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## **I TRADE, THEREFORE I AM: LEGAL PERSONHOOD IN THE EUROPEAN UNION**

CHARLOTTE O'BRIEN\*

### **1. Introduction**

EU citizenship is the subject of incremental and painstaking construction. In allowing ourselves to get caught up with dissecting each separate instalment that comes with each new case, we risk accepting without scrutiny what should be a controversial ideological framework – that of an economic/market citizenship. Within this framework, rights do not attach to personhood; rather rights are triggered, interpreted, delineated and weighed according to a miscellany of conditions. As a result, claimants can face “social welfare cliff edges” – tipping them over the edge of the cliff, from full protection to none – on the basis of apparently arbitrary tricks of circumstance. These vectors of disentitlement mean that EU citizenship is not quite a unitary status, but more a patchwork of personhoods. By vesting rights in criss-crossing conditions rather than in people, we lose the person as a fundamental moral unit of our social structure. In divesting the person of legal content, we risk divesting the law of moral content – and our own judgement of questions of justice and what is right.

The ECJ's fragmentary approach to citizenship has been necessary due to constraints of the legislature and Member State reticence regarding social integration. But in our preoccupation with the fragments, we as legal commentators keep the ideological framework of citizenship out of focus. This framework of market citizenship, though it may not endorse, does permit a parsimonious approach to implementation on the part of Member States, who can prise open the gaps between statuses, roll out minimal, piecemeal entitlements, and show little by way of social solidarity with, or concern for,

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the welfare or human condition of each other's nationals. This suggests a very minimal European commitment to social justice. In *Zambrano*,<sup>1</sup> the ECJ apparently emboldened the unconditional effects of EU citizenship status, allowing it to grant an autonomous right of residence within the EU not dependent on cross-border movement. But the case has sparked a restrictive follow-up approach, in national measures, case law, and in government interventions in subsequent ECJ cases – an approach which strips the right down to something little more than actual presence, by withholding access to social protection for workers reliant on *Zambrano*. This is hopefully not the intention of the ECJ, who may yet ameliorate this particular injustice. But the reality of EU citizenship experienced by some EU citizens is that host States are unwilling to offer protection from destitution and are keen to use the gaps in market citizenship to refuse benefits, including those directed at child welfare and intended to alleviate child poverty – benefits often recognized as the hallmarks of civilized society.

The current economic model of personhood is, or should be, contestable. The gender tilts and gaps in EU welfare law – including provisions of Directive 2004/38<sup>2</sup> which speak to a fear of a flood of pregnant migrants – reveal a particular power dynamic rather than the free play of “natural” market laws. This article therefore suggests that such a dynamic is not inevitable and that it should be possible to explore different constructions of citizenship-based rights, and different limitations that avoid unjust discrimination. Market citizenship does more than “add to” a basic economic minimal membership<sup>3</sup> – it also precludes a full and humane depiction of personhood, in which people are entitled to rights *and* to the healthy enjoyment of those rights. Through emphasizing economic status, it is in line with the EU wide shift in welfare policies to focus on duties to work, and the responsibility of claimants not to become dependent on state benefits. The discourse of responsibility is evident in the Union's “soft” social policy measures as well as national reforms. It redefines fairness<sup>4</sup> because it vests value in economic activity, and treats those not part of the labour market as inactive, as targets to be activated.

1. Case C-34/09, *Ruiz Zambrano*, [2011] ECR I-1177.

2. Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory, O.J. 2004, L 158/77.

3. On the added value of market citizenship see Nic Shuibhne, “The resilience of EU market citizenship”, 47 CML Rev. (2010), 1597.

4. An example of linguistic capture explored in more detail in O'Brien, “From safety nets and carrots to trampolines and sticks: The national uses of the EU as both menace and model to help neoliberalise welfare policy”, in Schiek (Ed.), *The EU Economic and Social Model in the Global Crisis: Interdisciplinary Perspectives* (Ashgate, 2013).

While the activation process at national level has been the subject of much struggle and political contestation, the process of stressing the responsibility of EU migrants, vesting their rights and personhood in their economic status, has been relatively straightforwardly accepted. This inevitably impacts upon our understanding of fair access to social welfare, and makes us more receptive at a national level to the basic premise that activation is ineluctable, and responsibility the *sine qua non* of fair social resource allocation. Rather than increasing the humane credentials of the EU, the rhetoric of citizenship might inadvertently disguise inhumanity, helping to strengthen the hold of economic personhood by infusing it with an authoritative moral glow. This in turn blunts our perceptions of Member States' uses of the personhood gaps – here described as “xenoseptic” practices, since they imply suspicion of EU migrants and lead to morally questionable outcomes.

How we define the person has a concrete bearing upon how we structure society, and define and allocate welfare. The first section of this paper will argue that much commentary on citizenship case law, whether positive or critical, makes bigger claims than are yet warranted as to the humanizing/enlightening effect of citizenship on Union law without seriously challenging the ideological presumptions of market citizenship. Drawing upon earlier scholarship on the then incipient EU citizenship, I submit that the situation has changed – but not through the construction of a social Europe anticipated<sup>5</sup> or feared<sup>6</sup> by some commentators. EU citizenship has more refined components, and some welcome softened edges<sup>7</sup> (especially with regard to own-state nationals – indeed, it is arguable that the Court affords stronger protection to the right to move for own-state nationals, than to the right of equal treatment for non-nationals).<sup>8</sup> But for non-national EU migrants it is still essentially an economic citizenship. Rather than the avowedly

5. Note Mancini's detection of “an evolution” and a judicial awareness of “certain progressive forces” in the context of EU citizenship: “The making of a constitution for Europe”, 26 CML Rev. (1989), 607; more recent anticipation is evident in Azoulay, “Euro-bonds”: The Ruiz Zambrano judgment or the real invention of EU citizenship”, 3 *Perspectives on Federalism* (2011), 31.

6. Hailbronner, “Union citizenship and access to social benefits”, 42 CML Rev. (2005), 1245; Tomuschat, annotation of *Martínez Sala*, 37 CML Rev. (2000), 449; Somek, “Solidarity decomposed: Being and time in European citizenship”, 32 EL Rev. (2007), 787.

7. So that, e.g., while a Member State may be entitled to deny a residence right to a non-worker, it cannot deny them welfare benefits unless that residence right has in fact been refused: Case C-456/02, *Trojani*, [2004] ECR I-7573, paras. 36–37. This has led to the creation of a technical “right to reside” in the UK, whereby denial is unlikely to actually mean expulsion, but is a means to refuse benefits: Larkin, “Migrants, social security, and the ‘right to reside’: A licence to discriminate”, 14 *Journal of Social Security Law* (2007), 61.

8. See Case C-224/98, *D'Hoop*, [2002] ECR I-6191; Case C-192/05, *Tas Hagen & Tas*, [2006] ECR I-10451; Case C-75/11, *Commission v. Austria*, judgment of 4 Oct. 2012, nyr; Joined Cases C-523 & 585/11, *Prinz & Seeberger*, judgment of 18 July 2013, nyr; and O'Brien,

economic institution of the past, able to rebuke criticism on the grounds of its naturally economic scope of action, its newer claims of a social dimension distract attention from the fact that its economic foundations have still not been excavated, that no transfiguration has taken place. So the premise of market citizenship escapes relatively unquestioned while shaping social policy and social agendas. Instead, criticism tends to focus upon competence creep – effectively also endorsing the idea (while criticizing the practice) of the EU becoming more of a “social” union.<sup>9</sup> An alternative approach to the case law is proposed here, highlighting the patchwork of personhoods created by multiple rights cliff edges.

The increasingly fine-grained nature of the citizenship fragments and the gradation of rights minimizing social welfare entitlement is demonstrated in an analysis of national responses to the *Ruiz Zambrano* judgment; the UK is presented as a case study, but with evidence to suggest that the UK Government is not an isolated example. The inhumanity in question has two key strands – withholding social protection rights from *Zambrano* families, revealing indifference to child destitution; and refusals to consider *Zambrano* residence claims where another parent is available, potentially demoting the child’s best interests in questions of appropriate family living arrangements.

Market citizenship is not only problematic because it blocks a more social alternative, but also because it contributes to an ideological linguistic capture – a fixing of politically loaded meanings to ostensibly objective, neutral words; “the market” and “economic” are associated with rationality while being pre-loaded with patriarchal leanings. The second section of this paper demonstrates the fabricated, non-neutral nature of an economic, migratory personhood through an analysis of the gender gaps in free movement law, noting that care and reproductive labour not only fall outside the definition of work – the criterion by which the “person” is fully legally relevant in the EU – but are also excluded from protected social security risks. They do not count as permitted *breaks* in work,<sup>10</sup> though pregnancy is about to be considered by the ECJ in *St Prix*.<sup>11</sup> The gendering of free movement law reveals not just the stratification of EU legal personhood, but also some of the ideological mechanics behind it. The current economic model utilizes the supposedly neutral language of citizenship and responsibility to help rationalize its exclusions. If we instead recognize the non-neutral effects of market

“Real links, abstract rights and false alarms: The relationship between the ECJ’s ‘real link’ case law and national solidarity”, 33 EL Rev. (2008), 643.

9. See Hailbronner, *op. cit. supra* note 6.

10. Art. 7(3) Directive 2004/38.

11. Case C-507/12, *Jessy Saint Prix v. Secretary of State for Work and Pensions*, pending.

citizenship, we should ask whether a different orientation of rights and limitations might be more appropriate and just.

The economic responsibility imposed on EU migrants echoes the EU-wide agenda to activate those out of work through a series of punitive measures – the responsibility model of welfare. This shared discourse is explored in the third section. It is submitted that the neoliberal conceptual convergence identified by O’Connell<sup>12</sup> on a global scale is even more prominent and explicit amongst the national welfare systems of EU Member States, who use, or misuse, the concept of market citizenship to explain problematic exclusions from EU social welfare law. This section explores how we have redefined fairness in terms of competition instead of solidarity. In making claims about fairness, market citizenship remodels concepts of humanity and morality. These redefinitions might not have had the same purchase previously, when EU citizenship made primarily economic ontological claims. Hence we have come to tolerate a degree of disguised commodification and instrumentalization of persons, as the market becomes not an alternative to morality, but a form of morality itself, as evident in the elevation of market freedoms to be equated with – if not prioritized over – human rights.

People gain their value and recognition through economic, mobile citizenship, so that economic activity – or trading as termed in the title of this piece – is the only surefire way to acquire meaningful personhood. That it is the only *guaranteed* way to access rights of social protection, while all other avenues and claims must be fraught with doubt, is, as Descartes said of the act of thinking proving existence, “so certain and so assured that... I came to the conclusion that I could receive it without scruple as the first principle”,<sup>13</sup> in this case, of the philosophy of the EU. But this begs the question as to where if anywhere we go from here. While it is beyond the scope of this paper to construct an alternative social constitution of the Union, it is submitted that if we wish to grant meaningful, substantive rights to people, not economic units, we must step back and be prepared to excavate the foundations of citizenship, and to judge honestly what we consider to be just, right, and humane – an assessment that should at least show that whatever that looks like, it is different from what we have now. That means confronting Member State reticence to embrace a social Europe and to protect each others’ nationals from destitution. It also means challenging the veil of non-interference<sup>14</sup> under which market citizenship, in the hands of Member State authorities, influences not only

12. P. O’Connell “The Death of Socio-Economic Rights’ (2011) 74(4) MLR 532.

13. Descartes, *Discourse on Method and Meditations on First Philosophy*, Weissman (Ed.) (Yale University, 1996), p. 21.

14. Which can act as a “veil for extensive and discretionary intervention”; Fine, “Examining the ideas of globalisation and development critically: What role for political economy?”, 9 *New Political Economy* (2004), 226.

social policy but the very political, philosophical underpinnings of social structures.

## 2. EU citizenship as a patchwork of personhoods

EU citizenship is quite a spectacle;<sup>15</sup> it has done something not a great many EU institutions do – captured imaginations (if not hearts),<sup>16</sup> and brought out the poetic and portentous<sup>17</sup> in us. It is certainly brim full of possibilities.<sup>18</sup> With each new case and each incremental change it is ever more tempting to herald the increasingly social, humane Union.<sup>19</sup> But such claims should be moderated. Damjanovic argues that negative welfare integration has established a “genuine social dimension” of the Union,<sup>20</sup> and that is difficult to dispute. But rather than asking whether that is a good thing or a bad thing, it is necessary to take a step back and ask what conception of *society* is encapsulated in this social dimension. It is here submitted that it does not take

15. Contributing to the “fundamental rulings” and “powerful expansion” of the scope of free movement identified by Trstenjak and Beysen, “The growing overlap of fundamental freedoms and fundamental rights in the case-law of the CJEU”, 38 EL Rev. (2013), 295.

16. As Dougan described constitutional developments in the Lisbon Treaty: “The Treaty of Lisbon 2007: Winning minds, not hearts”, 45 CML Rev. (2008), 3.

17. E.g. Somek’s reference to decomposing solidarity, op. cit. *supra* note 6; Van Eijken and De Vries, “A new route into the promised land? Being a European citizen after Ruiz Zambrano”, 36 EL Rev. (2011), 704; see also a summary of commentary summary, Kochenov, “The essence of EU citizenship emerging from the last ten years of academic debate: Beyond the cherry blossoms and the moon?”, (2013) ICLQ, 97.

18. “Citizenship becomes an epiphenomenon of how Europe is, or might be constituted according to certain analytical typologies or ideal conceptions of capitalism, socialism and democracy”: Bellamy, “The right to have rights: Citizenship practice and the political constitution of the EU”, in Bellamy and Warleigh (Eds.), *Citizenship & Governance in the European Union* (Continuum, 2001), p. 41.

19. Some optimistic examples include Downes’ description of Case C-85/96, *Martinez Sala*, [1998] ECR I-2691 as “a tantalising prospect of Union citizenship as the source of wide-ranging social rights which are not directly related to economic/market activity”: Downes, “Market citizenship: Functionalism and fig leaves”, in Bellamy and Warleigh, *ibid.*; offering similar assessments on subsequent cases see Golynger, “Jobseekers’ rights in the European Union: Challenges of changing the paradigm of social solidarity”, 30 EL Rev. (2005), 111 (on Case C-138/02, *Collins*, [2004] ECR I-2703); Lenaerts and Heremans, “Contours of a European social union in the case-law of the European Court of Justice”, 2 EuConst (2006), 101–115 (on, among others, Case C-184/99, *Grzelczyk*, [2001] ECR I-6193); Kochenov, “A real European citizenship: A new jurisdiction test; a novel chapter in the development of the Union in Europe”, 18 CJEL (2011), 56 (on *Ruiz Zambrano*, cited *supra* note 1).

20. “The EU market rules as social market rules – Why the EU can be a social market economy”, in this *Review*.



us far from the original, once controversial<sup>21</sup> logic of market citizenship. In focusing on the separate, increasingly profuse, “bits and pieces”<sup>22</sup> we risk forgetting to question that logic.

Rather than fusing together to develop a “fundamental status” that humanizes the Union, the separate increments added by different ECJ rulings create a perforated personhood patchwork. The reach of each incremental change is curbed, with Member State responses and the ECJ’s own follow-up rulings delineating their boundaries and guarding the gulfs between them. Although these gulfs may not form a part of the ECJ’s plans for a fundamental shared destiny, nor accord with academic visions and interpretations of citizenship, they form part of the legal environment within which claimants experience being EU citizens. The gaps in this patchwork can tip non-nationals into destitution, suggesting a fairly loose commitment to social protection and social justice for non-nationals. As Splitter said of postmodernism, “the fragmentation, displacement and pluralization characteristic of post-modernist thinking, threatens to destroy the individual subject and its identity”.<sup>23</sup> The many characters of the EU citizen, with variegated rights according to circumstance, similarly threatens to destroy the individual subject – the person – as a legally relevant being, as we come to accept steep status gaps and welfare cliff edges for nationals of other States; gaps and losses not currently tolerated for own nationals. Without assigning blame to the EU for Member State (mis)implementation, the remedy may lie in the reframing of EU citizenship rights to anticipate and guard against xenoscepticism.

EU citizenship means something – or at least, some things to some people. *Nural Ziebell* makes clear that the very similar free movement scheme for Turkish nationals is not to be regarded as exactly equivalent, since greater protection from expulsion is to be expected for Union citizens.<sup>24</sup> But beyond that rather general assertion, it is not easy to pin down the rights enjoyed by virtue of Union citizenship, as opposed to through economic, cross-border activity. Citizens enjoy very different rights of equal treatment and access to

21. Everson, “The legacy of the market citizen”, in Shaw and More (Eds.), *New Legal Dynamics of European Union* (Clarendon Press, 1995); Bellamy and Warleigh, “The puzzle of EU citizenship”, in Bellamy and Warleigh, op. cit. *supra* note 18; Weiler, *The constitution of Europe: “Do the new clothes have an emperor?” and Other Essays on European integration* (CUP, 1999); Peebles, “A very Eden of the innate rights of man? A marxist look at the European treaties and case law”, 22 *Law & Social Inquiry* (1997), 581.

22. The words of Curtin in “The constitutional structure of the Union: A Europe of bits and pieces”, 30 *CML Rev.* (1993), 17.

23. Splitter, “Asking some hard questions about citizenship, morality and identity”, 12 *Public Organization Review* (2012), 261.

24. Case C-371/08, *Nural Ziebell v. Land Baden-Württemberg*, judgment of 8 Dec. 2011, nyr, para 74.



social protection depending on a whole host of circumstances – including whether they are engaged in economic activity,<sup>25</sup> and if so, whether they are part of the “normal labour market”,<sup>26</sup> and whether they have developed sufficient “occupational aptitude”.<sup>27</sup>

Indeed, if you fall within the favoured category of genuine migrant worker (or her family member), the Court seems so ardent in its wish to protect the romantic, edifying bond of citizenship as to be affronted by the suggestion that mere prosaic finances should get in the way. In *Commission v. Netherlands*, the Court announced emphatically that it could not accept territorial restrictions of a study allowance on the grounds of mere “budgetary concerns”.<sup>28</sup> To do so would imply something apparently patently absurd – “that the application and the scope of a rule of EU law as fundamental as non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of Member States”.<sup>29</sup> But the self-evident truth about the consistency of the fundamental law of non-discrimination dissolves when dealing with non-workers; the Court distinguished *Förster*<sup>30</sup> and *Bidar*,<sup>31</sup> cases in which the Court had found that Member States could impose their own integration requirement on students, as the parties were not (at the material times) workers.<sup>32</sup> In recent years the ECJ has created the requirement that claimants demonstrate a real link with host societies in order to be entitled to equal treatment as regards welfare,<sup>33</sup> which seems more humane than an explicit economic/work link. However, *Commission v. Netherlands* shows that the real link concept allows for priority to be given to the economically active, while not binding Member States to do much more than consider the claims of others. Hence the fact of participating in the employment market “establishes... a sufficient link of integration” to be entitled to equal treatment.<sup>34</sup> This is because “through the taxes he pays... the migrant worker also contributes to the financing of the social policies of that State”.<sup>35</sup> As O’Leary asserted in 1995, in spite of a “progressive and human”

25. Whether they fit into Art. 7 of Directive 2004/38.

26. Case 344/87, *Bettray*, [1989] ECR 1621, Opinion of A.G. Jacobs, paras. 17 and 32; The Court did not exactly reproduce the A.G.’s wording “normal labour market”, but spoke of “employment under normal conditions” at para 18.

27. Case C-3/90, *M.J.E. Bernini v. Minister van Onderwijs en Wetenschappen*, [1992] ECR I-1071, para 16.

28. Case C-542/09, *Commission v. Netherlands*, judgment of 14 June 2012, nyr, para 58.

29. *Ibid.*

30. Case C-158/07, *Förster*, [2008] ECR I-8507.

31. Case C-29/03, *Bidar*, [2005] ECR I-2119.

32. *Commission v. Netherlands*, cited *supra* note 28, para 61.

33. O’Brien, *op. cit. supra* note 8.

34. *Commission v. Netherlands*, cited *supra* note 28, 65.

35. *Ibid.*, para 66.

approach to socio-economic rights, “the enjoyment of those rights has generally been linked to their status as workers, to their performance of an economic activity, or to their dependency on a worker”.<sup>36</sup> D’Oliveira noted, also in 1995, that the attachment of limitations and conditions to citizenship rights “amounts to declaring that not every citizen has the right to move and reside freely” and that the freedom of movement “for *all* nationals of Member States, whether economically active as workers and self-employed or not” was yet an “arcadian objective”.<sup>37</sup> Many citizenship increments later it still is, but that fact is better disguised. Universal social citizenship is not impossible, but a reality check on how much progress has been made suggests that a reorientation away from market citizenship is necessary for more ambitious objectives – such as fortifying the connection between expanding citizenship and fundamental rights as proposed by Von Bogdandy et al.<sup>38</sup> – to become attainable.

The citizenship increments have added more rights cliff edges: hence citizens need to demonstrate real links with host societies;<sup>39</sup> they may gain access to rights if they have a connection to a former migrant worker; if connected to a worker, their rights may depend on whether they have a child, and if so, whether the child is of school age,<sup>40</sup> and whether the worker was employed or self-employed.<sup>41</sup> If the citizen is temporarily out of work, their

36. O’Leary, “The social dimension of Union citizenship”, in Rosas and Antola (Eds.), *A Citizens’ Europe* (Sage, 1995), p.162.

37. Jessurun d’Oliveira, “Union citizenship: Pie in the sky?”, in Rosas and Antola, *ibid.*, pp. 69 and 70.

38. Von Bogdandy, Kottmann, Antpöhler, Dickschen, Hentrei and Smrkolj, “Reverse *Solange*: Protecting the essence of fundamental rights against EU Member States”, 49 CML Rev. (2012), 289.

39. See *D’Hoop*, cited *supra* note 8, and O’Brien, *op. cit. supra* note 8.

40. In order to rely upon the child’s right to education in Art. 12 of Regulation 1612/68 on freedom of movement for workers in the Union: Case C-480/08, *Teixeira*, [2010] ECR I-1107 and Case C-310/08, *Ibrahim*, [2010] ECR I-1065. The relevant category of residence right on the UK Border Agency *Application for a Derivative Residence Card* is called “Primary carer of a child of an EEA national where that child is in education in the United Kingdom” – so the child must actually have started school (other forms of integration do not seem to apply – nursery school does not count according to the form – s. 5.28), possibly leading to differences in treatment depending on the time of year of arrival, since “evidence of attendance” is required, not just enrolment (s. 5.28). Form DRF1 Version 08/2013 at <[www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/eea/drf.pdf](http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/eea/drf.pdf)> accessed 11 Aug. 2013.

41. *Teixeira* and *Ibrahim* draw upon the wording in Regulation 1612/68 so refer only to the EU migrant’s pursuit of activities as an “employed” person in the host State giving rise to the child’s right to reside to complete education, in turn creating a carer’s right of residence: *Teixeira*, *ibid.*, 44–45. The UK authorities are quite clear that this excludes self-employment – see HMRC “TCTM02089 – Entitlement: Residence rules – Right to reside: Right to reside on

rights may hinge on whether it is due to illness or to pregnancy.<sup>42</sup> Citizens joined by their third country national family member may have different residence and equal treatment rights depending on whether they are relying on Article 20 TFEU;<sup>43</sup> whether they have another EU national family member;<sup>44</sup> whether their subsistence is at risk, and if so, whether their residence risks are in direct peril.<sup>45</sup>

It is the contention of this paper that access to social welfare entitlement is the key right for assessing the content of EU citizenship and the credibility of the “social” face of the EU.<sup>46</sup> Such entitlement describes the degree of obligation felt by Member States to protect individuals as human beings, and so describes the degree to which individuals truly matter, or exist, for the purposes of EU law – accepting Turner’s premise that “an individual is an entity which has the capacity for rights and duties” and that “what it is to be an individual is bound up with what it is to be a citizen”.<sup>47</sup> Now, as much as when Curtin made the observation, the “whole future and credibility of the Communities as a cohesive legal unit which confers rights on *individuals*... is at stake”.<sup>48</sup> That each new ruling creates finer-grained fragments, and new welfare cliff edges, is evident in the responses to a case purported to herald a new fundamental rights based citizenship for the EU.<sup>49</sup>

### 2.1. *The Zambrano aftermath*

The finding that a third country national may have a subordinate EU right of residence, so that their EU national child who has never left his/her EU country of birth can continue to reside in the EU (since to find otherwise

basis of child in education in the United Kingdom”, at <[www.hmrc.gov.uk/manuals/tctmanual/tctm02089.htm](http://www.hmrc.gov.uk/manuals/tctmanual/tctm02089.htm)> last accessed 11 Aug. 2013.

42. I.e. whether they fit into Art. 7(3) of Directive 2004/38.

43. Following *Ruiz Zambrano*, cited *supra* note 1.

44. Following Case C-434/09, *McCarthy*, [2011] ECR I-3375 and Case C-256/11, *Dereci*, judgment of 15 Nov. 2011, nyr.

45. Since the mere desirability of keeping a family together – for economic or human rights reasons is not enough – *Dereci*, *ibid*.

46. There is not the space to fully justify this approach here; suffice to repeat Evans’ statement that “if it is to be at all meaningful, holders of Union citizenship must be equal in relation to some matters of importance”, (Evans, “Union citizenship and the equality principle”, in Rosas and Antola, *op. cit. supra* note 36, 86) and to add that it must require Member States to extend solidaristic membership in matters of importance to non-nationals. The key manifestation of national solidarity in EU Member States is social welfare, and the extension of this solidarity is necessary if free movement is to be an accessible positive right for EU nationals.

47. Turner, “Personhood and citizenship”, 3 *Theory Culture & Society* (1986), 6.

48. Curtin, *op. cit. supra* note 22, 67.

49. Azoulai, *op. cit. supra* note 5; Kochenov, *op. cit. supra* note 19.

would result in the child effectively leaving the EU, and being deprived of their rights as an EU citizen), exercised and excited commentators.<sup>50</sup> But it has not transformed Union citizenship, and the indications are that, until pushed to do otherwise, Member States will read this judgment as narrowly as possible, claiming the blessing of the ECJ via *Dereci* and *McCarthy*.<sup>51</sup>

Falling within the scope of *Zambrano* is difficult, so invoking the protection of EU law is tricky, let alone establishing what that protection is. *Dereci* offered some refinements to the concept of the denial of genuine enjoyment of citizenship rights – that “it refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole”.<sup>52</sup> The Court then added, in a paragraph that has come to provide a mainstay for domestic rulings in the UK,<sup>53</sup> that “the mere fact that it might appear desirable to a national of a Member State” for their *Zambrano*-reliant third country national family member to be granted a right of residence “for economic reasons or in order to keep his family together in the territory of the Union... is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted”.<sup>54</sup> So a high degree of imminence and causation is required between denial of the *Zambrano* right and departure from the EU of the EU citizen.

The Court of Appeal of England and Wales has explicitly wondered, in the *Harrison* judgment, whether there can be a “level of interference with the right... short of de facto compulsion”, but “more than simply the breakdown of family life”,<sup>55</sup> concluding that *Zambrano* only “bites” where *de facto* deportation of the EU citizen is at issue. Two problematic conclusions have followed in different courts – firstly, that where another parent is not being deported, the child cannot be said to be “forced” to leave the EU, even though staying without the deported parent may be detrimental to the child’s best interests. Secondly, the *Zambrano* right has been interpreted to afford little more than a simple right to be present; denying social protection to an extent that incurs destitution, and creates significant pressure to leave is not compulsory deportation, so does not count, regardless of the inhumane

50. E.g. Van Eijken and De Vries, op. cit. *supra* note 17; Lansbergen and Miller, “European citizenship rights in internal situations: An ambiguous revolution?”, 7 *EuConst* (2011), 287; Nic Shuibhne, “Seven questions for seven paragraphs”, 36 *EL Rev.* (2011), 161; Hinarejos, “Citizenship of the EU: Clarifying ‘genuine enjoyment of the substance’ of citizenship rights”, 71 *CLJ* (2012), 279; Kochenov, op. cit. *supra* note 17; Azoulai, op. cit. *supra* note 5.

51. Both cited *supra* note 44.

52. *Dereci*, *ibid.*, para 66.

53. *Harrison v. Secretary of State for the Home Department*, [2012] EWCA Civ 1736, 27 – noted at H22 that this *Dereci* finding was “highly pertinent”.

54. *Dereci*, cited *supra* 44, para 68.

55. *Harrison*, cited *supra* note 53, para 68.

conditions this may create. As summarized in *Harrison*, the “right to reside in the territory of the EU... is not a right to any particular quality or life or to any particular standard of living”.<sup>56</sup> This is an extremely minimal interpretation of “genuine enjoyment” of a citizenship right – but the Court of Appeal claims its authority, via *Dereci*, from the ECJ. As Davies has noted, a citizen might not be deported, so not deprived of a residence right, “but see the quality of it diminished, by measures which make remaining painful, difficult, expensive, or uncomfortable”.<sup>57</sup>

With regard to the apparent willingness to interfere adversely in family life, the UK Border Agency internal guidance instructs staff that “if there is another person in the UK *who can care* [not even who does care] for the British citizen, then a derivative family permit *must be refused* on the basis that such a refusal would not result in the British citizen being forced to leave the EEA”.<sup>58</sup> The Application for a Derivative Residence Card<sup>59</sup> indeed asks whether the applicant is the only primary carer, and if there is another person in the UK who “*could* or does assume caring responsibility for the British citizen”<sup>60</sup> – without making it clear that this is a “cliff edge” question, and asking for several pages of details in the event of there being another potential carer. A couple of post-*Zambrano* ECJ cases indicate that the UK is not the only Member State to suggest that where a child *could* remain with another parent, their removal is not sufficiently compulsory to justify a *Zambrano* right for the deported parent. This position poses the risk that such assertions may be crudely made, without a sensitive enquiry into the child’s best interests, as would happen in a family court deciding custody.<sup>61</sup> While the Court of Appeal of England and Wales claimed in *Harrison* that the judge in the asylum and immigration tribunal had had regard to the best interests of the child, there is fairly mixed, unpromising guidance on how this regard should be

56. *Ibid.*, para 67.

57. Davies, “The family rights of European children: Expulsion of non-European parents”, (2012) *EUI Working Paper No. RSCAS 2012/04*, 13, as quoted in *Harrison*, cited *supra* note 53, 62.

58. UK Border Agency “EUN01 – EEA nationals” – EUN 1.12, at <[www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/eun/eun1/#header12](http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/eun/eun1/#header12)>, last accessed 11 Aug. 2013.

59. See *supra* note 40.

60. *Ibid.*, sections 3.14 and 3.15.

61. See the UK Ministry of Justice guidance on “Looking after children if you divorce or separate” – <[www.gov.uk/looking-after-children-divorce/after-you-apply-for-a-court-order](http://www.gov.uk/looking-after-children-divorce/after-you-apply-for-a-court-order)>, last accessed 11 Aug. 2013, “‘What judges and magistrates consider’: They’ll always put the welfare of children first. They will think about the: child’s wishes and feelings; child’s physical, emotional and educational needs; effect any changes may have on the child; child’s age, gender, characteristics and background; possible risk of harm to the child; ability of parents to meet the child’s needs”.

demonstrated or how heavily it should weigh.<sup>62</sup> And little guidance is to be gleaned from ECJ cases *Iida*<sup>63</sup> and *O&S*.<sup>64</sup>

In *Iida*, the ECJ concluded that the right to “genuine enjoyment of the substance of the rights associated with their status of Union citizen” (deriving from *Zambrano*), did not help a third country national who was not living in the same Member State as his spouse and EU national daughter. The Court found rather simply that the genuine enjoyment of the daughter’s citizenship rights were not impeded – pointing out that the claimant was not seeking to live in the same Member State as her (Austria), but in Germany, and that he had not hitherto relied upon an EU based right to reside and this had not hindered his daughter’s ability to move and reside freely.<sup>65</sup> While attention has rightly been drawn to the rather *Zambrano*-twisting statement that reliance on Articles 20 and 21 TFEU must have an “intrinsic connection to freedom of movement”,<sup>66</sup> it is also worth highlighting that the key deciding factor here seems to be the choice of State of residence of the claimant. The daughter had moved and so could claim to fall squarely within EU law more easily than static citizens. If the claimant had moved, but to a different State to that of his daughter, he would have been in no better situation. The key was that he should move to the *same* Member State as her – though in that case he could have relied upon Directive 2004/38<sup>67</sup> – in order to lend credibility to the suggestion that the daughter’s continued residence in the EU might be affected by his expulsion. The Court essentially decided that potential deportation from the EU would not force the daughter to leave the EU, because she lived in a different country from her father anyway. But there is a great deal of difference between having a parent in a bordering EU country, and having a parent in Japan. Moreover, what of couples who happen to live either side of a border, both within the same frontier zone? It is not clear how detailed an investigation was conducted into ascertaining the daughter’s connections, and likely future decisions, or even the effect upon her welfare of being left with one parent only.

62. *Sanade and others (British children Zambrano – Dereci)*, [2011] UKUT 48 (IAC) (16 Feb. 2012); *MA and SM (Zambrano: EU children outside EU) Iran*, [2013] UKUT 380 (19 July 2013); *R (on the application of Tinizaray) v. Secretary of State for the Home Department*, [2011] EWHC 1850 (Admin) (25 Oct. 2011) and *ZH (Tanzania) v. Secretary of State for the Home Department*, [2011] UKSC 4, [2011] 2 AC 166.

63. Case C-40/11, *Iida*, judgment 8 Nov. 2012, nyr.

64. Joined Cases C-356 & 357/11, *O&S and L*, judgment of 6 Dec. 2012, nyr.

65. *Iida*, cited *supra* note 63, 74.

66. *Iida*, *ibid.*, para 72 – the subject of analysis by Reynolds, “Exploring the ‘intrinsic connection’ between free movement and the genuine enjoyment test: reflections on EU citizenship after *Iida*”, 38 *EL Rev.* (2013), 376.

67. *Iida*, *ibid.*, para 64.



The Court was similarly brief in its foray into family structure and organization in *O&S*, which dealt with the deportation of third country national step-fathers of EU citizen children. In assessing whether such deportation would prevent the EU national children from exercising their citizenship rights, the Court announced that “the fact that the third country nationals for whom a right of residence is sought are not persons on whom those citizens are legally, financially or emotionally dependent must be taken into consideration”.<sup>68</sup> But it is not clear from what evidence such a finding should be made with regard to emotional dependence. Nor is it clear whether any weight should be given to *potential* financial dependence – e.g. where the deportee has good chances of employment and the potential to support a family who would otherwise be reliant upon the public purse, which was claimed to be the case in *L*.<sup>69</sup>

The limiting of *Zambrano* to children in *McCarthy*<sup>70</sup> seems to have been accepted by default,<sup>71</sup> even though the expulsion of a third country national may well effectively compel the departure from the EU of an *adult* EU citizen – for instance, if the deportee is a spouse, or the carer of an adult with disabilities. UK regulations refer to a “primary carer”,<sup>72</sup> and the *Zambrano* section of the application form for a derivative residence card requests evidence of the relationship, “for example, birth certificate/adoption certificate”,<sup>73</sup> so it suggests that parental relationship – or some family proximity – is required in addition to care. It also requests evidence of dependency, “for example, how the child or adult is wholly reliant on the

68. *O&S and L*, cited *supra* note 64, para 56.

69. *Ibid.*, para 29.

70. *McCarthy*, cited *supra* note 44.

71. Note the summary in para 46 of *O&S and L*, cited *supra* note 64, of the *Zambrano* ratio: “With respect, finally, to the right of residence of a person who is a third country national *in the Member State of residence of his minor children*, nationals of that Member State, who are dependant on him and of whom *he and his spouse have joint custody*, the Court has held that the refusal to grant a right of residence would have the consequence that *those children, who are citizens of the Union, would have to leave the territory of the Union* in order to accompany their parents”. See also the summary in *Iida*, cited *supra* note 63, para 62: “in order for a parent who is a third-country national to have a right of residence under Union law which is derived from primary law, effective exercise of the Union citizen’s legal position would have to be harmed substantially if the parent who is a third-country national were denied a right of residence. Accordingly, a parent who is a third-country national was found to have a right of residence – in the same Member State, it should be noted, as that *in which the minor was residing* – for example where ‘a refusal would lead to a situation where ... children ... would have to leave the territory of the Union’, or where otherwise ‘the child’s right of residence [would be deprived] of any useful effect’”. Emphasis added.

72. The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012, S.I. 2012 No. 2560.

73. UK Border Agency, *op. cit. supra* note 40 (section 3.12).



primary carer(s) for their care”,<sup>74</sup> but it is not clear what care threshold, or relationship evidence, would be required for an adult care recipient.

A restrictive approach to *Zambrano* is evident in subsequent interventions to ECJ cases made by several national governments:<sup>75</sup> curbing the increments of citizenship case law is not just the preserve of the UK Government.<sup>76</sup> But it is something at which the UK Government is really rather adept. Following *Zambrano*, UK legislation has been altered, firstly to recognize a *Zambrano* right of residence,<sup>77</sup> and secondly, to strip those reliant upon that right of access to social protection, including housing assistance<sup>78</sup> and Child Benefit.<sup>79</sup> It is difficult to square the measures with a sense of societal responsibility for the well-being of children and a duty not to financially victimize lawfully resident individuals. Even budgetary concerns do not hold much persuasive sway, given that the Government’s own impact assessment of the EEA and Habitual Residence Regulations 2012 stated that fewer than 700 *Zambrano* carers had applied for residence by October 2012.<sup>80</sup> However, the Government stated that the benefit restrictions strike “a proportionate means of achieving the legitimate Government aim of encouraging migrants who can make a valuable contribution to our economy, whilst deliver fairness for the taxpayer by maintaining the current level of support the benefit system is able to provide to the general population”.<sup>81</sup>

While a deserving/undeserving migrant bifurcation is problematic in itself, since it commodifies migrants,<sup>82</sup> it is here bereft of its own logic, because the Regulations exclude *Zambrano* carers from benefits *even though they are working*. So “fairness” is clearly only applicable to *some* taxpayers. Hence the

74. Ibid. (section 3.13).

75. E.g. in *O&S and L* the Finnish, Danish, German, Italian, Netherlands and Polish governments; see *supra* note 64, 37.

76. A point made by Whiteford about social policy generally in 1995: “while the UK objections to Community action in the social field appear to have been consistent and predictable, the positions taken by other MS diverge significantly from their public affirmations of support for the social dimension. Particularly when qualified majority voting was possible, blame for the weak texts cannot be laid solely at the door of the British”. Whiteford, “Whither social policy?”, in Shaw and More, op. cit. *supra* note 21, 117.

77. See note 72 *supra*.

78. The Social Security (habitual residence) (amendment) regulations 2012.

79. The child benefit and child tax credit (miscellaneous amendments) regulations 2012 S.I. 2012 No. 2612.

80. Department for work and pensions (DWP), “Access to benefits for those who will have a ‘Zambrano’ right to reside and work equality analysis for the social security (habitual residence)(amendment) regulations 2012”, Oct. 2012, at <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220217/eia-zambrano-right-to-reside-and-work.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220217/eia-zambrano-right-to-reside-and-work.pdf)>, last accessed 11 Aug. 2013, 2.

81. Ibid., 3.

82. The problems of a commodification-based approach to rights are explored below, in sections 4 and 4.1.

legal advice service, Birmingham Law Centre (now sadly closed down),<sup>83</sup> noted that it is impossible for working clients on low incomes to take up tenancies without access to Housing Benefit. The Law Centre added that *Zambrano* clients wanting to work were “hamstrung by the prospect of not being able to earn the kind of salary that will cover... rent and living expenses” and are without “the kind of support available to other low income families”.<sup>84</sup> This kind of targeted exclusion is harder to defend when calling to mind the root of a *Zambrano* claim – typically the right of residence of an EU national child. That child’s welfare is very likely to be significantly impaired by lack of access to housing, or to benefits directly aimed at protecting the well-being of children, such as Child Benefit. UNICEF describes combating child poverty as “more than a slogan or a routine inclusion in a political manifesto: it is the hallmark of a civilized society”.<sup>85</sup> Excluding the children of immigrant parents from protection could in effect exclude some of the more vulnerable children in society,<sup>86</sup> the fate of whom, Chomsky has suggested “offers a sharper measure of the distance from here to something that might be called ‘civilization’”.<sup>87</sup> The indications are that we seriously risk compromising our claims to civilized social behaviour in the wake of *Zambrano*.

*Zambrano* carers and their children are thus caught in a contradiction. They have a right of residence by virtue of *Zambrano*, but poverty is thought not to jeopardize their residence right. Hence, as long as they are resident, (exercising a right *derived from EU law*) they are not facing *de facto* deportation and so are not considered to be in a *Zambrano* situation, so the situation is treated as *not within the scope of EU law*, and not within the scope of the Charter of Fundamental Rights.<sup>88</sup> Statements in the High Court of England and Wales in *Sanneh*<sup>89</sup> confirm that protection from poverty is not in itself part of the *Zambrano* residence right, even for those who are working.

83. Sadly, because the UK’s second largest city now does not have a law centre. See the Law Gazette, <[www.lawgazette.co.uk/news/birmingham-law-centre-closes-cash-runs-out](http://www.lawgazette.co.uk/news/birmingham-law-centre-closes-cash-runs-out)>, last accessed 11 Aug. 2013.

84. Birmingham Law Centre blog: 23 Feb. 2013, “*Zambrano* and Pryce: Does the homelessness duty mean anything?”, <[www.birminghamlawcentre.org.uk/wordpress/?p=61](http://www.birminghamlawcentre.org.uk/wordpress/?p=61)>, last accessed 11 Aug. 2013.

85. UNICEF Innocenti Research Centre, “Measuring child poverty: New league tables of child poverty in the world’s rich countries”, 10 *Innocenti Report Card* (2012), UNICEF Innocenti Research Centre, Florence, 4.

86. On the disproportionate representation of migrant families among children living in poverty, see Rutter, “Migration, migrants and child poverty”, 138 *Poverty* (2011), 6.

87. In Chomsky, *Profit over People: neoliberalism and global order* (Seven Stories Press, 1999), part IV, “Market democracy in a neoliberal order; Doctrines and reality”.

88. “EU law is simply not engaged at all: there is no EU law right that requires the protection of this court, now”. *R. (on the application of Sanneh) v. Secretary of State for Work and Pensions*, [2013] EWHC 793 (Admin), 103.

89. *Ibid.*

Indeed, the ability to work is in itself seen as sufficient protection – which is clearly problematic when considering areas of high living costs, the cost of childcare, low incomes, job instability, and the added costs of being a lone parent and/or working part time. These costs impact disproportionately upon *Zambrano* carers, who statistically are likely to be lone parents: the UK Government’s impact report on the welfare reforms notes that of the *Zambrano* residence claims “94 percent have not made their claim with a partner, suggesting they are lone parents”. *Zambrano* families thus fall into several poverty risk groups – since lone parents and immigrant families are at greater risk of poverty.<sup>90</sup>

The claimant in *Sanneh* had had different benefit claims refused one by one, so that for a while all she and her child had coming in was a small amount (about £43 per week, apparently erratically paid) of child support from her child’s father. Yet this deprivation was used against her, as “without any significant public assistance” it was found that she had been “surviving”.<sup>91</sup> Therefore, it could not be said that refusing benefit was depriving her of her residence right, since she hadn’t yet left the country as a result of destitution. Destitution would only play a part if in fact it *compelled* a claimant to leave – but this is surely quite an arbitrary measure. How much destitution a person chooses to “accept” may depend on a number of factors – including having no “home” to go to, or having mobility options impaired by e.g. illness of the child. In tolerating child poverty, it seems that the UK has used the patchwork principles and gaps in market citizenship to distil from *Zambrano* a lower grade of EU citizenship.

Other Member States may be engaging in similar *Zambrano*-demotion tactics. A recent judicial finding in the Netherlands suggests that as long as claimants are “not deprived of all means of subsistence” it cannot be said that denying benefits such as Child Support, another child-directed benefit, will require them to leave or compromise their enjoyment of their right to reside.<sup>92</sup> The Dutch court did mention the UN Convention on the Rights of the Child, but only to invoke the Netherlands’ reservations and to dismiss the instrument. Dutch courts also seem to have suggested that there is a very high tolerance for the statutory reorganization of families to avoid a *Zambrano* right being engaged – indicating in another case that a claimant had not sufficiently shown that her child’s residence was dependent upon hers, because it could be possible for the child to live with the father, notwithstanding the parental separation, and the fact that the mother was the primary carer with custody.<sup>93</sup>

90. DWP, op. cit. *supra* note 80, 2.

91. *Sanneh*, cited *supra* note 88, 50, 58.

92. ECLI: NL: 2012: BY3982, Arnhem court 13 Nov. 2012.

93. ECLI: NL: 2012: BY0833, Council of State 17 Oct. 2012.

A high burden of proof seems to be implied for demonstrating total dependence on the mother and impossibility of transferring custody – which is rather intrusive into the organization of family life, without much investigation into the best interests of the child. As this high burden of proof had not been discharged, the case fell outside the scope of EU law, so EU human rights obligations did not apply.

Given the chorus of negative interventions in *Zambrano*<sup>94</sup> and subsequent cases on the limits of the *Zambrano* right, *Dereci*<sup>95</sup> and *O&S*,<sup>96</sup> it seems plausible that many Member States will similarly adopt restrictive measures as to the social welfare rights of *Zambrano* residents unless and until directed otherwise. Market citizenship permits this use of personhood gaps and does not promote concern for social justice where non-nationals are concerned. While this may be attributed to the natural limits of the scope of EU law, and deference to national competences, it is important to remember that scope and competence are not determined according to an inexorable, divine law. Rather, they reflect malleable and man-made power relations, as the next section aims to show through an exploration of the gendering of migrant worker status, and so of citizenship and EU legal personhood.

### 3. Stratified rights – The gendering of economic mobility

While the *Zambrano* aftermath demonstrates the problem of excluding some citizens and their family members from basic social protection rights, the theoretically archetypal,<sup>97</sup> economically active, mobile man – around whom citizenship rights have materialized – is not an inevitable, neutral, or “natural” selective tool. Since it requires a degree of economic wherewithal, education in one’s rights, and (often) foreign language literacy, mobility itself is a highly economically selective criterion for rights, as noted by Reynolds.<sup>98</sup> It is internally stratified according to anachronistic and exclusionary reference

94. *Zambrano*, cited *supra* note 1, Rapport d’audience – the governments of the following countries invited the Court to give negative responses to the questions: Belgium, the Netherlands, Poland, Germany, Austria, Denmark, Greece, and Ireland (with Poland confining itself to invite the Court to declare it did not have competence to address the questions).

95. *Dereci*, cited *supra* note 44, hearing report.

96. *O&S and L*, cited *supra* note 64, hearing report: the governments of the following countries invited the Court to give negative responses to the questions: Denmark, Germany, Italy, the Netherlands, Poland and Finland.

97. Bothfeld and Betzelt critique the “ideal-typical model of economic citizens who strive to maximize their economic utility”; see “Introduction”, in Betzelt and Bothfeld (Eds.), *Activation and Labour Market Reforms in Europe Challenges to Social Citizenship* (Palgrave, 2011).

98. Reynolds, *op. cit. supra* note 66, 389.

points. The requirement to be “part of the normal labour market”<sup>99</sup> creates difficulties for persons in sheltered accommodation, regardless of the economic productivity of their work,<sup>100</sup> while those performing unpaid work, informal care work, or reproductive work (predominantly women) are lesser persons – facing rights cliff edges, regardless of the societal economic subsidy those people provide.<sup>101</sup> Despite a broad definition of migrant work, in 1994 it still tethered social rights to “the male breadwinner conceptualization of the family” according to Ackers, and it still does now.<sup>102</sup> Where apparent exceptions appear, e.g. providing residence rights to primary carers via *Teixeira* and *Ibrahim*,<sup>103</sup> they may be narrowly drawn, and in any case they derive from economic migratory activity – the EU migrant’s work when his/her child was “installed” in the Member State. The very concept of child “installation” may give rise to more rights disaggregation and cliff edges, depending on whether the child in question is of school age.<sup>104</sup>

Yet economic mobility provides the trigger for one’s citizenship to come into fruition – occupying the place, according to Somek, “held by solidarity in a national context”, to the extent that it creates a “teleological fix” in the case law that “eclipses the relevance of justice”.<sup>105</sup> It is also a tautological fix in which the exclusions justify themselves; care and pregnancy are gaps in the free movement framework because they are not work; and they are not work because work does not include unpaid reproductive labour.

### 3.1. *The care gap*

Reproductive labour is consistently demoted and disregarded within European free movement law as non-economic activity,<sup>106</sup> with the work of carers for children and for disabled adults registering upon the legal landscape only in certain circumstances, with carers at best recognized if they are

99. *Betray*, cited *supra* note 26.

100. See O’Brien, “Social blind spots and monocular policy-making: The ECJ’s migrant worker model”, 46 *CML Rev.* (2009), 1107.

101. The economic value of carer contributions in the UK has been estimated to amount to “a remarkable” £87 billion per year, Buckner, and Yeandle, *Valuing carers – calculating the value of unpaid care* (Carers UK, 2007), p. 1. For further evidence on the care subsidy, see O’Brien, “Confronting the care penalty: The case for extending reasonable adjustment rights along the disability/care continuum”, 34 *Journal of Social Welfare and Family Law* (2012), 5.

102. Ackers, “Women, citizenship, and European Community law: The gender implications of the free movement provisions”, 16 *Journal of Social Welfare and Family Law* (1994), 393–394.

103. *Teixeira* and *Ibrahim*, both cited *supra* note 40.

104. On distinctions created by the cases, see O’Brien case note on *Ibrahim & Teixeira*, 48 *CML Rev.*, 203.

105. Somek, *Individualism* (OUP, 2008), p. 225.

106. Note Case C-77/95, *Züchner*, [1996] ECR I-5689.

dependent upon – or have rights that are derivative<sup>107</sup> from – another. Hence in order to claim equal treatment rights which make the “enjoyment” of EU residence rights more than a right to destitute presence, but healthy, humane enjoyment of that residence, they must be the family members of migrant workers, or be charged with the care of the EU national child of a current/former migrant worker (as in *Teixeira* and *Ibrahim*).

The fact that such people do not attract rights in themselves leads to potentially arbitrary distinctions – so that someone present in a host State for four and a half years, with a couple of pre-school age children, may face a welfare cliff edge as compared to someone present for a few months whose child is enrolled in school. It amplifies the distorted meaning given to the word “dependence” when much economic activity, as was partly recognized in *Carpenter*,<sup>108</sup> depends on the family unit and care given within, rather than merely bankrolling it.<sup>109</sup> And it leads to the treatment of the carer as a shadow, or ex utero vessel, an appendage to the child, who, so long as they are “the right sort” of EU child<sup>110</sup> – born to a migrant worker, in school – has a comparatively full legal personal identity.

We have not come far from the finding in *Züchner*<sup>111</sup> that unremunerated care work, whatever level of competence required, and however full-time, cannot be recognized as economic activity. There, the Court did acknowledge that often care requirements for persons who become incapacitated “must be provided by an outsider in return for remuneration if there is no one else, whether or not a member of the family, who will do so without payment”. Given that such paid activities are frequently funded by statutory social and care services, this effectively concedes that unremunerated care workers subsidize Member States. But the Court went on to say that including them in the definition of economic activity “would have the effect of infinitely extending the scope of the directive, whereas the purpose of Article 2 of [Directive 79/7/EEC] is precisely to delimit that scope”.<sup>112</sup> So the Court equates coverage of unremunerated care to a total absence of limits – making it clear how ingrained is the adherence to the traditional model that

107. See the UK Border Agency application for a derivative residence card, cited *supra* note 40; the first three categories of applicants are carers.

108. Case C-60/00, *Carpenter*, [2002] ECR I-6279; Editorial comments, “Freedoms unlimited? Reflections on *Mary Carpenter v Secretary of State*”, 40 CML Rev. (2003), 537.

109. *Carpenter*, *ibid.*, 39 – A detriment to family life would also be a detriment “to the conditions under which Mr Carpenter exercises a fundamental freedom”.

110. Nic Shuibhne, “(Some of) the kids are all right: Comment on *McCarthy* and *Dereci*”, 49 CML Rev. (2012), 349.

111. *Züchner*, cited *supra* note 106.

112. *Ibid.*, para 15; referring to Council Directive 79/7 of 19 Dec. 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, O.J. 1979, L 6/24.



“economic” just ceases to make sense if conceived of differently.<sup>113</sup> This is in spite of the breadth of approach to Article 2 of the EEC Treaty taken in *Steymann*<sup>114</sup> in which unpaid odd jobs that might indirectly contribute to the economic life of a closed religious community in return for services (such as bed and board) could constitute economic activity.

Leaving aside this conceptually messy contradiction between unpaid care and unpaid odd jobs, it is of course problematic to characterize care as an economic activity, since we may not want to commodify more people.<sup>115</sup> But carers are already commodified under the system of free movement, and are found to be value-less. It is through attaining the status of the migrant worker that one graduates to full EU citizenship. Control over that status is both crucial and exclusionary. However, even if we do not try to attach monetary value to unpaid care work, EU law does not just disregard the work-like nature of care by excluding it from the definition of work. It goes further – care is treated as less significant and less valuable than illness, since care is not only excluded from the definition of *work*, but also from the definition of permitted *breaks* in work.

The provision for retention of worker status for EU migrant workers in Article 7(3) of Directive 2004/38 allows workers to be temporarily out of work due to involuntary unemployment, illness or accident without losing their worker status. This status is vital for their personal recognition and entitlements within the host State system – since citizenship alone confers little by way of social protection guarantee. A study on the national conformity of different Member State laws with Directive 2004/38 emphasized that worker status and its protection under Article 7(3) was “especially important”<sup>116</sup> because those with worker status “can never become an unreasonable burden”, so are entitled to full equal treatment and “have more rights under Article 24(2)” than those with a different status. Article 7(3) does not provide for retention of worker status when temporarily out of work due to care obligations, which is a mostly female social security “risk”.<sup>117</sup>

113. O’Brien, *op. cit. supra* note 100.

114. Case 196/87, *Steymann*, [1988] ECR 6159.

115. And we may not want to suggest that the “rewards and satisfactions” reported by many carers must be translated into remuneration: Glendinning, et al., “Care provision within families and its socio-economic impact on care providers”, (2009) *Report for the European Commission DG EMPL Working Paper EU 2342*. York, University of York social policy research unit.

116. Conformity Study of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Milieu Ltd. in consortium with the Europa Institute, 2008): The Netherlands.

117. On the gendering of care: Pickard, “Informal care for older people provided by their adult children: Projections of supply and demand to 2041 in England”, (2008) *Report to the Strategy Unit and Department of Health*. London, personal social services research unit.



As a consequence, years on from *Züchner*, we see in *Dias* the treatment of care as a rights cliff edge: there, the claimant had a period of “not working”<sup>118</sup> while caring for her child, who had been ill. While acknowledging that her childcare responsibilities had been exacerbated by the child’s illness, and by domestic violence, the Court of Appeal in England and Wales characterized her caring period as “perfectly comprehensible but voluntary”<sup>119</sup> unemployment. The questions referred to the ECJ centred on the acquisition of permanent residence, using periods of “lawful” (i.e. employed) residence before the transposition of Directive 2004/38, and/or adding periods together from either side of a “not lawful” – i.e. not remunerated – period of residence. The Court did not dispute the characterization of the claimant’s care periods as voluntary unemployment leading to a loss of lawful residence, but found that, where the claimant had a prior period of residing and working for five years,<sup>120</sup> subsequent periods without a right to reside of less than two years should not affect (though not count towards) the acquisition of permanent residence – i.e. the clock should not be automatically turned back. The Court claimed that such periods were analogous to periods spent outside the host State – provision for which was made in the Directive,<sup>121</sup> and had been clarified in *Lassal*.<sup>122</sup>

So the best that unremunerated care workers can get in terms of recognition is to be treated as people *not present*, as absences. In *Dias*, the ECJ stated that the “integration objective” of the permanent residence provision “is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State” (para 64); however, arguably, it is not based on territorial or time factors at all if the only decisive “qualitative” element of integration is remuneration.

Were Article 7(3) Directive 2004/38 to cover temporary periods of care, then those with work patterns punctuated by fluctuating care responsibilities could retain worker status during those periods, rather than face an automatic rights cut-off. The Court of Appeal of England and Wales seemed to suggest, in *Dias*, that the floodgates argument – that eternal last resort of social and legal conservatives<sup>123</sup> – prevented the legislature from considering the coverage of carers in Directive 2004/38, noting that “the circumstances of a parent, of either sex, who gives up employment to care for a child but

118. Case C-325/09, *Dias*, [2011] ECR I-6387, para 23.

119. As expressed by the Court of Appeal of England and Wales: *Secretary of State for Work and Pensions v. Dias*, [2009] EWCA Civ 807 [2010] 1 CMLR 4; 20.

120. She was not entitled to permanent residence on the basis of these 5 years since they included time completed before the transposition of the Directive.

121. In Art. 16(3).

122. Case C-162/09, *Lassal*, [2010] I-9217.

123. It was also invoked in *Züchner*, cited *supra* note 106.

anticipates a return after some as yet unknown time are very common”.<sup>124</sup> The implications are that it would extend rights to an unmanageable degree, and that the “unknown time” element would add too much complexity and threaten indefinite benefit claims. However, there is no reason to suppose that temporary care responsibilities should be more open-ended than temporary sickness, or less susceptible to a statutory time limit. Moreover, it is the very commonplace nature of the activity that suggests that the co-ordination scheme is poorly adapted to the reality of female working lives. Just suggesting that the exclusion of care from Article 7(3) Directive 2004/38 strikes an appropriate balance between “the interests of migrants and of host States and their taxpayers”<sup>125</sup> fails to appreciate that it is in fact *taxpayers* – female workers in atypical work patterns – who are being excluded. This gender tilt is even more evident in the pregnancy gap: another exclusion from Article 7(3).

### 3.2. *The pregnancy gap*

Pregnancy and maternity<sup>126</sup> do not feature in Article 7(3) of Directive 2004/38 as a permitted temporary break during which worker status may be retained. As a consequence, the lower courts of England and Wales have rejected claims for social assistance from women with sick babies, who left their jobs during pregnancy and were deemed to lose worker status. They intended to return to work in spite of temporary delays due to infant illnesses. According to decision makers, the Directive was not meant to allow such women to temporarily retain worker status and their rights cut-off is intentional on the part of the Union.

One case in which this reasoning was startlingly clear is the Social Security Commissioner case CIS/3182/2005.<sup>127</sup> There, the claimant’s plans to seek work were interrupted by her child’s illness and intensive care requirements. The Commissioner (Mark Rowland) outlined what he saw as the policy reasons for disallowing benefits in such a situation – essentially to avoid the UK becoming financially responsible – stating that it was legitimate to “put pressure on people to leave the United Kingdom”.<sup>128</sup> The Commissioner went on to accept that the claimant might not have been able to simply go back to her

124. *Dias*, cited *supra* note 119, 21.

125. *Ibid.*

126. Which are here treated as part of the same process recognizing that pregnancy and birth should entail a post-birth period of not working. See *infra* note 144.

127. Decision date 1 Sept. 2006, available at <[www.administrativeappeals.tribunals.gov.uk/judgmentfiles/j2043/CIS%203182%202005-00.doc](http://www.administrativeappeals.tribunals.gov.uk/judgmentfiles/j2043/CIS%203182%202005-00.doc)>, last accessed 11 Aug. 2013.

128. *Ibid.*, 14.

home State, as “it might have been impossible for her to travel to Holland while the child was ill in hospital”. But he found that even so, she should not be entitled to support while in the UK, because at an earlier point “she had known she was pregnant”, and at that point, by staying in the UK assumed the risk of being without support in the event of not being able to work or to return to Holland at a later date. In other words, she voluntarily assumed the risk of having an ill child, “so it cannot be said that she had not previously had the opportunity to return to Holland where she would have been entitled to benefit”.<sup>129</sup> The message derived from Directive 2004/38 is a remarkable one – that women’s free movement rights and choices are to be curtailed, *on becoming pregnant*, because at that point risks arise of having to stop work, and of delays in returning to work.

The Directive does make some acknowledgement of pregnancy in the provision on permitted breaks in residence for the purposes of acquiring permanent residence rights in a host State. Article 16(3) allows for one period of absence of up to 12 months “for important reasons such as pregnancy and childbirth” etc. The absence of a provision in 7(3) to enable women not working due to pregnancy and maternity to *stay in the host State*, combined with some protection if they return temporarily to *the home State* all seem to point towards a pregnancy centrifuge – negative incentives to go back home until resumption of actual work allows for resumption of worker status.

A case currently pending before the ECJ, *St Prix*, also involves a migrant worker who gave up her job in the later stages of pregnancy, as her work was physically demanding. Her baby was ill at birth, delaying her return to work, though she did in fact return to work when the baby was three months old, so the period of claim for social assistance was quite short, in spite of her baby’s heart condition which caused it to die when a year old. Her claim for income support during the period she was out of work was refused, and appeals to the First Tier Tribunal and Upper Tribunal dismissed on the ground that she did not have a right to reside deriving from EU law, with Judge Ward concluding that the omission of pregnancy in Article 7(3) was “a deliberate one”.<sup>130</sup> The appeal to the Court of Appeal was also dismissed.<sup>131</sup> The case has been appealed to the Supreme Court, which has referred the issue to the ECJ.<sup>132</sup>

129. *Ibid.*, 17.

130. Pointing to the legislature’s choice not to take up the amendment including pregnancy in the provision, as proposed by the Committee on Women’s Rights and Equal Opportunities; *Secretary of State for Work and Pensions v. JS* [2010] UKUT 131 (AAC), 22.

131. *JS v. Secretary of State for Work and Pensions* [2011] EWCA Civ 806.

132. *Jessy Saint Prix v. Secretary of State for Work and Pensions* [2012] UKSC 49. Case C-507/12, pending.

Although the Court of Appeal contends that the exclusion discriminates lawfully<sup>133</sup> on the grounds of a right to reside,<sup>134</sup> in fact it discriminates on the grounds of sex. Pregnancy and maternity directly and only concern women, and compared to illness, *inevitably* entail some incapacity for work – as well as a period during which paid work is not desirable. In a powerful judgment accompanying the Supreme Court’s referral to the ECJ, Hale SCJ argued in favour of worker status retention, noting that the need for some post-birth period of not working is reflected in UK welfare law “not only for the sake of the mother but also for the sake of her child”.<sup>135</sup> It would be open to the Union to establish a longer appropriate maternity period than that reflected in the provisions quoted by Hale SCJ, since a finite period of statutory maternity leave for discontinuous workers need not cost more to the public purse than that provided for continuous ones.<sup>136</sup>

The pregnancy gap is an example of structural sex discrimination reinforcing existing power relations,<sup>137</sup> and entrenching the stratification of EU personhoods. Pregnant women are perceived as greater threats to the benefit system, so less “responsible”,<sup>138</sup> and ultimately, because of the loss of worker status, less complete persons than sick men. In the context of illness and involuntary unemployment, a small amount of work can legitimately give rise to retained worker status and entitlement to benefits for an unknown period. In *Vatsouras and Koupatantze*, Mr Koupatantze made a claim for social assistance on the basis of retained worker status having been made unemployed after less than 2 months’ work; the ECJ found that even in the face of limited remuneration and a short duration of work, worker status could not be ruled out, which would in turn lead to coverage by Article 7(3).<sup>139</sup>

133. I.e. with justification.

134. *JS*, cited *supra* note 132, 21, suggesting the case is “manifestly” not one of direct discrimination.

135. *Saint Prix*, *supra* note 133, 19: since UK nationals are not required to seek or be available for work from 11 weeks before the expected date of confinement until 15 weeks after the pregnancy has ended: regulation 4ZA and para 14 of Schedule 1B to the Income Support (General) Regulations 1987 (SI 1987/1967).

136. Those in continuous employment would be drawing Statutory Maternity Pay, which in the UK is in effect mostly paid by the State; HMRC (2012), *Employer Helpbook For Statutory Maternity Pay*, E15 Crown copyright, <[www.hmrc.gov.uk/helpsheets/e15.pdf](http://www.hmrc.gov.uk/helpsheets/e15.pdf)>, last accessed 11 Aug. 2013, p. 14. “Recovering SMP”. Indeed Income Support for discontinuous workers could cost less as SMP is paid at a flat rate whereas Income Support is comprised of a basic allowance and topped up depending on circumstances.

137. Kay, Gaucher, Peach, Laurin, Friesen, Zanna, and Spencer, “Inequality, discrimination, and the power of the status quo: Direct evidence for a motivation to see the way things are as the way they should be”, 97 *Journal of Personality and Social Psychology* (2009), 421.

138. See section 3 *infra*.

139. Joined Cases C-22 & 23/08, *Vatsouras and Koupatantze*, [2009] ECR I-4585, paras. 30–31.

Pregnant migrants, in contrast, are subject to greater suspicion, with pregnancy treated as a badge of benefit tourism. Stanley Burnton LJ in the Court of Appeal commented that finding in favour of the claimant could lead to non-nationals coming “to this country in an advanced state of pregnancy, [in order to] work for a week as an agency worker, stop work (with no continuing employment contract), and then be entitled to income support”.<sup>140</sup> Such assumptions condone systemic hostility towards, and repelling of, migrants who are or become pregnant. There are many reasons why employment comes to an end – a worker may be on a fixed term contract,<sup>141</sup> or her activities may be too physically onerous to continue during pregnancy, and it is possible that in a small business no alternative employment is available. Or, she may have made an advance flexible working request and had it denied – since fairly dilute national provisions<sup>142</sup> and non-existent EU ones<sup>143</sup> do not create a right to flexible working.<sup>144</sup> Thus rigid work arrangements might be unsustainable in the face of prohibitively expensive and inflexible child care options.<sup>145</sup> So, knowing that her job will be incompatible with having a child, she may feel compelled to resign and look elsewhere, being channelled out of full time work and into a select few labour sectors.

The treatment of a pregnancy-break as an act of civic irresponsibility, and grounds for demotion of status and EU-identity, is difficult to defend morally, and calls into question the purported rationality – and implied inevitability – of market citizenship. The fear that pregnant migrants, unlike sick ones, will

140. *JS*, cited *supra* note 132, 25.

141. The claimant in *JS* was an agency worker – *ibid.*, para 2. Agency/fixed term/atypical workers are more likely to have difficulties “in relation to managing pregnancy in the workplace” and so their employment contract is made more precarious by pregnancy: James “Law’s response to pregnancy/workplace conflicts”, 17 *Feminist Legal Studies* (2007), 175.

142. Amounting to a rejectable right of request: for parents of young and disabled children see the Employment Act 2003; for carers of adult dependents see the Work and Families Act 2006 (s. 12(2)(ii)) and the Flexible working (eligibility, complaints and remedies) (amendment) regulations 2006, (SI 2006/3314).

143. Notwithstanding rhetorical drives to do something about reconciling work with care duties: in 2006 the European Commission declared a need to explore reconciliation action including “leave to care for elderly parents or disabled family members”: European Commission, “Communication from the commission: First stage consultation of European social partners on reconciliation of professional, private and family life”, SEC(2006)1245, 10.

144. A study by the National Childbirth Trust found that 16% of flexible work requests made by respondents resulted in no change in working patterns, and 7% changed their employer. National Childbirth Trust, *The experiences of women returning to work after maternity leave in the UK: A summary of survey results* (2008), 12.

145. Tomlinson, “Gender equality and the State: A review of objectives, policies and progress in the European Union”, 22 *The International Journal of Human Resource Management* (2009), 3767; Tomlinson, Olsen and Purdam, “Women returners and potential returners: Employment profiles and labour market opportunities: A case study of the United Kingdom”, 25 *European Sociological Review* (2009), 349.

do a bit of work in order to qualify for benefits belies the fact that pregnancy and maternity punctuate continuous working lives. Women are already by default – and in line with Union objectives<sup>146</sup> – in the labour force anyway before pregnancy,<sup>147</sup> and most do not view having children as a cut-off point, or the trigger for a lengthy work break. The Secretary of State submitted in *St Prix* that Article 7(3) should not cover pregnancy because “some women, once pregnant, may never return or intend to return to work”.<sup>148</sup> This attitude is widely shared by employers – a study cited by the NHS found that “The majority of employers who responded to the survey (64%) did not expect women to return to work after maternity leave regardless of their role within the organization”.<sup>149</sup> But this belief is a generation out of step; decades old studies over the last few decades have shown that women are highly likely to return to working after their maternity period. The Policy Studies Institute findings in 1997 suggested that not only were they likely to go back to work, but that they were taking less maternity leave than in previous years, possibly due to financial concerns but also career concerns,<sup>150</sup> neither of which are likely to have dampened down since then. A US study in 1998 that focused on women who were working prior to childbirth suggests that those expressing intentions to be only temporarily out of work can be trusted to act on those intentions.<sup>151</sup> A study in Germany found that those in part time work (who may be characterized as having done “a bit of work”) were actually more rapid returners to the labour market.<sup>152</sup>

146. The Lisbon Strategy set specific targets for increasing the female employment rate. *The Lisbon Strategy 2000–2010: an analysis and evaluation of the methods used and results achieved*, DG Internal policies: Employment and social affairs (2010) IP/A/EMPL/ST/2008-07, 12.

147. Employment rates for women age 20–64 in the EU in 2010 were 62.1% compared to overall employment rates of 68.6%: Eurostat: *News release* “Labour force survey employment rate for those aged 20 to 64 in the EU27 decreased to 68.6% in 2010”, 96/2011 – 29 June 2011.

148. *St Prix*, cited *supra* note 133, 17.

149. NHS Health for work blog at <[www.health4work.nhs.uk/blog/2011/08/mothers-returning-work-maternity-leave/](http://www.health4work.nhs.uk/blog/2011/08/mothers-returning-work-maternity-leave/)>, last accessed 13 Aug. 2013.

150. In 1997 it was found that “Two thirds of mothers now return to work after having a baby”. See Policy studies institute University of Westminster, Press release date: 30 June 1997, at <[archive.psi.org.uk/news/pressrelease.asp?news\\_item\\_id=63](http://archive.psi.org.uk/news/pressrelease.asp?news_item_id=63)>, last accessed 11 Aug. 2013.

151. Glass and Riley, “Family responsive policies and employee retention following childbirth”, 76 *Social Forces* (1998), 1401. The number of women who expressed a plan to start work in a *different* job after a maternity period – so in a similar situation to the claimant in *St Prix* – was very close to the number who actually *did* exactly that – 21.75% and 21.05% respectively (most intended to, and did, remain in their current job), 1416.

152. Ondrich, Speiss, Yang and Wagner, “The liberalisation of maternity leave policy and the return to work after childbirth in Germany”, 1 *Review of economics of the household* (2003), 99.



The pregnancy gap touches directly on the fracturing of EU personhood. As the ECJ has noted, unless governed at EU level, there is the risk that worker status may be modified by Member States willing to “eliminate at will the protection afforded by the Treaty to certain categories of person”,<sup>153</sup> but we have here one large category of person, women, being accorded an automatically more precarious status. Although one of the recitals of Directive 2004/38 states that the Directive “respects fundamental rights and freedoms and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union”,<sup>154</sup> the Commission has elsewhere asserted that gender equality is *not* just “about having well written statements”, and “cannot be something you add on ... by saying for example ‘we don’t discriminate’”.<sup>155</sup> The Directive’s equality credentials cannot simply be established in a recital.

However, it is possible that the Directive left it open to Member States to fill the gaps – that it *does not prohibit* coverage of pregnant migrants, since the recital added that “Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex”. Moreover, the judgments in *Baumbast*<sup>156</sup> and *Mangold*,<sup>157</sup> and the implementation duties in the Charter of Fundamental Rights<sup>158</sup> taken together may be read as creating a duty for Member States to interpret EU and national legislation in such a way as to avoid discriminatory effects,<sup>159</sup> for instance by reading extra categories into Article 7(3). But there are no signs that Member States have recognized that there are gaps to be filled. The conformity study mentioned above shows rather close adherence to the wording in the Directive in implementing acts, or in some cases vague wording appearing to offer

153. Case 75/63, *Hoekstra*, [1964] ECR 177, 1.

154. Directive 2004/38, Recital 31.

155. European Commission, *EQUAL Guide on Gender Mainstreaming Employment & European Social Fund* (2004), 9 and 5 at <[ec.europa.eu/employment\\_social/equal/data/document/gendermain\\_en.pdf](http://ec.europa.eu/employment_social/equal/data/document/gendermain_en.pdf)>, last accessed 11 Aug. 2013.

156. Case C-413/99, *Baumbast*, [2002] ECR I-17091.

157. Case C-144/04, *Mangold*, [2005] ECR I-9981.

158. Art. 51(1) on scope to include implementation of EU law & Article 21(1) on the prohibition of discrimination on grounds of sex. O.J. 2000, C 364/01; in Case C-45/12, *Office national d’allocations familiales pour travailleurs salariés (ONAFTS) v. Radia Hadj Ahmed*, judgment 13 June 2013, nyr, the Court stated that “the fundamental rights guaranteed in the legal order of the European Union, including the Charter, are applicable in all situations governed by European Union law”, 56.

159. Given that non-discrimination is a “general principle” of Union law, *Mangold*, cited *supra* note 157, 75, and limitations on the free movement of workers created by secondary legislation must be applied nationally in accordance with the general principles of Union law, *Baumbast*, cited *supra* note 156, 94. See also Case C-555/07, *Kücükdeveci*, [2010] ECR I-365 on duties of national courts to disapply discriminatory national provisions.



protection to fewer people than the Directive does.<sup>160</sup> The UK interpretation of the Directive appears to be in line with the Directive's wording. The conformity study picks up on one omission,<sup>161</sup> but "for the rest" of regulations dealing with Article 7(3), which must include the non-coverage of pregnancy/maternity, "it could be said that the UK legislation is at least as generous as the Directive".<sup>162</sup>

The Article 7(3) pregnancy gap is an extreme example, and may be soon partly closed – though probably with another "patch" that will be curbed by Member States, since it is doubtful whether it will encompass a right to a decent period of maternity leave, and/or periods of unpaid care (for children or sick/disabled adults). And the prospect of recognizing the labour value of these activities as not just breaks in work but actually as work seems vanishingly small under existing arrangements. The EU free movement framework is centred around a gendered conception of economic activity – a conception that has been criticized as giving scant recognition to reproductive labour,<sup>163</sup> defining those out of the labour market as inactive, and dependent "no matter how fully engaged or responsible for others they may be".<sup>164</sup> Free movement and equal treatment are arguably the core citizenship rights, yet are asymmetrically enjoyed, according to an economic profile which is not gender neutral and prevents women from feeling the full protection of EU citizen status;<sup>165</sup> this impacts upon the value and recognition of persons. As Collier et al note, (referring to, and using the spelling of, Thomas Hobbes) "Once all 'men' are declared 'equall', then those who are manifestly not equal cannot be 'men'".<sup>166</sup> Within the free movement framework, women are manifestly not equal, and therefore are not quite the EU citizens that men are.

The language of citizenship is thus deployed in the way that Hervey described the language of universalism in 1995 – that is, "to reinforce and perpetuate existing social and political arrangements, in particular the

160. Conformity Study, cited *supra* note 116.

161. The regulations do not specifically cover those in a fixed term employment contract of less than a year or who become unemployed during the first year.

162. Conformity Study, cited *supra* note 116: United Kingdom.

163. Moebius and Szyszczak, "Of raising pigs and children", 18 YEL (1998), 125.

164. Williams, "Good-enough principles for welfare", 28 *Journal of Social Policy* (1999), 676.

165. Currie, "The transformation of Union citizenship", in Dougan and Currie (Eds.), *50 years of the European Treaties: Looking Back and Thinking Forward* (Hart, 2009); Morgan and Stalford, "Disabled people and the European Union: Equal citizens?", in Barnes and Mercer (Eds.), *The Social Model of Disability: Europe and the Majority World* (The Disability Press, 2005).

166. Collier, Maurer and Suárez Navaz, "Sanctioned identities: Legal constructions of modern personhood", 2 *Identities* (1997), 10.

position of the dominant in those arrangements".<sup>167</sup> The gendered stratification of rights reflects a segmentation of citizens in which rights are vested in particular activities, and not in people, so that a person's self-hood on the European stage is contingent upon those activities. Where the economic fulcrum has a tendency to exclude people along potentially unsavoury lines of selection – such as gender and disability – it is submitted that we should recognize and criticize these effects, and consider whether alternative means of allocating and limiting rights would be more morally coherent. Market-centric citizenship both draws from and feeds into the EU wide responsabilization and activation paradigm, explored in the next section. The construction of personhood for migrants helps to normalize similar principles in EU soft welfare policy, and rationalize them according to a particular conception of fairness – making rights more contingent upon economic duties, and making persons responsible for their poverty.

#### 4. Responsibilization and the redefinition of fairness

Market citizenship does not connote a collective sense of solidarity, or of shared endeavour,<sup>168</sup> but is founded upon an individualistic approach to social problems – those migrants who cannot work are deemed irresponsible, fall out of favour with host Member States, and fall through the protection gaps. We are faced with something paradoxical – an atomistic, rather than societal, citizenship. EU citizenship, it seems, does not provide the answer to social injustice within Union law. Splitter notes that concepts of patriotism, nationalism and citizenship are loaded with “heavy and potentially divisive language” unnecessary for urging “the appropriate moral point”,<sup>169</sup> but it is possible that the heavy and divisive strata created from EU citizenship are not just unhelpful, but *prevent* us from urging appropriate moral points.

Those personhood strata speak to a responsabilization discourse, in which social protection is subsidiary to economic/employment policies. The responsabilization paradigm, and the consequent impact upon personhood, is a natural fit for a system premised on freedom; as Collier et al. note, “if people are free to act as they wish they become responsible for the consequences of

167. Hervey, “Migrant workers and their families in the European Union: The pervasive market ideology of Community law”, in Shaw and More, *op. cit. supra* note 21, 91.

168. “Citizens in the European Union’s approach are the object of caretaking policy-making, not its subjects” according to Neunreither, “Citizens and the exercise of power in the European Union: Towards a new social contract?”, in Rosas and Antola, *op. cit. supra* note 36, p. 3; also Everson, *op. cit. supra* note 21, pp. 84–85: “The market citizen cannot command the market... It is the part which the citizen proper is expected to play”.

169. Splitter, *op. cit. supra* note 23, p. 270.

their actions”.<sup>170</sup> Thus female EU migrants are responsible for later risks of worklessness – such as having a sick child – from the point they become pregnant, and *Zambrano* carers are responsible for their destitution if they choose to stay in a host Member State without benefits. Somek points to Weber’s prediction that “responsibility” would come to rationalize our indifference to poverty, as it “serves consistently the interest of those who are too avaricious to give”.<sup>171</sup> Here, it serves the interests of those unwilling to extend protection to non-nationals. This also helps reshape our thinking in terms of fairness.

The construction of EU citizenship around migrant work helps to fortify broader activation principles that relocate national welfare entitlement, putting groups such as the disabled and lone parents at greater risk of social and financial exclusion.<sup>172</sup> The fact that such exclusions go relatively unquestioned<sup>173</sup> in a migration context helps to make national welfare systems more receptive<sup>174</sup> to the soft law aims of responsabilization and activation,<sup>175</sup> and helps to normalize the targeting of “the inactive... like disabled, lone mothers, women at home, early retired, or those on sick leave”.<sup>176</sup> The ideological thrust of the Union’s policy message is clear – “more people need to work”<sup>177</sup> and benefits must be withdrawn to decrease “the burden for the welfare system”.<sup>178</sup> As with EU migrants, non-workers are considered

170. Collier et al., op. cit. *supra* note 166, 11.

171. Somek, *Engineering Equality* (OUP, 2011), p. 87.

172. Haux highlights some policy gaps in “Activating lone parents: An evidence-based policy appraisal of the 2008 welfare-to-work reform in Britain”, (2010) *ISER Working Paper No. 2010–29*.

173. Cf. an analysis of regional inequity – Strumia, “Remedying the inequalities of economic citizenship in Europe: Cohesion policy and the negative right to move”, 17 *ELJ* (2011), 725.

174. The influence of EU law upon national welfare reform and welfare discourse in the UK is charted in O’Brien, op. cit. *supra* note 4.

175. Flexicurity (A key policy objective, see “Flexicurity”, DG Employment, social affairs and inclusion, <ec.europa.eu/social/main.jsp?catId=102&langId=en>, last accessed 11 Aug. 2013) is undoubtedly an activation measure – in the Commission Communication “Towards common principles of flexicurity”, SEC(2007)861-2 COM(2007)359 final, there were 36 mentions of active labour market policies.

176. Public employment services 2020 working group *PES and EU 2020: making the employment guidelines work* (2011), adopted by heads of PES in Budapest, Hungary on 23–24 June 2011, 4.

177. European Commission, DG Employment, social affairs and inclusion, “Agenda for new skills and jobs”, at <ec.europa.eu/social/main.jsp?catId=958&langId=en>, last accessed 11 Aug. 2013.

178. Council working party on social questions: “Towards common principles of flexicurity – Draft Council conclusions”, (2007) SOC 476 ECOFIN 483, Annex, Common principles (3).

inactive and irresponsible,<sup>179</sup> and the withdrawal of protection has little regard for the quality, rather than simple quantity of work.<sup>180</sup> The emphasis is on reducing State support and State costs,<sup>181</sup> and so activation principles have been criticized as ignoring just redistribution in favour of the bare minimum to force people back into the labour market.<sup>182</sup> The responsabilization paradigm is an EU-wide phenomenon of questionable efficacy,<sup>183</sup> but market citizenship, with its economic conditions for acquiring full personal status within EU law, has the same roots and aims as activation measures which centre on the “homo economicus”<sup>184</sup> and “neutralize the varied lived realities of non-employment (for example [parenting, or caring for a disabled adult, or being ill or disabled])”.<sup>185</sup> It stigmatizes those not in paid work; while Wright suggests that activation makes employment the “only valid source of well-being”,<sup>186</sup> market citizenship makes employment the only valid source of complete *being* in the Union.

The linkage between market citizenship and activation measures is especially clear where activationist welfare reforms target non-nationals, such as the *Zambrano* reforms in the UK, explored earlier. A further UK example is provided by the future benefit “Universal Credit”. This replaces a number of existing benefits, and contains a Child Element to replace existing Child Tax

179. A report for the Commission emphasizes the “strong self-activity and self-responsibility of the job-seeker,” “From employment to ‘activation’ and self-responsibility”, *The role of the Public Employment Services related to “Flexicurity” in the European Labour Markets*, VC/2007/0927 Final report (March 2009, Policy and Business Analysis), 37.

180. A problem highlighted in the French activation measures by Beraud and Eydoux, who note the creation of low wage and low status jobs. “Redefining unemployment and employment statuses: The impact of activation on social citizenship in France”, in Betzelt and Bothfeld, op. cit. *supra* note 97.

181. A key objective of the measures according to the Council of Ministers is to reduce state costs: (EPSCO) *Joint Employment Report 7396/11* (2011) (2).

182. Betzelt and Bothfeld, op. cit. *supra* note 97.

183. E.g. Bothfeld and Betzelt have criticized the focus on cheap and short term strategies in Germany: “The erosion of social status: The case of Germany” in *ibid.*; see also Nybom, “Activation and ‘coercion’ among Swedish social assistance claimants with different work barriers and socio-demographic characteristics: What is the logic?”, 22 *International Journal Social Welfare* (2013), 45–57. Knijn et al. describe the Netherlands as having developed “within ten years a ‘shock and awe’ policy towards lone parents”. Knijn, Martin and Millar, “Activation as a common framework for social policies towards lone parents”, 41 *Social Policy & Administration* (2007), 638, 650. See also Dostal, “The workfare illusion: Re-examining the concept and the British case”, 42 *Social Policy and Administration* (2008), 19; and Larkin, “The legislative arrival and future of workfare: The Welfare Reform Act 2009”, 18 *Journal of Social Security Law* (2011), 11.

184. Betzelt and Bothfeld, op. cit. *supra* note 97, p. 13.

185. Wright, “Relinquishing rights? The impact of activation on citizenship for lone parents in the UK”, in Betzelt and Bothfeld, *ibid.*, p. 65.

186. *Ibid.*

Credit. Current plans are to only pay it to claimants whose children are actually present in the UK.<sup>187</sup> Although the regulations do not require certain EEA nationals to be “habitually resident”, they emphasize a new<sup>188</sup> “basic condition to be in Great Britain”.<sup>189</sup> The UK is not the only site of immigrant-targeting reforms. Bredahl also notes how Danish welfare reforms single out immigrants (including EU migrants).<sup>190</sup> The introduction allowance was created specifically for immigrants and Danish returners who were out of the country for seven years or more, providing an allowance between 35–50% lower than the standard social assistance; Briedahl quotes the Minister for Employment defending the policy choice to “activate” immigrants in particular.<sup>191</sup>

The suspicion of EU migrants infuses EU citizenship, reshaping our ideas of civic relationships, humanity and fairness, ideas that in turn mould our attitudes to the purpose and shape of welfare.<sup>192</sup> The responsibility model of fairness has something in common with Rawls’ equality of opportunity,<sup>193</sup> which assumes a game theory approach in which fairness is about “what’s fair for me”,<sup>194</sup> not about the sort of society we wish to live in. But fairness is not an objective concept; there is a whole discipline of fairness theory to indicate that it is open to contestation,<sup>195</sup> and it is possible to invoke other constructions

187. The Universal Credit Regulations, SI 2013 No. 376, Reg. 4(7).

188. Hitherto, Regulation 883/2004 On the coordination of social security systems, O.J. 2004, L 166/1 had meant that Child Tax Credit was required to be paid with respect to children in other Member States of migrant worker parents in the UK: “Child benefit and child tax credit for children resident in other EEA countries”, House of Commons library, social policy section SN06561, 13 Feb. 2013, at <[www.parliament.uk/briefing-papers/SN06561.pdf](http://www.parliament.uk/briefing-papers/SN06561.pdf)>, last accessed 11 Aug. 2013.

189. DWP, *Guidance for decision makers* “International issues: Chapter C1: Universal Credit”: section 1050: “Persons with certain specific rights to reside are not subject to the requirement that they be habitually resident...*they only need to be present in GB*”, at <[www.dwp.gov.uk/docs/admc1.pdf](http://www.dwp.gov.uk/docs/admc1.pdf)>, last accessed 11 Aug. 2013.

190. Bredahl, “Social security provision targeted at immigrants – A forerunner for the general change of Scandinavian equal citizenship? A Danish case study”, in Betzelt and Bothfeld, op. cit. *supra* note 97, p. 50.

191. Ibid.

192. On the relationship between suspicion and fairness, see Bostedta and Brännlund, “Rationality, fairness and the cost of distrust”, 41 *The Journal of Socio-Economics* (2012), 345.

193. Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001).

194. In that within the Rawlsian construct terms of a social contract are set according to what each person would accept, serving each participant’s rational advantage.

195. Cappelen et al have concluded that there is considerable heterogeneity of conceptions of fairness and responsibility. Cappelen, Sørensen and Tungodden, “Responsibility for what? Fairness and individual responsibility”, 54 *European Economic Review* (2010), 429; see also Corcho, “A proposal to unify some concepts in the theory of fairness”, 101 *Journal of Economic Theory* (2001), 540; Egger and Kreickemeier, “Fairness, trade, and inequality”, 86 *Journal of International Economics* (2012), 184; Fong, “Social preferences, self-interest, and the demand for redistribution”, 82 *Journal of Public Economics* (2001), 225; Kamas and Preston,

of fairness, equality and justice.<sup>196</sup> In a study on social protection adequacy, Nelson concluded that an emphasis on the principles of activation – principles governing EU market citizenship – “may have affected the moral foundations of European welfare states in terms of providing just social minimums”.<sup>197</sup> The way in which a fractured, economic personhood impacts upon our sense of morality is examined in the next section.

#### 4.1. *The market as the new morality*

Investing economic mobility with, and so divesting persons of, legal rights, undermines the moral claims of the law; it is here submitted that people are the fundamental moral units of society.<sup>198</sup> The irony of individualism is that it overlooks individuals, those fundamental moral units, whereas an approach that instead emphasizes the duties of society has a better chance of protecting the interests of individuals, especially the vulnerable. A failure to question the ideology behind market citizenship could mean that we sleepwalk from a market economy to a market society – two things which Sandel reminds us are, and should be kept, conceptually distinct.<sup>199</sup> What has been presented as a natural and logical progression in the EU context, economic citizenship, echoes policies that would appear more clearly politically loaded in a domestic context.<sup>200</sup>

The market origins of EU citizenship vest social protection rights in paid work. This has a detrimental impact upon those excluded, who may be left destitute, and upon the moral fabric of society, which may tolerate destitution. But it might also damage the workers, insofar as they are instrumentalized and commodified; they are meaningful as units of labour. This form of rights

“Distributive and reciprocal fairness: What can we learn from the heterogeneity of social preferences”, 33 *Journal of Economic Psychology* (2012), 538.

196. Drawing upon, e.g., Dworkin’s focus on equality of welfare and resources: Dworkin, “What is equality? Part 1: Equality of welfare”, 1 *Philosophy & Public Affairs* (1981), 185; id., “What is equality? Part 2: Equality of resources”, 10 *Philosophy & Public Affairs* (1981), 283; and Sen’s suggestion that justice should be about advancement not just creating idealized or transcendent models – Sen, *The Idea of Justice* (Penguin, 2010).

197. Nelson, “Social assistance and EU poverty thresholds 1990–2008. Are European welfare systems providing just and fair protection”, 29 *European Sociological Review* (2013), 387.

198. As Splitter contests it is “persons whose interests and concerns ought to be taken most seriously in ethical judgment and decision making”, op. cit. *supra* note 23, 258.

199. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin, 2012).

200. E.g. William Simon’s work in the US on economic citizenship was about making “personal liberty” paramount, and rejecting the “coercive levelling of egalitarianism”: Simon, *A Time for Truth* (Readers Digest Press, McGraw-Hill, 1978), p. 223.



allocation in the Union is perhaps unsurprising,<sup>201</sup> but it is nevertheless philosophically challenging – and has been for some time.<sup>202</sup> The commodification of workers within EU free movement law was criticized by Peebles,<sup>203</sup> who suggested that “it is only as a citizen-worker that ... one is granted the many rights accorded to commodities in the treaties” – though this was before the rise of “social” citizenship case law, which has since obscured, rather than replaced, the commodification process.

In spite of claims by different Advocates General that the migrant worker is “not a mere source of labour, but a human being”,<sup>204</sup> and that labour is not to be regarded as a commodity,<sup>205</sup> the EU free movement and social entitlement framework treats people as means for furthering the ends of the internal market.<sup>206</sup> And that social banner impacts upon conceptions of welfare, humanity and human rights. The “fundamental” language imbuing citizenship, which is intrinsically connected to free movement,<sup>207</sup> rather confuses the area of fundamental human rights, so that fundamental rights and fundamental freedoms are conflated. Back in 1997, Peebles, quoting Weiler and Lockhart, conceded that the ECJ had not yet “elevated market rights to human rights”.<sup>208</sup> However, it is submitted that it now has done so, helped by the discourse of citizenship blurring the boundaries between a market-based

201. Weiler pointed out in 1991 that we were dealing with a “highly politicized choice of ethos, ideology, and political culture: the culture of ‘the market’... [seeking] to remove barriers to the free movement of factors of production”, in id., “The transformation of Europe”, 100 *Yale Law Journal* (1991), 2477.

202. Ellerman points to Sabine’s suggestion that Cicero and Chrysippus were against treating men as living tools, and suggests the Stoics made similar arguments (Ellerman, “Inalienable rights: A litmus test for liberal theories of justice”, 29 *Law and Philosophy* (2010), 571) Kant famously denounced human instrumentalization, since rational beings “should not be used merely as means”, in *Fundamental Principles of the Metaphysics of Morals* (“Transition from popular moral philosophy”), 1785; translation Kingsmill Abbott. Schumpeter linked commodification with increasing inequality, insecurity and resentment: id., “Growing hostility” in *Capitalism, Socialism and Democracy* (Start Publishing LLC, 2012). More recently, inalienable rights theorists such as Ellerman have criticized the notion that rights are vested in anything other than people, and feminist theorists criticize the objectification process that commodification entails: Nussbaum, “Objectification”, 24 *Philosophy & Public Affairs* (1995), 249.

203. Peebles, op. cit. *supra* note 21.

204. A.G. Trabucchi in Case 7/75, *Mr and Mrs F v. Belgium*, [1975] ECR 696.

205. A.G. Jacobs in *Bettray*, cited *supra* note 26, 17.

206. Particularly evident in social dumping and worker posting cases, where workers are moved as cheap living tools. Joerges and Rödl, “Informal politics, formalised law and the ‘social deficit’ of European integration: Reflections after the judgments of the ECJ in *Viking* and *Laval*”, 15 *ELJ* (2009), 1.

207. *Iida*, cited *supra* note 63, 72.

208. Peebles, op. cit. *supra* note 21, 608.



and human-based right.<sup>209</sup> In practice, it has gone further, to elevate them *above* human rights, since the latter are frequently on the “back foot” if they are conceived as interferences with fundamental freedoms which must be justified.<sup>210</sup>

The 1990s commentary recognized that equal ranking was inadequate,<sup>211</sup> because market freedoms should not be equated with inherent human rights. Since the promotion of market freedoms, however, equal ranking seems to be the best approach on offer, as propounded by Trstenjak and Beysen,<sup>212</sup> and as partly adopted in *Schmidberger*.<sup>213</sup> But this demotes the importance of the person in herself, and suggests a moral content to market objectives.<sup>214</sup> While Sandel has argued that markets tend to crowd out morals,<sup>215</sup> and Somek that market based rationality is treated as stronger than morality,<sup>216</sup> it is argued here that in using economic citizens to displace persons, and deploying the language of fundamental rights and fairness, the market is treated *as* morality, which is arguably more potent.

If we step back and, instead of treating economic mobility as the epicentre of moral value, consider the consequences of market citizenship, we must ask how morally coherent the rights cliff edges are. To refer back to the cases mentioned in this article: is it moral that a woman who gave up work, intending to get another job once her child was born, is denied benefits and made destitute, even though she could not go back to her home State because her baby was so ill it was in hospital and could not be moved? Or is it moral that a tax-paying, working family relying on a *Ruiz Zambrano* right to reside to enable UK national children to remain in the Union should not be entitled to benefits designed to prevent child poverty? Or is it moral that the destruction of a family, and possibly devastating effects upon a child's future, should depend upon the parent's command of sufficient economic resources to

209. As evident in the fundamentalizing language: Wollenschläger, “A new fundamental freedom beyond market integration: Union citizenship and its dynamics for shifting the economic paradigm of European Integration”, 17 ELJ (2011), 1.

210. As argued in Spaventa, “Federalisation versus centralisation: Tensions in fundamental rights discourse in the EU”, in Dougan and Currie, op. cit. *supra* note 165.

211. Coppel and O'Neill, “The European Court of Justice: Taking rights seriously?”, 29 CML Rev. (1992), 669; Weiler and Lockhart, “‘Taking rights seriously’ seriously: The European Court and its fundamental rights jurisprudence – Part I”, 32 CML Rev. (1995), 51–94; Peebles, op. cit. *supra* note 21.

212. Trstenjak and Beysen, op. cit. *supra* note 15.

213. Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (where freedoms were also characterized as potential intrusions into fundamental rights, para 80).

214. See De Búrca, “The language of rights and European integration”, in Shaw and More, op. cit. *supra* note 21; Coppel and O'Neill, op. cit. *supra* note 211.

215. Sandel, op. cit. *supra* note 199.

216. Somek, op. cit. *supra* note 105 and 171.

exercise free movement? In accepting notions of economic responsibility we dodge questions of right and wrong.<sup>217</sup>

Clearly a change of approach would provoke criticism – not least accusations of inappropriate competence expansion. Reverse discrimination, by which mobile citizens are favoured above static ones, may be seen as a necessary side effect<sup>218</sup> to drawing up limits to the scope of EU law, while the other results noted above are the consequence of limited social affairs competence and non-harmonization.<sup>219</sup> But it is nonetheless important to recognize openly the effects of the system we have, to challenge its claims to fairness, and to defrock market citizenship of its moral robes. Unless we know what we have, we cannot make sensible decisions about possible change. Welfare is an example of an area in which governments must “constantly survey and alter [their] rules of property”, as Dworkin points out, adding that the norms of the market are inappropriate tools for the task, since they assume “the adequacy of the scheme already in place”.<sup>220</sup>

The will of the legislature and that of the Member States as masters of the Union may be invoked to suggest that the outcomes above are condoned, and that a more comprehensive notion of non-commodified personhood would not be tolerated. The patchwork results from the fact that the Member States want to carve up rights, to stratify people, and to allow many to fall through the gaps. There is some truth in this argument – as evident in the torrent of negative interventions with each new citizenship case. National xenoscepticism and reticence in contemplating European level social rights push the Union to an economistic minimalist approach, thickening the veil of non-interference under which a market agenda is pushed forwards as though ideologically neutral. But maybe the rights of citizenship ought not to be delineated according to the reluctance of Member States to treat each others’ nationals as in some way united to their own. To do so would suggest we have not come far from Weiler’s diagnosis that the Union’s value “is measured ultimately and exclusively with the coin of national utility and not community solidarity”.<sup>221</sup> Whatever the answer, the veil of non-interference is misleading;

217. Sandel claims political liberalism generally swerves questions of “comprehensive moral ideals” – he suggests political liberalism would “have a hard time explaining, in 1858, why Lincoln was right and Douglas was wrong”, “Political liberalism”, in *Justice: A Reader* (OUP, 2007), p. 369.

218. Or a “necessary evil” – Ritter, “Purely internal situations, reverse discrimination, *Guimont, Dzodzi* and Article 234”, 31 *EL Rev.* (2006), 690.

219. Since the Union’s competence “shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof” (Art. 153(4) TFEU).

220. Dworkin, *Law’s Empire* (Hart, 1998), p. 310.

221. Weiler, *op. cit. supra* note 201, 2481.

claims that welfare is inherently a national issue<sup>222</sup> are simply counterfactual. The EU is highly active in social policy areas, and the responsabilization agenda applied to migrants has wide ramifications.<sup>223</sup> As Chomsky has noted, judicial decisions and intellectual commentary, not legislation, have transformed conceptions of human rights and democracy.<sup>224</sup> Deference to the legislature does not make EU citizenship ideologically neutral, or immutable, and it does not discharge the duty of moral scrutiny.

Such scrutiny is even more important should the constraints of scope and competence be used to suggest that dissent is impossible, especially in the context of increased conceptual convergence around market ideals.<sup>225</sup> While O'Connell claims there is a shared, albeit unconscious global judicial sphere,<sup>226</sup> even stronger claims can be made of the EU and its Member States, thanks to an explicitly shared judiciary, shared legal norms, and shared market objectives.<sup>227</sup> The nature of the EU may make its positioning with regard to the individual predictable, but it is important to at least recognize it. Otherwise through bridging terms like citizenship we start unwittingly importing those principles into erstwhile non-market aspects of society. Welfare is the key example here, but others include employment strategies, responses to the economic crisis and the construction of human rights.<sup>228</sup>

222. Majone claims that "fairly homogeneous communities" are necessary for legitimately making "delicate value judgments about the appropriate balance of efficiency and equity": id., "Europe's 'Democratic deficit': The question of standards", 4 *ELJ* (1998), 14.

223. Somek describes "[m]ajor effects on the national social welfare state [that] originate from the individual pursuit of economic objectives", op. cit. *supra* note 105, 227, while Offe suggests that the EU requires nations to "unlearn" policy objectives, and "partially demolish entrenched institutional patterns". Offe, "The European model of 'social' capitalism: Can it survive European integration?", 11 *The Journal of Political Philosophy* (2003), 463.

224. Chomsky, op. cit. *supra* note 87.

225. Calling to mind the catechism of Thatcherism (TINA – "There is no alternative") used to push a neo-liberal agenda. See Levy, "Between neo-liberalism and no liberalism: Progressive approaches to economic liberalization in Western Europe", in Eichengreen, Stiefel and Landesmann, *The European Economy in an American Mirror* (Routledge, 2008).

226. O'Connell, op. cit. *supra* note 12, charting a neo-liberal convergence between South Africa, Ireland, India and Canada.

227. The idea of activationist convergence is explored in Eichhorst and Konle-Seidi, "Contingent convergence: A comparative analysis of activation policies", *Institute for the Study of Labor*, Discussion Paper Series IZA DP No. 3905 (Dec. 2008).

228. The UK case of *McDonald* saw budgetary constraints play a key role in determining whether Art. 8 ECHR and a right to reasonable adjustment had been infringed: *The Queen on the application of Elaine McDonald v. Royal Borough of Kensington and Chelsea*, [2010] EWCA Civ 1109, 66; Rix LJ stated that there was no such breach, because the error in assessing the claimant's care needs was the result of "the difficult task of balancing its desire to assist Ms McDonald with its responsibilities to all its clients within the limited resources available to it in its budget" (66). It was appealed to the Supreme Court which approved the Court of Appeal's judgment.

While it is beyond the scope of this paper to address possible ways forward, it is submitted that an accurate depiction of the terrain is the first requirement. It is necessary to ask whether social justice is an objective of the Union, and to give an honest appraisal of whether it is being delivered. Doing so requires unpicking the enmeshed concepts of citizenship, fundamental rights and fundamental freedoms, to expose, rather than obscure, serious ideological tensions between different constructions of welfare (including those based on need), the recognition of inherent personal rights, and the logic of the market, by which people are treated as factors of production. O’Leary noted these tensions in 1995, suggesting that Community law was then not “equipped to interfere to a greater extent in the determination and regulation of social policy”.<sup>229</sup> But such involvement in social policy is now commonplace, and the discourse of citizenship to enhance the moral credentials of economic personhood may mean that decisions about the type of society in which we want to live, about justice, and about social protection, get sucked into the neoliberal slipstream.

## 5. Conclusion

The economic preoccupations of the Union have long since been the subject of discussion and debate, though such critiques have fallen a little into desuetude in recent years, probably because developments in the creation of a social European agenda, and the fundamentalizing of European citizenship is thought to have taken us beyond the worker-commodity paradigm. This paper has argued that not only have we not left it behind, it is more implicitly accepted than before. Through the language of citizenship and fundamental citizenship-based rights, economic personhood has been endowed with the ultimate moral virtue – economic responsibility, so that vesting migrant rights in economic activity, rather than in persons, becomes an expression of “fairness”. Thus the commodification process has become more ingrained, automatic and less susceptible to dispute.

In focussing closely on the separate citizenship increments, we lose sight of the overall pattern, and accept the gaps in between. It is in falling over rights cliff edges and losing entitlement to social protection that one loses legal recognition and becomes a market irrelevance (or worse, burden) – a non-person. Since economic mobility is the one certain route to full citizenship rights, and to being a full EU citizen, it becomes the one known principle – like Descartes’ act of thinking – to establish a person’s Union existence – hence “I trade, therefore I am”.

229. O’Leary, *op. cit. supra* note 36, 181.

A multitude of circumstances lead to cliff edges, demonstrating a refusal on the part of Member States to conceive of a genuine “fundamental” shared status and destiny. An example here analysed is the case of *Zambrano* carers, who may be exercising an EU-based right to reside, and may be working, but may still be excluded from national social protection measures. Even claiming to fall within the scope of Union law is likely to become difficult due to a rigid approach taken to “enjoyment of citizenship rights” as amounting to no more than protection from *de facto* expulsion from the EU, resulting in a very high tolerance of destitution and intrusions into family life that do not prioritize the best interests of the children. This example may in time be ameliorated if pronounced upon by the ECJ, but such exclusions practised nationally speak to a constant and intense domestic curbing of rights accorded to non-nationals, and a desire to confine the reach of cases to narrow sets of facts – a desire made more realisable when working with the patchy, not necessarily humane, provisions of market citizenship.

The dehumanizing effect of delimited separate personhoods, and the attachment of rights to economic conditions does not result in neutral, random exclusions. This paper has examined the gender tilt of social entitlement within EU law, identifying pregnancy/maternity and care gaps, not only in the definition of work which centres upon remuneration (rectification of which would require quite a conceptual, progressive upheaval), but also in the risks for which worker status, and so a personhood that attracts social protection, is retained. These gaps are indicative of a broader tilt against the recognition of reproductive and care work, and its treatment as a chosen leisure activity, to be paid for with one’s European legal status. Women are thus more likely to be tipped over rights cliff edges – edges that divide the full rights-attracting citizens from those without any social protection entitlement. Market citizenship thus cannot be rational, innate or the only possible form of personhood within the Union; it is a fabrication reflecting existing power imbalances.

This fragmented set of statuses risks divesting the person of legal content, and so, if we accept the person as the fundamental moral unit of society, divesting the law of moral content. It is here argued that the language of citizenship has been deployed in paradoxically individualistic ways, promoting a particular conception of fairness as intrinsically bound up with “responsibility”, in line with notions of fair competition. This shift, or linguistic capture, hints that we may have accepted the foundations of a market society, not just a market economy. The responsibility paradigm codified in free movement law, and applied to non-nationals, echoes the activationist calls in EU soft law, and domestic welfare reform. Activation and responsibility are

presented as moral imperatives; the market is imbued, through invocations of fairness and responsibility, with a misleading glow of moralism.

The commanding moral power of the language of citizenship and fundamental free movement rights entrenches and edifies our commitment to a market agenda. This agenda should come as no surprise, but it is obscured by the discourse of social and human rights – rights which are demoted in importance if characterized as equivalent to market based rights, and demoted still further if treated as obstacles to the market. Muddiness of terminology and conceptual confusion mean we might not think to assess the morality of the eventual decision making, and whether those outcomes represent the sort of society in which we want to live, and whether they accord with whatever constructions society holds at a given time of right and wrong.

The challenges in reconfiguring European social law are plentiful and clear – not least of which are delimiting the scope of EU law and respecting the reluctance of Member States to relinquish aspects of welfare competence. But those challenges are not decisive, nor always philosophically or legally persuasive – for instance, when the protected aspects of welfare law are xenosceptic. And those difficulties should not present practical closure, or be cause for passive ideological resignation. They demand a thorough and honest assessment of the social structures and institutions currently in place. Otherwise, the same current that pitches people over rights cliff edges will engulf and erode notions of justice and stifle debate about the collective responsibilities of society.