Distributive Justice before the Eighteenth Century: The Right of Necessity

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Until recently, few people would have doubted that the idea of distributive justice is old, indeed ancient. Several authors have now challenged this assumption. Most prominently, Samuel Fleischacker argued that distributive justice originates in the eighteenth century. If accurate, this would upset much of what we have taken for granted about an important part of the history of Western political thought. However, the thesis is manifestly flawed. And since that it has already proven influential, it is important to set the record straight. We will focus on the principle of extreme necessity, developed in twelfth and thirteenth century canon law, and subsequently adopted in civil law. Despite its immense importance for the history of political thought, the principle is barely know, and much less discussed. We briefly characterize the main tenets of the principle and show that it meets all the criteria to count as a principle of distributive justice.
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In his *Short History of Distributive Justice*, Samuel Fleischacker puts forward an exciting thesis: He claims that the notion of distributive justice (in the way we use the phrase today) did not exist before the eighteenth century.¹ “Until quite recently,” he writes “people have not seen the basic structure of resource allocation across their societies as a matter of justice, let alone regarded justice as requiring a distribution of resources that meets everyone’s needs.”² If this is true, it would upset much of what we have taken for granted about an important part of the history of Western political thought. This startling thesis is defended in a concise and clearly written prose that covers a breathtaking range of subjects and thinkers from Aristotle to Rawls in a remarkably modest amount of space. Not surprisingly, the book has attracted quite a bit of attention, and despite the recent date of publication its thesis has already been endorsed³ and cited⁴ by several authors. Yet, the thesis is manifestly flawed. And since it has

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¹ Recently, other writers have argued along similar lines and we have arranged them in order of how supportive they are of Fleischacker’s thesis: Stedman Jones, *An End to Poverty?: A Historical Debate* (London: Profile Books, 2004); David Miller, *Principles of Social Justice* (Cambridge, Mass.: Harvard University Press, 1999), pp. 2-4; D. D. Raphael, *Concepts of Justice* (Oxford: Oxford University Press, 2001), pp. 233–36. While Fleischacker credits Babeuf, Rousseau, Kant and Smith for the birth of distributive justice, Jones thinks that Thomas Paine and Antoine-Nicolas Condorcet are responsible. Miller sees theorizing about ‘social justice’ as a distinctively modern enterprise, but does not use the terms ‘social justice’ and ‘distributive justice’ interchangeably and concedes that the idea of distributive justice has ‘a very long pedigree’. According to Raphael, the modern view of social justice was developed in the nineteenth century by Peter Kropotkin, but it was ‘a revival of the doctrine of Philo, Augustine, Peter Lombard, and Aquinas, that helping the poor and needy was a requirement of justice’ and it was present in an embryonic form in medieval Christian social teaching. The idea that social rights developed later than other political or civil rights can also be found in the influential work of T. H. Marshall, *Citizenship and Social Class, and Other Essays* (Cambridge [England]: University Press, 1950), chapt. 1.
already proven influential, and is likely to be more so in the future, we think it is important to show that Fleischacker’s *Short History of Distributive Justice* is too short to do it justice.

For the purpose of this paper, we will focus on a principle that was developed in medieval canon law and subsequently adopted in civil law and English common law: the right of necessity. Despite its immense importance in the Western legal tradition (and in the history of European political thought) it has been relatively neglected in the modern literature. To his credit, Fleischacker devotes a few pages to the principle, but he does so only to dismiss it as “badly misunderstood when regarded as an ancestor of modern welfare rights.” His refusal to recognize the right of necessity as an instance of distributive justice will strike those familiar with the right as odd, as it surely required a certain distribution of resources (as a matter of justice). Lack of familiarity with the intellectual history of the right of necessity may explain why his thesis has been uncritically endorsed, which is what this paper will attempt to rectify.

The Right of Necessity

The right of necessity was developed in the twelfth century, when theologians and canon lawyers began to discuss the question whether someone in extreme need could take something belonging to someone else without the latter’s consent if it was the only way to save his life. Theologians were originally inclined to answer in the negative. After all, Augustine had argued that no good intention or end could justify doing something that was in itself evil, and he explicitly mentioned theft as one of the evil works. For the canonists, however, the issue seemed to raise questions about the justification of property rights. The primary ground for their judgments on these issues was the *Decretum Gratiani*, a collection of authoritative statements from the bible, church fathers, popes and church councils. The *Decretum* counterposed seemingly contradictory statements on many issues, one of them being the issue of property. Although the canonists never doubted that the institution of

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private property was in fact legitimate, a consensus grew that it was based only in human law, not in natural or divine law. Many canon lawyers also believed that the earth was given by God for the sustenance of all. This belief led Huguccio, the most influential early canon lawyer, to forge a principle that was to guide all subsequent reflection on the subject: “by natural law all things are common, which means that in times of necessity they must be shared with those who need them.” Another canon lawyer, Ricardus Anglicus, applied this principle to the case of someone taking something that belonged to someone else: in case it was the only course open to survive, it did not amount to theft because in times of necessity all things are common.

The principle soon became standard doctrine in canon law. In the thirteenth century it was transferred to theology by Guillaume of Auxerre, and after having been endorsed by Bonaventure and Aquinas, it was accepted by all schools of theology. Similarly, the principle was transposed to civil law when it appeared in Accursius’s Glossa Ordinaria, after which it became generally accepted by subsequent generations of civil lawyers. The authority of the principle was so compelling to anyone writing in medieval and early modern Europe that it remained unchallenged until the second half of the seventeenth century. It was endorsed by all major sixteenth century theologians and by early modern civil lawyers like Grotius, Pufendorf, Barbeyrac and Vattel and it appeared in different forms in the writings of such diverse political philosophers as Hobbes, Locke, Hutcheson, Carmichael, Rousseau, Kant, Fichte, Hegel and arguably even Hume and Smith.

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9 Ibid., pp. 91-106.
10 Ibid., 208-53.
One of the extraordinary features of the principle was that it was as a legal principle, even as it was often conceived as constituting an exception to the normal functioning of human law. The idea was that the occurrence of necessity caused a temporary suspension of otherwise valid property rights, which were constituted by human law, and a relapse into the state of nature where everything was common in the sense of open for everyone’s use – not in the sense of common property. This is one (perhaps the only) instance where natural law effectively constrained human law. The right of necessity was – at least in theory – enforceable in court, despite the fact that it was not part of positive human law.

The Right of Necessity as Distributive Justice

The first thing to notice is that Fleischacker builds his case on a rather idiosyncratic definition of distributive justice. The modern concept of distributive justice, he suggests, consists of five elements. These are: 1) that each individual has rights … 2) to some share in material goods; 3) this can be justified in purely secular terms; 4) the distribution of this share is practicable; and 5) the state ought to be guaranteeing the distribution. The second element of Fleischacker’s definition is common in the modern literature, but the other four are unusual (#4 is downright controversial). Since Fleischacker’s criteria are offered, not as a stipulative definition, but as an analysis of “the modern concept” of distributive justice, it is hard to understand why he has deemed it unnecessary to justify the inclusion of these rather unusual elements. This is all the more surprising given the fact that his argument against the right of necessity as a candidate of distributive justice relies chiefly on the last two criteria. Nevertheless, we will show that the right of necessity is a principle of distributive justice, even on a charitable interpretation of these criteria.

References:
13 Natural law usually functioned to indicate whether positive human law was just, not whether it was valid.  
The right of extreme necessity clearly meets the first two criteria. It is indeed a right each individual has (at least on a widely accepted conception of rights), and it entitles the holder to some (small) share in basic material goods. From the twelfth century onwards, canon lawyers like Richardus Anglicus, Alanus Anglicus, Laurentius Hispanus, Vincentius Hispanus and Hostiensis (Henry of Segusio) in their commentaries on the *Decretum* claimed that an individual in extreme necessity had a natural right to take what was needed for self-preservation. Later, Godfrey of Fontaines, John of Paris and William Ockham also affirmed this natural right explicitly. As for some share of material goods, Thomas Hobbes argued that each individual had a right to whatever was necessary for self-preservation including food, clothing, ‘fire, water, free air, a place to live and… all things necessary for life’. Fleischacker does not explain what would or would not satisfy the third element of his definition—that the right can be justified in purely secular terms—and never mentions it in his discussion of the right of necessity. In fact the demand that something can be justified in purely secular terms is a very weak criterion, and there is little doubt that the principle of extreme necessity satisfies it as well. Even though it was sometimes justified in religious terms (as was most of the political theory in medieval and early modern Europe), it certainly can be and was justified independently in purely secular terms as well, even by the two pre-modern authors that he mainly focuses on.

Thomas Aquinas justified the right of necessity philosophically by appealing to the natural right of self-preservation (the right to life). ‘The order of the precepts of the natural law is

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15 Since it originated in the twelfth century and precedes other talk of natural rights, it invalidates talk of economic rights as a second generational right. See Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law*, 1150-1625, 3-4.

16 Ibid., 405-06; 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'Ancerre (1231)*, pp. 40-46, 97-100, 02; Swanson, "The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity."


according to the order of natural inclinations. Inasmuch as every substance seeks the preservation of its own being, according to its nature; and by reason of this inclination, whatever is a means of preserving human life and of warding off its obstacles belongs to the natural law.\(^20\) While there is a common use-right ‘said to be of the natural law’, private property or ‘the distinction of possessions… were not brought in by nature, but devised by human reason for the benefit of human life’.\(^21\) For Aquinas, ‘Things which are of human law cannot derogate from natural law or Divine law…the division and appropriation of things which are based on human law, do not preclude the fact that man’s needs have to be remedied by means of these very things’. The natural rights of self-preservation and necessities take precedence over the human law of private property reactivating the original common use-right, “In cases of need all things are common property… for need has made it common.”\(^22\) Hugo Grotius agreed: ‘[I]n a case of absolute Necessity that ancient Right of using Things, as if they still remained common must revive, and be in full Force: For in all Law of human Institution and consequently, in that of Property too, such Cases seem to be excepted.’\(^23\) As Grotius points out, the designers of the institution of property intended it to ‘deviate as little as possible from the rules of natural equity’\(^24\) by incorporating the safety valve of the right of necessity.\(^25\) Someone’s right to private property defended on the basis of self-preservation cannot be used to deny another the means of self-preservation. Therefore, the right of necessity ‘is not founded on what some allege, that the Proprietor is obliged by the Rules of Charity to give of his Substance to those that want it; but on this, that the Property of Goods is supposed to have been established with this favourable exception, that in such Cases one might enter again upon the Rights of the primitive Community’.\(^26\) Under this natural law framework, the right of necessity serves as a trump that causes the universal use-right to be reactivated, ‘as if community of ownership had remained.’\(^27\)

\(^{21}\) Ibid., 1012 (I-II, q. 94, a. 5 ad 3).
\(^{22}\) Ibid., 1474-75 (II-II q. 66 a. 7). The Black friars translation has “human right and natural right or Divine right” for the Latin iuris humani and iuris naturali vel iuris divino. The latter should clearly be natural law or Divine law.
\(^{24}\) Ibid., 434-35 (II. 2. vi. 1).
\(^{25}\) Ibid., 434-35 (II. 2. vi. 1).
\(^{26}\) Ibid., 434-35 (II. 2. vi. 4). This is often overlooked. See for example Steve Ford, “The Charitable John Locke.” *The Review of Politics* 71, no. 4 (2009), p. 443, who, in a discussion of Aquinas, Grotius and Pufendorf, refers to the right of necessity as the counterpart of the duty of charity.
\(^{27}\) Ibid., 434-35 (II. 2. vi. 2).
necessity as an exception to the laws of private property forbidding theft and robbery, the theory would be internally inconsistent. Thus, the right of necessity is not what Fleischacker alleges: an impotent ‘supplement’ to general laws of private property and its justification ‘unclear’ or extrinsic to the law of property. Rather as Stephen Buckle argues it is vital for the internal consistency of the natural law theory on property.

Fleischacker also asserts that Aquinas is primarily concerned with the judgments of the heavenly court, not the earthly one. But the correct interpretation of Aquinas is not nearly as important as Fleischacker seems to think it is. Aquinas was only one among many theologians, lawyers and philosophers who expounded on the principle, and though he was of course prominent, figures like Ockham were also enormously influential. Above all it should be remembered that the right of necessity originated in canon law, and was adopted in civil law and influential in English common law. So when Fleischacker argues that it seems of little concern to Aquinas what human law and human courts are to do about these cases he may be correct, but it is of little relevance to the broader tradition. That tradition was predominantly a juristic one, and it is simply wrong to suggest, as Fleishacker does, that the right of necessity was merely the carryover of a Christian ‘duty of charity’ to an otherworldly court. For Fleischacker, David Hume was the first transitional figure to argue that the needs of the poor generate claims of justice on the property of the rich. Yet neither Aquinas nor Grotius considered the right of necessity as resulting from an obligation of charity.

Fleischacker’s case against the right of necessity as a principle of distributive justice therefore hinges on whether or not it satisfies the last two criteria—i.e. those of practicality and of the state guaranteeing the right. He clearly thinks it doesn’t and, though he does not provide us with so much as a rigorous argument in favour of this position, the larger part of the section on the right of necessity seems indeed devoted to discrediting its status in these respects. The main reason Fleischacker gives us to doubt the status of the right of necessity as an instance of distributive justice is that (during the first centuries at least) the principle did not provide a basis for governments to actively distribute a share of goods. The right

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29 Ibid., note 32.
32 Ibid., 30.
33 Ibid., 29-30 and note 29.
only applied to cases of imminent danger, and in most cases it would be difficult to determine whether a person was truly starving at the point when he took food that did not belong to him. Hence, “the right of necessity can hardly be enforced, much less institutionalized.” More generally, “no law or general policy could possibly be an extension of the right of necessity. If law and general policy can handle a set of circumstances, those circumstances cannot constitute the sort of unmanageable and unpredictable exception to which “necessity”, in this sense, applies’. These points are relevant to his fourth and fifth criteria: if it is difficult to determine whether someone is about to starve, the distribution according to the right of necessity would presumably be impractical, and if the right cannot be institutionalized, it will be impossible for a government to guarantee the distribution. When considered more carefully, however, even this line of reasoning turns out to be a muddle of inadequate historical knowledge and non sequiturs.

While it is of course correct that it will not be easy to determine whether someone was truly starving at the moment when he took food belonging to someone else, it is also not impossible to do so. In some cases, there will of course be uncertainty in determining the facts. However, and most importantly, these difficulties are not significantly different from difficulties that arise in determining the facts relevant to many other legal rules. It will often be difficult to determine whether some act was a first degree or a second degree murder. Yet the law continues to enforce the prohibition of first degree and second degree murder, and continues to treat cases differently on the basis of an evaluation (however fallible) of the facts relevant to the distinction. Hence it remains entirely unclear how one could infer from such difficulties that the right of necessity cannot be institutionalized. In fact, historical evidence shows that practical problems like these were discussed and that solutions were suggested.

William Lyndwood, in the fifteenth century explained that a state of extreme necessity existed whenever a man lacked the means of subsistence—he did not have to be actually at the point of death, as ‘We are not to wait for a state of ultimate necessity, because then, perhaps, it may not be possible to assist nature, worn down by hunger and thirst’. One way English Common Law could have worked around the problem of determining the facts in institutionalizing this right was by not evaluating how starved the poor person is but to except from conviction poor people who burgled victuals that were only worth what they needed to live on. According to the law book Britton, which bore King Edward I’s seal of

35 Fleischacker, A Short History of Distributive Justice, 29.
36 Ibid., 34.
37 Medieval Poor Law : A Sketch of Canonical Theory and Its Application in England
royal approval, and which was presented as a compilation of the existing laws which the king had ordered to put in writing for the information of his subjects,\textsuperscript{38} infants under age and poor persons (and idiots and madmen) who out of hunger burgled for victuals of less value than twelve pence, could not be convicted of this crime.\textsuperscript{39} According to the \textit{Mirror of Justice}, ‘King Edward set a limit to the amount of robbery or larceny [that would serve to hang a man] in this manner, to wit, that no one should be adjudged to death if his larcency, hamsoken, or robbery did not exceed twelve pence sterling’.\textsuperscript{40} In the time of Edward I., twelve pence could purchase an ox.\textsuperscript{41} According to one commentator, the reason for the limit to be fixed at 12d. was that this amounted to eight days wages; ‘and as a man going without sustenance for eight days might be expected to die on the ninth, the 12d. has regard to the destruction of life, for which offence a man is rightfully put to death.’\textsuperscript{42} During the sixteenth century three common lawyers, two of whom cite Britton, argued that, ‘a person who stole under 12d. worth of food should not be charged with felony because it could be presumed from the smallness of his theft that he was taking only what he needed to stay alive’.\textsuperscript{43} Sir Matthew Hale, a seventeenth-century Lord Chief Justice of England comments on Edward’s legal reforms (through Britton), ‘The laws did never in any one age receive so great and sudden an advancement, nay, I think I may safely say, all the ages since his time have not done so much in reference to the orderly settling and establishing of the distributive Justice of the Kingdom as he did within a short compass of the thirty-five Years of his Reign’.\textsuperscript{44} Interestingly enough, Hale uses the term distributive justice to describe Edward’s


\textsuperscript{39} Ibid., 36 [I, 17] (I: XI).

\textsuperscript{40} Ibid.

\textsuperscript{41} Moses Maimonides, "Introduction by James Peppercorne," in \textit{The Laws of the Hebrews Relating to the Poor and the Stranger: From The "Mishna-Hatbora" Of the Rabbi Maimonides} (London: P. Richardson, 1840), 15. According to the editor’s footnotes in Breton, \textit{Britton an English Translation and Notes}, 47 [I, *22] (I: XVI), “In the time of Edward I. the price of a cow varied from 5s. to 12s., the price of a sheep from 8d. to 3s. Wheat varied from 2s to 16s. the quarter, and in times of scarcity rose much higher. See Fleetwood’s Chronicon Preciosum; and see the provisions as to the size of bread below, in c. xxxi. Bracton says that stealing a pig is a petty theft (Brac. 105)”

\textsuperscript{42} Breton, \textit{Britton an English Translation and Notes}, 47 [I, 22] (I: XVI).

\textsuperscript{43} Swanson, "The Medieval Foundations of John Locke’s Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity," 411, n. 26; Edmund Plowden, \textit{An Exact Abridgement of the Commentaries}, trans. Fabian Hicks (London: Printed by J. Streater for Henry Twiford, and are to be sold at his shop ... 1659).

\textsuperscript{44} Matthew Hale, \textit{The History of the Common Law of England. Divided into Twelve Chapters. Written by a Learned Hand} ([London]: In the Savoy: printed by J. Nutt, assignee of Edw. Sayer Esq; for J. Walthoe; and at his shop in Stafford, 1713), 159.
laws. These commentaries do not mention the principle of extreme necessity, but they are evidently responding to the principle’s influence.45

It is simply not true that ‘no law could possibly be an extension of the right of necessity’. Even if it was considered a natural right, it is obviously possible for a positive law to enforce the right, for example by punishing those who refuse access to necessary goods to those who need them. And in fact the right was enforceable in this sense. According to Tierney:

From about 1200 onward, several canonists argued that a simple and equitable process known as ‘evangelical denunciation’ was available to the poor person in extreme need. By virtue of the authority inhering in his office as a judge, a bishop could hear any complaint involving an alleged sin and could provide a remedy without the plaintiff bringing a formal action. The extremely needy could assert a rightful claim by an ‘appeal to the office of the judge’. The bishop could then compel an intransigent rich man to give alms from his superfluities, by sanctions ranging from penances to imprisonment or excommunication if necessary. It was, as Couvreur wrote, an elegant solution. ‘It provided a judicial sanction for the rights of the poor’.46

Finding evidence of this practice is problematic as the records have survived in very limited quantities.47 The guarantee of the medieval church is implicit in the right of necessity’s widespread acceptance in canon and civil law. This was no mere formal right of the poor that they could not claim because they were too poor to pay court fees or hire legal counsel. Court fees were waived, priests were allowed to defend a poor man’s case and Pope Honorius III (1216-1227) ruled that the poor were to be supplied with free counsel by the court.48 Fleischacker regards the medieval church as a voluntary charitable organization or non-state actor,49 but the medieval church had all the characteristics of a state. It claimed to be an independent, hierarchical, public authority. Its head had the right to legislate and it executed its laws through an administrative hierarchy. It also had a judiciary. ‘The church thus exercised the legislative, administrative, and judicial powers of a modern state.’50

49 Fleischacker, A Short History of Distributive Justice, 49-52.
Enforcement of the right of necessity remained in the jurisdiction of the church even after its acceptance into civil law as ‘canon lawyers were disinclined to believe that the poor could press their rights to the superfluity of the rich through action in the civil courts, since their rights were natural rather than civil and thus beyond the competence of civil courts’. After subsistence was formulated as a natural right it started to influence existing practices through papal decrees against exposure of children. Gregory IX stated in his decretal letter Si a patre (Decretals X.5.11.1) that fathers who withheld food from their children and lords who withheld food from their servants lost their parental or lordly rights, while their dependents who were thus denied subsistence gained their liberty.

Fleischacker puts a lot of emphasis on the fact that the right of necessity was (and is) seen as an exception to the ordinary functioning of law. This is indeed one of the striking features of the principle. Nevertheless, it is and always was a legal principle. There is nothing particularly puzzling about this. It is perfectly possible (and arguably desirable) for a body of normative principles to include a description of the range of its application. Moreover, when considering the history of a legal principle before the eighteenth century, we should also keep in mind that “the law” was never merely positive law. The principle of necessity was seen as an exception to positive human law, but obviously not to natural law. And while lawyers from at least the twelfth century onwards were perfectly able to distinguish sharply between them, it remained standard doctrine that positive law should conform to natural law. This was a legal restriction. Natural law, after all, was law. And it gave rise to an enforceable exception to positive law which was championed by canon, civil and common lawyers.

If the characteristic of the right of necessity as an enforceable exception is seen as its distinguishing feature, then it will be trivially true that certain forms of institutionalization of the right would transform it into something else. Pre-modern legal thought simply declared


53 Ibid.

54 Not everyone based the right of necessity in natural law, however. For an excellent discussion, see Kari Saastamoinen, Liberty and Natural Rights in Pufendorf's Natural Law Theory, ed. Virpi Mäkinen and Petter Korkman, Transformations in Medieval and Early-Modern Rights Discourse (Dordrecht: Springer, 2006), 225-56.
positive law incompetent to punish those who help themselves to the goods. The role of positive law would at most be to punish those who prevent people from helping themselves to the goods to which natural law entitled them. Once positive law aims at guaranteeing people access to a minimal amount of goods the right surely has become a legal right in the modern sense of the word. There is room for disagreement about where to draw the line, but there is a clear tendency in the legal and political thought of the seventeenth and eighteenth centuries towards the endorsement of positive legal rights to the necessities for life. The right of necessity had merely been a natural law safeguard against the possibility of private property (a product of positive law) jeopardizing the lives of the poor. In early modern political thought this notion of a safeguard outside positive law was increasingly considered inadequate, or even an anomaly. Hence we see a shift towards ‘institutionalization’ of the right of necessity. For Hobbes the natural right of necessity is retained even when the social contract is signed. For Hobbes the natural right of necessity is retained even when the social contract is signed. As life and self-preservation is insecure in the state of nature, Hobbes believed that people exchange their natural rights of self-preservation for secure means of self-preservation in a commonwealth where ‘they gain foresight of their own preservation.’ Positive laws ensure that the able-bodied are able to find work while those, ‘who by accident inevitable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provided for, (as far-forth as the necessities of Nature require,) by the Lawes of the Common-wealth’. Rousseau also proposed to institutionalize the right of necessity, but through an egalitarian agrarian property system in his Social Contract. For Rousseau, everyone has a natural right to ‘everything he needs’ (‘a right of necessity’). Based on this right, he

55 Kant, for example, still speaks of a right of necessity but considers only the right of self-defense in this category, which he calls an equivocal right (jus aequivocum), ‘belonging as it were to the “intermundia” of Epicurus’. See Immanuel Kant, The Science of Right, ed. Mary J. Gregor, trans. Mary J. Gregor, Practical Philosophy (New York: Cambridge University Press, 1996), 390.
56 Hobbes, The Elements of Law, Natural & Politic, 69 (1, 17, 2). This is repeated by Hobbes in Thomas Hobbes, De Cive; or, the Citizen, ed. Sterling Power Lamprecht (New York: Appleton-Century-Crofts, 1949), 51.
59 Ibid., 239 (XXX, 181).
can occupy as much land as he needs to subsist but is excluded from the rest. The (natural) rights of man... cannot go any further, and everything else, being only violence and usurpation contrary to the right of nature, cannot serve as a foundation for social right."

Even if proposals for institutionalisation may not properly be considered extensions of the right of necessity—because they aim at ensuring people’s access to the necessities of life by granting them positive legal rights to subsistence—it certainly is the result of the continued influence of the idea that supported the almost unanimous consensus behind the right of necessity for several centuries. The idea was that every human being ought to have access to the goods needed for survival at all times. The consensus surrounding this idea supported a massive amount of redistribution through institutionalised alms-giving organized by the medieval church. So when Fleischacker tries to explain the absence of an idea of social egalitarianism before 1750 with reference to a number of views some or all of which he claims were held in by practically everyone in most societies, including ideas that poverty is punishment for sin, that it is a natural evil, that it is a blessing, etc... he simply ignores the fact that none of these views in fact prevented an amount of redistribution in England’s medieval times that remained unequalled in modern times until the twentieth century. So while it may be true that attitudes towards poverty and entitlements changed in modern times, it is also certain that Fleischacker has not given us an adequate description of either these changes or their consequences for the history of political thought.

To sum up: The right of necessity satisfies all the elements of Fleischacker’s definition of distributive justice. It was a right to some share in material goods. As we saw, it not only can be but it frequently was justified on other than religious grounds. Most importantly, protection of the right of necessity was enforced and it did provide a basis for state guaranteed distribution of basic necessities.

*Among Men*, “It is manifestly against the law of nature, in whatever manner it is defined, that... a handful of men be glutted with superfluities while the starving multitude lacks necessities” in which he aligns himself with the natural law tradition on the right of necessity. Rousseau, *The First and Second Discourses*, 180-81 (Second Discourse).


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