having, the act of withholding, holding on to, keeping (as opposed to giving something away) and even concealing what one is keeping. The semantic range of the term used in the Latin translation of Basil’s works, *detineo* (the line is ‘*Esurientes est panis, quem tu detines*’), is similar to that of the Greek, in that it suggests that the object in question is held back and kept out of sight. Basil’s language intimates that what is commonly understood as property, at least the property of the rich, consists of things necessary to, but illegitimately withheld and hidden from, the poor. In the case of the bread withheld by the rich, what renders the withholding of it unjust is the fact that, as the English translation puts it, the bread ‘belongs’ to the hungry person, which suggests that Basil regards that person as the true owner of the rich man’s bread. In fact, ‘belongs’ is an interpolation: the line, in Greek or Latin, literally reads ‘The bread that you withhold is that of the hungry person’. There is no word for owning, for property or even for possession at all in the passage cited above, except for the highly ambiguous κατέχεις in the Greek version and *detines* in the Latin.

In fact, food poses particular challenges to ideas of property. Unlike land, a dwelling, tools or even animals, food cannot be the object of a *jus utendi, usus et fructus*, the right to use and enjoy something owned by another but without destroying its substance. Moreover, these categories leave the position of proprietor or *dominus* intact even if, as maintained by the Franciscan order a century later, God was declared to be the absolute *dominus* and the world and everything in it his dominion. The destitute individual’s food is his by virtue of *jus abutendi*, the right to ‘abuse’ (*abutor*, meaning to use up or consume and thus to destroy the substance of the thing). Indeed, without this right the mere possession of food would do nothing to aid in his survival. For Basil, it is rather the wealthy *dominus* who merely possesses the food without being able to use or consume it, as if he were temporarily holding another’s property which must be restored to its rightful owner on demand.

But is this not another way of preserving the regime of property right by returning the goods in question to their true and legitimate owner to use and abuse as he sees fit, in which case, the poor stand to benefit from this regime? The answer lies in the nature of the origin and foundation of *jus abutendi* that Basil, and with him Gratian, denies the rich man and bestows upon the pauper. What gives the latter the right to take and consume the food which the rich man must yield to him is precisely the fact that it is an object of need for him, an object without which he cannot go on living,

while for the rich man it is surplus. The effect here is to detach property in the fullest sense (*dominium* understood as *jus abutendi*) from the person and attach it instead to the condition of need or the relation of surplus to need. If the starving person is no longer starving, he ceases to have any claim to the surplus food another possesses, just as the existence of starving people deprives the possessors of any right over their surpluses and compels them to hand them over to those in need on demand. We are very close indeed to the notion of 'to each according to his need'. This also explains why Basil makes no mention of the right of the destitute to steal to survive. Such a right would be superfluous: the poor can no more be accused of theft in the act of taking what is necessary to their continued existence from the rich man's surplus, than someone retrieving lost property from the person who found it and is holding it for him. Once again, the implicit threat is quite palpable: if the rich man withholds from the poor what is theirs, he has stolen from them, in which case he can expect that they will come and take from him what is rightfully theirs by virtue of their urgent need.

Such might appear to be nothing more than an anachronistic projection of Marx onto one of the church fathers as read by Gratian and the Decretists of the twelfth century. But Couvreur, perhaps anticipating such a reaction, cites a 'violent' condemnation by the Archdeacon of Bath, Peter of Blois (1135-1203) of both the laws regarding theft by reason of severe poverty and the penalties typically imposed for such a crime. The particular case that outraged him was that of a pauper who, barely clothed and acutely malnourished himself, could not bear to see his wife and children dying before his eyes during a famine, and resolved to steal something of value that could be sold to obtain money for food. The pauper was caught during the commission of the crime and sentenced to death (the customary punishment for theft of an object of more than a minimal value). Peter demanded to know how is it that the theft of food (or the theft of an object whose sale would allow the thief to buy food) by a starving person could be called 'theft?' Is it not rather the wealthy who, by withholding their surplus from those who will perish from hunger without it, are guilty of a crime, namely the crime of murder? Further, can it be a crime for a person to steal food for a third party, whether one's family or a stranger, who is in danger of death by starvation? Is it a crime to steal an object in order to sell it if the proceeds are used to purchase food (or shelter or clothing)?

To understand the theologico-political positions inscribed in these statements, we might return to the maxim rescued from oblivion by Gratian: Because necessity has no law, it can itself make law (*Necessitas non habet legem, sed ipsa sibi facit legem*). The maxim takes the form of a paradox: Necessity makes (*facit*) but does not have (*habet*) law. Does it then 'have' the law that it makes? And if so, are we then to assume that having a law and being governed by it are the same thing? The precise wording of the maxim seems to suggest that necessity does not have, or perhaps more accurately have as its property, the law that it itself produces. In some sense, to designate law as something necessity does

not possess, while declaring that necessity makes law and does so necessarily, is to draw a line of demarcation within the concept of law (*lex*). On the one side, law is defined as an edict or decree that establishes what should be, but in fact may not be; as such it is external to the existing state of affairs, as the norm is separate from fact. This is the law necessity does not have. On the other side, however, is not lawlessness but the law that necessity makes, a law that cannot be situated outside of what necessarily exists to establish rules that may be disobeyed. It is possible, then, to see in the maxim (or in the effects that it produces) the notion that if necessity *has* no law, it is because necessity *is itself that law*, as if necessity and law are one and the same thing. From this perspective, to make law is simultaneously to overcome its merely potential existence as a norm and bring about its realisation in fact. It is not enough to decree that the surplus supply of food held by the rich man is legally the property of the poor; the poor driven by vital need must be authorised to take it. This is the law that necessity makes, the law immanent in life itself, especially when it resists death that can exist only in an actualised form.

According to Giorgio Agamben, both Gratian and Aquinas regarded necessity as the means ‘to justify single, specific case of transgression by means of an exception’ (*Exception*). But such a reading sees in the maxim *Necessitas non habet legem*, a declaration of the necessary lawlessness of necessity: where necessity is, law cannot be, insofar as necessity for as long as it is present, suspends or negates what he calls the legal order. Moreover, the legal order is opposed to a natural order which, for Hobbes and later Schmitt, is in fact the absence of order, just as the life at stake in these disputations is from Agamben’s perspective merely *la nuda vita*, the life, stripped of what is properly human, that we have in common with beasts. But nowhere in these debates do we find the notion of a setting aside of the system of law in order so that the violence necessary to the restoration of order will permit this system to operate once again. On the contrary, Aquinas, argues that to take another’s property (literally ‘thing’ or ‘things’) in a condition of urgent need is not a sin. This is not because the law has been or indeed could be suspended, in which case no transgression could occur, but on the contrary because necessity makes the things that were otherwise ‘another’s’ common (*propter necessitatem sibi factam commune*).²³ The fact that ‘the division and appropriation of things... are based on human law’, cannot be allowed to hinder an individual from taking what is necessary for life. Thus, for Aquinas, there is no lawless condition; such a condition would only allow the wealthy to continue to withhold their surplus from the poor. Instead, necessity operates within law to make it diverge from itself in the form of a counter-law, which here Aquinas calls natural law. But can we understand the relation between human law and natural law as a form of transcendence, as if natural law exists prior to and outside of human law, the set of norms against which human law may be judged? *Necessitas* neither nullifies ‘law’ as if law were, as Hobbes said, mere words, nor does it bring about a reversion to a more primary law, the real or more real law behind civil law. We should

23. Thomas Aquinas, *Summa Theologica*, II. II. 66, 7.

acknowledge the literal meaning of Aquinas's words, which echo the epigram: necessity makes law in the same movement by which it makes itself. The origin of law in this sense lies not in the groundlessness of sovereign decision, but in what necessity 'makes' or creates (the verb is '*facere*') from the materials salvaged from the wreckage of the existing law, shattered by the very operation of necessity itself. The outside of every law is another law, even if that other law, usually posited as discovered rather than made, as original and thus as the basis, even if superseded, of the present legal order, is invented after the fact and retroactively constituted as original. To answer Couvreur's question, the poor have rights only if the power to exercise these rights exists necessarily: there is no right without the power to realise its promise.

How are we to understand the meaning of Couvreur's book, not simply as a scholarly treatise on a now forgotten right, and perhaps on the idea of right itself, but as an intervention in the conjuncture in which he wrote? Perhaps it was his way of participating in that struggle so marked by Fanon, his 'prisoners of starvation' composed in counterpoint to *The Wretched of the Earth*. But unlike Fanon who often wrote without materials at hand as he moved from place to place and whose books were weapons designed to explode on contact, Couvreur slowly and patiently chose every scrap and fragment he could salvage from the ruins of that long-forgotten debate to fashion the theologico-political equivalent of a roadside bomb, an improvised explosive device. Disguised as a bundle of dust-covered papers on which are written lines of incomprehensible words, and placed carefully on the side of the road, it has remained to this day unexploded. Past it walk once again the millions who seek to go on living but whose mere existence is an affront to those who are convinced that their surplus is rightfully theirs to withhold from the destitute. The road these millions follow winds through the same deserts, over the same mountains, down to the same sea, across which awaits the same hatred and the same misery. What will detonate this book and release its power? We cannot know what or who will set it off or, once detonated, what armour it will pierce, what walls it will penetrate, what windows it will shatter. Unless, that is, the bomb that Couvreur constructed with such precision has already exploded, its fragments hurtling toward the fences that stand between life and death.

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