
ORIGINAL ARTICLE

Care on the move: the gender care gap and intra-EU mobility

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Abstract

The structure, interpretation, and implementation of the European Union (EU) free movement of persons rules mean that when one's circumstances involve caring responsibilities, the quality of one's rights and protections under EU law diminishes. The consequence of this, in the context of the gender care gap, is that women who are exercising their free movement rights and living in another EU member state are exposed to a disproportionately increased risk of legal and physical precarity, poverty, destitution, and exploitation. They face challenges in attaining and retaining rights and are at risk of falling through gaps that exist between legal rules. Furthermore, the gender care gap is not visible. The connection between the gender care gap and the EU free movement rules has not been made by EU policy makers and civil society; there is currently no strategy among EU civil society organizations to represent the lived experience of EU citizens and lobby the EU institutions for progress on gender equality in this regard.

1 | INTRODUCTION

This article evaluates the European Union (EU) free movement of persons rules in the context of the gender care gap (the disproportionate allocation of unpaid care work between women and

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men). The gender care gap is enjoying a prominent place on the policy agenda of the EU institutions, signalled by, *inter alia*, the adoption of the Work–Life Balance for Parents and Carers Directive,¹ the Council Conclusions on Tackling the Gender Pay Gap: Valuation and Distribution of Paid Work and Unpaid Care Work,² the *Gender Equality Strategy 2020–2025* of the European Commission (EC) (which focuses on closing the gender care gap),³ and the *European Care Strategy*.⁴ These developments are in response to the gender care gap and the significance that this has for, *inter alia*, the gender pay gap, the gender employment gap, and the gender pension gap.⁵ The focus of the EU institutions on the gender care gap began before the COVID-19 pandemic, the impact of which has been to further highlight the issues surrounding the gap. Care is often privatized, deemed to take place in private places and to be part of our private lives and personal choices.⁶ The pandemic rendered the value of care itself more tangible, making it ‘starkly visible’ how ‘indispensable’ paid and unpaid care is in our daily lives, for the well-being and functioning of our societies and our economies.⁷ The effect of the pandemic was also to widen the gender care gap, which prompted calls for a gendered response to pandemic recovery, one that took account of the gap.⁸ For all of these reasons, the gender care gap is on the minds of policy makers in the EU (and elsewhere). It is therefore an opportune moment to reflect on how EU law intersects with the gap and evaluate the extent to which it is contributing to the transformation or entrenchment of gender inequality in this regard.

The focus of the EU institutions in relation to the gender care gap is largely on matters that fall within the field of EU social policy and rights in the workplace.⁹ However, as the Council Conclusions recall, Article 8 of the Treaty on the Functioning of the European Union (TFEU) requires the EU, ‘in *all its activities*’, to aim to eliminate inequalities between women and men,

¹ Directive (EU) 2019/1158 of the European Parliament and of the Council on Work–Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU [2019] OJ L188.

² 13584/20 Council Conclusions on Tackling the Gender Pay Gap: Valuation and Distribution of Paid Work and Unpaid Care Work, Council of the European Union, Brussels, 2 December 2020.

³ EC, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Union of Equality – Gender Equality Strategy 2020–2025* [2020] COM/2020/152 final, at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:152:FIN>>.

⁴ EC, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Care Strategy* [2022] COM/2022/440 final, at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2022:440:FIN>>.

⁵ European Institute for Gender Equality (EIGE), *Gender Inequalities in Care and Consequences for the Labour Market* (2021), at <<https://eige.europa.eu/publications-resources/publications/gender-inequalities-care-and-consequences-labour-market>>.

⁶ F. E. Olsen, ‘The Family and the Market: A Study of Ideology and Legal Reform’ (1983) 96 *Harvard Law Rev.* 1497; J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (1994).

⁷ UN Women, ‘Unpaid Care Work: Your Daily Load and Why It Matters’ *UN Women*, 13 May 2020, at <<https://www.unwomen.org/en/digital-library/multimedia/2020/5/explainer-unpaid-care-work-your-daily-load-and-why-it-matters>>. See also Council Conclusions, op. cit., n. 2.

⁸ Council Conclusions, op. cit., n. 2; UN Women, op. cit., n. 7.

⁹ Through a combination of soft law measures and individual rights in the field of EU social policy, the EU has played an active role in engaging with the gendered impact of the unequal distribution of unpaid care work: see for example N. Busby and G. James, ‘Regulating Work and Care Relationships in a Time of Austerity: A Legal Perspective’ in *Work–Life Balance in Times of Recession, Austerity and Beyond*, eds S. Lewis et al. (2018) 78; E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (2010); E. Caracciolo di Torella and A. Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (2020); I. Isailovic, ‘Gender Equality as Investment: EU Work–Life Balance Measures and the Neoliberal Shift’ (2021) 46 *Yale J. of International Law* 277.

and to promote equality.¹⁰ This article looks beyond EU social policy and turns to the field of the free movement of persons, where the connection between the gender care gap and intra-EU mobility has not been made by the EU institutions. It is a topic that is reportedly ‘neglected’ in the research carried out by the EU institutions,¹¹ but there is an emerging academic debate in legal and socio-legal scholarship, which is beginning to consider gender, care, and EU citizenship together.¹² This article advances that debate by looking squarely at the issue of the gender care gap in the context of intra-EU mobility and provides a comprehensive and structured analysis of the gendered dimension of the legal rules and their impact on the lived experience of EU citizens. It looks at the EU free movement *acquis*, including the Citizens’ Rights Directive (CRD),¹³ the Workers Regulation,¹⁴ EU citizenship,¹⁵ and the case law of the Court of Justice of the EU (CJEU). It asks two questions. First, to what extent do the EU free movement rules transform or entrench the gender stereotypes surrounding unpaid care work? Second, to what extent are the issues surrounding the gender care gap visible within the field of EU free movement?

To help us to answer these two questions, the article draws on the scholarship of Nancy Fraser, specifically ‘After the Family Wage: Gender Equity and the Welfare State’ in relation to the first research question¹⁶ and ‘Struggle over Needs: Outline of a Socialist Feminist Critical Theory of Late Capitalist Political Culture’ in relation to the second.¹⁷ In ‘After the Family Wage’, Fraser evaluates alternative approaches to the distribution of unpaid care work between women and men. These range from a male breadwinner approach (which adopts gendered stereotypes towards unpaid care) at one end of the spectrum and a universal caregiver approach (which envisages the equal sharing of unpaid care work between women and men, breaking down the gender stereotypes related to unpaid care) at the other. Fraser evaluates these alternative approaches for their ability to promote gender equality. She provides a nuanced understanding of the extent to which different approaches to the distribution of unpaid care can transform or entrench the gender care gap. In ‘Struggle over Needs’, Fraser argues that political debates about health and social welfare

¹⁰ TFEU, art. 8: ‘In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.’

¹¹ L. Ackers et al., *The Gender Dimension of Geographic Labour Mobility in the European Union* (2009) 7, at <[https://www.europarl.europa.eu/thinktank/en/document/IPOL-FEMM_ET\(2009\)419617](https://www.europarl.europa.eu/thinktank/en/document/IPOL-FEMM_ET(2009)419617)>.

¹² L. Ackers, ‘Citizenship, Migration and the Valuation of Care in the European Union’ (2004) 30 *J. of Ethnic and Migration Studies* 373; K. Hyltén-Cavallius, ‘Who Cares? Caregivers’ Derived Residence Rights from Children in EU Free Movement Law’ (2020) 57 *Common Market Law Rev.* 399; A.-M. Konsta, ‘Towards a Right to Care in EU Law: Issues of Legitimacy, Gender and Care’ in *Legitimacy Issues of the European Union in the Face of Crisis*, eds L. Papadopoulou et al. (2017) 271; N. Miller, ‘Unpaid Care Work and Gender Equality in EU Law: Evaluating EU Social Policy and EU Free Movement of Persons Law’ (2021) PhD thesis, University of Glasgow; C. R. O’Brien, ‘I Trade, Therefore I Am: Legal Personhood in the European Union’ (2013) 50 *Common Market Law Rev.* 1643; I. Shutes and S. Walker, ‘Gender and Free Movement: EU Migrant Women’s Access to Residence and Social Rights in the UK’ (2018) 44 *J. of Ethnic and Migration Studies* 137; J. Shaw, ‘Importing Gender: The Challenge of Feminism and the Analysis of the EU Legal Order’ (2013) 7 *J. of European Public Policy* 406.

¹³ 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 [2004] *OJ L158*.

¹⁴ Regulation (EU) No. 492/2011 of the European Parliament and of the Council on Freedom of Movement for Workers within the Union [2011] *OJ L141*.

¹⁵ TFEU, art. 20.

¹⁶ N. Fraser, ‘After the Family Wage: Gender Equity and the Welfare State’ (1994) 22 *Political Theory* 591.

¹⁷ N. Fraser, ‘Struggle over Needs: Outline of a Socialist Feminist Critical Theory of Late Capitalist Political Culture’ in *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (1989) ch. 8.

needs can be dominated by whether or not needs will be met (by the state), and proposes that what is being missed in these debates is how and by whom these needs are being defined and interpreted and what social structures are at play. This is important, Fraser says, because the definition and interpretation influences whether and how the needs will be met. She describes three stages in the interpretation and eventual satisfaction of a need: (1) the identification and establishment of the need, where the need becomes ‘de-naturalized’ and is recognized as being of public significance; (2) the discussion of the need by a range of publics, including civil society; and (3) the determination by the official institutions of government of what would satisfy the need. Thinking of these three stages and the journey that a need takes through them is useful in considering the second question and the visibility of unpaid care within the EU free movement legal framework. The overall underlying premise of this article is informed by the theoretical position of the ethics of care, which promotes a vision of human relationships and society where care and dependency are regarded as ubiquitous and universal in nature and care is presented as critical for human well-being and to sustaining and reproducing society.¹⁸

This article makes the argument that the EU free movement legal framework is reproducing and reinforcing a regressive gender order where the quality of one’s rights and protections under EU law diminishes when one’s circumstances involve caring responsibilities or a combination of unpaid care and economic activity. Referring to Fraser’s gender equality analysis in ‘After the Family Wage’, it is apparent that unpaid care is marginalized within the EU free movement rules, and that not only work but an androcentric form of work is privileged. This means that those with caring responsibilities, primarily women, face problems enforcing their rights and protections under EU law and that they and their dependents are at an increased risk of legal and physical precarity, poverty, destitution, and exploitation.

Furthermore, the connection between gender, care, and intra-EU mobility has not been made and is not visible in the structure and interpretation of EU free movement law. The impact of the gender care gap on the experience of intra-EU mobility is neglected, and this neglect extends to the activities of the EU institutions and EU civil society where there is an apparent gap in knowledge of how the gender care gap intersects with intra-EU mobility. With reference to Fraser’s ‘Struggle over Needs’, unless the knowledge gap is closed and the gender care gap is made more visible, it will be impossible to develop activities and strategies that could represent the lived experience of mobile EU citizens with caring responsibilities and respond to the gender inequality in the EU free movement rules.

2 | RESEARCH METHODS

The research methods used in this article are socio-legal. The doctrinal analysis looks at the structure and interpretation of the legal rules and considers whether the gender care gap is visible in the legal and policy discourse of EU free movement law. It also scrutinizes the legal rules for their

¹⁸ C. Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (1982); V. Held, *The Ethics of Care: Personal, Political, Global* (2006); E. F. Kittay, *Love’s Labor: Essays on Women, Equality, and Dependency* (1999); F. Robinson, ‘Care Ethics and the Transnationalization of Care: Reflections on Autonomy, Hegemonic Masculinities, and Globalization’ in *Feminist Ethics and Social Policy: Towards a New Global Political Economy of Care*, eds R. Mahon and F. Robinson (2011) 127; S. Ruddick, *Maternal Thinking: Towards a Politics of Peace* (1989); Tronto, op. cit., n. 6; M. U. Walker, *Mother Time: Women, Aging, and Ethics* (1999); F. Williams, ‘In and beyond New Labour: Towards a New Political Ethics of Care’ (2001) 21 *Critical Social Policy* 467.

impact on women when their caring responsibilities are taken into account, thereby examining the extent to which the rules transform or entrench the gender care gap. The empirical element of this article explores the experience of individuals to contextualize the doctrinal analysis and investigate how the legal rules operate in practice in terms of impacting women on the ground. The empirical work also aims to draw out insights into the drivers and obstacles that may influence how the institutional actors and stakeholders engage with unpaid care work and gender and how the law evolves. This approach attempts to get behind the behaviours of the institutions and actors to better understand the law, its development, and its operation, and to begin to build a picture of how law and policy could proceed on these issues. The approach is informed by the methodology that I have adopted elsewhere, which, rather than solely considering the experiences of individuals who use the law, also looks to the role of law, the legal institutions, and those who work with and within them.¹⁹

The empirical data comprises seven semi-structured interviews conducted with representatives of civil society organizations (CSOs) active in EU social policy matters or EU free movement law based in Brussels, London, or Scotland between December 2016 and December 2019.²⁰ The interviewees were selected from within these CSOs on the basis of their specialist experience. A balance was sought between Brussels-based organizations and domestic organizations based in the United Kingdom (UK). This was to give an account of the perspectives of, on the one hand, those organizations that are interacting with and supporting the individual beneficiaries on the ground in the domestic context (in the UK) and, on the other, Brussels-based organizations that have an overview of different member states' experiences and that are also dedicated to liaising with the EU institutions in Brussels.

The functions of each of the interviewee organizations vary slightly. The CSOs whose focus is on EU social policy matters have a representative and lobbying function. They include member state organizations, and their key function is to lobby the EU institutions for policy reform. The CSOs with specialism in EU free movement law also lobby for legal and policy reform; however, they are additionally advisory organizations, providing advice and support to EU migrants in their host country – in this case, the UK. The free movement organizations also engage with legal reform by undertaking strategic litigation on prominent issues, which can involve references to the CJEU. Therefore, while the role of each interviewee organization is slightly different, there is convergence in their experience because they are all actors informally contributing to policy formation and legal development by engaging with the EU institutions. As such, the interviewees were asked to consider how care needs are politicized and interpreted, thereby engaging with the second research question on the visibility of care in EU law and policy and allowing reflection in terms of Fraser's 'Struggle over Needs'. Through their membership or client base, they also have experience of the practical relevance of the EU free movement rules and how they impact women on the ground. They were asked in what ways the free movement rules intersect with the gender care gap, how this impacts women, and whether the rules contribute to the transformation or entrenchment of gender stereotypes relating to unpaid care, thereby engaging with the first research question and Fraser's work in 'After the Family Wage'.

¹⁹ J. Shaw and N. Miller, 'When Legal Worlds Collide: An Exploration of What Happens When EU Free Movement Law Meets UK Immigration Law' (2012) 38 *European Law Rev.* 155.

²⁰ The decision to interview representatives of CSOs based in the UK was made before the UK voted to leave the EU ('Brexit'). The UK formally left the EU on 31 January 2020. Until that date, and so throughout the period that the empirical research was undertaken, EU law, including EU free movement law, remained in force in the UK.

3 | BACKGROUND AND CONTEXT

3.1 | The gender care gap and EU law and policy

‘Care work’ as defined by the European Institute of Gender Equality (EIGE), using Susan Himmelweit’s formulation, means

all activities and occupations that directly or indirectly involve care processes and entail ‘the provision of personal services to meet those basic physical and mental needs that allow a person to function at a socially determined acceptable level of capability, comfort and safety’.²¹

Data gathered by EIGE has shown that, taking the EU population as a whole, ‘almost all women in the EU (92%) are regular carers (i.e. provide at least one form of unpaid work at least several days a week) and 81% are daily carers (compared with 68% and 48% of men, respectively)’.²² The impact of the unequal distribution of unpaid care work on women is complex, affecting many aspects of their lives.²³ Perhaps most overtly, it impacts women’s relationship with the labour market. Relative to men, women are employed less. In 2021, the employment rate of working-aged women (aged between 20 and 64 years) in the EU was 10.8 per cent lower than that of men.²⁴ The employment gap is notably greater for mothers and women with caring responsibilities, with parenthood having a negative impact on women’s employment rate but boosting men’s in nearly all European countries.²⁵ EIGE’s *Gender Equality Index 2019: Work–Life Balance* report noted in this regard that ‘the disproportionate weight of care duties on mothers limits their participation in or forces their withdrawal from the labour market’.²⁶

A central claim of feminist scholarship is that the persistence of the gender care gap is due to the social structures that surround expectations of womanhood.²⁷ Hilary Graham writes that ‘caring is given to women: it becomes the defining characteristic of their self-identity and their life-work. At the same time caring is taken away from men: not caring becomes a defining characteristic of manhood.’²⁸ The association of women with the private sphere of the home and of care and men with the public sphere of paid work is a deeply embedded assumption within society, despite the increasing participation of women in the labour market.²⁹ Frances Olsen writes that this ‘structure of consciousness’ has led to a shared understanding of the social world that shapes ‘a society’s

²¹ EIGE, op. cit., n. 5, p. 9.

²² Id., p. 15.

²³ See for example id.; C. Davaki, *Differences in Men’s and Women’s Work, Care and Leisure Time* (2016) 15–28, at <<https://op.europa.eu/en/publication-detail/-/publication/97c41fae-9440-11e7-b92d-01aa75ed71a1>>.

²⁴ Eurostat, ‘Gender Statistics’ *Eurostat*, 2021, at <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_statistics>.

²⁵ EIGE, *Gender Equality Index 2019: Work–Life Balance* (2019) 33, at <<https://eige.europa.eu/publications/gender-equality-index-2019-work-life-balance>>.

²⁶ Id., p. 33.

²⁷ C. Pateman, ‘Feminist Critiques of the Public/Private Dichotomy’ in *Public and Private in Social Life*, eds S. I. Benn and G. F. Gaus (1983) 281.

²⁸ H. Graham, ‘Caring: A Labour of Love’ in *A Labour of Love: Women, Work and Caring*, eds J. Finch and D. Groves (1996) 13, at 18.

²⁹ J. Squires, ‘Public and Private’ in *Political Concepts*, eds R. Bellamy and A. Mason (2003) 131.

culture and also shapes the society's view of what social relationships are "natural" and, therefore, what social reforms are possible.³⁰

The report *The Gender Dimension of Geographic Labour Mobility in the European Union* (henceforth 'the *Geographic Labour Mobility* report') notes that the impact of the gender care gap on women exercising EU free movement rights has been neglected and that there is very little research on the subject.³¹ However, it states that the rate of male mobile EU citizen participation in the labour market is comparable to national male labour market participation rates, whereas the rate of female mobile EU citizen participation in the labour market is much lower than national rates.³² Research commissioned by the EC into the impact of non-economically active mobile EU citizens on member states' social security systems found that of those mobile EU citizen women who are not economically active in the host state, half are not working because of their child-care responsibilities.³³ The *Geographic Labour Mobility* report further notes that the challenges that women face due to the unequal allocation of unpaid care are compounded when they move to another EU member state as they encounter the added difficulty of being 'dislocated' from informal family networks, which in most European welfare systems make up the 'back-bone of care'.³⁴

The neglect of the gendered nature of free movement in the EU that the *Geographic Labour Mobility* report highlights is widespread. Neither the EU institutions, nor EIGE, nor EU CSOs routinely collect and analyse gender-disaggregated data on intra-EU mobility. There is an urgent need for more research on the lived experience of EU citizens from a gender perspective that will illuminate the impact of the gender care gap in the context of intra-EU mobility. This is an opportunity for civil society to represent EU citizens' lived experience from a gender perspective and to highlight the issues. However, to date, there has been little engagement by CSOs on this. While certain of the organizations that participated in this research and that work in the field of migrants' rights in the UK were able to identify individual instances where they could see the gendered impact of the rules, the connection between gender, care, and the EU free movement rules has not been made at a strategic level. Interviewees described a lack of concerted effort to engage with the gendered dimension of the free movement rules in the work of their own organizations and among the other legal actors with which they engage, such as lawyers or the EU institutions. One interviewee described the issues surrounding gender and free movement as being 'in the shadows'. Among CSOs working on intra-EU mobility in Brussels, there is an even poorer understanding of the gendered dimension of the free movement rules. Interviewees representing the women's rights organizations in Brussels said that the connection between the gender care gap and the free movement rules has not been made, and that it does not form any part of their work. They described EU CSOs and the EU policy institutions as working in silos and noted that it appears that the gendered dimension of intra-EU mobility has fallen through the gaps of this silo working. The following exchange with an interviewee illustrates the gulf between

³⁰ Olsen, op. cit., n. 6, p. 1498.

³¹ Ackers et al., op. cit., n. 11.

³² Id., p. 11.

³³ ICF GHK and Milieu Ltd, *Fact Finding Analysis on the Impact on 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* (2013) 60, at <https://ec.europa.eu/employment_social/empl_portal/facebook/20131014%20GHK%20study%20web_EU%20migration.pdf>; Ackers et al., op. cit., n. 11, p. 60.

³⁴ Ackers et al., op. cit., n. 11, p. 85.

the EU gender equality agenda and free movement law in the minds of those working on gender equality in Brussels:

- Interviewee: I've never thought about it – the thing is, when people do caring, [they] are very much bound to a place, no?
- Researcher: But the reality of free movement now is so many young people are moving, and they are settling and starting families in their host country.
- Interviewee: Yeah, it's true.
- Researcher: And they are having babies when they are working in another country.
- Interviewee: Yeah, that was my case.
- Researcher: When I look at the Commission's strategic documents on gender, they talk about gender and migration in terms of third-country national migration into the EU but not actually intra-EU free movement, and so far I just haven't found an explanation for this.
- Interviewee: I have no idea.
- Researcher: You have no idea.
- Interviewee: I have no idea. And actually, we never talk about that. I don't know if there is an idea behind it. Or ... no, no idea.

Where there could be a natural collaboration between organizations that campaign on policy relating to migration, EU citizenship, family rights, and gender equality, there is none. There appears to be an uninterrogated assumption that intra-EU mobility is unproblematic from a gender perspective. There is a notable gap in knowledge and in the activities of EU CSOs with regard to how the gender care gap intersects with intra-EU mobility.

Civil society has an influential role in policy formation in Brussels. On the matter of the gender care gap, EU civil society has had significant success. Such success was highlighted by the efforts of a broad coalition of CSOs that campaigned for the withdrawal of the Pregnant Workers Directive – which had stalled at the Council in 2015³⁵ – and then lobbied for a renewed commitment from the EC for a more wide-ranging response to the gender care gap. This coalition of CSOs included gender equality groups such as the European Women's Lobby, family rights groups, Age Platform, those with concerns over long-term care, informal carers, service providers, and trade unions. This diverse coalition had a shared concern over the issues surrounding care and the gender care gap, and communicated a clear message to the EC that addressing this gap needed to be central to the EU's social policy agenda in a way that would make a meaningful difference to EU citizens' lives. The coalition's effort contributed to the adoption of the Work–Life Balance for Parents and Carers Directive, which expanded the EU's response to the gender care gap and included EU rights for carers for the first time.

An equivalent effort, in the context of free movement in the EU, involving a coalition of organizations from the fields of gender equality, family rights, migration, and EU citizenship, could have a key role to play in investigating and representing the lived experience of EU citizens from a gender perspective, raising awareness, and influencing the response of the EU institutions. However, the connection between the gender care gap and the EU free movement rules has not been made by civil society and, with reference to Fraser's 'Struggle over Needs', the matter has not become

³⁵ Council Directive 92/85/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers Who Have Recently Given Birth or Are Breastfeeding [1992] OJ L348.

de-naturalized and recognized as being of public significance. Consequently, there is very little prospect of such a coalition until the knowledge gap is closed and there is further engagement with the gendered dimension of intra-EU mobility.

3.2 | EU free movement law

The free movement *acquis* provides rights and protections for EU citizens and their families to move throughout the EU, including the right to residence and right to equal treatment in the host state. It is enshrined in Articles 20, 21, 45, and 49 of the TFEU and in Article 45 of the Charter of Fundamental Rights of the European Union. Further conditions are set down by secondary legislation, in particular the CRD and the Workers Regulation, and the *acquis* continually evolves through interpretation by the CJEU. The CRD, introduced to ‘simplify and strengthen the right of free movement and residence of all EU citizens’,³⁶ represents a set of ‘highly privileged mobility and citizenship rights’.³⁷ These rights include entry and residence for up to three months with no conditions or formalities (Article 6). For residence beyond three months, residence and equal treatment in the host state can be enjoyed by those who fulfil one of the categories set out in Article 7(1)(a)–(d). These include workers, self-employed persons, those who have sufficient resources to support themselves and their family members, and, subject to certain further conditions, students. Family members of such EU citizens, irrespective of nationality, can also enjoy ‘derived rights’ of residence for this period. After a period of continuous lawful residence, it is possible for EU citizens and their family members to achieve permanent residence as set out in Article 16.

The EU free movement *acquis* is a set of rules that underpins one of the ‘core entitlements of the citizenship package’.³⁸ Yet despite the apparently universal access to rights suggested by the citizenship dimension of the CRD, accessing the fullest set of rights and protections is subject to satisfying the definition of ‘worker’ in Article 7(1)(a)–(d) and, as such, an ‘economic profile that is not gender neutral’.³⁹ When placed in the context of the gender care gap, this has gendered implications. ‘Work’ is not defined by the CRD; rather, its definition has been developed by the CJEU⁴⁰ and is a matter of ‘settled’⁴¹ and ‘well-established’⁴² case law. Overall, the scope of the term is broad, the CJEU having taken an expansive view of the kinds of activities that satisfy the definition,⁴³ including part-time work where the income is supported by private means,⁴⁴ the work of

³⁶ CRD, op. cit., n. 13, clause (3).

³⁷ Ackers et al., op. cit., n. 11, p. 7.

³⁸ S. Currie, ‘Pregnancy-Related Employment Breaks, the Gender Dynamics of Free Movement Law and Curtailed Citizenship: *Jessy Saint Prix*’ (2016) 53 *Common Market Law Rev.* 543.

³⁹ O’Brien, op. cit., n. 12, p. 1671.

⁴⁰ Case C-75/63 *Hoekstra (nee Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECLI:EU:C:1964:19.

⁴¹ Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v. ARGE* [2009] EU:C:2009:344, para. 26.

⁴² Case C-14/09 *Genc v. Land Berlin* [2010] EU:C:2010:57, para. 36.

⁴³ Case C-66/85 *Lawrie-Blum v. Land Baden-Württemberg* [1986] EU:C:1986:284; Case C-53/81 *Levin v. Staatssecretaris van Justitie* [1982] ECLI:EU:C:1982:105; Case C-196/87 *Steymann v. Staatssecretaris van Justitie* [1988] EU:C:1988:475; Case C-294/06 *Payir and Others v. Secretary of State for the Home Department* [2008] EU:C:2008:36; Case C-456/02 *Trojani v. Centre public d’aide sociale de Bruxelles* [2004] ECLI:EU:C:2004:488.

⁴⁴ *Levin*, op. cit., n. 43.

trainee teachers,⁴⁵ and unpaid odd jobs undertaken by a person living in a religious community where they received bed and board in return.⁴⁶ The CJEU has also upheld the status of worker for students who are workers as well,⁴⁷ and has recognized work that is of a rehabilitative nature.⁴⁸ However, the CJEU has consistently confirmed that reproductive labour and associated caregiving are regarded as non-economic activities and that unpaid care work does not qualify as work for the purposes of EU law.⁴⁹ In *Dias*, the CJEU further maintained that periods of childcare between periods of employment should not be considered to be 'lawful residence' and therefore should not count towards the accrual of permanent residence.⁵⁰ Therefore, access to the fullest set of EU free movement rights and protections is premised on a definition of 'work' that precludes unpaid care work, and that therefore neglects the gendered dimension of care. When related to Fraser's gender analysis of alternative approaches to the distribution of unpaid care work and considered from an ethics of care perspective, the approach to unpaid care work reflected in the free movement rules appears to marginalize care and entrench gender inequality. This article analyses and contextualizes the implications of this construction for women's access to free movement rights and protections.

4 | CARE ON THE MOVE

Caring on the move presents practical challenges, not least due to living apart from extended family networks.⁵¹ However, this article focuses on the legal challenges that arise when one has caring responsibilities while exercising EU free movement rights. This section presents the key findings of the legal analysis and does so by foregrounding care in the context of EU citizens' lived experience. It is structured around the following three questions:

1. What are the legal consequences for women's right to residence and associated rights if they do not qualify as workers due to their caring responsibilities?
2. How are women's rights affected when they combine paid work and unpaid care?
3. Are the rights for family members and primary carers sufficient to support women when they have caring responsibilities?

⁴⁵ *Lawrie-Blum*, op. cit., n. 43.

⁴⁶ *Steymann*, op. cit., n. 43.

⁴⁷ Case C-46/12 *LN v. Styrelsen for Videregaende Uddannelser og Uddannelsesstotte* [2013] EU:C:2013:97.

⁴⁸ Case 344/87 *Betray v. Staatssecretaris van Justitie* [1989] EU:C:1989:226; Case C-316/13 *Fenoll v. La Jouvène and APEI* [2015] EU:C:2015:200.

⁴⁹ Joined Cases C-48/88, C-106/88, and C-107/88 *Achterberg-te Riele and Others v. Sociale Verzekeringsbank* [1989] ECLI:EU:C:1989:223; Case C-31/90 *Johnson v. Chief Adjudication Officer* [1991] ECLI:EU:C:1991:100; Case C-325/09 *Secretary of State for Work and Pensions v. Dias* [2011] ECLI:EU:C:2011:498; Case C-77/95 *Züchner v. Handelskrankenkasse* [1996] ECLI:EU:C:1996:425. See also L. Ackers, 'Women, Citizenship and European Community Law: The Gender Implications of the Free Movement Provisions' (1994) 16 *J. of Social Welfare and Family Law* 406; N. Busby, 'Crumbs of Comfort: Pregnancy and the Status of "Worker" under EU Law's Free Movement Provisions' (2015) 44 *Industrial Law J.* 134; O'Brien, op. cit., n. 12.

⁵⁰ *Dias*, op. cit., n. 49. However, the CJEU has made an exception for periods of maternity leave since the decisions in Case C-507/12 *Jessy Saint Prix v. Secretary of State for Work and Pensions* [2014] ECLI:EU:C:2014:2007; Case C-544/18 *The Commissioners for Her Majesty's Revenue & Customs v. Henrika Daknevičute* [2019] ECLI:EU:C:2019:761.

⁵¹ Ackers et al., op. cit., n. 11, p. 85.

4.1 | What are the legal consequences for women's right to residence and associated rights if they do not qualify as workers due to their caring responsibilities?

Women's labour market participation is not perpetual; rather, it takes place within the context of the care requirements of their dependents and is interspersed with absences due to unpaid care.⁵² The EU free movement rules do not appear to reflect this reality. One interviewee noted:

There is a lack of an acknowledgement of the way certain people go in and out of the labour market. And because the free movement rights are so premised on people being part of that labour market and continuing to be in contact with the labour market, [they fail] in most circumstances to acknowledge that people may need to take short periods, not necessarily forever, out of that labour market. On the face of it, it's gender neutral, but the majority of carers are women. That gender bias is built in, and it's not recognized.

Periods of full-time caring responsibilities pose challenges for women accessing the autonomous EU free movement rights enshrined in the CRD. Those who are not in paid work on account of their caring responsibilities are treated first and foremost as economically inactive EU citizens. Assuming that they do not have enough resources to be regarded as economically self-sufficient, this means that they fail to meet the criteria in Article 7 of the CRD. As a result, they are not regarded as lawfully resident in the host state.⁵³ Without lawful residence, the autonomous rights and protections included in the CRD are unavailable. The effect of this is extreme. The legal consequences in the short term are, *inter alia*, the loss of the right to equal treatment and therefore access to social assistance on equal terms to host state nationals.⁵⁴ The consequences in the long term include, as clarified in *Dias*, the inability to accrue the continuous lawful residence needed to acquire the right to permanent residence.⁵⁵

The reality for women with full-time caring responsibilities is precarious, as interviewees explained. Without the autonomous right to residence and associated right to equal treatment, they are at an increased risk of legal and physical precarity, poverty, destitution, and exploitation. Interviewees described circumstances where women who were not working because of their caring responsibilities had no money for basic essentials and were unable to access housing benefit. They emphasized how this precarity is destabilizing and detrimental to the overall well-being of both the women and their child or children. As one interviewee explained, 'people ... are being made homeless, they are destitute, they don't have enough money for heating. It affects the children's education, it affects their well-being. That's the reality of it.'

For women with full-time caring responsibilities, there is no legal safety net. For nearly two decades, there was the possibility of such a net. On the basis of EU citizenship and being able to

⁵² EC, *European Semester Thematic Factsheet: Women in the Labour Market* (2017), at <https://commission.europa.eu/system/files/2020-06/european-semester_thematic-factsheet_labour-force-participation-women_en_0.pdf>; Ackers et al., op. cit., n. 11, p. 8.

⁵³ However, it should be noted that the CRD prohibits a host state from deporting an EU citizen for economic reasons (such as not being economically active): CRD, op. cit., n. 13, art. 27(1).

⁵⁴ 'Social assistance' refers to state benefits paid to individuals that help them to meet basic needs. These benefits may therefore be means tested and are not conditional on previous payments or contributions.

⁵⁵ *Dias*, op. cit., n. 49.

establish a ‘real link’ with the host state, women’s circumstances could be individually assessed, and there was the potential to enjoy lawful residence and rights and protections despite being economically inactive.⁵⁶ However, this safety net was removed by the CJEU in *Dano*, a case involving a single mother with caring responsibilities.⁵⁷ The CJEU ruled that where an EU citizen is economically inactive and has moved with the sole purpose of accessing benefits, a member state is not obliged to provide social assistance. The *Dano* decision has been heavily criticized for (among other things) its lack of legal coherence and its impact on poorer EU citizens. This article raises the concern that the CJEU did not consider the gender equality implications of its interpretation of the rules, nor did it place the case in the context of the gender care gap. This rendered invisible the reality of care in this EU citizen’s life. Substantively, this prevents an analysis of the rules that takes account of how Ms Dano’s caring responsibilities intersect with her right to free movement as an EU citizen in the specific circumstances. Qualitatively, the CJEU’s approach further entrenches the gendered privatization of unpaid care.

4.2 | How are women’s rights affected when they combine paid work and unpaid care?

Combining work and caring responsibilities means that women’s working life can take the shape of atypical styles of work.⁵⁸ The definition of ‘work’ under EU law for the purposes of free movement is broad and can capture different forms of work. Interviewees spoke of the EU’s ‘flexible’ use of the term, which, while not motivated by a concern for women combining work and care, is nevertheless important in this context. For example, it is possible for someone to qualify as a worker through part-time work and therefore maintain the right to access social welfare entitlements that can supplement an income and enable them to support themselves and their children. However, interviewees explained that this lawful route to autonomous rights under EU law is often impeded through the application of national minimum thresholds for the assessment of worker status. This practice, adopted by some member states, takes the form of either explicit criteria or a case-by-case assessment that determines whether work is ‘genuine and effective’ or ‘marginal and ancillary’.⁵⁹ For example, Belgium and Denmark uphold the presumption that work of 10 to 12 hours per week is marginal and ancillary. In the UK, a case-by-case approach is adopted, where a range of factors are considered and ‘genuine and effective’ work is largely regarded as being work that has been undertaken for a minimum of three months and at the earning level where individuals start paying national insurance.⁶⁰ As interviewees explained, the reality is that while the

⁵⁶ Case C-85/96 *María Martínez Sala v. Freistaat Bayern* [1998] EU:C:1998:217.

⁵⁷ Case C-333/13 *Dano v. Jobcentre Leipzig* [2014] ECLI:EU:C:2014:2358; C. R. O’Brien, ‘Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights’ (2016) 53 *Common Market Law Rev.* 937; N. Nic Suibhne, ‘“What I Tell You Three Times Is True”: Lawful Residence and Equal Treatment after *Dano*’ (2016) 23 *Maastricht J. of European and Comparative Law* 908; N. Nic Suibhne, ‘Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship’ (2015) 52 *Common Market Law Rev.* 889; D. Thym, ‘When Union Citizens Turn into Illegal Migrants: The *Dano* Case’ (2015) 40 *European Law Rev.* 249; D. Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’ (2015) 52 *Common Market Law Rev.* 17.

⁵⁸ EC, op. cit., n. 52; Ackers et al., op. cit., n. 11, p. 8.

⁵⁹ See further C. R. O’Brien et al., *Comparative Report 2015: The Concept of Worker under Article 45 TFEU and Certain Non-Standard Forms of Employment* (2016), at <https://eprints.whiterose.ac.uk/99808/1/ComparativeReport2015_ConceptOfWorker_20160426FINAL_2_.pdf>.

⁶⁰ Id.

definition of 'work' under EU law may be sufficiently broad to capture the kinds of part-time or atypical styles of work that enable women to combine paid work with their caring responsibilities, those with a low number of working hours or low earnings are at risk of being denied worker status through the application of the national thresholds. Furthermore, interviewees noted that these decisions, while potentially incompatible with EU law, are rarely appealed.

Combining work and caring responsibilities also means that women's working lives are often marked by periods out of full-time work. Since *Jessy Saint Prix*, it has been possible to retain worker status during maternity leave for a reasonable period on the basis of Article 45 of the TFEU.⁶¹ This ensures the autonomous right to lawful residence and equal treatment during this time.⁶² The result is an improvement in women's ability to retain worker status during periods of care-based leave from the labour market, but this was described by interviewees as modest progress. Interviewees explained that they frequently see women fall through gaps in the rules during absences from the labour market due to caring responsibilities. The specific gap that interviewees identified occurs when children are of pre-school age, after the *Jessy Saint Prix* maternity period ends (where worker status is retained) and before children start school. Once children (of an EU citizen worker) are in education, their primary carer may derive a right to residence.⁶³ However, during this pre-school period, those who are not in paid work are regarded as economically inactive and, as discussed above, cannot access rights and protections under EU law, therefore excluding them from, *inter alia*, social welfare. This is regardless of whether they have worked before and intend to return to work once the child is in school or childcare.

Interviewees also identified women who are fleeing domestic abuse to be at particular risk of falling through this gap. They described challenging circumstances where women leave abusive relationships with their small children. Women in these circumstances who are unmarried and not working are often unable to access rights under EU law or the housing benefit that would enable them to fund their stay in women's refuges. One interviewee explained:

We've got women falling [through] these gaps where often the partner is abusive, they leave them, and the child is not yet school age. They don't have rights, even if they previously did work themselves. And then they are penned up in refuges that they can't pay for. And obviously the refuges are doing everything they can, sometimes having to fund things out of other resources that they've got because the benefits system is not picking up the bill.

In these instances, an already precarious situation is exacerbated through the operation of the EU free movement rules. The *Jessy Saint Prix* case law is also, of course, only applicable to children and mothers on maternity leave.⁶⁴ Interviewees pointed to the further problem of there being nothing within the rules or the case law that provides for people who need to take other kinds of

⁶¹ *Jessy Saint Prix*, op. cit., n. 50. In *Henrika Daknevičiute*, the CJEU extended this protection to self-employed women: *Henrika Daknevičiute*, op. cit., n. 50.

⁶² See also O'Brien, op. cit., n. 12, pp. 1163–1167; S. Currie, op. cit., n. 38, p. 546; Busby, op. cit., n. 49, p. 140. Women who remain employed during their maternity leave retain their status as workers: Pregnant Workers Directive, op. cit., n. 35, art. 10. However, women who have to stop working or leave jobs, or who are on temporary or atypical contracts, risk losing their status as workers and therefore also their right to residence.

⁶³ Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002] EU:C:2002:493. Primary carers' rights are explained below.

⁶⁴ *Jessy Saint Prix*, op. cit., n. 50.

care-based leave, such as paternity leave or leave to care for a disabled relative, an elderly parent, or a partner who becomes ill – care needs that (except for paternity leave) are all disproportionately met by women.⁶⁵

As the CRD makes clear, workers are the most privileged beneficiaries of the EU free movement rules. However, by analysing how the rules intersect with someone who has caring responsibilities, it is clear that they also privilege a certain form of work, one that not only excludes unpaid care work but also upholds an androcentric notion of work: work that has consistent and regular hours and that has all but the most limited care-based leave. Women who are consistently employed in their host state may not encounter problems in enforcing their rights under the TFEU. However, placing the rules in the context of the gender care gap and intra-EU mobility, where women are dislocated from family networks of care and where the rate of women's labour market participation is even lower than national rates, it is possible to see how the EU free movement legal framework fails women. The findings demonstrate that women who initially exercise their rights under the TFEU by moving to another member state often find themselves on 'cliff edges' and fall through gaps in legal rights and protections due to the interaction of their roles as caregivers in society and the EU free movement rules' disregard for this function.⁶⁶ The diminished quality of their rights means that, *inter alia*, EU citizen women are having to patch together rights to be able to reside lawfully. This means that women in the most vulnerable situations, including those facing domestic abuse, may find themselves legally isolated, denied subsistence benefits for themselves and their children, and are at risk of being turned away from women's refuges.

Recent developments in the jurisprudence of the CJEU regarding the status of economically inactive EU citizens has removed a legal and economic safety net that had for a number of decades offered protection during periods out of work due to caring responsibilities. The rules, as they are interpreted following *Dano*,⁶⁷ impact all mobile EU citizens who are unemployed or in low-paid or precarious work. However, the findings here demonstrate that the consequences of this for those with caring responsibilities and those for whom they care are particularly acute and involve an increased risk of legal and physical precarity, poverty, destitution, and exploitation in the host state. Relating this to the question of how far the EU free movement rules transform or entrench the gender stereotypes surrounding unpaid care work, it can be seen that with regard to the enjoyment of the autonomous right to residence, the rules currently uphold a gender order that reproduces and reinforces androcentric forms of work, marginalizes care, and entrenches existing gender inequalities.

4.3 | Are the rights for family members and primary carers sufficient to support women when they have caring responsibilities?

Family members of EU citizens may enjoy the right to residence and associated rights under the CRD,⁶⁸ and these family member rights are regarded as an important means of providing residence status for women who are not in employment in the host state due to meeting family care

⁶⁵ EIGE, *op. cit.*, n. 5.

⁶⁶ O'Brien, *op. cit.*, n. 12, p. 1643.

⁶⁷ *Dano*, *op. cit.*, n. 57.

⁶⁸ This is contingent on the EU citizen meeting the conditions of Article 7(1)(a)–(c) of the CRD.

needs.⁶⁹ However, interviewees explained that there is a notable distinction in the quality of family member rights that leads in certain circumstances to difficulties for women and children. Unlike the rights that have been discussed so far, which are autonomous rights and are set out in Article 7(1)(a)–(c) of the CRD, family member rights are derivative rights afforded to family members as a consequence of their relationship with an EU citizen.⁷⁰ The existence and enjoyment of these rights are contingent on the EU citizen continuing to meet the conditions of Article 7(1)(a)–(c) and on the continued relationship between the family member and the EU citizen. The result is that this form of family member right creates a dynamic of dependence between the family member and the qualifying EU citizen spouse or partner. Interviewees explained that the problem with such a dynamic of dependence is immediately evident where there is a relationship breakdown. Challenges arise where couples separate, particularly when women leave abusive partners. This is because such women must rely both on their former partner's legal status and on their cooperation, potentially in situations where such contact may jeopardize their safety.⁷¹ One interviewee explained that

in domestic violence cases, where we have somebody who has been financially dependent on a spouse, who may have been here as a worker and depending on their rights from them, when they are escaping that situation and when they try and access housing and benefits, then they are quite often turned down because of the problems of proving that they [have] those rights, that they derive those rights through the person they have been a family member of, from the abuser ... In the meantime, we have got people who may have been evicted, their children have been without adequate housing, clothing, food, have had to rely on food banks. I have had a number of welfare rights workers contact me about these cases, where we've had to take very urgent action.

Alternatively, the dynamic of dependence can inhibit women from exiting relationships, which, in the case of those that involve domestic violence, means that women are faced with relying on their abusive partners for access to rights. By contrast, women whose partners or spouses are nationals of the host state (and therefore not *mobile* EU citizens) do not qualify for family member status under the CRD because their partners or spouses are not exercising their EU free movement rights. Such women who are not in paid work are therefore denied both worker status and family member status by the CRD, reinforcing their dependency on their partners.⁷²

Derivative rights are also enjoyed by primary carers of EU citizens. The category of primary carer is not an established one in EU law and has not been defined in the legislation; it has evolved through CJEU jurisprudence on EU citizenship and free movement. It provides the right to residence for primary carers of EU citizen children. As the right of primary carers is a derivative right, primary carers are susceptible to the same vulnerabilities as family members, where the structure of the right creates a dynamic of dependence flowing from the holder of the autonomous right – in this case, the EU citizen in receipt of care. However, primary carers' residence is more precarious.

⁶⁹ Ackers et al., *op. cit.*, n. 11.

⁷⁰ Ackers, *op. cit.*, n. 12, p. 396.

⁷¹ Shutes and Walker, *op. cit.*, n. 12, p. 147.

⁷² *Id.*, p. 148.

The case law is complex and requires urgent clarification. Part of the complexity is because there are different legal sources that have been used as the basis of primary carers' rights and each source provides a slightly different set of rights for primary carers. Under Article 10 of the Workers Regulation as interpreted in *Baumbast*, a primary carer (of a child of an EU citizen worker) may reside in the host country where the child is in education for as long as the child needs their presence and care.⁷³ The primary carer is entitled to equal treatment (and therefore social assistance) during this time. However, lawful residence is terminated when the authorities deem that the caring needs of the EU citizen child no longer exist or when the child is no longer in education.⁷⁴ The primary carer then has no right to continue residing in the host country because the CJEU has stated that, unlike family members under the CRD, primary carers are not entitled to apply for permanent residence on the basis of their time spent in the host country unless they can otherwise satisfy Article 7 of the CRD. Under that article as interpreted by *Zhu and Chen*,⁷⁵ it remains ambiguous, but primary carers (whether EU citizens or third-country nationals) may enjoy rights and protections analogous to those enjoyed by family members under the CRD, which include the right to equal treatment, the right to permanent residence, and protections from deportation; however, it requires the primary carers to satisfy the criteria of being economically active or self-sufficient. Article 20 of the TFEU as interpreted by *Ruiz Zambrano* sets out the most complex, limited, and precarious category of primary carer, as both the personal and the material scope of the rights are ambiguous.⁷⁶ Currently, '*Ruiz Zambrano* carers' are entitled to residence in the EU where denying it and deporting them would entail the EU citizen child in their care also being deported from the territory of the EU. Primary carers have access to a very limited set of rights, which include residence and access to a work permit, but there is no clarity on associated rights or protections, such as the right to equal treatment.⁷⁷ It is an area where significant ambiguity persists as to the boundaries of the rights, and further clarification from the CJEU is urgently needed.

Interviewees described the reality of primary carers, particularly *Ruiz Zambrano* carers, as precarious. Their rights, while providing a safety net for very vulnerable women, are so narrow and limited that primary carers are unable to fully and effectively support themselves and their children. Without access to social welfare, there is no entitlement to family welfare benefits on equal terms to home state nationals, which could provide or supplement an income or facilitate access to childcare. Interviewees described some women as feeling forced into jobs

⁷³ *Baumbast*, op. cit., n. 63.

⁷⁴ Case C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v. Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:290.

⁷⁵ Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECLI:EU:C:2004:639.

⁷⁶ Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* [2011] EU:C:2011:124; Case C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department* [2011] ECLI:EU:C:2011:277; Case C-256/11 *Murat Dereci and Others v. Bundesministerium für Inneres* [2011] ECLI:EU:C:2011:734; Case C-40/11 *Yoshikazu Iida v. Stadt Ulm* [2012] ECLI:EU:C:2012:691; Joined Cases C-356/11 and C-357/11 *O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L* [2012] ECLI:EU:C:2012:776; Case C-133/15 *H. C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others* [2017] ECLI:EU:C:2017:354. On the persistent ambiguity of the material scope of the rights, see also C. R. O'Brien, 'Acte Cryptique? *Zambrano*, Welfare Rights, and Underclass Citizenship in the Tale of the Missing Preliminary Reference' (2019) 56 *Common Market Law Rev.* 1697.

⁷⁷ The preliminary references made to the CJEU to date have focused on the personal scope of the right; the material scope of the right has been largely neglected and remains unclear: *Baumbast*, op. cit., n. 63; *Zhu and Chen*, op. cit., n. 75; *Ruiz Zambrano*, op. cit., n. 76.

that they could not actually afford to take due to the cost of childcare, or into risky informal childcare situations or illegal and exploitative work, including prostitution. Furthermore, the precarity is potentially indefinite as, depending on clarification from the CJEU, a *Ruiz Zambrano* carer may be prevented from accruing permanent residence and the autonomous right to residence and equal treatment that could lead to greater security. So poor in quality are the rights afforded to primary carers that Charlotte O'Brien refers to the reality of being a *Ruiz Zambrano* carer as akin to being a 'tolerated alien' in the host state, where, without access to social welfare, there is a real risk of destitution for the primary carer and the EU citizen child in her care.⁷⁸

Interviewees explained that the complexity and ambiguity of the rules compounds the precarity surrounding primary carers' rights. The rules are hard to navigate, challenging to implement, and very difficult for welfare authorities and welfare support agencies to administer. There is insufficient expertise within these bodies to engage with the complex intersection of EU law and domestic benefits law.⁷⁹ One of the consequences of this is that it increases the likelihood that first-level decisions (for example, concerning a primary carer's access to social welfare benefits) are challenged. This can involve huge delays not only for the applicant in the case but also for other similar cases, which are suspended until there is an outcome to the original appeal. People are left in limbo, sometimes for years. During this time, primary carers often need to rely on food banks, are at serious risk of legal and physical precarity, poverty, destitution, and exploitation, and suffer from the toll that this takes on their health, well-being, and ability to care.

The visibility of care and caregivers in the context of EU free movement appears to be enhanced by the jurisprudence concerning primary carers. One commentator has argued that 'the CJEU's present case law recognises the right to care ... among the "substance of rights" attached to EU citizenship'.⁸⁰ The concept of a primary carer as a beneficiary of rights is therefore suggestive of a set of rights that are important for women who have a caring role and who are otherwise unable to access EU free movement rights and protections in the host state while fulfilling that caring role. However, a closer look at these primary carers' rights reveals that, through their structure and limited material scope, they further entrench the marginalization of care and caregivers within the EU free movement *acquis*. Of the various beneficiaries able to enjoy free movement rights, primary carers enjoy the poorest-quality rights. The rules structurally devalue and marginalize care and caregivers.

On the basis of the Workers Regulation and potentially (depending on clarification from the CJEU) also on the basis of *Ruiz Zambrano*,⁸¹ primary carers' rights are removed when their presence and care are no longer needed. They no longer have lawful residence, the right to work, or access to equal treatment, and regardless of how long they have lived in the host country caring

⁷⁸ C. R. O'Brien, "'Hand-To-Mouth' Citizenship: Decision Time for the UK Supreme Court on the Substance of Zambrano Rights, EU Citizenship and Equal Treatment' (2016) 38 *J. of Social Welfare and Family Law* 228, at 234.

⁷⁹ For example, in the Netherlands, all third-country national parents, including *Ruiz Zambrano* carers, are entitled, under the Law on Social Assistance or the Law on Child Benefit, to claim benefits if they have been granted a right to residence: *Chavez-Vilchez*, op. cit., n. 76, para. 12. In the UK, *Ruiz Zambrano* carers are explicitly excluded from social assistance by domestic legislation, passed in 2012, regardless of their lawful residence and whether they are economically active: Social Security (Habitual Residence) (Amendment) Regulations 2012 (SI 2012/2587); *HC v. Secretary of State for Work and Pensions* [2017] UKSC 73; O'Brien, op. cit., n. 78.

⁸⁰ N. Cambien, 'EU Citizenship and the Right to Care' in *EU Citizenship and Federalism: The Role of Rights*, ed. D. Kochenov (2017) 489, at 495. See also Konsta, op. cit., n. 12.

⁸¹ *Ruiz Zambrano*, op. cit., n. 76.

for their EU citizen child, that time does not contribute towards accruing permanent residence. They are effectively discarded once the caring needs of their EU citizen child are fulfilled. Joan Tronto, perhaps the most well-known ethics of care scholar, writes of care as occupying a ‘lowly, hidden place in society’ and regarded as the work of ‘slaves, servants and women’.⁸² Through the dehumanizing treatment of primary carers in its case law, the CJEU is upholding this regressive attitude.

5 | CONCLUSION

EU citizenship and free movement rights are not enjoyed equally by women and men. The impact that the gender care gap has on women’s ability to work and therefore qualify for rights and protections under EU free movement law means that they are starkly disadvantaged when exercising their right to free movement. This article has foregrounded care in the analysis of the law, an approach informed by ethics of care theorists who accept that the ontological reality of being human inevitably involves the oscillation between dependency and care and that progressing through the lifecycle requires caring in some form, whether being cared for or caring for others.⁸³ By foregrounding care and placing the EU free movement rules in the context of the gender care gap, it is possible to see how the rules fail to take account of the reality of care. This article has asked two questions: to what extent do the free movement rules transform or entrench the gender stereotypes surrounding unpaid care work, and to what extent are the issues surrounding the gender care gap visible within the field of free movement? In response to these questions, the article has demonstrated that the rules marginalize care and embed gendered roles relating to unpaid care work within the legal framework. The structure, interpretation, and implementation of EU free movement rights means that when one’s circumstances involve caring responsibilities or a combination of unpaid care and economic activity, the quality of one’s rights and protections under EU law diminishes. The consequence of this, in the context of the gender care gap, is that women are exposed to a disproportionately increased risk of legal and physical precarity, poverty, destitution, and exploitation in the host state, face challenges in attaining and retaining rights, are at risk of falling through gaps that exist between legal rules, and experience reduced rights and dependency as family members or primary carers.

Fraser’s ‘After the Family Wage’ scrutinizes alternative, hypothetical models for the distribution of unpaid care between men, women, and the state, and evaluates these models on the basis of their potential to advance gender equality. What she finds is that ‘the key to achieving gender equity in a post-industrial welfare state ... is to make women’s current life patterns [of combining breadwinning and caregiving] the norm’.⁸⁴ This can only be done, she argues, in a universal caregiver society, a world where the gendered roles attributed to paid work and unpaid care are transformed so that men and women engage equally with paid and unpaid work and where care becomes the responsibility of both families and public actors, including the state and employers. This is an idealized model, one that Fraser acknowledges ‘is tantamount to a wholesale restructuring of the institution of gender’.⁸⁵ Nevertheless, she argues that

⁸² Tronto, *op. cit.*, n. 6, p. 113.

⁸³ See the ethics of care literature cited in n. 18.

⁸⁴ Fraser, *op. cit.*, n. 16, p. 611.

⁸⁵ *Id.*, p. 612.

‘unless we are guided by this vision now, we will never get any closer to achieving it.’⁸⁶ What this article has made clear is that the structure, interpretation, and implementation of EU citizenship and the free movement rules are not guided by a vision that seeks to acknowledge the reality of care and the gender care gap. On the contrary, the free movement rules uphold a gender order that marginalizes care and reproduces and reinforces androcentric forms of work and labour market dynamics that entrench existing gender inequalities and the privatization of care.

What the findings have also shown is that the gender care gap is not visible within the field of free movement. The connection between the gender care gap and the free movement rules has not been made by EU policy makers and civil society, and there is currently no strategy among EU CSOs to represent the lived experience of EU citizens and lobby the EU institutions. Awareness and understanding of the gendered dimension of intra-EU mobility is very limited. To recap, in ‘Struggle over Needs’, Fraser describes three stages in the interpretation and eventual satisfaction of a need: (1) the identification and establishment of the need, where the need becomes ‘de-naturalized’ and is recognized as being of public significance; (2) the discussion of the need by a range of publics, including civil society; and (3) the determination by the official institutions of government of what would satisfy the need. The findings of this article have made clear that the issues surrounding the gender care gap have not been de-naturalized, the first of Fraser’s moments. This is not the case in other fields of EU law. Innovatively, this article has contrasted EU free movement with the field of EU social policy, and reference to Fraser’s three moments has enabled this contrast to be made. As mentioned in the introduction, the gender care gap is currently high on the policy agenda of the EU institutions in the field of social policy. This prominence is remarkable. The history of EU engagement with the issues surrounding the gender care gap is not new and is well known; it goes back several decades, beginning with the principle of equal pay and gender equality in the Treaty of Rome⁸⁷ and the early case law of the CJEU,⁸⁸ and culminates in the Work–Life Balance for Parents and Carers Directive.⁸⁹ The gender care gap in the context of EU social policy has moved through all three of Fraser’s moments; having been de-naturalized, it continues to be debated widely among a range of stakeholders, which includes a large and active alliance of CSOs,⁹⁰ and the EU institutions continue to create measures that seek to alleviate the impact of the gap through a combination of soft law measures and individual rights.⁹¹ Therefore, while the issues associated with the gender care gap in the

⁸⁶ *Id.*, p. 613.

⁸⁷ Treaty of Rome (EEC), art. 119. For commentary, see for example C. Barnard, *EU Employment Law* (2012, 4th ed.); N. Busby and G. James, ‘Regulating Working Families in the European Union: A History of Disjointed Strategies’ (2015) 37 *J. of Social Welfare and Family Law* 295; Caracciolo di Torella and Masselot, *op. cit.* (2010), n. 9; Caracciolo di Torella and Masselot, *op. cit.* (2020), n. 9; E. Caracciolo di Torella, ‘An Emerging Right to Care in the EU: A “New Start to Support Work–Life Balance for Parents and Carers”’ (2017) 18 *ERA Forum* 187.

⁸⁸ Case C-43/75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1976] ECLI:EU:C:1976:56, paras 53–55.

⁸⁹ Work–Life Balance for Parents and Carers Directive, *op. cit.*, n. 1.

⁹⁰ See for example Social Platform, *Social Platform Contribution to the Call for Evidence on the European Care Strategy* (2022), at <<https://www.socialplatform.org/wp-content/uploads/2022/03/Social-Platform-contribution-to-the-call-for-evidence-on-the-European-Care-Strategy.pdf>>. For further examples, see <<https://www.socialplatform.org/resources/>>.

⁹¹ See for example Pregnant Workers Directive, *op. cit.*, n. 35; Barcelona Child Care Targets Presidency Conclusions C/02/930, Barcelona European Council, 15–16 March 2002; Work–Life Balance for Parents and Carers Directive, *op. cit.*, n. 1; Council Directive 96/34/EC on the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and the

field of social policy are well understood, this article has highlighted that the corresponding connection between gender, care, labour market participation, and intra-EU mobility has not been made.

It may be argued that the CJEU bears significant responsibility as the institution that has driven the field of free movement and EU citizenship law for decades. Beyond its position that unpaid care should not be regarded as work for the purposes of EU law, the CJEU has been reluctant to engage with the gendered dimension of free movement rights. The absence of gender equality in its reasoning in *Dano*, *Jessy Saint Prix*, and the primary carer case law illustrates this.⁹² However, while it may be the case that the CJEU bears some responsibility for the gendered impact of the EU free movement rules, it should be noted that the questions associated with care are also connected to issues that are hugely politically sensitive, such as equal treatment for economically inactive EU citizens, the protection of member states' welfare systems, and the rights under EU law of third-country nationals. These are difficult questions for the CJEU, and they reveal a schism between notions of equality and citizenship, on the one hand, and the persistence of the market-based ideology at the heart of the EU model, on the other – a tension that is compounded by member states' anxieties about sovereignty and the protection of public finances.⁹³

In Fraser's assessment of how a need may best be satisfied, she argues for a process of interpretation that is wide, egalitarian, and democratic and engages as many actors as possible. Thus, while the CJEU may bear significant responsibility, a truly effective response to the entrenched gendered impact of the EU free movement rules, according to Fraser, cannot come from a single institution, such as the CJEU. On the contrary, progress towards a system of free movement rights that promotes gender equality and deconstructs rather than entrenches the gendered roles associated with unpaid care should involve a full range of engaged actors, including academics, CSOs, the legislative institutions of the EU, and EU citizens. At this point, without enhanced visibility of the gender care gap in the context of intra-EU mobility, it is difficult to foresee concrete steps that could, in the near future, lead to such engagement and to progress on gender equality. In the meantime, without engaging with the gender implications of the rules, the EU free movement legal framework is upholding a regressive gender order, undermining gender equality as a 'constitutional principle' of the EU, and detrimentally impacting the lives of EU citizen families who are exercising their right to free movement.

This article has drawn a connection between the body of literature on care and that on EU free movement. Through conducting a structured legal analysis of how the gender care gap interacts with the EU free movement rules, it has demonstrated that the way in which EU free movement rights are structured, interpreted, and implemented means that the quality of rights and protections under EU law is reduced for those whose circumstances involve unpaid caring responsibilities. The article has also identified a gap in the activities of the EU policy actors, including

ETUC [1996] OJ L145. (The latter was amended by Council Directive 97/75/EC Amending and Extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and the ETUC [1998] OJ L10. It was then replaced by Council Directive 2010/18/EU Implementing the Revised Framework Agreement on Parental Leave Concluded by BUSINESSSEUROPE, UEAPME, CEEP, and ETUC and Repealing Directive 96/34/EC (Text with EEA Relevance) [2010] OJ L68.)

⁹² *Dano*, op. cit., n. 57; Case C-507/12 *Jessy Saint Prix*, Opinion of Advocate General [2013] ECLI:EU:C:2013:84, para. 2. The Advocate General in *Jessy Saint Prix* pointed out the opportune alignment in the case of the promotion of the free movement of workers and non-discrimination on the grounds of nationality, and the promotion of gender equality, both of which the Advocate General wrote 'undoubtedly enjoy constitutional status in EU law'.

⁹³ See the literature cited in n. 57.

CSOs. It has therefore provided a platform and a decisive opportunity for a range of actors, particularly EU CSOs, to engage with the gender care gap and the gendered experience of intra-EU mobility.

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