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RETRACING THE RIGHT TO FREE MOVEMENT: MAPPING A PATH FORWARD?

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As a founding principle of the EU, a prerequisite for the exercise of most other EU rights, and a key component of EU integration, the freedom of movement right has carried great political and practical importance. It has also been one of the most contested, politically abused, and poorly understood of EU rights, particularly in the context of mobility of nationals from Central and Eastern Europe ("CEE"). Notably, misinformation regarding the free movement right that was spread by the media, politicians, and the public helped to propel both the UK's renegotiation of its EU membership and, ultimately, its exit from the Union. Other EU-15 State politicians have also been perpetuating myths about freedom of movement and immigration. Scholars addressing free movement, even in the context of Brexit, have devoted little attention to this right's conceptualization as it has evolved over time, to how EU branches other than the European Court of Justice have approached it, or to how CEE nationals have been positioned and impacted by mobility's legal framework. Although some critical scholars have critiqued derogations from the free movement right imposed on CEE nationals in the aftermath of their States' accession to the EU, they have also failed to situate their analysis within a broader look at the creation and application of the legal framework behind mobility. CEE movers in the UK and other EU-15 States have tended to be racialized by the media, politicians, and the public – that is, described and approached by individuals and institutions in ways which denigrate or assume their inferiority. Hence, several tenets of critical race theory ("CRT") and critical whiteness studies ("CWS") that expound the relationship between race, power, society, and law are helpful to the analysis of their mobility.

This Article argues that the freedom of movement right has always been limited, and that CEE nationals' mobility rights have been especially restricted by both EU statutes and case law – and further impeded by

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restrictive Member State policies. Ultimately, the right of free movement has been created and consistently applied in a way as to benefit EU-15 States' economies, while approaching CEE movers as mere units of production. This broader understanding of this right is necessary to make Brexit negotiations more meaningful, and debates about intra-EU movers in other EU-15 States more responsible. Moreover, the discussion here also critiques CRT and CWS for overlooking the significance of immigrant background and of white minority ethnicities in the conceptualization and experience of equality. I suggest that both theoretical frameworks need to not only look beyond the black-white binary, but also consider contemporary transnational power dynamics to arrive at a more flexible and nuanced picture of micro-level racial and ethnic power relations in today's globalized world.

I. INTRODUCTION

Soon after its inclusion in Spaak's 1956 blueprint for the establishment of the European common market[1], freedom of movement of persons became widely regarded as a central aspect of the European integration project[2]. As a prerequisite for the exercise of most other EU rights[3] (including the right to equality) and a tangible symbol of EU integration, the right carries great social, economic, and political importance[4]. Mobility has been proclaimed to be a fundamental right, a founding principle, and a core right of EU citizenship by the European Commission (the "Commission")[5], the European Parliament[6], the Court of Justice of the European Union (the "ECJ")[7], and key EU representatives[8]. As revealed through Eurobarometer

[1] Paul-Henri Spaak, *The Brussels Report on the General Common Market* (Intergovernmental Committee on European Integration 1956).

[2] Michael Johns, *Post-Accession Polish Migrants in Britain and Ireland: Challenges and Obstacles to Integration in the European Union*, 15 EUR. J. MIGRATION & L. 29-45 (2013).

[3] Joined Cases C-64/96 and C-65/96, Land Nordrhein-Westfalen v. Uecker, and Jacquet v. Land Nordrhein-Westfalen, ECLI:EU:C:1997:285.

[4] CAMINO MORTERA-MARTINEZ & CHRISTIAN ODENDAHL, WHAT FREE MOVEMENT MEANS TO EUROPE AND WHY IT MATTERS FOR BRITAIN (Centre for European Reform, 2017).

[5] *See, e.g.*, European Commission, Communication from the Commission: on guidance for better transposition and application 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, COM(2009) 313 final.

[6] *See, e.g.*, European Parliament, European Parliament resolution of 15 December 2011 on freedom of movement for workers within the European Union (2013/C 168 E/12), OJEU C 168 E/88.

[7] *See, e.g.*, Case C-413/99 Baumbast and R v. Secretary of State for the Home

surveys, the public also considers it to be one of the most prized EU achievements. Western Member State ("EU-15"[9]) nationals have strongly supported unrestricted mobility among EU-15 States. For example, in 1986, 74% supported an unlimited right to reside in all other EU-15 States.[10] After the 2004 accession of A-8 States[11] and the 2007 accession of A-2 States[12] (collectively, the "Eastern Enlargement"[13]) of ten Central and East European ("CEE") countries, almost 90% of EU citizens polled considered mobility to be a fundamental right of their EU citizenship[14]. Majority of those polled in 2013 described it as the core EU right[15], and the most positive achievement of the EU[16].

In 2014, 15 million EU nationals (approximately 3% of the EU's population) were relying on their right to reside in other Member States[17]. Driven by employment opportunities and large gaps in earnings[18], post-2004 mobility has been predominantly from CEE to EU-15 States, with approximately 1.6 million CEE nationals taking up residence in EU-15 states by 2010[19].

Despite—or due to—its conceptual and practical significance, mobility has been a controversial concept at times. It was one of the most contested

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Department, ECLI:EU:C:2002:493.

[8] *See, e.g.*, Viviane Reding, European Commissioner for Justice, Fundamental Rights and Citizenship, Speech at the Conference for Mayors on EU Mobility at Local Level: Free Movement of EU citizens - turning challenges into opportunities at local level, SPEECH/14/123 (February 11, 2014).

[9] The fifteen Member States before 2004: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

[10] *See* http://ec.europa.eu/public_opinion/archives/eb/eb26/eb26_en.pdf.

[11] Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia. (Malta and Cyprus were also included in the 2004 enlargement.)

[12] Of Bulgaria and Romania.

[13] Both the European Council and the Commission consider the 2007 enlargement to have constituted the second wave of the 2004 enlargement. *See* Communication from the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2006–2007, COM(2006)649.

[14] European Commission, Special Eurobarometer: Internal market: Awareness, perceptions, and impacts (2011), http://ec.europa.eu/public_opinion/ archives/ebs /ebs_363 _en.pdf.

[15] European Commission, Flash Eurobarometer 365 (February 2013), http://ec.europa.eu/public_opinion/flash/fl_365_en.pdf.

[16] European Commission, Eurobarometer 79 (May 2013), http://ec.europa.eu/ public_opinion/archives/eb/eb79/eb79_en.pdf.

[17] *See* http://europa.eu/rapid/press-release_MEMO-14-9_en.htm.

[18] Mikkel Barslund & Matthias Busse, *Labour Mobility in the EU: Dynamics, Patterns and Policies*, 3 INTERECONOMICS 116-158 (2014).

[19] DER FINANZ EXPERTE, MOBILITY IN EUROPE REPORT (2011), available at http://www.mobilitypartnership.eu/WebApp/Reports.aspx.

topics during the Eastern Enlargement process, unpopular among EU-15 citizenry and officials[20]. As far back as 1991, 63% of EU-15 citizens polled had wished to restrict potential future CEE migration, and 20% desired to ban it altogether[21]. Gearing up toward the Enlargement, in a poll taken in 2002, 76% of EU-15 nationals who expected a "considerable" influx of post-accession CEE nationals regarded their mobility as a "negative" development[22]. Allegedly fearing welfare tourism—although studies indicated that such concerns were not warranted[23]—EU-15 States adamantly opposed an immediate post-accession access to free movement and to social benefits by CEE nationals[24]. Despite CEE politicians' objections, temporary restrictions on CEE workers' free movement were included in all accession treaties – imposed on CEE states acceding in 2004 until April 2011, and on those acceding in 2007 until December 2013[25].

When transitional limitations were coming to an end, renewed popular and political debates about benefit tourism and "poverty immigration" spread across EU-15 States[26]. In a 2011 Eurobarometer survey, the majority of nationals in every EU-15 State other than Sweden and Luxembourg agreed with the statement that the internal market had "flooded" their country with "cheap labour"[27]. Moreover, the 2008 economic crisis fueled Eurosceptic populist discourse condemning the freedom of movement right, and increasingly incorrectly labelling intra-EU movers (especially from CEE states) as "migrants" (synonymous with American "immigrants") and "foreigners"[28]. Poles, Bulgarians, and Romanians have been especially

[20] SAMANTHA CURRIE, MIGRATION, WORK AND CITIZENSHIP IN THE ENLARGED EUROPEAN UNION (2008); Michael Haynes, *European Union and Its Periphery: Inclusion and Exclusion*, 33(35) ECONOMIC AND POLITICAL WEEKLY 87-97 (1998).

[21] Commission of the European Communities, Eurobarometer 35: Public Opinion in the EC (June 1991), http://ec.europa.eu/public_opinion/archives/eb/eb35/eb35_en.pdf.

[22] European Commission, Eurobarometer 57: EU15 Report (2002).

[23] Jon Kvist, *Does EU Enlargement Start a Race to the Bottom? Strategic Interaction Among EU Member States in Social Policy*, 14(3) JOURNAL OF EUROPEAN SOCIAL POLICY 301-318 (2004); Michael Dougan, *A Spectre is Haunting Europe… Freedom of Movement of Persons and the Eastern Enlargement*, in EU ENLARGEMENT: A LEGAL APPROACH 111-141 (Chrisophe Hillion ed., 2004).

[24] AGNIESZKA KUBAL, SOCIO-LEGAL INTEGRATION: POLISH POST-2004 EU ENLARGEMENT MIGRANTS IN THE UNITED KINGDOM (2012).

[25] Restrictions on the mobility of nationals from Cyprus and Malta (which had replaced Bulgaria and Romania in the accession negotiation process) were never even considered – likely due to their small populations.

[26] Béla Galgóczi et al., *Intra-EU labour migration: flows, effects and policy responses*, Working Paper 2009.03 (European Trade Union Institute 2011); EVA-MARIA POPTCHEVA, FREEDOM OF MOVEMENT AND RESIDENCE OF EU CITIZENS: ACCESS TO SOCIAL BENEFITS (European Parliamentary Research Service 2014).

[27] European Commission, *supra* note 14.

[28] Theodora Kostakopoulou, *Mobility, Citizenship and Migration in a Post-Crisis*

targeted[29]. In a 2013 letter to the President of the European Council for Justice and Home Affairs, Ministers representing Austria, Germany, the Netherlands, and the United Kingdom[30] called for limitations on mobility of "immigrants" from other EU States due to CEE movers' alleged abuse and strain on the social systems of "benefit magnet" Member States.

From early 2000s, UK debates about its EU membership became conflated with mobility and immigration issues[31]. As part of the UK's membership renegotiation, Prime Minister David Cameron sought to decrease mobility into the UK, or at least EU citizens' welfare access - even by economically active movers. The British public's support for the UK's "New Settlement" with the EU focused on restricting EU movers' access to benefits[32]. Concerns regarding free movement, and especially CEE workers' mobility and their access to benefits, ultimately played a key part during the Brexit campaign and its outcome[33].

The conflation of EU membership, free movement right, and immigration by the media, politicians, and the public—during both the renegotiation process and the Brexit campaign—has been based on several inaccuracies. Central among them were the misconceptions that the ECJ had been overstretching Treaty[34] provisions and secondary laws on free movement rights[35], that Member States have little discretion to affect movers' access to welfare benefits[36], and that movers choose where to move

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Europe, IMAGINING EUROPE Nr. 9, 5 (Instituto Affari Internazionali 2014).

[29] Iwona Sobis et al., *Polish plumbers and Romanian strawberry pickers: how the populist framing of EU migration impacts national policies*, 5(3) MIGRATION AND DEVELOPMENT 431-454 (2016).

[30] *See* http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf.

[31] James Dennison & Andrew Geddes, *Brexit and the perils of 'Europeanised' migration*, 25(8) JOURNAL OF EUROPEAN PUBLIC POLICY 1137-1153 (2018).

[32] Catherine Barnard & Sarah Fraser Butlin, *Free Movement vs. Fair Movement: Brexit and Managed Migration*, 55 COMMON MARKET LAW REVIEW 203-226 (2018); Eiko Thielemann & Daniel Schade, *Buying into Myths: Free Movement of People and Immigratio*n, 87(2) THE POLITICAL QUARTERLY 139-147 (2016).

[33] Mortera-Martinez and Odendahl, *supra* note 4.

[34] Unless otherwise indicated, "Treaty", as used throughout this Article, refers to the Treaty on the Functioning of the European Union, and, after 1993, to the Treaty on European Union, including their amendments.

[35] Cameron himself incorrectly noted in his letter to Donald Tusk, President of the European Council, that ECJ had widened the scope of free movement beyond its statutory limitations. *See* David Cameron's letter to Donald Tusk (Nov. 10, 2015), available at www.gov.uk/government/uploads/system/
uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf.

[36] Samantha Currie, *Reflecting on Brexit: Migration Myths and What Comes Next for EU Migrants in the UK?*, 38(3) JOURNAL OF SOCIAL WELFARE AND FAMILY LAW 337-342 (2016); Charlotte O'Brien, *Civis Capitalism Sum: Class as the New Guiding Principle of EU Free Movement Rights*, 53 COMMON MARKET LAW REVIEW 937-978 (2016).

based on the attractiveness of host States' welfare benefits, adversely affecting host economies[37]. Such misinformation has not been confined to the UK. Other EU-15 State politicians have been perpetuating similar myths[38].

More generally, the freedom of movement right has been "legally over-complicated, politically abused, … [and] popularly misunderstood"[39]. As Barnard and Butlin note, there is a need for "a radical rethink of the free movement of persons provisions"[40]. It is crucial to better understand this right, especially in the context of CEE movers, to allow for more meaningful Brexit negotiations and their aftermath, as well as for a more responsible approach toward intra-EU immigrants in other EU-15 States - to which their mobility will continue after Brexit, and where anti-immigrant discourse and policies have been gathering strength.

Since the Brexit referendum, scholars have devoted more attention to free movement law and debates, but only during the last two decades. For example, Currie[41], Dougan[42], and O'Brien[43] have pointed out that, over the last decade, the ECJ has been decreasing movers' entitlements and tolerating increasing Member State discretion in doing so as well (most notably, through the imposition of national right-to-reside rules, and more demanding tests for what constitutes "work"[44] and what constitutes "jobseeker" status from which worker protections stem). Others have emphasized the importance of public opposition to free movement to the referendum outcome[45]. Barnard and Butlin[46], and Doherty[47] have noted that

[37] Thielemann & Schade 2016, *supra* note 32.

[38] *Id*.; Poptcheva, *supra* note 26.

[39] Jo Shaw, *Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law* 3, Univ. of Edinburgh School of Law, Research Paper Series No. 2015/28 (2015).

[40] Barnard & Butlin, *supra* note 32.

[41] Currie, *supra* note 36.

[42] Michael Dougan, *The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens*, in JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 127–154 (M. Adams et al. eds., 2013).

[43] O'Brien, *supra* note 36.

[44] Both the 2015 FreSsco study and the ongoing EU Rights Project have documented that some Member States have increasingly been treating even movers who are not economically inactive as such, placing heavy burdens on workers to prove their entitlement to worker status, and designating work as "marginal and ancillary" (and thus not leading to worker status) simply due to being based on temporary contracts. *See* Charlotte O'Brien et al., *The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, FreSsco Comparative Report (2015), available at www.ec.europa.eu/social/BlobServlet?docId=15476&langId=en; The EU Rights Project, www.eurightsproject.co.uk.

[45] Dennison & Geddes, *supra* note 31; Thielemann & Schade, *supra* note 32.

[46] Barnard & Butlin, *supra* note 32.

historically, the right to free movement has always been limited via statutes and case law, but again, focused mostly on recent EU legal developments and did not consider how actual movers have been affected by them.

Outside of the Brexit context, similarly little attention has been devoted to this right's conceptualization as it has evolved over time, to how EU branches other than the ECJ have approached it, or to how CEE nationals have been positioned and impacted by it. Detailed academic analyses of the right to free movement have traditionally focused on black letter law, at specific moments in time[48], and more recently, on the ECJ's approach toward access to social benefits by mobile individuals[49]. Although some scholars have pointed out tensions between EU and Member State approaches toward free movement[50], and internal tensions in the EU's free movement law[51], little academic attention has been paid to the evolution of such challenges over time, and to CEE movers' position. The one notable textbook that traces the evolution of EU law over time devotes only a chapter to freedom of movement of persons, in which, again, the focus is recent ECJ case law[52]. Similarly, scholarship on CEE nationals' mobility rights has tended to explain black letter law at the time of the 2004 and 2007 enlargements[53], and more recently, the effects of mobility on both sending and host States[54] and on mobile CEE nationals themselves[55].

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[47] Michael Doherty, *Through the Looking Glass: Brexit, Free Movement and the Future*, 27(3) KING'S LAW JOURNAL 375-386 (2016).

[48] *See, e.g.*, CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS (2013); DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW: TEXT AND MATERIALS (2014); PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXTS, CASES AND MATERIALS (2015); F. ROSSI DAL POZZO, CITIZENSHIP RIGHTS AND FREEDOM OF MOVEMENT IN THE EUROPEAN UNION (2013); PEDRO CARO DE SOUSA, THE EUROPEAN FUNDAMENTAL FREEDOMS: A CONTEXTUAL APPROACH (2015); NIGEL FOSTER, FOSTER ON EU LAW (2017); JOHN HANDOLL, FREE MOVEMENT OF PERSONS IN THE EU (1995); ERIKA SZYSZCZAK & ADAM CYGAN, UNDERSTANDING EU LAW (2008); LORNA WOODS ET AL., STEINER & WOODS EU LAW (2017).

[49] *See, e.g.*, Rebecca Zahn, *'Common Sense' or a Threat to EU Integration? The Court*, 44(4) INDUSTRIAL LAW JOURNAL 573-586 (2015).

[50] *See, e.g.*, ELISE MUIR, EU REGULATION OF ACCESS TO LABOUR MARKETS: A CASE STUDY OF EU CONSTRAINTS ON MEMBER STATE COMPETENCES (2012); CHRISTOFFER C. ERIKSEN, THE EUROPEAN CONSTITUTION, WELFARE STATES AND DEMOCRACY: THE FOUR FREEDOMS VS NATIONAL ADMINISTRATIVE DISCRETION (2012).

[51] *See, e.g.*, PANOS KOUTRAKOS ET AL., EXCEPTIONS FROM EU FREE MOVEMENT LAW: DEROGATION, JUSTIFICATION AND PROPORTIONALITY (2016).

[52] Sofia O'Leary, *Free Movement of Persons and Services*, in THE EVOLUTION OF EU LAW 499-546 (Paul Craig & Grainne De Burca eds., 2011).

[53] *See e.g.*, Peter van Elsuwege, *The Treaty of Accession and Differentiation in the EU*, 72(64) JURISPRUDENCIJA 117–123 (2005).

[54] *See, e.g.*, ETTORE RECCHI & ADRIAN FAVELL, PIONEERS OF EUROPEAN INTEGRATION: CITIZENSHIP AND MOBILITY IN THE EU (2009).

[55] *See, e.g.*, Zinovijus Ciupijus, *Ethical Pitfalls of Temporary Labour Migration: A*

Critical scholars have critiqued post-accession transitional mobility limitations for undermining the concepts of equality and EU citizenship, and for contradicting EU laws[56]. They have not situated their critique, however, in a broader analysis of the free movement right and its evolution. There is much space for a critical look at how CEE nationals have been situated in both the creation and application of the legal framework behind mobility, especially since they have been subjected to racialization, unlike western EU citizens. For example, EU institutions have portrayed them as fundamentally different than western Europeans, not part of European heritage, and not entitled to the same treatment as those from western Member States[57]. Moreover, the British media, politicians and the public have attacked CEE movers[58], ultimately contributing to, at least in part, the outcome of the Brexit referendum.

Several tenets that both critical race theory ("CRT") and critical whiteness studies ("CWS") expound lay the groundwork for my approach toward the intricate relationship between race, power, and law. Law, everyday discourse, economics, politics, and culture play a role in propagating white elites' power and privilege - by ignoring, naturalizing, sanctioning, and at times inciting discrimination against other groups[59]. Those in positions of social power construct legal frameworks in ways that benefit them[60]. To unpack law's role, I have been re-examining historical and legal records to focus on the underlying assumptions and interests that they serve. My analysis in this Article relies on an empirical qualitative study, based on systematic content analyses of relevant hard and soft laws, and legal discourse. I also draw on historical, economic, political, and other

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Critical Review of Issues, 97 BUSINESS ETHICS 9-18 (2010); Katherine Botterill, *Mobility and Immobility in the European Union: Experiences of Young Polish People Living in the UK*, 1 STUDIA MIGRACYJNE - PRZEGLĄD POLONIJNY (POLONIA AND MIGRATION STUDIES) 47-70 (2011).

[56] Sergio Carrera, *What Does Free Movement Mean in Theory and Practice in an Enlarged EU?*, 11(6) EUROPEAN LAW JOURNAL 699-721 (2005); Currie, *supra* note 20; Dimitri Kochenov, *The European Citizenship Concept and Enlargement of the Union*, 3(2) ROMANIAN JOURNAL OF POLITICAL SCIENCE 71-97 (2003); WILLEM MAAS ED., DEMOCRATIC CITIZENSHIP AND THE FREE MOVEMENT OF PEOPLE (2013); Helen Stalford, *Free Movement Post Accession – Transitional Arrangements in Poland and Bulgaria*, Paper Presented at the Symposium on Science Policy: Mobility and Brain Drain in the EU and Candidate Countries (University of Leeds, July 2003).

[57] Dagmar Rita Myslinska, *Peripheries of Equality and Belonging: Situating Brexit's Anti-Immigrant Rhetoric within EU Narratives*, _____ (forthcoming).

[58] Jon Fox et al., *The Racialization of the New European Migration to the UK*, 46(4) SOCIOLOGY 680-695 (2012).

[59] *See generally* RICHARD DELGADO & JEAN STEFANCIC EDS., CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (1997).

[60] *Id.*

background data to bolster my claims, and to place my findings in their local context. Content analysis allows me to also consider texts' latent characteristics, as well as any missing parts; and to make inferences from texts by relying on analytical constructs derived from my theoretical framework. As with all qualitative research, my purpose is not statistical generalization, but instead analytical generalization. That is, I seek to offer new insights based on theoretical and conceptual generalizations, and to help build better concepts and theories applicable to the world at large.

Despite relying on some tenets of CRT and CWS, I find both theories too essentialist at their core - due to ignoring transnational and other non-racial causes of inequalities[61], and due to focusing on homogeneous races: privileged whites, and underprivileged others. In this Article, I critique CRT and CWS analytical approaches for overlooking the significance of immigrant background and of white minority ethnicities in the conceptualization and experience of equality, racism, and privilege. My "Crit-Crit" work also considers how the formal legal framework (in its creation, interpretation, and specific policy contexts) approaches immigrants, who do not easily fit the black-white paradigm. Taking into account contemporary transnational power dynamics, I aim to arrive at a more flexible and nuanced picture of micro-level racial and ethnic power relations[62]. This Article not only poses new questions, but also relies on new data as I read the free movement framework critically, from the point of view of contemporary CEE movers.

Ironically, while today's concepts of race and ethnicity have been largely the products of historical migrations and colonialism (as well as slavery), the continuing significance to that construction of contemporary movements of people has been overlooked by legal and race scholars, who tend to see their study groups through the black-white binary. Only by better understanding the ramifications of contemporary mobility on equality can we better respond to the cultural, economic, and political challenges posed by mobility and immigration in an increasingly globalizing world. More broadly, any inabilities of law to adequately respond to the experiences of immigrant groups might provide insights into its inability to regulate other groups that do not neatly fit into privileged/disadvantaged binaries. This will hopefully lead to redefining concepts such as race,

[61] Although ClassCrits note the effects of lower socio-economic status on access to law and other power structures, and some critical scholars outside the United States have considered postcolonial effects on race construction, the role of globalization and contemporary immigrants in continuing to construct whiteness has been overlooked. LatCrit scholarship has opened up space for applying CRT to transnational power relations, but only between the global North and the global South.

[62] I am also aware of intersectionality issues—especially gender, and class—that affect the experience of equality by immigrants.

racism, discrimination, and equality so that they can better reflect multitudes of contemporary context-specific differences and power hierarchies.

Below, I trace the free movement right from its initial conceptualization (in Part II.A.), through its temporary derogations in the aftermath of the Eastern Enlargement (in Part II. B.), to what it is today (in Part II.C.) - to gain a better understanding of how EU institutions' approach might have evolved over time. Given that the right to mobility encompasses not only the rights to move and reside in other Member States, but also to access social benefits, I also trace the evolution of their provision to mobile EU citizens. I pay close attention to how CEE nationals have been affected by changes in the legal frameworks. In the Part III, I summarize my findings and reflect on their broader practical and theoretical implications.

II. FREEDOM OF MOVEMENT RIGHT: DIRECT AND INDIRECT MEASURES

A. Legal Framework Before the Eastern Enlargement

1. Freedom of Movement Laws Before 2004

The 1951 Treaty of Paris establishing the European Coal and Steel Community prohibited discrimination in employment, remuneration, and working conditions of workers from the then-Member States (Article 69). To facilitate creation of the common market, the 1957 Treaty of Rome establishing the European Economic Community called for the elimination of obstacles to the free movement of persons (Article 3[63]), and for abolition of nationality discrimination within the scope of application of the Treaty (Article 7). Pursuant to Title III, on the "Free Movement of Persons," mobility pertained to workers only. Hence, nationality discrimination was forbidden in the context of "employment, remuneration and other working conditions" (Article 48(2))[64], and could be limited only on grounds of public order, public safety or public health (Article 48(3)). The ECJ defined nationality discrimination broadly, to include direct, indirect[65], and covert measures[66]. Criteria which applied regardless of nationality constituted indirect discrimination if there was a risk that they placed mobile workers at a particular disadvantage[67]- for example, high transfer fees for professional

[63] Along with freedoms of movement of goods, capital, and services.

[64] Although Member States were permitted to restrict access to public service posts to their own nationals (Article 48(4)).

[65] Case 15/69, Uglolia [1970] ECR 363.

[66] Case 152/73, Sotgiu [1974] ECR 153.

[67] Case C-237/94, O'Flynn v. Adjudication Officer, ECLI:EU:C:1996:206.

soccer players[68], or residence conditions or language requirements more easily satisfied by domestic workers[69]. Moreover, any limits imposed on mobility had to be proportionate to legitimate State goals[70].

Although originally limited to coal and steel workers, the right of free movement was gradually expanded through statutes and ECJ decisions to include all workers, and some types of economically inactive persons. The 1993 Maastricht Treaty created the European Union and introduced the concept of a common EU citizenship (Article 8). Now "[e]very citizen of the Union" – including both economically active and inactive persons - was to "have the right to move freely and to reside within the territory of the Member States" (Article 8a). Although its scope had to be determined by reference to secondary legislation[71], the free movement right's recognition at the Treaty level indicated that no arbitrary or disproportionate intrusions would be permitted.

a. Workers

Worker status has been a precursor of not only mobility protections, but also residence rights, and access to social benefits and tax advantages. Noting that the concept must not be interpreted narrowly[72], the ECJ has gradually expanded this status, to include all who "for a certain period of time … perform services for and under the direction of another person in return for … remuneration"[73]. The amount of remuneration is irrelevant, and the worker may draw upon public assistance[74], as long as the services performed are of commercial value to the recipient[75]. Specific motives for undertaking work are irrelevant, so that securing work with the main aim of obtaining access to public assistance[76] would not disqualify one from worker status. Although the economic activity undertaken must be

[68] Case C-415/93, Union royale belge des sociétés de football association v. Bosman, ECLI:EU:C:1995:463.

[69] Case C-379/87, Groener v. Minister for Education, ECLI:EU:C:1989:599; Case C-424/97, Haim v. Kassenzahnärztliche Vereinigung Nordrhein, ECLI:EU:C:2000:357.

[70] Case C-413/99 Baumbast and R v. Secretary of State for the Home Department, ECLI:EU:C:2002:493.

[71] The right was subject to "limitations and conditions laid down in this Treaty, and by measures adopted to give it effect" (Article 8a).

[72] Case C-337/97, Meeusen v. Hoofddirectie van de Informatie Beheer Groep, ECLI:EU:C:1999:284.

[73] Case 66/85, Lawrie-Blum v. Land Baden-Württemberg, ECLI:EU:C:1986:284.

[74] Case 139/85, Kempf v. Staatssecretaris van Justitie, ECLI:EU:C:1986:223.

[75] Case 196/87, Steymann v. Staatssecretaris van Justitie, ECLI:EU:C:1988:475.

[76] Case C-413/01, Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst, ECLI:EU:C:2003:600.

"genuine" and "effective", rather than "purely marginal or ancillary"[77], no specific working hours are required. Thus, those employed short-term, seasonally, or part-time, and even apprentices and trainees may qualify as workers. Working "only a very limited number of hours", however, may not be sufficient[78]. Self-employed persons have been considered "workers"[79]. The ECJ has defined that status broadly - as working for oneself, being solely responsible for one's own business[80], and abiding by applicable national regulations (such as any registrations, records keeping, and income tax payments). The burden is on the host State to demonstrate sham self-employment[81].

Noting that "obstacles to the mobility of workers shall be eliminated" (Preamble), Regulation 1612/68 on the freedom of movement of workers called for equality of treatment between domestic and Community workers "in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing". More specifically, it prohibited any discriminatory legal or administrative measures which could hinder or restrict those from other Member States from undertaking employment (Articles 3 and 4). Employment offices were to provide equal assistance to jobseekers from other Member States (Article 5). Although Member States could request temporary suspension of workers' free movement if undergoing or foreseeing disturbances in the labor market "which could seriously threaten the standard of living or level of employment in a given region or occupation," it was up to the Commission to authorize such suspension (Article 20). No such request had ever been made under the Regulation.

Directive 68/360 sought to further abolish restrictions on movement and residence rights of mobile workers, by simplifying procedures for entering and obtaining residence cards in other Member States. For example, host States could not charge higher fees for residence permits than dues charged for issuance of their citizens' identity cards (Article 9).

EU-15 workers' statutory residence rights were further strengthened by the ECJ. For example, the Court had ruled that national residence formalities (such as requiring mandatory residence permits) which went beyond Directive 68/360's duty to report one's presence in the host State

[77] *Id*; Case 53/81, Levin v. Staatssecretaris van Justitie, ECLI:EU:C:1982:105.

[78] Case 357/89, Raulin v. Minister van Onderwijs en Wetenschappen, ECLI:EU:C:1992:87.

[79] See, e.g., Case C‑214/16, King v. The Sash Window Workshop Ltd, ECLI:EU:C:2017:914.

[80] Case C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, ECLI:EU:C:1999:126.

[81] *Id.*

(Article 8(2)) were an impermissible obstacle to free movement[82]. Failing to comply with all the formalities of the Directive did not justify workers' expulsion[83]. Moreover, in *Martinez Sala*[84] (1998), the Court ruled that a host State was precluded from requiring nationals of other Member States authorized to reside there to produce formal residence permits to receive social advantages if the same were not required of its own nationals. To reach this decision, the Court relied on Maastricht Treaty's prohibition of nationality discrimination of EU citizens. More generally, any national conditions on residency provisions under the Directive had to satisfy the proportionality test[85].

Before the Eastern Enlargement, mobility restrictions on workers had been imposed only once, during the Southern Enlargement of Greece in 1981 (for 6 years) and of Spain and Portugal in 1986 (for 7 years; shortened to 6 years after Council review). Like the transitional measures during the Eastern Enlargement, they relied on explicit derogations of Articles 1 through 6 of Regulation 1612/68 (pertaining to workers' right to take up employment in other Member States). These earlier restrictions, however, were implemented before Maastricht Treaty's creation of EU citizenship[86] and before the borderless Schengen Area was established through the 1999 Amsterdam Treaty.

b. Economically Inactive Movers (Including Jobseekers)

Secondary laws slowly expanded former workers' access to the freedom of movement right. According to Directive 68/360, those temporarily incapable of work (due to medical issues or accidents) or those involuntarily unemployed were not automatically deprived of residence rights (Article 7(1)). Once a worker had been involuntarily unemployed for more than a year, Member States could restrict such former worker's residence permit renewal period, but to no less than 12 months (Article 7(2)). Moreover, pursuant to Regulation 1251/70, workers who had reached retirement age or had become permanently incapacitated while working in a host State had the right to remain there.

In the 1990s, freedom of movement became also guaranteed through secondary laws for students, pensioners, and the unemployed, as well as for

[82] Case C-344/95, Commission v. Belgium, ECLI:EU:C:1997:81.

[83] Case 48/75, Royer, ECLI:EU:C:1976:57.

[84] Case C-86/96 Martínez Sala v. Freistaat Bayern, ECLI:EU:C:1998:217.

[85] Case C-413/99 Baumbast and R v. Secretary of State for the Home Department, ECLI:EU:C:2002:493.

[86] The only previous enlargement that took place after Maastricht did not include any impediments on mobility (involving Finland, Sweden, and Austria in 1995).

their families. This was further reinforced by the Maastricht Treaty's creation of EU citizenship and extension of the right of mobility to all EU citizens. However, pursuant to Directives 90/364, 93/96, and 90/365, economically inactive movers were required to have comprehensive sickness insurance (whether public or private) in the host State, and sufficient resources to avoid becoming a burden on the social security system of the host State during their period of residence. (For students, a mere declaration regarding resources sufficed.) "Sufficient resources" amounted to at least the level at which host State nationals became eligible for social assistance[87]. In making this determination, personal circumstances of each applicant, and easily accessible resources of any type[88] were to be taken into account.

The ECJ has been supportive of non-economically active EU citizens' right to reside in other Member States. For example, the Court found that jobseekers had a Treaty right to move and reside in other States "for the purpose of seeking employment"[89]. Although host States did have a right to expel them if they did not have a "genuine chance" of finding employment, jobseekers were afforded a "reasonable time" to conduct their search[90] - more than three months[91], and possibly more than six months[92]. Moreover, EU nationals who became unemployed after having worked in a host country were entitled to "the right to look for or pursue an occupation"[93].

The ECJ often drew on Treaty provisions regarding non-discrimination and EU citizenship to sidestep some of the limitations on mobility imposed by secondary legislation. For example, in *Grzelczyk*[94] (2001), the ECJ proclaimed that EU citizenship, as a "fundamental status", called for financial solidarity among all EU citizens. Thus, as long as mobile EU nationals were lawfully resident in another State, they could rely on the Treaty's prohibition of nationality discrimination in the context of free movement and residence rights. In *Baumbast*[95] (2002), the Court held that refusing a former worker residence because his sickness insurance did not cover emergency treatment in the host State constituted disproportionate

[87] Directive 90/364, Article 1.

[88] Commission of European Communities, Commission Report to Parliament and Council on the application of Directives 30/364, 90/365, and 93/96, COM/99/1027/FIN.

[89] Case C-292/89, Antonissen, ECLI:EU:C:1991:80.

[90] *Id.*

[91] Case C-344/95, Commission v. Belgium, ECLI:EU:C:1997:81.

[92] Case C-292/89, Antonissen, ECLI:EU:C:1991:80.

[93] Case 48/75, Royer, ECLI:EU:C:1976:57.

[94] Case C-184/99 Grzelczyk v. le Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, ECLI:EU:C:2001:458.

[95] Case C-413/99 Baumbast and R v. Secretary of State for the Home Department, ECLI:EU:C:2002:493.

interference with the exercise of Treaty rights. Finally, in *D'Hoop*[96] (2002), the Court concluded that any penalties on a mobile national's return to home country (such as refusing to grant tide-over allowance due to having completed secondary education in another Member State) constituted impermissible obstacles to free movement.

c. CEE Nationals

Before the Eastern Enlargement, none of the above rights applied to third-country nationals ("TCNs"), such as those from CEE countries. The Agreements on Trade and Commercial and Economic Cooperation entered into by the Community, existing Member States, and individual CEE states in the late 1980s and early 1990s focused on just that – trade, commercial, and economic cooperation – with no mention of mobility. This was followed by individual Europe Agreements in the 1990s, which approached CEE workers like TCNs, and did not provide them with any degree of mobility[97]. Despite the Agreements' liberalization of the movement of capital, goods, and services, sections on the "Movement of Workers, Establishment, Supply of Services" did not even mention the right to free movement of persons. Instead, existing Member States were permitted to continue applying their immigration rules to CEE nationals, although they were not permitted to make them more demanding than they had been at the time of signing of the Europe Agreements. Since the Agreements did nothing to positively facilitate mobility, CEE nationals lawfully resident in EU-15 States were there pursuant to a few national regimes and ad hoc bilateral agreements that permitted temporary-worker schemes (and responded to specific employer needs)[98], as refugees, or as family members of EU nationals.

Under Europe Agreements, those lawfully employed in the Member States in accordance with their immigration laws[99] were entitled to protection from nationality-based discrimination (in terms of working conditions, remuneration, and dismissal), and could be joined by their families (see, e.g., Article 37(1) of Europe Agreement with Poland).

[96] Case C-224/98 D'Hoop v. Office national d'emploi, ECLI:EU:C:2002:432.

[97] The only limited exception was pursuant to the right of free establishment, for highly-skilled "key personnel" employed by CEE companies operating in EU-15 States.

[98] European Commission, The Free Movement of Workers in the Context of Enlargement - Information Note (March 6, 2001). For example, since the early 1990s, Poland, Romania, and Bulgaria had bilateral agreements with Germany – all tied to specific German labor market needs, and permitting small quotas of temporary workers (ex: 500 from Romania).

[99] Case C-162/00, Land Nordrhein-Westfalen v. Pokrzeptowicz-Meyer, ECLI:EU:C: 2002:57.

According to the ECJ, these non-discrimination provisions had a direct effect, so that they could be relied on by CEE workers before national courts[100]. Moreover, their scope was deemed identical to equality rights conferred on EU-15 nationals under Treaty provisions[101]. Thus, in *Pokrzeptowicz-Meyer*, the ECJ struck down a national provision according to which positions for foreign-language assistants could be filled through fixed-term contracts, whereas for other teaching staff recourse to such contracts had to be individually justified. In *Kolpak*[102], the Court concluded that a sports federation rule authorizing clubs to field only a limited number of players from among TCNs could not be applied to lawfully employed CEE athletes.

Despite the ECJ's broad application of Europe Agreements' non-discrimination clauses, they were of little practical impact because the Agreements applied to so few categories of CEE nationals. They did not apply to economically inactive persons, jobseekers, or posted workers[103]. They also did not apply to those engaged in informal work arrangements – which was popular among CEE nationals[104]. Self-employed CEE nationals relied on non-discrimination provisions under the Agreements' establishment clauses[105], and only if they could demonstrate sufficient financial resources[106]. Given income discrepancies between EU and CEE states, possessing sufficient resources would have been difficult to prove for CEE nationals. In addition, impediments on CEE nationals' travel to EU-15 States (close to a ban under Communism, and visa requirements thereafter) would have inhibited their chances of establishing networks and possessing local know-how necessary to undertake self-employment.

2. Access to Social Benefits by Mobile Individuals Before 2004

The freedom of movement right is also inherently linked to equality in the receipt of social benefits and tax advantages[107]. Thus, since the 1960s,

[100] *Id.*

[101] *Id.*

[102] Case C-438/00, Deutscher Handballbund eV v. Kolpak, ECLI:EU:C:2003:255.

[103] Posted workers have been governed by a separate legal regime. *See* Directive 96/71 concerning the posting of workers in the framework of the provision of services.

[104] Daniela Andren & Monica Roman, *Should I Stay or Should I Go? Romanian Migrants during Transition and Enlargements*, IZA Discussion Paper No. 8690 (Institute for the Study of Labor, 2014); Kubal, *supra* note 24; Focus Migration, *Romania* (2008), http://focusmigration.hwwi.de/Romania.2515.0.html?&L=1.

[105] Titles IV of the Europe Agreements.

[106] Case C-37/98, The Queen v. Secretary of State for the Home Department, ECLI:EU:C:2000:224.

[107] European Commission, Free Movement – EU Nationals, http://ec.europa.eu/social/main.jsp?catId=457.

secondary laws and ECJ decisions have provided access to social benefits to at least some groups of mobile Member State nationals.

a. Workers

Pursuant to Regulation 1612/68, Member States were mandated to treat workers from other Member States (from the first day of their employment) equally with domestic workers in the provision of social and tax advantages (Article 7(2)), and in "matters of housing" (Article 9(1)). Furthermore, workers had the right to be joined by their families (Article 10), who were to be integrated into host State societies. The Commission advocated this Regulation's broad interpretation[108]. Moreover, Regulation 1408/71, implemented through Regulation 574/72, governed coordination in the provision of social security benefits to mobile workers.

Although Regulation 1612/68 applied to workers only (including permanent, seasonal and frontier workers, and those providing services), the ECJ had interpreted the concept of "worker" broadly, as discussed earlier. "Social advantages", not defined in the Regulation, were also interpreted broadly[109] by the ECJ - to cover all the advantages national workers enjoy primarily due to their status as workers or as residents in their home States, the extension of which seems likely to facilitate mobility[110] (regardless of whether the specific advantages are linked to employment contracts[111]). For example, they include discretionary benefits[112], welfare benefits[113], benefits granted after employment is terminated[114], and at least some benefits not directly linked to employment - such as the right to be accompanied in the host State by a partner[115], the grant of funeral expenses fund[116], and children's access to student grants.[117] They also encompass rights that represent "a significant factor in promoting the integration of the worker into the host nation, and thus in achieving the objective of free movement

[108] Jaime L. Fuster, *Council Regulation 1612/68: A Significant Step in Promoting the Right of Freedom of Movement within the EEC*, 11 B.C., INT'L & COMP. L. REV. 127 (1988).

[109] Case 207/78 Even, ECLI:EU:C:1979:144.

[110] *See* Case C-86/96 Martínez Sala v. Freistaat Bayern, ECLI:EU:C:1998:217.

[111] Case 249/83, Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn, ECLI: EU:C:1985:139.

[112] Case 65/81 Reina v. Landeskreditbank Baden-Württemberg, ECLI:EU:C:1982:6.

[113] *See* Case 249/83, Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn, ECLI: EU:C:1985:139.

[114] Case C-57/96 Meints v. Minister van Landbouw, ECLI:EU:C:1997:564.

[115] Case 59/85 Netherlands v. Reed, ECLI:EU:C:1986:157.

[116] *See* Case C-237/94, O'Flynn v. Adjudication Officer, ECLI:EU:C:1996:206.

[117] *See* Case C-337/97, Meeusen v. Hoofddirectie van de Informatie Beheer Groep, ECLI:EU:C:1999:284.

for workers," such as the right to have criminal court proceedings in the worker's native language[118]. Advantages available to workers' dependents are also included[119]. National tax rules which deter EU citizens from exercising the free movement right may constitute an impermissible obstacle[120] to mobility – for example, denying a refund of excess income tax when changing residence to another Member State[121].

b. Economically-Inactive Movers (Including Jobseekers)

Even after the extension of EU citizenship to economically inactive EU nationals, they were not statutorily provided with access to social benefits. However, by the late 1990s, the ECJ became instrumental in extending access to social benefits to include such movers, by relying on Treaty non-discrimination provisions to overstep limitations imposed by secondary EU legislation. According to *Martinez Sala* (1998), all EU citizens lawfully resident in another Member State fell under Treaty protections and hence were entitled to social benefits, including benefits under Regulations 1408/71 (social security benefits) and 1612/68 (social and tax advantages)[122]. In *Grzelczyk*[123] (2001), the ECJ derived a principle of financial solidarity between all EU citizens based on the Treaty, to preclude a national measure which made mobile students' entitlement to a non-contributory social benefit (such as a minimum subsistence allowance) conditional on demonstrating "sufficient resources" when no such condition applied to domestic students. The Court also noted that recourse to social assistance could not automatically lead to a denial of residence permit. Drawing on its ruling in *Grzelczyk*, the ECJ held in *Bidar* (2005)[124] that a student's right to reside in the host Member State was primarily regulated by Treaty provisions and thus included the right to equal treatment in obtaining social assistance benefits (including maintenance grants or loans).

c. CEE Nationals

The only TCNs to whom Regulations 1408/71 and 1612/68 applied

[118] Case 137/84 Mutsch, ECLI:EU:C:1985:335.

[119] *See* Case C-337/97, Meeusen v. Hoofddirectie van de Informatie Beheer Groep, ECLI:EU:C:1999:284.

[120] *Id.*

[121] Case C-175/88, Biehl v. Administration des contributions du grand-duché de Luxembourg, ECLI:EU:C:1990:186.

[122] *See* Case C-86/96 Martínez Sala v. Freistaat Bayern, ECLI:EU:C:1998:217.

[123] *See* Case C-184/99 Grzelczyk v. le Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, ECLI:EU:C:2001:458.

[124] Case C-209/03, R (Bidar) v. London Borough of Ealing, ECLI:EU:C:2005:169.

were family members of EU citizens[125]. During the 1990s, the Commission had made several proposals to extend social security protections afforded to mobile EU nationals to TCNs lawfully employed in the EU[126], but none came to fruition. None of the Europe Agreements with CEE states addressed social benefits, other than coordinating social security systems for workers[127].

B. Legal Regime After 2004, Including in the Aftermath of the Eastern Enlargement

1. Freedom of Movement Laws After 2004

Existing regulations and case law pertaining to mobility and residence rights were consolidated and replaced by Directive 2004/38 (the "Free Movement Directive"), adopted two days before the 2004 enlargement, and still in effect. All EU citizens now had the right to reside in other Member States for up to three months without any formalities or conditions (Article 6). Moreover, the Directive extended the right to be joined by family members to all mobile EU citizens (Article 3), and granted a new right of permanent residence after five years of lawful residence (Articles 16-17). Member States were forbidden from requiring movers to hold residence permits (Article 25), although they were permitted to compel them to register their presence (within a reasonable and non-discriminatory time frame) after more than three months (Article 8).

The Directive strengthened substantive and procedural safeguards available to mobile individuals whose rights of free movement or residence had been restricted (Article 15). Host States' ability to deny or terminate rights of residence were limited to grounds of public policy, public security, and public health (which could not be invoked to serve economic ends) (Article 27)[128], and fraud or abuse of rights[129] (Article 36). Workers, self-

[125] And refugees under Regulation 1408/71.

[126] European Commission, Proposal for a COUNCIL REGULATION (EEC) amending Regulation (EEC) N° 1408/71 or the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) N° 574/72 laying down the procedure for implementing Regulation (EEC) N° 1408/71, COM(91) 528 final OJ 1992; European Commission, Proposal for a Council Regulation (EC) amending Regulation (EEC) No 1408/71 as regards its extension to nationals of third countries, COM(97) 561 final OJ 1988 C 6/15.

[127] For example, Article 38 of the Europe Agreement with Poland.

[128] Measures taken on public policy or public security grounds must be proportionate and based exclusively on the needs of the host State and the personal conduct of the individual (which presents a genuine, present, and serious threat to a fundamental interest of the host society) (Article 27). Those taken due to public health must be based on only the most serious infectious diseases occurring within three months of arrival (Article 29).

employed persons, and jobseekers could only be expelled on grounds of public policy or public security (Recital 16). Host States could impose re-entry bans against those who had been expelled only on grounds of public policy, public security, or public health (Article 15(3)). An expulsion measure could not be an automatic consequence of recourse to social assistance (Article 14(3)). According to the ECJ, expulsion of an EU citizen was an exceptional measure, requiring individual examination of each specific case[130]. The proportionality principle applied to any such restrictions on mobility (Article 27), and the burden of proof was on the host State (EC 2009).

a. Workers

Pursuant to the Free Movement Directive, workers (including self-employed individuals) had an automatic right to reside in other Member States for longer than three months, with no formalities to satisfy (Article 7(1)). "Worker" status included former workers unable to work due to illnesses or accidents (Article 7(3)). Those who became involuntarily unemployed after at least a year of employment in a host State retained their "worker" status indefinitely - as long as they were registered as jobseekers with an employment office (Article 7(2)). If they had worked for less than a year, however, they retained "worker" status for at least six months (Article 7(3)).

The ECJ continued to define "worker" status broadly. For example, the Court ruled in *Trojani* (2004)[131] that performing various jobs for Salvation Army which totaled 30 hours a week, as part of a personal reintegration program, in return for benefits in kind and some pocket money, constituted employment. Even working fewer than 5 ½ hours per week has been found sufficient[132]. Similarly, the ECJ has continued to define "self-employment" broadly, as working for oneself, and being solely responsible for one's own business[133].

[129] Fraud or abuse of rights must be directly related to obtaining the rights of free movement or residence. *See* European Commission, *supra* note 5.

[130] Case C-348/09 P.I. v. Oberbürgermeisterin der Stadt Remscheid, ECLI:EU:C: 2012:300.

[131] Case C-456/02, Trojani v. Centre public d'aide sociale de Bruxelles, ECLI:EU:C: 2004:488.

[132] Case C-14/09, Genc v. Land Berlin, ECLI:EU:C:2010:57.

[133] *See* Case C‑214/16, King v. The Sash Window Workshop Ltd, ECLI:EU:C: 2017:914.

b. Economically-Inactive Movers

Pursuant to Directive 2004/38, economically inactive movers' right to reside for more than three months is conditioned on having comprehensive sickness insurance, and "sufficient resources" so as not to become a burden on the social welfare system of the receiving State (Article 7(1)). Member States are prohibited from setting a fixed amount below which the right of residence can be automatically refused (Article 8(4)). Instead, determining "sufficient resources" is to be a fact-intensive process, based on "the personal situation of the person concerned" (Article 8), including resources from third persons, and both periodic and accumulated capital[134]. Member States are encouraged to carry out proportionality test[135] in making this determination (Recital 16). The threshold may not be higher than the level below which nationals of the host State become eligible for social assistance or than the minimum social security pension paid by the host State (Article 8(4)). What constitutes "sufficient resources" should be interpreted in the light of the Directive's objective, that is, facilitating mobility[136]. Only the actual receipt of social assistance benefits may be considered relevant in determining "unreasonable burden," after considering the duration of such benefits receipt, their amount, and each recipient's personal situation[137]. Although Member States may expel economically inactive movers (unless they are permanent residents) if they become an "unreasonable burden", such expulsions may not be an automatic consequence of relying on social assistance (Article 14(3)).

c. First-Time Jobseekers

Among all the economically inactive categories, residence rights of those who enter another Member State to seek employment have been the most complicated. Although jobseekers must demonstrate self-sufficiency and having sickness insurance (like all economically non-active groups), Article 14(4)(b) prohibits their expulsion as long as they have a "genuine chance" of finding employment – that is, as long as they continue to demonstrate some prospects of finding employment, even after searching for more than six months[138]. Because jobseekers can only be expelled on grounds of public policy or public security, in practice, first-time jobseekers

[134] *See* European Commission, *supra* note 5.

[135] Adequacy of insurance must also be determined in accordance with proportionality principle. *See id*.

[136] *Id.*

[137] *Id.*

[138] *See* Case C-292/89, Antonissen, ECLI:EU:C:1991:80.

have the right to reside without having to prove self-sufficiency[139].

d. CEE Nationals

Although EU citizenship has always been differentiated by statutory and case law, pre-2004 distinctions had privileged workers over those economically inactive. The Eastern Enlargement temporarily reversed that hierarchy in the context of CEE nationals. Although empirical studies at the time of the Enlargement had predicted that EU-15 States would benefit economically from CEE workers' mobility, and that CEE movers would not rely heavily on host States' welfare systems[140], all Accession Treaties[141] expressly blocked application of Treaty Article 39(2), which had abolished discrimination of mobile workers in the context of employment. Member States could derogate for up to seven years from Articles 1 through 6 of Regulation 1612/68 (pertaining to mobility of economically active persons), and from provisions of Directive 68/360 (pertaining to mobile workers' residence rights). Transitional restrictions also limited access of workers' families to EU-15 labor markets[142]. Accession Treaties were silent about residence and citizenship rights[143], and did not offer any justification for these derogations.

EU-15 States were provided wide discretion in restricting CEE workers' mobility during the entire seven-year transitional periods. For the first two years after accession, EU-15 States could continue to apply their pre-accession national measures or bilateral agreements[144], as long as employers

[139] Case C-138/02, Collins v. Secretary of State for Work and Pensions, ECLI:EU:C:2004:172; Case C-258/04, Office national de l'emploi v. Ioannidis, ECLI:EU:C:2005:559.

[140] Tito Boeri & Herbert Brücker, *Why Are Europeans so Tough on Migrants?*, ECONOMIC POLICY 629-703 (2005); European Commission, Employment in Europe 2008 (2008); European Parliament, Resolution on the Transitional Arrangements Restricting the Free Movement of Workers on EU Labour Markets, 2006/2036 INI, C 293 E/230; Elena Jileva, *Visa and Free Movement of Labour: the uneven imposition of the EU acquis on the accession states*, 28(4) JOURNAL OF ETHNIC AND MIGRATION STUDIES 83-700 (2002); Stalford, *supra* note 56.

[141] *E.g.*, Annex XII of the Accession Treaty with Poland; Annex VI to the Act of Accession with Bulgaria.

[142] This treatment was less favorable than the family reunification rights conferred on TCNs pursuant to Directive 2003/86, and less favorable than the rights conferred by the Europe Agreements. This approach also was likely in conflict with ECJ case law stemming from the transitional measures imposed during Greece's accession in 1981. *See* Case C-77/82, Peskeloglou v. Bundesanstalt für Arbeit, ECLI:EU:C:1983:92.

[143] Moreover, there was not much discussion of these concepts in their legislative histories.

[144] As long as they were not more restrictive than those in force on the day of signing the Accession Treaties.

gave priority to all EU workers (including CEE workers) over TCNs. Before the end of the initial two-year phase, the Council was to "review" the functioning of transitional arrangements – but this "review" had no binding effect[145]. In practice, Member States could decide unilaterally to continue imposing their national measures during the second (three-year) phase, after simply notifying the Commission. Thereafter, States which had been applying restrictive measures had the discretion to continue applying them for two additional years "in case of serious disturbances" of their labor markets or merely in response to "a threat thereof", after notifying the Commission. No prior authorization by any EU body was required, and neither the Commission's role nor the concept of "serious disturbances" was ever clarified[146]. Most Member States relied on transitional measures, during both parts of the Eastern Enlargement[147].

In addition, any Member State that had not initially applied transitional restrictions could request at any point before the end of the seven-year periods that the Commission authorize mobility derogations if it experienced or merely could "foresee disturbances" of its labor market "which *could* seriously threaten the standard of living or the level of employment in a given region or occupation" – to be in place until the situation was restored to "normal". Again, none of the key terms were defined. Moreover, in "urgent and exceptional" cases, Member States could unilaterally suspend application of the free movement acquis at any point before the end of the seven-year periods. In the end, none of these provisions were applied in the aftermath of the 2004 enlargement. However, Spain obtained the Commission's authorization to suspend free movement of workers from Romania between August 2011 and December 2013, after having opened up its labor market in 2009. Although to obtain such authorization, a Member State was required to support its "convincing" arguments with specific data rather than merely citing unemployment

[145] Monika Byrska, *The Unfinished Enlargement: Report on Free Movement of People in EU-25* (European Citizen Action Service 2004).

[146] Adelina Adinolfi, *Free Movement and Access to Work of Citizens of the New Member States: The Transitional Measures*, 42 COMMON MARKET LAW REVIEW 469-98 (2005).

[147] After the 2004 enlargement, during the first phase (2004-06), all EU-15 States other than Ireland, the UK, and Sweden imposed direct mobility restrictions (Ireland and the UK also imposed limitations on access to social benefits); during 2006-09, additional nine Member States opened their labor markets; Austria and Germany were the only two states to have continued direct restrictions after 2009. After the 2007 enlargement, during the first phase (2007-09), Hungary, and all EU-15 states except Finland and Sweden imposed restrictions. UK, Ireland, Germany, Austria, France, Belgium, the Netherlands, and Luxembourg maintained restrictions until the end of 2013. Moreover, after invoking safeguard clause, Spain imposed restrictions between 2011 and 2013.

rates[148], Spain was given permission based on unemployment rates alone (of both its own nationals and Romanian nationals in Spain)[149].

Transitional mobility restrictions were not challengeable under EU law. Article 18 of the Treaty allows for limitations of the free movement right[150]. Moreover, the ECJ did not have jurisdiction to challenge their legality because they were an integral part of the Accession Treaties, and hence primary law[151]. Of course, since provisions limiting the freedom of movement right must be interpreted strictly, the Commission could have in theory brought infringement procedures against Member States for imposing measures that were overly broad[152]. No such procedures were initiated.

Although transitional mobility derogations did not apply to persons other than workers, CEE nationals' access to mobility was severely impeded by them. Transitional restrictions did not apply to economically inactive individuals, as long as they could demonstrate financial self-sufficiency and health insurance coverage. These conditions likely served as a significant impediment for CEE nationals, due to CEE states' lower GDPs[153]. Transitional mobility derogations also did not apply to self-employed persons[154]. Although legally not a very onerous standard to satisfy, as discussed above, becoming self-employed requires financial resources and familiarity with local markets. These hurdles would have been difficult for CEE nationals to overcome. Moreover, transitional measures also did not apply to CEE nationals who had already been

[148] European Commission, Report from the Commission to the Council on the Functioning of the Transitional Arrangements on Free Movement of Workers from Bulgaria and Romania, SEC(2011) 1343 final.

[149] European Commission, Decision of 20 December 2012 authorising Spain to extend the temporary suspension of the application of Articles 1 to 6 of Regulation (EU) No 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union with regard to Romanian workers (2012/831/EU), OJEU L 356/90.

[150] "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

[151] *See* Cases C-31/86 and 35/86 Levantina Agricola Industrial SA v. Council, ECLI:EU:C:1988:211.

[152] European Commission, Report on the First Phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as Requested According to the Transitional Arrangement set out in the 2003 Accession Treaty, COM(2008) 765 final.

[153] For example, see Eurostat, GDP and household accounts at regional level (2012), http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:GDP_and_household_accounts_at_regional_level&oldid=81499.

[154] Transitional restrictions also did not apply to posted workers, who were governed by a separate legal regime.

working lawfully in EU-15 States for an uninterrupted period of at least 12 months prior to accession[155], but the rights of such workers could be limited at the discretion of the receiving States. This provision carried little practical significance given how few CEE nationals had access to lawful employment opportunities before the Enlargement, and their propensity to engage in short-term migration[156] and informal employment[157], thus lacking an uninterrupted 12-month period of employment.

2. Access to Social Benefits After 2004

a. Workers

From day one of qualifying as a "worker" in a receiving State, access to that State's social security benefits[158] (Regulation 883/2004[159], Article 3), social and tax advantages (Regulation 1612/68, Article 7(2)), and social assistance (Directive 2004/38, Article 24(2)) followed.

The ECJ continued to support workers' receipt of all these benefits. Drawing on *Grzelczyk*, in *Trojani* (2004), the Court pointed out that a worker's receipt of social assistance could not automatically lead to removal due to termination of the right to residence. In *Hartmann*[160] (2007), the Court expanded the term "worker" to include frontier workers, for the purposes of social advantages. And in *Renneberg*[161] (2008), a national rule not allowing workers to offset tax income from one State with tax loss from another State was found impermissible under the Treaty's guarantee of freedom of movement.

b. Economically Inactive Movers (Including First-Time Jobseekers)

Drawing support from Treaty's provisions on EU citizenship and equality, the ECJ has continued to expand the rights of jobseekers and

[155] And did not move to another Member State within the first 12 months after accession.

[156] *See* Stalford, *supra* note 56.

[157] *See* Kubal, *supra* note 24.

[158] These are contributory benefits, including old-age pensions, survivor's pensions, disability benefits, sickness benefits, birth grants, unemployment benefits, family allowances, and healthcare benefits; and SNCBs (mixed type of benefits, between social assistance and social security), such as income support in the UK or jobseeker's allowance in Ireland (Regulation 883/2004, Article 3). Non-contributory benefits fall outside EU law's scope.

[159] Regulation 883/2004 on the coordination of social security systems. It replaced Regulation 1408/71, continuing its general framework.

[160] Case C-212/05, Hartmann v. Freistaat Bayern, ECLI:EU:C:2007:437.

[161] Case C-527/06, Renneberg v. Staatssecretaris van Financiën, ECLI:EU:C:2008:566.

economically inactive mobile EU citizens, thus overcoming some of the distinctions between economically active and inactive movers under secondary legislation.

Under the Directive, after the first three months of residence (during which host States could deny access to social assistance benefits (Article 24)), economically inactive movers were granted equal access to social assistance, as long as they could demonstrate self-sufficiency so that they did not lose their right to reside. The Court in *Trojani* (2004), however, expanded this right. It noted that since the right to reside in other Member States is conferred directly on every EU citizen by the Treaty, all mobile individuals are entitled to receive social assistance (non-contributory benefits) on the same conditions as host State nationals, even if they do not satisfy residence requirements under secondary legislation. Due to financial solidarity between all EU citizens, lacking sufficient resources was found not to prevent mobile persons from having access to all rights stemming from EU citizenship, including the right to equality in access to social assistance.

Although pursuant to Article 24(2) of the Directive, Member States were permitted not to grant first-time jobseekers from other Member States any social assistance for as long as they remained in that status, the ECJ mandated that they be given equal access to unemployment social assistance and other financial benefits "intended to facilitate access to the labour market"[162]. Which specific national benefits "facilitate" labor market access depends on the benefits' results, rather than their formal structure[163]. Member States could require prospective workers to demonstrate a "real link" with the host country's labor market to access such benefits. This could be satisfied where a jobseeker had genuinely sought work for a reasonable time period and had a "genuine chance" of finding employment[164]. This test was to be broad and flexible - not met only when it was inconceivable that a jobseeker could establish a real link[165]. Thus, for example, in *Ioannidis* (2005), a single requirement based on the place where a jobseeker had completed secondary education was found too general and restrictive to serve as a test of "real link"[166]. More recently, the ECJ has pointed out that genuinely having sought work (as demonstrated, for example, by being invited to job interviews, registering with employment

[162] Cases C-22/08 and C-23/08, Vatsouras and Koupatantze v. ARGE, ECLI: EU:C: 2009:150.

[163] *Id.*

[164] *See* Case C-138/02, Collins v. Secretary of State for Work and Pensions, ECLI:EU:C:2004:172; *see also* Cases C-22/08 and C-23/08, Vatsouras and Koupatantze v. ARGE, ECLI: EU:C: 2009:150.

[165] *See* Case C-258/04, Office national de l'emploi v. Ioannidis, ECLI:EU:C:2005:559.

[166] *Id.*

agencies, and participating in their events) for a reasonable period, even without having ever worked in the host State, suffices[167]. Any residence conditions such as the "genuine link" test must be applied under the principle of proportionality[168]. Thus, in its statutory interpretation, the ECJ had privileged jobseekers among other types of economically inactive movers. However, the test also endorses implicit discrimination of EU movers as opposed to domestic workers, since the latter automatically tend to have links with their home States[169].

Social and tax advantages were not available to jobseekers under Regulation 1612/68. However, in *Collins* (2004)[170], the ECJ ruled that only first-time jobseekers were excluded from access to social advantages, whereas those who had already entered the labor market were eligible for the same social and tax advantages (such as unemployment benefits) as national workers. Since jobseekers fell within Treaty provisions on free movement of workers, they were to be afforded equal treatment – including in access to financial benefits for the unemployed. The Court also noted that although EU law did not preclude national legislation which makes entitlement to unemployment benefits conditional on a residence requirement, it had to satisfy the proportionality test.

Pursuant to Regulation 883/2004 (Article 3 and Annex X), SNCBs (types of social security benefits[171] which are considered social assistance), were also made available to jobseekers, but only those deemed "habitually resident" in the host State. Habitual residence was a factual determination, based on factors including the duration and continuity of residence, mover's residence intentions, family status, housing, employment history, and tax payments (Regulation 987/09).

c. CEE Nationals

For CEE nationals lawfully residing in EU-15 States, EU law mandated that they have equal access to all the social benefits discussed above. Moreover, A-8 workers (including those self-employed) were entitled to

[167] Case C-367/11, Prete v. Office national de l'emploi, ECLI:EU:C:2012:501.

[168] See Case C-138/02, Collins v. Secretary of State for Work and Pensions, ECLI:EU:C:2004:172.

[169] Charlotte O'Brien, *Real links, abstract rights and false alarms: The relationship between the ECJ's 'real link' case law and national solidarity*, 33 EUROPEAN LAW REV. 643 (2008).

[170] *Id.*; *see also* Case C-258/04, Office national de l'emploi v. Ioannidis, ECLI:EU: C:2005:559.

[171] These are contributory benefits, including old-age pensions, survivor's pensions, disability benefits, sickness benefits, birth grants, unemployment benefits, family allowances, and healthcare benefits (Regulation 883/2004, Article 3).

equality of treatment in access to social security (both non-contributory and contributory) under Regulation 1408/71, explicitly mentioned in the A-8 Accession Treaties[172].

Nothing in the Accession Treaties provided Member States the right to impose restrictions in addition to the mobility derogations from Articles 1 through 6 of Regulation 1612/68, which were "exhaustive"[173]. Any additional restrictions would have been subject to the general equality principles under the Treaty. However, after the 2004 enlargement, all EU-15 States other than Sweden adopted new restrictions, for up to seven years, on post-2004 CEE movers' access to social assistance, social security benefits, or social advantages, including delays in providing such access even once labor market access was granted[174]. Similar restrictions were applied after the 2007 enlargement.

The Commission brought infringement proceedings against the UK[175] for applying a new habitual residence test to bar not only jobseekers but also unemployed persons from eligibility for social security benefits and social advantages for the first twelve months of employment even if they had retained worker status under EU law. The ECJ dismissed the case, however, after finding the UK approach proportionate (due to being based on individual assessments) and tied to a legitimate need to protect public finances[176]. This was one of the earliest indications of the ECJ's becoming more responsive to Member States' arguments about CEE nationals' alleged welfare tourism.

C. Legal Regime Since Transitional Mobility Derogations Had Expired

1. Freedom of Movement Law

Directive 2004/38 continues to be in force today, connecting the rights of residence, mobility, and social assistance benefits. In the last few years, there have been no changes in EU institutions' approach toward the Directive's basic principles on free movement and residence rights, except

[172] For example, Annex II, ¶ 13 of the Accession Treaty with Poland. Austria was excluded from this obligation.

[173] NICOLA ROGERS & RICK SCANNELL, FREE MOVEMENT OF PERSONS IN THE ENLARGED EUROPEAN UNION (2005).

[174] For example, under the Worker Registration Scheme in the UK, CEE workers did not have right of residence (and hence no access to benefits) until they completed twelve months of consecutive employment.

[175] The Commission also initiated infringement procedures against Austria, Germany, and Sweden, focusing on transitional limitations on the rights of CEE movers' family members.

[176] Case C-308/14, Commission v. United Kingdom, ECLI:EU:C:2016:436.

for the ECJ's imposition of limitations on residence rights of economically inactive movers.

a. Workers

Regulation 492/2011 replaced Regulation 1612/68 to mandate equality of mobile workers and jobseekers in the context of employment, including social and tax advantages (Article 7(2)). Adopted to improve application of Regulation 492/2011, Directive 2014/54 calls on Member States to strengthen redress mechanisms for workers suffering discrimination or infringement of their right to free movement (Article 3), and to designate bodies to support equal treatment of EU workers and their families (Article 4). These recent laws expanded the EU's conceptual approach to mobility: Regulation 492/2011 defines the right to free movement as including "all matters relating to the actual pursuit of activities as employed persons," as well as "conditions for the integration of the worker's family" (Recital (6)); and Directive 2014/54 denounces any "unjustified restrictions and obstacles" to mobility (Article 3).

The ECJ continues to define the concept of "worker" broadly. For example, in *Saint-Prix* (2014)[177], the Court extended worker status to a woman who had stopped working due to late stages of pregnancy and the effects of childbirth - as long as she would return to work within a "reasonable" time (to be determined based on specific factual circumstances). Moreover, the Court noted that Directive 2004/38 cannot limit the scope of "worker" status under the Treaty. In its 2013 *L.N.* decision, Case C-46/12, relying on the Treaty, the ECJ ruled that motivations for undertaking work abroad are irrelevant to the definition of "worker." Thus, the Court allowed a full-time student employed part-time to have worker status, despite the fact that he might have entered the host State with the intention to study rather than to work.

Transitional mobility restrictions were imposed on workers from Croatia after its accession in 2013. Moreover, any future accession treaties have been predicted to include permanent labor mobility safeguards[178]. As stated by the Council President in the Conclusions of the European Council summit held in 2016, any future enlargements will include "appropriate transitional measures concerning free movement of persons"[179]. The

[177] Case C-507/12, Jessy Saint Prix v. Secretary of State for Work and Pensions, ECLI:EU:C:2014:2007.

[178] Editorial Board, *The Free Movement of Persons in the European Union: Salvaging the Dream while Explaining the Nightmare*, 51 COMMON MARKET LAW REVIEW 729-40 (2014).

[179] European Council, Presidency Conclusions (February 18-19, 2016), EUCO 1/16,

Commission did not express a view on this approach.

b. Economically Inactive Persons (Including Jobseekers)

In the last few years, the ECJ has been reading secondary legislation narrowly rather than interpreting Treaty provisions expansively, to limit residence rights of economically inactive movers. In *Brey* (2013), the Court suggested that an economically inactive mover's entitlement to a means-tested SNCB benefit (such as compensatory supplement benefit) *could* be an indication of not having sufficient resources. Thus, such person's right to residence under Directive 2004/38 for longer than three months could be in question – to be determined through an individual examination. After *Dano* (2014)[180], however, economically inactive individuals' application for social assistance benefits results in automatically losing their right to reside due to lacking sufficient resources.

c. CEE Nationals

The above provisions fully apply to CEE nationals since transitional mobility restrictions had come to an end. Given that CEE nationals' mobility has been primarily motivated by employment opportunities in EU-15 States, measures that have decreased jobseekers' rights have been especially detrimental to their enjoyment of the free movement right. EU institutions' prioritizing worker status has likely put pressure on jobseekers to take up any available employment options, including those in flexible arrangements.

To support CEE nationals' residence rights in host States, the ECJ has ruled that their periods of lawful residence in EU-15 States before the Eastern Enlargement must be taken into account for the purpose of acquisition of permanent residence[181].

2. Access to Social Benefits Since 2014

In the last few years, there have been no statutory changes in provisions on mobile persons' access to social benefits. Directive 2004/38 continues to govern access to social assistance, and Regulation 883/2004 dictates the coordination of workers' access to social security benefits. Regulation 492/2011 replaced Regulation 1612/68, without changing its provisions on

ANNEX I, 24.

[180] Case C-333/13, Dano v. Jobcenter Leipzig, ECLI:EU:C:2014:2358.

[181] Cases C-424/10 and C-425/10, Ziolkowski and Szeja v. Land Berlin, ECLI:EU:C:2011:866.

workers' access to social and tax advantages (Article 7(2)). The ECJ, however, has been limiting economically inactive movers' access to benefits.

a. Workers

As stated in the Conclusions of the European Council summit in 2016, the ECJ opposes restricting economically-active movers' rights to social assistance[182]. In addition to continuing to define the concept of "worker" broadly, as discussed above, the ECJ has been strengthening workers' access to social assistance. For example, in *Saint-Prix* (2014)[183], the Court recognized entitlement to income support (a type of SNCB) of a woman who had stopped working due to pregnancy and childbirth.

The Council and the Commission, however, have been more responsive to Member States' concerns about limiting access to social benefits, even of workers. This became especially evident during David Cameron's renegotiation of the UK's membership in the EU. Essentially, Cameron was seeking to extend the application of *Dano* and *Alimanovic*, to reduce even workers' access to social security. According to the Council, "Member States have the right to define the fundamental principles of their social security systems and enjoy a broad margin of discretion to define and implement their social and employment policy, including setting the conditions for access to welfare benefits"[184] (2016, Annex I, at 19). To facilitate granting States greater discretion, the Council declared its intention to submit proposals to amend secondary legislation, including Regulation 883/2004 (on the coordination of social security systems) so that child benefits claims could be indexed by host States to benefits levels in the place of child's residence; and Regulation 492/2011, to provide an "alert and safeguard mechanism that responds to situations of inflow of workers from other Member States of an exceptional magnitude over an extended period of time, including as a result of past policies following previous EU enlargements"[185]. The only limitation would be that EU workers must not be treated less favorably than TCNs. The Commission was in support of these proposals[186]. Although these Conclusions were reached in the context of the UK's renegotiation of its membership, due to what the Commission had acknowledged to be "conditions of necessity" brought about by large

[182] European Council, *supra* note 179.

[183] *See* Case C-507/12, Jessy Saint Prix v. Secretary of State for Work and Pensions, ECLI: EU:C:2014:2007.

[184] European Council, *supra* note 179, Section D.

[185] *Id*. at 23.

[186] *Id.* at 33-34.

influx of movers into the UK, they nevertheless indicate EU institutions' openness toward prioritizing EU-15 States' concerns and limiting even workers' access to benefits. Critically, it is not clear what evidence the UK had presented to warrant such conclusions, which are incompatible with free movement and anti-discrimination provisions of EU law. The Commission simply declared that "the kind of information provided" to it by the UK showed "the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists in the United Kingdom today."[187] This is despite having concluded in 2013 that there was little evidence of benefit tourism across the EU, but only evidence of economic benefits to the receiving States, especially the UK.[188] Thus, it is likely that both the Commission and the Council subscribe to one of the key misconceptions about the effects of free movement – that it negatively affects host States' public purse.

b. Economically Inactive Persons (Including Jobseekers)

Whereas in the late 1990s and early 2000s, the ECJ had provided economically inactive EU citizens with access to some social benefits not accessible under secondary legislation, the Court has been retracting on this approach in the last few years. Having become more sensitive to EU-15 States' concerns about benefit tourism, the Court has been narrowly reading secondary legislation rather than relying on Treaty provisions. After *Dano* (2014)[189], Member States do not have to provide access to SNCBs to economically inactive EU citizens (or at least those who, like the petitioner, had never been employed in the receiving States and were not searching for work). Moreover, those who apply for social assistance benefits automatically lose their right to reside, without the need for an individual assessment. Thus, in practice, economically inactive persons lack the right to equal treatment in the provision of social assistance. Despite fundamental rights stemming from EU citizenship, Member States may attach conditions of residence from Directive 2004/38 to the provision of SNCBs with a social assistance component, and thus exclude access to them even if they

[187] European Commission, Declaration of the European Commission on the Safeguard Mechanism referred to in paragraph 2(b) of Section D of the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, Annex VI to the European Council conclusions of 18–19 Feb. 2016, EUCO 1/16, CO EUR 1, CONCL 1.

[188] European Commission, A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence, Final report, Oct. 2013.

[189] *See* Case C-333/13, Dano v. Jobcenter Leipzig, ECLI:EU:C:2014:2358.

are available under Regulation 883/2004.

Despite the Commission's obvious opposition, in *Commission v. United Kingdom* (2016)[190], the ECJ extended *Dano*'s exclusion of SNCBs to all social security benefits (including family benefits), not just those with a social assistance element. The ECJ imported *Dano*'s approach of not requiring an individual assessment, and *Brey*'s principle of permitting Member States to impose conditions (such as the UK's right-to-reside requirements) on economically inactive persons to be eligible for SNCBs into Article 4 of Regulation 883/2004 (regarding equality of treatment in the receipt of social security benefits, such as child benefits and child tax credits). Moreover, the Court reversed its prior approach regarding burden of proof, so that Member States are now presumed to be acting in a lawful non-discriminatory manner in denying access to social benefits as long as they justify their actions based on protecting their public finances.

The ECJ also narrowed the scope of fundamental Treaty principles by applying secondary EU legislation limitations in *Alimanovic* (2015)[191], an even stricter application of Directive 2004/38 than *Dano*. Despite research evidence to the contrary, the Court in *Alimanovic* accepted EU-15 States' "welfare magnet" argument, and concluded that even if individual social assistance claims did not place an "unreasonable burden" on national social security systems, Member States could argue that accumulated claims would do so. Thus, States were entitled to prevent mobile jobseekers' access to certain SNCBs (which constitute social assistance under Directive 2004/38, but are not benefits of financial nature intended to facilitate access to the labor market). Moreover, although Article 7(3) of Directive 2004/38 allowed former workers to retain their status for six months after becoming unemployed, the ECJ concluded that after that period, they could claim social assistance only if their right of residence was based on more than the non-expulsion provision of Article 14(4) (continuing to seek employment).

The Court in *Alimanovic* also narrowly construed the "intended to facilitate access to the labour market" test, so that only benefits that are *necessary* to jobseekers' ability to access the labor market fall outside the scope of Article 24(2), and thus cannot be withheld during the first three months of residence or to first-time jobseekers. Moreover, the Court ruled that expulsion decisions due to presenting an unreasonable burden on a national social assistance system did not require individual assessments.

[190] Case C-308/14, Commission v. United Kingdom, ECLI:EU:C:2016:436.

[191] Case C-67/14, Jobcenter Berlin Neukölln v. Alimanovic, ECLI:EU:C:2015:597. The petitioner could not be categorized as retaining worker status under Article 7(3)(c) only due to a technicality, having recently become a jobseeker again after having worked for 11 rather than 12 months, and having just passed the six-month period for retaining worker status.

This stance was reiterated in *Garcia-Nieto* (2016), in which the ECJ held that jobseekers never have access to unemployment benefits even if they facilitate access to the labor market because such benefits have a social assistance element. Thus, their primary aim is the preservation of dignity rather than facilitation of access to the labor market. Consequently, jobseekers can be automatically excluded from access to social assistance even in the first three months of residence.

c. CEE Nationals

In the last few years, the ECJ has reduced access of economically inactive movers to benefits, and other EU branches have considered diminishing even workers' access in response to EU-15 concerns about alleged welfare tourism. Such measures have generally had more impact on movers who are poor or not employable as highly-skilled workers in the receiving States. Jobseeker limitations on access to social benefits especially impact CEE nationals since they have access to fewer financial resources than EU-15 nationals, and tend to be employed in temporary, flexible, and semi-legal arrangements[192].

III. CONCLUSION

The UK's Brexit referendum had exposed immigration and free movement debates to wider public, political, and media scrutiny – oftentimes filled with inaccurate or misleading statements. Such erroneous myths have vilified movers, degraded their ability to integrate in host Member States, and increased strife between locals and movers. Although not often mentioned in those debates, the UK has been chipping away at the right to mobility for decades – through not belonging to the Schengen area, various immigration opt-outs, and the imposition of indirect transitional mobility derogations after the 2004 and 2007 enlargements. What also has been lacking from debates is how the EU has been approaching the right to free movement, and what limits on mobility it has accepted. In order for Brexit negotiations to be more responsive to the reality of mobility, for the pubic to understand this right and the aftermath of Brexit, and for improved future contestations over immigration in other Member States, it is important that politicians and the media address immigration more responsibly, and that the evolution of the right to free movement is understood correctly.

As discussed in this Article, although originally limited to workers, by

[192] Kubal, *supra* note 24.

the 1990s, the free movement right was gradually expanded via Treaty provisions, statutes, and ECJ decisions to beyond what is necessary for the functioning of the single market - to encompass former workers, jobseekers, and eventually all EU-15 citizens. Relying heavily on the post-Maastricht concept of EU citizenship as not linked to the market economy, the ECJ also expanded access to residence rights and social benefits to economically inactive EU-15 nationals, going beyond limitations imposed by secondary laws. As both legislation and ECJ decisions shifted the focus from the concept of economically active participants in the single market to EU citizenship, even economically inactive EU-15 nationals gained access to equal treatment and integration measures. While EU-15 nationals' access to free movement and to social benefits was being expanded, CEE nationals' ability to enter EU-15 States was very restricted. Before the Eastern Enlargement, CEE nationals' mobility was limited to bilateral agreements that provided for movement of small numbers of workers to satisfy specific economic needs in EU-15 States. The Europe Agreements did not facilitate mobility, and their right to equal treatment in the employment context applied to very few categories of CEE workers. The abolition of the requirement for entry visas to EU-15 States in 2001 led to a de facto influx of CEE labor migrants. As TCNs, CEE nationals were not entitled mobility protections or access to social benefits in EU-15 States.

Despite an overall expansion of protections of free movement and residence rights, statutory differentiation between the rights of workers and of economically inactive citizens continued after 2004. The rights of workers, former workers, and jobseekers were getting increased protections through both statutes and ECJ decisions. Due to transitional post-accession derogations, EU-15 Member States could limit their labor market access to EU-15 nationals only. CEE workers and jobseekers could be treated akin to TCNs. Continuing its trend from before 2004, the ECJ relied on Treaty provisions to also expand rights of economically inactive citizens, once again going beyond statutory limitations. The European Parliament was supportive of this approach[193]. Although CEE nationals who were self-employed or economically inactive were granted the same EU rights as mobile EU-15 nationals, in practice, few were able to benefit from such rights due to financial constraints.

Since transitional arrangements had come to an end, CEE nationals have benefited from increasing statutory and ECJ protections of workers' residence and social benefits rights. All EU institutions appear to have become more responsive, however, to EU-15 States' concerns about welfare tourism by CEE nationals. Starting with *Dano* in 2014 (the same year that

[193] European Parliament, Report Committee on Civil Liberties, Justice and Home Affairs, Report Catania, A 6-0411/2005.

transitional limitations on A-2 workers and jobseekers' mobility had come to an end), the ECJ broke from its precedent and began to diminish residence rights and access to social benefits of jobseekers and economically inactive individuals, by narrowly applying secondary laws. References to Treaty provisions, EU citizenship rights, or financial solidarity—which had permeated pre-*Dano* case law—are no longer part of the ECJ's decisions. Consequently, CEE jobseekers and economically inactive movers are facing increasing impediments. The reasoning and outcomes in these recent cases indicate that EU citizenship depends on participation in the market, so that poor and economically inactive EU citizens do not enjoy the same rights as those who are employed or have resources.

Current mobility laws discourage movement of jobseekers and those who lack access to financial resources. By privileging worker status, the current legal framework reduces worker autonomy as it likely encourages efforts to obtain employment soon upon arrival in host States or even before, and thus increases reliance on employment agencies and willingness to accept temporary or flexible work arrangements. It also negatively affects workers who become unemployed, especially those who are poor. Recent impediments in economically inactive movers' access to social benefits are likely to have greater impact on CEE than EU-15 mobile nationals due to the formers' propensity to engage in irregular, poorly paid employment, more recent labor market access in EU-15 States, and lesser access to financial resources from home. By providing Member States with discretion to withhold equal access to social benefits without terminating residence right, the ECJ has created a class of economically inactive EU citizens who cannot be expelled but have no entitlement to social assistance. Moreover, Member States have been provided discretion to define work status narrowly, thus leading to withholding benefits from workers on low incomes and in flexible, insecure work arrangements – more and more prevalent in today's economies. The EU has not acknowledged today's labor market patterns in its legal framework. Because immigrants, especially those from poorer states, tend to concentrate in low-pay, less secure jobs, they have been especially impacted. Since the economic crisis of 2008, part-time, flexible, insecure employment options have proliferated in the EU[194]; and inequalities have been increasing across the EU[195].

[194] Carole Lang et al., *Atypical forms of employment contracts in times of crisis*, Working Paper (European Trade Union Institute 2013).

[195] Kaja Bonesmo Fredriksen, *Income inequality in the European Union*, OECD Economics Department Working Paper No. 952, ECO/WKP(2012)29; Oxfam, *A Europe for the many, not the few: Time to reverse the course of inequality and poverty in Europe*, 206 Oxfam Briefing Paper (2015); Jutta Allmendinger and Ellen von den Driesch, *Social*

Precarious employment, very often undertaken by CEE workers in EU-15 States, becomes even more precarious as a result of the increasing divergence between EU rhetoric and EU rights, further weakened due to Member State discretion. This has had an especially negative impact on CEE workers. For example, Dwyer et al. have documented that the imposition of the UK's post-accession Worker Registration Scheme had made them especially susceptible to forced labor[196]. Such effects were likely amplified in the twelve EU-15 States that had imposed direct post-accession mobility restrictions on CEE nationals. O'Brien[197] has called this "a triumph of capitalist reasoning": the creation of a non-national working poor class, responsive to labor market fluctuations, yet with few entitlements to the public purse. Ultimately, this will have consequences for all low-skill workers, foreign and local, increasing socio-economic inequalities, and increasing resultant social costs – homelessness, poor health, increased crime, and decreased social cohesion and trust.

Perhaps it is thus not surprising that EU institutions' praise of mobility has often been tied to economic benefits rather than to values such as human dignity. Functioning as "one and undivided economic workforce", "European citizens should 'move', because their 'movement' prospers the development of 'human resources' and the 'Single Market'"[198]. Having praised the free movement right for creating a "more efficient allocation of resources" and "more integrated labour markets… better able to adjust to asymmetric shocks"[199], the Commission acknowledged that its support of workers' equality was grounded in improving overall economic success of the EU rather than in respect for human dignity[200]. The European Parliament and the Council have also pointed out economic benefits of intra-EU mobility – linking it to the "proper functioning of the internal market" (Directive 2014/54, Recital (10)), by "helping to satisfy the requirements of the economies of the Member States" (Regulation 492/2011, Recital (4)). Such rhetoric regarding the free movement right is

inequalities in Europe: Facing the challenge, Berlin Social Science Center (WZB) Research Area Discussion Paper 2014-005.

[196] Peter Dwyer et al, *Forced labour and UK immigration policy: Status matters*, JRF Programme Paper (Joseph Rowntree Foundation 2011); *see also* Migration Advisory Committee, *Review of the transitional restrictions on access of Bulgarian and Romanian nationals to the UK labour market* (Nov. 2011), 9.

[197] O'Brien, *supra* note 36, at 939.

[198] Commission of the European Communities, Commission's action plan for skills and mobility, COM(2002) 72 final, 72.

[199] European Commission, Proposal for a regulation of the European Parliament and of the Council on a European network of Employment Services, workers' access to mobility services and the further integration of labour markets. COM(2014) 06 final, 10.

[200] European Commission, Green Paper – European Social Policy: Options for the Union, COM(93) 551 final.

in line with my analysis of secondary laws, which still retain an economic core despite having been expanded to non-economically active persons. Given that intra-EU mobility has been primarily from CEE to EU-15 States since the Eastern Enlargement, it is EU-15 States' economies that have been emphasized and protected.

Similarly, EU discourse regarding post-accession mobility derogations has focused on economic benefits accruing to EU-15 States. Although EU institutions were less enthusiastic about applying transitional measures than some EU-15 States were, they rarely acknowledged any conceptual or legal difficulties with the derogations. Instead, the Commission has tended to frame its critique in economic terms only, finding transitional measures unnecessary for ensuring EU-15 States' economic interests, particularly in light of predictions of low CEE post-accession mobility[201]. Moreover, the Commission disfavored mobility restrictions because they were likely to hinder the functioning of the internal market[202]. After the Enlargement, the Commission continued to question the necessity of imposing transitional measures, but again, its critique focused on economic benefits to EU-15 States of unlimited mobility[203]. On occasion, the Commission had even defended direct transitional mobility limitations – again, this was in economic terms only, for allegedly benefiting CEE States by better allocating labor[204].

As discussed in this Article, freedom of movement has never been an absolute right. Although expanded via secondary laws and especially ECJ decisions relying on Treaty provisions, the right has always differentiated between economically active movers and those with financial resources, as opposed to economically inactive and poor ones. Benefiting economics of

[201] *See, e.g.*, European Commission, *supra* note 126; European Commission, *supra* note 98.

[202] European Commission, *supra* note 98.

[203] European Commission, Enlargement, Two Years After – An Economic Success, COM(2006) 200 final; European Commission, Fifth Report on Citizenship of the Union (1 May 2004 – 30 June 2007), COM(2008) 85 final; European Commission, *supra* note 152; Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The impact of free movement of workers in the context of EU enlargement - Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty.

[204] EUROPEAN COMMISSION, EMPLOYMENT AND SOCIAL DEVELOPMENTS IN EUROPE (2011). The European Parliament had, on at least one occasion, noted that mobility restrictions contradicted the principle of solidarity between EU-15 and CEE States. *See* European Parliament, *supra* note 140. Arguably, given that Parliament members are elected directly by the people, it is more responsive than other EU bodies to interests of all EU citizens.

host, that is, EU-15 States has been prioritized over mobility rights of CEE nationals. Moreover, the complex web of EU law on social benefits has intersected with freedom of movement laws to further privilege EU-15 States' economic interests, which has also been reflected in EU rhetoric. As Cook[205] had noted, "at the heart of the EU project lies a preoccupation with the mobility and residence rights of workers rather than citizens per se". I argue that this mobility has always been structured—and, as needed, undermined by the EU—in the service of EU-15 Member States' economic and political concerns. Although CEE nationals (and CEE states) have benefited in numerous ways from the Eastern Enlargement, such benefits appear ancillary. This brings to mind Derrick Bell's interest convergence theory[206], which, although based on black-white relations in the United States, can be expanded to encompass all dominant groups' promotion of legal or social advances for groups with less power only when such advances also promote their own self-interest.

Whereas mainstream CRT scholars postulate a view of racial relations and power differentials between whites and non-whites, some CWS scholars[207] have noted the need for a more nuanced look at fractures and hierarchies within whiteness. My analysis of the policy of mobility indicates that CEE nationals have straddled belonging and exclusion from the bundle of rights that accrue from EU citizenship, pointing to a hierarchy of Europeanness, citizenship, and whiteness within the EU. Immigrants stand at the intersection of various binaries of privilege and subordination, and thus the need for adding more nuances to critical approaches to the study of law, race, and power. By testing and critiquing limitations of CRT and CWS, I hope to reinvigorate critical approaches to the study of law. Moreover, through the exploration of the internal boundaries of whiteness, I expose its fabrication, taking a step toward abolishing racism. As Justice Blackmun had noted in *Bakke v. Regents of the University of California*[208], "[i]n order to go beyond racism, we must first take account of race."

More generally, my analysis here demonstrates how EU institutions have exhibited longstanding willingness to compromise the right of free movement[209], undermining trust and solidarity among EU citizenry. Their

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[205] Joanne Cook et al, *The Experiences of Accession 8 Migrants in England: Motivations, Work and Agency*, 49(2) INTERNATIONAL MIGRATION 54–79, 59 (2011).

[206] Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARVARD LAW REVIEW 518-533 (1980).

[207] *See, e.g.*, STEVE GARNER, WHITENESS: AN INTRODUCTION (2007); ERIC P. KAUFMANN, RETHINKING ETHNICITY: MAJORITY GROUPS AND DOMINANT MINORITIES (2004); CYNTHIA LEVINE-RASKY, WHITENESS FRACTURED (2013).

[208] 438 U.S. 265 (1978).

[209] Determining whether EU institutions' position on free movement facilitates or merely responds to Member State attitudes is beyond the scope of this paper.

approach has diminished the status of and rights stemming from EU citizenship, challenged coherence of the EU legal order, and shown how malleable the concept of equality can be. This is especially problematic given that populist parties in several other EU-15 States have supported their own versions of Cameron's pushback against the EU[210]. As O'Brien[211] had noted, since national measures limiting access to mobility and social benefits are not supported by evidence of negative economic effects of mobility, they are likely driven by capitalism and nationalistic prejudice. If EU institutions were to challenge—as they should—Member State attacks on mobility, they would have to begin by more closely matching their policies to their lofty rhetoric.

[210] Including Austria, Denmark, Germany, and Sweden. *See The 'emergency brake' is only symbolic, but it will probably work*, THE ECONOMIST, Feb. 1, 2016, available at www.economist.com/blogs/bagehot/2016/02/david-cameron-s-euendgame.

[211] O'Brien, *supra* note 36, at 976.