Yearbook of European Law, Vol. 00, No. 0 (2021), pp. 1–26
doi:10.1093/yel/yeab006

The Liminal European: Subject to the EU Legal Order

Floris de Witte[†]

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

Abstract: This contribution suggests that recent changes to EU free movement law have led to the emergence of a new type of subject: the liminal European. This subject is deemed to deserve the protection of EU law, in terms of the rights of residence and equal treatment in the host state, only when she is economically productive and socially adaptive. These changes pose a fundamental challenge to the authority of the EU, whose legal order is premised on its ability to challenge domestic processes of subjugation, exclusion, and precarity, which it is now, instead, starting to perpetuate. Being European is increasingly a status that is deeply precarious and conditional: a transitory state that is bestowed on rather than inhabited by the European. This notion of liminality is not only a useful descriptive category with which to analyse recent changes in EU free movement law. It also comes with significant normative implications for the EU and its legal order.

This contribution describes what emerges when 'being' European is conditional upon meeting a certain prescribed quality. In such circumstances, EU subjecthood becomes not only highly exclusionary and stratified, but also perpetuates the national processes of economic, social, or cultural subjugation that the EU arguably served to constrain. It was in its more agnostic vision of the subject and her choices that EU law could traditionally be seen as an emancipatory force, and as a project that sought to mediate its internal contradictions by opening up space for the articulation of novel sites and forms of self-realization. Crucially, it is also exactly this role for EU law that undergirds the authority of its legal order, now more unstable than ever before.

The argument in this contribution is premised on a view—long held by a number of scholars—that recognizes the intimate link between the subject of EU *law* and the authority of the EU's integration project. From the foundational ruling of *Van Gend & Loos* onwards, the exercise of individual rights by Europeans has been central to making integration 'work', both in practical and normative

yeab006-FM1Associate Professor, Law Department, LSE. Many thanks to Sarah Trotter, Stephen Coutts and Dion Kramer for comments on a previous draft. The usual disclaimer applies.

© The Author(s) 2021. Published by Oxford University Press.

terms. This highly juridified (as opposed to politicized) link between the European and the integration process has been applauded as civilizing the state, as liberating the individual and as, at a very basic level, allowing integration to *actually* take place. It has also, however, been criticized as offering a very skewed and partial vision of the European, as an atomistic and highly responsibilized subject, and as undermining or 'threatening' domestic redistributive arrangements (Section I).

Recent developments suggest a new vision of the European, which appears to be much more sensitive to the distributive and identarian conflicts that are central to the EU of today. This is a vision in which the European only 'deserves' protection from EU law—whether in claiming a right to residence, equal treatment, or protection against expulsion—if, and for as long as, she meets certain prescriptive qualities. These qualities mainly go towards her being an economically self-sufficient and socially responsible actor. The emergence of this 'new' European can be understood as the creation of a 'liminal' European as a conditional and highly precarious status that can (temporarily) be 'won' but never be 'had' (Section II).

Such a vision of the European subject is arguably deeply destabilizing—not only on the individual level, creating precarious legal situations and furthering processes of stratification and commodification, but also for the EU's legal and normative order. It does away with the unique 'Europeanness' that long typified free movement and that served to problematize rather than perpetuate the processes of economic, social, and political subjugation that are part and parcel of the nation state. It also structures subject-formation on the European level in a fashion that gives up on the (perhaps illusory) vision of a gradual politicization of that level and that would allow for a more productive discourse on the distributive conflict that is at the core of contemporary free movement law. *Both* these processes go to the heart of the EU's authority: when 'being' European becomes meaningless—a mere rhetorical extension of what it means to 'be' Portuguese or Finnish—the foundations of integration and the EU's legal order become tenuous (Section III).

I. The Europeans and their integration

In hindsight, it was probably a long time coming. In fact, the absence of meaningful pushback and criticism on the judicial elaboration of the rights of mobile Europeans was as conspicuous as the ambition with which the Court undertook its task. For decades, serious discussions on the *ethos* of free movement and the scope of its commitment to equal treatment have struggled to emerge. Today, the critique on free movement comes in two—opposite—flavours. On the one hand, it has been argued that free movement is *too elitist*. This argument, essentially, suggests that the current legal framework of free movement is normatively

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

unappealing because it carves out a whole section of society from enjoying its benefits. Typically, this argument alludes to the fact that *actually* making use of free movement—be it as a worker, patient, pensioner, or student—requires significant cultural, economic and social capital. These preconditions mean that access to free movement is often conditioned by the economic qualities of the European—whether as a 'worker' or as the 'playboy' whose resources make mobility possible. Free movement, in other words, creates 'legally separate' and 'privileged' pockets of European society.[1] This form of 'market citizenship' has been criticized as inimical to a more egalitarian vision of subjecthood in Europe.[2] Additionally, this elitist nature of free movement is seen as undermining the development of a more robust version of Union citizenship stooled on transnational egalitarian principles, which could in turn serve as the premise for a genuine transnational political citizenship[3] and policies driven towards a form of direct transnational redistribution, going beyond the current reliance of the Union's vision of solidarity as expanding *domestic* welfare schemes.[4] The solution, under this critique, is to secure the preconditions for more extensive access to the *possibility* of free movement. In essence, here, the claim is evidently not that every single European *should* make use of free movement, but that such a choice should be predicated on personal preferences or temperament instead of the individual's capacity as an economic actor .[5]

On the other hand, free movement has been heavily criticized for being too disruptive of national welfare schemes and the functioning of national political communities—be it by creating more competition for available jobs, imposing a downward pressure on labour conditions, squeezing public services or extending social benefits to categories of citizens who are not deemed to 'deserve' such access. This argument suggests that free movement and the commitment to equal treatment create a bias in the application of systems of labour law, healthcare, access to jobs, education, or welfare benefits. This bias, simply put, works in favour of mobile actors and to the detriment of immobile citizens, that is, those

[1] See G Davies, 'How Citizenship Divides' (2020) *European Papers*, 675–95. C O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principles of EU Free Movement Rights' (2016) *CML Rev*, 937; N Nic Shuibhne, 'Reconnecting the free movement of workers and equal treatment in an unequal Europe' (2018) 43 *ELR*, 477; even if both the majority of highly politicized cases in EU free movement law, as well as the Brexit narrative surrounding free movement, suggests that the problem is not elitist movement, but the movement of so-called low-wage labour. Perhaps a predisposition to move is based more on personal temperament than resources.

[2] D Kostakopoulou, 'European Union citizenship: Writing the future' (2007) 13 *European Law Journal*, 623, N Nic Shuibhne, 'The resilience of EU market citizenship' (2010) 47 *CML Rev*, 1597.

[3] S Seubert, 'Shifting boundaries of membership: The politicisation of free movement as a challenge for EU citizenship' (2020) 26 *European Law Journal*, 48.

[4] F De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford: Oxford University Press, 2015); M Ferrera, 'The contentious politics of hospitality: Intra-EU mobility and social rights' (2016) *European Law Journal*, 754.

[5] See on who actually moves, G Davies, 'European Union citizenship and and the sorting of Europe' (2021) 43 *Journal of European Integration*, 49.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

nationals who have remained 'at home'. This creates tension in the administration and political stability of these sectors, as it is seen as challenging the egalitarian premise that national citizenship is structured on.[6] Implicitly, of course, such accounts suggest that free movement and equal treatment should not be understood as articulating an incipient form of supranational citizenship, but as instruments that, problematically, constrain the articulation of visions of national identity or national (political) community—be it in terms of redistributive politics or the more ephemeral ideals of 'sovereignty' or 'identity'.[7] The solution, in any event, is the same: a more robust insulation of the contours of *national* political and redistributive citizenship from the demands of free movement.

While the criticism of free movement, then, seems to pull in different directions—one arguing in favour of *more* free movement in an attempt to create a more egalitarian vision of the subject on the supranational level, and one arguing in favour of *less* free movement in order to protect national redistributive and political communities—they also share certain assumptions. Both sides, for example, argue that free movement in its current guise introduces a new cleavage in access to opportunities and resources. Both, equally, are committed to the vision of citizenship that is egalitarian (or, at least, they employ this rhetoric), even if they disagree about the appropriate governmental level through which to shape this. Likewise, both sides appreciate, albeit implicitly, that the question of the scope of free movement is a proxy for the much wider debate on the nature of the EU, the interaction between national and supranational political communities, and the appropriate scope of integration. The discussion of whether a vulnerable Romanian single mother, who has lived in Germany for three years, should receive access to special non-contributory benefits in Germany,[8] then, is as much about the scope of free movement as about the nature and limits of EU law and European integration itself.

This intimate link between the individual European's rights and the nature and *ethos* of European integration is of crucial importance for the argument presented here. It is, in fact, at the very core of the EU's legal and normative order. And while it has long been clear that the EU's *legal* order is heavily reliant on the individual exercise of rights, it is not always clear what this tells us about the *normative* premise of the EU's authority. Let me unpack this interaction.

The individual is, as Weiler has put it, both the subject and object of European integration.[9] Ever since the Court's claim, in *Van Gend & Loos*, where European integration is expressed as a legal order for the benefit of both states *and* its

[6] R Bellamy, The liberty of the post-moderns? Market and civic freedom within the EU' LSE 'Europe in Question' Discussion Paper Series, LEQS 01/2009

[7] A Somek, 'Solidarity Decomposed: Being and time in European citizenship' (2007) 32 *ELR*, 787, A Menendez and E Olsen, *Challenging European Citizenship* (Palgrave, 2020).

[8] Case C-333/13, *Dano* EU : C : 2014:2358.

[9] JHH Weiler, 'Van Gend and Loos: The individual as subject and object and the dilemma of European legitimacy' (2014) 12 *International Journal of Constitutional Law*, 94.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

citizens, the individual has become central to the way in which we 'do' European integration. In the absence of a sufficiently thick political space through which integration could be secured, it has always to a large extent been premised on the exercise of individual rights. On this view, the doctrines of direct effect and supremacy serve to cut through opposition against the objectives of European integration, while national courts are employed to secure the authority of EU law by embedding it within the domestic constitutional settlement.[10] It is the exercise of an individual right (more often than not, the rights to free movement) then, guaranteed on the domestic level by national courts, that serves to make European integration 'happen', that is, to discipline Member States and their policies in conforming to the demands and objectives of integration. This system, secured institutionally through the preliminary reference procedure and by offering clear incentives for transnational actors *and* national judicial bodies to engage,[11] and substantively by the Court's extension of material limits to free movement,[12] has created a formidable engine of integration that cannot be meaningfully challenged by political actors on either the national or European level, even where it appears to move beyond the confines of the Treaty.[13]

What is often overlooked in this context, and underexplored in the discussion, is the extent to which individual rights are central to the EU's *normative* order, that is to say, that they are not only an *instrument for* integration, but also constitute the very *ethics of* integration. The link between the subject's rights and the EU's authority, in other words, is not only about how we do European *integration*, but also about how we do *European* integration.[14]

The centrality of individual rights to the EU's *normative* (rather than legal) order can be explained in a number of ways. On the most general level, it can be understood within the context of a push, after the Second World War, to constrain the exercise of popular sovereignty,[15] or, more precisely, to de-couple the exercise of popular sovereignty from a vision of community that centres around national identity or ethnic belonging. It is, at its core, an attempt to

[10] JHH Weiler, 'The political and legal culture of European integration: An exploratory essay' (2011) 9 *International Journal of Constitutional Law*, 678.
[11] K Alter, 'The European Union's Legal system and domestic policy: Spillover or backlash?' (2000) 54 *International Organisation*, 489.
[12] The Court habitually argues that Member States, even when acting within the scope of their competences, must do so while respecting the free movement provisions. One of the most recent restatements to this effect is in *BU*: 'Thus, although the Member States are at liberty, in the framework of bilateral agreements for the avoidance of double taxation, to determine the connecting factors for the purposes of allocating powers of taxation, that allocation of powers of taxation does not allow them to apply measures that are contrary to the freedoms of movement guaranteed by the TFEU'. Case C-35/19, *BU* EU : C : 2019:894, para. 31.
[13] See eg F Scharpf, 'The asymmetry of European integration, or why the EU cannot be a "social market economy"' (2010) 8 *Socio-Economic Review*, 211; S Garben, 'Competence creep revisited (2017) 57 *Journal of Common Market Studies*, 205.
[14] See for a similar development in Charter cases: D Chalmers and S Trotter, 'Fundamental rights and legal wrongs: The Two sides of the same EU coin' (2016) 22 *European Law Journal*, 9.
[15] J-W Muller, *Contesting Democracy* (New Haven, CT: Yale University Press, 2013).

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

reconcepualize political authority as an exercise in spatial governance rather than to be expressive of certain traits of a *particular* political community. A central part in this move was to consolidate a range of individual rights that served to limit the exercise of state power. The post-war proliferation of constitutional charters, and of the tribunals tasked to uphold them against the executive branches of government, are the most evident proof of this. The universalist character (or at least language) of constitutional norms and human rights, moreover, could be seen as a way to combat the particularism of national visions of personhood. The rights protected under this new order also included economic rights, which, as the ordo-liberals realized even before the war, would serve as a crucial instrument to discipline the exercise of public power.[16]

This is not to suggest a nihilistic narrative that understands the *ethos* of the EU to be about the evaporation of political power and the protection of individual rights *per se*. Instead, what emerges is a vision of the subject both created by and burdened by the nation state. What survives is the *state*, what is weakened is the *nation*—even if such a separation is obviously artificial in parts. The EU's promise, the normative basis for its authority, then, is to offer an escape from the constraints that the nation state necessarily places on the individual in the ordering of society. These constraints exist in very practical terms—insofar as free movement allows me to move to a location with properties (climate, temperament, language, economic development, cultural norms) that are unavailable 'at home'[17]—but also, more importantly, in normative terms. The nation state reduces the complex notion of who someone 'is' or can 'become' in order to allow for social structuring. The 'self' is reduced to the subject *as a national*—which is a category that is used to determine who we share our resources with, who has a say on imposing the limits on acceptable behaviour, and who determines the normative contours of society. The nation state, in other words, artificially prioritizes one vision of the 'self', a priority that is justified with reference to the need to make it possible to manage a society or community composed by citizens who are infinitely complex and heterogeneous in their predisposition, outlook on life, needs, and preferences.

The risk, in this process, has always been the capacity of the nation state to create categories of citizens and categories of 'being' that are excluded, both practically in excluding them from access to the rights accorded to 'insiders', and normatively by creating a prescriptive vision of what it means to be a 'national' or 'good' citizen. The emergence of the regimes of constitutional rights after the war can be seen as a way to limit this exclusionary potential, and to signal certain privileged categories of 'being' that individuals *must* be allowed to express and realize (usually centring around their political expression, their productive

[16] M Wilkinson, 'Authoritarian liberalism in Europe: A common critique of neoliberalism and ordoliberalism' (2019) 45 *Critical Sociology*, 1023.
[17] H De Blij, *The Power of Place: Geography, Destiny and Globalization's Rough Landscape* (Oxford: Oxford University Press, 2010).

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

capacity as a worker, or religious and gender-based identifiers). Constitutional rights, on this view, serve to ringfence certain ways of articulating or realizing the 'self' from the hegemonic vision of subjecthood implicit in national political communities. It is, in a sense, about creating a negative space of freedom (not: a space of negative freedom) through which the individual can both understand and realize herself in a more authentic fashion—unburdened by the need to 'be' a national.

European integration can be understood to pursue this same aspiration of allowing for alternative modes and sites of self-realization in an even more ambitious fashion. EU law, and in particular free movement, can be seen as central to the EU's normative order because it problematizes the domination that the nation state exerts over the individual's self-understanding and capacity for self-realization. National policies, in a way, artificially render the subject, and cannot reflect their complex and contradictory character. Amartya Sen explains:

> a person belongs to many different groups (related to gender, class, language group, profession, nationality, community, race, religion and so on), and to see them merely as a member of just one particular group would be a major denial of each person to decide how exactly to see himself or herself. The increasing tendency towards seeing people in terms of one dominant 'identity' ... is not only an imposition of an external and arbitrary priority, but also the denial of an important liberty of a person who can decide on their respective loyalties to different groups.[18]

Sen's point, in a way, is to suggest that the artificial boundaries created in the process of state-formation and state-management create legal subjects that are both inaccurate and incomplete. A person, in simple terms, is so much more than a national—even if that is the category through which the rights of the subject are rendered, and the prism through which their opportunities are constrained. Free movement, then, frees up space for alternative realizations of one's self. Research shows that free movement helps to liberate individuals from their self-understanding as purely a national *even when they do not move across borders*.[19] The right (or even mere possibility) of free movement sits, in a way, on the faultline of 'being' and 'becoming', creating a 'potential space' that, according to psychoanalytical work, is central to the development and realization of the self.[20] This transitory—liminal—space is crucial in the argument advanced in this paper that suggests that the authority of the EU's legal order is fundamentally predicated on allowing its citizens to *become* themselves rather than *be* nationals.

[18] A Sen, *The Idea of Justice* (Penguin, 2010) 246–7.
[19] S Koikkalainen and D Kyle, 'Imagining mobility: The prospective cognition question in migration research' (2015) 42 *Journal of Ethnic and Migration Studies*, 759.
[20] DW Winnicott, *Playing and Reality* (Abingdon: Routledge, 1991 [1971]); Y-F Tuan, 'Geopiety: A theme in man's attachment to nature and to place', in D Lowenthal and MJ Bowden (eds), *Geographies of the Mind: Essays in Historical Geography* (New York: Oxford University Press, 1976), 30.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

This is so for two reasons. The first, straightforwardly, is because it allows the EU to do something that the nation state cannot: challenge the forms of domination that are implicit in the nation state itself. As Breton highlights, in a multi-tiered structure, all levels of government source their authority from being able to offer something that the other levels *cannot*.[21] The second is that the EU's normative authority is agnostic about 'the good'. It doesn't seek to replace the hegemonic vision of the subject as 'national' with something else, with the vision of the subject as 'European', for example. Instead, it problematizes hegemonic visions of the subject *per se*, and as such offers a dynamic instrument to challenge and discipline diverse forms of domination in whichever site and space they may emerge—be it political, economic, social, or cultural. It offers, simply put, new sites for self-realization. The *reason* for someone to prioritize a certain 'self' and decide to realize or express it in another Member State is not important. It might even be a logically incoherent or evidently self-defeating reason. Amartya Sen, again, on why this 'blind' or 'agnostic' element of free movement bolsters the EU's normative order:

> Our motives [for living any particular life] are for us to choose—not, of course, without reason, but unregimented by the authoritarianism of some context-independent axioms or by the need to conform to some canonical specification of 'proper' objectives and values. The latter would have had the effect of arbitrarily narrowing permissible 'reasons for choice', and this certainly can be the source of a substantial 'unfreedom' in the form of an inability to use one's reason to decide about one's values and choices.[22]

Free movement, then, sits at the heart of this project and articulates the EU's core normative ambition. It transcends the space between *being* and *becoming* and makes for a subjecthood that is not trapped by the nation state. As Weiler and Lockhart have put it: '[p]art of the Community *ethos* . . . lies in the important civilizing effect [which] . . . is achieved through the intended inability of Member States, practical and legal, to screen off different social choices, legally sanctioned, in other Member States'.[23] The individual right to free movement, then, is not just central to the legal order that defines how we do European *integration*, but also to the normative authority that underpins *European* integration: a commitment to the maintenance of forms and sites of self-realization beyond the control of the exclusionary processes of the nation states.

As we will see in the next section, this vision of free movement is increasingly unstable in so far as EU law creates a liminality at the heart of integration that perpetuates rather than challenges the exclusionary practices of national

[21] A Breton, 'Federalism and decentralization: Ownership rights and the superiority of federalism' (2000) 30 *Publius*, 1; D Chalmers, 'Gauging the cumbersomeness of EU law' (2009) 62 *Current Legal Problems*, 405.
[22] Sen (n 18), 5–6.
[23] J Weiler and N Lockhart, 'Taking Right's seriously seriously: The European Court of Justice and its fundamental rights jurisprudence (1995) 32 *CML Rev*, 604.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

citizenship. The European subject is rendered as a liminal subject: temporarily, transitionally, elevated beyond the constraints of the nation state but doomed to collapse back into them. As such, this is a very profound challenge for the EU's normative order, which is fundamentally premised on allowing new sites and forms of self-realization for the European citizen.

II. The prescriptive turn

If asked in, say, 2010, to describe the legal regime governing the rights of mobile Europeans in their host state, the answer would have been relatively straightforward. As soon as a mobile actor qualifies as a worker, she and her direct family members would be entitled to residence and full equal treatment in access to welfare benefits.[24] In accordance to well-established EU legislation and case law of the Court, a 'worker' is anyone who worked in the host state (for at least 5.5 hours per week), is remunerated for their work in cash or kind, and finds herself in a relationship of subordination vis-à-vis her superior.[25] Only mobile EU nationals doing work that can be categorized as 'marginal and ancillary' could be excluded from the rights under EU free movement law, an exception interpreted very narrowly by the Court.[26] EU law, in a sense, was *agnostic* about the *nature* of the work or the employment relationship: as long as these minimum criteria were met, the mobile actor would classify as a 'worker' and the rights attached to this privileged status would be unlocked. If anything, it appeared that some sort of Durkheimian organic solidarity underpinned the regime of economically active migrants, whereby merely 'producing among' locals served as the key to unlock privileged access to rights in the host state.[27]

Most resistance from Member States against this privileged status of the 'worker', tellingly, focused on redefining the *personal* scope of application—that is, the criteria that must be met in order to classify as a 'worker'—rather than on the material scope of the equal treatment obligations attached to it. As such, there has been pushback by Member States against the inclusion of part-time workers, temporarily unemployed workers, work pursued for educational or rehabilitation purposes, and frontier, temporary, or seasonal workers. Finland, for example, seems to demand both a minimum employment of 18 hours/week as well as a

[24] Regulation 492/2011.

[25] Case C-507/12, *Saint Prix* EU : C : 2014:2007, paras 33–35; Case C-14/09, *Genc* EU : C : 2010:57.

[26] Case C-344/87, *Bettray* EU : C : 1989:226.

[27] The justification for this focus on interdependence can alternatively be understood to emerge from the macroeconomic objectives of the EU as encouraging mobility; from the pursuit of a vision of social integration of the worker and her family for which welfare benefits are crucial; from a commitment to fiscal reciprocity; or from an idea of just return on the subordinate relationship of labour vis-à-vis capital. The lack of clarity of the Court as to the source of this obligation is not without its problems.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

minimum monthly salary of €1165.[28] Somehow, it was felt that these categories of mobile workers did not 'deserve' the privileged status accorded to the more traditional image of the worker—who has a stable, long-term, full-time position.

If a mobile actor was economically *in*active, her rights would be slightly downgraded. Residence for longer than three months for herself, her spouse, children, and parents is conditional upon having healthcare insurance and sufficient resources,[29] although, in practice, Member States have very seldom demanded proof of this, and the Court has imposed a requirement of proportionality that allows Member States to demand only very limited resources.[30] The economically inactive migrant, however, could export almost all benefits *from* her home state, without having to indicate the purpose or nature of her stay in the host state. This exportability went a long way towards ensuring that she would not have to rely, initially, on the welfare state of the host state.[31] Equal treatment in access to welfare benefits for economically inactive Europeans in the host state, on the other hand, was not full and automatic (as it is for workers), but conditioned upon a temporal proxy used to determine the 'degree of integration' of the migrant in the host state. This 'degree of integration', sometimes also articulated in the case law as a 'real link with the host state society', seems to suggest a qualitative assessment of the migrant's behaviour, life choices, and attitude in the host state. From quite early on, however, in the *Förster* case, the Court explicitly rejected the qualitative approach (even if not always followed in practice), using a temporal proxy of residence as the main relevant criterion to decide on the 'degree of integration' that had been achieved by the economically inactive EU citizen. This means that, once again, EU law was quite *agnostic* about the individual, her behaviour and choices: the aspect of a subject's life that mattered most, for the assessment of her rights under EU law, was the amount of time spent in the host state.[32] In other words, the longer an economically inactive migrant lived in the host state, the more extensive her rights to equal treatment and the more meaningful her protection against expulsion from the host state. This somewhat one-dimensional vision of solidarity, focused around 'time and being', rendered the migrant as a passive subject, whose rights accrue by mere virtue of staying put in the host state.[33] What she does in her time in the host state—whether she is fully integrated, fluent in the local language, does volunteering work, or, conversely, has been sitting in a basement for three years watching Netflix—is immaterial to her accruement of rights under EU law.

[28] C O'Brien, 'Civis capitalist sum: Class as the new guiding principles of EU free movement rights' (2016) *CML Rev*, 956.
[29] Article 7 of Directive 2004/38/EC.
[30] Case C-184/99, *Grzelczyk* EU : C : 2001:458.
[31] Case C-192/05, *Tas-Hagen* EU : C : 2006:676.
[32] As well as the nature of the welfare product to which access is demanded. See De Witte (n 4).
[33] A Somek, 'Solidarity decomposed: Being and time in European citizenship' (2007) 32 *ELR*, 787.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

In 2022, the answer to these very same questions is more complex. The past 10 years or so have seen changes in the case law of the Court and indeed in the structure of labour markets more generally—some categorical but many others subtler and somewhat paradoxical. All, however, suggest a changing understanding of the *reason* for which mobile actors are granted protection by EU law in their exercise of free movement. This section analyses the changes over the past decades in both the case law of the Court and the wider policy context of free movement, suggesting a prescriptive turn that conditions free movement on the personal and productive qualities of the actor and replaces the agnostic nature that underpinned the personal scope of EU law protection. EU free movement law is, in other words, starting to colour in the blank image of the subject that has traditionally been at its centre. The result—as will be elaborated below—is a liminal subject: a European doomed never to quite become anything else than preordained by the Member States.

A first range of cases that signal a change in the Court's reasoning deal with the rights of frontier workers. These are workers who do not reside in the host state, but still have a right to equal treatment to welfare benefits in that state. *Geven* dealt with a Dutch national (and resident) working in Germany for between 3–14 hours per week. The Court argued that while she could be categorized as 'worker', her access to welfare benefits could be curtailed by Germany, which had, in this case, imposed a demand of 'more than minor' employment before childcare benefit were extended to migrant workers.[34] This rowing back from the automatic protection that EU law grants 'workers' instead demanding proof of 'significant' work before protection is offered, was further highlighted in two cases in which children of frontier workers demanded student benefits from their parents' state of employment. Both *Commission v Netherland* and *Giersch* focused on the legality of limitations imposed by Member States on the ability to export student loans by non-resident children of frontier workers.[35]

In these cases, the Court signals two significant changes to its approach. First, it accepts, as do AG Mengozzi and AG Sharpston, that, in principle, Member States are allowed to limit access to student loans to those students that are likely to make a future economic contribution to *that particular* state. This not only imposes a specific and highly functional vision of students as prospective workers (rather than as young adults discovering themselves, their interests or strengths), but also awkwardly cuts across any vision of the *single* market (after all, only those students likely to make a future economic contribution to the Netherlands or Luxembourg, not the EU as such, are included). This vision is articulated most explicitly where the Court (unbiddingly!) suggests that Luxembourg could

[34] Case C-213/05, *Geven* EU : C : 2007:438.
[35] Case C-20/12, *Giersch* EU : C : 2013:411. Case C-542/09, *Commission v The Netherlands* EU : C : 2012:346. See for a fascinating account of the evolution of the Dutch rules in light of the Court's jurisprudence, D Kramer, 'Earning social citizenship: Free movement, national welfare, and the European Court of Justice' (on file with author).

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

imposes a homecoming requirement on the students that export student benefits, requiring them to work on the territory of the Duchy for a number of years upon completion of their degree[36]—a requirement that has been accepted by the Court, albeit in much more specific circumstances, in the *Federspiel* case.[37] Access to the privileged right of equal treatment in EU law, in other words, is now constrained not with reference to the objective criterion of (the parents') employment or the students' residence, but the much more qualitative criterion of *prospective productivity* of the children.

This central focus on productivity comes back once the Court moves on to discuss what all this means for the applicants in *Giersch*. It argues that while Luxembourg is allowed to condition the export of student loans to citizens who are likely to become productive actors in Luxembourg, this does not mean that the residence requirement is lawful. Long-term employment of the parents, for example (in *Giersch*, this was up to 23 years), could also be an indication of the willingness of the child to work in Luxembourg *after* they received their degree,[38] but also, the Court explicitly highlights, serves as an indication of the productive nature of the relationship between Luxembourg and Giersch's parents. It is the fiscal reciprocity between productive actors (ie Giersch's parents have paid income tax for 23 years in Luxembourg) that entitles their children to demand something back from Luxembourg: 'the link of integration arises, in particular, from the fact that the migrant workers contribute to the financing of the social policies of the host Member State through the taxes and social contributions which they pay'.[39] Conversely, a meaningful interruption in the frontier workers' economic productivity could void any such claim.[40] This dual focus on the productive capacity of EU citizens—the prospective capacity of the student *as well as* a significant retrospective one of the parents—in the assessment of their right to welfare benefits in the host state is a clear change from previous case law.

The most explicit example of this new wave of thinking is perhaps David Cameron's renegotiation deal prior to the Brexit referendum. In an attempt to convince the British people to vote to remain in the EU, he extracted a number of 'concessions' from the other Member States and EU institutions. One of these was a commitment towards an 'emergency break' mechanism that entitles Member States to restrict access to welfare benefits for migrant workers. This mechanism would enter into force where the inflow of migrant workers was of 'exceptional magnitude' over a long period of time, putting pressure on the

[36] Case C-20/12, *Giersch* EU : C : 2013:411.
[37] Case C-419/16, *Federspiel* EU : C : 2017:997. The particularity in this case was the obligation for doctors to be bi-lingual and the absence of German-language education in the province of Bolzano.
[38] As it indicates geographical proximity, language ability, or lack of employment in border regions.
[39] Case C-410/18, *Aubriet* EU : C : 2020 : xxx, para. 33.
[40] Case C-410/18, *Aubriet* EU : C : 2020 : xxx, para. 40; and Case C-238/15, *Linares Verruga* EU : C : 2016:949.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

labour market and welfare structures of the host state. In such circumstances, to be verified by the Commission, the host state could restrict access to non-contributory in-work benefits for migrant workers for a period of four years.[41] This mechanism has not entered into force as a result of the British electorate's vote to leave the EU. But it is, nevertheless, striking for a number of reasons. Substantively, it dramatically breaches one of the basic principles on the free movement of workers, by no longer extending their right of equal treatment in an automatic and unconditional fashion. Instead, it is deliberately tailored to adversely affect *a certain group of migrant workers*—typically low-wage workers—who are considered to push out domestic workers on the labour market of the host state.[42] Procedurally, what is most striking is that the Commission agreed that the circumstances exceptional enough to trigger the emergency break mechanism did in fact exist in the UK, despite the absence of any empirical verification (and a number of empirical studies evidencing the exact opposite).[43] This leads into the most problematic element of the (non-)creation of the emergency break mechanism: *all Member States, plus the Commission, agreed to this proposal*. It is clear, regardless of whether the emergency break mechanism will ever resurface, where the political wind is taking us: to a place where some workers' rights are protected, and other workers' rights (and in particular the low-wage , seasonal, temporary ones) are no longer guaranteed when working across borders. Work, as such, is no longer enough. Instead, for EU law to offer the migrant worker its protection, such work must be durable, stable, productive, and 'sufficiently significant' .

The new prescriptive tendency of the Court is also visible in the case law on Union citizenship. As highlighted, the case law of the Court in this area revolves around the concept of the social integration of the migrant in the host state society, which is, somewhat awkwardly, assessed with reference to the time spent in the host state.[44] This emphasis on the temporal link between migrant and host state was confirmed by the Union legislator in Article 24 of Directive 2004/38.[45] In other words, the individual choices, behaviour, or attitude of the migrant in the host state are not meant to be taken into consideration for the assessment of the migrant's rights to reside and access welfare benefits in the host state.

[41] European Council Conclusions of 19/2/2016, EUCO 1/16.
[42] Nic Shuibhne (n 1), 477.
[43] Declaration of the Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism. Annex 4 to European Council Conclusions of 19/2/2016, EUCO 1/16; and the Declaration of the Commission on the safeguard mechanism referred to in parah 2(b) of Section C of the Decision of the Heads of State or Government. Annex 6 to European Council Conclusions of 19/2/2016, EUCO 1/16. See for an economic analysis of the fiscal effect of free movement for the UK: C Dustmann and T Frattini, 'The fiscal effect of immigration to the UK' (2014) 124 *Economic Journal*, 563.
[44] Despite the plea of AG Geelhoed in Case C-209/03, *Bidar* EU : C : 2005, the Court settled on a temporal proxy under pressure from the Member States, concerned with questions of administrative efficiency and legal certainty.
[45] Directive 2004/38/EC.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

In some recent cases, this agnostic nature appears to be waning. In *Prinz and Seeberger*, for example, the Court highlights that 'other factors, such as, in particular, [the applicant's] family, employment, language skills or the existence of other social and economic factors' such as 'the centre of family interests' or the place where the applicant 'was educated for a significant period' must play a role in the assessment of the degree of integration of a migrant.[46] As Barbou des Places has argued, these cases see the emergence of the 'situated' subject, offering an archetype vision of the integrated subject: 'the [Court] does not describe what she does but focuses on her personal life: she sometimes has a husband, and has one or two kids or none; she has resided in two Member States, and she has studied three years in the host country; there she has met and married a national; she has a clean criminal record and she speaks perfectly the language of the host society. We could also learn that she knows how to bake the regional pastry or that she is a supporter of the local football team'.[47] In this type of cases, the Court's use of qualitative criteria serves to mitigate any potential harshness of the agnostic temporal link. It works, in other words, to the benefit of the citizen.

In other cases, however, the logic of *Prinz and Seeberger* serves to *exclude* citizens from the protection that EU law offers. The case of Elisabeth Dano is, of course, a prime example.[48] Ms Dano, a Romanian national, and part of the Roma minority, moved to Leipzig with her son (born in Germany) to look after her sisters' children. By the time of the hearing at the Court, she had lived at least four years in Germany (although the case file suggests that her son was born a year prior to these four years, in Germany as well). Ms Dano made an application to receive a non-contributory social security benefit, aimed at ensuring that all residents in Germany have sufficient funds for shelter, food, and heating. Under the pre-existing case law, the only relevant question would have been whether or not Ms Dano was 'socially integrated' in Germany, that is, the amount of time that she had resided on German territory. However, the Court decided to go a different route. In a circular piece of reasoning, the Court suggested that the very right to equal treatment and residence (that is, essentially *all* rights that EU law offers mobile actors) are *continually conditional* upon the migrant proving she has sufficient resources for herself and her family, that is, that she is self-sufficient.[49] Ms Dano, in a way, invalidated her own claim to protection under EU law by demanding she receive a special non-contributory benefit that is only available to citizens who do *not* have sufficient resources. In short, the

[46] Joined Cases C-523/11 and C-585/11, *Prinz and Seeberger* EU : C : 2013:524, para. 38. Although, this—unlike Dano—concerns the legality of a national scheme meant to support free movement rather than the legality of the application of secondary law. Thanks to Dion Kramer for pointing this out.

[47] S Barbou des Places, 'The integrated person in EU law', in L Azoulai, S Barbou des Places, and E Pataut (eds), *Constructing the Person in EU Law* (Oxford: Hart, 2016) 191.

[48] Case C-333/13, *Dano* EU : C : 2014:2358.

[49] Case C-333/13, *Dano* EU : C : 2014:2358. See D Thym, 'The elusive limits of solidarity: Residence rights of and social benefits for economically inactive migrants' (2015) 52 *CML Rev*, 17.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

Court bypassed its proportionality analysis, which employs the temporal proxy to determine access to welfare products, in favour of a much more radical delimitation of the personal scope of EU law protection on the basis of the migrant's self-sufficiency. Most telling, however, is the emphasis that both the AG and the Court put on Ms Dano's personal circumstances, especially given that the legal resolution of the case did not demand any such assessment.[50] We learn that the father of Ms Dano's son Florin is unknown, that she was in secondary school for three years but did not complete her degree, has 'not been trained in a profession', never worked nor has sought work, 'expresses herself simply in German', does not read or write German, and has come to Germany 'solely to obtain . . . social assistance'.[51] What we learn is that Ms Dano is not simply unemployed, but that her attitude and character are somehow inherently flawed: it is impossible to envisage her as a productive and integrated actor in Germany. In fact, the narration employed by the Court is not too dissimilar from that employed by the Daily Mail who 'tracked down' 'the Roma gipsy who sparked a crackdown on benefit tourism'.[52] The picture that is painted is one of a Union citizen migrant who *cannot possibly* integrate in the host state society for lack of productive qualities and a type of attitude. What we do *not* learn, on the other hand, is that Ms Dano's ethnicity (not mentioned anywhere in the case file)[53] likely has caused discrimination in her access (and completion) to education and the labour market.[54] Nor do we learn why caring duties for her nieces (or reproductive work, for that matter) should not constitute sufficient evidence of work or engagement with the host society to warrant access to the welfare benefits.[55] *Dano* throws up more questions about the scope of application of EU law than it answers. What is most problematic, however, is the heavy narration on the Court's part,[56] and its depiction of the subject as somehow unworthy of EU law's protection in securing residence and equal treatment in the host state.

This same evolution can be traced in the case law of the Court on the possibility to expel lawfully resident EU citizens from the host state. In accordance with the applicable legislation and the traditional case law of the Court, expulsion for criminal offences becomes more difficult the longer the migrant resides in the

[50] The refusal of access to welfare benefits was determined by the absence of sufficient resources, which was demonstrated by the mere fact that Ms Dano applied for the minimum subsistence allowance. Despite that, see paras 34, 131 in the Opinion of AG Wathelet and paras 37–39 in Case C-333/13, *Dano* EU : C : 2014:2358.

[51] Ibid.

[52] https://www.dailymail.co.uk/news/article-2835442/The-Roma-gipsy-sparked-crackdown-benefit-tourism-Elisabeta-Dano-25-tracked-German-city-finding-centre-landmark-welfare-case.html

[53] J Guth and S Elfving, *Gender and the Court of Justice of the European Union* (Routledge. 2018).

[54] Guth and Elfving (n 53), 121.

[55] See Case C-67/14, *Alimanovic* EU : C : 2015:597 and Case C-442/16, *Gusa* EU : C : 2017:1004.

[56] See on this Phao, 'EU citizens' access to social benefits: Reality or fiction? Outlining a law and literature approach to EU citizenship in Pennings and Seeleib-Kaiser (eds), *EU Citizenship and Social Rights: Entitlements and Impediments to Accessing Welfare* (Cheltenham: Edward Elgar, 2018)

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

host state. In practice this means that the longer the migrant has resided in the host state, the more severe the criminal offence (and the prison sentence attached to it) must be to warrant expulsion.[57] As Azoulai and Coutts have highlighted, this logic has recently been revised to include an assessment of the extent to which a certain criminal offence 'offends against the moral sentiments of the host society', including the 'calm and physical security'.[58] The Court increasingly looks at the behaviour and attitude of the migrant criminal in order to assess whether or not their actions qualify as somehow inimical to the host state's society, which, in turn, would decrease the protection against expulsion offered by EU law.[59] The artificial nature of this exercise is most clear in AG Bot's Opinion in *PI*, where he argues that an Italian national, who has resided in Germany for over 20 years, could nevertheless be expelled because his crime, the rape of his step-daughter, demonstrated his 'total lack of desire to integrate in the society in which he finds himself and some of the values he has conscientiously disregarded for years'.[60] What determines a migrant criminal protection against expulsion, today, is not the severity of his crime, but the extent to which the *specific* crime breaches values that are portrayed as somehow being *particular* to the host state (whatever that may mean). What emerges, once again, is the picture of a new type of European: the one responsible for her own integration in the host state—in the market and society more generally—as a precondition for the residence rights, welfare rights, and protection against expulsion that are usually considered *constitutive* for their very integration.[61]

These obligations of productivity and propriety are popping up in too many different areas of EU law to be dismissed as accidents. While it is, of course, true that the Court occasionally expands the rights available to economically inactive migrants,[62] the direction of travel appears clear, and is also highlighted in cases where the Court *expands* the rights of economically 'useful' or 'productive' citizens despite Member State objections. In *Trojani*, for example, the Court stressed that the question whether or not someone was a worker is determined by whether a job and the employee is 'capable of being regarded as a normal part of the labour market' (that is, makes 'productive sense').[63] In *Saint Prix* and *Dakneviciute*, the Court extended the qualification of worker to pregnant worker, who had momentarily stopped working 'provided she return to work within

[57] Article 28 of Directive 2004/38/EC. See for an example of the first line of cases C-482/01, Orfanopoulos EU : C : 2004:262

[58] S Coutts, 'The absence of integration and the responsibilisation of Union citizenship' (2018) *European Papers*, 773–5; L Azoulai, 'The European individual as part of collective entities (market, family, society)', in L Azoulai, S Barbou des Places, and E Pataut (eds), *Constructing the Person in EU Law* (Oxford: Hart, 2016).

[59] Coutts (n 58), 779.

[60] Case C-348/09, *P.I.* EU : C : 2012:300, para 60–61.

[61] See A Somek, 'Alienation' in L Azoulai, S Barbou des Places, and E Pataut (eds), *Constructing the Person in EU Law* (Oxford: Hart, 2016).

[62] See recently Case C-322/17, *Bogatu* EU : C : 2019:102.

[63] Case C-456/02, *Trojani* EU : C : 2004:488.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

reasonable time after the birth of her child'[64] while, more recently, in *Gusa*, the Court highlighted that involuntary unemployment does not mean the end of EU law protection, as long as the migrant remains capable and available on the job market, that is, as long as he remains *potentially* a productive member of the economy of the host state. Likewise, in *Jobcentre Krefeld*, the Court goes through a lot of conceptual trouble to find an explicity economic rationale and connection between migrant and host state in order to guarantee the continued primary education of the migrant's children in the host state.[65]

This evolution is haphazard, potentially deeply problematic (as we will see in the following section) and also, perhaps more disturbing, largely unacknowledged. It is a reflection, arguably, of the critique on EU free movement law (and migration more generally) as being economically, socially, and even morally disruptive of the host state's texture. These changes can be understood on their substance—as emphasizing that rights under EU law are a benefit for 'good' Europeans, and not necessarily *all* Europeans—or on more procedural grounds, as an attempt to offer Member States more jurisdictional latitude in imposing their visions of political economy or criminal justice. On either score, however, these changes have a significant second-order effect on the EU's authority. The creation of the new European—the liminal European—is a fundamental challenge to the very nature of European integration and the authority of its legal order.

III. The liminal European and her progeny

What emerges from the previous section is a *new* type of European that deserves to be protected by the EU legal order. These changes have far-reaching consequences. They fragment the European citizen, amplifying processes of stratification, commodification, and depoliticization, and they generate precarity at the core of EU subjecthood. These effects, moreover, compound rather than challenge the forms of domination that are present in contemporary political economy on the national level. The result is a significant challenge to the EU's authority. It makes us question whether legal subjectification on the EU level is immanently liminal, in the sense that it perpetuates but does not transcend the space between 'being' and 'becoming'.

At a descriptive level, what follows from the previous section is the fragmentation of the European citizen. Free movement law, and EU law more generally, had already been criticized for decades for creating two categories of Europeans: the mobile citizens—who move across borders and in doing so receive a range of rights under EU law—and the immobile citizens, who stay at home and for

[64] Case C-544/18, *Dakneviciute* EU : C : 2019 : 761, para 20.
[65] Case C-181/19, *Jobcentre Krefeld* ECLI : EU : C : 2020:794.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

whom EU law offers very limited rights.[66] The previous section highlights the increased stratification and the emergence of further categories of citizens, with EU law varying the rights granted to a citizen in accordance with her capacity to be a productive and responsible actor in the host state.

At the apex we find the 'good' worker—let's say a Belgian national working at a university in another Member State. She qualifies as highly-skilled, has a permanent contract, and is a productive and integrated part of the society of the host state. She and her family receive the full slate of rights available under EU law: an unconditional right to reside for herself, spouse, children, and parents; a full right to equal treatment to welfare, tax, and social benefits; and extensive protection against expulsion. A tier lower we find the precarious worker, who, perhaps, is less highly-skilled, is considered to compete with locals for a limited number of positions, has a temporary, zero-hour, or seasonal contract, and is not fully committed to life in the host state by virtue of being a frontier worker. This is visible in the fact that he might mix periods of employment and unemployment; might reside in the host state only part of the year; hasn't bothered to bring over his family; or learned the language. Such workers have more limited rights under EU law. Their right to equal treatment, for example, is increasingly conditional upon remaining a stable and productive force in the labour market. Once their abilities, or circumstances, throw their continuous productivity into doubt, their right to equal treatment becomes more easily rebutted.[67]

A third tier is the economically inactive migrant that *could* become a functional and productive part of the host state society. The archetype character here is the student, as we saw in the previous section, who, as soon as she can demonstrate a prospective economic link to the host state, becomes eligible for support from that host state. The young student is adaptive, quick to integrate in the host state, and likely to become a productive part of the host state society because of the malleability of his character and abilities.[68] This focus on economic productivity and the personal capacity to integrate economically *and* socially distinguishes Bidar from the fourth category of economically inactive migrants—the one characterized by the figure of Ms Dano. Dano personifies the category of Europeans deemed not to deserve any protection under EU law. Their productive abilities (degrees, languages spoken, jobs held) and personal behaviour (single parent, criminal record, inability to finish school or hold a job) add up to an image of

[66] D Hanf, 'Reverse discrimination in EU law: Constitutional aberration, constitutional necessity, or judicial choice?' (2011) 18 *Maastricht Journal of European and Comparative Law*, 21.

[67] See also Case C-67/14, *Alimanovic* EU : C : 2015:597; and A Iliopoulou-Penot, 'Deconstructing the former edifice of Union Citizenship? The *Alimanovic* judgment (2016) 53 *CML Rev*, 1007.

[68] As AG Geelhoed put it: 'The chances that an EU citizen in the situation of Bidar has integrated into society as a young person, having lived there under the legal guardianship of his grandmother, who was already settled in the United Kingdom, and having followed secondary education in the host Member State, surely must be deemed to be greater than EU citizens arriving at later stages of life.' Opinion of AG Geelhoed in Case C-209/03, *Bidar* EU : C : 2005:169, para. 60.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

the 'useless' European, whose rights to residence is continuously conditional, whose right to equal treatment is severely limited, and whose protection against expulsion is significantly lowered.

But the fragmentation of the European does not only exist as a descriptive account of the changes in the Court's case law and EU policy making. On the normative level, it signals the (re)introduction of a highly stratified, commodified, and *liminal* type of citizenship: which is at once precarious and conditional—a status that can be conveyed but never really be *had*. Being European, in a sense, is *being* something that is temporarily available, a status bestowed on a *certain type of* individual but never *of* the individual.[69] The European's actions or inactions might at any time lead to a demotion to a less privileged category of citizenship.

The concept of liminality best defines this state, capturing both the precariousness and conditionality of *being* European.[70] The modern-day European is a liminal category for three reasons. First, it exacerbates tensions already identified in EU free movement law, that see to its commodifying, stratifying, and depoliticizing nature. The new vision of the European is highly exclusionary. EU law (in deciding whether a citizen deserves a right to residence, equal treatment, or protection against expulsion) has started to internalize contemporary practices of exclusion that pervade political economy or criminal justice on the national level.[71] New precarious employment relationships—zero-hour contracts, the gig economy, seasonal work—are transposed from the national labour policy domain into the determination of personal rights under EU law. In a way, the EU's vision of the 'good' worker or citizen has started to predetermine *access* to rights rather than their scope.[72] Charlotte O'Brien's work on the position of migrants in the EU's political economy suggests, moreover, that migrants are relatively overrepresented in precarious work situations compared to nationals.[73] The same goes for the exclusionary practices of domestic criminal justice regimes. As Insa Koch's pathbreaking work indicates, such regimes are not just deeply depoliticizing, but increasingly target the economically vulnerable, often in a way where

[69] It is telling, in fact, that upon presence on the territory of a host state for five years, EU nationals are considered a 'long-term resident' and are conceptualized in both the legislation and case law as fully assimilated to nationals. They derive rights, in other words, by their (presumed) assimilation as opposed to their being European. See also Case C-165/16, *Lounes* ECLI : EU : C : 2017:862, paras 57–59. Thanks to Stephen Coutts for pointing this out.

[70] Nic Shuibhne also refers to this concept as a possible analytical tool to make sense of the disorientation created by the case law on free movement of workers and citizens. See N Nic Shuibhne, 'Limits rising, duties ascending: the changing legal shape of Union citizenship' (2015) 52 *CML Rev*, 889.

[71] I Koch, *Personalising the State: An Anthropology of Law, Politics and Welfare in Austerity Britain* (Oxford: Oxford University Press, 2019).

[72] L Azoulai, 'Transfiguring European citizenship: From Member State territory to Union territory', in D Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2018).

[73] C O'Brien, 'Civis capitalist sum: Class as the new guiding principles of EU free movement rights' (2016) *CML Rev*, 938–9.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

exclusion of the labour market and social welfare coincides with punitive and exclusionary measures of criminal justice.[74] It is unsurprising that where EU migrants are increasingly excluded from both labour access and social welfare access, domestic systems of criminal justice are employed to challenge their very right to reside in the host state.[75] All this leads to a liminal condition for the mobile European—nominally freed from domestic forms of domination and subjugation but doomed to collapse back into them—where a misstep on the job market or in your personal life that betrays a lack of economic potential or social adaptability leads to the evaporation of one's status as a European and the concomitant rights under EU law.

Secondly, the liminal nature of the European is manifested through her responsibilization.[76] The European migrant is, herself, now responsible for whether or not she has rights under EU law. This focus on the migrant's (objective) capacities and (subjective) willingness to be a productive member of society, as well as their 'attitude' in doing so, all matter in the determination of access to rights of residence, equal treatment, and protection against expulsion. But this responsibilization also comes with a highly specific structuring of the individual's agency.[77] Neuvonen has demonstrated how EU law constraints the exercise of self-determination to very specific forms that offer a very limited capacity for genuine self-expression. EU law increasingly only incentivizes the expression of very particular elements of personhood.[78] This *neurotic* vision of the responsible European subject—somehow burdened by her immutable economic (in)abilities and highly constrained in her 'attitude' and choices in the host state—makes 'being' European both a precarious, deeply stressful and a conditional pastime. It is a condition that keeps the subject in a permanent limbo—not quite a mere national but not quite herself, either. It also creates employment and autonomy traps, wherein choices other than those preordained by EU law are made realistically unavailable due to the threat of the loss of the very rights that are crucial for the migrants' ability to *live*, further entrenching the precariousness of the mobile subject's position in society.[79] This focus on the individual's own responsibility towards her integration posits a difference between the migrant and the host state's citizens as a flaw or problem to be overcome rather than a *condition* for the

[74] Koch (n 71).
[75] See, for example, S Coutts, *Citizenship, Crime and Community in the European Union* (Oxford: Hart, 2019) and L Marcano, *The European Union and the Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Oxford: Hart, 2019).
[76] S Barbou des Places, 'The integrated person in EU law', in L Azoulai, S Barbou des Places, and E Pataut (eds), *Constructing the Person in EU Law* (Hart. 2016) 191; Coutts (n 58), 763.
[77] P Neuvonen, *We, the Burden: Equal Citizenship and its Limits in EU Law* (Oxford: Hart, 2016) and D Chalmers, 'The unconfined power of European Union law' (2016) *European Papers*, 405.
[78] P Neuvonen, 'Retrieving the "subject" of European integration' (2018) *European Law Journal*, 6.
[79] See O'Brien (n 73), 962 for an overview of research on the mental and physical burden of precariousness.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

subject's self-realization.[80] Evidently, this liminality is internalized by the European subject, and research suggests that this even carries over how the *immobile* European understands herself and her choices.[81] Making Europeans themselves responsible for their own 'Europeanness', in short, offers both a deeply stressful vision of life and an impoverished vision of the European subject.[82]

The third way in which the liminal European manifests herself is through her individualization. As Dion Kramer has argued, the 'economic rationality [of the Court's case law] is increasingly based on a neoliberal anthropology of the human being', wherein the subject is seen (and rendered) as an atomistic actor, as unburdened by attachments to collectivities (whether the family, the community, or the nation) and as fully self-reliant or 'empowered'.[83] This is a slightly different critique from the one by scholars such as Somek and Chalmers, who have highlighted the dislocating and depoliticizing effect of EU law through its excessive reliance on individual agency. All, however, make a similar point. The subject can only be seen as authentically rendered (or even emancipated) when she can realize herself fully in both private and public.[84] The EU's excessive (and increasing) reliance on the former offers a skewed image of the subject. Her access to the rights that might make the public dimension of her self-realization more plausible—such as guaranteed residence in the host state, access to the welfare structures that facilitate social integration, protection against expulsion, political rights—however, remain conditional upon her private abilities, attitudes, and choices. This emphasis on the atomistic individual, and its potential for alienation,[85] is the third characteristic of the emerging liminal European.

The liminal nature of EU subjecthood is problematic in a more structural sense as well. As we saw in the first section, an intimate relationship exists between, on the one hand, the subject of EU law, and, on the other hand, the authority of EU law. The latter is, in both practical and normative terms, dependent on the former. The prescriptive turn taken in the subjectification of the European, as elaborated in the previous section, offers three challenges to this source of authority. The first is practical: the prescriptive iteration makes the right to free movement and equal treatment unavailable for a whole category of

[80] Neuvonen (n 78), 15.

[81] S Koikkalainen and D Kyle , 'Imagining mobility: The prospective cognition question in migration research' (2015) 42 *Journal of Ethnic and Migration Studies*, 759.

[82] See also A Somek, 'Alienation' in L Azoulai, S Barbou des Places, and E Pataut (eds), *Constructing the Person in EU Law* (Oxford: Hart, 2016).

[83] D Kramer, 'From worker to self-entrepreneur: The transformation of *homo economicus* and the freedom of movement in the European Union' (2017) *European Law Journal*, 172–3.

[84] See for a discussion on the extent to which emancipation and social freedom is possible in the absence of institutions C Welzel, *Freedom Rising* (Cambridge: Cambridge University Press, 2013), A Honneth, *Freedom's Right* (New York: Columbia University Press, 2015), and F De Witte, 'Emancipation' in L Azoulai, S Barbou des Places, and E Pataut (eds), *Constructing the Person in EU Law* (Oxford: Hart, 2016).

[85] A Somek, 'Solidarity decomposed: Being and time in European citizenship' (2007) 32 *ELR*, 787; Neuvonen (n 77).

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

citizens who do not meet the prescribed economic productivity and social adaptability. The EU, for better or worse, is becoming relevant to a smaller number of citizens—at the exact time when the EU is desperately looking to bolster its authority by coming up with policies that make the citizens' lives easier and more meaningful.[86]

The second problem lies in the fact that the EU has moved away from its agnostic vision of the subject (where *status* instead of productivity, and where *residence* instead of qualitative integration were central). The main advantage of the agnostic approach, as we saw, was that it allowed the EU to become an instrument through which the subject is allowed to become *something else*, or to realize herself in forms and sites which the Member State does not necessarily allow for. The strength of this vision was exactly that EU law was *agnostic* about the preferences, needs, desires or quirks of the subject; she did not need to conform to a preordained or hegemonic vision of the self or the 'good life'.[87] Instead, EU law served to liberate the subject from the imposition of an artificial preference for particular or axiomatic ways of looking at the world, allowing the citizen to form relational commitments based on aspects other than nationality. In its new prescriptive guise, however, EU free movement law loses much of its attraction: it now offers a very specific avenue for self-realization or for 'becoming' European.

The third and most problematic way in which the prescriptive turn is undermining the EU's normative authority is not because it is prescriptive *as such*, but because the *substance* of the prescription mirrors the exclusionary practices of the Member States. The nation state, in the process of governing, creates structures of inclusion and exclusion throughout its policies—whether on the labour market, in access to social goods, in access to political rights, through criminal justice or taxation. These processes of cleavage management, stratification, and commodification offer powerful narratives of domination—they render the individual and her potential life in a specific and constrained form. EU free movement law could, arguably, be seen as a way to problematize these forms of domination, and as liberating the individual from their constraints. It served, in a way, to discipline the nation state's capacity to impose a hegemonic vision of the 'good life' on its citizenry, to exclude whole groups in society from access to specific rights, and to internalize the effect that policy choices might have on outsiders. In its new prescriptive guise, however, EU free movement law perpetuates the *exact same* exclusionary practices that typify the political economy of the modern state—punishing the less productive, the ethnic minorities, the more vulnerable

[86] See, for example, 'White Paper on the Future of Europe' COM (2017) 2025; F De Witte*, re : generation Europe* (Palgrave, 2020); E Spaventa, 'Earned citizenship: Understanding Union citizenship through its scope', in D Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2018) 220–1 on stratification and on the types of citizens for whom free movement has become meaningless.

[87] Within, as discussed above, the boundaries of the conception of the subject as operating in a liberal market order.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

or those unable to adapt to the new realities of the market or modern society. The case of Ms Dano, of course, is a prime example of a European citizen whose ethnicity, economic capacity, and circumstances have not just led to exclusion from education, the job market, and social welfare in Romania and Germany, but also from all the rights that EU law offers. Shaping EU subjecthood in reference to national visions of citizenship, however, is problematic, as the latter prioritizes unity and belonging over the difference and alterity that used to be central to the EU's normative order.[88]

In perpetuating the exclusionary practices of the nation state, EU law gives up on what arguably made the process of integration *European*—a sensitivity to the vulnerable position of the individual vis-à-vis the forms of domination generated in the process of the state building. However, this reproduction of exclusionary practices on the level beyond the state was the *very point* of the prescriptive turn in the Court's case law—mirroring the national welfare retrenchment of the 2010s and responding to the critique that free movement law is dislocating domestic visions of identity, justice, or morality. While this dislocation can certainly be problematic, it is primarily so because of the EU's inability to mediate it through distributive policies or representative politics on the transnational level. At the core of the development described in this paper, in fact, is the EU's inability to internalize social conflict.[89] Free movement as such does not seem to be the problem.[90] It is, rather, its distributive consequences that perpetuate such conflict. Law, ultimately, can only get us so far.

The prescriptive turn taken by the EU is *reducing* the European subjects' agency, thereby also reducing the possibility that it might serve as the starting point for a proto-political citizenship. When 'being' European is exclusively an option for the economically productive and socially adaptable, after all, the chance of it serving as a mediating force becomes null. Instead, what is needed is a return to a vision of the European subject that is agnostic about her economic capabilities, behavioural attitudes, and social adaptability. This entails both a reorientation of the Court's case law, moving away from qualitative assessments of the migrant's life and life choices, and a rethinking of the nature of the categories of mobile Europeans to account for caring duties, reproductive work, and precarious employment. One avenue might be to indefinitely guarantee rights to residence, equal treatment, and protection against expulsion once a citizen has lawfully entered a host Member State as a worker or under the conditions attached to citizenship. Counterintuitively, this more privileged vision of subjecthood, insofar as EU law protection is blind to the 'significance' of the subject's economic contribution or her personal attitude, and thereby much more sensitive

[88] Neuvonen (n 78), 18.
[89] F De Witte, 'Interdependence and contestation in European integration' (2018) 3 *European Papers*, 475.
[90] Spring 2019 Eurobarometer showing that on average 81% of Europeans support free movement, with each Member State reporting at least 68% support.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

to the subject's ability for self-realization, already exists in EU law. It is part of the post-Brexit standstill clause, entitling EU nationals lawfully present in the UK, and vice versa, to lifelong protection regardless of their subsequent professional or personal choices.[91]

If anything, then, it is the *political* subjectification of the EU subject, that is, the extension of her agency to include not only mobility but also political voice, which could serve as an instrument for the stabilization of the emerging cleavage between mobile and immobile citizens. Perhaps we have reached the end of the current phase of integration, with its excessive reliance on *legal* subjectification. The European might no longer be able to shoulder the burden of and for integration alone anymore. A stable European polity requires a much more significant vision of the subject as a political being—one that complements and undergirds the logic and effects of EU free movement law. Its absence, after all, has caused the overbearing *legal* regime that governs EU subjecthood, and which is doomed, in light of its apolitical nature, to produce individualization and disaffection.[92] It is unsurprising that political subjectification of the European subject is reserved for the municipal and European level, but non-existent for general elections. The latter, after all, is burdened by the weight of the nation—whereas the former carry less strong communitarian and bounded articulations of individual and collective identity. Tying electoral equality to residence rather than nationality, however, would go a long way in alleviating both the critique that EU free movement law is too elitist, that it atomizes the subject and cannot offer a meaningful vision of emancipation, and that it is too disruptive of domestic understandings of justice, identity, or morality. Instead, such social conflicts would be mediated through the subject's political participation in the host state, without the artificial antagonism between nationals and mobile Europeans that the current system produces. The current system structures a German living in Leipzig and her Romanian neighbour in a (judicially mediated) competition for resources. A new system would think of them as being equally concerned and entitled in securing a stable climate, a just economic system or appropriate distributive politics. Such a reconceptualization of the preconditions for the exercise of political authority would be based on the subject's structured encounter with the other,[93] and further entrench the *European* project of disciplining the potential excesses of the nation state by structuring its authority as *spatial* rather than identity-based. It would also alleviate the need to rely on juridical concepts in the rendering of the subject, and offer a public site through which relational commitments beyond

[91] Withdrawal Agreement between EU and UK, section 2. As Charlotte O'Brien suggests, the WA itself reflects many of the precarities and vulnerabilities highlighted in the previous sections. C O'Brien, 'Between the devil and the deep blue sea: Vulnerable EU citizens cast adrift in the UK Post-Brexit' (2021) 58 *CML Rev*, 431.
[92] See L Azoulai, 'Integration through law and us' (2016) 14 *International Journal of Constitutional Law*, 449.
[93] Neuvonen (n 78), 17–18.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

the private sphere can be realized in full rather than the liminal state—caught between being a national and becoming something more—in which it is currently trapped.[94]

Such a reimagination of political authority and political community should, to follow the argument in this paper to its logical conclusion, be complemented with policies—on the regional, national, or European level—that serve to further liberate the European subject from the diverse forms of social, economic, or cultural domination imposed on them. This could, for example, take the form of a reimagination of social freedom—that is, the preconditions necessary to allow the subject to realize herself in a way that is most authentic—for example through policies on universal basic income. My claim here is not that this is legally or politically feasible, but simply that it would complete the vision of the European subject as unburdened by the domination exerted by the nation state, that was, for a long time, at the normative core of the project of European integration.

IV. Conclusion

Like much of the integration project, free movement is in flux. It is beset by a new form of welfare nationalism, on the one hand, and a sense of disappointment in its potential as a launchpad for a type of cosmopolitan citizenship, on the other. This contribution has sought to work through the changes in EU free movement law, paying specific attention to the reflexive interaction between legal subjectification and the authority of the legal order. Whereas the former ('acting as' a subject of EU law) is necessary for of the latter, the latter is also necessary for the articulation or expression of the former. We have seen the start of a prescriptive turn in the EU's understanding of the European subject—focusing on her economic productivity and social adaptability before the subject can access the rights available under EU law. This development is deeply problematic. It narrows the type of transnational social relations that can exist, but also narrows the difference between Europeans and creates a liminal European: perpetually caught between the burden of the state and the promise of self-realization.[95] This contribution has argued that the prescriptive turn risks not just creating an ever more impoverished European subject and new structures of systemic exclusion, but also risks destabilizing the normative core of the EU's authority, which is predicated on offering avenues of self-realization beyond those sanctioned on the national level.

Ultimately, however, it might make sense to turn the argument of subjectification on its head. Perhaps, if European integration is to be taken seriously, it is

[94] See Honneth (n 84).
[95] Neuvonen (n 78), 6.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021

time to stop thinking about how EU law renders or creates the European subject. Instead we should think about how EU law can offer the preconditions for the European subject to create herself. This, as a start, requires the liberation from (and not the perpetuation of) highly prescriptive and precarious visions of self-realization that pervade the Member States, coupled with a reimagination of ways in which the European subject can realize herself publicly and politically. Perhaps, then, the process described in this contribution is a moment in which one phase of integration ends and another one might begin. Because when being European becomes a burden, after all, its purpose is entirely lost.

Downloaded from https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeab006/6348026 by guest on 08 October 2021