

SAMUEL PUFENDORF AND THE RIGHT OF NECESSITY

“[I]t is an easy matter to talk philosophically, whilst we do not ourselves feel the hardship any farther than in speculation.”¹

From the end of the twelfth century until the middle of the eighteenth century, the concept of a *right of necessity* –i.e. the moral prerogative of an agent, given certain conditions, to use or take someone else’s property in order to get out of his plight– was common among philosophers, who took it to be a valid exception to the standard moral and legal rules.

In this essay, I analyze Samuel Pufendorf’s account of such a right, founded on the most basic instinct of self-preservation and on the notion that, in civil society, human beings have certain minimal duties of humanity towards each other. To put this analysis in context, I offer a brief synopsis of Pufendorf’s secularized account of natural law, his conception of the civil state, and the function of property laws within it. I then turn to his criticism of Hugo Grotius’s understanding of the right of necessity as a retreat to the pre-civil right of common use, and defend his account against some recent criticisms. Finally, I turn to the conditions that the author deems as necessary and jointly sufficient for this right to be *morally enforceable* (by which I mean claimable by actual force²), and conclude by pointing to the main strengths of this Pufendorffian right of necessity.

The law of nature

For Pufendorf, the most basic fact about human nature is our desire of self-preservation, which we share with other animals and is so strong that it leads us to resort to all sorts of means to secure it. Unlike other animals, however, we are too feeble to preserve ourselves without the help of others, while at the same time are prone to harming others and doing mischief. This “wonderful impotency and human indigence”³ coupled with our strong desire of self-preservation, gives rise to the first principle of the law of nature: that “every man ought, as far as in him lies, to promote and preserve a peaceful

¹ Samuel Pufendorf, *The Law of Nature and Nations* II.VI.7, p. 210 (hereinafter, Pufendorf 1729).

² As opposed to *legally enforceable*, i.e. as established by human laws.

³ Pufendorf 1729 II.III.14, p. 136.

sociableness with others, agreeable to the main end and disposition of human race in general.”⁴

Sociability is, then, the most fundamental prescription of the law of nature, and our duties to ourselves and to others derive from it.⁵

Depending on their source or origin, the latter are divided into *absolute*, and *hypothetical*. Pufendorf thinks of duties as attaching to persons in virtue of our different *statuses*.⁶ According to this, absolute duties oblige us under our status as human beings, independently of any human arrangements. They are basically three: not to harm others, to treat them as equals, and to benefit them as much as we can. Hypothetical duties, meanwhile, are created through human compacts, and attach to the specific statuses we acquire in relation to them (for example, as parties to a contract).⁷

Starting from the Grotian distinction between *perfect rights* and *aptitudes*, Pufendorf also divides duties to others according to their form, in *perfect* and *imperfect*. Because universal compliance with perfect duties “conduce[s] to the very being” of society, while the latter “only to <its> well-being”, “the former may be required and executed by more severe courses and means; whereas, in regard to the latter, it is mere folly to prescribe a remedy more grievous than the disease.”⁸

The primary objective of perfect rights and duties is the protection of one’s minimal *suum*.⁹ Once we enter into civil society, they also protect our extended *suum*, that is, private property. From then on, transgressions into our extended *suum* are also considered as a violation of a perfect duty, and become punishable by law. As a contractualist, Pufendorf assumes that, by entering into civil society, we transfer certain rights that we used to hold in the state of nature (like self-defense) to the institutions, in charge from then on of protecting and enforcing such rights against prospective violations.

Although it may be conceivable to have a society where individuals merely abstain from encroaching into one another’s *suum* without further relating to each other, this is not enough to comply with the basic precept of sociability. To fulfill the latter, we have to further the good of our fellow-beings through the performance of “the common duties of humanity.”¹⁰ Based on the Ciceronian account of duties of beneficence, Pufendorf offers a full gradation of these, from the easiest acts of kindness to those whose performance is more costly and whose exercise shows a greater moral worth. Because we

⁴ Pufendorf 1729 II.III.15, p. 137.

⁵ Together with these, there are also our duties to God. Cf. Pufendorf 2003 I.IV, pp. 60-69.

⁶ Pufendorf 2009 I.III, pp. 26-38.

⁷ Cf. Pufendorf 1729 II.III.24, p. 152.

⁸ Pufendorf 1729 I.VII.7, p. 81. Henceforth, angle brackets enclose added text and square brackets enclose changed text.

⁹ “One’s life, body, limbs, liberty, good reputation, honor and one’s actions belong to oneself by nature.” (Olivecrona 2010, p. 210)

¹⁰ Cf. Pufendorf 1729 III.III.1, p. 233.

only have an imperfect right to this kind of acts, it is not proper to feel damaged by those who omit to perform them, neither is it morally permissible to exact their performance by force. There is, however, one important exception to this rule; that is when the right of necessity enters into the picture.

What property is, and what it is not

One of the big changes that civil society brings about is that individuals can extend their *suum* to external things other than what they minimally require to preserve themselves, through the institution of private property. Once this institution is in place, trespasses into the property of others are considered as trespasses into their *suum*, and thereby as a wrong or injustice to be corrected.¹¹ While, in the natural state, it is lawful even to kill someone who tries to take away one's minimal possessions ("without things necessary we cannot keep ourselves alive"¹²), in civil society this power is no longer regularly allowed: it is assumed that the individuals have given the civil authorities and institutions the right to act on their behalf. Trespassers are to be brought to the courts of justice instead, and it is only in exceptional situations –for example, when one is attacked by "highwaymen and night-robbers" (so that one cannot receive timely protection, or one cannot expect to bring them to justice) that self-help is granted.¹³

The function of property laws is twofold. The first is to avoid quarrels and feuds: as human communities grow larger and as people put more effort and ingenuity toward improving their quality of life, it is not possible to keep a peaceful sociability any more. It is thus necessary to assign to each the power of property over things, an arrangement that accords with natural law and with our human tendencies. The second is to promote individual industriousness.¹⁴ On one hand, this may be seen as a clear manifestation of Pufendorf's Protestant background and the work ethic underlying it. On the other hand, it is a sign of the growing faith on the beneficial powers of the nascent capitalist system, a faith that would see its culmination on Adam Smith's *Wealth of Nations*.

The institution of property, moreover, brings about a beneficial side-effect for morality: namely, that men are not limited to display their charitable endeavors through the exercise of their physical strength

¹¹ Cf. Pufendorf 2003 I.XIII.1, p. 137.

¹² Pufendorf 2003 I.V.23, p. 90.

¹³ Pufendorf 2003 I.V.23, p. 90.

¹⁴ Cf. Pufendorf 1729 II.VI.5, p. 207.

only (as in the natural state), but may practice their imperfect duties of humanity more extensively, disposing of their property at will and making their beneficiaries obliged to them by duties of gratitude. Not surprisingly, Pufendorf strongly objects to those who accumulate their property without sharing it with others, as this is a distortion of its original function. The epithets he uses to characterize them are as strong as those he uses against those too lazy to strive for their own sustenance: “Such great churls are like swine, good for nothing till they are dead;” “<those> are indeed the great impediments of society, and the plagues of mankind.”¹⁵

The right of necessity

In a recent essay, Scott Swanson refers to Pufendorf’s account of the right of necessity in far from laudatory terms: “<Pufendorf’s> provisional and not particularly satisfactory exposition of the principle, in fact, offers the perfect example of a deeply-held ethical belief in search of a plausible justification.”¹⁶ Another commentator, John Salter, says that Pufendorf tried but “failed to produce a coherent alternative to the Grotian theory.”¹⁷

In this section, I defend Pufendorf against Swanson’s and Salter’s criticisms, and purport to show that these are misdirected: contrary to their views, I suggest that his account of the right of necessity is in fact more satisfactory and coherent than Grotius’s, even though it presents problems of its own.

The rejection of Grotius’s argument

Grotius secularizes the standard justification given for the right of necessity by Christian theologians and canonists, based on the belief that the right of necessity was a retreat to the original right of common use: because the earth had been given by God to all humankind, in this pre-civil state no one owned anything in particular, but everyone was free to take whatever was needed for their immediate consumption. Pufendorf finds that there are three major difficulties with this proposal.

First, it leaves the needy as fair game for the equally needy. If, in the natural state, there is no criterion

¹⁵ Pufendorf 1729 III.III.2, p. 234; and Pufendorf 1729 III.II.4, p. 16.

¹⁶ Swanson 1997, p. 431.

¹⁷ Salter 2005, p. 284.

to demarcate one's possessions (however fleeting these may be), Pufendorf thinks that the outcome is that might makes right: the stronger and more dexterous may easily exercise their right to help themselves from the fruits of the earth, and this does not seem to exclude the possibility of grabbing from those who have already appropriated some things for their own consumption. With no agreements (explicit or tacit) in place, there is no guarantee that even the most basic act of appropriation will be respected! Physical strength then seems to determine who gets to exercise his right of common use and, therefore, his right of necessity.

Second, Grotius's proposal cannot justify the duty of restitution. For, why should I be obliged to compensate under this scheme when I have limited myself to taking a thing that I was entitled to in the first place? If the right of necessity is a mere *privilege* in a Hohfeldian sense (which seems to be Grotius's idea), then the duty to compensate would be an imperfect duty of gratitude, highly commendable but never enforceable.¹⁸

Third, Grotius ignores the moral innocence of the agent as a necessary condition to rightfully invoke necessity. By this omission, "a right seems to be given to idle knaves, whose vices have brought them into want, to seize forcibly for their own use the fruits of other men's honest labors."¹⁹ If moral innocence is not required, these idle knaves will have no incentive to work and leave their abject condition, thus putting a permanent strain on the laborious, who will be forced to feed "such useless bellies for nothing."²⁰

So what does Pufendorf propose instead?

The pull of self-preservation

According to Pufendorf, the justification for the right of necessity springs from a single principle: "that it is impossible for a man not to apply his utmost endeavor towards preserving himself; and that therefore we cannot easily conceive or suppose, such an obligation upon him, as ought to outweigh the desire of his own safety."²¹

Because self-preservation is of so much regard for human beings, and because it is presumed that those

¹⁸ A *privilege*, in Hohfeldian terminology, means that A is at liberty or has no duty to ϕ or not to ϕ , and that others have no duty to let A ϕ or not ϕ . Cf. Hohfeld 1913, p. 32.

¹⁹ Pufendorf 1729 II.VI.6, p. 208.

²⁰ Pufendorf 1729 II.VI.6, p. 208.

²¹ Pufendorf 1729 II.VI.1, p. 202.

who laid down the laws had as their main aim the safety and convenience of humankind, “we may suppose them, generally speaking, to have had before their eyes the weak condition of human nature; and to have reflected upon the impossibility which every man lies under, not to avoid, and to drive off, all things that aim at his destruction.”²²

It is upon this assumption about the original intentions of the first legislators that human laws are judged to except cases of necessity; that is, “not to oblige, when the observance of them must be attended with some evil, destructive of our nature, or exceeding the ordinary patience and constancy of men.”²³ Rather than saying that necessity allows us to violate the law, Pufendorf claims that it is “not comprehended in the general words of a law.”²⁴ Exceptions of necessity are approved, then, to prevent human laws from receding too much from natural law, to the point where following them would bring about a morally undesirable or even morally repugnant result. The duty of the judicial authorities, therefore, is to recognize when this exception arises and to accept it, on the presumption that –had the original legislators been in their place– they would have themselves approved of the exception.

Therefore, although respecting the law does indeed bring about most of the time that peaceful sociability which is the first precept of the law of nature, there are occasions –like these– where, to deviate as little as possible from natural equity, an exception has to be granted.

The Pufendorffian right of necessity is so in a double sense: the first and most obvious one is that it is a right that the person has to certain external things in order to preserve herself or her minimal *suum*. In this sense, *necessity* is a synonym for *need*; more precisely, *material need*. In another sense, it is a right of *necessity* because the person is not thought to be entirely free to choose her actions, when subjected to such a state. Because acting otherwise would go against her most basic instinct, this right might be said to be to some extent *necessitated*, in that it derives from a natural pull that admits no intervention of the human will (heroes and saints excepted), “[s]ince to throw off the love and care of ourselves is justly ranked amongst impossible attempts; or however amongst such as surpass the common strength of men’s souls.”²⁵

This is why Pufendorf criticizes those who qualify those acting on necessity as committing theft. This would be the case, he thinks, if the person were to derive any gain from it. In cases of necessity, by

²² Pufendorf 1729 II.VI.2, p. 203.

²³ Pufendorf 1729 II.VI.2, p. 203.

²⁴ Pufendorf 1729 II.VI.2, p. 203.

²⁵ Pufendorf 1729 II.VI.2, p. 203.

contrast, the person exercises this right “purely for the relief of his extreme distress”²⁶. Similarly, in cases where the authorities neglect their duties toward their citizens under extreme circumstances (for example, by not demanding that the suppliers open their granaries in times of famine), the needy are under no duty to starve: if they take what they need from the granaries, they commit no theft. Necessity is thus clearly recognized as a valid exception from human laws. But what about natural law? Can necessity ever allow one to ignore its precepts? To answer this, Pufendorf divides natural duties in *affirmative* and *negative*: respectively, those that oblige us to engage in certain actions, and those which require us to abstain from certain actions.

For affirmative precepts, the exception of necessity holds in cases of extreme material want: when one’s very self-preservation is at stake, the power of acting (which is supposed to be one of the requisite conditions for the performance of these precepts) is absent: it should not be presumed that the person is under a duty to help others when doing so endangers her life. So, for example, a person is under no duty to give away her last loaf of bread, when she requires it for her very sustenance.²⁷

For negative precepts, meanwhile, Pufendorf rejects that necessity –understood as extreme material want– gives us a right to take the possessions from someone under equally, or almost equally, dire straits (in fact, this is one of the four conditions he sets to limit the exercise of this right).

Thus, the right of necessity allows us to keep for ourselves our minimal *suum* against others who are equally or almost as equally needy. At the same time, it forbids us from taking the minimal *suum* of others who are are equally or almost as needy.

The justification for the use of force

Grotius’s focus while discussing the right of necessity is on what the needy may do for themselves; namely, taking and using someone else’s property, which under those circumstances is not considered as part of the latter’s extended *suum* any more, but as common property, as in the original state. But he omits discussing two important points. First, he says nothing about what the owners of the resources needed ought to do in those situations. Second, he never discusses the possibility of the needy resorting to the use of actual force.

²⁶ Pufendorf 1729 II.VI.7, p. 210.

²⁷ Cf. Pufendorf 1729 II.VI.2, pp. 203-204.

On the contrary, Pufendorf has quite a lot to say on each topic. For one thing, he underlines the active role to be played by the potential helper or owner of the resources needed, provided that he is not in equal straits. It is on the basis of the law of humanity that “any one whatsoever is bound, when not under an equal necessity, to the extent of his power to come to the aid of a second person placed in an extreme necessity.”²⁸ When confronted with someone in extreme necessity, humanity demands that we do what is in our power to do to aid that person, either through our direct involvement—as when we can easily save someone from drowning—, or through our material aid, when the other is in a situation of extreme want.

In fact, when what is required is material aid, Pufendorf claims that “necessity gives the authority to claim this aid *in very much the same manner* as we claim the things to which we have a right.”²⁹ The force of necessity is such then that it prevails over the considerations which normally prevent us to claim by force what is only owed to us as a matter of humanity. Necessity, as it were, changes the very *form* of this duty, otherwise imperfect, into an enforceable duty to aid; a duty to the performance of which the recipient has a morally enforceable right: “[T]he wealthy person is bound to relieve him who innocently wants, by an imperfect obligation; to the performing of which though regularly no man ought to be compelled by violence, yet the force of extreme necessity is so great, as to make these things recoverable *by the same means as those which are truly and rightfully due*: that is, by making complaint to the magistrate, or when the urgency of the distress cannot allow time for such an expedient, then by seizing what is ready at hand, in a secret or in an open manner.”³⁰

To use the Hohfeldian terminology once more, it could be said that Pufendorf understands the right of necessity as a *claim*, which is correlated with a *duty* that may be morally enforced.³¹ It is not that the needy simply has a *privilege* to use or take someone else’s property, as in Grotius’s story, with nobody having a duty to provide what she needs. What Pufendorf is saying is much stronger: in situations of extreme need, the very *form* of humanity, which is under normal circumstances that of a morally non-enforceable duty, is modified, and becomes that of a duty claimable by force. In these exceptional situations, the remedy—to bring back Pufendorf’s own metaphor—is no longer more grievous than the disease (namely, to force the agent to perform a duty which should serve to display his moral virtue

²⁸ Pufendorf 2009 II.VI.6, p. 239.

²⁹ Pufendorf 2009 II.VI.6, p. 239 (my emphasis).

³⁰ Pufendorf 1729 II.VI.6, pp. 208-209 (my emphasis). Cf. also: “When the necessity has merely to do with the property of the other, or when our life can be saved only by the property of the other, there is scarcely any doubt but that, when no other means are available, this property can be appropriated by force, and against the will of the owner, who is not under pressure of the same necessity.” (Pufendorf 2009 II.IV.7, p. 331)

³¹ A has a Hohfeldian *claim* against B to ϕ , iff B has a *duty* toward A to ϕ . Cf. Hohfeld 1913, p. 32.

freely).³² On the contrary, what would be grievous is to endanger someone's self-preservation just because the agent is too indolent, stingy, or plainly malicious to succor the person in need –either by helping her out, or by letting her take or use a part of his property.

One could apply here the notion of *moral liability* used by Jeff McMahan to cases of killing in war. For McMahan, a person is *morally liable* to be killed when he has “acted in such a way that to kill him would neither wrong him nor violate his rights, even if he has not consented to be killed or to be subjected to the risk of being killed.”³³ Analogously, in Pufendorf's account of the right of necessity, the owner becomes liable to having his property used or taken away by the needy, if he fails to comply with his corresponding duty of humanity. This implies that the needy may take or use his property without wronging him or violating his rights, even if he has not consented to this, and even if he does not consider himself to be the party in a position to help.

This fits neatly into Pufendorf's overall moral theory, with its emphasis on sociability. In order to have a functioning society, it is not enough to abstain from harming others directly, but sometimes we are required to actively do things for others. Underlying this is the idea of reciprocity: because any of us may one day become the party in extreme need, it is only sensible to accept that humanity –though only exceptionally– may be enforced, thus serving as a safety net.

An incongruous theory?

At this point, Scott Swanson accuses Pufendorf of letting his argument “come to rest, ark-like, on twin-peaks of contradiction”: “[he] teaches that a man who fails in his obligations to succor the poor deserves to forfeit his property, but he never explains why extreme necessity entitles a person to press a claim that is not a right as though it truly were a perfect right, let alone why a magistrate might dispossess a person of something he holds by perfect right (...) His theory of property rights renders claims in extreme necessity incoherent; his theory of claims in extreme necessity renders absolute property rights incoherent. He is unwilling to give up either principle, and he is incapable of resolving one principle into the other. So he simply asserts them both.”³⁴

Swanson's criticism rests, however, on a twin-peak of misunderstandings.

³² Cf. Pufendorf 1729 I.VII.7, p. 81.

³³ McMahan 2005, p. 386.

³⁴ Swanson 1997, p. 432.

On one hand, Pufendorf does explain why extreme necessity entitles the person to press as a perfect right what under normal circumstances is only owed to her imperfectly: as I have already mentioned, it is attention to the most basic pull of self-preservation, and to the assumption that human laws (and agents) have to take this fact into consideration to depart as little as possible from natural equity. On the other hand, Swanson misunderstands the role of property rights within Pufendorf's theory. This leads him to say, erroneously, that he "teaches that a man who fails in his obligations to succor the poor deserves to forfeit his property."³⁵ But Pufendorf never makes such a general statement; rather, he holds that those who fail on their duties to succor *specifically* those whose very self-preservation is at stake forfeit their right against them to a *specific* part of their property. It is only in these exceptional situations when the performance of an otherwise imperfect duty of humanity becomes morally enforceable.

Regarding property, Pufendorf is adamant that its function is to avoid conflict and promote industriousness, and it is to achieve these ends that it was originally established and is currently maintained. Contrary to what Swanson affirms, the right of property is not *absolute*. To recall, while absolute duties (and rights) are those that everyone has (or holds against) everyone else, hypothetical duties are adventitious and arise from human institutions. Accordingly, property falls into the latter category, and this makes it plausible to say that a person has a perfect, legally enforceable right over her property, which allows him to claim it against everyone else, and to have it defended by the civil authorities or even by himself, in some exceptional scenarios. This perfect and legally enforceable right, however, arises from a human institution, so that it is posterior to the most basic right that we all have to our minimal *suum*, and to the things necessary to preserve it. This is why, when a person's minimal *suum* is at stake, and her only way to preserve it is to take or use someone else's property –i.e. his extended *suum*–, the legally enforceable right of the latter is 'trumped' by the prior morally enforceable right of the former.

John Salter criticizes Pufendorf along similar lines. He says that, *contra* Grotius, and to avoid the abuse of the stronger over the weaker, Pufendorf founds the right of necessity on the imperfect duty of humanity of the wealthy, but he then asserts that, "*in extremis*, the poor can claim the surpluses of the rich 'on the same ground as things that are owed by a perfect right.'"³⁶ Salter takes this to mean that the right to property is conditional upon the performance of the duty of humanity, so that those who refuse

³⁵ Swanson 1997, p. 432.

³⁶ Salter 2005, p. 300.

to carry out the latter forfeit their otherwise perfect right, which is then transferred to the person in need. For Salter, this renders Pufendorf's account incongruous, and creates two difficulties: first, it undermines the key distinction between perfect and imperfect duties; and, second, it ends up granting the poor even stronger rights than Grotius.

To start, I think that Salter wrongly interprets Pufendorf as claiming that property is conditional upon the exercise of the duty of humanity. Rather, the author makes the legally enforceable right of property dependent upon the morally enforceable right to one's minimal *suum* which, in some exceptional cases, does correlate to a morally enforceable duty of humanity on those who are in a position to help. This holds even if it means making an exception to the human laws and the social mores, or going against them, when the laws exclude this exception, or when the people are too inattentive and indifferent to comply with even their most minimal requirements of humanity.³⁷

Regarding Salter's first criticism, he says that the distinction between perfect and imperfect duties is very important for Pufendorf, as it explains why imperfect duties give the rich the chance to display their kindness freely. But then, "this is entirely inconsistent with the idea that those who refuse to be charitable should lose their property, as if they are being punished for their refusal to show humanity."³⁸

Here, Salter makes a similar mistake to Swanson: namely, he implies that a failure to exercise the duty of humanity *in general* should result in the person forfeiting her right to property *as a whole*. But this is not the gist of Pufendorf's argument. Not to weaken the institution of property, under normal circumstances the author has good reason to leave the relief of the needy to the good will of those who can easily help them out, with no interference or external compulsion. When humanity has as its object not the mere benefit, but the very lives of others, however, there is a very good reason to make it compellable by force. To be sure, letting people display their imperfect duties freely is very important for achieving a harmonious sociability; but it is even more important to have a mechanism that protects people from being seriously harmed or even dying, especially when this can be secured at little cost to others.

Salter's second point is that, although he criticizes Grotius "for shifting the balance of rights and duties

³⁷ Cf., for example: "But now supposing under another government the like good provision {a duty of charity enforceable by law} is not made for persons in want, supposing likewise that the covetous temper of men of substance cannot be prevailed on to give relief, and that the needy creature is not able, either by his work or service, or by making sale of anything that he possesses to assist his present necessity, must he therefore perish with famine? Or can any human institution bind me with such a force, that in case another man neglects his duty towards me, I must rather die, than recede a little from the ordinary and the regular way of acting?" Pufendorf's answer is obviously no. (Pufendorf 1729 II.VI.5, p. 207)

³⁸ Salter 2005, p. 301.

too far in favor of the poor”³⁹, Pufendorf ends up giving the latter even stronger rights than Grotius. But Salter here misinterprets Pufendorf. The latter’s complaint against Grotius, after all, is not that his argument gives undue preference to the poor as such. Rather, it is that it leaves the door open for the needy to prey on the equally needy, and to the lazy and idle to prey on the hard-working. It is true, as Salter points out, that the right of necessity as Pufendorf conceives of it does give the needy the possibility to resort to force against the owners, something that Grotius never implies. But, again, it is not that the poor *in general* have free reins to go and grab the possessions of the rich, but only those who are *in extreme distress*, and who have appealed in vain to the humanity of the latter. Summing up, the main point of Swanson’s and Salter’s criticisms against Pufendorf is that, by letting an otherwise imperfect right to the humanity of others turn into a morally enforceable right, which may even trump the perfect right to property, the author creates a tension within his theory, rendering it incoherent. I have argued, on the contrary, that the right of necessity has to be understood as an exception to human laws, but as a necessary corollary of natural law. As long as these two different levels are duly acknowledged, Pufendorf’s theory no longer appears incongruous but, if anything, more realistic and attentive to the demands of specific moral contexts.

Four conditions

Pufendorf sets four necessary and jointly sufficient conditions to exercise the right of necessity. The first condition is that “we suppose the owner to abound.”⁴⁰ On the contrary, if he is just as needy or close to falling into an indigent condition, this right can by no means be claimed. It should be clear by now why this is so. What the right of necessity seeks to guarantee is that nobody falls under the minimal threshold of subsistence, and it does so through the acknowledgment that, when we are not under an equal necessity, nor close to it, we have a morally enforceable duty to aid those whose very self-preservation is at risk. This duty is fulfilled by letting them take or use our property, or by giving it to them directly. However, when giving away her possessions (or letting them be used or taken) is not merely an inconvenience for the agent, but a threat to her own minimal *suum*, this morally enforceable duty of

³⁹ Salter 2005, p. 301.

⁴⁰ Pufendorf 1729 II.VI.6, p. 209.

humanity is extinguished, as is the right of necessity of the other. Pufendorf makes this clear when asking whether necessity may except one from following the precepts of natural law: while affirmative precepts –i.e. helping others–, may be omitted without fault when one’s own life or preservation is at stake, negative precepts –not to harm others– must be respected even by those in extreme material need, so that taking from those just as needy is ruled out. If this right compelled the needy to give up their own self-preservation for the sake of those equally needy, it would be denying the very principle it is founded upon!

Moreover, if this exceptional moral prerogative is presumed to be part of any rational agreement between agents when entering civil society, it is easy to see why preventing the needy from taking from the equally (or nearly as) needy is left out of the agreement: “[T]he only question is, whether I am obliged by the bare law of humanity, to perish myself for the sake of preserving another: which is a paradox that no man will pretend to maintain.”⁴¹

As far as it is in her power, then, Pufendorf’s suggestion is that the needy agent should try to claim necessity against those who are better-off, both because it is less costly and inconvenient for them, and because possessing a larger property gives them weightier reasons to practice their duty of humanity anyway.

The second condition is the intention of the agent to offer restitution, “especially if the thing taken were of great value, and such as the owner could not well part with without some consideration.”⁴²

But if the right of necessity has the form of a perfect, morally enforceable claim against those in a position to help, as I have been interpreting Pufendorf to say; and if the latter have, in turn, a morally enforceable duty of humanity whose performance the needy may exact from them, isn’t restitution just as out of place as it was in Grotius’s theory?

Here it is important to keep in mind once again Pufendorf’s assumption of what the original lawmakers would have agreed on. And two reasons may be given as to why actual restitution or plain gratitude are a desirable condition. On one hand, the duty of restitution disincentivizes people to become dependent on others: if one has to give back what one has taken or used, the appeal to this exceptional prerogative does not look so tempting any more. On the other hand, by requiring that the owners be compensated, it prevents this right from becoming too heavy a burden on the latter, and gives them an incentive to keep complying with their duty voluntarily, on the reasonable expectation that they will get back what they

⁴¹ Pufendorf 1729 II.VI.6, p. 209.

⁴² Pufendorf 1729 II.VI.6, p. 209.

gave away; if not in kind, at least in grateful expressions.

Because it is an exception to the standard division between perfect rights and duties, it is then not implausible to say that the right of necessity is a right which has the form of a claim, but that, given its exceptional circumstances, it requires restitution, actual or symbolic. Similarly, the duty of humanity of those confronted with someone in extreme need may be demanded by force, but that does not erase the need to compensate or be grateful to the duty-bearers.

Moreover, because restitution is not a formal legal requirement to be demanded *ex post*, but a highly commendable action which the person in need has to intend to do, this makes it possible to distinguish between the treatment of the morally innocent and the morally guilty in cases of necessity: while the former may comply with their duty of restitution freely, the latter could be enforced by law to compensate the owner of the resources taken (given that they never had a right of necessity in the first place).

A third condition is the moral innocence of the agent. The reason is that, for Pufendorf, one of the duties that we have toward ourselves (founded on the first precept of sociability), is to cultivate our abilities and endowments, and become useful members of society.⁴³ To voluntarily become dependent on others is thus a condemnable attitude for which he shows no pity.

It might be objected that this requirement is *ad hoc*, given Pufendorf's equally strong insistence that the right of necessity is founded on the universal desire of self-preservation. This seems to assume that the main reason to keep cases of extreme necessity as an exception is that it would be psychologically too demanding to require the agents to comply with a duty to respect the property of others, when they need some of the latter for their very subsistence.

I think a possible interpretation of both assertions taken together –namely, that the right of necessity is founded on the strong instinct of self-preservation, and that only those who are morally innocent may claim necessity– is the following. Although all those who fall in dire straits have, in principle, the right to take or use the resources needed, or to demand assistance from those who are in a position to help them out (and even to force them, if the latter fail to do so), those who are responsible for their situation lose this moral prerogative to act for themselves, and have to rely instead on the good will of the potential aiders. Just as those who fail miserably on their duty of humanity forfeit their property rights and become legitimate targets for the demands of the needy, those who fail on their duty to become self-sufficient members of society forfeit their right of necessity and are left at the mercy of the

⁴³ Cf. Pufendorf II.IV.1, p. 154.

property owners.

Again, McMahan's account of moral liability is useful here: although all those who are at risk of being harmed or killed by another have, in principle, the right to defend themselves (even if this means harming or killing the attacker in question), those who attack first forfeit their right and make themselves liable to being harmed or killed by the person they put under threat. In the same fashion, those who are responsible for their plight forfeit their original right to take or use what they need, or to demand assistance in a forcible way from those who can help them out. Making themselves liable in this situation means that, what would have otherwise been a perfect right or claim of necessity on their part, is by their own responsibility turned into an imperfect right for the charity of others. This would render intelligible Pufendorf's dictum that "[n]o man is accountable for not doing that which exceeded his power, and which he had not strength sufficient to hinder or accomplish. Hence that maxim, to impossibilities there lies no obligation. But this exception must be added, provided, that by the person's own fault he has not impaired, or lost that strength which was necessary to the performance."⁴⁴

But how does this overcome the objection that one cannot expect self-restraint from the agents in situations of this kind? In answer to a question that he himself does not address, I suggest that it may be inferred from Pufendorf's account that, just as someone who has injured another has to offer reparation for past damages, those who take and use what they need when they have no right to do so could be legally forced to compensate. While offering restitution is presented as a highly commendable imperfect duty for those who are innocent of their plight, it could well be demanded as a legally enforceable duty from those who are responsible for their need.⁴⁵

A final point which seems problematic regarding this third condition is that property owners retain the privilege to judge the moral innocence of the potential recipients of their beneficent actions, even when they are under extreme necessity. This seems to undo with one hand what had been done with the other: for, what practical clout does the right of necessity retain, if the needy have to rely on the judgment of those who are in a position to help them out?

One way out would be to say that the exercise of this privilege has a limit. After all, Pufendorf does affirm that it "shall *in some measure* prevail even against a person in extreme necessity"⁴⁶, leaving the door open for cases where it may not. The problem is that neither does he specify how much the

⁴⁴ Pufendorf 2003 I.I.23, p. 39.

⁴⁵ Another possibility would be to force the lazy and idle into self-enslavement. This is actually taken by Pufendorf to be one of the reasons why slavery came about. (Pufendorf 1729 II.VI.5, p. 205) The author does not think, however, that this is a satisfactory resolution for the problem. For a detailed discussion of this point, cf. Buckle 1991, pp. 118-124.

⁴⁶ Pufendorf 1729 II.VI.6, p. 208 (my emphasis).

owners have to know about the circumstances of the needy before making their judgment, nor how much the needy have to wait before taking action, making the actual procedure for the practice of the right unclear. Moreover, the claim that the owner is the one to judge whether the needy person is worthy of his help or not seems to contradict Pufendorf's idea that, as a corollary of natural law, the right of necessity is a right that a person has independently of human laws and social customs, allowing the needy to turn into judges of their own cause in the last resort. This creates an unresolved tension in Pufendorf's account.

A fourth and final condition to claim necessity is that this right may only be exercised after "all fairer courses [have been] tried, as complaining to the magistrate, begging and intreating, promising restitution, or offering to discharge the debt by equivalent labor and service."⁴⁷ This is understandable, given Pufendorf's caution to make actual claims of necessity only exceptional occurrences. Invoking necessity is not the first option, but the last resort. For it to remain like that, it is required that society be framed in such a way that proper claims of necessity are indeed rare. One way to achieve this is by protecting property, so that industry and commerce are promoted and the lot of the majority is improved. The other, interconnected way, is by the better-off complying with their common duties of humanity, which they should display more extensively, the more extensive their material means.

Concluding remarks

Against the criticisms that accuse his account of being incongruous, for keeping a perfect right of necessity vis-à-vis a perfect right of property, I have suggested that the Pufendorfian right of necessity is a corollary of the natural law and, consequently, a necessary exception to the standard moral and legal rules. Thus, its recognition does not render property rights incoherent, but on the contrary, reminds us of the primary function of this human institution, which is to preserve as best as possible natural equity.

To keep this right strictly limited and prevent its abuse, Pufendorf sets four necessary and jointly sufficient conditions for this right to obtain, and fares better than Grotius when it comes to justifying

⁴⁷ Pufendorf 1729 II.VI.6, p. 209. The last point, regarding the offer of one's labor and service, brings us back again to the idea of self-enslavement. I cannot treat here in more detail Pufendorf's conception of slavery, but only briefly it can be said that, while acknowledging that the original rationale might have been a voluntary agreement of goods for work, at the point in history when he is writing the institution has proved to be not only inefficient, but also against natural law. Cf. Buckle 1991, pp. 118-121.

them: first, the needy may not take from the equally (or almost as) needy; second, restitution has to be intended; third, the agent has to be morally innocent, and fourth, this right may be invoked only as a last resort.

On the whole, Pufendorf's understanding of the right of necessity, based ultimately on the assumption that we have a duty of sociability toward others, which obliges us not only to refrain from harming them, but also to benefit them, is more convincing than Grotius's retreat to the original state of common use. While keeping the importance of individual self-preservation as an ultimate human drive, Pufendorf emphasizes at the same time the importance of performing our common duties of humanity and, far from giving them a subsidiary role, he assigns to them a leading place.

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