

Towards a Legal Turn in the Ethics of Immigration

Johan Rochel

This contribution presents the case for a 'legal turn' in the ethical debate on immigration. The legal turn is an invitation directed mainly at philosophers to take law as a normative practice seriously, to draw upon the normative resources which it entails and to look for cooperation opportunities with legal scholars. In the continuation of the debates on the ethics of immigration, this legal turn represents an important opportunity for philosophy to gain more relevance in the legal and political realms by affirming its capacity to inspire and guide concrete legal evolutions.

This piece proposes both a methodological argument on how to make room for the contributions made by ethical theory within a legal argument and an exemplification of this innovative approach as a way to uncover new research fields for both immigration law and ethics. This legal turn represents a promising development of the consistency-based approach used widely by philosophers arguing from the point of view of liberal and democratic values and highlighting inconsistency in immigration policy. The legal turn pleads for a new locus for ethical investigation (namely immigration law) and proposes a methodology labelled as a 'normative reflexive dialogue'. The potential of this dialogue will be exemplified through the principle of proportionality, a decisive principle for migration law and ethics.

Introduction: Finding Ethics within the Law

Most philosophers would acknowledge a desire to have a practical impact when addressing an issue. This might especially be true of philosophers dealing with the ethics of immigration. But do philosophers succeed in living up to this ambition? The present contribution argues that philosophers wanting to have an impact should stop neglecting immigration *law*, both as an essential institutional setting and as a normative language through which immigration is conceived, and invest time and energy into investigating how their contributions might be made fruitful in a legal context. In arguing for a 'legal turn' in the ethics of immigration, this paper aims to sketch a blueprint for this endeavour. This legal turn is an invitation directed mainly at philosophers to take the law as a normative practice seriously, to draw upon the normative resources which it entails and to look for cooperation opportunities with legal scholars. This contribution will

propose a way to operationalize this legal turn by presenting a methodology on how and where to draw upon ethical resources as part of a legal argument. Seen in the successive developments of the ethics of immigration debate, this legal turn represents an important opportunity for ethics to gain more relevance in the legal and political realms by affirming its capacity to inspire and guide concrete legal evolutions.

Starting with the seminal article by Joseph Carens in 1987, the ethical debate on immigration has been continually broadened.¹ The primary focus of this debate was long the so called 'open/closed borders' question, focusing on substantial arguments for or against the state's competence to choose its immigration policy as it sees fit.² Claiming that we need to complement what he called 'substantive-moral' arguments with a 'procedural-political' analysis, Abizadeh has broadened the debate towards the conditions of decisions on the different normative elements at stake and their evaluation.³ This new front might be labelled the 'procedural turn' in the ethics of immigration. According to Abizadeh, the regime of immigration control subjects both members and non-members to the state's coercive power. It invades the autonomy of would-be migrants and therefore gives rise to a right of democratic participation in the making of border policies. Finally, the debate is currently being further broadened by applying these general arguments to specific real-world situations, such as a state's responsibility in dealing with large refugee camps⁴ or the reform of the European Dublin system.⁵

The legal turn should be one of the further evolutions of this debate.⁶ Firstly, it represents a complement to mainstream immigration ethics. Until now, most philosophers working on immigration have used a consistency-based approach⁷ which draws upon general, liberal and democratic values as benchmarks to highlight

¹ Joseph Carens, 'Aliens and Citizens: The Case for Open Borders', *The Review of Politics* 49:2 (1987), pp. 251-273. See also the classical text by Michael Walzer: *Spheres of Justice: a Defence of Pluralism and Equality* (New York: Basic Books, 1983).

² Veit Bader, 'The Ethics of Immigration', *Constellations* 12:3 (2005), pp. 331-361; Joseph Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013); Jonathan Seglow, 'Immigration', in *International Encyclopedia of Ethics*, edited by Hugh LaFollette. Malden, MA: Wiley Blackwell, 2013, pp. 2549-2560.

³ Arash Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders', *Political Theory* 36:1 (2008), pp. 37-65; Arash Abizadeh, 'Closed Borders, Human Rights, and Democratic Legitimation', in *Driven from Home, Protecting the Rights of Forced Migrants*, edited by David Hollenbach (Washington, D.C.: Georgetown University Press, 2010), pp. 147-166.

⁴ Joseph Carens, 'How Should We Think About the Ethics of International Migration?', *EUI Forum on Migration, Citizenship and Demography* (2014), 1-8. Online at <http://www.eui.eu/Documents/RSCAS/PapersLampedusa/FORUM-Carensfinal.pdf> (accessed 2017-05-01). More generally, Alex Sager (Ed.), *The Ethics and Politics of Immigration: Core Issues and Emerging Trends* (Lanham: Rowman & Littlefield International, 2016), at pp. 6ff.

⁵ Vincent Chetail, Philippe De Bruycker and Francesco Maiani (Eds.), *Reforming the Common European Asylum System* (Nijhoff: Brill, 2016), Ch. 4.

⁶ Interestingly, further cooperation with legal scholars is not mentioned by Sager as research opportunities in the introduction of the latest edited book on the issue of the ethics of immigration (Sager, *The Ethics and Politics of Immigration*, p. 8).

⁷ For an example of this general consistency-based approach, see Carens, *The Ethics of Immigration*, pp. 5-10.

inconsistency in (Western) immigration policy and call for reform proposals.⁸ For the last thirty years, this approach has helped identify and formulate numerous ethical problems raised by immigration policy. It has highlighted normative resources held by states in the form of their founding values in addressing these challenges. The legal turn perpetuates and complements this approach by outlining a new methodology and a new locus of investigation. The new locus is the law; and the new methodology proposed is labelled as a normative reflexive dialogue.

Secondly, the legal turn takes advantage of the cooperative willingness shown by legal scholars. In interpreting and making sense of immigration laws, important voices have already tried to build bridges towards immigration ethics.⁹ Philosophers have neglected the opportunity to draw upon normative resources which are already entailed by a specific legal regime or, even more problematically, have missed ethical challenges that arise from the application of the law.¹⁰ Current political challenges render the need for fuller cooperation particularly timely and practically relevant.

The present contribution is organized in two main parts, each of them dedicated to one of the two main objectives of the paper. It firstly presents how to operationalize the legal turn by adopting a normative reflexive dialogue. It locates this approach as part of a non-ideal approach to the ethics of immigration and clarifies some jurisprudential issues in order for ethical arguments to be made fruitful in the context of a legal argument. In this regard, the relevance of legal values and principles as modulation norms between law and ethical considerations are stressed. Secondly, the potentiality of this legal turn is exemplified through the principle of proportionality, a decisive principle for both immigration law and ethics. Proportionality's specific applicability in immigration matters, especially in situations in which would-be migrants submit an application for immigration, is demonstrated. Assuming this applicability, it will furthermore be argued that important elements of the debate on the ethics of immigration should be drawn upon as part of the proportionality test foreseen by the law. The ethical arguments developed shall be made fruitful in the normative space created by the three-pronged test of proportionality (suitability, necessity and proportionality *stricto sensu*). This example shall illustrate the powerful combination that stronger cooperation among philosophers and legal scholars might bring about.

⁸ In this respect, see the important work by Cole (2000). *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh, Edinburgh University Press).

⁹ See for instance, Howard F. Chang, 'The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism', *DePaul Law Review* 52:759 (2003), pp. 759-776, at pp. 767ff; Matthew Lister, 'Justice and Temporary Labor Migration', *Georgetown Immigration Law Review* 29:1 (2014), pp. 95-123, at pp. 109ff; Ayelet Shachar, 'Selecting By Merit: The Brave New World of Stratified Mobility', in *Migration in Political Theory: The Ethics of Movement and Membership*, edited by Lea Ypi and Sarah Fine (Oxford: Oxford University Press, 2016), pp. 175-199, at pp. 185ff; Daniel Thym, 'Europäische Einwanderungspolitik: Grundlagen, Gegenstand und Grenzen', in *Europäisches Flüchtlings- und Einwanderungsrecht. Eine kritische Zwischenbilanz*, edited by Rainer Hofmann and Tillmann Lühr. Baden-Baden: Nomos, 2008, pp. 183-204, at pp. 188ff; Bas Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (London: Routledge, 2012); Jürgen Bast, *Aufenthaltsrecht und Migrationssteuerung* (Tübingen: Mohr Siebeck, 2011).

¹⁰ See, for instance, questions of reverse family reunification which occur when applying the law and which are hardly taken into consideration by ethical investigations.

Non-Ideal Theory Well-Understood: The Case for a Legal Turn

The legal turn is a general invitation directed mainly at philosophers. The objective of this section is to present and defend a promising methodology to operationalize this invitation. I label it a 'normative reflexive dialogue'.¹¹ This proposition is by no means exclusive and other approaches might be perfectly suited to make the legal turn in immigration ethics a reality. In short, the objective of this dialogue is to make graspable and take advantage of the process of mutual normative interactions between the functioning of a legal regime and the interpretation of its key values and principles. After having defined this dialogue, I locate it as part of a non-ideal approach to the ethics of immigration.

The Normative Reflexive Dialogue

The normative reflexive dialogue is a methodology by which to draw upon ethical considerations in interpreting specific legal norms. The concept of 'dialogue' is used in contrast to a top-down characterization.¹² The dialogue works as an on-going and bilateral process of integrating and mutually combining the relevant normative components.¹³ This process focuses on the interpretation of the legal values and principles impacting the interpretation and application of specific legal norms. The necessary process of interpreting them requires bodies in charge of applying the law, but also legal scholars proposing a doctrinal reading, to make their assumptions on how they interpret these legal values and principles explicit and transparent. It is essential to underline that this necessary effort is internal to the law, i.e. part of the interpretative effort required by the application of the law. For the present paper, we aim at drawing upon resources coined by the ethics of immigration in illuminating the underpinnings of these legal values and principles and thereby identifying promising patterns of interpretation and application.

As a general matter, we shall define the concept of 'legal regime' as a relatively closed set of legal norms related to a specific field of social interactions. Given this definition, 'EU immigration law', for example, will be characterized as a legal regime. The use of this concept is to be understood as a practical expedient to encompass in a single analytical object the diverse legal norms regulating immigration to the EU. The

¹¹ For an application to another migration issue (GATS Mode 4), see Johan Rochel, 'Paving the Way for an Institutional Approach Towards an Ethical Migration Regime', *Ancilla Iuris* (2013), pp. 51-70.

¹² The use of the concept 'dialogue' is preferred to the bottom-up/top-down characterization in that it better crystallizes the mutual and reflexive process of normative interactions. For the use of bottom-up/top-down, see Kalypso Nicolaidis and Justine Lacroix, 'Order and Justice Beyond the Nation-State: Europe's Competing Paradigms', *Order and Justice in International Relations* 1 (2003), pp. 125-155, at p. 128; Samantha Besson, 'The European Union and Human Rights: Towards A Post-National Human Rights Institution?', *Human Rights Law Review* 6:2 (2006), pp. 323-360, at p. 328.

¹³ This on-going process could be said to share important commonalities with the reflexive equilibrium. See Norman Daniels, 'Reflective Equilibrium', *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), edited by Edward N. Zalta. Online at <https://plato.stanford.edu/archives/win2016/entries/reflective-equilibrium/> (accessed 2017-05-01). See also the original formulation in John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971), pp. 18-22; 46-53.

unity of this analytical object is primarily functional: it encompasses all the relevant norms impacting the regulation of immigration to the EU. It follows from this definition that a legal regime entails different types of legal norms, from general principles to highly specific legal norms.¹⁴ These different legal norms cannot be grasped without taking into account their application and interpretation by administrative and judicial bodies. These bodies are special institutional loci where legal norms are identified, interpreted and applied. On a fundamental level, this requirement reflects a specific view on the authority of legal norms. According to Raz, an investigation on legal norms should give due attention to the decisions made by legal authorities in that they reflect purportedly authoritative directives concerning what ought to be done. This view presupposes the acknowledgment that the 'law is an institutionalized normative system, and in being institutionalized it is based on recognizing the authority of institutions to make, apply and enforce laws.'¹⁵ In this respect, judicial practices are of central importance because they enable us – and the individuals subjected to their authority – to grasp the ways in which legal norms give rise to specific obligations.

Given this definition of a legal regime, it is important to stress that the normative dialogue is built upon a jurisprudential assumption on the nature and function of the legal values and principles. This assumption is that they represent modulating norms at the junction of the realms of law and morality.¹⁶ This junction is not to be understood to distinguish an 'outside' from an 'inside', but rather as a point of junction between different modi of functioning. This idea of modulation explains why the relations between law and morality should be approached as a 'two-way' relationship (and not as a movement from morality towards a legal instantiation). As shall be fully defined later, these legal values and principles represent a locus of investigation for our present purposes.

It would be false to argue that during this process of interpretation, moral values are imported from a 'foreign' realm into the law.¹⁷ The process is bound by the normativity of the law as a specific normative realm. It is distinct from the normativity of morality and should be respected as such. Assuming that both the law and morality raise motives for actions, our task is, following Besson, to address why 'the normativity of the law is a special kind of moral normativity.'¹⁸ In other words, it is to be asked: from the

¹⁴ Note that this preliminary characterization does not commit one to a specific position on how those different norms relate to each other (like Dworkin's). For further reflections, see Jeremy Waldron, 'Legal and Political Philosophy', in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, edited by Jules Coleman and Scott Shapiro (Oxford: Oxford University Press, 2002), pp. 352-382, at p. 354.

¹⁵ Joseph Raz, 'Why Interpret?', *Ratio Juris* 9:4 (1996), pp. 349-363, at p. 357. For a similar interpretation of Raz's point, see Julie Dickson, 'Interpretation and Coherence in Legal Reasoning', *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), edited by Edward N. Zalta. Online at <https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret/> (accessed 2017-05-03).

¹⁶ Human rights also represent a kind of legal norms which play this modulation role (see Samantha Besson, 'The Law in Human Rights Theory', *Zeitschrift für Menschenrechte – Journal for Human Rights* 7 (2013), pp. 120-150, at p. 125.

¹⁷ Leslie Green, 'Positivism and the Inseparability of Law and Morals', *New York University Law Review* 83 (2008), pp. 1035-1058, at pp. 1051-1052.

¹⁸ Besson, 'The Law in Human Rights Theory', p. 129.

point of view of the types of demands which the law confronts us with, what is it that makes law special?¹⁹ What is important to highlight is that different accounts of this legal normativity might be compatible with the argument to follow. What is needed is an account compatible with law and morality being in a relation of modulation, i.e. a relation between realms functioning according to their own modi.

As an example, interpreting the legal principle of 'equality' requires making transparent and explicit the considerations we assume. In this sense, the bodies interpreting the law and the scholars proposing a doctrinal argument draw upon considerations which are immediately grasped, discussed and materialized into the legal principle at stake. Waldron makes a similar point for the law in general when, focusing on the notion of 'dignity', he writes: 'we evaluate law morally using (something like) law's own dignitarian resources.'²⁰ This interpretative exercise remains internal to the law, but it strives to bring the kind of reflections used in the process to the fore. As noted by Besson with respect to human rights law, the idea is to 'theorize the law in order to identify its immanent morality and hence the immanent critique within the law as a normative practice.'²¹

A potential critic might contest the need for moral resources for this legal interpretation. Indeed, why do we need to call upon a philosopher to come to the rescue of lonely legal scholars in need of transparency? Beyond the issue of labelling this task moral or legal, the key point remains to identify and exploit the potentiality entailed by the law as a normative practice. What is essential is requiring the assumptions and underpinnings of legal norms to be explicit. As stated by Besson, a philosopher could approach the issue 'through law and the normative practice of moral ideas in legally institutionalized circumstances.'²² Tools and concepts developed by ethical theory are interesting resources to draw upon as part of the legal argument. Beyond disciplinary boundaries, these tools and resources might well be called 'legal' in the context of the dialogue. Much more important is the fact that legal and ethical scholars reinforce cooperation to improve institutional realities.

Legal Values and Principles

As already indicated, legal values and principles are an important locus for the dialogue to take place. For the sake of providing an especially promising case regarding immigration, we shall focus on the general principles of EU law.

Generally, legal principles provide interesting occasions to interrogate the relation between a legal order and its broader moral-political foundations.²³ This view

¹⁹ Joseph Raz, 'Incorporation by Law', *Legal Theory* 10:1 (2004), pp. 1-17, at p. 7.

²⁰ Meir Dan-Cohen and Jeremy Waldron, *Dignity, Rank, and Rights* (New York: University Press, 2012), p. 67.

²¹ Besson, 'The Law in Human Rights Theory', p. 126.

²² *Ibid.*, p. 128.

²³ Samantha Besson and Pascal Pichonnaz (Eds.), *Les principes en droit européen - Principles in European law* (Genève: Schulthess, 2011), pp. 5-16; Wil J. Waluchow, 'Constitutionalism in the European Union: Pipe Dream or Possibility', in *The Philosophical Foundations of European Union*, edited by Julie Dickson and Pavlos Eleftheriadis (Oxford: Oxford University Press, 2012), pp. 189-215, at p. 194; Johan Rochel and Alain Zysset, 'Between Authority and Morality: Identifying Two Legitimatory Roles of Legal Principles', in *Principes en droit européen - Principles in European Law*,

relies upon a definition of principle as a general and foundational legal norm.²⁴ As a general legal norm, a principle is (gradually) opposed to a particular legal norm and is marked by its structural indeterminacy.²⁵ In this regard, contrary to a standard legal rule, a principle cannot be applied in a syllogistic way. As a foundational legal norm, a principle grasps and expresses political and moral values upon which a specific legal framework is founded.²⁶

Following Besson, general principles might be considered to fulfil two main functions.²⁷ Firstly, they are gap-fillers. In this sense, they might be relied upon as a way to fill a *lacuna* in an existing legal order. Generally, this function might explain why principles are especially important legal mediums for the development of post-national legal orders such as the EU and, arguably, for international law.²⁸ These general principles are used by the Court of Justice of the European Union (CJEU) as a means to ensure the dynamic development of EU law. Following Lenaerts and Gutiérrez-Fons, 'as instruments of constitutional dialogue, general principles facilitate the constant renewal of the EU legal order, epitomizing the "EU's living constitution."' ²⁹ Secondly, general principles ensure the coherence of EU law. In this sense, they represent fundamental structuring norms applicable across the entire EU legal order.³⁰ As Farahat writes, 'the main purpose of using the idea of principles lies in their function for the legal discourse [...] to structure and systematize the existing legal material.'³¹ Von Bogdandy goes further, stating that 'constitutional principles enable an internal critique of the positive law [...] They promote the transparency of legal argumentation, are gateways for new convictions and interests, can be agents of universal reason against local rationalities.'³²

This contribution focuses on the general principles of EU law because of their normative richness and the effort of interpretation they require. With respect to their function, they appear to be especially interesting as a 'route' for specific normative

edited by Samantha Besson and Pascal Pichonnaz (Genève: Schulthess, 2011), pp. 85-105, at pp. 92ff.

²⁴ Riccardo Guastini, 'Les principes de droit en tant que source de perplexité théorique', in *Les principes en droit*, edited by Sylvie Caudal-Sizaret (Paris: Economica, 2008), pp. 113-126; Samantha Besson, 'General Principles in International Law - Whose Principles?', in *Les principes en droit européen - Principes in European law*, edited by Samantha Besson and Pascal Pichonnaz (Genève: Schulthess, 2011), pp. 19-65.

²⁵ This is opposed to the influential Dworkinian position according to which the distinction is qualitative, not only gradual.

²⁶ Joël Molinier, *Les principes fondateurs de l'Union européenne* (Paris: PUF, 2005); Armin von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch', *European Law Journal* 16:2 (2010), pp. 95-111.

²⁷ Besson, 'General Principles in International Law - Whose Principles?', pp. 55-56.

²⁸ Joxerramon Bengoetxea, 'Principia and Teloi', in *Principes en droit européen - Principes in European Law*, edited by Samantha Besson and Pascal Pichonnaz (Genève: Schulthess, 2011), pp. 65-84.

²⁹ Koen Lenaerts and José A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', *Common Market Law Review* 47:6 (2010), pp. 1629-1669, at p. 1169.

³⁰ Xavier Groussot, *General Principles of Community Law* (Groningen: Europa Law Publishing, 2006), pp. 421ff; Armin von Bogdandy and Jürgen Bast (Eds.), *Principles of European Constitutional Law* (Oxford, Hart/München, CH Beck, 2010), pp. 26ff.

³¹ Anuscheh Farahat, "'We want you! But . . .", Recruiting Migrants and Encouraging Transnational Migration Through Progressive Inclusion', *European Law Journal* 15:6 (2009), pp. 700-718, at p. 701.

³² Bogdandy, 'Founding Principles of EU Law', p. 110.

content.³³ Costello speaks of them as 'medium' to assert how to illuminate specific constitutional arguments.³⁴

The Dialogue as Part of the Ideal and Non-Ideal Debate

In addition to clarifications about jurisprudential assumptions, it is important to highlight methodological considerations from the point of view of applied ethics. This shall also be the opportunity to clarify which contribution the reflexive dialogue might represent in this respect.

Several assumptions are treated in the philosophical literature on the debate between ideal and non-ideal theory.³⁵ Most notably developed by Rawls in its modern form, the distinction between ideal and non-ideal theory has come to be refined as several distinct questions were found to be entangled within the original ideal/non-ideal framework.³⁶ For the sake of a brief overview, it appears possible to distinguish between four intertwined issues.³⁷ Firstly, the distinction is about the aim of a theory to be practically guiding. This first aspect fundamentally relies upon the exact definition of the objective of 'practical guidance' and its exact scope.³⁸ Secondly, the distinction is about feasibility understood as the (factual and practical) possibility of a specific normative theory and the implications of those considerations on the theory itself.³⁹ Thirdly, along the original lines proposed by Rawls, the discussion is about compliance. For Rawls, ideal theory was conceived for situations of strict compliance with principles of justice (and

³³ Jürgen Bast, 'Of General Principles and Trojan Horses - Procedural Due Process in Immigration Proceedings under EU Law', *German Law Journal* 11 (2010), pp. 1006-1024, at p. 1018.

³⁴ Cathryn Costello, 'The Asylum Procedures Directive in Context: Equivocal Standards Meet General Principles', in *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, edited by Anneliese Baldaccini, Elspeth Guild and Helen Toner (Oxford: Hart, 2007), pp. 151-193, at p. 193. For the example of the right to an effective judicial review, *C-69/10, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* [2011], ECR 2011 p. I-07151, § 70.

³⁵ For a good overview, see the special issue of *Social Theory and Practice* 34:3 (2008). See also for a 'conceptual mapping', Laura Valentini, 'Ideal vs. Non-ideal Theory: A Conceptual Map', *Philosophy Compass* 7:9 (2012), pp. 654-664.

³⁶ Schmidtz defines it as 'a constellation of concerns related by family resemblance rather than shared essence' (David Schmidtz, 'Nonideal Theory: What It Is and What It Needs to Be', *Ethics* 121:4 (2011), pp. 772-796, at p. 773).

³⁷ This sets aside completely distinct views about the role of political theory. See, for example, Geuss or Mouffe who argue that political philosophy should be in the first line concerned with understanding why political actors act the way they do and thereby try to bring light into relationships influenced by power's structures (Raymond Geuss, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008); Chantal Mouffe, *On the Political* (London: Routledge, 2005).

³⁸ Laura Valentini, 'On the Apparent Paradox of Ideal Theory', *Journal of Political Philosophy* 17:3 (2009), pp. 332-355, at pp. 334-337; David Wiens, 'Prescribing Institutions Without Ideal Theory', *Journal of Political Philosophy* 20:1(2012), pp. 45-70, at pp. 5-10; Holly Lawford-Smith, 'Ideal Theory – A Reply to Valentini', *Journal of Political Philosophy* 18:3 (2010), pp. 357-368, at pp. 358-361.

³⁹ Ingrid Robeyns, 'Ideal Theory in Theory and Practice', *Social Theory and Practice* 34:3 (2008), pp. 341-362, at pp. 349-352.

favourable conditions).⁴⁰ Fourthly, the distinction encompasses a meta-theoretical discussion of the fact-sensitivity upon which a normative theory should be built.⁴¹

The contribution of the reflexive dialogue – and more generally the legal turn – is mainly relevant to the first dimension. In this sense, the dialogue shall allow the idea of ‘providing guidance’ to be further operationalized in the context of a legal argument. In brief, providing guidance through the development of a legal argument targets institutional bodies with the capacity to influence how specific legal norms are interpreted and applied. This includes administrative bodies applying legal norms, Courts and other judicial bodies, but also legal practitioners engaged in ‘strategic litigation’.⁴²

To develop such an argument, the hypothesis is that we do not need a full account of what morality or justice requires in perfect or highly idealized conditions in the original sense proposed by Rawls; we rather need a solid account of which values we ought to respect and pursue as part of a legal regime. This account should be able to claim relevance across changing realities⁴³ and provide definitions of central values such as freedom, equality and justice.⁴⁴ A comprehensive account on how they relate to each other, why they ought to be pursued and which different forms they could take in every possible institutional configuration is not the point here. The account provided shall remain capable of adapting itself to different contexts, in the sense of remaining relevant across different imperfect and contingent situations and against the different types of injustices that might exist.⁴⁵

This approach focused on the key values and principles of a legal regime shall prevent the problems linked to what Wien calls the ‘ideal guidance approach’.⁴⁶ In his

⁴⁰ Rawls, *A Theory of Justice*, ch. 39; John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 2002), pp. 11ff. For a reconstruction of Rawls’ position, see A. John Simmons, ‘Ideal and Nonideal Theory’, *Philosophy & Public Affairs* 38:1 (2010), pp. 5-36; Julian Culp, ‘Two Conceptions of a Complementary Relation Between Ideal and Nonideal Theory’, *Arace – Direitos Humanos em Revista* 2:2 (2015), pp. 127-153; Zofia Stemplowska and Adam Swift, ‘Ideal and Nonideal Theory’, in *The Oxford Handbook of Political Philosophy*, edited by David Estlund (Oxford: Oxford University Press, 2012), pp. 373-389.

⁴¹ Colin Farrelly, ‘Justice in Ideal Theory: A Refutation’, *Political Studies* 55:4 (2007), pp. 844-864, at pp. 846-848.

⁴² This concept is used by Costello, ‘The Asylum Procedures Directive in Context: Equivocal Standards Meet General Principles’, p. 193. On the role of legal scholars, see e.g. Anja Wiesbrock, ‘The Self-Perpetuation of EU Constitutionalism in the Area of Free Movement of Persons: Virtuous or Vicious Cycle?’, *Global Constitutionalism* 2:1 (2013), pp. 125-150.

⁴³ This position is inspired by Onora O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press, 1996), pp. 39-44; Valentini, ‘On the Apparent Paradox of Ideal Theory’, pp. 337-340; Robert E. Goodin, ‘Political Ideals and Political Practice’, *British Journal of Political Science* 25:1 (1995), pp. 37-56, at pp. 40-45.

⁴⁴ For a similar strategy, Wiens, ‘Prescribing Institutions Without Ideal Theory’, p. 11.

⁴⁵ Joseph Carens, ‘Realistic and Idealistic Approaches to the Ethics of Migration’, *International Migration Review* 30:1 (1996), pp. 156-170, at p. 168; Joseph Carens, ‘The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum’, in *Immigration Admissions: the Search for Workable Policies in Germany and the United States*, Vol 3, edited by Kay Hailbronner, David A. Martin and Hiroshi Motomura (New York: Berghahn Books, 1997), pp. 3-50.

⁴⁶ Wiens, ‘Prescribing Institutions Without Ideal Theory’, p. 11.

view, philosophers have the tendency to concentrate on developing ideal theory, thereby expecting non-ideal prescriptions to crystallize as practical means to implement this ideal theory.⁴⁷ Applied to our subject matter, this would mean first developing an ideal theory of immigration before assessing immigration laws as imperfect ways to implement ideal prescriptions.

Our approach takes a different path, turning the focus away from the idea of ideal guidance. Firstly, as mentioned above, the approach does not presuppose an ideal theory of immigration, but 'only' – which is already significant – more clarity about the definition of already legally recognized values and principles. In other words, the approach starts from within the law as it currently exists. Secondly, the idea of guidance remains, but in a much weaker form. By making his assumptions explicit, the theorist himself is required to provide the benchmark to assess potential reform proposals. As we shall see when dealing with proportionality, the concept requires definitional work on our part: we have to set the benchmark by which we define proportionality and the related values and principles. This sets the idea of consistency at the core of the argument. Thirdly, this benchmark should be used in delineating a set of acceptable reform proposals.⁴⁸ To put it in an illustrative way, we could sketch a sort of a normatively acceptable space and distinguish it from a normative space not in line with the definition of the values and principles.⁴⁹ This view echoes the general consistency-based approach favoured by philosophers of immigration (drawing upon general liberal-democratic principles), but it goes further by putting this necessary consistency at the core of a *legal* argument, anchored within the law as it exists.

This approach might be criticised for its lack of critical force.⁵⁰ Most importantly, it seems ill-equipped to face profoundly unjust legal regimes. For example, in cases such as slavery law, our methodological approach could amount to a mere defence of an unacceptable status quo by limiting itself to an interpretation of the law as it exists. It is true that the methodology sketched here is tailored for working from within a specific legal reality; it is not best-suited to fundamentally question the foundations of a specific legal regime, something which is best done from a completely external point of view. However, our approach should draw upon existing legal norms and make the most out of them. This reflects what Buchanan has called 'progressive conservatism'.⁵¹ From his perspective, we should draw upon the most promising norms already entailed by a specific legal reality and try to make sense of them in the process of interpretation. This

⁴⁷ This is especially true for the so called 'approximation strategy' according to which ideal theory might be reached bit-by-bit. The most important difficulty is related to what economists have called the 'second best theory', For instance, Juha Räikkä, 'The Problem of the Second Best: Conceptual Issues', *Utilitas* 12:2 (2000), pp. 204-218.

⁴⁸ Pevnick uses a similar distinction between the formulation of an ideal policy and the description of the range of policies that do not violate constraints of justice (Ryan Pevnick, *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty* (Cambridge: Cambridge University Press, 2011).

⁴⁹ This seems to be compatible with the thesis advanced by Schmidtz, according to which theories are 'maps' (Schmidtz, 'Nonideal Theory: What It Is and What It Needs to Be', pp. 778ff.

⁵⁰ Beitz has to address similar concerns with his 'practical approach' (Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009)).

⁵¹ Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), p. 63.

would allow justice to be done to both what has already been reached in terms of moral progressiveness and to what still appears to be possible. Interestingly, Carens refers to a similar idea when referring to legal practices which 'sometimes even run ahead of theory so that in some cases we have found ways of treating immigrants without having managed to articulate fully to ourselves why this way of doing things is right'.⁵²

Intermediary conclusions

The normative reflexive dialogue operationalizes the invitation formulated by the legal turn. It offers a promising tool for both philosophers of immigration interested in contributing to legal arguments and for legal scholars attracted by theoretical considerations. Its use shall facilitate the movement of ethical considerations into the interpretation of immigration laws. Most importantly for philosophers, the type of contribution produced would be very different from the one developed using what could be called an external point of view about the law (taking immigration law as passive object of investigation). Similarly, it would be different from the widely shared consistency-based approach among philosophers of immigration. As put by von Bogdandy, this approach would produce a type of contribution which 'differs from general political criticism since it is phrased in legal terms, is closely connected to the previous operation of the law and can thus be absorbed by the law more easily'.⁵³

Implementing the Legal Turn: The Principle of Proportionality

The next step of the argument is exemplifying how the reflexive dialogue works by focusing on the principle of proportionality. Proportionality is surely one of the most important principles modulating between the law and ethics of immigration, but is by no means the only one. The method sketched here could bring promising results for principles such as sovereignty, jurisdiction and several concepts related to human rights. As explained before, the common denominator of these concepts is their level of generality and their normative richness.

In order to show how the dialogue might be used at distinct levels, I shall defend two main hypotheses regarding proportionality. Firstly, the dialogue might be used to provide a case for the principle of proportionality being applied to a specific issue regulated by immigration law. At this first general level, the argument is a legal case for the relevance of proportionality. Secondly, the dialogue might be used to work on the interpretation of the principle of proportionality in a specific concrete case. The objective here is to provide a reconstruction of the normative underpinnings of the principle as part of a legal proportionality assessment.

The Case for Proportionality in Immigration

The first level of exemplification of the reflexive dialogue relates to the case for the principle of proportionality being applied to demands of entry by would-be migrants, as organized by EU immigration law.

⁵² Carens, *The Ethics of Immigration*, p. 5.

⁵³ von Bogdandy, 'Founding Principles of EU Law', p. 110.

The general relevance of proportionality in immigration matters is nothing new. Proportionality has long been applied to the issue of internal free movement in the EU as well as to family reunification of third-country nationals (TCNs). Most importantly, proportionality is a key principle when it comes to the deportation of TCNs residing within a political community.⁵⁴ The application of the principle of proportionality to these cases is uncontroversial because the cases at stake are clearly within the jurisdiction of a political community (the sponsor in the case of the family reunification, the TCN to be deported in the deportation case) and the interests affected are legally recognized. In contrast, our present argument addresses situations in which the relevant relation between the public authority and the individual has not been fully acknowledged, namely the typical case of a would-be labour immigrant applying for a residence permit in the EU.⁵⁵ Unlike the other situations mentioned, the relevance of proportionality in cases where the political community claims a discretionary competence to regulate immigration still needs to be established and affirmed. This is the first level on which the reflexive dialogue as exemplified through proportionality should become reality.

On this first level, the argument has three main steps. It shall firstly offer a broad understanding of what the legal value of freedom means in the context of the legal foundations of a political community such as the EU (what could be described as the constitutional foundations). Secondly, the argument shall provide a link between the interpretation of this positivized constitutional value and the legal principle of proportionality as a realization of it. Thirdly, it shall clarify why a specific situation – such as the demands of entry formulated by would-be migrants – should be apprehended on the basis of the principle of proportionality. Clearly enough, the present section can only sketch this three-pronged argument and thereby exemplify the potentiality of the normative reflexive dialogue.

To start with, the argument begins at a very fundamental level by proposing a reading of the underlying normative substrate that can be claimed to be found in the value of freedom as entailed by Art. 2 Treaty of the European Union (TEU) and its further jurisprudential developments. Due to their special and distinct position in the Treaties, the values of Art. 2 TEU provide a central point of reference for the interpretation of Treaty provisions. The function of these founding values is precisely to provide a normative frame of reference within which the objectives and limits of public authority should be discussed and decided upon.⁵⁶ Art. 2 'seeks to forge a common political identity and also serves as a postulate: respect for the values enshrined therein becomes a political and legal imperative both for the Union institutions and the Member States.'⁵⁷ The point here is to underline that assumptions and elements of interpretation of freedom as entailed by Art. 2 should be made explicit. In the context of the EU, it might for instance be interesting to try to outline a republican understanding of freedom.⁵⁸ In

⁵⁴ Among a large Strasbourg case-law, 54273/00, *Boultif v Switzerland* [2001], Reports of Judgments and Decisions 2001-IX.

⁵⁵ Bast, *Aufenthaltsrecht und Migrationssteuerung*, p. 181.

⁵⁶ Sionaidh Douglas-Scott, 'The Problem of Justice in the European Union: Values, Pluralism and Critical Legal Justice', in *Philosophical Foundations of European Union Law*, edited by Julie Dickson and Pavlos Z. Eleftheriadss (Oxford: Oxford University Press, 2012), pp. 412-447, at pp. 412-413.

⁵⁷ Takis Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press, 2007), p. 15.

⁵⁸ Johan Rochel, *Immigration to the EU: Challenging the Normative Foundations of the EU Immigration Regime* (Genève: Schulthess/LGDJ, 2015), pp. 403ff.

this context, the importance of a secured enjoyment of freedom is particularly attractive as a relational account of freedom.⁵⁹ Beyond the specific interpretation chosen, what is essential is to interpret freedom in the context of its legal realization, namely as a founding legal value of the EU.

The second step of the argument links the assumed interpretation of the legal value of freedom to the principle of proportionality and explains why this principle could be approached as one of its legal realizations. Proportionality is seen as a fundamental pillar of the modern understanding of a legitimate public authority interfering with the freedom of individuals.⁶⁰ At its core, the principle foresees that a public authority should frame and apply its decisions so as to infringe upon individual freedom in the smallest possible way. The principle of proportionality has been early recognized as a general principle of EU law.⁶¹ In its usual formulation, the CJEU defines it as follows:

The principle of proportionality, which is one of the general principles of European Union law, requires that measures implemented by acts of the European Union are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it.⁶²

This understanding makes the link between the principle of proportionality and the rule of law particularly strong. In *Handelsgesellschaft*, the CJEU requires that ‘the individual should not have his freedom of action limited beyond the degree necessary in the public interests’⁶³ Here again, it is arguable that there are several ways to present and justify the links between the legal value of freedom and proportionality. What is essential is to choose one in order for the consistency-based structure of the argument to appear: if freedom is a founding value, then in specific situations, proportionality is the legal way to realize it. From this perspective, the growing relevance of proportionality might be put into the broader evolution towards a better respect for individual freedom as key value and principle of the EU.⁶⁴

The third step of the argument shall provide a case for the applicability of proportionality in immigration matters. From a legal point of view, this third step is

⁵⁹ Iseult Honohan, ‘Domination and Migration: an Alternative Approach to the Legitimacy of Migration Controls’, *Critical Review of International Social and Political Philosophy* 17:1 (2014), pp. 31-48, at p. 36.

⁶⁰ This has not always been the case and commentators highlight the global rise of the use of proportionality in constitutional contexts (Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’, *Law & Ethics of Human Rights* 4:2 (2010), pp. 142-175, at pp. 141-142; Moshe Cohen-Eliya and Iddo Porat, ‘Proportionality and the Culture of Justification’, *American Journal of Comparative Law* 59:2 (2011), pp. 463-490, at p. 465.

⁶¹ For instance, C 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970], ECR 1970 p. 1125, 1147. See further Tor-Inge Harbo, ‘The Function of the Proportionality Principle in EU Law’, *European Law Journal* 16:2 (2010), pp. 158-185, at pp. 164ff; Tridimas, *The General Principles of EU Law*, pp. 141-142.

⁶² Joined cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen* [2010], ECR 2010 p. I-11063, § 74.

⁶³ C 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970], ECR 1970 p. 1125, 1147.

⁶⁴ Bast, *Aufenthaltsrecht und Migrationssteuerung*, pp. 293-294.

especially disputed for two main reasons. Firstly, it might be argued that a would-be immigrant is not in a normatively relevant relation with the EU considered as a public authority. Secondly, it might be argued that proportionality does not apply where there is no legally protected right (e.g. a right to immigrate). As a reply, the argument I want to make credible runs along the following line: When interfering with would-be migrants in a relevant way, the EU is bound by its own commitments and has to affect their protected interests in a proportionate manner. In this context, the *ratio legis* of proportionality is interpreted as a key articulation between a public authority and the respect due to individual freedom as infringed upon by EU decisions.

On the first criticism, imagine the case of an IT-specialist based in Bangalore and applying for immigration to the EU. Although the would-be migrant is still in his country of origin (i.e. outside the jurisdiction of the EU), his application to be admitted should be considered within the jurisdiction of the EU.⁶⁵ EU law has created a legal position for his application in laying out the conditions which need to be fulfilled, the administrative steps to be taken to submit it and the potential grounds for its refusal. As formulated by Bast, the activity of the Union legislator has created 'an entitlement to a legal status' for third-country nationals.⁶⁶ This does not mean that everyone has a right to be accepted, but that the Union legislator has created a legal channel for immigration and described the conditions of its access and success. This channel (and the decision taken through it) becomes inseparable from the fundamental principles to which this public authority is committed. For instance, the Single Permit Directive lays down the procedure through which entry applications should be handled. As stated in its Recital 5,

A set of rules governing the procedure for examination of the application for a single permit should be laid down. That procedure should be effective and manageable, taking account of the normal workload of the Member States' administrations, as well as transparent and fair, in order to offer appropriate legal certainty *to those concerned*. (italics added)

This last point illustrates our argument: the Directive creates a legal position for would-be migrants applying for a permit: 'those concerned' should be treated fairly and in a transparent way.

In summary, in applying the EU law on immigration, public authorities claim political and legal authority, most importantly by providing normative reasons for the application's acceptance or rejection.⁶⁷ This implies that the application is to be assessed and decided upon as an EU-internal matter and according to the relevant EU legal norms (and relevant national norms). As soon as this specific relation is established and with respect to the points concerned by this relation – meaning, in legal terms, that jurisdiction is triggered⁶⁸ – the decision taken by a public authority should respect the principle of

⁶⁵ For a similar point, see David Miller, 'Border Regimes and Human Rights', *Law & Ethics of Human Rights* 7:1 (2012), pp. 1-23, at p. 4.

⁶⁶ Bast, 'Of General Principles and Trojan Horses', p. 1023.

⁶⁷ Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', *Leiden Journal of International Law* 25:4 (2012), pp. 857-884, at p. 865.

⁶⁸ Michael Blake, 'Immigration and Political Equality', *San Diego Law Review* 45:4 (2008), pp. 963-980, at pp. 966ff.

proportionality in order to respect the person's freedom (as shown in the second step of the argument). In its structure, the argument is comparable to the case-law developed by the CJEU on the applicability of procedural guarantees. EU law creates the legal channel and, hand-in-hand, its principle-based control and monitoring. Similar to procedural guarantees, proportionality is an essential element of the principle-based responsibility of the EU.

On the second criticism (reserving proportionality assessment to legally protected rights and their infringement), the argument needs only to make credible the idea that proportionality should be applied to cases in which protected interests of would-be migrants are affected. Relying upon our previous reflections, we should define the protected interests as the interests directly linked to the legal position created by EU law. These interests are procedural interests (because they are created in virtue of the existence of the procedure), broadly including being treated fairly, being given justifications for decisions and being given a way to contest these decisions. Assuming the existence of these protected interests (as can be found in the case-law of the CJUE on procedural guarantees), the point is to investigate which implications the general principle of proportionality might have on them. For instance, how should the principle of proportionality affect the requirement to give reasons for the rejection of an application? The important limitation of this argument is hence that the principle of proportionality only applies to the fairly specific protected interests created by the existence of a legal channel of immigration. In other words, the argument does not rely upon a putative right or interest to immigrate, but rather upon 'the adequate administration of the law' with respect to the interests created and affected by specific legal norms.⁶⁹ It is simultaneously its strength and its limitation.

To sharpen the argument, imagine the case of someone wanting to immigrate to the EU without having any legal channel available (even if, with the transversal application of the Single Permit Directive, this case has become a clear minority⁷⁰). Firstly, the applicability of proportionality would be more difficult to demonstrate because of the lack of relevant normative relation between the EU as a public authority and this particular would-be migrant. Jurisdiction is not triggered. Secondly, there are no protected interests to which we should apply proportionality. There is no doubt that some *de facto* interests of would-be migrants are affected (even *de facto* interests with a high moral value), but these are not legally protected (because the would-be migrant was not given any legal position).⁷¹

In brief, there are fundamentally no grounds to consider immigration in general, and labour immigration in particular, to be a legal and policy field that escapes important principles such as proportionality.⁷² Expressed by a minimal claim, the argument shall succeed at least in making the following case credible: *if* an immigration procedure does not make any room for the relevant EU authority to assess the proportionality of its decision (under the relevant interests created by the same procedure), it is incompatible with the general principle of proportionality. Any authority is required to provide a legal

⁶⁹ Schotel, *On the Right of Exclusion*, p. 192.

⁷⁰ For this point, see Steve Peers, 'An EU Immigration Code: Towards a Common Immigration Policy', *European Journal of Migration and Law* 14:1 (2012), pp. 33-61, at p. 37 n23.

⁷¹ For this point, see Schotel, *On the Right of Exclusion*, pp. 190ff.

⁷² *Ibid.*

space to assess the proportionality of a decision. Nevertheless, this means that proportionality will only be applied to these specific interests created by the procedure. Furthermore, it does not preclude proportionality – a principle marked by flexibility – being applied along distinct standards of scrutiny.⁷³

Using Proportionality In Situ

Assuming the first part of the argument, we can turn to concretely making use of the principle of proportionality. This leads to the second exemplification of the relevance of the normative reflexive dialogue, namely the ambition to normatively work on the interpretation of the principle of proportionality as applied to immigration. For those who remain unconvinced by the previous argument on the applicability of proportionality to immigration cases, the reflections to come might easily be transposed into other migration-related contexts, e.g. family reunification.

This second part of the argument relies upon the idea that proportionality has an interesting ‘unveiling’ function when it comes to the determination of the interests that ought to be protected from abusive public authority interferences.⁷⁴ Lecucq distinguishes between a negative and a positive ‘unveiling’ function. The negative dimension focuses on the fact that a test of proportionality requires a relatively precise identification of the interests at stake. In other words, proportionality renders the protected interests clearly visible. In the positive dimension, to declare a decision disproportionate indicates that a limit to public authority has been reached. The focus has shifted from the identification of the interests to the justified limits upon them. The necessity to conduct a proportionality assessment requires the public authority to make explicit which rights or interests are at stake and where ‘red-lines’ for acceptable interference should be drawn. Franck stresses this function when he writes that the role of proportionality is not to ‘prevent bad decisions but to create optimum opportunity for good ones by creating a space for rendering transparent, principled second opinions.’⁷⁵ This is the normative space in which the public authority is called to assess and take into account the interests of affected individuals.

In European law, the proportionality test is conceived as in the German constitutional tradition with three parts: suitability, necessity and proportionality *stricto sensu* (s.s.). For the present argument, we shall focus on proportionality s.s.. Following Advocate General Mischo in the *Fedesa* case, proportionality s.s. can be defined as ‘weighing the damage caused to the individual rights against the benefits accruing to the general interests.’⁷⁶ In the case of immigration, as Schotel formulates,

⁷³ *Ibid.*, pp. 181-183.

⁷⁴ Olivier Lecucq, ‘Le principe de proportionnalité : simple technique juridictionnelle ou norme de fond. Réflexions tirées du droit constitutionnel des étrangers’, 8è Congrè Mondial de l'Association Internationale de Droit Constitutionnel (2010), pp. 1-15, pp. 6-7.

⁷⁵ Thomas M. Franck, ‘On Proportionality of Countermeasures in International Law’, *American Journal of International Law* 102:4 (2008), pp. 715-767, at p. 755.

⁷⁶ AG Mischo in C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990], ECR 1990 p. I-04023, § 42.

[i]t boils down to the very difficult question as to how exactly the admission of immigrants affects the valued aspects of a (liberal) political community, e.g. public order, democratic self-governance, arrangements of social justice.⁷⁷

Applying proportionality *s.s.* always presupposes a normative evaluation of the different interests at stake.⁷⁸ As Craig writes, 'in any proportionality inquiry the relevant interests must be identified, and there will be some ascription of value to those interests, since this is a condition precedent to any balancing operation.'⁷⁹ This ascription of value is a necessary precondition of the process of evaluation of 'the objectives pursued by the measure in issue and its detrimental effects on individual freedom.'⁸⁰

A first insight might hence be formulated in the following terms: proportionality offers a strong and recognized legal device by which to structure our evaluation of the different interests at stake. On the one hand, this structuring effect is by no means morally neutral. This will be a faulty equation with what Letsas calls 'instrumental rationality'.⁸¹ The value of freedom as outlined above represents the normative context in which the principle of proportionality is justified and applied. On the contrary, proportionality represents a widely accepted legal concretization of the principle of freedom.⁸²

On the other hand, this evaluation always presupposes a prior contextual evaluation of the different interests. The legal space created by proportionality and the necessary evaluation it carries represent the *locus* which the ethics of immigration should contribute to. My hypothesis is that the process of evaluation entails two dimensions, meaning that two predicates could be attributed to each interest, and that philosophers might contribute to a better understanding of both dimensions. Firstly, the interest might be deemed 'legitimate', reflecting its legitimacy according to the values which a political community is committed to and which are considered founding values of its legal order. Secondly, a legitimate interest might be considered more or less 'weighty' in the context of a balance of interests. Fundamentally, the use of the 'weight' metaphor should not be understood to suggest that the different interests could be cumulated or directly compared. Likewise, the use of the concept of 'balance of interests' should not imply a mechanistic conception.⁸³ This is reflected in the theory and practice of balancing, most

⁷⁷ Schotel, *On the Right of Exclusion*, p. 171.

⁷⁸ Matthias Klatt and Moritz Meister, 'Proportionality – a Benefit to Human Rights? Remarks on the I-CON Controversy', *International Journal of Constitutional Law* 10:3 (2012), pp. 687-708, at pp. 692ff.

⁷⁹ Paul P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2012), p. 591.

⁸⁰ Tridimas, *The General Principles of EU Law*, p. 139.

⁸¹ In the context of human rights and the different values embodied by them, Letsas makes this point in the following way: 'Proportionality, in its normative sense, can track a variety of moral reasons and applies to a variety of moral practices. Its semantic content is subservient to the moral value that governs the domain in question (e.g. democracy or desert in punishment)' (George Letsas, 'Rescuing Proportionality', in *Philosophical Foundations of Human Rights*, edited by Rowan Cruft, Matthew Liao and Massimo Renzo (Oxford: Oxford University Press, 2015), pp. 316-340, at p. 320.

⁸² Franck, 'On Proportionality of Countermeasures in International Law', pp. 716ff.

⁸³ Joxerramon Bengoetxea, Neil MacCormick and Leonor Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in *The European Court of Justice*, edited by Gráinne De Burca and Joseph Weiler (Oxford, Oxford University Press, 2001), pp. 43-86, at p. 64.

importantly among constitutionally protected rights.⁸⁴ The concept of 'weight' is rather meant to grasp the idea that interests have relevance in the context of a specific case which might evolve. I shall discuss in turn these two predicates and illustrate the important role which the ethics of immigration should play.

To discuss whether an interest is 'legitimate' in the context of a proportionality assessment clearly connects to two important issues of the ethical theory on immigration. Firstly, it relates to the general justification for the competence claimed by a political community to decide upon its immigration policy. Secondly, it relates to a systematic investigation of the interests which this political community might put forward.

The first element illustrates a common feature of almost any ethical discussion of immigration. All arguments which might be developed depend, in various ways, upon the fundamental justification offered for the state's competence to control its immigration policy. According to how this competence is justified – if any justification is found solid – the type of interests labelled as 'legitimate' will vary. In the context of a proportionality assessment, imagine that the IT-specialist from Bangalore could be refused admission because of the threat he represents to the European culture. Depending on how the competence of the EU to control immigration is justified, this interest might not be legitimate and might be excluded from a values-based proportionality assessment. Or it might be conditionally accepted: a culture-based interest is only legitimate in the immigration context if it respects the principles of equality and freedom.⁸⁵

Going further than differences related to this fundamental justification, legal scholars and judicial bodies applying proportionality might be interested in taking advantage of the systematic mapping of the legitimate interests a political community might put forward. This mapping is one of the core debates of the ethics of immigration. Drawing upon the ethical literature, the following interests have been thoroughly addressed: security and basic institutions, culture, social cohesion, economic prosperity, natural resources, mobility, interest in stability and prosperity.⁸⁶

In contrast to the ethical literature on these issues, this legitimacy is not to be discussed in general, but in the context of a specific political community and with respect to specific positivized values. Which interests should be considered legitimate for the sake of the application of the EU immigration regime is hence discussed in light of a certain account of the founding values of the EU. By providing a systematic and values-based account of the different interests which have to be accounted for in a proportionality assessment, ethical theorists make an important contribution to a jurisprudential issue.

The second 'weight' predicate offers a specification of the 'legitimacy' predicate in the context of the evaluation of an interest. An interest might be considered legitimate, but its relative 'weight' in a specific constellation might change. The structure of the

⁸⁴ Sybe de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', *Utrecht Law Review* 9:1 (2013), pp. 169-192, at pp. 170-171.

⁸⁵ For this argument, see David Miller, 'Immigration: the Case for Limits', in *Contemporary Debates in Applied Ethics*, edited by Andrew Cohen and Christopher Heath Wellman (Oxford: Blackwell, 2005), pp. 193-206.

⁸⁶ For overviews, see Christopher Heath Wellman, 'Immigration', *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), edited by Edward N. Zalta. Online at <https://plato.stanford.edu/archives/sum2015/entries/immigration/> (accessed 2017-05-03); Bader, 'The Ethics of Immigration'.

'weight' predicate relies upon a sense of conditionality. In brief, the argument goes as follows: the EU has a legitimate claim to apply immigration rules that promote and prioritize its interests *if* it fulfils its justice duties.⁸⁷ More specifically, in a proportionality assessment, these duties – namely their fulfilment or non-fulfilment – are to play a subsidiary role as a normative compass to evaluate the relative weight of the legitimate interests at stake.

The specification of these duties relates to a classical issue in the ethical debate on immigration. On the one hand, it again relates to the justification offered for the competence to determine immigration policy. On the other hand, and in some ways independently of the specific justification offered, these duties underscore the link between the determination of an immigration policy and the broader, justice-based commitments made by the political community. To exemplify this, we could focus on the claim by the political community to prioritize its own members in the distribution of resources.⁸⁸ In light of our argument, the legitimacy of the priority-giving scheme among co-members of the community depends upon the fulfilment of the justice duties. It thus appears to be illegitimate for co-members of the EU to secure themselves priority in the distribution of societal resources if they do not recognize *any* duty towards needy outsiders living in absolute deprivation (as an example of global duty). The fulfilment of the duties (or lack thereof) has repercussions on the legitimacy and 'weight' of some of the interests advanced by the political community.

If this conditionality is established in general, it is necessary to specify it in order to address the implications which (non)fulfilment brings for the proportionality assessment. Two models of the conditionality thesis shall be distinguished. A strict conditionality model contends that non-fulfilment should have strict implications on the legitimacy of the claims held by the EU in matters of immigration.⁸⁹ Alternatively, a gradual model might oppose this stance,⁹⁰ instead contending that the degree of legitimacy that the EU can claim to have depends upon the engagement it demonstrates in fulfilling its background duties. In contrast to the strict model, there is thus room here for a grey area in terms of fulfilment. The strict conditionality model does not seem able to do justice to the objectives of our non-ideal and reform-oriented investigation. If the general argument is accepted and assuming that the EU (like other affluent political communities) is currently not fulfilling its duties, the interests (even if legitimate) which are considered in the proportionality assessment should have less 'weight' in relation to other interests.

This chapter has tried to operationalize the reflexive dialogue in the context of a legal proportionality assessment. This proportionality assessment has an 'unveiling'

⁸⁷ Rochel, *Immigration to the EU*, pp. 305ff.

⁸⁸ For a discussion of this challenge, see Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001). In the specific context of migration, see David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge, Harvard University Press, 2016), pp. 20-37.

⁸⁹ Stephan Schlothfeldt, 'Ökonomische Migration und globale Verteilungsgerechtigkeit', in *Was schulden wir Flüchtlingen und Migranten? Grundlagen einer gerechten Zuwanderungspolitik*, edited by Alfredo Märker and Stephan Schlothfeldt (Wiesbaden: Westdeutscher Verlag, 2002), pp. 93-109, at pp. 105ff; Shelley Wilcox, 'Immigrant Admissions and Global Relations of Harm', *Journal of Social Philosophy* 38:2 (2007), pp. 274-291, at pp. 5-7.

⁹⁰ Bader, 'The Ethics of Immigration', p. 342; Schotel, *On the Right of Exclusion*, p. 157.

function which brings to the fore the interests at stake and which requires being as explicit as possible in regards to how those interests are evaluated and 'balanced' against each other. On the basis of this hypothesis, I have shown that the legal space created by proportionality is the place where the range of concepts and tools developed by the ethics of immigration should be drawn upon as part of a legal argument. These tools are a powerful means to illuminate legal material and address its underpinnings.

Conclusion

I have outlined how the reflexive dialogue might make the 'legal turn' in the ethical theory on immigration a reality. In light of the example of proportionality, the dialogue has shown how philosophers should draw upon their expertise in the context of a legal argument. Beyond disciplinary labelling, our argument should be understood as a plea for cooperation against the background of distinct, but complementary expertise. Quoting Besson again, the reflection on the principle of proportionality has outlined how to 'theorize the law in order to identify its immanent morality and hence the immanent critique within the law as a normative practice.'⁹¹ The practical opportunities made possible by the legal turn should not be underestimated. It could inform doctrinal arguments on the potential implications of principles such as proportionality. In this respect, the legal turn might facilitate cooperation with legal scholars in consolidating complementary expertise in interpreting important legal values and principles. It could also inform the way judicial bodies deal with cases bearing a high normative potential. As for the example of the CJEU, the position delivered by AGs on sensitive cases could be an institutional opportunity to make room for underlying ethical reflections. The principle of proportionality and the interpretation of its normative underpinnings is a perfect candidate for such positions. As noted by Schotel, strategic litigation should take advantage of the dynamic nature of proportionality. Turning once more to the above-mentioned example of reasons given for entry rejection, this dynamic movement should first occur 'at the extremes' by requiring higher standards of justification/quality of reasoning to some very specific cases, thereby allowing the first pieces of a theory of high-qualitative decisions in first-entry cases to be laid down.⁹² In the end, this specific example recalls that this working relation is bilateral: to work from within the law will surely bring philosophers important insights on new fields of research and ethical challenges. There is a real opportunity not only to have a greater practical impact, but to learn from the law as a living normative practice.⁹³

Johan Rochel, University of Zürich
johan.rochel@uzh.ch

⁹¹ Besson, 'The Law in Human Rights Theory', p. 126.

⁹² Schotel suggests this strategy in evoking 'obviously proportionate decisions' (Schotel, *On the Right of Exclusion*, p. 193).

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