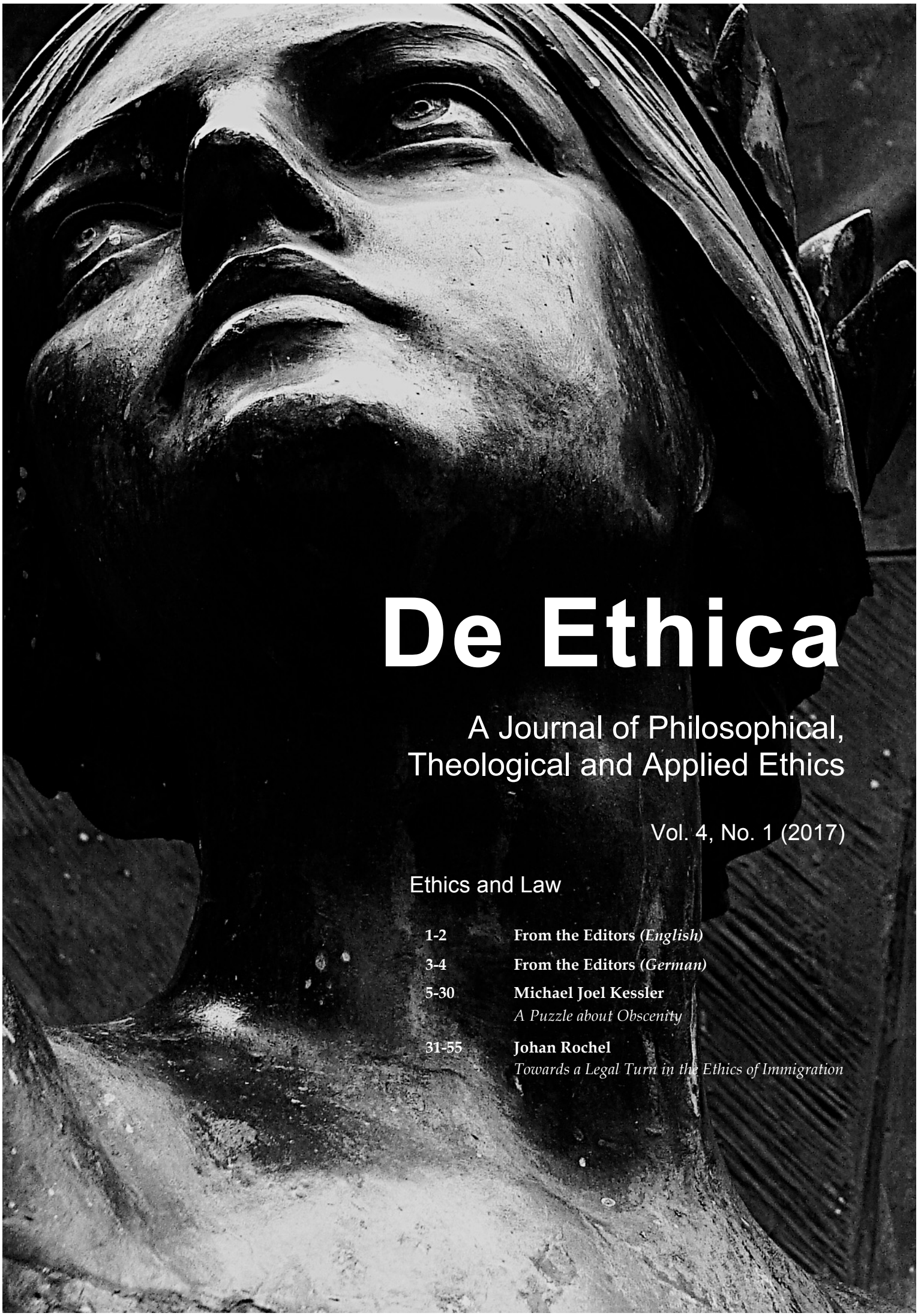

De Ethica

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Ethics and Law

D E E T H I C A

A JOURNAL OF PHILOSOPHICAL, THEOLOGICAL AND APPLIED ETHICS

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We welcome contributions from all philosophical and theological traditions. While we do welcome historically and empirically oriented work, our focus is on normative ethical questions. We also have a special interest in papers that contribute to ongoing public debates.

It is our aim to facilitate intellectual exchange across disciplinary and geographical boundaries and across the gaps between different philosophical and theological traditions. Thus we seek to publish papers that advance a clear and concise argument, avoid jargon, and are accessible to a non-specialized academic audience.

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De Ethica was founded in 2013. It published its first issue in 2014, under the guidance of its first Editor-in-Chief, distinguished professor Brenda Almond.

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From the Editors

In his famous *Law, Liberty, and Morality* H.L.A. Hart formulates four main questions that concern the relation between law and morality. The first one concerns the historical and causal relation between law and conventional morality, the second one is whether some reference to morality should be included in an adequate definition of law, the third one is about the possibility and forms of moral criticism of law, and the fourth and final one is about legal enforcement of morality.[1] These four different, although related, questions mark the powerful return of the issue of law and morality in analytic philosophy, a return that was exemplified by Hart's introduction of his sophisticated model of legal positivism. This positivism recognizes the important, even crucial role that ethical critique of law plays in political processes of the improvement of legislation.

Rejecting any analytic link between valid law and morality, Hart argues in favor of explicit ethical and political critique of law relating to both legal and moral *conventions*. Therefore, his legal positivism shares with the tradition of natural law the fundamental belief in the possibility of rational critique of social conventions (be they moral or legal). As is well known, Hart views utilitarianism as the most valuable normative model for such critique of moral conventions and he uses the writings of Bentham and Mill in order to critically approach the English legislation on homosexuality.

Since Hart's time many important contributions have been made to the analysis of the relation between law, morality and ethics, the latter understood as the critical level of morality. Not the least of these was the nuance and reframing that was added to the controversy between legal positivism and natural law. However, there is a persistent challenge of involving more professional ethicists in the philosophical and theological analysis of law. Such an involvement is not just a matter of quality of the theoretical enterprise. It is also timely if we take into consideration the dramatic global growth of nationalism followed by legislative initiatives that seek to reduce rights and liberties of the most vulnerable groups and individuals.

In this issue of *De Ethica* we present two articles that make substantial contributions to the philosophical critique of law. The first one, written by Michael Joel Kessler, scrutinizes the potential of Mill's understanding of prevention of harm as the only legitimate purpose of restriction of individual freedoms. The article is titled 'A Puzzle about Obscenity' and deals with the challenge of legal regulation that aims at prohibition of obscene pornography. Starting with an analysis of some American courts' rulings on pornography, Kessler develops an argument against moral harm as a fruitful tool for legal approach to conflicting rights. In his conclusion, he proposes to abandon the legal concept of obscenity.

[1] H.L.A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963), pp. 1-4.

Johan Rochel's contribution is titled 'Towards a Legal Turn in the Ethics of Immigration'. Rochel argues in favor of the idea that there are legal principles, i.e. general and foundational legal norms. Such principles, he states, offer a firm platform for a meaningful ethical contribution to the legal debate. In the article the principle of proportionality is discussed and applied to the analysis of the European legislation on immigration. Rochel argues that ethicists can and should use interpretative and critical resources within the law rather than critically approach law from distinctively ethical and philosophical perspectives.

We hope that this issue will enrich the ongoing international discussion about law and ethics. Most importantly, we hope that it demonstrates that there is a need for a continuing search for efficient ethical tools for critical scrutiny of law.

From the Editors

In seinem berühmten Werk *Law, Liberty, and Morality* formuliert H. L. A. Hart vier Hauptfragen zum Verhältnis von Recht und Moral. Die erste betrifft die historische und ursächliche Beziehung von Recht und konventioneller Moralität; die zweite die Frage, ob Moralität zu einer adäquaten Definition des Rechts gehören sollte; die dritte die Frage nach der Möglichkeit und den Formen moralischer Kritik des Rechts; und die vierte und letzte betrifft die rechtliche Durchsetzung von Moralität.[1] Diese vier verschiedenen, doch miteinander verbundenen Fragen markieren die kraftvolle Rückkehr der Thematik von Recht und Moralität in die analytische Philosophie; eine Rückkehr, für die exemplarisch Harts Präsentation seines ausgefeilten Modells des Rechtspositivismus stehen kann. Dieser Positivismus erkennt die wichtige, ja entscheidende Rolle, die die ethische Auseinandersetzung mit dem Recht in den politischen Prozessen spielt, welche die Qualität der Gesetzgebung verbessern.

Hart weist die analytische Verknüpfung von Recht und Moral zurück und argumentiert für eine explizite ethische und politische Kritik des Rechts, die sich sowohl gegen rechtliche wie auch gegen moralische *Konventionen* richtet. Daher teilt sein Positivismus den Glauben und die Möglichkeit rationaler Auseinandersetzung mit sozialen Konventionen (ob diese nun moralisch oder rechtlich verfasst sind) mit der Naturrechtstradition. Wie allgemein bekannt ist, betrachtet Hart den Utilitarismus als das wertvollste normative Modell einer solchen Auseinandersetzung und benutzt die Werke Benthams und Mills, um sich kritisch zur englischen Gesetzgebung der Homosexualität zu äußern.

Seit Harts Wirkungszeit sind viele weitere wichtige Beiträge zum Verhältnis von Recht, Moral und Ethik entstanden (letztere dabei verstanden als das kritische Niveau der Moralität). Dazu zählt auch und besonders die Nuancierung und Neuausrichtung der Debatte zwischen der rechtspositivistischen und der Naturrechtstradition. Es gibt jedoch die anhaltende Herausforderung, Ethikerinnen und Ethiker stärker in die philosophische und theologische Analyse des Rechts einzubinden. Diese Einbindung würde nicht nur die Qualität des theoretischen Unterfangens verbessern – sie wäre auch zeitgemäß im Angesicht des dramatischen Anwachsens nationalistischer Bewegungen und ihres Einflusses auf Gesetzgebungsvorhaben, die die Rechte und Freiheiten der verwundbarsten Gruppen und Individuen der Gesellschaft einschränken wollen.

In dieser Ausgabe von *De Ethica* präsentieren wir zwei Artikel, die substantielle Beiträge zur philosophischen Kritik des Rechts leisten. Der erste, von Michael Joel Kessler, untersucht das Potential von Mills Verständnis der Vermeidung von Schaden als dem einzig legitimen Zweck der Einschränkung individueller Freiheitsrechte. Sein Titel

[1] H.L.A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963), pp. 1-4.

lautet ‚Eine Reflektion auf den Obszönitätsbegriff' und er widmet sich den gesetzgeberischen Vorhaben, die ein Verbot obszöner Pornographie zum Ziel haben. Ausgehend von einer Analyse amerikanischer Gerichtsurteile zu pornographischen Inhalten entwickelt Kessler ein Argument gegen die Auffassung, dass moralischer Schaden ein fruchtbares Werkzeug für die juristische Handhabe von Rechtskonflikten sei. In seiner Schlussfolgerung plädiert er dafür, Obszönität als Rechtskategorie abzuschaffen.

Johan Rochels Beitrag hat den Titel ‚Für eine juristische Wende in der Migrationsethik'. Rochel folgt dem Gedanken, dass es Rechtsprinzipien gebe, also generelle und grundlegende Normen des Rechts. Solche Prinzipien gäben der inhaltlichen ethischen Auseinandersetzung mit dem Recht eine feste Basis. In seinem Artikel diskutiert er das Prinzip der Proportionalität und wendet es auf die Debatte zur europäischen Zuwanderungsgesetzgebung an. Rochel vertritt den Standpunkt, dass Ethikerinnen und Ethiker die hermeneutisch-kritischen Ressourcen innerhalb des Rechts nutzen können und sollten, statt sich dem Recht aus einer ethischen oder politisch-philosophischen Außenperspektive zu nähern.

Wir hoffen, dass diese Ausgabe die internationale Debatte über Recht und Moral bereichern wird. Insbesondere hoffen wir, dass sie aufzeigt, dass wir auch weiterhin die Suche nach wirksamen Mitteln der ethischen Auseinandersetzung mit dem Recht betreiben müssen.

A Puzzle about Obscenity

Michael Joel Kessler

Laws against sexual obscenity rely on a distinction between explicit materials that merely offend and materials that cause something worse than offense. While most offensive content is protected under the banner of freedom of expression, obscenity is not. In this paper I try to locate a distinctive harm in the case of obscenity, that would justify prohibiting this material while permitting other kinds of offensive content. I argue that the best case for laws against obscenity relies on the concept of moral harm. If we rely on Mill's Harm Principle and moral harm is a real harm, then it could be used to justify the distinction between protected and unprotected sexually explicit speech. I argue this demonstrates a weakness in the Harm Principle as a liberal principle of justice. By giving weight to moral harm, Mill's principle risks eroding an important distinction between the public and private domains.

The right to freedom of expression protects a significant amount of offensive speech. This is regarded as the price we must pay to live in a society that values diversity of thought and political disagreement. Protecting offensive speech is so essential to the United States constitution that, unlike European and Canadian courts, the U.S. Supreme Court has consistently struck down hate speech laws aimed at protecting vulnerable groups from verbal abuse. The Court's rationale is that if the right to freedom of expression means anything then it must protect the worst speech as much as the best.[1] By contrast, when it comes to sexually obscene expression the U.S. falls in line with many other countries in treating it as unprotected speech. Producers and distributors of such materials face fines or jail terms if convicted.[2] Obscenity prosecutions have trended downwards in recent

[1] For examples, see *National Socialist Party of America v. Village of Skokie* 432 U.S. 43 (1977), *R.A.V. v. ST. PAUL* 505 U.S. 377 (1992), and *Snyder v. Phelps* 562 U.S. 443 (2011).

[2] 'Federal law makes it illegal to distribute, transport, sell, ship, mail, produce with intent to distribute or sell, or engage in a business of selling or transferring obscene matter. […] Although the law generally does not criminalize the private possession of obscene matter, the act of receiving such matter could violate federal laws.' (Online at http://www.justice.gov/criminal/ceos/subjectareas/obscenity.html, last updated June 3 (2015) (accessed 2017-03-10).

years yet these laws remain in place and there is little momentum to overturn them.[3] During his election run in 2016 Donald Trump signed a pledge stating: 'Internet obscenity laws have not been aggressively or adequately enforced.'[4]

The topic of sexual obscenity yields a division between liberal and conservative approaches to freedom of expression. Historically, liberals have regarded obscenity laws as an attempt to enforce puritanical moral standards on society as a whole, while conservatives argued that sexually explicit images can be corrupting to those who view them. Beneath the surface of this disagreement there is significant common ground. Both sides agree that some speech is not just offensive but rather can constitute an assault against its audience. In such cases there is no controversy about whether speech should be protected. Both sides agree that the state has an important role to play in balancing free speech rights against shielding citizens from being harmed. So why is the legal status of sexual obscenity controversial?

The reason for the split surrounds the idea of harm. Laws against sexual obscenity rely on a distinction between sexually explicit materials that merely offend on the one hand, and materials that cause something worse than and different from offense on the other. Proponents of censorship argue that obscene materials harm rather than offend, and this is what justifies a legal intervention. This is not what the other side denies. Rather, opponents of obscenity law deny that the harms in question are sufficient to overturn the right to freedom of expression. Hence, the real point of contention surrounds the precise nature of the harms in question, and whether they are weighty enough to infringe upon a basic right.

A focused debate about the relative political weight of different kinds of harm rarely emerges because there is a tendency to group very disparate harms under one category. This conflation is pervasive in political discourse. In a 2011 letter addressed to President Obama's Attorney General, forty-one Senators said:

> We know more than ever how illegal adult obscenity contributes to violence against women, addiction, harm to children, and sex trafficking. This material harms individuals, families and communities and the problems are only getting worse.[5]

The letter appeals to several different kinds of harm, most of which are conceptually and practically distinct. The same point can be seen in the United Kingdom's recent attempts to modernize its obscenity laws. The new charge of 'possession of extreme pornography' prohibits accessing images that are 'grossly offensive, disgusting or otherwise of an obscene character,'[6] where obscene character refers to materials that 'tend to deprave and

[3] In 2005, under President George W. Bush, the U.S. Department of Justice created the Obscenity Prosecution Task Force (OPTF). In 2011, under President Barack Obama, this unit was folded into the Child Exploitation and Obscenity Section (CEOS). Republicans criticized this change as indicative of the administration's lack of commitment to prosecuting producers of hardcore pornography.

[4] The Children's Internet Safety Presidential Pledge. Online at http://enough.org/objects/EIE-prespledge-signedtrump.pdf (accessed 2017-03-10).

[5] The letter is reproduced at http://www.politico.com/static/PPM153_obsc.html (accessed 2016-05-08).

[6] Criminal Justice and Immigration Act s.63(6)(b).

corrupt persons.'[7] Disgust, depravity, and corruption are distinct concerns and do not rise and fall together. As such, when the government says the law sends 'a clear message that it has no place in our society' it is not clear what 'it' is, and why we should not allow reasonable pluralism with respect to its value as we do with most expression.[8] In Canada, obscenity law restricts 'undue exploitation of sex' which isolates materials that are either violent, or dehumanizing, or degrading. The Court's concern is with pornography that serves 'to reinforce male-female stereotypes to the detriment of both sexes' or that makes 'degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable.'[9] Any such materials will be found obscene if they violate a community standard of tolerance for what people should be allowed to consume in private.

In all three countries obscenity law identifies a sub-group of pornography, made by and for consenting adults, and holds it to a higher legal standard than other materials. In each case there is a lack of precision about what specifically makes obscene pornography bad. This is a different problem from the definitional difficulties associated with a 'you know it when you see it' standard.[10] The problem here is the lack of clarity about what one is supposed to be looking for.

This jumbled legal approach to obscenity reinforces the complaint that at its root this is just sexual conservatism. In this paper I will argue that the case for obscenity law is strongest when we understand it as a concern about *moral* harm to consumers of obscene pornography. There are a variety of ways of understanding what it means to be morally harmed, and all share the general idea that one is made into a worse person than one was before. The liberal camp has mostly dismissed moral harm as shorthand for outmoded views about sex, but this response is mistaken. I will show that there is a plausible argument connecting obscene pornography with moral harms to willing consumers by interfering with their ability to function within society. If moral harm is a genuine category of harm then liberals owe an argument for why the law cannot be used to shield individuals from it. This is a task few have taken up with much depth.

I will take as my ethical starting point a broadly Millian form of liberalism that places foundational value on the independence of the individual within society. Mill argues that within a democracy those with unconventional preferences should not have to 'request permission to differ' from others.[11] This violates both the equality of persons and the important liberty that each person needs to test out for oneself which ways of life are best. For this reason Mill defends a right to liberty of tastes and pursuits alongside his famous arguments for freedom of expression. This implies that individual freedom, especially when it comes to both unpopular choices and unpopular speech, must be

[7] Obscene Publication Act s.1.

[8] Home Office 2005, 1. Cited in Paul Johnson 'Law, Morality and Disgust: The Regulation of "Extreme Pornography" in England and Wales', *Social & Legal Studies* 19:2 (2010), pp. 147-163.

[9] *Regina v. Butler*, 1 S.C.R. 452 (1992).

[10] *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Few people who cite Justice Potter's words recall the ones that preceded them: 'I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so.'

[11] John Stuart Mill, *On Liberty* (1859), edited by Mary Warnock (Oxford: Blackwell: 2003), p. 93.

protected from society's tendency to 'compel people to conform to its notions of personal as of social excellence.'[12]

Beyond his arguments about fundamental rights, Mill has much to say about how people should behave towards each other in public, how husbands should treat their wives within the home, and how society should promote human flourishing. This leads to a debate among Mill scholars about what his views would be about pornography. Pro-censorship interpreters argue that commercial pornography negatively affects women which conflicts with Mill's vision of 'perfect equality'[13] between the sexes. Anti-censorship interpreters argue that Mill's concern with the dangers of giving legal force to the 'tyranny of the prevailing opinion and feeling'[14] would take precedence over the very important goal of eliminating the social bases of gender inequality.[15]

My goal is not to offer a textually exhaustive argument to convince the pro-censorship Millians they are wrong. Nor is it to vindicate a definitive no-censorship reading of Mill's writings. My aim is to show that, in cases that do not involve the causation or incitement of direct harms, the anti-*coercion* aspect of Mill's principles places a high burden of proof on the use of the law to regulate individual conduct. On the basis of this ethical theory I will argue that the distinction presupposed by obscenity law, namely that *some but not all* consensually made pornography contains a distinctive harm, cannot be justified.[16] Accordingly, the argument that pornography merely offends while obscenity harms does not succeed. Therefore, if pornography is protected expression then so is obscene pornography.

The paper proceeds as follows. First, I will outline some basic Millian principles. Second, I show how American courts have given conflicting rulings on pornography. One way to resolve the conflict is to suppose, as courts implicitly have, that there is some distinctive harm contained in obscene pornography that is missing from the rest. Third, I will argue that the best way to understand this distinctive harm is moral harm. I show that on a view of moral harm that both liberals and conservatives care about, there are theoretical and empirical reasons against using moral harm as a basis for selective restriction within the category of pornography. Fourth, I show why moral harm is a problematic concept to countenance as the basis for law when fundamental rights are at issue. I conclude that the best way to regulate the worst kind of pornography is by

[12] *Ibid*., p. 97.

[13] John Stuart Mill, 'On the Subjugation of Women' (1869), in *On Liberty and Subjection of Women*, edited by Alan Ryan (London: Penguin Classics, 2006), p. 133. See also David Dyzenhaus 'John Stuart Mill and the Harm of Pornography' *Ethics* 102:3 (1992), pp. 534–551 and Clare McGlynn and Ian Ward, 'Would John Stuart Mill have Regulated Pornography?', *Journal Of Law And Society*, 41:4 (2014), pp. 500-522.

[14] Mill, *On Liberty*, p. 91.

[15] See for example Nick Cowan, 'Millian Liberalism and Extreme Pornography', *American Journal of Political Science* 60:2 (2016), pp. 509–520.

[16] For the purposes of this paper I am restricting the subject matter to pornography that does not include actual corpses, animals, children, or rape. In each of these cases there can be no valid consent by at least one of the parties depicted. Further, these acts are already criminal in most jurisdictions, so they would enjoy no protection qua expression. There is an extremely difficult question about whether to criminalize pornography that simulates sex with animals, corpses, children, and unwilling women. I do not address that issue fully here, though my conclusion is compatible with permitting personal use but banning distribution.

abandoning the legal concept of obscenity altogether. My argument is compatible with the regulation of all pornography based on egalitarian considerations. However in order to do so one must reframe the debate away from rights-based arguments about freedom of expression.

Millian Principles

Mill famously sought to establish a principle for determining 'where to place the limit […] between individual liberty and social control?'[17] This seems like exactly the right question for present purposes.[18] Laws against sexual obscenity are a form of social control in a direct way since they block people from acquiring materials of interest to them. This also has a limiting effect beyond willing consumers and producers. The law protects unwilling audiences from exposure to these materials, and in so doing also prevents potential consumers who have no current view on these materials from discovering them.

This is a general point about legal prohibitions on purchases but it also has a special connection to Mill's account of freedom of expression. Whenever a government regulates expressive content – what can be said or published – the community as a whole is deprived of something whether they realize it or not. Even if you never had any intention of buying obscene materials, the fact that they are banned affects you. When ideas are present in the marketplace then people can respond to them, positively or negatively. When those ideas are banned from the marketplace there is nothing for anyone to respond to, favourably or otherwise.

It is important not to overstate this point. All we have noted so far is that banning expression changes the 'marketplace of ideas' by making it harder for certain ideas to compete. This can in principle yield good or bad results, and it is precisely this question the state must assess by considering the likely effects of making certain expression illegal because of its content. In chapter II of *On Liberty* Mill draws our attention to the dangers of entrusting the state with the power to censor what it considers to be bad ideas. Governments could use this authority to silence ideas contrary to their political interests. This abuse of authority has a well-established history. However Mill's worry about social control includes more than just power hungry dictators.

As Mill puts it 'all restraint, *quâ* restraint, is an evil.'[19] A law against obscenity might be overwhelmingly popular, however such a law involves a restriction on the freedom of those who would like to produce, sell, and buy obscene materials. Society may not see much value in these choices, but that does not make the legal prohibition costless. From the standpoint of those constrained there is a significant loss of freedom, that is for them an 'evil'. This constraint needs to be justified. As citizens we are owed an

[17] Mill, *On Liberty*, p. 91.

[18] This is one among many possible theories of political morality. Some will reject Mill's claim that harm is the *only* criterion for law. Even if one disagrees with Mill, any plausible theory will agree that to be harmed is bad, and that in some cases it is the proper role of the law to protect us from being harmed.

[19] Mill, *On Liberty*, p. 165.

explanation whenever majorities, though the legislature, impose legal limits on individual choice.

What this means is that even if we could show that the marketplace of ideas would not suffer as a result of censorship, this would not justify the interference. Censorship is contrary to an interest that Mill regarded as fundamentally related to freedom, namely the ability to make one's mind up rather than being told what to think.[20] When I am forbidden from encountering certain ideas then I am less able to reason critically about them. If the government suppresses offensive content then it also interferes with the audience's interest in reaching conclusions on their own, even if the audience would (or should) eventually come to reject those ideas. This is why restraint is an evil – it is contrary to freedom of the mind.[21] As a matter of political and moral principle, it is better for an idea to be heard and repudiated than for it to be silenced.

This principle is not absolute. Mill very clearly endorses the conclusion that censorship *can* sometimes prevent harm, and should be employed in those cases. Mill gives the example of preventing someone from inciting a riot by restricting his speech to an enraged mob.[22] The question before us is how to weigh the prevention of the harms from the riot against the harms inherent with empowering the state to interfere with the free exchange of ideas? To answer this we need to return to the Harm Principle, which states:

> […] the only purpose for which power can be rightfully exercised over an member of a civilized community, against his will, is to prevent harm to others. His own good, *either physical or moral*, is not a sufficient warrant. Over himself, over his own body and mind, the individual is sovereign.[23]

There are two distinct parts to Mill's principle: (1) it is wrong to coerce people through the criminal law unless they are harming others, and (2) it is not the proper role of the law to improve a person's character.

The first part identifies the criterion by which we determine whether coercion can be considered at all. Harm to another must be present or very close at hand. Any attempt to use the law to restrain individual choice is immediately under an evidentiary burden to show proof of harm to others. The harm-to-others condition is met by Mill's example of inciting the enraged mob by blaming their poor circumstances on the corn dealers. As he explains, these very same words could be published in a newspaper without censorship. The difference is that when speaking to the mob, the speech act and severe physical harm to specific others are tightly causally linked. By contrast, if a person reads a column stating the same opinion and then attacks the corn dealer, the agent has become the main cause of the harm. The mediating steps taken by this agent – reading, thinking, arming oneself, setting off with intent to injure – push the newspaper column very far away from the eventual assault. Therefore, unless one's speech leads to a direct, immediate, and severe harm to another there can be no justification for censorship.

[20] *Ibid*., pp. 114-118.
[21] David Brink, 'Millian Principles, Freedom Of Expression, And Hate Speech', *Legal Theory* 7 (2001), pp. 119–157.
[22] Mill, *On Liberty*, p. 131.
[23] *Ibid.,* pp. 94-95, emphasis added.

The second part of the Harm Principle – sovereignty over one's mind and body – identifies a criterion that *cannot* justify law. Mill recognizes that the law could be very effective in making us into better people, and thereby improving the quality of the society we share. However, this form of reasoning about legal coercion is blocked. Each of us is responsible for improving our characters, which means that no one can be compelled to take up that responsibility. If I choose not to become a better version of myself the state may not force me to improve because, over myself, over my own body and mind, I am sovereign.

As applied to the domain of expression, Mill would readily grant that exposure to certain messages can harm the audience. However, if this exposure is willing then it counts as a risky choice and these fall squarely within the realm of individual sovereignty. When discussing cases of harms-to-self Mill consistently adheres to the principle that society has a duty to warn people of the dangers they face, but to leave individuals as much as possible in control of the ultimate decision. The clearest example of this is when considering a man walking across a faulty bridge, Mill states that if 'there were no time to warn him' then we may forcibly interfere without wronging him. If there is time, however, then the person ought 'to be only warned of the danger; not forcibly prevented from exposing himself to it.'[24]

This provides clear ethical guidance for purely private choice. Mill acknowledges that self-harms may not always be sequestered to the life of individual. He cites the example of private drunkenness to make the point. If my drinking affects my driving then clearly the danger is no longer just to myself. No one may choose to add danger to the life of another with securing consent. Invading your sovereignty cannot be part of my sovereignty.[25]

Putting the two parts together, Mill's general moral view is that the law must be used to protect us from harms imposed on us by other people. Assaults, whether verbal or physical are prohibited, as are incitements to commit assaults. This means that actions that harm others are a matter of public concern and invoke the coercive powers of the law. The law cannot, however, be used to protect us from our own bad selves. Actions whose immediate harms befall only the agent must remain legal and be kept beyond the scope of the law, so long as that harm is knowingly and willingly accepted. Self-harms

[24] *Ibid*., p. 165.

[25] *Ibid*., p. 166. In 'Would John Stuart Mill have Regulated Pornography?', McGlynn and Ward argue this shows that self-harms can be harms-to-others at the same time. 'The very fact of being drunk constitutes the harm to others, even in the absence of proof of a crime being committed, due to the risk of further crimes of violence. […] This precautionary approach was summed up by Mill elsewhere when he stated that: `It is the business of the law to prevent wrongdoing, and not simply to patch up the consequences of it when it has been committed.' (p. 507) I disagree with this reading of the text. Mill defends pre-emptive action with those who have been convicted of previous offenses involving drunkenness. We know in their case that alcohol leads to violence. This argument does not generalize to those who have not committed crimes. As Mill states: 'I should deem it perfectly legitimate that a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction, *personal to himself*.' (*On Liberty*, p. 166) For similar reasons I disagree with Brecher's interpretation of regulation as proof that 'Mill […] subordinates individual autonomy more than many liberals would accept.' (Bob Brecher, *Getting What You Want? A Critique of Liberal Morality* (London: Routledge, 1998), p. 166) I regard restrictions as opposed to prohibitions as Mill's attempt to balance risk of harm to others with individual liberty.

'cannot without tyranny be made a subject of legal punishment' unless 'a man fails to perform his legal duties to others.'[26] As applied to the domain of expression, both harms to self and harms to others are to be tolerated as a consequence of protecting freedom of the mind. Toleration extends up to the point where the speech itself constitutes an assault.

A Puzzle about Obscenity

American jurisprudence embodies some of the points Mill defends in *On Liberty* as well as the thesis that there is a substantive difference between the offensiveness of pornography and the harm of obscenity. When we look at the case history concerning sexually explicit expression, we can see very clearly that the law is trying to target a specific kind of harm that lives in obscene pornography and only in obscene pornography.[27]

Laws against obscenity are a species within a general category of laws regulating wounding words.[28] Over the last fifty years the U.S. Supreme Court has settled on a two-level theory with respect to laws constraining freedom of expression. The first level refers to *Content-Neutral (CN) Restrictions*. A restriction on expression is content-neutral when it involves no direct reference to the message being expressed. Since no specific message is picked out as bad, CN-restrictions do not raise worries about censorship directly.[29] The second level involves *Content-Based (CB) Restrictions*. Here the state identifies some particular message as inappropriate and uses the law to ban it. Given the high likelihood that such laws could be used to suppress competing political views or to marginalize minorities, CB-restrictions must pass a much more stringent standard of review.[30] Courts have established that when the government tries to restrict expression in a content-specific manner, it must show that the damage that is done to free speech could only be avoided by allowing something worse to happen. This mirrors the logic of Mill's

[26] Mill, *On Liberty,* p. 166.

[27] This is the spirit of both English and Canadian obscenity laws as well, though both countries are trying to move towards an evidentiary standard of harm for all pornography. Canada's Supreme Court ruling on indecency points to the end of using community standards altogether. See Richard Jochelson, 'After *Labaye*: The Harm Test Of Obscenity, The New Judicial Vacuum, And The Relevance Of Familiar Voices, *Alberta Law Review*. 46:3 (2009), pp. 741-767. For a discussion of the U.K.'s failure to move completely to an evidence based standard of harm, see Clare McGlynn and Erica Rackley,'Criminalising Extreme Pornography: A Lost Opportunity', *Criminal Law Review* 4 (2009), pp. 245–260.

[28] I will focus on the American context here. For a thorough analysis of the Canadian approach to obscenity see Leonard W. Sumner's *The Hateful & The Obscene* (Toronto: University of Toronto Press, 2004). For a comparison between the Canadian and American contexts see Bret Boyce, 'Obscenity and Community Standards', *Yale Journal of International Law* 33 (2008), pp. 299-513, see especially pp. 322-338..

[29] Content-neutral restrictions do raise indirect worries. A restriction on protesting, for example, can be content-neutral yet mostly penalize the side of the debate that struggles to get its message out via other means.

[30] Justification for content-based censorship was for a long time subject to the 'clear and present danger' test. This test has been since refined so as to only apply when speech intends to incite or produce 'imminent lawless action'. See *Brandenburg v. Ohio* 395 U.S. 444 (1969).

exemption for speech that incites a riot. Restraint is an evil, but in such cases it is a necessary evil.

Obscenity does not fit anywhere on the two-level view. The Court draws a separate distinction between 'high' and 'low' value expression. Obscenity falls into the low-value category, alongside fraud,[31] defamation,[32] and incitement to law breaking.[33] High value speech enjoys a very strong presumption against content-based censorship, and can only be restricted in accordance with a stringent standard of review. Low-value speech can be restricted precisely *because* of its content, and therefore enjoys no strong protection.

From a Millian perspective you can see the logic of the distinction between high and low value speech. Fraud and defamation are speech acts that clearly impose direct harms on identifiable others: I take your money or your reputation from you without your consent. Banning this kind of expression prevents a direct harm in the same way that a law against robbery prevents direct harm. It is true that banning defamation involves content regulation, but this presents no special problem because the content of the expression *is* the cause of the harm. There is no reason to protect harmful acts just because they involve speech rather than force. As we have seen with Mill's example of inciting a riot, speech-based harms can be prohibited under the Harm Principle when there is a direct connection between the speech and a significant harm to assignable individuals.

This does not yet explain why obscenity is lumped in with fraud and defamation. On the American model, non-obscene pornography, non-sexual gory imagery involving corpses, and hate speech are considered high value and protected from censorship. Obscenity is not protected. What is it about obscene sexual expression that makes it low value? In looking at the case history we can see that courts have fumbled around with this question while steadfastly affirming obscenity's low value status. I'll briefly mention two cases that bring out what I see as the puzzle of obscenity.

Consider first *Rowan v. US Post Office Department*.[34] In the world before the Internet, people selling sexually explicit materials would reach out to potential customers by mailing catalogues advertising available titles and genres. Unsurprisingly, many homeowners were upset to receive these mailings. The Court ruled that the individual householder has an 'absolute and irrevocable' right to determine whether such mailings could be delivered in the future.[35] With this decision the Court established a defeasible permission on direct mailings of a sexual nature. The rule is the following: pornographers are allowed to mail these materials until the homeowner complains. The determination of *which* sexual materials are offensive is entirely subject to the homeowner's judgment. So, a homeowner who does not object to receiving catalogues from Playboy retains the right to object to solicitation from more hardcore magazines.

I will refer to this as an *Opt-out Model*. According to this model, the best policy is one that allows individuals to judge what is offensive from their own point of view. Once

[31] See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, Inc. 425 U.S. 748 (1976).
[32] See *NY Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[33] See *Brandenburg* for incitement criteria.
[34] 397 U.S. 728 (1970).
[35] *Ibid.*, p. 757.

this is positively established, any future solicitation is actionable.[36] The appeal of Opt-out is that the government takes no stand on whether these materials are in fact offensive. Rather, the law's role is merely to enforce the right of the individual against unwanted exposure. By deferring to the judgment of the homeowner, the state sidesteps the issue of content regulation.[37]

Under an Opt-out model the advertiser remains free to address other people who might want to become customers. So, the loss of freedom is minimal since the seller is still able to reach the desired audience. The restriction is that the seller must to cast the net more cautiously so as to exclude the unwilling. So, even though *Rowan* picks out some content – sexual materials – as subject to regulation, Opt-out maintains viewpoint neutrality. It is the homeowner, not the government, who decides which content to restrict. *Rowan* thus embodies most of the core values of Mill's approach to restricting speech. In Mill's framework, there is always an 'evil' wherever the law is used to constrain free choices and *Rowan* effectively constrains that evil in a way that is sensitive to all the interests at stake.

The second decision germane to our discussion is the Court's landmark obscenity ruling in *Miller v. California*. The 1973 ruling established that material is criminally obscene based on whether

> (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[38]

The striking thing about *Miller* is that it endorses a very different approach to the sale of sexually explicit material. I am going to describe *Miller's* underlying principle as the *Democratic Model*. On this model, the best policy is one that allows juries to determine which explicit materials should be banned. Like *Rowan*, *Miller* is a subject-matter restriction, since the materials must appeal to a prurient interest in sex, as opposed to a prurient interest in violence or money.[39] *Miller* picks out a special kind of intention – the desire to arouse – as a necessary condition for sexual material to be obscene. This exempts content that is sexual in nature but has educational or medical value from being deemed obscene. The third condition – overall merit – is meant to protect sexually explicit literary works from being banned. However, a literary work that goes too far in its prurience can still be found obscene if the offense it causes, judged by community standards, is not redeemed by its overall artistic value.

[36] An opt-out model can be narrow or broad. In addition opt-out models can be preemptive or after the fact. Compare for example national and local 'do not call' lists versus legislation requiring email advertisements to honour 'unsubscribe' requests.

[37] *Rowan* was written to apply only to sexually explicit materials. There is a question about whether it would apply if one objected to receiving other mailings. The case law since *Rowan* has not resolved this ambiguity.

[38] *Miller v. California*, 413 U.S. 15, 24 (1973)

[39] See Geoffrey R. Stone, 'Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter restrictions', *The University of Chicago Law Review* 46:1 (1978), pp. 81-115.

Both rulings say there is something special about pornography that calls for intervention in the market.[40] The key differences are, first, that *Rowan* says individuals can decide for themselves whether to welcome solicitations of prurience from sellers of sexual materials. *Miller* deviates from *Rowan* by saying that there are some sexual materials no one should be able to see, and that this judgment is to be made on a case-by-case basis by a jury of one's local peers. Second, *Miller* jettisons viewpoint neutrality entirely, since a buyer of obscenity cannot sway the prosecutor by saying 'it's not offensive to me.' A homeowner can do precisely that under *Rowan*, by refraining from opting out when he receives dirty catalogues in the mail. A third key difference is that *Miller* criminalizes the production and sale of something that some citizens enjoy and seek out. *Rowan* stays out of the marketplace entirely, except to enforce individual sovereignty over wanted and unwanted solicitation.

A finding of obscenity establishes that some expression does not deserve to be heard even by willing audiences. This kind of censorship is usually held to the very high standard that the speech will or is likely to cause imminent violent lawlessness. But *Miller* makes no claim that banning private voluntary exposure to obscene materials is thwarting any such harm. *Miller* declares that this standard does not apply, since the speech is low-value.

The puzzle of obscenity now emerges. What explains the difference between the treatment of direct sexual mailings from *Rowan* to *Miller*? Why shift from an individual-centered model (Opt-out) where the government takes no stand on what is offensive and avoids the issue of censorship, to a community-centered model (Democratic) where the government, via the courts, declares some ideas to be criminally offensive? Why opt for censorship when a more neutral and less restrictive option is already in place?

The rulings look contradictory. One way to dissolve the contradiction is the following: the standards for *obscenity* are different than the standards for *pornography*. So despite their surface similarities, these rulings apply to different domains. *Rowan* applies to the merely pornographic, which may or may not be offensive. By contrast, *Miller* applies to what lies beyond offense. Therefore the rulings are not in tension with each other.

If this analysis is correct, in *Miller* the Court affirmed a genuine content-based difference between pornography and obscenity. Canadian and English courts have drawn the same distinction though not as clearly. All agree that obscenity is what lies beyond offense, and all agree that obscenity can be identified by looking at the effects of this content on its audience. I now turn to the question of what that effect could be, and whether a Millian view could justify criminalizing some kinds of pornography on this basis.

[40] This justification for content regulation can be criticized on its own merits. What is it about sexual materials that makes them different from violent or politically charged materials? For the purposes of the argument I'll leave this aside. My focus is on the differences between *Rowan* and *Miller* so, as with the previous footnote, I'll assume that the subject-matter restriction to sexual materials is permissible.

A Millian Case for Obscenity Law

There are two levels to thinking about obscenity within a Millian framework. The first is whether or not there is distinctive harm lurking in obscene sexual expression. This would provide a basis for drawing distinctions within the category of offensive sexual expression. If we can identify the distinctive harm associated with obscene pornography, the second level is to determine whether the presence of this distinctive harm justifies removing this type of consensually made pornography from the marketplace.

Let's clarify two assumptions we are taking on board, one from Mill and one from the case history. First, there must be some domain of privacy. According to the Harm Principle an action is private when its consequences do not harm anyone but the agent. Absent some evidence that the harm extends beyond the agent, such choices must be permitted, though the state has a duty to warn the agent of the inherent danger. Second, the state may not rule that all sexually explicit material is obscene. In order for *Miller* and *Rowan* not to be flatly contradictory, there must be both protected and unprotected pornography. To declare all pornography as obscene (and therefore low-value) would imply that individuals would not be free to consume *any* sexually explicit materials in private. This is not what *Miller* says, nor what it intended. The ruling was narrowly crafted with the goal of leaving most pornography firmly in the domain of protected expression. Thus, to show that obscenity law is both philosophically and legally sound we need to show that *some but not all* pornography generates harms that extend beyond the realm of personal sovereignty even when used in private. These special harms are what justify treating obscenity, but not pornography, as a public matter subject to legal coercion.

I will consider two kinds of arguments that attempt to meet this challenge: (1) Social Harm arguments, and (2) Moral Harm arguments.

Social Harm

Consider the following very plausible claim: the community is made worse off by obscene materials, even when those materials are consumed in private. If we can show this, then the difference between pornography and obscenity is that the latter produces tangible social harms while the former does not. If these harms are sufficiently widespread it is compatible with Millian principles for this to overturn the presumption in favour of individual liberty.

How would private consumption of obscene materials harm society in way that is not also present in the case of run-of-the-mill pornography? I'll consider three versions of this argument. First, we can focus on the harms to *unwilling* audiences. This is a sound strategy: we want to protect the unwilling from being harmed by the decisions of the willing. There is something shocking about being exposed to graphic sexual content. The Harm Principle can certainly countenance psychological damage due to unwilling exposure as a real and significant harm.[41] This is exactly the logic of the *Rowan* ruling: no

[41] In 2011 France expanded their protections against spousal abuse to include a ban on actions that involve mental cruelty. These actions are classified as psychological violence. See http://www.theglobeandmail.com/news/world/france-still-struggling-with-its-landmark-spousal-mental-cruelty-law/article4252503/ (accessed 2016-07-25).

one should be subjected to unwanted exposure just because other people want to sell and buy graphic content.[42]

However, if that's the extent of the social harm then the correct solution is much less restrictive than the criminal ban imposed by *Miller*. Restrictions on where obscene materials can be bought, sold, and displayed will successfully protect unwilling audiences. We have established methods for preventing unwanted exposure including warning labels, check-boxes before entering websites, consent forms, zoning laws, and ISP-based blocks. Why would we insist on different standards for obscene materials than the ones that work reasonably well for pornographic materials? If a shop has an 'adults only' sign on it, what difference would it make if this store specializes in obscene pornography rather than softer options? The bystander and the consumer have both been adequately warned that danger lies ahead. According to Mill, this is where legal interference should end.

A defense of *Miller* based on the social harm of unwanted exposure fails to justify a criminal ban rather than regulation.[43] Regulation can manage the risk of unwanted exposure to all kinds of offensive expression without resorting to censorship and criminal penalties for possession, as is now the case in the U.K.[44]

There is a second sense of social harm that makes more progress towards distinguishing obscenity from pornography. One could argue that the willing consumers of obscenity threaten the physical security of others. On this hypothesis, viewing obscene materials can make you into a criminally dangerous person, or at least creates a high risk of this happening in some viewers. As with Mill's example of inciting a riot by feeding inflammatory words to a charged audience, perhaps obscene pornography incites people to commit acts of sexual violence they would otherwise not commit. This would connect the private act of viewing the materials with the very public act of criminal violence.

The idea that obscenity inspires violence has been a part of the discussion of obscenity for decades. Canadian and American courts found it 'reasonable to presume' that such a causal relationship exists even if evidence is hard to find.[45] English courts endorsed this as well, stating:

> The Government believes there is some evidence that viewing these images may have an effect on young peoples' attitudes to sexual and violent behaviour, and that that some men can exhibit heightened aggression towards women after exposure to violent pornography.[46]

[42] This shows that we do not need to adopt what Dyzenhaus calls a 'narrow harm principle' where only direct physical assault count as proscribed acts. See Dyzenhaus, 'John Stuart Mill and the Harm of Pornography', p. 544.

[43] This reply omits reference to the value of unwanted exposure. While we want to protect people from shock we don't want to do it in a way that prevents people from challenging conventional ideas. For a discussion of the reasons for allowing unwanted exposure, see T.M. Scanlon, 'Freedom of Expression and Categories of Expression', *University of Pittsburgh Law Review* 40 (1978-1979).

[44] See Clare McGlynn and Erica Rackley, 'Prosecuting the Possession of Extreme Pornography: A Misunderstood and Misused Law', *Criminal Law Review* 4 (2013), pp. 400–405.

[45] See Boyce, 'Obscenity and Community Standards', p. 332.

[46] Criminal Justice and Courts Bill, Section 10.

This version of the social harm strategy face the challenge that the empirical case connecting viewing obscene pornography causes direct criminal violence is inconclusive.[47] Unlike Mill's example of setting off a charged mob with invective, clear causation between a specific type of pornography and acts of violence is rare.[48] Where there is a link, the U.K. the government's research concluded: 'The findings of the meta-analyses indicated an increased susceptibility to the influence of pornographic material on men who are measured as having a combination of high predisposing aggression levels, past histories of sexual and other aggression, self-reported likelihood to rape and sexual arousal to rape depictions.'[49] This evidence supports a plainly Millian solution: when someone shows themselves unfit to safely use some dangerous material we are permitted to restrict that person's access to it in the name of preventing direct harm to others.

The justification for this restriction on the browsing habits of offenders does not generalize to non-offenders. The overwhelming majority of pornography users of all types never commit crimes and that is the kind of social harm we are now focusing on. Since the acts of violence in question are already criminal, single cases of inspiration will not be sufficient to justify further legislation banning swaths of pornography that many use regularly and safely.

More detailed work needs to be done in this domain to test whether specific kinds of pornography have greater tendencies to produce acts of violence in individuals *without* 'high predisposing aggression levels'. Even if such evidence can be produced reliably under testing conditions, we would need to weigh this evidence against the evidence that availability of this pornography functions as a safety-valve for individuals with violent predispositions.[50] Moving from Mill to *Miller*, the fact that someone might use obscene pornography as criminal inspiration does not present a threat of 'widespread imminent lawlessness.' Under American law, this is what needs to be shown to justify banning protected speech. This is why starting riots can be banned. There are very specific physical harms associated with the expression in a specific context. Pointing to

[47] Sumner canvasses the social scientific literature on this issue. See Sumner, *The Hateful & The Obscene*, pp. 131-141. While there is some correlation between exposure to violent materials and violent attitudes towards women, this is not limited to the domain of sexually violent materials. As such, *Miller*'s claim that violence must be coupled with sex to count as obscene lacks an evidentiary basis.

[48] In the decade since Sumner's survey, further studies have aligned with his analysis. For a review of the recent empirical literature, see Milton Diamond's 'Pornography, Public Acceptance and Sex Related Crime: A Review', *International Journal of Law and Psychiatry* 32 (2009), pp.304-314: 'Indeed, the data reported and reviewed suggests that the thesis [that pornography increases violence] is myth and, if anything, there is an inverse causal relationship between an increase in pornography and sex crimes.' (p. 312)

[49] Catherine Itzin, Ann R. Taket and Liz Kelly, *The evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment*. Ministry of Justice research series, 11/07 (London: Ministry of Justice, 2007).

[50] See Andrew Koppelman's discussion of the safety valve rejoinder to fantasy depictions of sexual violence in 'Does Obscenity Cause Moral Harm?', *Columbia Law Review* 105:5 (2005), pp. 1635-1679, at pp.1658-1659. See also a summary of this evidence in 'The Sunny Side of Smut' in *Scientific American*; online at https://www.scientificamerican.com/article/the-sunny-side-of-smut/ (accessed 2017-03-10).

cases where pornography has inspired sexual violence will not be sufficient to clear the high standard for banning expression based on its content.

Finally, and perhaps most importantly for the purposes of my argument, correlations can be observed between content consumption and increased aggression in the case of both violent and non-violent pornography.[51] Correlations can also be found with non-sexual video games, graphic novels, or movies.[52] All of these are subject to regulation like age-restrictions rather than being treated as low-value criminal expression. Since *Miller* is narrowly drawn to apply only to crude depictions of sex, any evidence that quickly generalizes to other content fails to locate a specific harm inherent only in sexual obscenity that would explain why it stands legally apart from the rest of expression that is correlated with inducing aggression.

The violence version of the social harm argument is not very persuasive on empirical grounds. The evidence fails to validate the content-based censorship we see in *Miller*. A third version of the social harm argument focuses on the specific harms of pornography to women.[53] A content-based restriction on sexist expression would be appropriate because the harms of that speech fall almost exclusively on women. Rather than being a price we all pay, pornography makes women pay the price for expression that satisfies male sexual desire.

Having addressed direct causation of violence in the previous argument, I will focus on feminist arguments that have a more social focus. Dyzenhaus describes this approach clearly:

> For procensorship feminists [violent] pornography is but one end of a continuum, the other end of which is pornography showing women consenting to and enjoying their role in satisfying male desire. These feminists think that such 'consensual' pornography is as much a matter for concern as violent pornography.[54]

The connection between the offensive content and social harm is the perpetuation of the idea of male power.[55] Accordingly 'the harm of pornography is then the special way in which it contributes to a regime of inequality'.[56] This inequality manifests itself in many

[51] 'Consumption of material depicting non-violent sexual activity increased aggressive behaviour; and media depictions of violent sexual activity generated more aggression than those of non-violent sexual activity.' (Itzin, Taket and Kelly, *The evidence of harm to adults relating to exposure to extreme pornographic material*, p. 9)

[52] A recent study on violent video games notes: 'First, it appears in this study that there are effects of violent game play on aggressive outcomes. These are consistent with the claims made by social cognitive theory: mere game play can increase aggression.' (Marina Krcmar, Kristie Farrar and Rory McGloin, 'The Effects of Video Game Realism on Attention, Retention and Aggressive Outcomes', *Computers in Human Behavior* 27:1 (2011), pp. 432–439, at p. 438.

[53] For an early version of this argument see Catherine A. MacKinnon *Feminism Unmodified: Discourses on Life & Law* (Cambridge, MA: Harvard University Press, 1987). More recently, see Rae Langton, 'Whose Right? Ronald Dworkin, Women, and Pornographers', *Philosophy and Public Affairs* 19:4 (1990), pp. 311-359.

[54] See Dyzenhaus, 'Mill and the Harm of Pornography', p. 535.

[55] See Andrea Dworkin, *Pornography: Men Possessing Women* (New York: Putnam, 1981).

[56] Dyzenhaus, 'Mill and the Harm of Pornography', p. 536.

obvious ways, like pay-gaps and glass-ceiling, and more subtle ones including 'experiences of subordination' as well increased levels of 'unease, distress, and anger'.[57]

These harms are significant and certainly infused into our social world in pernicious ways. Pornography is part of a general cultural tendency to sexualize women's bodies wherever they are. Nudity and sexually explicit content are not necessary in order for this to occur. This point weakens the plausibility of a genuine distinction between obscene pornography and the rest. Objectification and 'pornification' are present in almost all pornography that is created and consumed.[58] The most violent forms of pornography attract the most attention, but the degradation seen there is, as Dyzenhaus notes, on a continuum with degradation seen in all non-violent pornography that depicts women in servile positions. If this is cause for censorship then it will apply to much more than is currently prohibited by obscenity law in the U.S., Canada, and the U.K. An argument for treating all hardcore pornography as obscene will not fit within existing legal frameworks.

So much the worse for those legal frameworks then. This reply leads to a second reply. The social harms under consideration pertain to the social inequality of women relative to men. This is a matter of basic justice that requires political action. However, it would be very difficult to isolate the unique contribution that obscenity makes to the social inequality of women, even if it plays a contributing role. As Brecher compellingly states,

> [p]ornography does not simply mirror society: as with violence on TV or 'lonely hearts' advertisements in the press, so pornography helps create society in its image; and it does not simply give people what they want, it gets them to want those, and other, things.[59]

Since my concern here is whether obscenity merits special treatment under the law, any objection that puts all pornography on a continuum will find evidence of social harm to unwilling audiences caused by any private use of pornography. This is incompatible with both a Millian principle protecting some domain of privacy in which to pursue liberty of tastes, and the legal distinction between protected and unprotected pornography.

Moreover, this is a place where regulation stands out as a viable solution that meets most of the interests at stake. If pornography is protected speech this does not mean that women (or men) must accept its presence either in public or in their private lives. As discussed, technological and regulatory solutions exist here to protect unwilling audiences. This ensures some private space for every individual where they are not answerable to the demands of society. This will not defeat the social harms of inequality. What this does is break the direct connection between pornography consumption by an individual in private and invading another's sovereign control over body and mind. The protection of privacy both legally and ethically is something every citizen can demand,

[57] Julia Long, *Anti-Porn: The Resurgence of Anti-Pornography Feminism* (London: Zed Books, 2012), at p. 144.
[58] *Ibid*., p. 111.
[59] Brecher, *Getting What You Want?*, p. 157.

and this will protect both those who want to consume obscenity and those who want freedom from it.[60]

To sum up: none of the versions of the social harm argument considered will establish that there is a unique harm in the private use of obscene materials versus the private use of other sexually explicit speech or other offensive content more generally. The harms we do find are either too causally remote or too inclusive to justify the special legal treatment of obscenity. This is, I think a dead end for defending content-specific restrictions within the domain of pornography. I turn now to the different and more promising argument that obscenity involves *moral harm* and this differentiates it from other expression.

Moral Harm

Consider the following hypothesis: obscenity threatens to impair a person's ability to function as a normal member of society. The Harm Principle forbids laws that force us to act for our own moral perfection, but it does not categorically prohibit laws aimed at protecting the individual's long-term well-being. For example, when I engage in irrationally risky behavior that threatens my survival the Harm Principle allows legal interference as consistent with my sovereignty. Such laws are paternalistic, but the paternalism is not motivated by moralistic considerations.[61] Rather, the legal intervention tries to prevent bad outcomes for me that I would recognize as bad by my own lights.[62] In the moment, there is some temporary impairment to my cognitive faculties that prevents me from seeing how to achieve what I want. In such cases intervention aims to uphold what agents would, in time, regard as their own best interests. Paternalistic state intervention is for the sake of individual liberty.

This kind of legal paternalism has strong textual support in Mill. He famously argues that no society should recognize a contract to sell oneself into slavery.[63] He also allows that we can interfere with a person suffering from impairment with respect to 'the full use of the reflecting faculty'.[64] His reasoning is that the state is responsible for respecting our ability to pursue what we desire, and our power to formulate coherent desires is vulnerable. In such cases, the proper policy is not one of non-interference. As Mill says about restraining the man unknowingly walking on a faulty bridge, 'liberty consists in doing what one desires, and he does not desire to fall into the river'.[65]

[60] This reply to pro-censorship feminist argument is not decisive. I return to these concerns in the next section.

[61] This argument is different from the debate about the status of 'morality-dependent harms' in Mill's theory. The moral component of moral harm is primarily about the agent's interests rather than the audience's. For a discussion of the importance of morality dependent harms see Ted Honderich's '*On Liberty* and Morality-Dependent Harm', *Political Studies* 30:4 (1982), pp. 504-514. For a reply, see Jeremy Waldron, 'Mill and the Value of Moral Distress', *Political Studies* 35:3 (1987), pp. 410-423.

[62] Some argue that these kinds of laws don't even count as paternalistic. See, for example, Joel Feinberg, *The Moral Limits of the Criminal Law Volume 3: Harm to Self* (Oxford: Oxford University Press, 1989), pp. 12-16.

[63] 'It is not freedom to be allowed to alienate his freedom.' (Mill, *On Liberty*, p. 170)

[64] *Ibid*.,p. 165.

[65] *Ibid*.

One can construct a parallel argument regarding moral harm: (1) moral harm is the likely consequence of willing exposure to obscene materials, (2) moral harm impairs normal human functioning, (3) this leads to bad consequences that the agent would regard as bad, were the agent thinking clearly. Therefore, (4) the state is warranted in restraining the person from viewing morally harmful pornography. This is a restraint that prevents an even greater evil to the agent.

If this is right, then we have a harm-based justification for restricting private consumption of obscene materials. This argument rests on what I'll call the *Moral Harm Hypothesis*, according to which obscene pornography is material that contains a high risk of serious impairment to a person's ability to engage in normal human relationships (sexual, social, or otherwise).[66] We have a valid basis for restricting access to such materials due to the depth, gravity, and scope of the impairment for the agent. This is a harm-to-self that leads to bad consequences, mostly for the agent but also indirectly for others. A rational agent sees these outcomes as bad and would choose not to become so impaired. If obscenity can make one's life worse in ways that we can see clearly from the outside but lose track of once we are in the grip of these materials, then our dominant preference would be protection from this harm. An interference with the agent's choice of pornography is therefore compatible with the agent's independence.

This hypothesis, if confirmed, would justify the divergent opinions in *Rowan* and *Miller* and more generally provide an ethical basis for treating some pornographic depictions as worse than others. This would preserve the distinction between obscenity and pornography in a simple and plausible way. Run-of-the-mill pornography presents a low risk of damage to a person's healthy functioning. This level of risk falls within an acceptable range, akin to the risk we tolerate with other bad habits. With obscenity, the risk that significant damage will occur is much higher, given how disturbing these images are.[67]

This way of singling out obscenity via the concept of moral harm is a compelling alternative to the social harm strategy considered earlier. We have identified a kind of

[66] This concept of moral harm differs from the one discussed by Koppelman in 'Does Obscenity Cause Moral Harm?'. For Koppelman, moral harm involves an impairment in 'B's ability to discern the morally better from the morally worse.' (p. 1643) My focus is interpersonal. I am concerned specifically with the kind of moral harm that affects our ability to stand in working relations with others. This is, arguably, a species of the category of moral harm Koppelman describes. Another conception of moral harm comes from Feinberg's *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing* (Oxford: Oxford University Press, 1990), pp. 22-23. Feinberg describes moral harm as rendered void in those cases where the agent had no antecedent interest in avoiding the harm. Thus, for Feinberg, there is no external standard against which a person's subjective preferences are to be evaluated. Like Koppelman I reject the conception of well-being that underlies Feinberg's argument that moral harms is not real harm for political purposes. Mill clearly employs an external standard of well-being when he appeals to mankind's 'progressive' interests as those which should not be setback by social policies. For an elaboration of this idea in Mill, see Brink, 'Millian Principles, Freedom Of Expression, And Hate Speech'.

[67] This tracks a distinction we often draw between hard and soft drugs. On some views, the latter may be used recreationally without significant risk. However, almost everyone is exposed to significant harms (addiction, sickness, poverty, etc.) through the use of hard drugs. Recent reviews have found little supporting data for pornography addiction as a pathology. See David Ley, Nicole Prause and Peter Finn, 'The Emperor Has No Clothes: A Review of the "Pornography Addiction Model"' , *Current Sexual Health Reports* 6:2 (2014), pp. 94-105.

harm that plausibly could be the consequence of viewing some but not all types of pornography. This harm has debilitating effects that any rational agent would want to avoid, and a restriction on the production and consumption of obscene pornography would leave non-obscene pornography untouched.

In order for this argument to work we need to be more precise about how we understand the purported debilitating effects of being morally harmed. How does moral harm make its way in and how does it manifest itself? One way of spelling this out is that exposure to disturbing content can dull our moral sensibilities.[68] On this view, the damage done by obscenity lies in its tendency to make us into morally worse people. The trouble with this conception echoes the problem with saying that obscenity causes social harm by making people more dangerous. The evidence does not support the connection. It is very plausible that those who enjoy obscene pornography are inuring themselves to things that should fill them with revulsion, as they do for most others. However, enjoying content that should be upsetting does not make one less likely to obey the speed limit, tell the truth on the witness stand, or pay one's taxes. Further, under the Harm Principle the state is barred from coercively bringing about our moral improvement. Dulling one's moral sensibilities in a way that has no clear harmful effects on others remains in the protected sphere of personal sovereignty. Once I stop paying my taxes then the state can punish me for that. My pornography preferences have nothing to do with that. So this conception of moral harm risks quickly sliding into a form of legal moralism that is not sanctioned by Mill's ethical theory.

A second way of conceiving of moral harm is a weaker variant of the dulled sensibilities argument: obscenity warps our views about normal human relations, and so makes us less able to function within conventional social norms. This version of moral harm leaves aside moralistic considerations and focuses instead on the basic capacities we all need to get around in society. It seems initially plausible that long-term exposure to obscenity could impair a person's ability to have successful social and personal relationships. This argument is often being made with respect to Internet pornography in general. Its sheer volume and ease of access has a profound effect on how individuals see themselves and others. Regular use of pornography blurs the line between fantasy and real life.[69] This blurring between fantasy and reality is present in obscene pornography as well. And if obscene pornography is deeply warping, then the risk to the individual is significant. Indeed, this is the concern voiced by the Canadian court, which sees the role of obscenity law to prevent 'degradation, humiliation, victimization, and violence in human relationships *appear normal and acceptable*'.[70]

This conception of moral harm brings conservative and liberal sides as well as pro- and anti-censorship interpreters of Mill very close together. The reason obscenity involves a moral harm is because it distorts our conception of others in a way that risks worsening our social and intimate relationships. This has nothing to do with moralistic

[68] Immanuel Kant famously argued that cruelty to animals 'weakens' our moral sensibilities and facilitates a transition to moral failure towards human beings.

[69] There is research linking pornography consumption to a decrease in commitment to one's primary romantic relationship. See, for example, Nathaniel M. Lambert, Sesan Negash, Tyler F. Stillman, Spencer B. Olmstead and Frank D. Fincham, 'A Love That Doesn't Last: Pornography Consumption and Weakened Commitment to One's Romantic Partner', *Journal of Social and Clinical Psychology* 31:4 (2012), pp. 410-438.

[70] *Regina v. Butler* 1 S.C.R. 452 (1992), emphasis added.

ideals of what relationships should look like. This is simply about making sure the agent is able to be in the kinds of relationships he or she wants.

In order to justify coercive interference we don't need proof of a necessary causal connection between obscene pornography and warpage. All we need is that the risk to the average person be high.[71] If obscenity can cause relational debilitation in some non-trivial percentage of people, then there is no theoretical tension between empowering states to protect us from this kind of harm.

The reason this unites all camps is that there is general agreement on the value of making meaningful choices. There is a broader disagreement, of course, about what makes a choice meaningful. However, all can agree that protecting people from debilitating consequences of their mistakes has *some* place within the law. This will justify coercive protection for the sake of the individual when things are dire.

This also provides the state with a legitimate, albeit indirect, interest in the character of its citizens. As citizens we are often required to stand in good social relations with others. We have responsibilities to pay taxes and drive safely in traffic, to raise our children well and to take care of our elderly family members and to act decently towards our neighbours. Relational impairment is for that reason not a purely private outcome. If moral harm damages these social capacities, then agents will be less able to function in the ways expected of citizens. Therefore, even our most personal private relationships – spouses, parents, children, intimates – have a public dimension.

We have now identified and clarified a kind of privately induced self-harm that falls within the state's legitimate concern.[72] This conception of moral harm passes both parts of Mill's principle and fits well with his discussion of self-harmful consumption habits in *On Liberty*. We now have an ethical basis for the law of obscenity. Could a concern for moral harm vindicate the distinction between pornography and obscenity drawn by the U.S. Supreme Court in *Miller*?

There are several reasons why this cannot be the case. First, recall that *Miller* stipulates that obscenity must involve appeal to a 'prurient interest' in sex. Under *Miller*, if it's not sexual in nature it cannot be obscene. According to the current view of moral harm this restriction is unwarranted. Gory movies, violent video games, and sadistic song lyrics can all be morally harmful to some audiences. If our concern centres on relational impairment then violence *without* sex needs to be on the list of what counts as obscene.[73] Further, many common forms of popular entertainment also have the potential to warp our views about how normal people behave. In the case of sitcoms and reality TV the risks of warping are high precisely because the moral harm they contain hides in plain sight.

This is not a knockdown point against the moral harm hypothesis, but only an argument that the actual verdict in *Miller* cannot be understood as appealing to this broad conception of moral harm. *Miller* is too narrowly drawn to be relying on a general

[71] In discussing whether poisons should be freely available Mill acknowledges that failure to warn via labeling about this risk constitutes harm because '[…] the buyer cannot wish not to know that the thing he possesses has poisonous qualities.' (Mill, *On Liberty*, p. 165)

[72] This is in line with Mill's argument that drunkenness may well be private but that failure to take care of one's children because one is drunk is not. In such cases, the law may be used to curb excessive drinking. (Mill, *On Liberty*, p. 166)

[73] The same argument could be made about hateful materials. See Sumner, *The Hateful & The Obscene*, Ch. 3.

concern for relational impairment. *Miller* could obviously be expanded to include non-sexual expression.

A second problem with understanding *Miller* as focused on moral harm is that this would end up collapsing the distinction between pornography and obscenity. If we truly believe that sexual materials contain a high risk of distortion leading to impairment, then the charge would stick against almost all commercial pornography. Most of it is fantastical and larger than life, and most of it paints a deeply inegalitarian picture of gender roles. So the attempt to isolate obscene pornography on the basis of its harmful content would fail.

Accordingly, all pornography would be suspect. Once all pornography is capable of being censored then the distinction between obscenity and pornography would depend on establishing a threshold risk for warping messages.[74] However, *Miller*'s blunt way of approaching these subtle differences of degree is by reference to the views of the community as a whole. The threshold is to be drawn by the community's standards of offense at prurient displays of sex.[75] This route leaves behind concerns about moral harm in the sense of *impairment*. In its place we give legal force to the moral disapproval of the community of certain sexual preferences. For Mill, this is precisely the tyranny from which citizens need protection. As I have argued, the only way to vindicate the legal difference between pornography (*Rowan*) and obscenity (*Miller*) is to show that there are harms in the latter but not the former. The community standards approach doesn't uncover this harm; it merely reports the point at which the average person is offended by sexually explicit content.

This leads to a final point. Appealing to moral harm to ban sexual expression requires demonstrating that the harm in question interferes with the minimal conditions necessary for an agent to stand in functional relations with others. That is what, on the moral harm hypothesis, converts the matter from being private into being public. Obscenity might contribute to making you a less good human being, but we have no strong empirical case for thinking that it incapacitates your basic social functioning. And this is what we would need to show – that the choice to consume obscenity is like the choice to use damaging drugs. No rational person would choose the physical, economic, and social hardships associated with addiction to hard drugs, were the person to know in advance that these evils would ensue. Laws against hard drugs make sense precisely because the causal connection between consumption and the likelihood of harmful addiction is demonstrably strong. There is no similar evidence about consumption of obscenity. Rather, some studies show that pornography can have beneficial social and personal effects for some agents.[76]

The evidentiary burden that falls to the defender of moral harm is the following. First one must show that obscene pornography is a significant cause of harmful warping,

[74] This is, I think, the best way to conceptualize the difference between pornography and obscenity. I'll return to this in the next section.

[75] Despite statistics on the widespread use of pornography, public opinion of pornography is quite low. Recent studies put pornography usage among young men around 87 per cent and young women around 31 per cent. See Jason S. Carroll, Laura M. Padilla-Walker, Larry J. Nelson, Chad D. Olson, Carolyn McNamara Barry,, Stephanie D. Madsen, 'Generation XXX: Pornography Acceptance and Use among Emerging Adults', *Journal of Adolescent Research* 23:1 (2008), pp. 6-30.

[76] See Mary Anne Watson, Randyl D. Smith, 'Positive Porn: Educational, Medical, and Clinical Uses', *American Journal of Sexuality Education* 7:2 (2012), pp. 122–145.

as opposed to simply having one's horizons expanded. Then, one must show that these warping effects are socially debilitating to a higher degree than other offensive content. This step provides the basis for coercive interference in the name of the agent's own rational interests. Both points point require empirical findings in order to overturn the Millian presumption in favour of non-interference, especially in matters concerning the basic rights to both freedom of expression and to liberty of tastes and pursuits. Absent this evidence, an argument for obscenity law based in moral harm is at best a well-meaning form of paternalistic over-reaching, and at worst straightforward legal moralism.

In sum, neither an other-regarding argument from social harm nor a self-regarding argument from moral harm provides a justification for the legal practice of treating obscenity as low value. Obscenity should not be exempted from the usual protections against content-based restrictions. Expression that is vapid, racist, homophobic, sexist, gory, or hateful is entitled to protection under the First Amendment. For reasons of consistency, obscenity belongs in this group as well.

Conclusion: Beyond the Harm Principle

Recall the list of unprotected low-value speech: obscenity, defamation with malice, false or misleading commercial advertising, fraudulent solicitation, incitement to law-breaking, and threats of violence. When juxtaposed with threats and fraud, obscenity is out of place. In each of the other examples I threaten or succeed in taking something away from another. And indeed, if I were to do so I would likely create a harm. But the harm is not what makes these actions wrong. Rather, the wrong is that I am depriving another of something that is not mine to control. Fraud deprives you of your money, defamation deprives you of the ability to enter into arrangements with others based on your actual track-record, and the riot I cause deprives you of your physical safety. There are often harms associated with these wrongs, but there need not be. I could defraud you in a way that leads to your benefit, or I could engage in deceptive advertising to get you to act in your own best interests. These are still wrongs because I take something of yours without your consent. We don't need to look for harm to establish that these actions invade your sovereignty.

Framed in this way, it is clear that obscenity law doesn't belong here.[77] My private use of obscene materials does not deprive anyone else of anything that is theirs to control. Attempts to lump the speech-based harm of obscenity with the speech-based harm of fraud is conceptually confused. This is a failure in the Court's reasoning in *Miller*, but it is a failure that is invited by the Harm Principle. As noted, it is compatible with Mill's argument to show that a harm-to-self is so severe that it results in harm-to-others. And this bolsters the idea that obscenity is like fraud in that both eventually lead to harm others.

However if obscenity threatens harm to others it does so in a way that is wholly unlike the threat contained in fraud or inciting riots. Those actions involve individual

[77] For an argument that pornography is like low-value fighting words see John M. Kang's 'Taking Safety Seriously: Using Liberalism To Fight Pornography', *Michigan Journal of Gender & Law* 15:1 (2008), pp. 1-40, at pp. 10-11.

interpersonal domination: taking away your independence and putting mine in its place. No such thing happens when I willingly expose myself to obscenity. It may be the case that moral self-harm will eventually have negative spillover effects on the rest of my life, and on society. When that happens the problem lies very far from the obscene expression. This is more like Mill's example of publishing a column about the tyranny of the corn dealers. Any incitement this brings about will go through the agent's will. The speech is part of the causal story but not in any unique way.

However, in light of the analysis given here, it would be a mistake to see *no* possible relation between the harm in fraudulently deceptive advertising and the harm in obscenity. As I have argued, if moral harm is real harm, then Mill's principle needs to countenance it, even if this harm will not on balance justify a legal prohibition.

The need to acknowledge and compare harms beyond physical harms is a strength and a weakness of Mill's principle. It's a strength because it forces us to consider the *severity* of different kinds of harms as well the extent of their effects. Differences of degree should matter when determining if the law ought to be used or if regulation would suffice. This sensitivity to the degree of harmfulness becomes a weakness when applied to the case of obscenity. Under the Harm Principle, whether or not a harm is private in the right way is not up to you to decide. This blurring of the line between public and private is what makes *Miller* problematic, as well as the UK's inclusion of disgust and offense in the CJIA and the Criminal Justice and Court Bill Act.[78] You think there is nothing wrong with consuming privately your preferred kind of pornography but as it turns out the community gets to deny this choice, based on what most people would regard as disgusting and deeply disturbing.

My argument is that individuals should be able to block intrusion into their pornography preferences simply by asking 'who am I wronging by watching legally created extreme pornography made by consenting adults in the privacy of my own home?' No one has a right invade the sovereignty of others over their own body and mind. The government may not invade my right to liberty of tastes unless it can connect my actions with assignable wrongful harms. It cannot.

My conclusion is that the law of obscenity as presented in *Miller, Butler*, and the OPA is unjustified on both ethical and empirical grounds. Obscenity law involves the state in a paternalistic form of content-based censorship. As a matter of policy, whatever harm are contained in obscenity can be dealt with by regulatory measures like zoning laws, permits, workplace safety standards, and restrictions on selling to minors. These restrictions are appropriate for obscenity just as they are appropriate for pornography and gore. There is no reason, however, to restrict the production, sale, or possession of obscenity to consenting adults assuming that all parties depicted gave initial and ongoing consent. Regulatory determinations based on what people find disgusting or depraved are incompatible with independence.

The moral harm hypothesis fails to justify current legal practices, but it also points to a different and promising way of thinking about what to do with the worst kind of pornography. We should abandon the distinction between obscenity and pornography

[78] Criminal Justice and Courts Bill - Extension of the offence of Extreme Pornography (possession of pornographic images of rape and assault by penetration). Online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322160/fact-sheet-extreme-porn.pdf (accessed 2017-05-04).

altogether and replace it with the distinction between safe and risky pornography. This terminology highlights the harm we are trying to mitigate by involving the law within the domain of regulating content. The most common risks of pornography use are relational. The risk is that a person will not be able to separate what they see on screen with what they want out of their relationships. Pornography creates expectations that individuals carry over into their bedrooms at beyond.

Here are two concrete examples. First, some of the expectations people acquire from pornography can harm partners performing sexual acts that can only be done safely by experienced professionals, sometimes with expensive specialized equipment. This is a clear place where some pornography is riskier than others to its audience, and so deserves stricter regulation.[79] Second, some pornography can negatively affect relationships by making extreme sexual acts that are not necessarily painful or physically harmful seem conventional. Here I am thinking of cases involving physical restraint, humiliation, role-play, and other vulnerability-inducing acts or contexts. A partner whose appetite for these extreme acts is (understandably) low may be pressured to regard these acts as basic, in light of the partner's exclusive interest in this kind of pornography.

No rational agent wants to be burdened by having sexual expectations that will physically harm their partners or lead to being perpetually dissatisfied with one's partner. This is a kind of self-regarding harm we can all acknowledge as contrary to our interests in having successful relationships. Stricter regulation of physically and emotionally risky pornography is compatible with (and arguably required by) a Millian framework. This regulatory approach is also compatible with pursuing gender equality, although in a way that will seem inadequate for pro-censorship feminists. Mill was adamant that censorship robs us of an opportunity to exchange falsity for truth and to see truths enlivened by striking down falsehoods. One of the important discussions to have and to have more publicly is why so many men enjoy seeing women in servile positions, beaten, or brutalized. This desire rests on a falsehood about women and their place relative to men. The criminalization of pornography that feeds these desire distorts the marketplace by adding to its appeal. In order to see that falsehood replaced with truth, much more needs to be understood about these desires and their source. Obscenity law interferes with this goal.[80]

Michael Joel Kessler, University of Toronto
mkessler@trinity.utoronto.ca

[79] This is compatible with criminal or civil sanctions resulting from harming another through risky sexual practices.

[80] Versions of this paper have been presented to the Toronto Area Political Philosophy group, the Bechtel Workshop in Moral & Political Philosophy, and New Research in Practical Philosophy. I thank participants at these meetings, especially Laurens van Apeldoorn. I also thank the anonymous reviewers from *De Ethica* for immensely helpful comments.

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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 camps[4] 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 approach[7] 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* (Edimburgh, Edimburgh 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 Löhr. 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 Nicolaïdis 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 - Principles 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 - Principles 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 realities[43] 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 triggered[68] – 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 minority[70]). 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 Congré 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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