

EU migration, out-of-work benefits and reciprocity: Are member states justified in restricting access to welfare rights?

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Abstract

This article examines whether restrictions on access to welfare rights for EU immigrants are justifiable on grounds of reciprocity. Recently political theorists have supported some robust restrictions on the basis of fairness. They argue that if EU immigrants do not immediately contribute sufficiently to the provision of basic collective goods in the host state, restrictions on their access to the welfare state are justified. I argue that these accounts of the principle of reciprocity rely on an ambiguous conception of contribution that cannot deliver the restrictions it advocates. Several strategies open to those advocating reciprocity-based restrictions are considered and found wanting. This article defends that verdict from a number of objections.

Keywords

Brexit, EU migration, European Union, migration, out-of-work benefits, reciprocity, social justice, social rights, welfare rights, welfare state

Introduction

Immigration is a permanent fixture in current debates about the nature and the future of the EU. Freedom of movement and provisions for non-discrimination

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make skills-selective immigration difficult to implement within the EU. However, UK-EU negotiations before and after the UK referendum brought forward arguments to undermine the pertinence of both principles for the EU and to add qualifications to their implementation. One measure is significant restrictions on the access to welfare rights for EU migrants to discourage low-skilled EU migration and so-called benefit tourism (HM Government, 2014). Are member states justified in restricting access to welfare rights for EU migrants as a matter of justice? What normative reasons are used to justify these restrictions?

This article examines whether the restrictions are appropriate from a normative point of view. The EU is unique and challenging for normative approaches to migration in at least four ways. First of all, there is disagreement about whether the EU constitutes an institutional structure that sufficiently approximates the nation state (Nagel, 2005: 133–143; Van Parijs, 2003: 7–20). The EU clearly resembles the institutional structures of a state in some policy areas but not in others, so resolving disagreements is hard and drawing relevant thresholds of sufficient resemblance can be challenging and arbitrary. Second, and more significantly for our discussion, the EU has no internal border checks. Hence, it physically permits freedom of movement for the citizens of its member states. But also in this case this right is qualified in ways that freedom of movement within its member states is not (De Witte, 2015). Those seeking work in other member states and those who are not economically active or self-sufficient are increasingly subject to restrictions on its exercise (European Union, 2004b). Third, and relatedly, an analogy between EU workers and immigrant guest workers is a difficult one to draw, as EU law gives all EU citizens who are working the same rights as nationals (European Union, 2004a). Nonetheless, those seeking work and those who lack the means to support themselves are entitled to a significantly smaller bundle of rights than nationals and their bundle of rights increasingly resembles that of immigrants from third countries (Attas, 2000). Fourth, EU immigrants are citizens of relatively developed countries so discussions of brain drain in the EU are less pressing (Brock and Blake, 2014; Oberman, 2013). Again, however, differences in economic and social development among member states create incentives for movement across borders that could have similar brain drain effects, especially during economic crises. These four dimensions call for a tailored answer, drawn from the current literature on the ethics of migration but attuned to the special circumstances of the European Union.

This article critically examines one of the most promising arguments in the context of the four dimensions. This is the claim that reciprocity-based considerations justify restrictions on access to the welfare state of host countries for both EU students and jobseekers, as well as more generally for EU citizens who have not made enough relevant contributions to the host member state (Sangiovanni 2013, 2017, forthcoming; as well as Carens, 2013: 281; Miller, 2016). Until then, the argument goes, EU immigrants must not be treated as full members of the host society's system of social cooperation and their case must not trigger considerations of reciprocity. This article shows that a concern for reciprocity does not

deliver a valid argument for restrictions on EU immigrants' access to welfare rights.

The structure of the article is as follows. The second part outlines the restrictions to welfare rights for EU immigrants and the reciprocity-based arguments in favour of them. The third part identifies four problems with these arguments and shows the inherent dilemma of restrictions: advocates either have to abandon a restricted conception of reciprocity at the price of granting immediate access to welfare rights for EU immigrants or exclude EU immigrants at the price of also excluding nationals from the ambit of domestic social justice. The fourth part examines a number of possible objections, while the fifth section concludes.

The argument for restrictions

Migrants' access to welfare is a subset of a wider literature on the ethics of migration in political theory (see e.g. Obermann and Miller in Fine and Ypi, 2016). This debate is overshadowed, if not superseded, by the reality of the EU, its laws and its institutions. EU member states have already agreed to lift restrictions on freedom of movement reciprocally, not least because the economic stability of their common economic area, where freedom of movement of labour, capital, goods and services reigns supreme, demands it (De Grauwe, 2012). This constraint clearly renders the EU a special case. Physical barriers to migration – border controls – have been removed in the EU. Therefore, restrictions or qualifications to freedom of movement must be exercised by other means, mainly economic, but also discursive, and their invocation by member states raises the issue of their justification.¹ Another set of questions seems more urgent in the case of the EU. Are they justified in implementing policies that de facto limit access as a 'softer' means to implement a selective immigration policy? Are member states justified in restricting access to welfare, through measures such as waiting periods, to prioritise and channel resources to their least advantaged nationals?

Justifications as to whether and when immigrants should be granted welfare rights fall roughly into two categories. On the one hand, there are those who argue that what predominantly matters is that migrants stand in a particular *type* of relationship to the host state. Migrants who reside outside their own state are subject to, and affected by, coercive laws and public policies that they cannot influence due to their restricted access to social and political rights (e.g. Lenard and Straehle, 2012; Walzer, 1983). The counter-argument provided by another group of theorists is that this is not a sufficient condition for triggering duties characteristic of social justice. The relationship in question needs to be pervasive and enduring (e.g. Blake, 2002; Shachar, 2011): it is not merely the type but also the *degree* of the relationship that matters for the triggering of duties characteristic of welfare rights.² Is the EU immigrant's relationship with the host state of a type and/or of a degree that justifies current restrictions on access to welfare rights?

The literature on access to welfare rights is scarce, particularly for non-economically active migrants. This is primarily because the *loci classici* in this

literature depart from the assumption that host states have the right to grant admission to non-citizens on the basis of their expected economic contribution. Therefore, discussions of immediate access to welfare rights in this literature are usually limited to migrants who have met such selection criteria.³ Even in this case, however, both David Miller (2016: 125, 120–121, 124–125) and Joseph Carens (2013: 281, 118–122, 280–283) agree that the host state can postpone access to welfare rights to ‘underline the reciprocal nature of the scheme’ and to prevent EU immigrants from taking ‘immediate advantage of the receiving state’s more generous welfare programs’, respectively. But if probationary periods are permissible for those whose right to reside is based on their potential economic contribution then it seems to follow that at least the same, if not more strict, probationary periods are justified for those who seek work.⁴

The common denominator behind these calls for restrictions is the view that immigrants must contribute for a significant period of time to the society that hosts them before they are entitled to welfare rights. This argument echoes concerns among citizens in the UK, the US and some European countries that immigrants must ‘pay in’ before they ‘get out’.⁵ It makes debates about economic migration more politically salient and urgent. However, if this consensus is unqualified, then both the political theory and public policy of EU migration need to be revised. Thus, the question is: should mobile EU citizens have the same access to welfare rights as nationals? If the answer is ‘no’, then restrictions on the access to welfare rights are justified; if the answer is ‘yes’, then restrictions are unwarranted.⁶

The current literature on immigration and access to welfare in the EU in political theory is limited. A popular position is that newly arriving EU migrants in work should accrue the same benefits as nationals but that there should be a waiting period before newly arriving EU immigrants can access out-of-work benefits (Bellamy and Lacey, 2018; Sangiovanni, 2017). Following the aforementioned trend in the literature on the ethics of migration, this recent work draws on the relationship between duties of reciprocity and the right to access the goods that welfare rights are meant to safeguard. This link could motivate an argument in support of restrictions on welfare rights. The argument from reciprocity used to support this thesis is:⁷

1. Reciprocity in the mutual provision of the basic collective goods *condition* the content, scope and justification of welfare distributive equality in general and welfare rights in particular.⁸
2. The distributive, extractive and regulative capacities required for the provision of basic collective goods are only provided at the state level.
3. Therefore, it is ultimately nationals who provide the financial and sociological support required to sustain the state through taxation, participation in political activity and compliance with the law.⁹
4. When one aids in the reproduction of the state through participation, contributions and compliance, then one becomes a joint author of the state.

5. If, and only if, one becomes a joint author of the state, then other residents and citizens owe one, as a duty of reciprocity, equal access to the full panoply of social guarantees and protections guaranteed to other citizens.
6. The EU lacks the autonomous distributive, extractive and regulative capacities for the provision of basic collective goods. Its provision of additional collective goods to its member states is parasitic on the existence of states.
7. Therefore, EU nationals, when residing within their home states, do not contribute to the provision of basic collective goods within other member states.
8. EU nationals who move to other member states do not necessarily and immediately contribute sufficiently to the provision of basic collective goods within the host member state, but only gradually, and after a sufficiently lengthy period of time.
9. Therefore, restrictions on EU immigrants' access to the welfare state (varying according to the degree and kind of contribution to the host society) are justified.

If the above argument is sound, then the conclusion that follows is:

Argument for Restrictions (AfR): EU immigrants who have not contributed enough over time in one of the ways necessary to sustain the state must not be beneficiaries of the duties of reciprocity characteristic of welfare rights. Therefore, access to welfare rights for EU immigrants must not be immediate but rather subject to restrictions, such as waiting periods, that correspond to the required level of contribution.

This article shows that this conclusion does not follow from the aforementioned argument, because a concern for reciprocity does not imply restricting access to welfare for EU immigrants. The next section discusses the concept of 'a sufficient contribution' to the maintenance of the state on the part of EU immigrants (see step (8) above). The article shows how restrictions on EU immigrants' access to welfare impact the discharge of duties of reciprocity both in the host and the home state.

A few points of clarification are needed at this point. First, this article does not challenge the foundational premises of reciprocity-based approaches to social justice, but rather questions the conclusions drawn from it with respect to transnational justice in the EU, and more specifically restrictions on access to welfare for EU migrants. Therefore, steps (1), (2), (3), (4) and (5) of the argument above are not necessarily in dispute here. Those who are not committed to reciprocity-based conceptions of justice or to contribution-based accounts of social justice more broadly are invited to read what follows as an immanent critique and not as a qualified defence of the necessity of a reciprocity-based approach to social justice. Those who believe that states must reserve the right to exclude economic immigrants from their territory on grounds of national self-determination, as well as those who reject welfare rights as incompatible with justice,¹⁰ will find little in this article to change their minds.

Second, this article shares with proponents of the reciprocity-based approach a commitment to practice-dependent political theory. This has a key advantage in the context of the EU: it relies heavily on an account of justice that treats the state as the primary terrain of principles of social justice. Therefore, steps (6) and (7) of the argument for restrictions (AfR) are not challenged. Hence, if successful, the criticisms of the third and fourth sections of this article deliver an argument for granting full and immediate access to welfare rights for EU immigrants without appealing to more demanding cosmopolitan understandings of social justice and the EU. If the argument in this article is successful, then statisticians who believe that the causes of wealth and poverty of member states are internal to a system of social cooperation and not influenced by external factors must also endorse it. In that respect, the analysis is also compatible with adopting explanatory nationalism as the explanans behind current inequalities among the EU's member states. If valid, it converts (some) statisticians to proponents of transnational social justice.

Third, I assume for most of this article that international justice is observed in current and historical relations among the EU's member states. This is to show that any injustices at this *transnational* level, between nationals and EU immigrants residing within the same member state, are not necessarily the aftermath of injustices between member states at the international level.¹¹

Four problems for AfR and a dilemma

The reciprocity view in the second section tells us that no transnational obligations exist in the case of welfare rights because the EU is not a globalist project, but rather an international union that aims to strengthen its member states' regulative capacities via international coordination to make it easier to improve the overall position of *their* least advantaged citizens. The reciprocity view also tells us that to become and count as a member of a member state's scheme of social *cooperation*, a person must make the requisite *type* and *degree* of contribution over a certain period of time. Therefore, after that period of time one must be considered a member of a scheme of social cooperation. All nationals have contributed enough over time to be granted access to welfare rights as a matter of reciprocity, whereas EU immigrants have to spend a certain period of time making the requisite *type* and *degree* of contribution.

In support of the above conclusion, we need an argument that will show that the *type* and *degree* of EU immigrants' contributions is insufficient to grant them access to welfare rights, but also sufficient to grant access to nationals. Hence, the argument for restrictions (AfR) must be supported by an account of reciprocity that determines: a) *what* counts as contribution; b) what is the *threshold* contribution; and c) *when* an individual becomes a participant in the host society's scheme of cooperation. The focus of this section is on how different interpretations of the requisite *type* and *degree* of contribution to a scheme of social cooperation undermine rather than support either AfR or cooperation-based approaches to social justice as reciprocity.

In this section I show that:

- A. IF justice as reciprocity is taken to imply determining the requisite TYPE and DEGREE of contribution in the way that reciprocity theorists suggest, and if it is needed to reach the conclusion that EU immigrants' access to welfare rights must be restricted, THEN nationals must also be subject to similar restrictions.
- B. Justice as reciprocity does not imply determining the requisite TYPE and DEGREE of contribution *in the way* that reciprocity theorists suggest, and it is needed to reach the conclusion that EU immigrants' access to welfare rights must be restricted.

Advocates of restrictions use an argument that delivers the above conclusions by employing a *wide* conception of contribution. A wide conception of contribution is contribution via economic activity, political participation and compliance with the law (Sangiovanni, 2007, forthcoming). This is necessary in order to support the view that those incapable of working and the involuntary unemployed also fall under the ambit of social justice.¹² These categories of citizens meet social justice obligations when they participate in other ways (e.g. voting and law-abidingness) in the domestic scheme of social cooperation. Therefore, contribution to a scheme of *economic* cooperation is sufficient but not necessary to give someone a right to welfare.

This raises a difficulty for the reciprocity approach. What about those who are too young (e.g. infants and children) to contribute in any meaningful sense, as well as in a deliberate manner, to a system of social cooperation? A successful reply to this objection requires extending further the notion of contribution at play here: such individuals may lack the capacity to contribute at t_1 but they retain the capability to participate later at t_2 when they reach maturity. It follows that a member state can grant rights to welfare to both economically and non-economically active nationals, because all of them have the capability to contribute in different ways as adults (Abizadeh, 2016; Sangiovanni, 2017; Song, 2016).

But does broadening the *type* of requisite contribution justify access to welfare rights for non-economically active nationals only? If the *capability* to contribute in different ways is a sufficient condition for granting welfare rights to non-economically active nationals, then newly arriving EU immigrants also qualify, as they clearly also have the capability to do so. If, on the other hand, capability is a necessary but not sufficient condition, because a sufficient *degree* of contribution over time to a society's system of social cooperation is also necessary, then it follows that non-economically active nationals must also contribute *enough* over time to be entitled to social benefits (Song, 2016: 235–237). Hence, they must also be denied access to welfare rights until they have contributed sufficiently. This second condition is consequential for restricting access to welfare rights: EU immigrants, and nationals, can be excluded from welfare state entitlements until they have contributed enough to the domestic system of social cooperation. Hence, waiting periods before accessing such rights are justified.

It is arguable that nationals typically meet one of the three criteria of contribution over the first few years of their adulthood, and that therefore they must be granted access to welfare rights. But again, the same objection is relevant here. EU immigrants, either as individuals or as a group, may reach the contribution threshold more quickly if their average *degree* of contribution is higher than that of nationals. Therefore, also in this case, if waiting periods are relevant to both nationals and immigrants as a matter of justice, then those periods must be tethered to the degree of contribution to the relevant *types*. In fact, as we will see below, if waiting periods for nationals must be short, then waiting periods for EU immigrants might need to be even shorter or omitted altogether when they have a higher expected capability to contribute.¹³

This leads to a conclusion that grants welfare rights to EU immigrants *and* nationals on the basis of the *degree* of their contribution via one of the requisite types of contribution. However, it faces problems as a contribution-based account of social justice. First, and regardless of the currency of contribution, it seems plausible to assume that contribution to a scheme of social cooperation *varies* from one person to another. This is primarily because the *capability* to contribute varies from one individual to another. So shouldn't everyone receive according to their individual and varying contribution to a system of social cooperation, irrespective of whether they are nationals or EU immigrants?

Reciprocity views are different from the wider family of contribution approaches on this point. They differentiate between a view of society as a scheme of individual contribution and reward, and one where individual contribution occurs within a system of social cooperation that gives individual contribution its gross value (Fine and Sangiovanni, 2015; Rawls, 2001: 52–54; Rawls, 2005: 265–269; Sangiovanni, 2015). The question remains: why should the state distribute the fruits of social cooperation in an egalitarian fashion? Why not allocate resources according to every individual's marginal contribution, restricting access to welfare rights and barring those incapable of contributing via their taxes and their political and economic activities from accessing them at all?

The move from the claim that someone is a joint author of the state to the claim that someone is entitled to an equal share of the product of her cooperation (see the move from the 4th to the 5th step of the argument in the previous section), therefore, seems unqualified. It also renders the argument for restrictions vulnerable to a criticism aired earlier: if an immigrant's individual expected contribution is higher than that of a national's, shouldn't the immigrant be granted earlier access to welfare rights than the national on grounds of reciprocity? The response given here by reciprocity theorists is an empirical one: 90% of our income is generated by positive externalities of living in a well-functioning state with a wide and reliable provision of collective goods, rather than by our individual talents and efforts (Sangiovanni, 2015; Simon, 2000). Therefore, as a matter of justice, we are entitled to only 10% of our income as this is our pure or net marginal contribution. The rest of the income falls under the scope of egalitarian justice and can be fully taxed (Sangiovanni, 2015: 355).

One can use this empirical response to move from step 4 to step 5. The average individual contribution is set at 10% of the expected national income, whereas the rate of social contribution is set at 90%.¹⁴ This evidence motivates the argument for restrictions on access for EU immigrants because they, unlike nationals, have not contributed to the social system of cooperation, which brings about the externalities that account for 90% of the expected income of nationals. Therefore, EU immigrants' waiting periods before accessing welfare rights must be determined, and their access to welfare rights granted, on the basis of their individual expected contribution to the host society's scheme of social cooperation. That is, at least until they fulfil the criteria of membership to the scheme of social cooperation and count as co-authors of the relevant externalities (see also e.g. Miller, 2016: 124–125; Yong, 2016: 827).¹⁵ EU immigrants cannot be beneficiaries of duties of reciprocity in the form of welfare rights until that point is reached. But note that even this argument does not deliver the conclusion sought by AfR. What it justifies is a *common* waiting period before accessing welfare rights for all nationals who reach the age of maturity, and newly arriving EU immigrants, due to individual invariance in contribution. However, focusing on the social nature of contribution in any scheme of social cooperation still leaves many questions unanswered with regard to EU immigrants' access to welfare rights.

There are three issues. First, if a person's gross expected contribution is not equal to her net contribution, then focusing on an EU immigrant's expected gross contribution during the waiting period overlooks the fact that her contribution is the aftermath of her membership to both her home and host society's scheme of social cooperation. In simple terms, 90% of that gross value is also a social and not an individual product. Two things follow. First, EU immigrants surely also owe other members of their home member states, including those who may now reside in the same *host* member state, duties of reciprocity. The host member state could easily facilitate the discharge of those duties during those waiting periods without an international transfer scheme. For example, part of the taxes paid by EU immigrants in work in the host member state could be used to pay the social assistance benefits of EU immigrants out-of-work or on low income, providing immediate access to welfare rights (until EU immigrants qualify as full members of that scheme of social cooperation). Therefore, nationals have a duty not to obstruct the discharge of such duties of reciprocity among EU immigrants and, where necessary and reasonable, to facilitate them.¹⁶ One need not qualify as a full member of the host society's system of social cooperation to be owed such access as an instantiation of duties of reciprocity.

Second, EU immigrants' expected contribution to the host state is by a factor of 90% the product of positive externalities found in the host state and not the product of their individual talent or effort *as soon as* they start to reside in the host state. They *immediately* become subject to the same social forces as other members of that system of social cooperation when they state their intention to reside in the host member state.¹⁷ Treating EU immigrants' expected rate of contribution as an individual rather than a social product ignores the fact that all

forms of contribution take place within a system of social cooperation. If net-individual contribution is low for anyone subject to the rules of a system of social cooperation then this should be the case for both nationals and EU immigrants within that structure. Within those social structures, the degree of net individual contribution is *ex hypothesi* determined by policies that shape the opportunity to find and keep a job. Not all those capable of contributing via work are *able* to contribute as much as they would have liked to, or wished to do, due to structural involuntary unemployment as well as irregular and precarious work patterns. Being economically active or inactive in those circumstances is not a matter of individual choice for both nationals and EU immigrants. Hence, the average degree of required net individual contribution should be the same for both groups in those circumstances. Nonetheless, the degree of required net contribution to welfare schemes should not be the same for every individual within both groups. For those with ample opportunities it will need to be higher, and for those with a limited set of job prospects lower, than average; while for those willing but unable to contribute due to structural unemployment the net required contribution could be zero.¹⁸ Therefore, a non-economically active EU immigrant need not wait to become employed to become a member of the host society's system of social cooperation. As soon as one is *subject* to such a scheme of regulations that determine one's level of economic activity but *willing* to contribute to and participate in that scheme, one must be considered a member of that scheme and be granted access.¹⁹

Third, determining the effect of positive externalities on our income due to the reliable provision of collective goods by one's compatriots doesn't tell us much about the *precise threshold* for each individual type of contribution required. However, it crucially and significantly lowers that threshold when applied to an individual contributor regardless of whether one defines contribution strictly in terms of economic activity or more broadly. A net 10% of individual contribution to a scheme of social cooperation implies an ever lower, if any, threshold of contribution *over a specific period of time*. Even if elapsed time is a good proxy for measuring the degree of contribution, it doesn't follow that the contribution of EU immigrants must be measured and compared to that of nationals between an entry time t_1 and a stipulated threshold that is approximately met at t_2 . Measuring contribution over a longer period of time makes more sense. This is because one could contribute less than average, or not at all, between t_1 and t_2 , but more than average between t_2 and t_3 or at any other point over time t_n . This is crucial for how we compare the contribution of nationals to that of immigrants because EU immigrants tend to contribute significantly more *over time*.²⁰ Therefore, a concern for contribution does not warrant the imposition of waiting periods.²¹ On the contrary, such concerns are compatible with immediate and full access.²²

Given the problems that these arguments from *degree* (of contribution) face, one might be tempted to resort to arguments from *type* (of contribution). For example, one could argue that the three *types* of contribution are *incommensurable* in nature, as well as individually necessary and jointly sufficient conditions (with

the same or different minimum waiting periods) for granting anyone access to welfare rights. However, this pluralisation of contribution, coupled with socialisation, also implies a complex and long waiting period for all participants, nationals and EU immigrants alike. As a result, some nationals must be excluded from the welfare state, or serve a waiting period, most likely after they reach their 18th birthday. But such a policy would deny social justice to some of the most vulnerable nationals in a critical period. It would also result in such a two-tiered workforce with two different sets of rights (undermining each other's reservation wage) due to the constant flow and presence of a subset of EU immigrants with no access to welfare.²³ Both are counterintuitive implications for social justice and a high price for justifying the exclusion of EU immigrants.

A response to these objections could be to broaden the requisite *type* even further. But once we have started broadening the concept of contribution, why should we limit ourselves to work and taxes, and voting and legal compliance? Surely, these do not exhaust the repertoire of participation to a system of social cooperation that aims to bring about basic public goods or welfare goods in general.²⁴ Isn't it then more apposite to also treat other types of contribution, such as education, training, care-giving and volunteering as sufficient conditions for triggering reciprocity on the part of the state?²⁵ Certainly, these are all ways in which an individual can participate in a system of social cooperation, but contribution-based reciprocity approaches somehow ignore them, depriving in this way not only EU immigrants but also nationals from having their contributions recognised. Such broadening of the type also appears inconsistent with AfR. The broader the set of individually or jointly sufficient conditions of contribution, the less likely that EU immigrants will not satisfy any of them.

The above criticisms could be avoided if one adopts a narrower conception of contribution, but at a price. One could opt for a narrow *type* of contribution that equivocates contribution with economic input. Despite being reductionist and too restrictive with regard to contribution, this has two clear advantages. First, it makes it easier to measure the contribution of immigrants, so it avoids problems of indeterminacy. Second, the link between those who fund via their activities the welfare state and those who enjoy its provisions becomes clearer. Saying that someone has a right to housing benefits (i.e. to a welfare system good) because they voted in the last election or didn't break the law (i.e. contributed to other types of collective goods) may sound like a huge theoretical jump to many (Arneson, 2014).

This is a plausible defence, but it has two serious consequences. First, under stringent contribution requirements a significant number of worse-off nationals would be outside the scope of domestic social justice. Second, at the group level, EU immigrants are as likely as nationals to contribute to the host society and economy (Dustmann and Frattini, 2014; Dustmann et al., 2010, 2012). Since according to this narrow conception of contribution it is not the *type* of contribution (as economic input in this case is the only type of contribution) but the *degree* of economic contribution that matters, it follows that EU immigrants will be as

likely to be granted access to the welfare rights as nationals – if not more, given their higher expected average contribution over time due to their higher average skills.

This raises a dilemma for advocates of AfR. They have to accept either the broadening of the *type* of the contribution at the price of loosening restrictions, or a narrow *type* of contribution at the risk of excluding a greater number of nationals from welfare rights than EU immigrants. If the above is correct, then AfR can't convincingly link contribution to restrictions on access to welfare for EU immigrants. Narrowing what falls under contribution, and hence under a conception based on reciprocity, will have adverse implications. It will deny welfare to citizens who are 'economically inactive' and most in need. At the same time, under plausible empirical assumptions, it is likely to make it easier for the average EU immigrant to access welfare than the average national. Broadening what falls under contribution appears to be more promising, but it is unclear whether it can justify restrictions on access for EU immigrants by the force of its own argument. We can conclude that further conceptual clarity comes at a heavy price for AfR.

Objections

In this section, I consider a number of objections. First, that the proposal is overtly conservative because it is considered within the current institutional setting and upon contribution-based conceptions of justice. Instead of challenging restrictions on access to benefits as direct violations of global and egalitarian cosmopolitanism, this approach is not far from the status quo; instead of challenging the structural injustices that global capitalism imposes on EU workers by compartmentalising them into a two-tiered citizenship and assigning them to groups with different sets of rights within the same labour market, it proposes rather timid reforms to EU law and institutions.

However, the reciprocity-based view sees the EU as an institution that aims to strengthen the capacities of its member states, including their capacities to realise socioeconomic rights, and not as a union intended to realise international equality of opportunity among its member states. The latter might be a noble ideal, but it is clearly beyond the scope of a reciprocity-based and practice-dependent theory of justice for the EU. Furthermore, welfare is not merely a means to compensate people for adversities produced by a capitalist economy, but is also a way to empower them by improving their bargaining power and to make it easier for them to contest structural injustices.²⁶ Access to welfare is a structural issue because it strengthens the power of labour relative to capital. In the absence of welfare and facing the prospect of unemployment, EU immigrants are more likely to accept precarious and low-paid jobs. A two-tiered workforce serves the *structural* interests of capital as a collective agent but not the interests of workers as a collective agent. The aim of *this* article is to transcend *existing* practices while staying committed to the broad principles already embedded in the EU's institutions. This is not because I endorse one particular way of theorising over others,

but because I want to start from the same methodological premises as proponents of AfR but deny that AfR follows from those premises. There is one more reason, however, that defenders of more ideal forms of theorising have to engage with: if a moderate version of justice at t_1 is practically *necessary* to achieve more justice of the egalitarian type or other varieties at t_2 , then those who subscribe to those views of justice must strategically, and in that sense instrumentally, endorse the reciprocity-based view sketched in this article. This is because if the above is true, then the proposal sketched here becomes instrumentally necessary for achieving what those conceptions of justice demand.²⁷

Second, one could ask whether an EU-wide brain drain tax, or similar, could be an alternative to freedom of movement and more generous access to the welfare systems of host countries. Such a tax is clearly insufficient for resolving the problems arising from restrictions on access to welfare rights in the context of the EU. One potential problem is that high-skilled labour, and talent, is not easily replaceable and hence directly compensable (see Brock and Blake, 2014; Oberman, 2013). Investment in education and training does not necessarily result in equally good outcomes if the most talented and the most ambitious emigrate in significant numbers. Access to welfare rights tackles this issue. It serves as an enabling condition, in the form of welfare payments, that makes the transitional costs of immigration lower.²⁸ In this way, immediate access to welfare balances the outflow of high-skilled labour with a greater outflow of low-skilled workers and reduces the pressure on the welfare system of sending member states. Further, it makes it more difficult for high-earning and high-skilled individuals to escape their duties of reciprocity by exercising freedom of movement across EU member states, as easy access to social assistance also allows low-earning, and low skilled, workers to become members of the same systems of social cooperation. Transnational access to social assistance benefits, therefore, also prevents the EU's internal borders from becoming socioeconomic filters; it hinders their use as a means to cherry pick and corral people.

A third objection is as follows: the reciprocity-based approach relies on a simplified picture of EU migration. It is geared to cases of EU nationals who are making a new life in the host country and who intend to reside there for a long time, if not permanently (see e.g. Ottonelli and Torresi, 2012). But it is less convincing when it comes to cases of temporary EU migration. Does an EU national who only intends to work seasonally in a host member state or who looks for work periodically in that state also qualify as a member of that system of social cooperation? There are two responses.

First, what matters for duties of reciprocity is that they take place *within* a system of social cooperation. But they are duties owed not only within the group of nationals but also within the group of EU migrants. What matters for justice as reciprocity then is not whether person A leaves country C_1 to go to country C_2 only to go back to country C_1 soon after, but whether that person is interacting with others that reside in C_2 in ways that trigger duties of reciprocity. Temporary residence does not change the fact that duties of reciprocity are

triggered by such interactions. In the case of non-economically active EU migrants, as argued in the third section, duties of reciprocity could be triggered by the fact that those who are willing but unable to contribute via work are owed by those who are able to contribute via their employment. This could be the case regardless of whether the person is a short-term or long-term jobseeker. What matters is that this person genuinely looks for work *for the period of time* she resides in country C₂. For that period of time, therefore, she should be entitled to social assistance.

Second, it is important to emphasise that a person qualifies as an associate to *that* system of social cooperation only for the period of time she *resides* in country C₂. Therefore, she is owed, and owes, duties of reciprocity for that *particular* time period. In the case of EU migrants, this entails access to social assistance and social insurance. EU immigrants should be able receive benefits but also to pay taxes and social insurance contributions for the period they have worked and lived in country C₂. They should be entitled to the same benefits as nationals who have contributed for the same periods, and have those benefits directly paid by the host state. Finally, it has to be noted that some of these benefits, most notably those following from contributions towards pension schemes, need not be tied to residency and should be portable. Mobile persons are often participants in different systems of social cooperation over their lifetime. The portability of such insurance benefits ensures that the host society *continues* to reciprocate for the immigrants' contributions over time.

Finally, one could object: what makes EU immigrants special vs. other groups of immigrants? Shouldn't the restrictions also be lifted for non-EU immigrants on grounds of reciprocity? Would that be an unreasonable financial burden for host member states? EU immigrants are a special case for two reasons: the EU's member states have *reciprocally* agreed to allow freedom of movement of human capital and hence to extend the range of choices that their citizens can exercise. There are no such reciprocal agreements with non-EEA member states. It would be unreasonable to expect EU member states to give US jobseekers access to welfare if the US refused to do the same with EU citizens. Second, the profile of EU immigration would probably be different to that of non-EU immigration under freedom of movement with immediate access to welfare, due to large inequalities in GDP per capita and welfare state provisions in EU member states vs. some countries of the developing world. The financial costs of extending freedom of movement globally while granting immediate access to welfare could increase exponentially, making the financial burden for host member states unreasonable.²⁹

Conclusion

In the current political constellation in the EU, freedom of movement is increasingly conditional and the conditionality targets one group: poor, low-skilled and multiply disadvantaged EU immigrants. It is a form of discrimination not so much on the basis of nationality, which is used instrumentally, as on the basis of an individual's potential economic contribution. The rationale is clear: those individuals who

cannot prove that they can imminently contribute to the economy of their host state, and who cannot support their job search via their own means, should find it more difficult to move to and remain in another EU country. I argued that this is inconsistent with what justice as reciprocity requires in the case of the EU. I showed that to justify such restrictions, one needs to dramatically overstate both the type and degree of contribution that both nationals and EU immigrants are required to make to the host member state's system of cooperation before they access welfare. Further, such overstatement comes at a high price: it leaves the most vulnerable members of both groups without access to welfare rights. Finally, I defended those claims from a number of objections showing how they are relevant in both ideal and non-ideal circumstances, as well as how they could be intrinsically linked to other less practice-orientated approaches to social justice in the EU.

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Notes

1. On the relationship between normative justifications and discursive or noumenal power, see Forst (2015).
2. There are three common arguments that could be used to support the claim that only nationals are owed special obligations of social justice on the basis particular types and degrees of relationships. These draw on: a) the social aspects of nationals' relationships and

- interactions; b) specifically civic features constitutive of citizenship itself; and c) the political relation of joint responsibility for the exercise of power over persons (see Abizadeh, 2016). The arguments from reciprocity examined in this article are a subset of the first type.
3. Much depends here on whether one treats social assistance and public services funded by general taxation as falling under duties of social justice or as following from more basic human rights to subsistence. Miller (2016: 116–117) uses this distinction to argue for access to basic subsistence rights for immigrants, but he is unclear on the level of provision required to meet these standards or on whether nationals are entitled to a higher level of provision than immigrants. Given that the current level of provision of social assistance benefits (like means-tested jobseeker's allowance, child benefits, housing benefits and public services) in the EU surpasses that of basic human rights, I treat social assistance and public services funded by general taxation as falling into the former category rather than the latter. What ultimately matters for the argument here, however, is whether access to such benefits could be justified on grounds of social justice as reciprocity, rather than whether reciprocity is the only grounds for granting access. By expanding the scope for such duties of reciprocity, the analysis reduces the need to supplement reciprocity-based approaches with ad hoc or competing principles.
 4. This is what I take to be Miller's and Caren's position on this issue. Carens explicitly supports restrictions on access to welfare on grounds of reciprocity as well as a means of protecting the more generous welfare regimes of the EU. Miller does not explicitly discuss the case of the EU but his position could be extrapolated from his discussion of immigrants' access to welfare rights. See the third section for why restrictions on access to welfare rights do not necessarily follow from these concerns.
 5. For a discussion of these attitudes and differences among the EU member states' attitudes towards access to welfare rights, see Roos (2016). See also Atlas of European Values (n.d.) on attitudes towards immigration and the welfare state across Europe.
 6. Discussions of EU immigrants' access to in-work and out-of-work benefits are often couched in terms of discriminatory treatment. Following Andrea Sangiovanni's (2017) discussion of discriminatory treatment with regard to EU immigrants' access to in-work benefits, I treat restrictions on EU immigrants' access to out-of-work benefits as uncontroversially also an instance of direct discrimination. The question then becomes: 'is such treatment wrongfully discriminatory on the grounds of reciprocity?'. In other words, the claim that I examine in this article is whether restrictions on EU immigrants' access to welfare rights wrongfully discriminate on the grounds of reciprocity irrespectively of whether those restrictions wrongfully discriminate on other grounds, e.g. by demeaning or disrespecting those disadvantaged by these restrictions.
 7. For an argument that broadly follows this rationale, see Sangiovanni (2012, 2017, forthcoming).
 8. What matters for our purposes is that this is treated as a sufficient condition for triggering duties characteristic of welfare rights. Whether or not it is a necessary condition is left open and not relevant here. Regarding why it is not necessary for basic social assistance benefits or welfare rights more generally, see Efthymiou (n.d.).
 9. These forms of contribution are treated as individually sufficient conditions for the provision of basic collective goods. By 'nationals', I mean both citizens and long-term residents who have eventually been granted access to welfare. I use the term 'nationals' generically to distinguish those groups from EU immigrants who are neither citizens nor long-term residents.

10. See e.g. Gauthier (1986); Nozick (1974). For some robust criticisms of these views, see Barry (1989) and Cohen (1995), respectively.
11. We can distinguish three domains of justice: firstly, a *national* one, which applies to relations among members of the same member state; secondly, an *international*, or inter-member state, domain of justice, which applies to relations among member states of the EU as collective political agents; and thirdly, a *transnational* one, which applies to relations of nationals to EU citizens who reside within the same member state.
12. Any of these three types of contribution can be interpreted narrowly or broadly. For example, it is unclear whether actively seeking employment, when involuntary unemployed, qualifies a person as economically active or inactive according to reciprocity theorists (see e.g. Sangiovanni, 2017). Reciprocity theorists' focus on EU immigrants' access to in-work benefits as opposed to out-of-work benefits needs to be noted and is rather puzzling given the relatively uncontroversial moral and legal basis for such access (see e.g. Sangiovanni, 2017).
13. The term 'expected contribution' must apply to all types of valued contribution. If expected economic contribution is a legitimate criterion of selection and sufficient for granting an individual access to welfare, so must be *expected* contribution of other types (e.g. expected contribution via political participation). This is often overlooked in discussions of 'expected contribution'. See Blake (2008: 972); Carens (2013: 183–185); Higgins (2013: 202–222); Miller (2007: 222–223).
14. Herbert Simon's work concerns the rather non-ideal case of welfare capitalist societies and not property-owning democracies or democratic socialist societies (see Rawls, 2001). In those capitalist societies, some groups of people who are capable of contributing are *unable* to contribute due to structural involuntary unemployment or have their capacity to contribute hindered by social injustices. Reciprocity theorists who cite Simon's empirical evidence must therefore concede that the expected contribution from such groups must be significantly lower in non-ideal circumstances than that of the average citizen of those well-ordered societies and that, in some cases, it might well have to be zero. Otherwise, reciprocity theorists risk blaming the victims of social injustice for under-contributing to their host society's scheme of social cooperation.
15. On the permissibility of restrictions on the grounds of reciprocity, see Miller (2016: 124–125), and on the alleged permissibility of policies aiming to generate a higher level of primary goods, see Yong (2016: 827). If a host state has a duty not to undermine social justice between two groups of persons within other states, then surely it also has the duty to not to do the same with the same two groups of persons when they reside within its borders.
16. The positive aspect of this duty could be grounded to a pre-institutional or natural duty of reciprocity that reciprocity theorists acknowledge is consistent with the discharge of duties of reciprocity. See, for example, Yong (2016: 824–825).
17. A third way is also possible if we are to assume that membership of a host member state's system of social cooperation is *gradual* and not a matter of reaching a particular threshold. The more EU immigrants become woven into the social fabric of the host member state, the more their duties towards other EU immigrants weaken and are replaced by duties they have to, or claims they are owed by, those who are already full members of the host society's system of social cooperation.
18. The lower the net individual contribution, the less relevant a contribution threshold becomes. A willingness-to-contribute condition is more in line with the fact that many individual cases of net average contribution will be below 10% and, possibly for some of them, 0%.

19. To see why granting such access will not be *additionally* burdensome for the host member state, one has only to think that newly arriving EU immigrants in work could pay for the non-contributory social assistance benefits of EU migrants out-of-work via their taxes in the very same way that nationals in work pay for the non-contributory social benefits of non-economically active nationals via their taxes. EU migrants are no more or less of a burden than nationals are. As long as there are restrictions in place, however, access to welfare amounts to non-reciprocal transfers from EU immigrants in work to nationals out of work as nationals in work do not have to pay for the benefits of EU immigrants out of work. Furthermore, restrictions on EU immigrants' access blocks transfers within the group of EU immigrants. This is because the group of EU immigrants in-work are not permitted to make a similar transfer to EU immigrants out of work. This also explains why a policy of restrictions could be more beneficial for worse-off nationals than a policy of immediate access grounded on duties of reciprocity across and within the two groups. In theory, at least, every euro not paid to EU immigrants' social assistance benefits could be used to pay higher benefits to nationals. Hence, observing duties of reciprocity and not worsening the overall position of worse-off nationals could part ways.
20. EU immigrants contribute more to the welfare budget of the UK than do UK nationals themselves (ICF GHK, 2013). Immigrants, in general, tend to contribute to the host state dynamically and are therefore more likely to make a positive fiscal contribution over time; for the case of the United States though, see Macedo (2007).
21. If time is a good proxy for degree of contribution and some period of net contribution is necessary as an *assurance mechanism* to other members of that scheme of cooperation, then waiting periods appear to be justified. However, this is also not the case. Periods of net contribution need not be frontloaded in the form of waiting periods, but could take the form, if necessary, of (very short) periodic breaks after immediate and full access to welfare rights at t_1 .
22. Rawls says that '[w]e are not to gain from the cooperative labors of others without doing our fair share' Rawls 1999a: 96; 1999b. That statement leaves open the form that fair share should take, as well as *when* that share is to be paid and, as a consequence, whether that share could be *zero* for a given and initial period of time. For a wider range of policies broadly consistent with this approach, see Atkinson (2015) as well as Goodin (2002).
23. On the exploitation of migrants, see e.g. Van Parijs (1993) and (Ypi 2016).
24. One could object that broadening the conception of contribution in this way is inconsistent with reciprocity theorists' focus on basic collective goods and its emphasis on non-excludable goods necessary to protect us from physical attacks, such as police protection and national defence, and the rule of law more generally, as well as those goods necessary to maintain and reproduce a stable system of property rights and entitlements (see Sangiovanni, 2007: 20–21). Even though these basic collective goods might be necessary in some fundamental way to protect us from fear and to allow us to develop and pursue a plan of life, they aren't sufficient for the provision of welfare rights. Hence, as a category of goods, they do not perfectly overlap with the category of collective goods necessary to protect us from domination and want. Therefore, someone can contribute directly to the production of goods that are necessary (e.g. via education) for the provision of social welfare and not just indirectly by contributing to basic non-excludable goods, or

- contribute indirectly by providing support (e.g. via care) that makes the provision of those goods easier and less costly. Therefore, it might be more accurate to draw a distinction between direct and indirect production of, and contribution to, welfare goods.
25. A similar point is made by Abizadeh in Fine and Ypi (2016).
 26. Karl Marx also considered such measures necessary for the emancipation of the working class. See Marx (1990 [1867]: 367).
 27. See Efthymiou (2014, 2018, forthcoming) for a defence of the link between ideal and non-ideal theory. The argument put forward here also aims to be compatible with realist approaches to political theory; see Rossi and Sleat (2014) but also Cole (2014).
 28. Empirical evidence (see ICF GHK, 2013) suggests such incentives are currently low. Therefore, there is plenty of room for strengthening such pulling factors where it is actually required by justice as reciprocity.
 29. For reasons that I discussed earlier under the first objection (i.e. see discussion of restrictions leading to a two-tiered labour market) and have no space to elaborate on here, it would be preferable for these restrictions not to take the form of restrictions on access to welfare rights. For instance, a better alternative is a selective migration policy (albeit far less selective than the one currently in place in EU member states) that ensures that non-EU migration does not unreasonably burden the welfare systems of host member states.

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