

## “Either I Close My Eyes or I Don’t”

### *The Evolution of Rights in Encounters between Sovereign Power and “Rightless” Migrants*

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Around the world, harsh migration enforcement has sparked courageous humanitarian reactions. This, in turn, has led to hundreds of criminal prosecutions of aid workers, volunteers, ship captains, and many others.<sup>1</sup> As a major 2020 report by Amnesty International entitled “Punishing Compassion” noted, “In recent years, human rights defenders and civil society organizations that have helped refugees and migrants have been subjected to unfounded criminal proceedings, undue restrictions of their activities, intimidation, harassment, and smear campaigns in several European countries.”<sup>2</sup>

Such prosecutions ostensibly seek to vindicate the power of governments to control nation state borders. But, in a number of recent high-profile cases, they seem, ironically, to have achieved the opposite: They have vindicated, reinvigorated – and even inspired new forms of – basic human rights. Indeed, it is noteworthy that the subtitle of the Amnesty Report was “Solidarity on Trial.”<sup>3</sup> This chapter explores how this has been happening and what it may portend.

Let us start with a brief introduction to perhaps the most famous such recent case. In 2017, Cédric Herrou, a French olive farmer, was criminally tried for having assisted unauthorized migrants in France, near the Italian border. Herrou, who had been arrested numerous times before for similar offenses, was described as being

\* Thanks to the excellent editors of this volume and to Julie Dahlstrom and Katie Young for reading earlier drafts of this chapter and offering helpful suggestions. Thanks to Dean Vincent Rougeau for research support.

<sup>1</sup> N. Archer et al., “Hundreds of Europeans ‘Criminalised’ for Helping Migrants,” *Open Democracy*, May 18, 2019, [www.opendemocracy.net/en/5050/hundreds-of-europeans-criminalised-for-helping-migrants-new-data-shows-as-far-right-aims-to-win-big-in-european-elections/](http://www.opendemocracy.net/en/5050/hundreds-of-europeans-criminalised-for-helping-migrants-new-data-shows-as-far-right-aims-to-win-big-in-european-elections/); see also L. Vosyliūtė and C. Conte, *Crackdown on NGOs and Volunteers Helping Refugees and Other Migrants*, [www.resoma.eu/node/194](http://www.resoma.eu/node/194) (ReSOMA, June 2019).

<sup>2</sup> Amnesty International, *Punishing Compassion: Solidarity on Trial in Fortress Europe* (2020), [www.amnesty.org/download/Documents/EUR0118282020ENGLISH.PDF](http://www.amnesty.org/download/Documents/EUR0118282020ENGLISH.PDF).

<sup>3</sup> *Ibid.*

part of a quasi-clandestine resistance against the French government’s inhumane response to the European migration and refugee “crisis” that began around 2015.<sup>4</sup> He became an inspirational figure in some quarters as his actions – and the French government’s reactions – provoked controversy and soul-searching around the world. Indeed, a *New York Times* writer analogized Herrou’s movement to the Underground Railroad.<sup>5</sup>

Perhaps more significant than his actions, Herrou’s legal cases have been both complex and unusually resonant. After one arrest in 2016, prosecutors declined to pursue charges because they accepted that Herrou was acting for “humanitarian reasons.”<sup>6</sup> As he became increasingly prominent and continued his work with undocumented migrants, however, political and social pressures built. He was rearrested and charged with serious offenses. Herrou was, to say the least, unrepentant. At one of his trials, he testified, “My inaction and my silence would make me an accomplice, I do not want to be an accomplice.”<sup>7</sup> Eric Ciotti, president of the Alpes-Maritimes department and a member of Parliament, held a quite different view: “Who can say with certainty that of the hundreds of migrants that Mr. Herrou has proudly brought across the border, there isn’t hidden among them, a future terrorist?”<sup>8</sup> Ciotti argued more generally, “At the very moment when we need strict controls, Mr. Herrou’s ideological, premeditated actions are a major risk.”<sup>9</sup>

Herrou described his motivation clearly. When asked by a judge, “Why do you do all this,” he described French migration enforcement as “ignoble.”<sup>10</sup> He evoked the deepest, most basic human rights and humanitarian principles: “There are people dying on the side of the road. It’s not right. There are children who are not safe.” The prosecutor, however, argued that Herrou had demonstrated a “manifest intention to violate the law . . . . One can criticize it,” he continued, “but it’s got to be applied.”<sup>11</sup> As the prosecutor bemoaned, “This trial springs from a communications strategy for a cause that I totally respect . . . . But I am the prosecutor. I must defend the law.”<sup>12</sup>

<sup>4</sup> A. Nossiter, “An Underground Railroad in France, Moving African Migrants,” *New York Times*, October 5, 2016, [www.nytimes.com/2016/10/05/world/europe/france-italy-migrants-smuggling.html](http://www.nytimes.com/2016/10/05/world/europe/france-italy-migrants-smuggling.html).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> K. G. Brown, “France Prosecuting Citizens for ‘Crimes of Solidarity,’” *Aljazeera*, January 25, 2017, [www.aljazeera.com/indepth/features/2017/01/france-prosecuting-citizens-crimes-solidarity-170122064151841.html](http://www.aljazeera.com/indepth/features/2017/01/france-prosecuting-citizens-crimes-solidarity-170122064151841.html).

<sup>8</sup> *Ibid.*

<sup>9</sup> A. Nossiter, “A Smuggler’s Defense: ‘There Are People Dying,’” *New York Times*, January 6, 2017, [www.nytimes.com/2017/01/05/world/europe/cedric-herrou-migrant-smuggler-trial-france.html](http://www.nytimes.com/2017/01/05/world/europe/cedric-herrou-migrant-smuggler-trial-france.html).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

Similarly polarized arguments about migration enforcement and humanitarian aid have been taking place in other criminal courts around the world. Two German “rescue” ship captains, Carola Rackete and Pia Klemp, have faced criminal prosecutions for rescuing distressed migrants at sea and bringing them to Lampedusa, Italy. In 2017, Italy had enacted a restrictive and highly controversial “Code of Conduct” pertaining to such rescues.<sup>13</sup> Captain Rackete’s case was dismissed, but Captain Klemp faced up to twenty years in prison.<sup>14</sup> Echoing other human rights activists, she has, with critical irony, referred to her prosecution as a “crime of solidarity.”<sup>15</sup> In Arizona, the US government has repeatedly prosecuted Scott Daniel Warren, who was arrested and tried after allegedly providing food, water, beds, and clean clothes to undocumented immigrants near Arizona’s Sonoran Desert. His first trial resulted in a hung jury; the second in an outright acquittal, much to the dismay of the prosecutors.<sup>16</sup>

Such tectonic tension between government sovereign power to enforce migration rules and humanitarian or moral principles is not new. Criminal prosecutions of this type typically implicate notions of criminal intent (*mens rea*) and construction of ambiguous statutory terms. They may also implicate the so-called rule of lenity (the principle that statutes ought to be construed narrowly against the government so that people have a clear idea of what sort of conduct is criminally impermissible) or, more basically, notions of “necessity” as a defense to criminal prosecution. But Herrou prevailed through a different, new, and potentially deeply influential strategy. “Remember the last word in the French Republic’s motto, ‘Liberté, Egalité, Fraternité,’” his lawyer argued. “They are saying M. Herrou is endangering the

<sup>13</sup> “Italy’s Code of Conduct for NGOs Involved in Migrant Rescue: Text,” *Euronews*, March 8, 2017, [www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue](http://www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue).

<sup>14</sup> L. Tondo and J. Le Blond, “Italian Judge Orders Release of Ship Captain Who Rescued Refugees,” *The Guardian*, July 2, 2019, [www.theguardian.com/world/2019/jul/02/more-than-im-raised-for-rescue-ship-captain-carola-rackete-italy](http://www.theguardian.com/world/2019/jul/02/more-than-im-raised-for-rescue-ship-captain-carola-rackete-italy). On January 17, 2020, the Supreme Court of Cassation of Italy rejected an appeal filed by Italian prosecutors of the dismissal of charges against Carola Rackete. “Italy’s Highest Court Rejects Charges against Rescue Ship Captain,” *The Maritime Executive*, January 17, 2020, [www.maritime-executive.com/article/sea-rescue-captain-cleared-of-charges-for-unauthorized-port-entry](http://www.maritime-executive.com/article/sea-rescue-captain-cleared-of-charges-for-unauthorized-port-entry).

<sup>15</sup> D. Boffey and L. Tondo, “Captain of Migrant Rescue Ship Says Italy ‘Criminalising Solidarity,’” *The Guardian*, June 15, 2019, [www.theguardian.com/world/2019/jun/15/captain-of-migrant-rescue-ship-says-italy-criminalising-solidarity](http://www.theguardian.com/world/2019/jun/15/captain-of-migrant-rescue-ship-says-italy-criminalising-solidarity); see also “La solidarité, plus que jamais un délit?” *Délinquants solidaires*, January 2017, [http://snpespjj-fsu.org/IMG/pdf/delinquants\\_solidaires\\_manifeste.pdf](http://snpespjj-fsu.org/IMG/pdf/delinquants_solidaires_manifeste.pdf) (“Bien sûr, la solidarité n’a jamais été inscrite dans aucun code comme un délit. Cependant, des militants associatifs qui ne font que venir en aide à des personnes en situation de très grande précarité, victimes de décisions dangereuses, violentes, voire inhumaines, se retrouvent aujourd’hui face à la justice.”); Brown, “France Prosecuting Citizens.” See also F. Pusterla, “Legal Perspectives on Solidarity Crimes in Italy” (2020) *International Migration*, <https://onlinelibrary.wiley.com/doi/abs/10.1111/imig.12740>.

<sup>16</sup> R. Devereaux, “Bodies in the Borderland,” *The Intercept*, May 4, 2019, <https://theintercept.com/2019/05/04/no-more-deaths-scott-warren-migrants-border-arizona/>.

Republic. On the contrary, I think he is *defending* its values.”<sup>17</sup> Herrou was convicted at trial. However, in a landmark decision, the French Constitutional Council overturned the verdict and held, for the first time, that *fraternity* is a principle with constitutional value: “The freedom to help others for a humanitarian purpose, regardless of the regularity of their stay on the national territory follows from this principle.”<sup>18</sup> In related, if less constitutionally portentous formulations, Captains Klemp and Rackete appealed to the ideal of *solidarity* in their defense. Warren’s attorney, in closing argument, intoned to the jury, “Being a good Samaritan is not against the law, following the golden rule is not a felony.”<sup>19</sup>

This chapter considers certain basic human rights and politico-legal questions illustrated by these cases and others like them: What is the full extent of the “law?” What effects might such cases have on human rights law in general, and migrant rights more specifically?<sup>20</sup> It suggests that these prosecutions illustrate how human rights laws and principles are tested – and sometimes expanded – at the *intersections* of sovereign power, law, and compelling moral claims.

The analysis herein transcends previous initiatives designed to protect “human rights defenders.”<sup>21</sup> As migration enforcement has taken increasingly harsh and life-threatening turns in recent decades, new principles are evolving and connecting in deep ways with extant and inchoate constitutional principles. The more vigorous governments become in harsh migration enforcement, the more such principles are invoked, and the greater power they may assume. This implicates deep questions of constitutional legitimacy and migrant rights as it also illustrates how rights develop and evolve. The process of creating rights is not primarily confined – as some interpreters of Hannah Arendt argue – to the *internal* processes of the nation-state. Nor is it intrinsically tied to the so-called right to have rights of those with membership in a political community. Rather, rights often arise from encounters between raw state sovereign power and ostensibly extralegal, humanitarian actions for those at the lowest ebb of their power and with the least legal status (what Agamben has

<sup>17</sup> Nossiter, “A Smuggler’s Defense” (emphasis added).

<sup>18</sup> Conseil constitutionnel décision no. 2018-717/718 QPC, July 6, 2018, [www.conseil-constitutionnel.fr/en/decision/2018/2018717\\_718QPC.htm](http://www.conseil-constitutionnel.fr/en/decision/2018/2018717_718QPC.htm).

<sup>19</sup> P. Ingram, “Scott Warren Found Not Guilty by Jury in No More Deaths Case,” *Tucson Sentinel*, November 20, 2019, [www.tucsonsentinel.com/local/report/112019\\_warren\\_trial\\_day\\_6/scott-warren-found-not-guilty-by-jury-no-more-deaths-case/](http://www.tucsonsentinel.com/local/report/112019_warren_trial_day_6/scott-warren-found-not-guilty-by-jury-no-more-deaths-case/).

<sup>20</sup> See generally D. Kanstroom, “‘Alien’ Litigation as Polity-Participation: The Positive Power of a ‘Voteless Class of Litigants’” (2012) 21(2) *William & Mary Bill of Rights Journal* 399, <https://scholarship.law.wm.edu/wmborj/vol21/iss2/5/>.

<sup>21</sup> See, e.g., Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, March 8, 1999, U.N. Doc. A/RES/53/144. The Declaration has been said to have “shifted the understanding of the human rights project: from a task accomplished mainly through the international community and States, to one that belongs to every person and group within society.” *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, U.N. Doc. A/73/215 (July 23, 2018), <https://undocs.org/en/A/73/215>.

called “bare life”).<sup>22</sup> Such encounters demand a coherent legal response, which may be developed, if imperfectly, through such notions as *fraternité* and solidarity. These principles may enhance more well-accepted rights formulations such as dignity and equality as they engage the border between those who lack rights and those who seek to protect lives.

Such an analysis also helps us to understand and critique more technical initiatives, such as the European Union’s 2002 “Facilitation Directive” and the so-called Facilitators’ Package, which requests that member states criminalize behaviors that “facilitate” irregular entry, transit, and stay, aiming toward a consistent approach.<sup>23</sup> However, as a study commissioned by the European Parliament concluded, the European Union has brought about “legislative ambiguity and legal uncertainty.”<sup>24</sup> Fundamental questions remain unresolved. As Captain Klemp poignantly argued, “I refuse to believe that we live in a Europe where you have to go to jail for saving lives in need.”<sup>25</sup>

HERROU: “THERE ARE PEOPLE DYING ON THE SIDE OF THE ROAD.  
IT’S NOT RIGHT.”<sup>26</sup>

The so-called European migration or refugee “crisis” that began in 2015 spawned not only reactionary politics and harsh policies but also creative legal responses at the

<sup>22</sup> G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, 1998).

<sup>23</sup> In 2002, the EU adopted the “Facilitation Directive,” which defines “facilitation of unauthorized entry, transit and stay.” Council of the European Union, *Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence*, OJ L 328, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0090> (December 5, 2002). An accompanying Council Framework Decision strengthened the penal framework to prevent such facilitation. Council of the European Union, *Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence*, 2002/946/JHA, OJ L 328 (December 5, 2001), <https://eurlex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002F0946>.

<sup>24</sup> Directorate-General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and Criminalisation of Humanitarian Assistance to Irregular Migrants*, (Brussels: European Parliament, 2016), p. 10, [www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL\\_STU\(2016\)536490\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf); Directorate-General for Internal Policies of the Union, Policy Department for Citizens’ Rights and Constitutional Affairs, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update* (Brussels: European Parliament, 2018), [www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL\\_STU\(2018\)608838\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf); see also Amnesty International, *Punishing Compassion*, p. 20.

<sup>25</sup> J. Beenen and V. Wulf, “I’ve Never Been to Sea for Fun,” *Basler Zeitung*, [www.bazonline.ch/ich-war-noch-nie-zum-spaess-auf-see/story/31855284](http://www.bazonline.ch/ich-war-noch-nie-zum-spaess-auf-see/story/31855284).

<sup>26</sup> A. Nossiter, “Farmer on Trial Defends Smuggling Migrants: ‘I Am a Frenchman,’” *New York Times*, January 5, 2017, [www.nytimes.com/2017/01/05/world/europe/cedric-herrou-migrant-smugler-trial-france.html](http://www.nytimes.com/2017/01/05/world/europe/cedric-herrou-migrant-smugler-trial-france.html).

intersections of sovereign power and basic human rights.<sup>27</sup> For example, a reinstatement of migration controls at the French–Italian border in November 2016 made the Roya Valley a dangerous crossing point for migrants seeking to enter France. In addition to other methods of police intimidation, harassment, and investigation, French prosecutors, since at least 2016, have brought criminal charges against activists and volunteers who assist migrants and asylum seekers.<sup>28</sup> Although many prosecutions resulted only in suspended sentences, they took a significant toll on the accused and contributed to the creation of “a hostile environment for humanitarian work in the region.”<sup>29</sup> Indeed, a recent study found that between 2015 and 2019, at least eighty-three people have been investigated or prosecuted in Europe for facilitating irregular entry and transit, and eighteen were investigated or prosecuted for facilitating the stay or residence of migrants and asylum seekers.<sup>30</sup>

Pursuant to the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA), any person who, directly or indirectly, facilitates the illegal entry, circulation, or residence of a foreign national in France or on the territory of another contracting party of the Schengen Agreement shall be sentenced to five years' imprisonment with a fine of €30,000.<sup>31</sup> The statute has long contained two exemptions: certain close relatives of the foreign national,<sup>32</sup> and the facilitation of illegal residence (“irregular stay”) of a foreigner when the alleged act does not give rise to any direct or indirect compensation and only entails providing legal advice, food, accommodation, or health care in order to ensure decent living conditions for

<sup>27</sup> The term “crisis,” though clearly inapt in various ways, is used herein to describe European migration events since 2015 because it was a staple of media reporting at the time and since. See “Migrant Crisis: Migration to Europe Explained in Seven Charts,” *BBC*, March 4, 2016, [www.bbc.com/news/world-europe-34131911](http://www.bbc.com/news/world-europe-34131911) (“More than a million migrants and refugees crossed into Europe in 2015, sparking a crisis as countries struggled to cope with the influx, and creating division in the EU over how best to deal with resettling people.”). Moreover, there has been substantial debate about the usage of the term “migrant,” which connotes voluntariness, versus “refugee,” to describe the people seeking to enter Europe in recent years. See, e.g., C. Ruz, “The Battle over the Words Used to Describe Migrants,” *BBC*, August 28, 2015, [www.bbc.com/news/magazine-34061097](http://www.bbc.com/news/magazine-34061097).

<sup>28</sup> Human Rights Watch, *Subject to Whim: The Treatment of Unaccompanied Migrant Children in the French Hautes-Alpes* (2019), pp. 68–72, [www.hrw.org/sites/default/files/report\\_pdf/france0919\\_web\\_0.pdf](http://www.hrw.org/sites/default/files/report_pdf/france0919_web_0.pdf).

<sup>29</sup> *Ibid.*

<sup>30</sup> Vosylüüté and Conte, *Crackdown*, p. 25 (“[Fifty-seven] persons are prosecuted simultaneously on both the grounds of the facilitation of entry and stay of migrants and other grounds including membership of a criminal organisation, sabotage or waste management contracts.”); see also L. Fekete, F. Webber, and A. Edmond-Pettitt, *Humanitarianism: The Unacceptable Face of Solidarity* (London: Institute of Race Relations, 2017).

<sup>31</sup> Code of Entry and Residence of Foreigner and Right of Asylum (CESEDA), art. L. 622-1 [www.legifrance.gouv.fr/affichCode.do;jsessionid=06DA61E11833B73124F3B0AEDCFD23B7.tplgfr34s\\_2?idSectionTA=LEGISCTA000006147789&cidTexte=LEGITEXTE000006070158&dateTexte=20200728](http://www.legifrance.gouv.fr/affichCode.do;jsessionid=06DA61E11833B73124F3B0AEDCFD23B7.tplgfr34s_2?idSectionTA=LEGISCTA000006147789&cidTexte=LEGITEXTE000006070158&dateTexte=20200728); see also Editorial, “Fraternité” (2019) 15 *European Constitutional Law Review* 183–193.

<sup>32</sup> CESEDA, art. L. 622-4, §§ 1–2.

foreigners, or any other assistance aimed at preserving their dignity or physical integrity.<sup>33</sup> However, neither the facilitation of illegal *entry* nor illegal *circulation* (internal movement or transportation) are covered by the statutory exemptions.

Herrou and Pierre-Alain Mannoni, a marine ecology research professor, were criminally prosecuted for assisting several illegal immigrants en route from Sudan and Eritrea via Italy. Herrou was already well known for this work. Mannoni was arrested after he picked up three Eritrean women who had just crossed into France, intending to give them a ride to Nice. He described having seen them suffering on the roadside: “They are afraid, they are cold, they are exhausted, they have bandages on their hands, on their legs.”<sup>34</sup> Herrou and Mannoni were convicted and given suspended prison sentences of, respectively, four and two months for facilitating the entry and/or circulation of illegal immigrants in France. Both appealed to the *Cour de cassation*, the supreme civil and criminal court in France. Their respective counsel then raised a “QPC” (*question prioritaire de constitutionnalité*)<sup>35</sup> disputing the compatibility of the criminal statute with the principle of fraternity, in addition to other arguments. The *Cour de cassation* referred that question to the *Conseil constitutionnel*.

In its now famous decision of July 6, 2018, the *Conseil* held that fraternity is in fact a principle endowed with constitutional value in France.<sup>36</sup> The *Conseil* then concluded that the freedom to help one another, for humanitarian reasons – *regardless of whether the assisted person is legally residing or not within the French territory* – follows from the principle of fraternity. The *Conseil* made clear, however, that such freedom does not guarantee a general and absolute right of entry to – or even residence – on French national territory. The *Conseil* said that the legislature has the responsibility to “strike a balance” between freedom and fraternity in the fight against illegal immigration and a different constitutional objective: that of safeguarding “public order.”<sup>37</sup> Thus, the decision contained an innovative approach to individual constitutional rights even as it reinforced rather traditional notions of fundamental government sovereign power and public order.

The *Conseil* essentially narrowed the offense and broadened the exemption as a matter of constitutional principle. It concluded, rather technically, that the legislature had failed to strike an appropriate balance between fraternity and public order by limiting the scope of the exemption to providing assistance for irregular stay

<sup>33</sup> *Ibid.*, § 3.

<sup>34</sup> Human Rights Watch, *Subject to Whim*, p. 68.

<sup>35</sup> The QPC is a 2008 constitutional reform, 1958 Const. art. 61-1, that allows plaintiffs to raise an issue relating to the compatibility of legislation with the rights and freedoms guaranteed by the Constitution.

<sup>36</sup> *Conseil constitutionnel* decision No. 2018-717/718, July 6, 2018. The *Conseil* cited Article 2 of the Constitution, which contains the triadic Republican maxim, the Preamble, and Article 72-3, which refer to “the common ideal of liberty, equality and fraternity” between the French Republic and its overseas territories and populations. *Ibid.* ¶ 7.

<sup>37</sup> *Ibid.*, ¶ 13.

(“illegal residence”). The facilitation of illegal circulation (movement) was worthy of inclusion as an exemption to render the legislation constitutionally sound.<sup>38</sup> Recognizing the limitations of its legitimate role, however, the *Conseil* postponed the implementation of parts of its ruling. The immediate abolition of the contested parts of the statute might have had “clearly excessive consequences,” for example, the effect of extending the criminal exemptions established in Article L. 622-4 to actions that facilitate or attempt to facilitate illegal entry into French territory. Therefore, it was up to the Parliament to determine the modifications that must be made in order to remedy the ascertained unconstitutional aspects of the prosecution.<sup>39</sup>

Simply put, the *Conseil* was treading a fine line between announcing rights-based enforcement limitations and superseding the state’s sovereign authority to control its external borders. Still, as of the day of the publication of its decision, Herrou would be exempt from prosecution for “humanitarian acts that aimed to facilitate the circulation of illegal immigrants when the latter is ancillary to their residence.”<sup>40</sup> A key, if rather complicated, line was maintained: “The assistance provided to the foreign national for his or her circulation does not necessarily give rise, as a consequence thereof, to an unlawful situation, in contrast with the assistance provided for his or her entry.”<sup>41</sup> In other words, according to the *Conseil*, facilitating unlawful presence that *has already been achieved* is different for constitutional fraternity purposes than is assistance that enables entry.

The French legislature, called upon to act, did so quickly. The extant exemption was largely rewritten. It now covers all acts facilitating illegal circulation or residence that do not give rise to any direct or indirect compensation and that consist of providing legal advice, linguistic or social assistance, or any other assistance with an exclusively humanitarian objective.<sup>42</sup> The criminal cases were then remanded. Herrou was not necessarily completely liberated, either from this case or from future similar prosecutions. Indeed, the practical reach of the *Conseil* decision was, as noted, quite narrow. A key issue will now be “facilitation of entry.” This remains an offense in France, whether or not motivated by humanitarian purpose.

Still, the Herrou decision has major implications. The substantive reliance on the fraternity principle – as a constitutional provision with real bite – may justifiably be called a milestone in French jurisprudence.<sup>43</sup> Indeed, the resonance of this case has led some to refer to the “Pandora’s box” of fraternity as a fundamental rights

<sup>38</sup> *Ibid.*, ¶¶ 13–15.

<sup>39</sup> *Ibid.*, ¶ 23.

<sup>40</sup> *Ibid.*, ¶ 13.

<sup>41</sup> *Ibid.*, ¶¶ 12, 24.

<sup>42</sup> See Art. 38 of Law No. 2018-778 of September 10, 2018 for contained immigration, an effective right to asylum and successful integration; Editorial, “Fraternité” at 4.

<sup>43</sup> Editorial, “Fraternité” at 5.



principle.<sup>44</sup> Moreover, the assertion by the *Conseil* of such broad interpretive and constitutional review power is a form of judicial authority that raises profound separation of powers questions. This is especially true in the legal realms of immigration and asylum, where deference to the government is typically strong.

To appreciate these phenomena more generally, let us now consider analogous cases in other legal systems: those of Captains Rackete and Klemp in Italy and of Scott Warren in the United States.

#### THE RESCUE CAPTAINS, RACKETE AND KLEMP: THE “CRIME OF SOLIDARITY”

The French *Conseil*'s affirmation of strong deference to government power at the border – an exception to its elaboration of the *fraternité* principle – is echoed in all legal systems. It has had particularly powerful consequences in Italy, where thousands of desperate migrants have faced death on the Mediterranean for many years.

From 2014 to 2018, more than 600,000 migrants attempted the perilous crossing from North Africa to Europe.<sup>45</sup> More than 10,000 people drowned.<sup>46</sup> In addition to government and EU-led rescue missions – many of which were widely criticized by human rights groups – European NGOs began to charter ships to monitor the waters off Libya, rescuing migrants and transporting them to Sicily.<sup>47</sup> This led Matteo Salvini, Italy's hardline, anti-immigrant interior minister, leader of the ultranationalist Lega (League) party, to close Italian waters to NGO rescue ships.<sup>48</sup> Malta soon followed suit. Several such boats were stranded at sea for weeks. Salvini, motivated by anti-immigrant sentiment and also concerned that France and other EU countries had not assumed what he saw as their share of the “burden,” said: “We will use every lawful means to stop an outlaw ship, which puts dozens of migrants at risk for a dirty political game.”<sup>49</sup> His understanding of the word “lawful” was soon to be tested.

<sup>44</sup> See G. Canivet, “La fraternité dans le droit constitutionnel français,” in *Conférence en l'honneur de Charles Doherty Gonthier*, May 20–21, 2011, [www.conseil-constitutionnel.fr/la-fraternite-dans-le-droit-constitutionnel-francais](http://www.conseil-constitutionnel.fr/la-fraternite-dans-le-droit-constitutionnel-francais); see also Editorial, “Fraternité” at 5.

<sup>45</sup> C. Stephen, “Italy Bars Two More Refugee Ships from Ports,” *The Guardian*, June 16, 2018, [www.theguardian.com/world/2018/jun/16/italy-bars-two-more-refugee-ships-from-ports](http://www.theguardian.com/world/2018/jun/16/italy-bars-two-more-refugee-ships-from-ports).

<sup>46</sup> See “Tracking Deaths Along Migratory Routes,” *Missing Migrants*, <https://missingmigrants.iom.int/region/mediterranean>.

<sup>47</sup> Human Rights Watch, *EU/Italy/Libya: Disputes over Rescues Put Lives at Risk*, [www.refworld.org/docid/5b646a9f4.html](http://www.refworld.org/docid/5b646a9f4.html) (2018).

<sup>48</sup> Stephen, “Italy Bars Two More Refugee Ships.” The Lega governed Italy until September 2019 in a coalition with the antiestablishment Five Star Movement (M5S).

<sup>49</sup> L. Tondo, “Migrant Rescue Ship Defies Salvini's Ban to Enter Italian Port,” *The Guardian*, June 26, 2019, [www.theguardian.com/world/2019/jun/26/ngo-boat-carrying-migrants-defies-mat-teo-salvini-veto-lampedusa-italy](http://www.theguardian.com/world/2019/jun/26/ngo-boat-carrying-migrants-defies-mat-teo-salvini-veto-lampedusa-italy).

In June 2019, following a grim, two-week standoff with Italian authorities, the Sea-Watch 3 docked at the Sicilian island of Lampedusa with forty-two rescued migrants on board.<sup>50</sup> One of the rescued migrants, a man from Ivory Coast, said in a video, “We can’t hold on any longer. It’s like we’re in a prison because we are deprived of everything. Help us, think of us.”<sup>51</sup> The captain, Carola Rackete, had knowingly defied Salvini’s ban. In a video, Rackete said: “I know this is risky and that I will probably lose the boat, but the 42 shipwrecked on board are exhausted. I will bring them to safety.”

Sea-Watch 3 declined to bring the migrants to Tripoli, as Italy had demanded. “Libya is not a safe country,” said spokesperson Giorgia Linardi. “Forcibly taking rescued people back to a war-torn country, having them imprisoned and tortured, is a crime that we will never commit.”<sup>52</sup> Salvini, however, called the Sea-Watch 3 “an outlaw ship.” By early evening, the ship was about two to three nautical miles away from Lampedusa when it was boarded by Italian financial police. A Sea-Watch 3 spokesperson, Ruben Neugebauer, said: “We are waiting for Italian authorities now. There is not much more we can do. We will not run away.”

Rackete was charged with criminal offenses, but the charges were dismissed in July 2019. Judge Alessandra Vella, among other concerns, opined that the crew’s actions were justified under the circumstances “in the performance of duty” and found that neither Libya nor Tunisia were safe ports. The judge further concluded that Salvini’s decree should not apply to rescue operations, but only to human trafficking. Salvini, unrepentant, said that Captain Rackete would be expelled to Germany because she was “dangerous for national security.”<sup>53</sup>

In a related case, Pia Klemp, the captain of the *Iuventa*, another rescue vessel, was accused with nine others of aiding and abetting illegal migration in relation to their role in seeking to rescue people in danger after fleeing Libya. The charges carry a prison term of up to twenty years or a €15,000 fine for each person illegally brought to Italy.<sup>54</sup> This grim test of will, power, and principle shows little signs of definitive resolution. However, it has become clear that criminal law has become a fulcrum upon which to balance larger political and rights principles. A petition in support of Captain Klemp and her crew, signed by some 71,000 people, intones: “If the crew were convicted, it would be the end of humanity in Europe.”<sup>55</sup> A court in Sicily

<sup>50</sup> Ibid.

<sup>51</sup> Sea-Watch International (@seawatch\_intl), *Twitter* (June 24, 2019), [https://twitter.com/seawatch\\_intl/status/1143251415374225409](https://twitter.com/seawatch_intl/status/1143251415374225409).

<sup>52</sup> Ibid.

<sup>53</sup> Sea-Watch International (@seawatch\_intl), *Twitter* (July 2, 2019), [https://twitter.com/seawatch\\_intl/status/1146178020664889345](https://twitter.com/seawatch_intl/status/1146178020664889345).

<sup>54</sup> Boffey and Tondo, “Captain of Migrant Rescue Ship.”

<sup>55</sup> See “Stop the Prosecution of Those Who Are Saving Lives in the Mediterranean Sea,” *Change.org*, [www.change.org/p/we-demand-impunity-for-saving-lives-at-the-mediterranean-sea-freepia](http://www.change.org/p/we-demand-impunity-for-saving-lives-at-the-mediterranean-sea-freepia).

ruled in January 2019 that Salvini himself could be charged with kidnapping after he prevented refugees from disembarking from an Italian coast guard ship in August. “I confess,” Salvini taunted back, “there is no need for a trial. It’s true, I did it and I’d do it again.”<sup>56</sup>

In June 2019, Italy’s government closed Italian ports to migrant rescue ships and threatened fines of up to €50,000 and impounding of the vessel.<sup>57</sup> Claudia Lodesani, president of Médecins Sans Frontières in Italy, said: “The new decree is threatening legal principles and the duty of saving lives. It is like fining ambulances for carrying patients to hospital.”<sup>58</sup> Carlotta Sami, the spokesperson for the United Nations High Commissioner for Refugees (UNHCR), said: “If we do not intervene soon, there will be a sea of blood.”<sup>59</sup> In September 2019, a new agreement was reached pursuant to which Germany and France would take in 25 percent each of the migrants onboard another rescue ship, the *Ocean Viking*. Other EU states, including Italy, would process the others. Following a meeting with the European Council president, Donald Tusk, in Brussels, Conte said EU member states that refused to share the burden of the arrival of migrants should face financial penalties. Salvini, though out of power, was unwavering: “The new government has opened again its seaports to migrants,” Salvini said, “The new ministers must hate our country. Italy is back to being Europe’s refugee camp.”<sup>60</sup>

Meanwhile, although the number of desperate migrants seeking to cross the Mediterranean has decreased recently, it is clear that risks have remained severe.<sup>61</sup> As the UNHCR notes, “it is likely that reductions to search and rescue capacity coupled with an uncoordinated and unpredictable response to disembarkation led to an increased death rate as people continued to flee their countries due to conflict, human rights violations, persecution, and poverty.”<sup>62</sup>

<sup>56</sup> E. Schumacher, “Italy: Court Rules Far-Right Leader Salvini Can Be Charged with Kidnapping,” DW, January 24, 2019, [www.dw.com/en/italy-court-rules-far-right-leader-salvini-can-be-charged-with-kidnapping/a-47224819](http://www.dw.com/en/italy-court-rules-far-right-leader-salvini-can-be-charged-with-kidnapping/a-47224819).

<sup>57</sup> L. Tondo, “Italy Adopts Decree that Could Fine Migrant Rescuers up to €50,000,” *The Guardian*, June 15, 2019, [www.theguardian.com/world/2019/jun/15/italy-adopts-decree-that-could-fine-migrant-rescue-ngo-aid-up-to-50000](http://www.theguardian.com/world/2019/jun/15/italy-adopts-decree-that-could-fine-migrant-rescue-ngo-aid-up-to-50000).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> L. Tondo, “Italy’s New Government Says Migrants Can Disembark from Rescue Boat,” *The Guardian*, September 14, 2019, [www.theguardian.com/world/2019/sep/14/italys-new-government-says-migrants-can-disembark-from-rescue-boat](http://www.theguardian.com/world/2019/sep/14/italys-new-government-says-migrants-can-disembark-from-rescue-boat).

<sup>61</sup> C. Mainwaring, “At Europe’s Edge: Migration and Crisis in the Mediterranean,” *Border Criminologies*, October 14, 2019, [www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/10/europes-edge](http://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/10/europes-edge); see also “Mediterranean Migrant Arrivals Reach 76,558 in 2019; Deaths Reach 1,071,” IOM, November 10, 2019, [www.iom.int/news/mediterranean-migrant-arrivals-reach-76558-2019-deaths-reach-1071](http://www.iom.int/news/mediterranean-migrant-arrivals-reach-76558-2019-deaths-reach-1071).

<sup>62</sup> UNHCR, *Desperate Journeys: Refugees and Migrants Arriving in Europe and at Europe’s Borders, January–December 2018* (2019), [https://data2.unhcr.org/en/documents/download/67712#\\_ga=2.70740368.1640035127.1578321369.48067902.1578321369](https://data2.unhcr.org/en/documents/download/67712#_ga=2.70740368.1640035127.1578321369.48067902.1578321369).

## WARREN: WATER IN THE DESERT

The government failed in its attempt to criminalize basic human kindness.<sup>63</sup>

At least 7,000 migrants who have tried to cross the parched lands of the southern United States near the Mexican border since the 1990s have died doing so.<sup>64</sup> The deaths are a terrible consequence of “prevention through deterrence,” a border control strategy first developed during the Clinton administration.<sup>65</sup> The Border Patrol built barriers in traditional entry points near urban areas such as El Paso to push border crossers out into more remote and dangerous terrain. Doris Meissner, then-Commissioner of the Immigration and Naturalization Service (which at the time included the Border Patrol), later described the plan in remarkably optimistic terms, suggesting that policymakers believed that once people saw how perilous the new routes were, they would stop trying. As Meissner put it in 2019, “The deaths weren’t contemplated. Obviously, one can’t be anything but regretful about the deaths.”<sup>66</sup> As a 1994 Border Patrol memorandum had put it, however, the essential idea from the beginning was to disrupt traditional entry and smuggling routes so that “illegal traffic will be deterred or forced over *more hostile terrain, less suited for crossing and more suited for enforcement.*”<sup>67</sup> The planners knew that those who were thus compelled to avoid traditional routes could “find themselves in mortal danger.” Indeed, the Border Patrol cruelly envisioned that “violence will increase as effects of the strategy are felt.”<sup>68</sup>

The human costs of this strategy soon became horribly clear. By 1998, the Border Patrol launched the “Border Safety Initiative,” a set of measures to warn migrants about risks, rescue those in trouble, and quantify border-crossing deaths. But the initiative left it up to leaders in each of the Border Patrol’s nine Southwest border sectors to decide which bodies to count and how. By the mid-2000s, the rising death toll continued to raise hard questions. In a 2006 report, grimly entitled, “Border-Crossing Deaths Have Doubled Since 1995,” the Government Accountability Office found that the Border Patrol had consistently understated the numbers of deaths.<sup>69</sup> Moreover, federal authorities had failed to ask local law enforcement agencies,

<sup>63</sup> J. Augilera, “Humanitarian Scott Warren Found Not Guilty after Retrial for Helping Migrants at Mexican Border,” *Time*, November 21, 2019, <https://time.com/5732485/scott-warren-trial-not-guilty/>.

<sup>64</sup> B. Ortega, “Border Patrol Failed to Count Hundreds of Migrant Deaths on US Soil,” CNN, May 15, 2018, [www.cnn.com/2018/05/14/us/border-patrol-migrant-death-count-invs/index.html](http://www.cnn.com/2018/05/14/us/border-patrol-migrant-death-count-invs/index.html).

<sup>65</sup> U.S. Border Patrol, *Border Patrol Strategic Plan 1994 and Beyond* (1994), <https://assets.documentcloud.org/documents/5987025/Border-Patrol-Strategic-Plan-1994-and-Beyond.pdf>.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> U.S. Government Accountability Office, *Illegal Immigration: Border-Crossing Deaths Have Doubled since 1995; Border Patrol’s Efforts to Prevent Deaths Have Not Been Fully Evaluated* (August 2006), [www.gao.gov/new.items/do6770.pdf](http://www.gao.gov/new.items/do6770.pdf).

coroner's offices, and others about cases. Still, diversion to hostile terrain has been a major part of US policy now for a quarter century.

Scott Warren, when arrested, was a thirty-seven-year-old geographer and a volunteer with No More Deaths (aka No Más Muertes), an aid group that leaves water and food for migrants who seek to cross the deadly Sonoran Desert. This group, along with others, was inspired by the so-called Sanctuary Movement of the late 1980s.<sup>70</sup> As described by one of the Sanctuary Movement's leaders, Reverend John Fife of the Southside United Presbyterian Church in Tucson, No More Deaths left water and provided medical aid. But it also documented abuses on the border, as "the most aggressive organization to challenge Border Patrol violations of human rights." Fife noted, "If you look at the founding principles of the Sanctuary Movement and No More Deaths, they're the same: 'civil initiative.'" As he elaborated, "if government isn't fulfilling its obligations, it's up to civil society members to step in."<sup>71</sup> As one local activist put it,

When you think of how tiny our town is, and when you think of the number of bodies that were recovered last year – like 58 or 60 bodies that were recovered here – I can't imagine that happening in any town in our country and not having people be up in arms . . . you have to do something. You don't want to be a cemetery. These are human lives.<sup>72</sup>

Warren was arrested by Border Patrol agents on January 17, 2018.<sup>73</sup> No More Deaths had just published a report that had implicated the Border Patrol in the destruction of thousands of gallons of water left for migrants in the desert.<sup>74</sup> As one reporter noted, it now seemed that the Border Patrol was "punching back."<sup>75</sup> The agents caught Warren with two Central American migrants. Warren told the agents that he had given the migrants shelter, food, and first aid. All of this seemed to the agents to clearly violate US law, which bars "harboring" and "transporting" unauthorized migrants. The Border Patrol and prosecutors – unmoved by Warren's humanitarian motives – argued that he was assisting the migrants to evade custody. He was charged with two counts of harboring undocumented immigrants and one count of conspiracy to harbor and transport. He faced some twenty years in prison. Also, in a particularly bizarre exercise of state power, Warren, along with nine other volunteers, faced federal charges of littering for leaving water on the Cabeza Prieta National Wildlife Refuge.<sup>76</sup>

<sup>70</sup> This movement, some of whose members had been convicted at that time, also inspired civil legal action that led to the creation of Temporary Protected Status in US law. *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Devereaux, "Bodies in the Borderland."

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

At Warren’s first trial in June 2019, the jury failed to reach a verdict.<sup>77</sup> The government quickly sought a retrial, although it dropped the conspiracy charge. After a six-day retrial in Tucson, Arizona, in November 2019, the jury found Warren not guilty after about two hours of deliberation. Reports from the trial and conversations with jurors might seem to indicate that Warren’s case was quite different from those of Herrou and the captains. His lawyers did not mount an explicit “necessity defense” (i.e., arguing that Warren should not be criminally punished for avoiding a greater harm to others). Nor did they expressly argue for jury nullification to override the letter of the law in the pursuit of abstract ideals of higher justice. Warren’s lawyers simply argued that the government had not proven criminal intent, something that was surely rather nebulous under these circumstances. The government had devoted enormous resources to investigation and surveillance. They had evidence. Warren, for example, was observed with the migrants pointing northward. Prosecutors argued that this meant he was guiding the migrants away from the border and deeper into the United States. But Warren testified that he was merely showing them local mountains.<sup>78</sup> He said that the only available highway ran between them. If they needed rescue, that’s where they should go. But if they strayed outside of those mountains, they would find an active US bombing range and deadly desert.<sup>79</sup>

How should a jury decide such questions? One can hear the echoes of Warren’s humanitarian motives and sense the larger debates about harm and justice in every facet of the case. Warren testified that the work he and others do is similar to that of the International Red Cross: neutral provision of aid amidst humanitarian crisis. From this, one gleans a hint of necessity and nullification. Such work, he said, is legal. The jury accepted this, apparently completely. One juror reportedly said, “He

<sup>77</sup> This was not the first encounter between No More Deaths and federal law enforcement. See *ibid.* In 2005, volunteers Shanti Sellz and Daniel Strauss were arrested and charged with multiple felony smuggling and conspiracy counts, after driving three seriously ill migrants to John Fife’s church for medical care. “Volunteers Fight Arrests for Aiding Illegals,” *Associated Press*, April 2, 2006, [www.deseret.com/2006/4/2/19946256/volunteers-fight-arrests-for-aiding-illegals](http://www.deseret.com/2006/4/2/19946256/volunteers-fight-arrests-for-aiding-illegals). US District Judge Raner C. Collins dismissed the charges on the grounds that the volunteers had followed a protocol that they understood to be in line with the law, with full knowledge of the Border Patrol. D. Grossman, “‘No More Deaths’ Volunteer Charges Tossed,” *Arizona Daily Star*, September 2, 2006, [https://tucson.com/news/local/border/no-more-deaths-volunteer-charges-tossed/article\\_86d4dcod-ddf7-5b9c-9f8e-e5303d83eddb2.html](https://tucson.com/news/local/border/no-more-deaths-volunteer-charges-tossed/article_86d4dcod-ddf7-5b9c-9f8e-e5303d83eddb2.html). In 2008, Daniel J. Millis, caught with other volunteers in an SUV loaded with water jugs on the Buenos Aires National Wildlife Refuge, was convicted of littering. He had been found guilty of “Disposal of Waste” pursuant to 50 C.F.R. § 27.94(a). His conviction was overturned by a 2-to-1 vote at the Ninth Circuit. The judges found that the term “garbage” in the regulation under which Millis was prosecuted is ambiguous, and applied the “rule of lenity” to vacate the conviction. *United States v. Millis*, 621 F.3d 914, 918 (9th Cir. 2010); see generally, K. Campbell, “Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary” (2012) 63 *Syracuse Law Review* 71.

<sup>78</sup> Devereaux, “Bodies in the Borderland.”

<sup>79</sup> *Ibid.*

seemed like a humanitarian that was just trying to help. He seemed very kind and not like he was trying to harbor somebody or do anything illegal at all.”<sup>80</sup> As another juror put it, nullification of the law was not necessary: “There was just too much of a lack of evidence to convict,” he said. “I think we can all agree, it was the intent . . .” But a third juror chimed in after the trial: “I think we all agreed,” she said, “what he and these people do is fantastic.”<sup>81</sup>

In the end, Warren’s jury – through their interpretation of his intent – policed the border between law and deep values. The prosecutor, a US attorney, did not see it this way. After the not guilty verdict, he promised that in future cases his office “won’t distinguish between whether somebody is trafficking or harboring for money or whether they’re doing it out of, you know, what I would say is a misguided sense of social justice or belief in open borders or whatever.”<sup>82</sup> One of Warren’s lawyers, Amy Knight, was offended by the word “misguided,” seeing it as “a value judgment, not a legal judgment.” As she paraphrased the instructions that had been given to the jury, “If you’re doing it out of a sense of social justice, then you don’t intend to violate the law.”<sup>83</sup>

#### THE POTENTIAL POWER AND LIMITATIONS OF FRATERNITY

I speak an open and disengaged language, dictated by no passion but that of humanity . . . my country is the world, and my religion is to do good.<sup>84</sup>

The cases of Cédric Herrou, Captains Rackete and Klemp, and Scott Warren clearly involve distinct, technical legal questions and different sociopolitical backdrops. However, the fundamental issues they present have much in common, whether understood through the lens of fraternity, solidarity, necessity, or more general implicit values of justice and fairness that always guide interpretations of facts and law. These questions, most simply put, are:

1. What legal principles may be invoked when humanitarian actions impede or conflict with government power over “unauthorized” migrants?
2. Where do such principles come from and how do they evolve?

The idea that a particular doctrinal formulation is all one might need to inspire judges and legislatures to humanize border practices and to protect the fundamental rights of migrants is of course a form of magical thinking that must be resisted. Still,

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> T. Paine, *The Rights of Man* (Ware: Wordsworth Editions Ltd., 1996), part II, p. 181.

the potential of power of fraternity, compared to solidarity, necessity, equality or even dignity, is worth considering.

### Fraternity

Although the roots of fraternity as a philosophical principle may be traced back through antiquity, its resonant strength – and certain historically well-known and ideological objections to it – may be most directly traced back to its origins as a motto of the French Revolution.<sup>85</sup> Though its evolution as a politico-legal concept in France was rather slow and tentative, it was eventually incorporated into the 1958 Constitution.

Though some suggest – following Diderot – that fraternity may be largely a euphemism for the ostensibly broader concept of “humanity,” fraternity is a narrower ideal that, in some respects, may paradoxically be a stronger source of obligation than humanity to those who arrive from outside of a particular civil society.<sup>86</sup>

Some, however, view fraternity as a rather limited, highly interpersonal concept. Wilson Carey McWilliams, for example, in a 1973 book entitled *The Idea of Fraternity in America*, saw fraternity as “a bond based on intense interpersonal affection.” It was thus “limited in the number of persons and in the social space to which it can be extended.” Moreover, it “implies a necessary tension with loyalty to society at large.”<sup>87</sup> But this seems a rather parsimonious approach when compared to obligations that go beyond charity and beyond narrow conceptions of interpersonal relations or community.<sup>88</sup> Since the Enlightenment, fraternity has often been said to transcend a “feeling of a community and the demand for communion.”<sup>89</sup> Rather, it “postulated an order based on the equality of men.”<sup>90</sup> Whether that order – what Robespierre once called *les doux noeuds de la fraternité* (“the sweet knots of brotherhood”) – is confined to the “Fatherland” or extends beyond that to a global community of values has always been an important if implicit question at the heart of the fraternity principle.<sup>91</sup>

<sup>85</sup> C. D. Gonthier, “Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy” (2000) 45(3) *McGill Law Journal* 567–589 at 570.

<sup>86</sup> *Ibid.* It may certainly be stronger once they have become, in any way, a part of the fraternal community. But even before that universal “brotherhood” seems a stronger principle than simply being members of the same species.

<sup>87</sup> W. C. McWilliams, *The Idea of Fraternity in America* (Berkeley: University of California Press, 1973), p. 7.

<sup>88</sup> P. Vernière, “L’idée d’humanité au XVIII<sup>e</sup> siècle” in *Lumières ou clair-obscur?* (Paris: Presses universitaires de France, 1987), p. 186 aux pp. 187–188 (quoted in Gonthier, “Liberty, Equality, Fraternity” at 571).

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> J. Boulad-Ayoub, *Contre nous de la tyrannie. ... Des relations idéologiques entre Lumières et Révolution* (Quebec: Hurtubise HMH, 1989), p. 58.



More recent invocations have sought to situate fraternity within broader theories of justice, fairness, equality, and liberty.<sup>92</sup> As former Canadian Supreme Court Justice Charles Gonthier wrote, fraternity advances core values that relate to *forming* a community.<sup>93</sup> It is in this sense a dynamic, evolutionary, aspirational, and idealized concept. Its related values, which he termed “interrelated threads weaving the cloth of fraternity,” include empathy, cooperation, commitment, responsibility, fairness, trust, and equity.<sup>94</sup> If the essence of fraternity is based on membership in a community, however, it is puzzling how it could ground a theory of rights to outsiders, or “others.” McWilliams’ argument that fraternity “is limited in the number of persons and in the social space to which it can be extended” could thus be a significant limitation.<sup>95</sup> The broader view, as Pope Francis recently explained, is much more powerful: “Universal fraternity and social friendship are . . . two inseparable and equally vital poles in every society.”<sup>96</sup> Fraternity, understood in this way, is “born not only of a climate of respect for individual liberties, or even of a certain administratively guaranteed equality. Fraternity necessarily calls for something greater, which in turn enhances freedom and equality.”<sup>97</sup> Social friendship and universal fraternity both “necessarily call for an acknowledgement of *the worth of every human person*, always and everywhere.”<sup>98</sup> Most relevant for our purposes: “No one, then, can remain excluded because of his or her place of birth, much less because of privileges enjoyed by others who were born in lands of greater opportunity. The limits and borders of individual states cannot stand in the way of this . . .”<sup>99</sup> As Justice Gonthier noted, “fraternity may be universal in its object,” but it has specific applications.<sup>100</sup> Broad universal values of fraternity may, for example, be seen – in a relevant analogy to the Herrou matter – in the rather narrowly fraternal Quebec Charter of Human Rights and Freedoms, which contains a unique Good Samaritan provision.<sup>101</sup>

<sup>92</sup> See e.g., J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 105.

<sup>93</sup> Gonthier, “Liberty, Equality, Fraternity” at p. 570.

<sup>94</sup> *Ibid.*

<sup>95</sup> McWilliams, *The Idea of Fraternity in America*, p. 7.

<sup>96</sup> Encyclical Letter *Fratelli Tutti* of the Holy Father Francis on Fraternity and Social Friendship, October 3, 2020, Par. 142, [http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20201003\\_encyclica-fratelli-tutti.html](http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_encyclica-fratelli-tutti.html).

<sup>97</sup> *Ibid.*, ¶ 103.

<sup>98</sup> *Ibid.*, ¶ 106.

<sup>99</sup> *Ibid.*, ¶ 121.

<sup>100</sup> Gonthier, “Liberty, Equality, Fraternity” at p. 575.

<sup>101</sup> Section 2 reads:

Every human being whose life is in peril has a right to assistance.

Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

Quebec Charter of Human Rights and Freedoms, chp. 6, § 2, June 27, 1975, <http://legisquebec.gouv.qc.ca/en/showdoc/cs/c-12>.

If fraternity were to be limited only to Good Samaritan ideals, however, then it would seem to amount to little more than charity, a relatively uncontroversial notion that does not imply much in the way of rights. The Herrou case, however, implies that fraternity is potentially more resonant and powerful than this. And for this reason, it has provoked historically well-known objections. Conservatives have long recoiled at the abstract ideal of love of “mankind,” particularly when clothed in the language of brotherhood. James Fitzjames Stephen, for example, in his 1873 critique of the neo-utilitarian philosophy of John Stuart Mill in *Liberty, Equality, Fraternity*, offered a stinging rejoinder to proponents of universal fraternity. Though admitting as “common ground” that “upon some terms and to some extent it is desirable that men should wish well to and should help each other,” Stephen expressed a feeling of disgust . . . for expressions of general philanthropy” that he saw as “an insulting intrusion.”<sup>102</sup>

The potential power of fraternity as a legal concept derives from the fact that it does not *necessarily* demand a clear choice between a cosmopolitan view of rights and a Burkean idea of rights as “a patrimony derived from . . . forefathers.”<sup>103</sup> Fraternity imbues charity with implications of universal obligation. This accounts for its invocation as the spiritual admonition in the very first article Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>104</sup> In its recognition of the constitutional principle of fraternity in the Herrou matter, the *Conseil constitutionnel* thus articulated a humanistic, universal interpretation ideal deeply related to the Declaration and to Kant’s duty of “hospitality.”<sup>105</sup>

Scott Warren’s lawyer argued to the jury, “Being a good samaritan [sic] is not against the law, following the golden rule is not a felony.”<sup>106</sup> One could perhaps view this as an implicit invocation of fraternity. But it is a narrower argument against proof of alleged criminal intent. The potential power of fraternity is stronger: as a constitutional principle, it *could* – as some legal commentators have advocated – override government attempts to criminalize all sorts of arguably socially just behaviors.<sup>107</sup> This is especially powerful in migration cases where the principle

<sup>102</sup> J. Fitzjames Stephan, *Liberty, Equality, Fraternity* (London: H. Elder & Co., 1874), p. 106.

<sup>103</sup> E. Burke, *Reflections on the Revolution in France: A Critical Edition* (J. C. D. Clark ed., Stanford, CA: Stanford University Press, 2001).

<sup>104</sup> Universal Declaration of Human Rights, December 10, 1948, United Nations General Assembly Res. 217A(III), pmb.

<sup>105</sup> I. Kant, *Perpetual Peace and Other Essays on Politics, History and Morals* (T. Humphrey, trans., Hackett: 1983), pp. 118–120.

<sup>106</sup> Ingram, “Scott Warren Found Not Guilty.”

<sup>107</sup> See Gonthier, “Liberty, Equality, Fraternity” at 570; see also G. Canivet, “La fraternité”; J. C. Colliard, “Liberté, égalité, fraternité,” in *L’État de droit: mélanges en l’honneur de Guy Braibant* (Daloz, 1996), pp. 100–101, [www.worldcat.org/title/etat-de-droit-melanges-en-lhonneur-de-guy-braibant/oclc/247045796/editions?referer=di&editionsView=true](http://www.worldcat.org/title/etat-de-droit-melanges-en-lhonneur-de-guy-braibant/oclc/247045796/editions?referer=di&editionsView=true); M. Borgetto,

has a dual dimension: “a collective one based on solidarity and an individual one based on tolerance.”<sup>108</sup>

### *Solidarity*

Solidarity, too, may have this dual dimension. Solidarity has typically been viewed as an internal value *within* communities.<sup>109</sup> However, it also may apply – like humanity and fraternity – to global issues. As Pope Francis has put it, “No one can remain insensitive to the inequalities that persist in the world.”<sup>110</sup> He then called for “a valuable lesson in solidarity, a word that is too often forgotten or silenced because it is uncomfortable,” as he appealed to “those in possession of greater resources, to public authorities and to all people of good will who are working for social justice: never tire of working for a more just world, marked by greater solidarity.”<sup>111</sup> Other exponents of the Catholic social teaching ideal of solidarity similarly emphasize the relationship between fraternity and solidarity. Pope Benedict XVI once noted that “As society becomes ever more globalized, it makes us neighbours but does not make us brothers.”<sup>112</sup> On this view, solidarity is “simply the demand of fraternity, that we treat each other as brothers and sisters.”<sup>113</sup> The Catechism of the Catholic Church thus emphasizes solidarity “among nations *and peoples*. International solidarity is a requirement of the moral order; world peace depends in part upon this.”<sup>114</sup>

“La notion de fraternité en droit public français. Le passé, le présent et l’avenir de la solidarité” (1993) 48(1) *Revue internationale de droit comparé* 215–217.

<sup>108</sup> C. Dadomo, “‘Liberty, Equality, Fraternity’: The French Constitutional Court Confirms the Constitutional Status and Force of the Principle of Fraternity,” *EU Law and Policy*, September 21, 2018, <https://eulawpol57.wordpress.com/2018/09/21/liberty-equality-fraternity-the-french-constitutional-court-confirms-the-constitutional-status-and-force-of-the-principle-of-fraternity/> (“By ruling that ‘fraternity is a constitutional principle from which ensues the freedom to assist others for humanitarian reasons without consideration as to whether the assisted person is legally residing or not within the French territory’ (paras 7 and 8 of the ruling), the Constitutional Court not only stresses the humanitarian dimension of acts of assistance but also provides the freedom to assist a general scope of application irrespective of whether the assisted person has a legal right or not to reside in France.”).

<sup>109</sup> See e.g., P. Kropotkin, *Mutual Aid: A Factor of Evolution* (New York: McClure Phillips & Co., 1902); É. Durkheim, *The Division of Labor in Society* (George Simpson, trans., New York: The Free Press, 1947).

<sup>110</sup> Address of Pope Francis, *Visit to the Community of Varginha (Maguinhos): Apostolic Journey to Rio de Janeiro on the Occasion of the XXVIII World Youth Day*, July 25, 2013, [www.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco\\_20130725\\_gmg-comunita-varginha.html](http://www.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco_20130725_gmg-comunita-varginha.html).

<sup>111</sup> *Ibid.*

<sup>112</sup> Pope Benedict XVI, Encyclical Letter *Caritas in Veritate*, June 29, 2009, [www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate.html](http://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html).

<sup>113</sup> *Ibid.*

<sup>114</sup> Pope John Paul II, *Catechism of the Catholic Church* (1992), part 3, § 1, chapter 2, art. 3, [www.vatican.va/archive/ccc\\_css/archive/catechism/p3s1c2a3.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c2a3.htm) (emphasis added).

It is noteworthy that activists such as Cédric Herrou and Captains Rackete and Klemp sometimes refer, ironically, to the crimes with which they have been charged as crimes of solidarity.<sup>115</sup> This reflects how solidarity operates both as a normative principle and as legal doctrine in Europe. Article 2 of the 1993 Treaty on European Union (TEU) lists values that are common to the member states.<sup>116</sup> It then states that these values are common in a society in which “pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”<sup>117</sup> The EU Charter of Fundamental Rights lists solidarity more prominently and specifically as a value. Chapter IV of the Charter, “Solidarity” (which precedes the chapter on “Citizens’ Rights”), lists rights of workers, prohibits child labor, protects family rights (including protections against dismissal due to maternal and guaranteeing parental leaves), social security, health care, access to “services of general economic interest,” environmental protection, and consumer protection.<sup>118</sup> Thus, solidarity appears in the European Union as a “vector of concrete social rights . . . aimed at the *protection* of individuals as such or in their economic capacity.”<sup>119</sup>

Solidarity, like some narrow visions of fraternity, may also work as an exclusionary principle. This can be seen in situations where solidarity is not viewed as a universal construct, but is limited to particular communities. Article 67 § 2 of the Treaty on the Functioning of the European Union, for example, mandates a common policy on asylum, immigration, and external border control, which is based on *solidarity between member states* but which is simply “fair” toward third-country nationals.<sup>120</sup>

### Necessity

The lawyers in Warren’s case and those planning the defense of Pia Klemp also rely on the defense of necessity. This defense, a form of justification, has been most simply defined as “the assertion that conduct promotes some value higher than the value of literal compliance with the law.”<sup>121</sup> Others have called it the choice of “the

<sup>115</sup> See also, L. Fekete, “Europe: Crimes of Solidarity” (2009) 50(4) *Race and Class* 83–97; M. Tazzioli, “Crimes of Solidarity: Migration and Containment through Rescue” (2018) 2.01(2) *Radical Philosophy* 1–10, [www.radicalphilosophy.com/commentary/crimes-of-solidarity#:~:text=Crimes%20of%20solidarity%20put%20in,migrants%20acts%20of%20spatial%20disobedience&text=In%20this%20way%2C%20crimes%20of,crisis%20and%20security](http://www.radicalphilosophy.com/commentary/crimes-of-solidarity#:~:text=Crimes%20of%20solidarity%20put%20in,migrants%20acts%20of%20spatial%20disobedience&text=In%20this%20way%2C%20crimes%20of,crisis%20and%20security).

<sup>116</sup> Treaty on the European Union, November 1, 1993, [www.refworld.org/docid/3ae6b39218.html](http://www.refworld.org/docid/3ae6b39218.html) (“[H]uman dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”).

<sup>117</sup> Consolidated Version of the Treaty on European Union, December 13, 2007, 2008/C 115/01, [www.refworld.org/docid/4b179f222.html](http://www.refworld.org/docid/4b179f222.html).

<sup>118</sup> Charter of Fundamental Rights of the European Union, December 18, 2000, 2000/C 364/01, [www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>119</sup> Editorial, “Fraternité” at 2.

<sup>120</sup> Treaty on the Functioning of the European Union, 2012/C 326/01, tit. V, chapter 1, art. 67, § 2, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A2012E%2FTXT>.

<sup>121</sup> G. Williams, *The Criminal Law* § 229 (2nd ed., London: Stevens & Sons, 1953).

lesser evil.”<sup>122</sup> It is obviously related to broader concepts within the Anglo-American adversarial system, such as jury nullification, and to related defenses such as “excuse.”<sup>123</sup> But there is a basic distinction between an excuse and a justification: that between being “forgivably wrong” versus being *right*. Thus, a person who claims justification does not seek pardon, nor argue for mitigation or excuse. Justification implies that there is no need for forgiveness.<sup>124</sup>

Though its roots in Anglo-American law are complex and interwoven with various semantic formulations, the basic idea of necessity has long resided at the intersection between positive law and moral principle.<sup>125</sup> Sir James Fitzjames Stephen, in his 1883 treatise, referred to the necessity defense as “one of the curiosities of law,” and a subject on which the law of England was “so vague that if cases raising the question should ever occur the judges would practically be able to lay down any rule which they considered expedient.”<sup>126</sup> One might well ponder whether this renders necessity too vague to be a meaningful *legal* principle, perhaps more a matter of discretion than law.<sup>127</sup> In fact, necessity has sometimes been used as an epithet against judges themselves. A nineteenth-century Texas Justice of the Peace was reportedly known as “Old Necessity” because he knew so little about the law. Deadwood judge, W. R. Keithly, apparently had the same moniker during the Gold Rush.<sup>128</sup> Others, however, have historically sided with Sir Walter Scott that although the law of necessity “is not well furnished with precise rules . . . necessity creates the law; it supersedes rules; and whatever is reasonable and just in such circumstances is likewise legal.”<sup>129</sup>

The way in which the necessity principle has informed the development of international law illustrates its potential limitations.<sup>130</sup> Robert Phillimore cites

<sup>122</sup> E. Arnolds and N. Garland, “The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil” (1975) 65(3) *Journal of Criminal Law and Criminology* 289–301, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5903&context=jclc>.

<sup>123</sup> See *ibid.* (“To justify does not mean to excuse; justification is a circumstance which actually exists and which makes harmful conduct proper and noncriminal, while excuse is a circumstance which excuses the actor from criminal liability even though the actor was technically not justified in doing what he did.”) (citing *Final Report of the National Commission on Reform of Federal Criminal Laws*, § 601 (1971)).

<sup>124</sup> *Ibid.*, p. 290.

<sup>125</sup> For a general overview, see A. Brudner, “A Theory of Necessity” (1987) 7(3) *Oxford Journal of Legal Studies* 339–368.

<sup>126</sup> J. Fitzjames Stephen, *A History of the Criminal Law of England* (London: Macmillan & Co, 1883), vol. II, p. 108.

<sup>127</sup> See D. Kanstroom, “Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law” (1997) 71 *Tulane Law Review* 703–818.

<sup>128</sup> J. Agnew, *Crime, Justice and Retribution in the American West 1850–1900* (Jefferson, NC: McFarland & Company, 2017), p. 180.

<sup>129</sup> *The Gratitude*, 3 Rob. Adm. R. 240 (1801); R. A. Anderson (ed.), *Wharton’s Criminal Law*, 5 vols. (12th ed., Rochester, NY: Lawyer’s Cooperative Publishing, 1957), vol 1, chapter 3, part 7, sub. 126.

<sup>130</sup> R. Phillimore, *Commentaries upon International Law* (London: Hodges, Foster & Co., 1871), vol 2.

Lord Stowell, who opined that “a clear necessity will be a sufficient justification of everything that is done fairly and with good faith under it.”<sup>131</sup>

One’s potential admiration for Cédric Herrou or Captains Rackete and Klemp should not obscure the difficulties inherent in the defense of necessity, however. Its invocation is always – indeed inevitably – highly controversial.<sup>132</sup> It arose famously in nineteenth-century cases of cannibalism among those adrift on the high seas. The British Home Office<sup>133</sup> and judges reportedly worried that if yielding to temptation were sanctioned, necessity might become “the legal cloak for unbridled passion and atrocious crime.”<sup>134</sup> Perhaps the most salient example of this is that necessity was invoked as a defense to prosecution by the defendants at Nuremberg, whose counsel argued that a necessity defense “must also be considered one of the fundamental principles of the criminal law of all civilized nations.”<sup>135</sup>

#### THE (RE-)BIRTH OF RIGHTS THROUGH FRATERNITY, SOLIDARITY, AND NECESSITY

Hannah Arendt famously (and chillingly) noted the failures of abstract human rights principles to protect “national minorities” and stateless people prior to the Second World War: “The world found nothing sacred in the abstract nakedness of being human.”<sup>136</sup> Arendt reasoned that, to have meaningful rights, individuals must be more than mere human beings; they must be members of a political community. She called this right the “right to have rights.” As she wrote in *The Origins of Totalitarianism*: “We became aware of the existence of a right to have rights [to live in a framework where one is judged by one’s actions and opinions] and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights.”<sup>137</sup>

<sup>131</sup> *Ibid.*, p. 110.

<sup>132</sup> The phrase “Neede hath no law,” an English version of the Latin proverb, *necessitas non habet legem*, has been traced as far back in the fourteenth-century work, “Piers Plowman.” J. Simpson and J. Speake (eds.), *The Oxford Dictionary of Proverbs* (5th ed., Oxford, UK and New York: Oxford University Press, 2008) [www.oxfordreference.com/view/10.1093/acref/9780199539536.001.0001/acref-9780199539536-e-1526](http://www.oxfordreference.com/view/10.1093/acref/9780199539536.001.0001/acref-9780199539536-e-1526); see generally H. Potter, *Law, Liberty, and the Constitution: A Brief History of the Common Law* (Woodbridge, UK: Boydell Press, 2015), p. 241.

<sup>133</sup> The Home Office is a ministerial department of Her Majesty’s Government of the United Kingdom, responsible for immigration, security, and law and order. “Home Office,” *Government of the United Kingdom*, [www.gov.uk/government/organisations/home-office](http://www.gov.uk/government/organisations/home-office).

<sup>134</sup> *Ibid.*; see also *Regina v. Dudley and Stephens*, 14 QBD 273 (1884).

<sup>135</sup> *Trials of War Criminals before the Nuremberg Military Tribunals* (Washington, DC: United States Government Printing Office, 1952) vol. 8, pp. 986–987, [www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-VIII.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VIII.pdf).

<sup>136</sup> H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt Books, 1994), p. 209; see also S. DeGooyer et al., *The Right to Have Rights* (London: Verso, 2018).

<sup>137</sup> Arendt, *The Origins of Totalitarianism*, p. 294.

The cases of Herrou, Warren, and Captains Rackete and Klemp challenge this rather circumscribed formulation. They offer powerful examples of how encounters at or near the borders of the “organized community” between potentially “rightless” outsiders and state agents cannot be completely insulated from legally salient human rights claims. Rights norms grounded in fraternity, solidarity, and necessity are, to be sure, complex and nuanced. They arise in technically detailed ways at particular points of legal processes. Moreover, one might object that, in all of the cases discussed herein, they have been successfully deployed *not* by migrants themselves but derivatively by those who sought to aid them. This is an important objection. But it does not disprove my main thesis. Logically, one cannot make sense of fraternity, solidarity, or even necessity without acknowledging that the migrants themselves must be understood to have certain basic human rights, too, albeit in a perhaps rather nascent form. As evolving legal principles, they are thus firmer, more distinct, more crystalized, more enforceable, and more a part of law itself than, for example, an aspirational ideal such as charity.

To be sure, this is a challenge for human rights theories in general. As Jacques Rancière has noted, echoing Arendt: “the Rights of Man turned out to be the rights of the rightless, of the populations hunted out of their homes and land and threatened by ethnic slaughter. They appeared more and more as the rights of the victims, the rights of those who were unable to enact any rights or even any claim in their name.”<sup>138</sup> The effects of this, as well illustrated by the cases described herein, are problematic in many ways. For one thing, as Rancière highlights, “eventually their rights had to be upheld by others, at the cost of shattering the edifice of International Rights, in the name of a new right to ‘humanitarian interference.’”<sup>139</sup> This raises the old concern of Arendt that “the ‘man’ of the Rights of Man was a mere abstraction because the only real rights were the rights of citizens, the rights attached to a national community as such.”<sup>140</sup>

But a deeper analysis of such ostensibly humanitarian cases offers a more optimistic rights vision. Fraternity, for example, is a dialogical concept. It implies certain human rights that go beyond those of Herrou to be kind, as it were, to any living creature. While the *Conseil* was at pains not to create an explicit right to *enter* France, the extension of what one might call derivative constitutional fraternity rights to those on French soil without legal status is a conceptual step forward from the EU ideals of solidarity and surely a more powerful rights principle than using necessity merely as a defense.

Moments such as the encounters between Herrou, Warren, Captains Rackete and Klemp, and state agents are significant because they also involve the presence of

<sup>138</sup> J. Rancière, “Who Is the Subject of the Rights of Man?” (2004) 103(2) *South Atlantic Quarterly* 297–298.

<sup>139</sup> *Ibid.* at 298.

<sup>140</sup> *Ibid.*

other human beings, *the migrants themselves*, who have *definable* – and perhaps someday *enforceable* – rights claims. Thus, justice and rights are much more than “a negotiation between the conflicting rights of members of a community.”<sup>141</sup> These encounters illustrate a profound negotiation *between* the rights of members of a community and the rights of those who are *not* members of that, or perhaps of *any* legally cognizable, community.<sup>142</sup>

Legal challenges by, on behalf of, or in relation to unauthorized migrants are often seen by governments as an impediment or an annoyance, if not part of a crime. Others view such claims more positively, but still in an impoverished way – as, at best, a humanitarian corrective against occasional harsh practices. But such invocations of evolving legal principle are much more than this. As the Herrou case demonstrates quite clearly, they are part of the dynamic process of mediating the inevitable tension between majoritarian, “sovereign” power and the rights aspects of law. Indeed, this is a component of the essential revitalizing project of both constitutional democracy and of international human rights law. As Bonnie Honig has suggested, we should reframe the traditional question: “How should ‘we’ solve the problem of foreignness?”<sup>143</sup> That question inevitably leads us to ask what “we” should do about “them.” A more intriguing and useful inquiry is: “What problems does foreignness solve for us?”<sup>144</sup> The most important such problem is how – in a real, tangible way – to implement Martha Nussbaum’s admonition that, “[w]e should recognize humanity wherever it occurs, and give its fundamental ingredients, reason and moral capacity, our first allegiance and respect.”<sup>145</sup>

In sum, noncitizens, especially the unauthorized and ostensibly “rightless,” are uniquely positioned to challenge, to critique, and to improve the meaning of law in constitutional democracies and of international human rights. This is both despite and because of the threats and disadvantages they experience. Through the legal system, noncitizens are a crucial part of a “circular process that recursively feeds back” into engagement and debate.<sup>146</sup> Since legitimate lawmaking both responds to and generates communicative power from, as it were, below, noncitizens play a central role in translating communicative power into administrative power and law.

<sup>141</sup> S. Degooyer and A. Hunt, “The Right to Have Rights,” *Public Books*, May 5, 2018, [www.publicbooks.org/the-right-to-have-rights/](http://www.publicbooks.org/the-right-to-have-rights/).

<sup>142</sup> *Ibid.*

<sup>143</sup> B. Honig, *Democracy and the Foreigner* (Princeton, NJ: Princeton University Press, 2001), p. 4.

<sup>144</sup> *Ibid.*

<sup>145</sup> M. C. Nussbaum, “Patriotism and Cosmopolitanism,” *Boston Review*, October 1, 1994, <http://bostonreview.net/BR19.5/nussbaum.php>.

<sup>146</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg, trans., Cambridge, MA: MIT Press, 1996), p. 130; *see also* Kanstroom, “Alien’ Litigation as Polity-Participation.”



The reactions of the French Parliament to the *Conseil* decision in the Herrou case illustrate this phenomenon well. Although the cases described in this chapter offer only moderate cause for optimism in terms of a more robust and comprehensive corpus of rights for migrants, the evolution of principles such as fraternity and solidarity may yet benefit not only “them,” but all of us, together.