

TRANSNATIONAL FAMILIES IN CRISIS: AN ANALYSIS OF THE DOMESTIC VIOLENCE RULE IN E.U. FREE MOVEMENT LAW

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Domestic violence is a problem that “exists in all [forty-seven] Council of Europe [M]ember [S]tates and occurs at all levels of society.”¹ As part of the greater phenomenon of violence against women, domestic violence even has a European definition, formulated by the Council of Europe in a recent campaign: “Domestic violence typically comprises abusive and coercive behavior, such as physical, psychological or sexual abuse.”² It is the result, among other things, “of an imbalance of power between men and women,”³ a view closely aligned with the European Women’s Lobby’s self-avowed “feminist perspective,”

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1. Council of Europe Domestic Violence Campaign, http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Aboutdomesticvio_en.asp (last visited June 13, 2009).

2. *Id.*

3. Recommendation Rec (2002)5 of the Committee of Ministers to Member States on the Protection of Women Against Violence, [http://www.coe.int/t/e/human_rights/equality/05_violence_against_women/003_Rec\(2002\)05.asp](http://www.coe.int/t/e/human_rights/equality/05_violence_against_women/003_Rec(2002)05.asp) (last visited June 13, 2009).

which perceives violence against women “as a structural phenomenon the cause of which is a direct result of gender inequality.”⁴

Although European law is slowly evolving to address the problem of domestic violence on a regional scale, there is not yet a truly European solution. The two European legal orders—Council of Europe and European Union—offer some protection against gender-based violence. In general, however, the protections European law offers result from creative interpretation of provisions that do not specifically address domestic violence, such as reinterpretation of the right to respect for private life and the right to be free from inhuman and degrading treatment or torture, found in the European Convention on Human Rights.⁵

This Essay analyzes a concrete rule of European law that has emerged to address the problem of domestic violence within certain transnational families. The domestic violence rule is found in Article 13 of the European Community Free Movement Directive (the Directive), legislation that governs the rights of E.U. citizens and their family members to enter and reside in other E.U. Member States.⁶ The rule affects the rights of a discrete group: non-E.U. (“third-country national”) family members of migrant E.U. citizens, that is, E.U. citizens who have moved to another E.U. Member State (the “host State”) to exercise residence rights there. In order to make moving within the European Union easier and more attractive to E.U. citizens, the Directive, permits third-country nationals to reside in the host State with their migrant E.U. national family members. For example, this legislation permits a Spanish national to live and work in France, and authorizes his Bolivian wife to live in France with him. As will be discussed further, *infra*, the domestic violence rule of the Directive permits the third-country national to *retain* that right of residence in the host State even in the event of a divorce, if she has experienced domestic violence.

The inclusion of a domestic violence rule in the Directive is both logical and strange. It is logical because studies show that immigrant women dependent on their partners for immigration status are at a particularly high risk of experiencing domestic abuse.⁷ It is strange because this legislation is situated within a highly specialized area of law that mainly addresses internal movement of E.U. citizens within the Euro-

4. European Women’s Lobby’s Charter of Principles on Violence Against Women, http://www.womenlobby.org/site/1abstract.asp?DocID=667&v1ID=&RevID=&namePage=&pageParent=&DocID_sousmenu= (last visited June 13, 2009).

5. See, e.g., *M.C. v. Bulgaria*, 2003-XII Eur. Ct. H.R. 1, 27–28.

6. Council Directive 2004/38, art. 13(2), 2004 O.J. (L 158) 77, 102 (EC) [hereinafter Free Movement Directive].

7. Leslye E. Orloff et al., *Recent Development: Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43, 45–47 (2003).

pean Union, *not* the residence rights of third-country nationals (a topic generally covered by immigration laws).

Historically, the goals of European Community law addressing internal movement of citizens have been primarily *economic*; they have focused on encouraging economically active (or at least self-sufficient) E.U. citizens to move around the European Union, in order to solidify European economic integration and to encourage economic growth through the creation of a single market in services and labor. Because the Directive addresses a discrete group, in keeping with its specific aims, the group that stands to benefit from this domestic violence rule is small: the domestic violence provision applies only to third-country spouses involved in abusive relationships with *migrant* E.U. citizens. While European Community law could provide the same benefit to other third-country spouses—for example, the spouse of an E.U. national who has not left his country of origin—it has not yet done so.⁸ Instead, spouses forced to remain in abusive relationships in order to preserve their immigration status must rely on national laws, which in Europe have historically been unsympathetic to their plight.⁹ Thus, a small group of third-country national spouses—those married to E.U. citizens who themselves are migrants within the European Union—have been singled out in European law for special treatment in the case of domestic violence.

This Essay addresses the unique operation and effect of the Free Movement Directive's domestic violence rule. Part I introduces this rule. Subsection A describes how the rule operates in theory, and situates it within the larger legislative scheme of Community free movement law. Subsection B asserts that the rule is largely ineffective because these abused spouses are frequently unable to meet those criteria necessary to retain their right to reside in the host State.

Part II places the domestic violence rule in its European context. Subsection A discusses the rule as an immigration law provision, which is comparable to laws passed in the United States, the United Kingdom, and other countries, and is particularly progressive when viewed relative to the legal landscape in E.U. Member States before the Free Movement Directive came into force. Subsection B examines the legislative history of the Directive's domestic violence rule and the factors that influenced its development, laying particular emphasis on the role of the European

8. *But see infra* notes 119–124 and accompanying text (describing the genesis of the Family Reunification Directive).

9. *See infra* note 84 and accompanying text (quoting Council of Europe research on national laws).

Parliament, and assesses why the domestic violence rule is so different from comparable rules in U.S. and U.K. immigration law.

Finally, Part III seeks to understand the place of the domestic violence rule *not* as an immigration law provision, but as a part of European Community law. Subsection A examines the way the domestic violence rule fits into the larger discussion of the development of E.U. citizenship. Subsection B identifies the domestic violence rule as a site of transformation of European Community law concepts of citizenship and fundamental rights.

I. THE DOMESTIC VIOLENCE RULE IN E.U. FREE MOVEMENT LAW: A FLAWED ATTEMPT AT PROTECTION

A. *How the Free Movement Directive's Domestic Violence Rule Works in Theory*

Because of the unique nature of the European Union—an association of sovereign States whose law nonetheless bears significant similarities to a national federal system—the rights of domestic violence victims under the Free Movement Directive must be understood within the general context of European Community free movement law. Free movement law is a branch of European Community¹⁰ law governing the rights of E.U.¹¹ citizens and, significantly, their family members to enter and reside in other Member States of the European Union. The textual basis of E.U. free movement law is found in provisions of the European Community Treaty,¹² as well as in secondary legislation adopted by the Community institutions to implement treaty provisions. It applies uniquely to internally mobile E.U. citizens and their family members and generally does not apply to E.U. citizens residing in their State of nationality¹³ or outside Europe.

10. Under the current structure of the E.U. Treaty, the European Community is one of three pillars of the European Union. For an overview of the structure of the European Union, see generally PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 1–37 (4th ed. 2007).

11. The rights also extend to European Economic Area nationals who are not E.U. nationals (i.e. citizens of Norway, Iceland, and Liechtenstein). See Council Decision 94/1, arts. 28–30, 1994 O.J. (L 1) 1, 12–13 (EC). Swiss nationals also have broadly similar rights, under a bilateral agreement between the European Union and Switzerland. See generally Council Decision 2002/309, arts. 28–30, 2002 O.J. (L 114) 1, 6–72 (EC).

12. See *Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community*, O.J. (C 321) E/5, E/37-E/185, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf> (last visited June 13, 2009).

13. *Contra* Case C-370/90, *The Queen v. Immigration App. Trib. & Surinder Singh, ex parte Sec'y of State for Home Dep't*, 1992 E.C.R. I-4265. This case deals with E.U. citizens

Up until 2004, a patchwork of Directives¹⁴ and Regulations¹⁵ placed minimum requirements on States to allow for the free movement of certain categories of E.U. citizens. Since free movement was initially a tool to achieve European *economic* integration, historically, E.U. citizens had to *work* in a Member State in order to exercise rights there.¹⁶ Later, this requirement was relaxed and other categories of E.U. citizens became eligible to reside in other Member States, including the self-employed,¹⁷ students,¹⁸ and the self-sufficient.¹⁹

Current free movement law, codified by Directive 2004/38 (the Free Movement Directive), sets out the rights of E.U. citizens falling within these categories (and their family members) to enter Member States of which they are not nationals,²⁰ to reside in those States,²¹ and to receive certain forms of treatment from the State (for example, equal access to social assistance benefits²²). The Free Movement Directive consolidated and built on four decades of law governing the free movement of E.U. citizens—including Directives, Regulations, case law of the European Court of Justice (“ECJ”), and the free movement provisions in the European Community Treaty.²³ The Directive confers on E.U. citizens and their family members (regardless of the latter’s nationality) the right to enter any Member State and stay for up to three months, so long as they do not become “an unreasonable burden on the social assistance system.”²⁴ Furthermore, under the Free Movement Directive, as long as an E.U. national is exercising a “treaty right” (i.e., residing in one of the categories discussed above)²⁵ in that State, he and his family members can stay there indefinitely. But, to exercise a treaty right, the E.U. citizen

who have been exercising rights of free movement in another E.U. Member State and then return home. In that circumstance, they are entitled to the same treatment as migrant E.U. nationals (i.e., they have the same family reunification rights in their home country upon return as they had in the host State where they were residing).

14. Directives are a form of secondary legislation in which Member States are given a set period of time in which to implement the necessary provisions. *See* CRAIG & DE BÚRCA, *supra* note 10, at 85.

15. Regulations are a form of secondary legislation with automatic legal effect. *See id.* at 83–84.

16. *See* generally Commission Regulation 1612/68, Freedom of Movement for Workers within the Community, arts. 2–13, 1968 O.J. SPEC. ED. (L 257) 2.

17. Council Directive 73/148, art. 4, 1973 O.J. SPEC. ED. (L 172) 14, 14–16.

18. Council Directive 93/96, art. 1, 1993 O.J. (L 317) 59, 59–60.

19. Council Directive 90/364, art. 1, 1990 O.J. (L 180) 26, 26–27.

20. Free Movement Directive, *supra* note 6, art. 5.

21. *Id.* arts. 6–7.

22. *Id.* art. 24.

23. *See* Nicola Rogers & Rick Scannell, FREE MOVEMENT OF PERSONS IN THE ENLARGED EUROPEAN UNION 79 (2005).

24. Free Movement Directive, *supra* note 6, art. 6.

25. *See supra* notes 15–19 and accompanying text.

must be working,²⁶ self-employed,²⁷ be a student,²⁸ or otherwise have sickness insurance and sufficient resources for himself and his family, to avoid being a burden on the social assistance system of the host State.²⁹

Under the Directive's family reunification provisions, an E.U. citizen exercising treaty rights in another Member State is entitled to be joined in that State by his or her family members, regardless of whether the family members are E.U. citizens themselves.³⁰ Eligible family members include spouses, children, and stepchildren up to the age of 21 (and dependent children who are older), and dependent relatives in the ascending line.³¹ Further, Member States must "facilitate the entry and residence" of other relatives (in certain circumstances) and unmarried partners in "durable relationships, duly attested."³² Significantly, eligible individuals may include E.U. nationals not exercising treaty rights and third-country (i.e., non-E.U.) nationals. And, notably, if not for these family reunification provisions, both of these categories would otherwise have to rely on national immigration laws to enter and reside in the host State. It is important to note that these family reunification provisions apply uniquely to E.U. *migrants*. For example, a Spanish national working in France is entitled, as a matter of Community law, to be joined there by his Ecuadorian wife and her children from a previous marriage (who are considered his family members as well). If the Spanish national remains in Spain, however, his right to family reunification is governed by Spanish immigration law, which might provide fewer rights. Eligible family members are entitled to reside in the host State as long as the E.U. national is there exercising treaty rights. Those family members can access the labor market³³ and certain other social advantages in the host State, such as social assistance benefits.³⁴

These family reunification provisions may provide a definition of the contemporary European family: these provisions are an attempt by European legislators to determine which family ties are so important that an individual cannot be expected (or will not be motivated) to abandon them when moving from one State to another. Critics, however, assert that Community free movement law's definitions reflect an outdated or

26. Free Movement Directive, *supra* note 6, art. 7(1)(a).

27. *Id.*

28. *Id.* art. 7(1)(c).

29. *Id.* art. 7(1)(b).

30. *Id.* art. 7(1)(d) (E.U. national family members); *id.* art. 7(2) (third-country national family members).

31. *Id.* art. 2.

32. *Id.* art. 3(2).

33. *Id.* art. 23.

34. *Id.* art. 24.

inaccurate picture that has not kept up with the changing reality of European family life.³⁵

The Free Movement Directive significantly changed the rights of non-E.U. family members of E.U. migrants exercising treaty rights in a host State. Before the Directive came into force, these family members lost the right to reside in the host State once the E.U. national left or stopped exercising treaty rights there.³⁶ The ECJ had begun to carve out exceptions to this rule. For example, in cases where an E.U. national stopped exercising treaty rights, his children could remain in the host State with their primary carer (e.g., a third-country national parent) to complete their education.³⁷ The Directive codified these exceptions³⁸ and added others. For example, today, family members who reside lawfully and continuously in a host State for five years now acquire permanent residence there. Their residence rights are no longer dependent on the status of their E.U. national relatives, or even the existence of a family relationship.

Additionally, under the old legislation, family members lost all of their rights if the family relationship ended in divorce (in cases of spouses, parents-in-law, and step-children).³⁹ Article 13 of the Free Movement Directive introduced an innovation here as well. This Article, which also includes the domestic violence rule, states:

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

35. See, e.g., Linda Hantrais, *What is a Family or Family Life in the European Union?*, in *THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION* 19, 19 (Elspeth Guild ed., 1999) ("The concept of the family unit used in European legislation would not, however, be readily recognised in most of the fifteen EU Member States today . . .").

36. However, even prior to the Free Movement Directive, under exceptional circumstances, family members of migrant E.U. citizens could gain residency rights in a host State independent of their E.U. spouse or family member. For example, if an E.U. worker became permanently unable to work after having resided in the host State for a certain period of time, he and his entire family could acquire permanent residence in the host State, independent of the E.U. national's continued presence or activities there. See, e.g., Commission Regulation 1251/70, *The Right of Workers to Remain in the Territory of a Member State After Having Been Employed in That State*, 1970 O.J. SPEC. ED. (L 142) 24.

37. Case C-413/99, *Baumbast & R. v. Sec'y of State for the Home Dept't*, 2002 E.C.R. I-7091 [hereinafter *Baumbast*].

38. See, e.g., Council Directive 2004/28, art. 12, 2004 O.J. (L 158) 77, 100–01 (EC) (codifying *Baumbast*).

39. Cf. Case 267/83, *Diatta v. Land Berlin*, 1985 E.C.R. 567 [hereinafter *Diatta*] (considering that a couple is married until a final divorce decree).

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(C) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.⁴⁰

Article 13 appears to accommodate the fragile state of marriage in the European Union. In 2004, the year the Free Movement Directive came into force, 2.2 million couples married in the twenty-five E.U. Member

40. Free Movement Directive, *supra* note 6, art. 13.

States, and almost one million divorced.⁴¹ Though Article 13 introduces important provisions for third-country spouses whose marriages end in divorce, E.U. free movement law does not yet accommodate other phases of family breakdown, including physical and/or legal separation, court orders, and custody battles. For purposes of E.U. free movement law, a couple is considered married until there is a final divorce decree and no further inquiry into the state of the marriage for purposes of residence rights is permitted.⁴²

At first glance, Article 13 of the Free Movement Directive offers family members a fair compromise: certain third-country nationals deprived of “family member” status through divorce can retain their right to reside in the host State, but only if they meet certain conditions. The rule applies only to certain categories of people, facing unique circumstances: category (a) covers situations in which the family member is likely to have developed significant links with the host State; categories (b) and (d) cover situations where the third-country national’s ties with children make it appropriate to allow him or her to remain in the host State; and category (c) provides a catchall that allows the rule to apply in other, “particularly difficult circumstances,” including domestic violence.⁴³ The conditions imposed before one can retain the right to remain in the host State appear reasonable in light of the rest of the Free Movement Directive; in all cases, what is asked of those third-country nationals is essentially what is asked of E.U. migrants: that they be economically active, self-sufficient, or the family member of such a person.

B. How the Rule Does Not Work

In theory, the domestic violence rule in the Free Movement Directive is a progressive measure aimed at preventing gender-based violence related to the power imbalance immigration law creates when one family member derives residence rights through another. In practice, considerable hurdles prevent many third-country nationals who derive residence rights under the Free Movement Directive through an abusive relationship from making use of the retained right of residence Article 13 promises.

Those seeking the domestic violence rule’s benefit face two potential obstacles. First, a black-letter reading of the Free Movement Directive reveals that the E.U. migrant abuser must still be present in the host State

41. Press Release, Eurostat, *The Family in the EU25 Seen Through Figures* (May 12, 2006), http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-12052006-AP/EN/3-12052006-AP-EN.PDF (last visited June 13, 2009) (noting that there is “nearly one divorce for every two marriages.”).

42. See Diatta, *supra* note 39.

43. See Free Movement Directive, *supra* note 6.

and exercising treaty rights there at the time of the divorce in order for his (now former) family members to benefit from the domestic violence rule. Second, those family members seeking to benefit from the rule must be economically active, self-sufficient, or *already* family members of such an economically active person to retain their right to reside in the host State independent of their abuser.

The first problem is a product of a formalistic reading of the Directive. Generally, an E.U. national and his family members only have a right to reside in another E.U. State as long as the E.U. national is exercising treaty rights there.⁴⁴ In one sense, then, E.U. law is generous: even if a couple is legally separated and/or the partners have no contact with one another, they are considered married for the purposes of E.U. free movement law until there is a final divorce decree.⁴⁵ As long as the couple is married within the meaning of national law, then, the rule offers significant benefits to some third-country family members in abusive relationships with E.U. migrants.⁴⁶ First, they can leave the relationship and obtain the necessary court orders or separation without affecting their rights to reside. Additionally, if their spouses are workers or self-employed, they can continue to access social assistance benefits and social housing.⁴⁷ In fact, third country family members of E.U. migrants can be much better off than abused spouses who are married to E.U. nationals or permanent residents living in their home States; in the United Kingdom, for example, the latter derive rights from the Immigration Rules and must wait until the authorities grant them “indefinite leave to remain” (permanent residence) as victims of domestic violence before accessing these rights.⁴⁸

However, once the E.U. national stops exercising treaty rights in the host State, or once he leaves the host State altogether, his family members lose their right to reside. The provision in Article 13(2) allows third-country nationals to *retain* the right to reside that they have as family members of E.U. migrants in case of divorce. However, if the E.U. migrant has left the country before the divorce occurs, there is no *right to retain*: Article 14 of the Free Movement Directive makes it clear that third-country spouses lose their right to reside when their family members leave the country.⁴⁹ Article 14 places some limits on the State’s ability to verify whether the family members still have a right to reside: “In specific cases where there is a reasonable doubt as to whether a Un-

44. *But see supra* notes 30–34 and accompanying text.

45. *Id.*

46. *Id.*

47. Free Movement Directive, *supra* note 6, art. 24.

48. *See infra* note 87 and accompanying text.

49. Free Movement Directive, *supra* note 6, art. 14(2).

ion citizen or his/her family members satisfies the conditions . . . [to exercise a right to reside], Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.”⁵⁰ But, as applied to cases of domestic violence, this restraint appears illusory: if the authorities have reason to believe that an abusive E.U. national spouse has left the Member State, the authorities can investigate and may discover that the E.U. national has in fact abandoned his spouse (causing the abused spouse to lose her right to reside). When the abused spouse then applies for a “retained right to reside” under Article 13, the State can, in keeping with the Directive, inform her that there is nothing for her to retain, since she lost the right when her husband left the country. This type of abandonment, particularly by an abusive spouse who risks criminal prosecution for his behavior, or who knows that his absence will produce negative consequences for his wife, children, or parents, is probably common, especially since the abusers are themselves migrants and often merely a budget airplane flight from home. It seems then that the domestic violence rule protects spouses subject to the *threat* of losing their right to reside, but not those against whom the threat has been fulfilled.

The Commission was apparently ignorant of this potential obstacle. In its initial proposal, it wrote:

It must be specified that, for reasons of legal certainty, for a marriage to count as dissolved a decree absolute must have been granted; in the event of a *de facto* separation, the spouse’s right of residence is not affected at all. The Court of Justice has upheld that “the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date.”⁵¹

The ECJ’s formalistic approach to marriage and divorce, apparently a boon for third-country nationals, is in fact double-sided. The Commission’s confident assertion that “in the event of a *de facto* separation, the spouse’s right of residence is not affected at all”⁵² neglects the fact that migrant E.U. citizen abusers may leave the host State and are particularly likely to do so. Third-country spouses will find themselves asking host State authorities to look into the circumstances of their marriage

50. *Id.*

51. *Commission Proposal for a European Parliament and Council Directive on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States*, at 15, COM (2001) 257 final (May 23, 2001) [hereinafter *Right of Citizen of the Union*].

52. *Id.*

before divorce occurred; but, ECJ case law directs the host State to ignore the circumstances of the marriage.⁵³

If the domestic violence rule applied only to those third-country national spouses who obtained a divorce while the E.U. migrant was still present and exercising treaty rights in the host State, this would arguably deprive the rule of *effet utile* and give the abusive E.U. spouse too much leverage.⁵⁴ But a progressive interpretation of this unfortunate confluence of residence rules in the Free Movement Directive raises difficult questions. Must the battered spouse begin divorce proceedings while the E.U. national is still exercising treaty rights in the host State (a logical interpretation based on Article 13(2)(a))? Or must divorce proceedings have been completed by the time the E.U. national stops exercising treaty rights in the host State? Are there exceptions for *exceptional* “particularly difficult circumstances,”⁵⁵ such as when an abusive spouse prevents his wife from accessing support services, until after he abandons her and leaves the country? Will the domestic violence rule accommodate the difficulties spouses may face, for example, in England and Wales, where couples cannot divorce during the first year of marriage⁵⁶ or, in the Republic of Ireland, where couples must be separated for four years before they can obtain a divorce?⁵⁷

The second problem—that those seeking to benefit from the rule must be economically active, self-sufficient, or dependent upon such an economically active person in order to retain their right to reside in the host State—cannot, like the first, be interpreted away. Article 13(2) provides a *retained* right of residence, not a *permanent* right. A retained right of residence depends on the situation of the person who enjoys it. Only after the third-country national has resided in the host State for a continuous period of five years does she acquire a permanent right of residence;⁵⁸ until then, she must be a worker, self-employed, already the family member of such a person, or have sufficient resources to avoid being a burden on the host State’s social assistance system.

Whereas before the third-country national’s rights were parasitic on the E.U. family member’s rights—i.e., dependent on the E.U. family member’s whereabouts and activities—they are now dependent on her. She has assumed (some of) the responsibilities of E.U. citizenship her-

53. See *Diatta*, *supra* note 39.

54. The doctrine of *effet utile* (effectiveness) requires Member States to offer adequate remedies to “secure the effectiveness of Community rights.” See generally CRAIG & DE BÚRCA, *supra* note 10.

55. Free Movement Directive, *supra* note 6, art. 13(2)(c).

56. Matrimonial Causes Act, 1973, c. 18, § 3 (Eng.).

57. Family Law (Divorce) Act, 1996, (Act No. 33/1996) (Ir.), available at <http://www.irishstatutebook.ie/1996/en/act/pub/0033/index.html> (last visited June 13, 2009).

58. Free Movement Directive, *supra* note 6, art. 18.

self: she can remain in the host State, access its labor market, and, after five years' residence, acquire a permanent right to reside. This empowering gesture of compromise is a strange solution for people who experience domestic abuse and have lived in a relationship defined by power imbalance between the spouses.⁵⁹ The very factors that give rise to that dynamic—for example, differences in education and knowledge of relevant languages, which may be particularly acute in E.U.-third country national couples—may leave the abused spouse unable at first, to enter the labor market. Further, the abuse itself may render an individual unable to support herself. This is a strange problem, unfamiliar to domestic violence advisers working with other migrant populations: usually the first concern is obtaining some form of residence status that will enable abused spouses to work and/or access state support. When working with this migrant population, however, advisers must be prepared to help their clients to re-enter the labor market as soon as their divorce is complete, or risk refusal of state support and possible deportation. If the third-country national spouse is working, then like an E.U. worker she would presumably be able to access state support. It is unclear, however, whether all the rights of E.U. workers are extended to third-country nationals who have retained a right to reside by being a worker. Would the third-country national “retain” her worker status in case of temporary illness or accident and gain access to out-of-work benefits, as an E.U. migrant worker would? Interestingly, some third-country nationals who benefit from more than one of the subparagraphs of Article 13(2)—namely abused spouses with custody of the E.U. citizens' children—may be less likely to benefit from a retained right of residence, since their responsibilities as single parents may leave them unable to work. It appears thoughtless that provisions designed explicitly to protect single parents would include a requirement to be economically active, and perverse that no exception to the requirement was introduced for situations of abuse.

We are left with a strange rule. It protects with certainty an absurdly discrete group: abused third-country spouses of E.U. migrants exercising treaty rights, when those spouses are economically active or self-sufficient and have obtained a divorce before their spouse left the country. Among migrant couples in abusive relationships, there would appear to be an indirect relationship between the severity of abuse on the one hand and the ability of the abused spouse to support herself in the new country on the other. If this inverse relationship holds true, then the rule becomes less effective as the vulnerability of the individual it is designed to protect increases. The rule covers, with certainty, those abused

59. Council of Europe Domestic Violence Campaign, *supra* note 1.

spouses who demonstrate requisite pluck: those who divorce before the E.U. spouse leaves the country, and who manage to join the labor force (or have healthy bank accounts and private health insurance) at the time the divorce occurs. Such a rule is arguably an affront to the “human dignity” the Free Movement Directive’s preamble purports to protect.⁶⁰

The next part explores the legislation’s background to see how this apparently progressive, but profoundly dissatisfying rule, came into existence.

II. THE GENESIS OF THE RULE

A. Domestic Violence, Immigration, and the European Context

1. Domestic Violence and Immigration

Rules extending further immigration rights to alien spouses whose immigration status derives from an abusive relationship have now become a feature of the immigration systems of a limited number of wealthy countries who control the entry of immigrants into their territory, such as the United States,⁶¹ Australia,⁶² and the United Kingdom.⁶³ Jacqueline Bhabha has described asylum as “a bridge between morality and law, entrenching a regime of international sovereignty and solidarity with an increasingly harsh and discriminatory state-based system.”⁶⁴ Like refugee law provisions, domestic violence rules in immigration law appear to inject a certain morality back into a rigid system of immigration control by providing some form of immigration relief in cases where the individual has experienced ill-treatment.

In reality, however, these rules differ from asylum provisions, as well as from other forms of international protection from removal. Laws extending international protection from expulsion are based on granting residence status in order to prevent *future* harm that will most likely take place abroad. While in theory situations of domestic violence can give rise to claims for asylum or other protection from removal, domestic vio-

60. Free Movement Directive, *supra* note 6, at 82 recital 15.

61. See generally Mary B. Clark, *Falling Through the Cracks: The Impact of VAWA 2005’s Unfinished Business on Immigrant Victims of Domestic Violence*, 7 U. MD. L.J. RACE, RELIGION, GEN. & CLASS 37 (2007) (describing the situation of immigrant women facing domestic violence under U.S. immigration law).

62. See generally E. Odhiambo-Abuya, *The Pain of Love: Spousal Immigration and Domestic Violence in Australia—A Regime in Chaos?*, 12 PAC. RIM L. & POL’Y J. 673 (2003) (describing the domestic violence rule in Australian law).

63. See *infra* note 87 and accompanying text.

64. Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155, 161 (2002) (citing David Held, *Laws of States, Law of Peoples: Three Models of Sovereignty*, 8 LEGAL THEORY 1, 13 (2002)).

lence rules grant residence status as a result of harm that an individual *has already experienced* in the State in which she is looking to remain. As a form of “harm-based” immigration status, this is unique.⁶⁵ Immigration law domestic violence rules arguably go beyond both what international refugee law and other provisions of international law designed to protect individuals against harm require. For example, the European Court of Human Rights is developing a body of case law around the responsibilities of States to abused spouses; this body of case law, however, has little to do with immigration status and instead focuses on the responsibility of State authorities like the police to investigate acts of domestic violence and protect potential objects of such violence.⁶⁶

The idea that harm experienced within a State should provide a basis for granting residence status within that State is at—and probably beyond—the cutting edge of European human rights law⁶⁷ and other regional and international law systems designed to protect migrants from removal. Looking at the justification for domestic violence rules in immigration explains why this basis for granting residence status is so different. The typical justification for domestic violence provisions in immigration law is that abused spouses who depend on the abusive relationship for their immigration status are particularly unlikely to come forward to seek help that would enable them to exit the abusive situation. Indeed, immigration law that leaves one spouse dependent on the other creates or exacerbates situations of domestic violence, which are typically defined by “a pattern of coercive control that one person exercises over another. Abusers use physical and sexual violence, threats, emotional insults and economic deprivation as a way to dominate their partners and get their way.”⁶⁸ As another U.S. scholar has put it, “[b]y making lawful permanent resident status conditional upon a spouse’s

65. *But see, e.g.*, Council Directive 2004/81, arts. 1–19, 2004 O.J. (L 261) 19, 19–23 (EC) (legislating grant of residence permits for third-country national victims of human trafficking in the European Union who cooperate with investigative and prosecuting authorities).

66. *See, e.g.*, *Bevacqua & S v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. 1, 16 (2008) (finding a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, right to respect for private and family life, in a case where Bulgarian authorities did not act to protect a mother and child subjected to domestic violence).

67. The author is not aware of any ECHR case law finding that an individual cannot be expelled from a European State because of ill-treatment that occurred within the State. More typical are situations where the ill-treatment occurs abroad. *See, e.g.*, *Chahal v. United Kingdom*, 22 Eur. Ct. H.R. 1831, 1839–41 (1996). In one case, where an applicant was dying as a result of AIDS, the Court found that he could not be removed because the removal itself would constitute ill-treatment. *D v. United Kingdom*, 37 Eur. Ct. H.R. 777, 805–07 (1997).

68. Tamara L. Kuennen, *Analyzing the Impact of Coercion of Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GEN. L. & JUST. 2, 8–9 (2007) (citing SUSAN SCHECHTER, GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES 4 (1987)).

status as a citizen or lawful permanent resident, or a nonimmigrant visa dependent upon a spouse's visa, immigration law isolates battered women within the walls of their abusive homes."⁶⁹

This analysis is clear and is a valid basis for legislative reform. The reason why this kind of analysis does not yet come within refugee or human rights law is that it is predicated on the assumption that "pull factors" keeping the women in the country are a valid consideration. Consider the campaign launched by Southall Black Sisters in London to reform the Immigration Rules in favor of women in this category:

Women whose marriages broke down due to domestic violence [before the introduction of the UK domestic violence rule] had only two options in order to avoid deportation: to apply for refugee status on the grounds of gender persecution; or apply for leave to remain on compassionate grounds. These cases were rarely successful even where women had remained in marriage for a number of years and had children unless a co-ordinated and long-term public campaign was fought on an individual basis.⁷⁰

Such a campaign assumes that there are multiple valid reasons for wanting to remain in the United Kingdom: to have a better life for oneself and one's children, to avoid shame following a failed marriage, or to get continued access to medical and other support services. The law of international protection from removal nonetheless remains lodged in the genuine refugee/economic migrant binary; those who do not fall into the former category are necessary in the latter, and the State has absolute power to determine their residence status. Individuals looking for a better life or access to enhanced medical or social care are economic migrants, not genuine refugees.⁷¹

Viewing spouses who have experienced domestic violence as mere economic migrants is not only an affront to their dignity, but harmful to their well-being: statistics bear out the desperate need for immigration law provisions to ensure that migrants in abusive relationships are not left doing the cost-benefit analysis of staying in an abusive relationship or losing their residence rights and/or access to basic social services.⁷² While international law governing protection of aliens from expulsion is

69. Karyl Alice Davis, *Unlocking the Door by Giving her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557, 559 (2004).

70. Two Year Rule [formerly One Year Rule] Campaign, http://www.southallblacksisters.org.uk/campaign_oneyearrule.html (last visited June 13, 2009).

71. Cf. *N. v United Kingdom*, App. No. 26565/05, 47 Eur. H.R. Rep. 885, 900–01 (2008) (distinguishing between aliens seeking economic and political rights).

72. Orloff et al., *supra* note 7, at 67–68 (“[A] battered immigrant victim’s immigration status made a significant difference in whether or not an immigrant domestic violence victim would call the police for help”).

not yet suited to provide the right response, national immigration laws have begun to do so.

2. The Free Movement Directive and European Immigration Law

The Free Movement Directive is not immigration legislation, but its provisions on family reunification have important immigration implications. Viewed in the context of the national immigration provisions in place before the Free Movement Directive came into force, its domestic violence rule is particularly progressive. In order to see this progress, some background on Community law is necessary.

Immigration is still a core feature of Member State sovereignty.⁷³ National law is the gatekeeper that allows certain third-country nationals to accede to the privileges—long-term resident status or family reunification—that E.U. immigration law currently provides. There are two exceptions to the rule that national (as opposed to Community) law governs the first entry and stay of third-country nationals in the European Union. The first exception is for refugees and those eligible for subsidiary protection from expulsion. The second is for third-country national family members of migrant E.U. nationals exercising treaty rights. Following some confusion and Member State resistance,⁷⁴ the ECJ has now clarified that family members of E.U. migrants exercising treaty rights have an unconditional right to enter and reside in the host State.⁷⁵ The same is not true of spouses of host country nationals, who must rely on national immigration law. Likewise, a third-country national in an E.U. Member State whose right to reside depends on a third-country national family member with some form of immigration status can rely only on Directive 2003/86/EC (“the Family Reunification Directive”) and only in limited circumstances.⁷⁶

73. See, e.g., Anneliese Baldaccini & Helen Toner, *From Amsterdam and Tampere to the Hague: An Overview of Five Years of EC Immigration and Asylum Law*, in WHOSE FREEDOM, SECURITY AND JUSTICE? 1, 15 (Anneliese Baldaccini et al. eds., 2007) (expressing disappointment that Community law in the area of legal migration has remained narrow).

74. See, e.g., Case C-109/01, Sec’y of State for the Home Dep’t v. Akrich, 2003 E.C.R. I-9607 (finding that the third-country national family member of an E.U. national could not exercise a right to reside when his entry into the E.U. was made clandestinely); Immigration (European Economic Area) Regulations, 2006, No. 1003, art. 12, ¶¶ 1–2 (requiring spouses of E.U. nationals either to be resident in the European Economic Area or to satisfy the requirements of spouses of U.K. nationals or permanent residents under the Immigration Rules in order to obtain an entry visa).

75. See generally Case C-127/08, *Metock v. Minister for Justice, Equal. & Law Reform*, 2008 ECJ Celex No. 608J0127 (July 24, 2008) [hereinafter *Metock*] (reversing *Akrich* and finding that third-country national family members of E.U. migrants exercising treaty rights have a right to reside in the host State regardless of their immigration history there).

76. Council Directive 2003/86/EC, art. 15(3), 2003 O.J. (L 251) 12, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:EN:PDF> (last visited June 13, 2009); see also *infra* note and accompanying text 124. For more general

The result may appear paradoxical: the Senegalese spouse of a French national working in Germany has an unconditional right under Community law to enter and reside there;⁷⁷ further, the Senegalese spouse of a Senegalese national residing in Germany can reside there under Community law after the latter has been there for one year and has a reasonable prospect of acquiring permanent residence status under German law;⁷⁸ however, the Senegalese spouse of a German national who has never resided elsewhere other than Germany cannot obtain any benefits under Community law and must rely entirely on German law for her entry and residence rights. This difference can have significant practical consequences: in the first situation, the Senegalese national can stay in Germany even if she previously entered the country illegally, is a failed asylum seeker, or had overstayed her visa before marrying the Frenchman. By contrast, a Senegalese national in the same situation who initially married a German might derive no benefit at all under German immigration law and would not benefit from any Community law provisions.⁷⁹

This difference in treatment may appear discriminatory and, as such, illegal under Article 12 of the EC Treaty, which prohibits discrimination based on nationality. The ECJ has nonetheless addressed the issue with indifference: “Any difference in treatment between those Union citizens who have exercised their right of freedom of movement, as regards the entry and residence of their family members, does not therefore fall within the scope of Community law.”⁸⁰ This is the doctrine of “internal situations,” to which Community law does not apply.⁸¹

It is in the context of this doctrine that the domestic violence rule appears particularly progressive. The domestic violence rule is only legally binding in situations where third-country nationals are married to E.U. migrants, creating dynamic contrast between family reunification rights under Community law for E.U. migrants and those available in national law for non-mobile citizens. Just after the deadline for implementation passed on April 30, 2006, the Council of Europe coincidentally published a “Stocktaking study on the measures and actions taken in Council of Europe [M]ember States” to combat domestic

information on discrimination between E.U. migrants and host State nationals in the conditions of family reunification, see generally ANNE WALTER, REVERSE DISCRIMINATION AND FAMILY REUNIFICATION (2008).

77. *Metock*, *supra* note 75, ¶ 99.

78. See generally Council Directive 2003/86, 2003 O.J. (L 251) 12 (EC) [hereinafter Family Reunification Directive].

79. See WALTER, *supra* note 76, at 9–10.

80. *Metock*, *supra* note 75, ¶ 78.

81. See CRAIG & DE BÚRCA, *supra* note 10, at 855–58; see generally Walter, *supra* note 76, at 25–33.

violence.⁸² At that point only four of the (then) twenty-five E.U. Member States (and, indeed, of the entire forty-seven member Council of Europe) had some form of protection in their immigration laws for “women who have entered the country by way of marriage” and who remain dependent on an abusive relationship for immigration status and access to “social or welfare benefits.”⁸³ Even in those four countries—the United Kingdom, France, Sweden, and Germany—the protections were not perfect:

Research indicates that these rules have not yet been developed to cover the variety of situations in which they are needed. For example, in the United Kingdom women who have entered the country to join a resident partner still require that partner’s support to apply for permanent residence. If, because of this difficulty, they overstay their two-year probationary period without securing permanent residency, the domestic violence rule no longer applies and they risk deportation.⁸⁴

The report goes on to note that applicants for this form of protection in Germany and Sweden must demonstrate a high level of physical violence.⁸⁵

In this bleak context for third-country nationals in Europe dependent on abusive relationships for their immigration status, the Free Movement Directive’s domestic violence rule provides an attractive alternative. Due to the federalist complexities discussed directly above, the domestic violence rule’s influence has broken over the landscape of European immigration controls in waves of varying intensity. The strongest wave has completely washed over national immigration law: thanks to Article 13(2) of the Directive, in twenty-five (now twenty-seven) E.U. Member States a discrete subset of third-country nationals who derive a right to reside from E.U., as opposed to national, law can continue to reside despite the breakdown of their relationship. In a second, almost equally powerful breaker, the Free Movement Directive has shaped national immigration law in a limited number of Member States. Despite the doctrine of internal situations in Community law, these States, for purposes of administrative convenience or because of a strong theory of

82. CAROL HAGEMANN-WHITE, COUNCIL OF EUROPE, COMBATING VIOLENCE AGAINST WOMEN: STOCKTAKING STUDY ON THE MEASURES AND ACTIONS TAKEN IN COUNCIL OF EUROPE MEMBER STATES 24 (2006) available at [http://www.coe.int/T/E/Human_Rights/Equality/PDF_CDEG\(2006\)3_E.pdf](http://www.coe.int/T/E/Human_Rights/Equality/PDF_CDEG(2006)3_E.pdf) (last visited June 13, 2009).

83. *Id.*

84. *Id.*

85. *Id.*

equal treatment in national law,⁸⁶ have introduced the domestic violence rule and other rules of the Free Movement Directive into the national immigration rules that govern the family reunification rights of their own citizens and others residing in their territory.

The rule has produced less erosive but productive ripples in other Member States. The United Kingdom, for example, now has two parallel but separate domestic violence rules: one in the Immigration Rules, for third-country nationals dependent on relationships with U.K. citizens or permanent residents for their immigration status; and another for third-country national family members of E.U. migrants. It is not entirely clear which group fares better. Under the Immigration Rules, spouses of U.K. nationals or permanent residents are entitled to a two-year conditional entry clearance during the first two years of marriage, after which time they acquire permanent residence themselves. If, during the two-year period, the relationship breaks down due to domestic violence, the spouse can acquire indefinite leave to remain in the United Kingdom earlier, but must pay a hefty fee of £750 (which can be waived in cases of destitution).⁸⁷ The spouses of E.U. migrants are “at risk” (i.e., dependent on the relationship for their immigration status) for a longer period (five years) and have no fee to pay, but do not acquire permanent residence in the United Kingdom under the Directive until they have resided for a full five years there. In States like this, the existence of parallel rules under E.U. and national law puts into question certain failings of the national rule. For example, in the United Kingdom, these shortcomings include the fee and the inability of applicants under the national law rule to access social assistance benefits before receiving indefinite leave to remain (i.e. permanent residence under U.K. immigration law). Notably, spouses of E.U. migrant workers would be able to access such assistance. Campaigners for change in the United Kingdom, however, have not seized on this comparison to press forward, despite their preoccupation with the situation faced by women married to U.K. citizens or permanent residents, who under the Immigration Rules cannot access social assistance until after they have acquired indefinite leave.⁸⁸ Again,

86. See WALTER, *supra* note 76, at 13–14 (describing a situation in Austria, in which the Constitutional Court declared, in light of discrimination, that conditions of family reunification for EEA nationals had to apply to Austrian nationals as well).

87. UK Border Agency — Immigration Rules, <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules> (last visited June 13, 2009).

88. See, e.g., AMNESTY INTERNATIONAL UK & SOUTHALL BLACK SISTERS, NO RECOURSE, NO SAFETY: THE GOVERNMENT’S FAILURE TO PROTECT WOMEN FROM VIOLENCE (2008), available at http://www.amnesty.org.uk/news_details.asp?NewsID=17694 (last visited June 13, 2009).

spouses of E.U. migrants can access social assistance as long as the E.U. migrant is in the United Kingdom and is economically active.⁸⁹

In another set of States, the domestic violence rule only assists family members of E.U. migrants; in Ireland, for example, national immigration law provides no residence rights for spouses whose immigration status depends on relationships no longer viable following domestic abuse.⁹⁰ In these States, the legal landscape has superficially resisted the potentially erosive effects of the domestic violence rule. The introduction of a Community law domestic violence rule that applies equally to situations arising under national immigration law leaves the latter system vulnerable to criticism. Community law generates leverage for activists to lobby for change.

In some cases, of course, national immigration law is impervious to change: in Italy, where spouses of Italian nationals automatically acquire Italian nationality, no domestic violence rule appears necessary⁹¹ and provisions for E.U. migrants families remain inferior. In all States, however, E.U. federalism has brought some progress on the situation of immigrant women in situations of domestic violence, a situation that Council of Europe authorities, with fewer legal tools, could only lament in their 2006 report.⁹²

The inclusion of such a rule in the Free Movement Directive (and the more vague rule in the Family Reunification Directive) is an important, albeit tentative, regionalization of immigration protection for women who experience domestic violence. It is a recognition that many third-country spouses accompanying an E.U. migrant will want to remain in the European Union, and that the advantages that free movement law offers to these spouses may in fact create or leverage opportunities for E.U. citizens to abuse their third-country spouses. The European Commission laconically acknowledged the overarching justification for domestic violence rules in immigration law as the motivation for its inclusion of such a rule in the Directive:

Paragraph 2 of [Article 13] settles the problem of the right of residence of non-EU family members of Union citizens where the marriage is ended by divorce or annulled. The purpose of this provision is to provide certain legal safeguards to people whose right of residence is dependent on a family relationship

89. See Free Movement Directive, *supra* note 6, art. 24.

90. See Press Release, Immigrant Council of Ireland, The Needs of Migrant Women Experiencing Domestic Violence Can No Longer Be Ignored, (Nov. 11, 2008), available at http://www.immigrantcouncil.ie/press_detail.php?id=82 (last visited June 13, 2009).

91. Law n. 91 of Feb. 5, 1992, Racc. Uff. 1992, vol. 3, in G.U. Feb. 15, 1992, n. 38 (Italy).

92. See *supra* note 84 and accompanying text.

by marriage and who could therefore be open to blackmail with threats of divorce.⁹³

The preamble to the Directive itself also vaguely suggests that the measure “legally safeguard[s]” family members, “[w]ith due regard for family life and human dignity, and in certain cases to guard against abuse”⁹⁴

The Community law rule, like the rules in the United States, the United Kingdom, and elsewhere, was apparently intended to redress the power imbalance implicated in a dependent right of residence. Although the Commission and other Community institutions did not articulate them, there are other reasons specific to the project of European integration which may make such a rule particularly appropriate in the Free Movement Directive. The European Community (unlike the U.S. federal government) is charged with ensuring gender equality: equality between men and women stands, along with “a high level of employment and of social protection,” “improvement of the quality of the environment,” and “the raising of the standard of living and quality of life,” as one of the “tasks” of the European Community.⁹⁵ Even if the Community’s role in ensuring gender equality is primarily in the area of employment,⁹⁶ it is only natural that E.U. legislation in any area would contain supplementary provisions that counteract gender inequality and its most egregious symptoms, like domestic violence.

The European Union is also charged with creating an area of “freedom, security and justice . . . in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.”⁹⁷ By giving third-country nationals residence rights dependent on the rights of migrant E.U. citizens, free movement law will inevitably create or exacerbate power imbalances linked to domestic violence, and therefore criminal activity. The fact that both perpetrators and victims here are migrants may make this criminal activity difficult to detect and prosecute. The Directive’s domestic violence rule furthers the Union’s goal of creating an area of freedom, security, and justice by ensuring that those who experience abuse are able to escape it and report the crime to the proper authorities.

93. *Right of Citizen of the Union*, supra note 51, at 15.

94. Free Movement Directive, supra note 6, ¶ 15.

95. Treaty Establishing the European Community, art. 2, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

96. The emphasis on equality between men and women in the treaty is on equal pay. However, Article 13 permits the Community to adopt anti-discrimination measures aimed at ending discrimination against women. *Id.* art. 13.

97. Treaty on European Union, art. 3, Feb. 7, 1992, 2008 O.J. (C115) 1.

The domestic violence rule responds to another consideration. Member States are free to regulate the immigration of third-country national spouses married to their own nationals, as well as the first entry and residence of spouses of third-country nationals in their territory. Member States frequently do so in a manner ostensibly designed to prevent abuse of the immigration system and abusive relationships. For example, third-country spouses of German nationals can only come to live in Germany if they are at least eighteen years old and have sufficient knowledge of the German language.⁹⁸ The Free Movement Directive does not permit such restrictions on spouses of E.U. migrants: these spouses have an unconditional right of entry and residence in the host State as long as the E.U. migrant is exercising treaty rights in the host State.⁹⁹ These extensive rights of entry and residence for third-country family members have made the exercise of treaty rights attractive for many Europeans who cannot get their family members to Europe otherwise.¹⁰⁰ However, since a German with a young third-country national wife from a forced marriage might find it easy to live with her in Spain, the domestic violence rule counterbalances any increased potential for abuse, while erring on the side of family reunification for mobile E.U. citizens.

B. Legislative History: Parliamentary Democracy at Work

The European Community adopts legislation through various procedures laid out in the EC Treaty; depending on the kind of legislation being adopted, different E.U. bodies will play different roles and will apply different procedures.¹⁰¹ Article 251 of the EC Treaty outlines the procedures necessary to adopt free movement legislation like the Free Movement Directive: the European Commission (consisting of Commissioners and an elaborate bureaucracy of experts with wide-ranging responsibilities for Community law and policy¹⁰²) must propose legislation for presentation to the European Parliament (directly elected¹⁰³) and the Council of Ministers (representing individual Member States¹⁰⁴). The Council of Ministers can approve legislation by a “qualified majority” after consultation with and the approval of the European Parliament.¹⁰⁵

98. See WALTER, *supra* note 76, at 9.

99. Metock, *supra* note 75, ¶¶ 49–54.

100. See WALTER, *supra* note 76, at 21–22 (describing the “Belgian route” for Dutch citizens and “Swedish route” for Danish citizens who exercise free movement rights “in order to legally bypass the impact of reverse discrimination”).

101. See generally CRAIG & DE BÚRCA, *supra* note 10, at 109–18.

102. See *id.* at 38–42.

103. See *id.* at 58.

104. See *id.* at 48.

105. See EC Treaty, *supra* note 95, art. 251.

In this multi-polar process, directly elected parliamentarians and national government representatives engage in formalized debate on whether to accept, change, or eliminate the Commission's proposed text.¹⁰⁶ The Commission, in turn, retains some control over amendments to the original proposal.¹⁰⁷

The domestic violence provision, like the other divorce provisions, did not exist in prior free movement legislation. It was an innovation of the Free Movement Directive, which appeared, cryptically, in the Commission's original proposal for Article 13(2). That proposal provided:

Without prejudice to the second subparagraph, divorce or annulment of marriage shall not entail the loss of the right of residence of an EU citizen's family members who are not nationals of a Member State where:

- (a) prior to the initiation of the divorce or annulment proceedings, the marriage has lasted at least five years, including one year in the host Member State; or
- (b) by agreement between the spouses or by court order, the spouse, not being an EU national, has custody of the EU citizen's children; or
- (c) this is warranted by particularly difficult circumstances.

Before acquiring the right of permanent residence, the right of residence of the non-EU national shall, nonetheless, be subject to the condition that they engage in gainful activity in an employed or self-employed capacity or that they have sufficient resources to support themselves and their family members to avoid becoming a burden on the social assistance system of the host Member State for the duration of their stay and covering all risks in the host Member State, or be a member of the family, already constituted in the host Member State, of an applicant satisfying these conditions.¹⁰⁸

The Commission commented in the proposal that "[t]he wording in the [A]rticle is vague and is meant to cover, in particular, situations of domestic violence."¹⁰⁹ This admission of vagueness is curious. In Community law, a vague provision in a Directive is not simply an oppor-

106. *See id.*

107. *See id.*

108. *Right of Citizen of the Union*, *supra* note 51, at 36.

109. *Id.* at 1. The language would remain like this in the Family Reunification Directive, which applies to family members of third-country nationals present in the European Union.

tunity for judicial interpretation. Only certain provisions of Directives have “direct effect;” that is, there are only some parts of a Directive which, after the date of implementation of the Directive has passed, can be relied on by individuals directly in national courts. Otherwise, individuals must rely on the implementing provisions in national law. Only those provisions which are “clear, precise and legally complete”¹¹⁰ have direct effect. In this context, the assertion that a provision is “vague” yet “meant to cover” a specific situation is particularly problematic, and appears to signal ambivalence about whether this rule will ultimately fall within the competence of Community or national law.

Obstacles to the effective exercise of the retained right of residence by spouses experiencing domestic abuse¹¹¹ were thus present in the rule from the beginning. The Economic and Social Committee, in its advisory capacity, expressed concern about this vague language and suggested that “the wording should be more explicit, referring, *inter alia*, to family, domestic, or gender violence, both psychological and physical in nature.”¹¹²

In its first reading, the European Parliament proposed an amendment to the domestic violence provision: “this is warranted by particularly difficult circumstances *such as physical or mental abuse within the family, or on humanitarian grounds.*”¹¹³ The Parliament commented that there was “a need for greater clarity.”¹¹⁴ The Parliament did not propose eliminating the requirement that beneficiaries be economically active, but instead proposed allowing those who are “the assisting spouse or partner of a self-employed person.”¹¹⁵

110. CRAIG & DE BÚRCA, *supra* note 10, at 281. *See generally id.* at 268–304.

111. *See supra* Part I.B.

112. *Opinion of the Economic and Social Committee on the “Proposal for a European Parliament and Council Directive on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States,”* § 4.3.3, COM (2001) 257 final (June 21, 2002), available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52002AE0522&model=guichett (last visited June 13, 2009); *see also Right of Citizen of the Union*, *supra* note 51.

113. *European Parliament Legislative Resolution on the Proposal for a European Parliament and Council Directive on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States*, at 19, COD (2001) 0111 (Feb. 11, 2003), available at <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2001/0111>.

114. *Id.*

115. *Id.* This is perhaps an oblique reference to the ECJ judgment in *Carpenter*. Case C-60/00, *Carpenter v. Sec’y of State for the Home Dep’t*, 2002 E.C.R. I-6279. In this case, a national of the Philippines, living in the United Kingdom with her British spouse, was subject to deportation under U.K. immigration law. The ECJ ruled that she had a right to reside in the United Kingdom, as her husband provided services throughout the European Union; the fact that his wife looked after his children from a previous marriage made this possible. If the Parliamentarians had *Carpenter* in mind, it is a strange connection to have made: why not permit an individual in this situation to become the spouse of another kind of economically

The Commission accepted the first change, defining “particularly difficult circumstances.” However it rejected the second, an amendment to the economic activity requirement,¹¹⁶ which would have created a strange incentive for beneficiaries to begin relationships with entrepreneurs while their divorce was underway. In their Common Position, the Commission and the Council of Ministers changed the language of the rule again: “[T]his is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting.”¹¹⁷ According to the Commission, “[t]he content of the [Parliament’s] amendment has been taken over in the common position, but the reference to humanitarian grounds has been removed.”¹¹⁸ The Parliament accepted this version of the Free Movement Directive without comment and the Directive came into force on April 30, 2004; Member States had until April 30, 2006 to implement its provisions in national law.

What emerges from the provision’s legislative history is some wrangling over the definition of “difficult circumstances.” The Commission favored a vague approach that might have been developed by the ECJ, but more likely would have been left to the Member States. The Parliament, on the other hand, preferred what can fairly be called a progressive definition, covering a wide range of abuse. The Commission and Council settled on a much more traditional definition, using the arguably disempowering term of “victim” and the undefined term “domestic violence.”

During these discussions, there seems to have been little concern over the practical functioning of the domestic violence rule. Instead, the back-and-forth between the various Community organs focused on how explicit and broad the reference to abuse would be. Discussion of the practical aspects of the timing of the divorce and the problems that would arise for “victims” becoming economically active or self-sufficient cannot be found in the legislative history. Viewed in hindsight, the legislative organs responsible for creating this rule appeared more concerned with making a progressive gesture than with ensuring its prac-

active individual, such as a worker? (Under the rule as it was adopted, third-country nationals retaining the right to reside after a divorce must either be economically active, self-sufficient, or already in a relationship with an economically active individual. Becoming the family member—e.g., spouse—of an economically active person does not help. The Parliament’s proposed addition would have changed this, but strangely only in the case where the third-country national married an entrepreneur.)

116. European Parliament Legislative Resolution, 2003 O.J. (C 43) 42, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:043E:SOM:en:HTML> (last visited June 13, 2009) [hereinafter Legislative Resolution].

117. Council Common Position (EC) No. 13263/03 of Nov. 2003, art. 13, available at <http://register.consilium.europa.eu/pdf/en/03/st13/st13263.en03.pdf> (last visited June 13, 2009).

118. *Id.*

tical usefulness. While this criticism may seem unfair, it is important to note that the Commission in particular is made up of experts on the technical working of free movement law provisions.

It is noteworthy that a similar rule was making its way through a parallel lawmaking process within the Community institutions at around the same time. The Family Reunification Directive¹¹⁹ was being adopted under the Article 67 procedure, which requires unanimous approval of a Commission proposal by the Council of Ministers and restricts the Parliament to an advisory role.¹²⁰ In its initial proposal, the Commission included a provision similar to the provision provided in the proposal for Directive 2004/38:

In the event of widowhood, divorce, separation or death of relatives in the ascending or descending line, persons who have entered by virtue of family reunification and have been resident for at least one year, may apply for an autonomous residence permit. Where necessary by reason of particularly difficult situations, Member States shall accept such applications.¹²¹

The Commission noted that the provision was designed “to protect women who have suffered domestic violence.”¹²² It “may also be useful in the situation of women who are widowed, divorced or repudiated, and who would be in particularly difficult circumstances if they were obliged to return to the country of origin.”¹²³ The provision, thus vaguely worded, poses the same direct effect problems that the original rule in the Free Movement Directive threatened.

The Commission, in a revised proposal, changed the rule somewhat:

In the event of widowhood, divorce, separation, or death of relatives in the ascending or descending line, persons who have entered by virtue of family reunification and have been resident for at least one year, may apply for an autonomous resident permit. Where necessary by reason of particularly difficult situations, Member States shall accept such applications.¹²⁴

119. Family Reunification Directive, *supra* note 78; see also Helen Oosterom-Staples, *The Family Reunification Directive: A Tool Preserving Member State Interest or Conducive to Family Unity?*, in WHOSE FREEDOM, SECURITY AND JUSTICE? 451 (Anneliese Baldaccini et al. eds., 2007) (describing the Family Reunification Directive).

120. EC Treaty, *supra* note 95, art. 67.

121. *Proposal for a Council Directive on the Right to Family Reunification*, at 30, COM (1999) 638 final (Jan. 12, 1999).

122. *Id.*

123. *Id.*

124. *Commission Amended Proposal for a Directive on the Right to Family Reunification*, at 14, COM (2000) 624 final (Oct. 10, 2000).

The measure was adopted as it was in the Commission's second proposal. While the measure probably has direct effect under E.U. law, it does not designate domestic violence as a "particularly difficult circumstance" and appears explicitly to leave extensive latitude to the Member States to enact appropriate provisions. It is nonetheless possible that the ECJ will find that "particularly difficult circumstances" has a meaning specific to Community law that encompasses domestic violence.

The Free Movement and Family Reunification Directives invite comparison, and a tempting theoretical explanation: because the Family Reunification Directive dealt directly with immigration rules, previously the preserve of national law, the Community institutions moved slowly. In contrast, because the Community institutions have been exercising competence over the free movement of citizens for decades, we could assume that those institutions felt empowered to take a more radical approach. The real explanation for the differences between the two laws may be more practical, however: the European Parliament appears to have taken a greater interest in the Free Movement Directive because of its role under the Article 251 procedure, and may have used that role to force the domestic violence rule out of the "vague" shadows of shared national and Community competence and into the light of direct effect.

The legislative history teaches us little, except that the Commission seems inclined, but ambivalent, about providing greater protection for abused spouses in Community law provisions that deal with immigration, and that the Parliament's efforts were key in converting those tentative efforts into law. The Family Reunification Directive provides an interesting comparison. In the Free Movement Directive, the Community put forth a robustly articulated measure for migrants who experience domestic abuse, undermined from the start by the architecture and purpose of the Directive, in which the residence rights of third-country nationals serve the larger goal of encouraging the migration of certain E.U. citizens.¹²⁵ In the Family Reunification Directive, which deals with "pure" immigration law, similar compromises were not called for, but the Community legislature still held back from offering equally explicit protection. The (unintended) message seems to be that there is a greater need in free movement law, as opposed to standard immigration law, for an explicit domestic violence rule. The next two parts look at whether the domestic violence rule really fits into this specialized area of law.

125. See Free Movement Directive, *supra* note 6, at 79 recital 5 ("The right of all Union citizens to move and reside freely within the territory of Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.").

III. WOMEN, ALIENS, AND CITIZENSHIP

A. *What the Rule Says About European Citizenship*

The domestic violence rule in the Free Movement Directive looks at first glance like a beneficial federal intervention in women's rights, of the kind the U.S. Congress engineered in the Violence Against Women Act.¹²⁶ This view is too simple, however, because Community law in this case has singled out a specific group of third-country nationals for special treatment, and not because the Community could not go further to protect vulnerable migrant women. If the Community institutions wanted to ensure that every third-country national present in the European Union on the basis of an abusive relationship could leave the relationship without risking her immigration status, they could legislate to do so. The Community has competence to enact "measures on immigration policy" including "conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion."¹²⁷ The Family Reunification Directive in fact provided an opportunity to enact such a provision for many more third-country migrants in this position. As we have seen, however, the Community institutions were unable to enact something that specific—likely because of the lesser role of the European Parliament in the decision-making process.¹²⁸ Only in the Free Movement Directive did the disparate elements of the Community legislature align to create this domestic violence immigration rule.

The problem is that the Free Movement Directive is not an instrument of immigration law. (If it were, the European Parliament would not have had so much influence.) Free movement law relates to two other dynamically interrelated areas of Community law: the internal market (of which E.U. citizen workers and providers of services are an element) and E.U. citizenship, of which free movement is one right. The Free Movement Directive in fact reflects and drives a change in the role of citizens' free movement in Community law, from a purely economic function to something more "social and human."¹²⁹ This is legislation designed, in part, to encourage E.U. citizen participation in the common market for goods, services, and labor, and in part to advance the rights that Union citizens can assert against Member States other than their

126. See *United States v. Morrison*, 529 U.S. 598, 601 (2000).

127. EC Treaty, *supra* note 95, art. 63.

128. See *supra* note 120 and accompanying text.

129. Anne Pieter Van Der Mei, *Residence and the Evolving Notion of European Union Citizenship*, 5 EUR. J. MIGRATION & L. 419, 419 (2003).

own. The Free Movement Directive is then the center of tensions between “market citizens,” who are “instrumentalized with regard to the completion of the internal market”¹³⁰ and a more “social and human” vision of E.U. citizenship.

In the mid-1990s, shortly after E.U. citizenship was created, critics pointed to the economic imperatives that drove it: “[T]he rights of the market citizen, particularly those of free movement, have not merely been transferred to the Union citizen but continue to form the very core of that citizenship.”¹³¹ Today, some Union citizens who are no longer¹³² or never were¹³³ part of the internal market in goods, services, or labor are now able to exercise social rights in other Member States, for example, to access social assistance benefits. The emphasis on the “social” as opposed to the “market” aspects of Union citizenship¹³⁴ now makes it possible to assert that “[c]itizenship rights have benefited from being coupled with fundamental rights, and the non-discrimination principles in particular, in order to emancipate from market-citizenship rights.”¹³⁵

The Free Movement Directive is still rooted in market imperatives; the social aspects of the Directive are derived from the case law of the European Court of Justice, a “complex, rapidly evolving and often highly technical” jurisprudence responsible for moving Union citizenship beyond the marketplace by giving economically inactive E.U. migrants rights against the State in which they find themselves.¹³⁶

The rights of the third-country national family members are part of this social-market dynamic that revolves principally around the rights of the E.U. citizen. The ECJ case law on citizenship and free movement has pushed forward the rights of third-country national family members to reside in Europe, but always as a function of the E.U. citizen’s rights. The rights of E.U. migrant workers’ children to remain in the host State to continue their studies after the E.U. citizen parents have left, and to remain with their primary carer (even if this person is not an E.U. citizen), in the *Baubast* case were ultimately linked to the initial right of

130. Michelle Everson, *The Legacy of the Market Citizen*, in *THE NEW LEGAL DYNAMICS OF EUROPEAN UNION* 73, 85 (Jo Shaw & Gillian More eds., 1995) [hereinafter Everson].

131. *Id.* at 79.

132. Case C-85/96, *Martinez Sala v. Bayern*, 1998 E.C.R. I-2691 [hereinafter *Martinez Sala*].

133. Case C-456/02, *Trojani v. Centre public d’aide Sociale de Bruxelles*, 2004 E.C.R. I-7573.

134. See Tamara K. Hervey, *Migrant Workers and Their Families in the European Union: The Pervasive Market Ideology of Community Law*, in *THE NEW LEGAL DYNAMICS OF EUROPEAN UNION*, *supra* note 130, 91, 92 [hereinafter Hervey].

135. Samantha Besson & Andre Utzinger, *Future Challenges of European Citizenship—Facing a Wide-Open Pandora’s Box*, 13 *EUR. L.J.* 573, 578 (2007).

136. Francis Jacobs, *Citizenship of the European Union—A Legal Analysis*, 13 *EUR. L.J.* 591, 593 (2007).

free movement.¹³⁷ Similarly, the ECJ recently upheld the right of spouses of E.U. migrants to reside with them in the host State, even if the spouses have previously violated national immigration laws and only later married the E.U. migrant in the host State, because refusing the right of the spouses to continue to reside in the host State may “discourage [the Union citizen] from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country.”¹³⁸

Interestingly, the domestic violence rule in the Free Movement Directive, unlike other socially progressive aspects of the Directive,¹³⁹ was not merely codification of ECJ case law; it was a creation of the legislation. The domestic violence rule is a difficult rule to understand within the contexts of the ECJ’s prior case law and the tension between the market and social aspects of free movement, since discussion of free movement and citizenship has generally been centered on the rights of Union citizens. The domestic violence rule is designed for a situation in which the Union citizen has abused his dominant position vis-à-vis his third-country national spouse by, as the Commission put it, “blackmailing” his wife,¹⁴⁰ including, for example, instances in which abusive spouses threaten to divorce if their wives go to the police.

Viewed from the perspective of Community competence, the domestic violence rule is part of an effort to inject a “social” sensibility into legislation designed, at its inception, to facilitate the creation of a common European market. From this perspective, the legislation is responding not, like the U.S. domestic violence rules, to situations where immigration laws lead to or exacerbate gender-based violence; instead, the legislation is responding to an effect of the operation of the common market on vulnerable members of European society. That effect is the power imbalance that develops between economically active, mobile European citizens and the family members who enjoy rights through them and are consequently vulnerable to blackmail.

The domestic violence rule, in this sense, can be seen as a partial response to gender-based critiques of Community free movement law that emerged in the 1990s concerning the problematic operation of the European common market on women. According to one of the critics, Ursula Vogel, “many women would have nothing to claim if they were to appeal

137. *Baumbast*, *supra* note 37.

138. *Metock*, *supra* note 75, ¶ 89.

139. *See, e.g.*, Free Movement Directive, *supra* note 6, art. 12 (codifying *Baumbast* rule on children in education being able to remain in host State with their primary carer).

140. *See supra* note 93 and accompanying text.

to the rights of European worker-citizens.”¹⁴¹ According to another critic, Tamara K. Hervey “the ideology of women’s difference, and domesticity, has not been rejected in Community policy, nor in European society. The rhetoric of the legislative framework therefore cannot be translated into practices which challenge institutionalized and structural discrimination.”¹⁴² Hervey also aimed at the effect of the *Diatta* rule, so apparently helpful to third-country national spouses on the surface, but which, in reality, had the effect of giving the E.U. national “husband control over the expulsion of his wife.”¹⁴³ Hervey pointed to the precarious place of women in a legislative scheme that values men’s work in the labor market while ignoring women’s work in the home:

The disadvantaged position of women in the labour market has the result that women are more vulnerable than men after divorce to exclusion from the [M]ember [S]tate of residence of the family. [Third Country National] women, whose residence rights in the European Union arise only from their legal relationship with an [E.U. national] husband, suffer a double jeopardy. Even if they have been able to find work they may still be excluded from the European Union if their marriage breaks down.¹⁴⁴

The domestic violence rule in Article 13 offers a “social” response to these market-based critiques. The women whose work “commodifies” men and makes them “ready to sell their labour power on the market”¹⁴⁵ are now able to claim, on their own, the rights of European worker-citizens; their role is valued, and when they are taken advantage of, they can rely on a rule which challenges structural discrimination and allows them to exercise rights on their own.

The Community’s legislative organs, if forced to explain why the beneficiaries of this rule are required to join the labor force in order to escape a situation of gender-based violence, might respond that the domestic violence rule is not a provision of immigration law but one enabling the common market: in the end, the legislation’s provisions must serve that overall purpose, while responding to social imperatives like gender equality. The overall market function of the legislation explains away the paradoxes discussed above.

141. Ursula Vogel, *Emancipatory Politics Between Universalism and Difference: Gender Perspectives on European Citizenship*, in *CITIZENSHIP, DEMOCRACY AND JUSTICE IN THE NEW EUROPE* 142, 148 (Percy B. Lehning & Albert Weale eds., 1997)[hereinafter Vogel].

142. Hervey, *supra* note 134, at 104.

143. *Id.* at 106. For a discussion of the *Diatta* rule, see *supra* note 39 and accompanying text.

144. Hervey, *supra* note 134, at 106.

145. *Id.* at 107.

To refer simply to the common-market imperatives of free movement legislation to resolve these problems is dissatisfying. To see why, we need to see what exactly is being offered to “victims of domestic violence.” Article 13 introduces an innovative mechanism to resolve the tension between the market and social aspects of free movement law: the provision confers on the now ex-family member of the E.U. migrant a limited set of rights and responsibilities belonging to the E.U. citizen. From the perspective of most third-country nationals in Europe, the woman is very lucky; from the perspective of the normal E.U. citizen, she is somewhat restrained.

RIGHTS/RESPONSIBILITIES OF CITIZENSHIP OFFERED	RIGHTS/RESPONSIBILITIES OF CITIZENSHIP WITHHELD
To work in the host State where she has been resident.	To work in <i>any</i> E.U. State.
To live as a self-sufficient person in the host State (with sickness insurance).	To be a student (with the lesser requirement of making a “declaration” of self-sufficiency).
To reside as the family member of a worker or self-sufficient person.	To create new family relationships in the host State that would confer this benefit.
To retain worker or entrepreneur status in certain circumstances (if Article 7.3 of the Directive applies).	To confer parasitic rights to new family members acquired after the divorce.
To access social assistance benefits while working or running a business.	

We are in the presence of a unique form of solidarity for third-country national divorcé(e)s: having been a victim of domestic violence (or having spent a certain amount of time in the host State or having children who remain there) entitles the divorcé(e)s to a minimum set of rights, attached to a secure demonstration of economic activity or financial independence. These ex-family members, because of the abuse they have experienced, have gone from having rights ultimately dependent on their E.U. family members to being a kind of market citizen: fixed elements of the mobile economic order whose presence in the host State is tolerated, but not encouraged.

In fact, by offering a very limited concession to gender equality norms that run against pure market ideology, the Free Movement Directive’s domestic violence rule highlights the ways in which “the Community’s false claim of equality of treatment for all individuals in Community law has an adverse impact on women . . . *in addition* to their

disadvantaged position under national legal systems.”¹⁴⁶ The third-country national who has experienced domestic violence has, as a result, the privilege of trying her chance in the European labor market (at least in the State where she was abused). As a measure of “solidarity,” she is given a chance to compete, like other European women, and sink or swim on the basis of her skills or independent means.

Having left a situation of domestic abuse—arguably facilitated by her subordinate status in the European market economy to the E.U. citizen whose work, recognized as such by the European common market, she facilitated—the third-country national spouse now has rights dependent on her ability to survive in the market. She has the rights of the old-fashioned E.U. market citizen, rights “fully dependent on both the personal characteristics of each market citizen and prevailing labour demands.”¹⁴⁷ In other words, she has rights that “should not be understood as independent from, and thus constitutive of, the person.”¹⁴⁸

Granting individuals who have experienced domestic violence rights that depend on their personal characteristics and situation is perverse. This is because personal characteristics that leave the third-country national vulnerable to domestic abuse will also likely leave her unable to participate effectively in the labor market. What many of these individuals need are not rights that flow from economic activity, but unconditional state support. Such support will allow those who are vulnerable as a result of the trauma they have experienced to recover and make decisions as to how to move forward with their lives.

The current regime creates perverse outcomes for those who have experienced domestic violence: the more vulnerable the individual, the less likely she is to enjoy the benefit of the domestic violence rule. Likewise, those who benefit from both Article 13(2)(c) *and* Article 13(2)(b)—by retaining custody of the E.U. national’s children (which will likely be the case when there has been domestic abuse) are even less likely to enjoy the domestic violence rule’s benefit, as their work caring for their children will not count as work for the purposes of the second subparagraph of Article 13(2).¹⁴⁹

146. *Id.* at 94.

147. Everson, *supra* note 130, at 84.

148. *Id.*

149. The definition of “workers” in European Community free movement law does not encompass women who perform work within the home. *See* Case 66/85, *Lawrie-Blum v. Land Baden-Württemberg*, 1986 E.C.R. 2121 (defining a worker as someone who performs services of economic value under the direction of another in exchange for remuneration). Nor could a woman who performs domestic work claim to be self-employed. *See* Case C-268/99, *Jany v. Staatssecretaris van Justitie*, 2001 E.C.R. I-8615 (defining self-employed as those who provide services in return for some form of remuneration).

Having escaped one part of the “double jeopardy” these abused individuals face—that divorce would leave them without rights—the Free Movement Directive places its subjects in a strange situation of solidarity with other European women, who are “less likely than men to be in the position of ‘migrant worker’ and thereby to acquire their own residence rights, given that the [ECJ’s] construct of ‘worker’ reflects a model of work and family which excludes the work undertaken by many women from the status of ‘work.’”¹⁵⁰ These abused foreign women are no better off than E.U. migrant women who experience domestic violence at the hands of E.U. migrant spouses: these women too, by operation of Article 13(1), only have a right to remain if they too meet the conditions of economic activity (although thanks to ECJ case law, they may, in some very specific circumstances, enjoy equal rights regardless of their economic activity¹⁵¹).

In considering the strange position of these third-country national women, it is no response to explain that they must obey the economic imperatives of the legislation; because working from a market perspective, this form of solidarity should not have been included at all. It is, in Alexander Somek’s language, a “miracle,” for the Free Movement Directive is essentially an economic instrument facilitating the opening of a free market for labor and services, and “the existence of any type of solidarity is the *miracle* the occurrence of which neo-liberalism is in principle unable to explain.”¹⁵² In this case, though, the solidarity that is extended—the right (coveted by many third-country nationals living in the European Union) to stay—is minimalist and subsumed entirely by market imperatives, predicated as it is on the “responsibility” of the beneficiary to remain economically active or financially independent.

When Somek discusses the kind of solidarity that has developed in E.U. free movement law he notes that “there is something disturbingly autistic about Union citizenship”¹⁵³ because the kind of solidarity migrant E.U. citizens enjoy is dependent essentially on their presence in another Member State over a certain period of time. The same could be said about the domestic violence rule. Community free movement law—essentially aimed at promoting the spread of a free market in services and labor—recognizes that its provisions provide an opportunity for gender-based violence. Community free movement law’s response is to allow the victims of that violence into the privileged circle of market citizens who access Community law rights as a function of their

150. Hervey, *supra* note 134, at 106.

151. See Martinez Sala, *supra* note 132.

152. Alexander Somek, *Solidarity Decomposed: Being and Time in European Citizenship*, EUR. L. REV. 787, 810 (2007).

153. *Id.* at 814.

individual capabilities, without realizing that only a select few “victims of domestic violence” will be able to enjoy these benefits.¹⁵⁴

The fatal flaw in Community free movement law’s approach lies in the perception that the abusive E.U. migrant spouse is the only agent of gender-based abuse. The European common market, privileging men’s work and ratifying the privileged position they held before the process of European integration began, will in many cases of domestic abuse pick up where the abusive spouse left off. No longer at the mercy of an abusive husband, she is now at the mercy of the host State’s labor market and social assistance system. She will, in many cases, find herself without any rights at all; or she will be confined to “the female employment ghetto at the margins of the regular labour market,”¹⁵⁵ “part of a cheap and immobile labour force, which is indispensable to and forms the basis of western Europe’s post-industrial economy.”¹⁵⁶

B. *Jumping Tracks*

The domestic violence rule in the Free Movement Directive looks like a failed attempt to ensure that free movement law does not become a tool for abusing vulnerable third-country migrants, particularly women susceptible to domestic abuse. It superficially gives the impression of protection, but in practice offers its beneficiaries nothing more than a chance to compete in the host State’s labor market for the privilege of remaining in the host State.

In Somek’s language, however, it is a miracle that anything has been provided for these individuals at all: ensconced in a legislative scheme for establishing a free market in labor and services, the domestic violence rule is distinctly out of place. If it fails as a rule, it is because it attempts to remedy a situation that falls entirely outside of the market by offering a market-based solution. The domestic violence rule will, until national or European judicial authorities or the Community legislature revise its scope, fail the individuals it purports to help—mainly vulnerable women from poor countries suffering abuse from European spouses reaping the benefits of participation in the common market. But it will also stand out as an anomaly, both in relation to the national immigration laws of Member States that do not have similar rules, and as a fundamental (or *quasi*-fundamental) rights provision embedded in a legislative scheme designed to create a common market.

It is significant that the Community legislature was only able to create a domestic violence rule in what is essentially a common market

154. See Free Movement Directive, *supra* note 6, art. 13(2)(c).

155. Vogel, *supra* note 141, at 148.

156. Hervey, *supra* note 134, at 101.

legislative instrument. To use Saskia Sassen's language, the Community is using a *capacity* developed to permit the creation of a common market—that is, the capacity to open Member States' borders to third-country nationals notwithstanding national immigration laws—in order to address the very different subject of domestic violence.¹⁵⁷

This analysis and interpretation seem paradoxical: the Community has competence to ensure long-term residence permits for all “victims of domestic violence,” the way that it has done for victims of human trafficking.¹⁵⁸ This competence, however, has not translated into a capacity to reach large numbers of individuals in this situation: for whatever reason (likely the reluctance of Member States to cede that much control of their borders to European control), the Community is not, or not yet, in a position to do this.

Instead, another capacity is being redirected or “jumping tracks” as Sassen might phrase it, from its aim of creating a common European market to the aim of protecting some of the most vulnerable migrants in Europe. The domestic violence rule is not the first symptom of this shift: for decades, particularly in the context of ECJ cases, we have heard that “the migrant worker is not regarded by Community law—nor is he by the internal legal system—as a mere source of labour, but is viewed as a *human being*,”¹⁵⁹ and that Community law “gives precedence to the fundamental rights of workers over satisfying the requirements of the economies of the Member States.”¹⁶⁰

Two things are different here. The first is that we are faced with a rule included in Community legislation, not required or, it appears, inspired by ECJ case law. The Community legislature has directed its capacity to open Member States' borders towards the protection of fundamental rights in a way that cannot be justified by market imperatives. Second, the group whose rights are advanced are third-country nationals. Historically non Europeans have only been addressed by Community free movement law to the extent that they enable the movement of Union citizens. These third-country nationals, however, gain rights at exactly the moment when they end their relationship with the E.U. migrant. In an important shift, the rule gives rights to third-country family members not to facilitate the free movement of their E.U. family members, but to protect them from those family members in cases of abuse.

157. SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* 6–11 (2008).

158. See *supra* note 65 and accompanying text (citing Council Directive 2004/81/EC, 2004 O.J. (L 261) 19 (EC), requiring Member States to provide third-country national victims of human trafficking residence permits in certain circumstances).

159. Case 7/75, *Mr.F v. Belgian State*, 1975 E.C.R. 679, 696 (emphasis added).

160. Case 344/87, *Betray v. Staatssecretaris van Justitie*, 1989 E.C.R. 1621, 1637.

If the ECJ is called upon to interpret the problematic aspects of the domestic violence rule in the Free Movement Directive, it will lack the interpretive anchor that existed in other cases, namely the encouragement of citizens' free movement.¹⁶¹ The rule cannot be justified in terms of the common market or the rights of Union citizens: protecting victims of gender-based violence here is its own end. The rule may still bend to market imperatives, but it is not designed to respond to those imperatives. Instead, it has a purpose—protecting other vulnerable women—for which theories of market integration simply cannot account.

For years the Community institutions—particularly the ECJ—have been using the Community's capacities related to the common market to advance fundamental rights. Most notably, the ECJ has used the capacity to force open Member States' social assistance funds to E.U. migrants to benefit migrants who were not active in the common market.¹⁶² Now the Community's capacity to open borders to third-country nationals—also developed in the name of the common market—is being redirected towards creating solidarity between Member States and third-country nationals who have only a territorial connection to the State. This solidarity is rooted in a specific form of ill-treatment—gender-based violence. The Community's capacity is not yet entirely detached from its market orientation. But the nonsense of a rule which simultaneously removes vulnerable third-country nationals from the market and forces them to survive in it may be the hallmark of a shift in the use the Community is making of a specific capacity it has developed. The common market is being used to advance the rights of not only E.U. citizens, but also of certain non Europeans who are particularly vulnerable.

In the current political context, with Member States attempting to regain control over their borders and take away from Europe the power to decide who can stay on their territory,¹⁶³ this redirected capacity may prove of great importance to third-country nationals present in or coming to Europe. The fact that the Community legislature is turning its capacities developed in the creation of the common market towards the problem of immigration and gender-based violence is suggestive of an emerging new order. As European States gear their immigration policies towards the economic needs of the State,¹⁶⁴ they ignore the human rights

161. See *supra* notes 135–136.

162. See *supra* notes 130–131.

163. See Memorandum, European Pact on Immigration and Asylum, at 6 (Sept. 24, 2008) (affirming “that it is for each Member State to decide on the conditions of admission of legal migrants to its territory and, where necessary, to set their number”), available at <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf> (last visited June 13, 2009).

164. See RYSZARD CHOLEWINSKI, IRREGULAR MIGRANTS: ACCESS TO MINIMUM SOCIAL RIGHTS 18 (2005).

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implications of migration. The domestic violence rule may be a sign that the European Union—here in its capacity as guardian of the common market—will provide a salutary counterbalance in favor of vulnerable migrants. Whether this proves true, however, will ultimately depend on influence and orientation of institutions like the European Parliament and European Commission; and of course will depend on the willingness of Member States to let socially progressive provisions into binding E.U. legislation.