ARTICLES

TESTING LIBERAL NORMS: THE PUBLIC POLICY AND PUBLIC SECURITY DEROGATIONS AND THE CRACKS IN EUROPEAN UNION CITIZENSHIP

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European Union law has curtailed the traditional discretion Member States have in ordering non-nationals to leave their territory. Although Directive 2004/28 (the Citizenship Directive) has enhanced the system of protection afforded to offending European Union citizens, it still contains a number of cracks that lead to policy incoherence and gaps in rights protection. This is evident in the first rulings on Article 28(3) of Directive 2004/38 concerning the deportation of offending EU citizens. These issues also threaten to transform European Union citizenship from a fundamental status into a thin overlay that, under pressure from national executive power, loses its effect and significance. To be sure, EU citizenship has demonstrated that community belonging does not have to be based on organic-national qualities, cultural commonalities, or individuals' conformity to national values, but the continued deportation of long-term resident Union citizens makes nationality the ultimate determinant of belonging. The

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subsequent discussion suggests possible remedies and makes recommendations for institutional reform.

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I. INTRODUCTION

Crises in liberalism are not merely triggered by exogenous factors, such as international terrorism, wars, global economic downturns and natural disasters. They can also emerge endogenously when basic principles underpinning liberalism come adrift, fluctuate, and burst when they come into contact with a new idea or a harsh reality. One such harsh reality is insecurity of residence. This challenges the fundamental principles of freedom from state coercion, human emancipation from unnecessary restrictions, and the equal treatment of all individuals irrespective of their place of birth and nationality.

We take it as given that citizens have the right to enter and reside freely and unconditionally in the country they call "their own."[1] Migrants, on the other hand, can never rely on such security of residence. Notwithstanding the length of their residence in the territory of the host state and their immersion into a multifarious web of socioeconomic relations, migrants' futures are always precarious. Migrants can be ordered to leave the country if state authorities view their presence as either not "conducive to the public good" or as a threat to public policy or national security. States have also cited economic recessions as a reason, or more realistically, as a pretext, for the expulsion of migrant workers. Additionally, states broadly interpret "public policy," "public morality," and "national security" in order to force the exit of migrant workers. Trivial incidents find their way into justifications for exclusion, and it is often the case that state authorities or lower courts misapply norms and standards.

Fortunately, those migrants who are beneficiaries of European Union law enjoy considerable protection against experiences of injustice and illegitimate harm inflicted by state authorities. Public policy, public security, and public health derogations from the Treaty's provisions on the free movement of persons have to be interpreted strictly, and justifications of state actions must be in line with the standards prescribed by European Union law.

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[1] *See* Article 3 of the Fourth Protocol to the 1950 European Convention on Human Rights [hereinafter ECHR].

European Union law has curtailed traditional state discretion in ordering non-nationals to leave, and some non-member states commit to not "eject at their pleasure" non-offending, non-national residents. Nonetheless, the system of protection afforded to offending European Union citizens contains a number of cracks that lead to policy incoherence and gaps in rights protection. These cracks also threaten to transform European Union citizenship from a fundamental status into a thin overlay that, under pressure from national executive power, loses its effect and significance.

Investigating those cracks and how they could be corrected is the main focus of this article. True, it may be objected from the outset that no sympathy should be given to offending EU citizens residing in the territory of Member States whose rules and laws they fail to respect. For by failing to respect the requirements of hospitality, offenders essentially forfeit their right to receive such hospitality and are no longer deserving of special protection. Although such a view is certainly understandable, it is also troubling. In this harsh scenario, the penalty imposed for offending conduct does not meet the requirements of proportionality, and it can cause irreparable and illegitimate harm to human beings.

It is one thing to accept the penalty accompanying a transgression, but quite another to be placed outside the society's circle of membership. Being stripped of membership status and rendered "homeless" shatters lives, destroys personal identities, and tears apart social and family relations. After all, "home" is where our lives are woven and entangled with the lives of others and where our identities are manifested and shaped. In addition to its spatial dimension, "home" also has another temporal dimension: we cannot imagine our life and contemplate future life choices without it. Home settles people, because it allows them to make commitments, and imagine and plan their future. In this respect, "homelessness"—being ordered to leave a country in which you have made your home—not only makes us feel abandoned and hurt, it also makes us feel futureless. Without security of residence, personal autonomy is meaningless. Because deportation negates and demeans EU citizens' lives, expectations, and futures, the effect of the public policy and public security derogations in Directive 2004/38 on Union citizenship itself must be seriously examined.

The subsequent discussion is structured as follows. In Section Two, we examine the "old" and "new" interpretative frameworks relating to public policy and public security derogations. We also examine the shortcomings in the judgments of the first cases on Article 28(3) of Directive 2004/38 that have reached the Court of Justice of the EU (Court). In Section Three, we consider whether EU migration and external relations laws could shed light on the conceptual ambiguity surrounding the terms "public security" and "public policy" that underpin deportation decisions. In Section Four, we extend our search for a solution to the Court's interpretation of these terms across the four fundamental freedoms. We argue, in Section Five, that international migration law, and not European Union law, could provide useful pointers and inspiration for the reform of law and policy in this area. We conclude by discussing our proposals for institutional reform.

II. THE PUBLIC POLICY AND PUBLIC SECURITY DEROGATIONS: PAST AND PRESENT

The public security, public policy, and public health derogations from free movement have been marked by a disjunction between governmental interests and sovereign power on the one hand, and EU regulation on the other. Member States have been keen to maintain the vestiges of their sovereignty in the sphere of migration law. Accordingly, they have preserved the power to restrict the free movement rights of Union citizens and their family members on public security, public policy, and public health grounds (Article 45(3) TFEU). But these grounds must be strictly interpreted and comply with the principle of proportionality.[2] They cannot be invoked in order to serve economic ends, even in times of recession, and they cannot be imposed automatically.[3] Instead, the Member States are obligated to verify that a Union citizen's personal conduct poses "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."[4]

This is not merely confined to entry. It also applies to restrictions on the right of exit imposed by the Member State of origin on one of its nationals. For example, in *Jipa*, the Court ruled that in the absence of a genuine threat to public policy or public security, the Member State of origin cannot restrict an EU national's right of exit.[5] Similarly, in *Gaydarov*, the Court ruled that, "the genuine, present and sufficiently serious threat to the requirements of public policy" test, observance of the principle of proportionality, and the subject of the restrictive measure to effective judicial review can all justify the restriction of the right of a Member State national to exercise the fundamental rights of entry and residence.[6] The same assessment must take place with respect to third country national spouses of EU nationals who are the subject of alerts entered in the Schengen Information System. The Court has stated that both the Member State issuing an alert and the Member State that consults the Schengen Information System must first establish that the presence of a person constitutes a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society.[7]

The Court's clear preference for a rights-based approach to the interpretation of the Treaty's derogations from free movement in the internal market shields individuals from the discretionary power of states. As protected persons, their

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[2] Case C-100/01, Ministre de l'Interieur v. Oteiza Olazabal, 2002 E.C.R. I-11000; Joined Cases C-482/01 & C-493/01 Orfanopoulos & Oliveri v. Land Baden-Wurttemberg 2004 E.C.R. I-5295; Case C-430/10 Gaydarov v. Direktor na Glavan direktsia "Ohranitelna politsia" pri Ministerstvo na vatreshnite raboti, 2011 E.C.R. I-11639, ¶ 32.

[3] *See* Case C-33/07, Ministerul Administraţiei şi Internelor-Direcţia Generală de Paşapoarte Bucureşti v. Jipa, 2008 E.C.R. I-5157, ¶ 23 (Opinion of Advocate General Mazak).

[4] Case 30/77, Regina v. Bouchereau, 1977 E.C.R. I-2000, ¶ 35.

[5] *Jipa*, 2008 E.C.R. I-5157. *Jipa* was a reverse discrimination case. There, the applicant requested that his state of origin lift a restriction on his right to cross-border movement (Article 38 of Romanian Law 248/2005) in order to travel to Belgium. Romania had implemented this restriction following a Readmission agreement it had signed with Belgium before its accession to the EU.

[6] Case C-430/10 Gaydarov v. Direktor na Glavan direktsia "Ohranitelna politsia" pri Ministerstvo na vatreshnite raboti, 2011 E.C.R. I-11639.

[7] Case C-503/03, Comm'n v. Spain, 2006 E.C.R. I-1122.

interests take priority over the interests of states. From this it follows that public policy or security risks must be clearly linked to particular persons before any action is taken by national authorities against an EU citizen. By requiring concreteness and contextualism rather than abstract interpretations of threats or risks flowing from authorities' perceptions about certain (unwanted) individuals and their actions, the Court shields EU nationals and their families from utilitarian calculations and arbitrary state practices. Accordingly, a Member State cannot order the expulsion of a Union citizen as a deterrent or a general preventive action.[8] Nor, it is submitted, can exclusion or expulsion decisions be justified on the basis of governmental policy agendas, such as, for example, tackling pornography or organized crime. This should also rule out the application of preemptive measures or the precautionary principle, which became salient in counter-terrorist law and policy post 9/11.

Additionally, previous criminal convictions will not in themselves constitute grounds for imposing limitations on cross-border movement.[9] As Article 27(2) of Council Directive 2004/38 states, "justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted." According to Advocate General Mazák,

> [I]t follows from the ruling of the Court in *Commission v. Spain* that a Member State, when limiting the rights granted to Union citizens pursuant to Article 18(1) EC [21 TFEU], cannot rely on general non-specific assertions made, in relation to the conduct of a Union citizen, by another Member State. A Member State when limiting the fundamental freedoms of Union citizens must itself verify and confirm whether the exercise of those freedoms poses a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.[10]

Of course, there is no isomorphism in the definition of public policy across the EU—public policy and public security remain "national concepts" because they are defined on the basis of national laws and traditions. However, for more than three decades, the Court has clearly stated that Member States' discretion in this area is circumscribed by EU law.[11]

Although strict interpretation of the public policy derogations in legislation (as seen initially in Directive 64/221 and then in Directive 2004/38 from 30 April 2006) and the Court's jurisprudence have limited Member States' discretionary power, the States nevertheless continue to deport Union citizens on the basis of enforceable criminal convictions. The Court rejected these policies in *Calfa* when it held that automatic expulsion for life following a criminal conviction on the basis of public policy, without consideration of the personal conduct of the offender or the danger (s)he represented, contravened Treaty provisions (formerly Article 49 EC) and

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[8] Case 67/74, Bonsignore v. Oberstadtdirektor der Stadt Köln, 1975 E.C.R. I-297, ¶ 7; Case 36/75, Rutili v. Minister for the Interior, 1975 E.C.R. I-1220, ¶ 29.

[9] Parliament and Council Directive 2004/38/EC, art. 27(2), On the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States, 2004 O.J. (L 158) 77; Case C-348/96, Re Donatella Calfa, 1999 E.C.R. I-21, ¶¶ 22–24.

[10] *See Jipa*, 2008 E.C.R. I-5157, ¶ 43 (Opinion of Advocate General Mazak).

[11] Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1338.

Directive 64/221 (now Directive 2004/38).[12] In *Commission v. Germany*, Advocate General Stix-Hackl asserted that the German practice of automatic deportation without regard for personal circumstances, justified on the ground of its deterrent effect on other foreigners, and in breach of the fundamental right to family life, breaches Community law.[13] In *Huber*, the Court took issue with the German Central Register of Foreign Nationals and ruled that the prohibition of discrimination on the ground of nationality laid down in Article 18 TFEU precludes the establishment of a system specifically for Union citizens for processing personal data for the purpose of fighting crime when no such similar system exists with respect to nationals of that Member State. Conversely, the Court reached the opposite conclusion with respect to the use of a central register for foreign nationals for the purpose of regulating their residential status.[14]

The Citizenship Directive has enhanced security of residence for Union citizens and their family members. National authorities contemplating an expulsion decision must take into account a complex array of factors such as the length of an individual's residence in the national territory, her age, state of health, family and economic situation, social and cultural integration into the host Member State, and the extent of her links with the country of origin.[15] Frequent and long absences from the territory (not exceeding two consecutive years) would presumably indicate the existence of a weaker link with the host Member State. In contrast, long and uninterrupted residence manifests a greater degree of integration in the host Member State, thereby necessitating a greater level of protection against expulsion. In such cases, "uprooting" would result in multiple, serious harms for individuals and their families.[16] In the case of a Union citizen "who has lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure."[17]

The Directive also stipulates that permanent residents can be ordered to leave only on "serious grounds of public policy or public security."[18] It further stipulates that Union citizens resident for the previous ten years and minors may not be ordered to leave the territory of a Member State, except "on imperative grounds of public security."[19] In addition, according to Article 33 of Directive 2004/38, the host Member State cannot issue an expulsion order as a penalty or legal consequence of a custodial penalty unless the general requirements pertaining to the application of restrictions on entry and residence apply;[20] if issued, an expulsion order should be subject to assessment after two years.[21] In cases of interrupted residence in the ten-

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[12] *Calfa*, 1999 E.C.R. I-21.

[13] *See* Case C-441/02, Comm'n v. Germany, 2006 E.C.R. I-3452 (Opinion of Advocate General Stix-Hackl).

[14] Case C-524/06, Huber v. Bundesrepublik Deutschland, 2008 E.C.R. I-9705.

[15] Parliament and Council Directive 2004/38/EC, *supra* note 9, art. 28(1).

[16] *See id.*, recital 24 of the Preamble; *see also* Case C-145/09, Land Baden-Württemberg v. Tsakouridis, 2010 E.C.R. I-11979, ¶¶ 44–45, 115–19 (Opinion of Advocate General Bot).

[17] *Tsakouridis*, 2010 E.C.R. I-11979, ¶ 53.

[18] *See* Parliament and Council Directive 2004/38/EC, *supra* note 9, art. 28(2).

[19] *Id.* art. 28(3).

[20] *Id.* arts. 27–29.

[21] *Id.* art. 33.

year period required for protection against expulsion under Article 28(3), national authorities can take into consideration the duration of each absence from the national territory, the frequency and cumulative duration of those absences, the reasons for the absences, and any evidence that appears to suggest that the individual concerned intended to transfer the hub of her life and activities to the Member State of origin or another Member State.[22]

The distinction between the high level of protection provided by the requirement of "serious grounds of public policy and public security" under Article 28(2) and the higher level of protection entailed by the phrase "imperative grounds of public security" under Article 28(3) arose in two recent cases before the Court: Case C-348/09 *Pietro Infusino v. Oberburgermeisterin der Stadt Remscheid*, lodged on 31 August 2009, and the *Tsakouridis* case noted above. In both cases, the referring courts sought guidance as to whether the absence of any reference to public policy matters in Article 28(3) implies that this provision is confined to threats to internal and external security of the state. Such threats would put at risk institutions and important public services, the survival of the population, foreign relations, and the peaceful co-existence of nations. A literal interpretation of Article 28(3) appears to lend credence to a *restrictionist* approach, that is, a confinement to very serious conduct that undermines state security and threatens to jeopardize its functions and the survival of the population. But in *Tsakouridis*, the Court made it clear that the term "imperative grounds of public security" does not necessarily exclude domestic criminal law matters. There, the Court found that the fight against crime in connection with dealing in narcotics as part of an organized group, which undoubtedly falls within the ambit of Article 28(2), is capable of being covered by Article 28(3).[23]

This ruling essentially makes the distinction between the second and third paragraphs of Article 28 inexact, notwithstanding the existence of close conceptual links between "internal security" and "public policy." The Court's ruling underscores the belief that the *differentia specifica* between Articles 28(2) and 28(3) is not the nature of the threat. After all, the meanings of "public policy" and "security"[24] cannot be clearly demarcated and, having varied meanings in the various Member States, they remain national law concepts even if circumscribed by EU law. Instead, attention should be given to the "exceptional circumstances" surrounding the offending conduct and the "high degree of seriousness" it reflects—elements that are captured by the adjective "imperative."[25] This could be termed the "counter-restrictionist" view.

Accordingly, *Tsakouridis* gives the impression that national authorities contemplating expulsion decisions need not be concerned about the object of the

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[22] *See* Case C-145/09, Land Baden-Württemberg v. Tsakouridis, 2010 E.C.R. I-11979, ¶¶ 32–34.

[23] *Id.*

[24] According to Advocate General Bot [hereinafter AG Bot], the concept of public policy includes, inter alia, the prevention of urban violence, the prevention of the sale of stolen cars, protection of the right to mint coinage and respect for human dignity. *See Tsakouridis*, 2010 E.C.R. I-11979, ¶ 63. However, he went on to state that in most of the cases, the Court has not made a distinction between the two concepts and used *Olazabal* to substantiate this point. *See id.* ¶¶ 43–45.

[25] *Tsakouridis*, 2010 E.C.R. I-11979, ¶¶ 40, 41.

threat, but rather whether the survival of the state (and its institutions) is threatened. Nor is it the case that the "specialness" of the public security threat triggers the application of Article 28(3). Imperative grounds of public security do not presuppose the existence of special security threats. Instead, the circumstances of the threat must be exceptional in order to justify the exceptionality of the deportation of long-term residents and minors. The threat must entail a high degree of seriousness, which is not found in ordinary criminal activities.[26] The Member State would have the burden to furnish coherent arguments highlighting the extraordinary circumstances surrounding the threat, while EU citizens challenging expulsion decisions would have to produce evidence that the threat they pose does not go beyond the capabilities of the State's normal security procedures. In other words, the Court's definition of the term, "imperative grounds of public security" shifts the focus from the type of the security threat to the *security constellation* accompanying the offending conduct. For it is that security constellation which will transition conduct normally caught by either public policy or public security into the exceptional area of public security.

This shift has been confirmed by the Grand Chamber's judgment in *Pietro Infusino*, mentioned above.[27] Infusino, an Italian national, lived in Germany since 1987 and was sentenced to seven years' imprisonment in 2006 for the sexual assault, sexual coercion, and rape of his former partner's daughter. Although he is due to be released in July 2013, a deportation order was issued in May 2008, and Infusino challenged the order. The Higher Administrative Court for the Land North Rhine-Westphalia, which heard the case on appeal, sought the Court's guidance on the application of Article 28(3) of the Citizenship Directive by inquiring as to whether, besides dealing in narcotics as part of an organized group, other extremely serious criminal offenses fall within its scope. The Court drew upon Article 83(1) TFEU, which labels the sexual exploitation of children as a serious crime with a cross-border dimension that permits the EU to intervene, and Directive 2011/92, which addresses sexual abuse and sexual exploitation of children and child pornography,[28] to make an unprecedented widening of the public security derogation. As a result, the derogation now encompasses all criminal offenses that "might pose a direct threat to the calm and physical security of the population" as long as "the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine."[29] This means the paramount consideration is the security constellation surrounding the offense rather than the type of offense. Given that, in principle, all forms of criminality can be seen to pose a direct threat to the calm and physical security of the population, Article 28(3)

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[26] Of course, the test of proportionality must always be carried out, and national authorities contemplating the taking of an expulsion decision must consider other factors, such as the length of residence in the host Member State, the protection of the right to privacy and family life enshrined in the Charter of Fundamental Rights (Article 7) and the ECHR (Article 8), and they must not prejudice the offender's social rehabilitation in the state in which he or she has become genuinely integrated.

[27] Case C-348/09, Infusino v. Oberbürgermeisterin der Stadt Remscheid, 2012 WL Celex No. 609CJ0348 (May 22, 2012).

[28] Parliament and Council Directive 2011/92/EU, On Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, 2011 O.J. (L 335) 1.

[29] *Infusino*, 2012 WL Celex No. 609CJ0348, ¶¶ 28–29, 33. Pietro Infusino had threatened and isolated his victim for a number of years.

becomes a gradation of Article 28(2) of Directive 2004/38. Particularly serious crimes can thus activate the application of Article 28(3). As such, the Court instigated a definitional isomorphism between public security and public policy (and public order) by infusing the former with an "everyday" dimension relating to the preservation of the "calm and physical security of the population." While the "normalization" of the public security derogation will please Member States that remain free to categorize conduct as contrary to public security "according to the particular values of their legal order,"[30] it is deeply problematic from an EU law standpoint. The phrase "threat to the calm and physical security of the population" constitutes an interpretive innovation,[31] which undermines the rationale of the Citizenship Directive and its objectives of promoting security of residence for long-term resident EU citizens and enhancing their citizenship status.[32] Similarly, the reference to the referring court's assessment of conduct leading to expulsion in the light of "the particular values of the legal order of the Member State" is so ambiguous that it is bound to lead to legal uncertainty and the unequal treatment of Union citizens throughout the European Union.[33] The Grand Chamber's deference to the Member States' interpretational freedom may be attuned to the present rise in Euro-skepticism in several countries, but it is certainly at odds with its traditional attestation of the strict interpretation of the derogations.

We have reservations as to whether the shift from *security threat* to *security constellation* reflects the intentions of the European legislature. If this were the case, Article 28(3) would read, "imperative grounds of public policy or public security," thereby making the difference between 28(2) and 28(3) an issue of scale with regard to the seriousness of the threat. In addition, in its Guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, the Commission has explicitly stated:

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[30] *Id.* ¶ 29.

[31] *Tsakouridis* referred to the economic and social danger for society.

[32] Interestingly, AG Bot reached a totally different conclusion by applying the same consideration in *Infusino*, 2012 WL Celex No. 609CC0348. In AG Bot's opinion, Infusino's conduct did not reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it; he was not a threat to the security of the citizens of the Union by being a sexual predator and thus his conduct was not covered by the concept of "imperative grounds of public security." *Id.* ¶¶ 44–47. However, in a problematic way, the AG did import a very contestable and state-derived argument about the integration of Union citizens in the host Member State, which made the Citizenship Directive subordinate to Member States' views of integration of third country nationals, thereby ignoring the fact that the only conception of integration characterizing free movement of persons is one based on rights, non-discrimination on the ground of nationality and equal opportunities. Permanent residence in the meaning of the Directive 2004/34 is not predicated on a "test of integration," as the Netherlands Government submitted, which can be rebutted. For a discussion of the divergent notions of integration with respect to internal mobility and external migration, see Dora Kostakopoulou, Sergio Carrera & Moritz Jesse, *Doing and Deserving: Competing Frames of Integration in the European Union*, *in* ILLIBERAL, LIBERAL STATES: IMMIGRATION, CITIZENSHIP AND INTEGRATION IN THE EU 167 (Elspeth Guild et al., eds. 2009) and Dora Kostakopoulou, *The Area of Freedom, Security and Justice and the Political Morality of Migration and Integration*, *in* A RIGHT TO INCLUSION AND EXCLUSION? NORMATIVE FAULT LINES OF THE EU'S AREA OF FREEDOM, SECURITY AND JUSTICE 185 (H. Lindahl ed. 2009).

[33] *Infusino*, 2012 WL Celex No. 609CJ0348, ¶ 29.

> It is crucial that Member States define clearly the protected interests of society, and make a clear distinction between public policy and public security. The latter cannot be extended to measures that should be covered by the former. Public security is generally interpreted to cover both internal and external security along the lines of preserving the integrity of the territory of a Member State and its institutions. Public policy is generally interpreted along the lines of preventing disturbance of social order.[34]

Nonetheless, one cannot preclude a future amendment of Article 28(3) so as to include a reference to "public policy." Alternatively, the Court could define the types of threats[35] that fall within public policy by doing so in a clear and comprehensive, albeit non-exhaustive manner in its subsequent jurisprudence.

Notwithstanding the Court's supervision of Member States' compliance with EU law and the increasing weight and relevance of European Union citizenship, it may be argued that States' continued practice of deportation on the grounds of security and public policy, particularly in the cases of long-term resident EU citizens and minors, undermines the principle of equal treatment irrespective of nationality, a principle fostered by Union citizenship. In other words, it is time to abolish Article 28(3). Given the importance of the fundamental status of EU citizenship, and that at least ten years residence is necessary to qualify for naturalization in most Member States, it is inappropriate to preserve states' deportation power in these cases.[36] After all, the criminal justice system offers ample scope to punish the unlawful conduct of permanent EU citizens in the same manner as that of nationals without transforming the former into "dangerous outsiders" who "must be expelled from the national body."[37] Put differently, the contingency of nationality need not be a critical consideration if an EU citizen has a very solid link with the host state owing to birth on its territory, childhood and schooling, age and family connections, or long-term residence exceeding ten years. Such an approach would make the restrictionist/counter-restrictionist dualism obsolete.

Currently, with regard to security of residence, Union citizenship appears to be a lesser status than that of national citizenship. Essentially, it approximates third-country national long-term residence status. As Jesse has observed in another context,

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[34] *Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, at 10, COM (2009) 313 final (July 2, 2009).

[35] These could include armed struggle, terrorism, cyber-terrorism, serious organized crime, and cyber-crime. An interesting question that arises here is whether a Member State could view an EU citizen's conduct resembling Julian Assange's Wikileaks disclosures as conduct justifying expulsion from the host Member State on "imperative grounds of public security," even after a twenty-year residence there.

[36] Belgium provides absolute protection from withdrawal (and non-renewal) of settled migrants' resident permits since the status of settlement is deemed to be permanent. Additionally, residents born in Belgium and those who have lived in Belgium from the age of twelve onwards cannot be deported.

[37] Compare the emphasis on connections with the host society of a EU citizen who is a permanent resident in relation to the execution of a European arrest warrant given by the Grand Chamber in Case C-123/08, Dominic Wolzenburg, 2009 E.C.R. I-9621, ¶¶ 64–70.

> [S]trong protection from forced removal or revocation of statuses is a signal that a society accepts individuals as members. Full members of society, i.e., nationals, are not under any threat to be expelled. The threat of removal is thus always a reminder of differentiation in status and membership.[38]

This stratified notion of membership and the degradation of EU citizenship give rise to an additional internal contradiction. The establishment and development of EU citizenship demonstrates that community belonging does not have to be based on organic-national qualities, cultural commonalities, or individuals' conformity to national values, but instead can be built on *de facto* associative relations and connections brought about through residence in the host community and *de jure* equal membership as far as possible.[39] But the continued deportation of long-term resident Union citizens effectively makes nationality the ultimate determinant of belonging.[40] The legal contours of Union citizenship thus become fractured and the European Union becomes transformed from a community of law into a community of state-defined national memberships.

III. LOOKING FOR GUIDANCE INSIDE EUROPEAN UNION LAW

A. EU Migration and External Relations Laws

Having identified the analytical as well as empirical shortcomings of Article 28 of Directive 2004/38, the next crucial question is whether EU migration law contains any resources that could be utilized in the process of enhancing the security of residence for Union citizens in the host Member State. Directive 2003/109, the long-term residence directive, embraces the principle that domicile generates an entitlement to increasing security of residence.[41] Indeed, Recital 16 refers to the "reinforced" protection against expulsion that long-term resident third-country nationals (TCNs) ought to enjoy. Guided by, albeit not perfectly reflecting, the Tampere mandate, which provides a set of rights that are "as near as possible" to those enjoyed by citizens of the European Union, the Directive embeds the Court's case law concerning Article 39(3) EC (now Article 45(3) TFEU) and Directive 64/221 into Article 12. As such, expulsion can take place solely when a TCN constitutes an actual and sufficiently serious threat to public policy or public security. Notably, public health is excluded as a ground. In addition, Article 12(2) repeats the provision of the former Directive 64/221 and its successor Directive 2004/38 to affirm that economic considerations are not permitted grounds for making expulsion decisions. Finally, Article 12(3) incorporates the considerations derived from the jurisprudence of the European Court of Human Rights (ECtHR), in

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[38] Jesse Moritz, *The Civic Citizens of Europe: Legal Realities for Immigrants in Europe and the Legal Potential for their Integration*, PhD Dissertation, EUI: Florence, Oct. 2010, at 259.

[39] *See* Dora Kostakopoulou, *European Union Citizenship: Writing the Future*, 13 EUR. L. J. 623 (2007).

[40] By so doing, it facilitates the stigmatization of EU citizens and the possible erosion of their special, citizen status in the host Member States by official discourses on the deportation of foreign criminals. Such anti-migrant and xenophobic discourses have featured in the media in the UK, Italy, and the Netherlands recently.

[41] Council Directive 2003/109/EC, Concerning the Status of Third Country Nationals Who Are Long-Term Residents, 2004 O.J. (L 16/44).

particular with respect to Article 8 ECHR (respect for private and family life). However, the standard requirement that previous criminal convictions do not automatically constitute grounds for exclusion was omitted in the final version of the long-term residence Directive. Similarly, the standard EU law requirement that one's personal conduct must represent a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society, featured in Article 27(2) of Directive 2004/38 and discussed extensively in the previous section, is not mentioned.

The omissions should not be regarded as fundamental flaws, because the Court is bound to apply its existing case law by analogy to relevant cases. After all, the Commission's commentary on the Articles of the Directive clearly states that a person's personal conduct is the decisive criterion justifying an expulsion decision and that the proportionality test has to be met. An important fault of the long-term residence Directive, however, is its silence concerning the enhanced level of protection that longstanding residents and minors ought to enjoy by analogy with the provisions of the Citizenship Directive.

States' objections and concerns precluded long-term residents' equalization in this domain.[42] For example, in *Ziebell*, Advocate General Bot defended the distinction between the increased level of protection afforded to longstanding resident EU citizens in the territory of a host Member State under Article 28(1) of Directive 2004/38, and the lesser protection afforded to TCN residents, including those of Turkish nationality, under Article 14(1) of Council Decision 1/80, by focusing on their differing legal status.[43] Moreover, with respect to residence in other Member States, a long-term resident TCN may not be allowed to reside if "the person concerned constitutes a threat to public policy or public security." However, as Article 17(1) paragraph 2 states, "[W]hen taking the relevant decision, the Member State shall consider the severity or type of offence against public policy or public security committed by the long-term resident or his/her family member(s), or the danger that emanates from the person concerned." Finally, as Article 17(2) of Directive 2003/109 reiterates, such a decision must not be based on economic considerations.

Similarly, the Blue Card Directive also includes public policy, public security or public health as grounds for withdrawing or refusing to renew an EU Blue Card.[44] Of course, officials' decisions in such cases should be open to legal challenge in accordance with the relevant national law.[45] The requirement that individuals should not be considered to pose a threat to public policy, public security or public health is

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[42] Steve Peers, *Implementing Equality? The Directive on Long-Term Resident Third Country National,* 29 EUR. L. REV., 437, 452 (2004); DIEGO ACOSTA ARCARAZO, THE LONG-TERM RESIDENCE STATUS AS A SUBSIDIARY FORM OF EU CITIZENSHIP 121–39 (2011).

[43] Case C-371/08, Ziebell v. Land Baden-Württemberg, 2011 E.C.R. I-12739, ¶¶ 55, 62 (Opinion of AG Bot).

[44] Council Directive 2009/50/EC, art. 9(3)(a), On the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment, 2009 O.J. (L 155) 17.

[45] *Id.* art. 11(3).

also found in Articles 7(1) and 13(2) of the Researchers' Directive,[46] as well as in Articles 6(1)(d) and 16(2) of the Pupils' Directive.[47] The Family Reunification Directive's preambulary references to public policy or public security, on the other hand, are more explicit regarding the meaning of public policy. The Directive states that, in refusing to grant family reunification on duly justified grounds, the notion of public policy may cover a conviction for committing a serious crime.[48] The Directive further states that the notions of public policy and public security cover cases where a TCN belongs to an association which supports terrorism, supports such an association, or has extremist aspirations (Recital 14).[49]

But the Family Reunification Directive is also attuned to the ECtHR case law.[50] Article 6(2) of the Family Reunification Directive states that, "when taking the relevant decision, the Member State shall consider, besides Article 17, the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such person." Article 17 of the Directive requires the Member States take into account three criteria: family ties, the duration of residence in the host Member State, and the existence of links with the country of origin.[51] This list is shorter than the list of considerations applying to expulsion decisions taken against EU citizens—age, state of health, and social and cultural integration in the host Member State are not mentioned.[52] EU migration law, therefore, does not contain any resources that could be utilized in closing the protection gaps identified in Chapter VI (public policy, public security, or public health restrictions) of the Citizenship Directive. It is destined to approximate, rather than to supplement or expand, the European Union provisions on the free movement of Union citizens.

Although EU migration law cannot be of assistance, external relations law could well be a source for inspiration and direction. EEA nationals (including citizens of Norway, Iceland, and Liechtenstein) and those enjoying derived rights of residence as family members of Union citizens residing on the territory of the host Member State are protected against expulsion. The Citizenship Directive removed family members' dependency requirements in the case of death or departure of the Union

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[46] Council Directive 2005/71/EC, arts. 7(1)(d) & 13(2), On a Specific Procedure for Admitting Third Country Nationals for the Purposes of Scientific Research, 2005 O.J. (L 289) 15.

[47] Council Directive 2004/114/EC, arts. 6(1)(d) & 13(2), On the Conditions of Admission of Third-Country Nationals for the Purposes of Studies, Pupil Exchange, Unremunerated Training or Voluntary Service, 2004 O.J. (L 375) 12.

[48] *Id.* art. 6.

[49] Council Directive 2003/86, On the Right to Family Reunification, 2003 O.J. (L 251/12) (EC).

[50] *See* Moustaquim v. Belgium, 193 Eur. Ct. H.R. (ser. A) (1991); *see also* Beldjoudi v. France, 234 Eur. Ct. H.R. (ser. A) (1992), *available at* http://hudoc.echr.coe.int/sites/eng /pages/search.aspx ?i=001–57767.

[51] The Directive states, "Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family."

[52] *Cf.* Parliament and Council Directive 2004/58/EC, On the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004 O.J. (L 229) 35.

citizen,[53] in the event of divorce, annulment of marriage or termination of the registered partnership,[54] or after five years of residence.[55] In addition to this privileged category of beneficiaries, beneficiaries of the agreements concluded by the Community and third countries, such as the 1963 EEC-Turkey Association Agreement,[56] its 1970 Protocol,[57] and Decision 1/80 of the Association Council,[58] enjoy security of residence. Indeed, according to Article 14(1) of Decision 1/80, the right of residence of a Turkish worker can be terminated on the grounds of public policy, public security, or public health. The Court has held that the interpretation of Article 14(1) must mirror the interpretation given to these grounds as regards the rights of nationals of EU Member States and, in particular, the existence of a criminal conviction must constitute evidence of personal conduct posing a threat to the requirements of public policy and the threat must be genuine and sufficiently serious.[59] Accordingly, expulsion cannot be ordered on general preventive grounds.[60] The family members of Turkish workers, spouses and children, enjoy security of residence too. In fact, state officials can expel Turkish family members only for reasons related to public policy, public security, public health, and absence from the host territory for a significant length of time without justification.[61]

A lesser tier of protection is envisaged under the Maghreb Agreements (Tunisia, Morocco and Algeria) of 1976, which offer protection from discrimination in working conditions, social security, and dismissal. These Agreements subject the length of validity of the residence permit issued to a worker to public policy, public security, and public health considerations.[62] This is also true of the Europe Agreements (the agreements concluded with Central and Eastern European countries, Baltic states and Slovenia), which provided for a right to free movement for self-employment and protection from discrimination in working conditions.[63] The Europe Agreements included a provision subjecting the exercise of the right of establishment to limitations imposed by the Member States on grounds of public policy, public security, or public health.[64] But no innovative ideas have been generated by the application and interpretation of these Agreements with regard to

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[53] Parliament and Council Directive 2004/38/EC, *supra* note 9, art. 12.

[54] *Id.* art. 13.

[55] *Id.* art. 16.

[56] Council Decision 64/732/EEC, On the Conclusion of the Agreement Establishing an Association between the European Economic Community and Turkey, 1963 O.J. (217) 3685.

[57] Agreement Establishing an Association Between the European Economic Community and Turkey, Dec. 24, 1973, 1973 O.J. (C 113) 1.

[58] Case 242/06, Minister voor Vreemdelingenzaken en Integratie v. T. Sahin, 1980 E.C.J. (1980).

[59] *See* Case C-340/97, Nazli v. Stadt Nurnberg, 2000 E.C.R. I-957; *see also* Case C-467/02, Cetinkaya v. Land Baden-Württemberg, 2004 E.C.R. I-10895.

[60] Case C-349/06, Polat v. Stadt Russelsheim, 2007 E.C.R. I-8170.

[61] Case C-329/97, Sezgin Ergat v. Stadt Ulm, 2000 E.C.R. I-1487.

[62] Case C-97/05, Gattoussi v. Stadt Russelsheim, 2006 E.C.R. I-11934; Case C-416/96, El Yassini, 1999 E.C.R. I-1209.

[63] *See* Kees Groenendijk, Elspeth Guild & Robin Barzilay, *The Legal Status of Third Country Nationals who are Long-Term Residents in a Member State of the European Union*, CTR. FOR MIGRATION LAW, NIJMEGEN (2000), *available at* http://cmr.jur.ru.nl/cmr/docs/status.pdf.

[64] For a comprehensive analysis, see ELSPETH GUILD, NICK ROLLASON & RUPERT COPEMAN-HILL, A GUIDE TO THE RIGHT OF ESTABLISHMENT UNDER THE EUROPE AGREEMENTS (1996).

the public policy and public security derogations.[65] The interpretation given to these derogations is serialized in judgments and there is little, if any, departure from the established line of reasoning. What we are witnessing, therefore, is the contiguous effect of EU law and the Court's legitimate quest for coherence in the (strict) interpretation of the public policy, public security, or public health derogations. After all, interpretative divergence in this area would not only contradict the Court's ruling in *Nazli*,[66] but would also raise the specter of affording the Member States different degrees of discretion to exclude individuals depending on their nationality, thus permitting discrimination on the ground of nationality.

B. Public Policy and Public Security in the Case Law of the Court

Another source of inspiration is case law of the Court regarding public policy and public security derogations across the four fundamental freedoms. Our survey of 233 judgments between the period of 1974 and 2011 (26 judgments regarding free movement of capital, 106 regarding free movement of goods, 30 regarding free movement of persons, and 71 regarding free provision of services and freedom of establishment),[67] reveals a prevalence in the use of derogation grounds in the field of free movement of goods, followed by its use in the field of free provision of services and freedom of establishment, and finally in the field of free movement of persons and capital.[68]

Although all derogation grounds have been invoked over time to a greater or lesser extent, the discussion of all grounds in Court judgments indisputably increased after 2000. The survey included 10 judgments from the 1970s, 53 from the 1980s, and 56 from the 1990s, as opposed to 114 since 2000. The varied relevance of each

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[65] Arguably, the same applies to provisions pertaining to EU's external border law. The concepts of public policy, public security, and national security entailed by the 1990 Schengen Implementing Convention [hereinafter CISA], a part of the Schengen acquis which was integrated into the EU framework at Amsterdam (*see* Council Decision 1999/435/EC, Determining, in Conformity with the Relevant Provisions of the Treaty Establishing the European Community and the Treaty on European Union, the Legal Basis for each of the Provisions or Decisions Which Constitute the Schengen Acquis, 1999 O.J. (L 176) 17–30) have not been defined, thereby inviting divergence in definitions provided for by national laws. Article 96 of CISA provides pointers as to when an alien could be deemed a threat to public policy or public security for the purposes of entrance into the Schengen Information System.

[66] *See* Case C-340/97, Nazli v. Stadt Nurnberg, 2000 E.C.R. I-957.

[67] This selection of case law includes decisions that have, in one way or another, contributed to the definition of the scope of the derogation grounds under analysis; decisions that only tangentially refer to these notions, or that relate more to procedural than to substantive aspects of these notions, have not been included. All decisions have been categorized under one of the fundamental freedoms; when more than one freedom applied, the one most relevant on the facts and legal reasoning was chosen. All figures are presented here bearing in mind that they lack any degree of "scientific certainty;" they are used with the mere purpose of identifying trends and highlighting possible commonalities and differences amongst the different derogation grounds and fundamental freedoms.

[68] The selection of case law analyzed concentrates on the notions of public health, public policy, and public security, but also covers, to a more limited extent, the notion of public interest. The latter is a very broad category and of limited relevance in the context of free movement of persons, but it often overlaps with the notions of the other derogation grounds in the case law of the Court. Bearing this in mind, we have analyzed 95 judgments regarding public health, 56 regarding public policy, 16 regarding public security, 19 regarding all or a mix of derogation grounds, and 47 regarding public interest. When more than one ground applied and one of the grounds in question was particularly relevant, the most relevant ground invoked was afforded precedence for the purposes of this classification.

derogation ground in relation to the different freedoms is also striking. For example, public health has been more relevant in relation to free movement of goods (78 cases) and free provision of services/establishment (14 cases) than in relation to free movement of persons (3 cases) or free movement of capital (no case identified); public policy has been relevant in relation to free movement of goods, persons and provision of services/establishment (14, 18 and 20 cases respectively), but less relevant in relation to free movement of capital (4 cases); public security has been equally relevant with regard to all freedoms except free movement of persons (6 cases of free movement of goods, 5 cases of free movement of capital and 4 cases of free provision of services/establishment, but only 1 case of free movement of persons); finally, public interest has only been significant in relation to free movement of capital (17 cases) and free provision of services/establishment (27 cases), but not in relation to free movement of goods (1 case) or free movement of persons (2 cases). Thus, public policy is the ground most commonly invoked to derogate from free movement of persons; it has been invoked in 24 (80%) out of the 30 free movement of persons cases included in our survey as either the only ground (in 18 cases) or a complementary one (in 6 cases).

The notion of public policy has perhaps been the most contentious derogation basis. This owes much to the fact that there is not a "uniform scale of values"[69] across all EU Member States. As a result, the Court accepts a certain margin of appreciation in determining the precise definitional content of public policy. Over time, it has brought within its ambit issues relating to combating organizations which are deemed to be non-conducive to the public good;[70] limiting the free movement of individuals with a criminal record;[71] preventing the export of coins no longer of legal tender;[72] preventing the registration of stolen vehicles;[73] maintaining the non-commercial and pluralistic nature of a broadcasting system;[74] supervising financial dealers;[75] preventing tax evasion/avoidance (and more generally guaranteeing the effectiveness of fiscal supervision);[76] combating the use of drugs;[77] ensuring road

[69] Joined Cases 115 & 116/81, Rezguia Adoui v. Belgian State & City of Liège; Dominique Cornuaille v. Belgian State, 1982 E.C.R. 1665; Case C-268/99, Aldona Malgorzata Jany & Others/Staatssecretaris van Justitie, 2001 E.C.R. I-8615.

[70] *See* Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337.

[71] *See* Case 30/77, R. v. Pierre Bouchereau, 1999 E.C.R. I-1977.

[72] *See* Case 7/78, Thompson, 1978 E.C.R. 2247.

[73] *See* Case 154/85, Comm'n v. Italy (Re Import of Foreign Motor Vehicles), 1985 E.C.R. 1753; Case C-286/07, Comm'n v. Luxembourg, 2008 E.C.R. I-63.

[74] *See* Case 352/85, Bond van Adverteerders v. Netherlands, 1988 E.C.R. 2085.

[75] *See* Cases C-163/94, C-165/94 & C-250/94, Criminal Proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez & Figen Kapanoglu, 1995 E.C.R. I-4821.

[76] *See* Case C-28/95, A. Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2, 1997 E.C.R. I-4161.

[77] *See* Case C-348/96, Re Donatella Calfa, 1999 E.C.R. I-11.

safety;[78] combating gaming and betting;[79] prohibiting games simulating acts of homicide;[80] protecting young people;[81] and generally fighting criminal activities.[82]

Conversely, a range of other types of conduct have been excluded from the reach of the public policy derogation (at least on the precise facts of the case). These include the exercise of trade union rights;[83] engaging in legal but "morally suspect" activities;[84] using a particular shape of wine bottle;[85] protecting consumer rights;[86] fixing a minimum price for fuel;[87] refusing to accord sickness benefits to a director of a company formed in accordance with the law of another Member State;[88] imposing restrictions on the nationality of owners of companies responsible for the development of data-processing systems for public authorities;[89] requiring prior registration with a social security scheme of the host State or registration with one particular social security scheme;[90] imposing a quota on moorings for non-resident owners;[91] limiting the free movement of individuals not complying with legal formalities concerning the entry, movement and residence of aliens;[92] allowing a non-member country to revoke, suspend or limit air traffic rights;[93] and limiting the activity of non-national private security undertakings.[94] Of course, any conduct triggering the public policy derogation must involve a "genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental

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[78] *See* Case C-451/99, Cura Anlagen GmbH v. Auto Service Leasing GmbH (ASL), 2002 E.C.R. I-3193.

[79] *See* Case C-243/01, Criminal Proceedings against Piergiorgio Gambelli & Others, 2003 E.C.R. I-13031.

[80] *See* Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9609.

[81] *See* Case C-244/06, Dynamic Medien Vertriebs GmbH v. Avides Media AG, 2008 E.C.R. I-505.

[82] *See* Case C-524/06, Heinz Huber v. Bundesrepublik Deutschland, 2008 E.C.R. I-9705.

[83] *See* Case 36/75, Roland Rutili v. Ministre de l'Intérieur, 1975 E.C.R. 1219.

[84] Joined Cases 115 & 116/81, Rezguia Adoui v. Belgian State & City of Liège; Dominique Cornuaille v. Belgian State, 1982 E.C.R. 1665.

[85] *See* Case 16/83, Criminal Proceedings against Karl Prantl, 1984 E.C.R. 1299.

[86] *See* Case 177/83, Theodor Kohl KG v. Ringelhan & Rennett SA, 1984 E.C.R. 3651.

[87] *See* Case 231/83, Henri Cullet & Chambre Syndicale des Réparateurs Automobiles et Détaillants de Produits Pétroliers v. Centre Leclerc à Toulouse & Centre Leclerc à Saint-Orens-de-Gameville, 1985 E.C.R. 305; Case 34/84, Procureur de la République v. Leclerc, 1986 E.C.R. 529; Case 114/84 & 115/84, Piszko v. Leclerc et Carrefour Supermarché, 1985 E.C.R. 2961; Case 149/84, Procureur de la République v. Binet, 1985 E.C.R. 2969; Case 201/84, Procureur de la République v. Gontier, 1985 E.C.R. 2977; Case 202/84 Procureur de la République v. Girault, 1985 E.C.R. 2985.

[88] *See* Case 79/85, D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, 1986 E.C.R. 2375.

[89] *See* Case 3/88, Comm'n v. Italy, 1989 E.C.R. 4035.

[90] *See* Case C-363/89, Danielle Roux v. Belgian State, 1991 E.C.R. I-273, although the Court recognized "compliance with social security provisions" as a possible public policy objective.

[91] *See* Case C-224/97, Erich Ciola v. Land Vorarlberg, 1999 E.C.R. I-2517.

[92] *See* Case 48/75, Procureur du Roi v. Jean Noël Royer, 1976 E.C.R. 497; Case C-459/99, Mouvement Contre le Racisme, l'Antisémitisme et la Xénophobie ASBL (MRAX) v. Belgium, 2002 E.C.R. I-6591; Case C-215/03, Salah Oulane v. Minister voor Vreemdelingenzaken en Integratie, 2005 E.C.R. I-1215.

[93] *See* Case C-466/98, Comm'n v. United Kingdom, 2002 E.C.R. I-9427; Case C-467/98, Comm'n v. Denmark (Open Skies), 2002 E.C.R. I-9519; Case C-476/98, Comm'n v. Germany (Open Skies), 2002 E.C.R. I-9855.

[94] *See* Case C-465/05, Comm'n v. Italy, 2007 E.C.R. I-11091.

interests of society," a phrase that has been frequently repeated by the Court since *Bouchereau*.[95] In addition, the application of the public policy derogation does not depend on the imposition of penal sanctions.[96] As has been widely acknowledged, purely economic objectives are also excluded from the scope of the public policy derogation ground.[97]

Besides the above mentioned general principles guiding the application of the public policy derogation reflecting the "strict interpretation" approach favored by the Court, one cannot find insights relating to its definition that could transfer from the fields of free movement of goods, establishment and services, and capital, to the free movement of persons. Its ambit is varied and flexible. In addition, judgments have started to refer to an unclear notion of "public order," seemingly meaning public policy, signifying inconsistency either in the use of legal terminology or, more prosaically, in translation.[98]

IV. WHY INTERNATIONAL MIGRATION LAW IS MORE RELEVANT THAN EVER

If neither EU migration and external relations laws nor the Court's case law can shed light on the meaning of the public policy and public security derogations, perhaps international migration law could prove a useful resource. International migration law is especially helpful as legal orders become increasingly multilayered and interlaced. As in other fields, norms in law do not arise in a vacuum. They have a capacity to permeate borders of all sorts (they migrate across spaces, legal orders and time) because they hold the promise of offsetting and solving both social coordination problems and rights violations.

The post-World War II era focused the spotlight on the need to protect migrant workers against arbitrary expulsion. As such, the protective provisions of Directive 64/221 mirrored provisions formulated through international conventions. Admittedly, this is hardly surprising; most legal instruments are essentially mosaics of unique rearrangements of pre-existing elements and legal fragments derived from various sources. The 1949 ILO Migration for Employment Convention (No. 97), which entered into force in 1952, contained a number of protective measures. Recommendation 86, which accompanied the 1949 Convention, envisaged the migrant workers' protection against host state decisions to remove migrants due to insufficient means or a weak employment market.[99] It included the recommendation that, "in principle no migrant shall be removed who has been [in the host state] for

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[95] Case 30/77, R. v. Pierre Bouchereau, 1977 E.C.R. 1999.

[96] *See* Case 16/83, Criminal Proceedings against Karl Prantl, 1984 E.C.R. 1299.

[97] *See* Case C-17/92, Federación de Distribuidores Cinematográficos v. Estado Español et Unión de Productores de Cine y Televisión, 1993 E.C.R. I-2239; Case C-243/01, Piergiorgio Gambelli, 2003 E.C.R. I-13031.

[98] *See* Case C-465/05, Comm'n v. Italy, 2007 E.C.R. I-11091; Case C-319/06, Comm'n v. Luxembourg, 2008 E.C.R. I-4323, ¶ 29. The languages of these cases are, respectively, Italian and French, and the equivalent to "public policy" in those languages is "ordine pubblico" and "ordre public," thus resembling much more "public order" than "public policy."

[99] Recommendation 86 was adopted in Geneva on June 8, 1949.

more than five years."[100] The Council of Europe further highlighted the increasing importance of the rights of non-citizen residents in host states. For example, the 1955 European Convention on Establishment[101] contributed to changing assumptions about the allegedly unfettered sovereign prerogatives of states regarding rights of "aliens" in their jurisdiction. The obligation of states to facilitate the movement of nationals of other states was accompanied by the qualification that the activities of the persons concerned "would [not] be contrary to *ordre public*, national security, public health or morality."[102] The same applied with respect to expulsion. Noteworthy was the Convention's clear distinction between public order and national security—a distinction that is not reflected in the EU's rules on free movement. Of course, the European Convention on Establishment offered Member States a margin of discretion in interpreting these terms[103] that was certainly wider than the provisions of Directive 64/221 and the subsequent case law. For example, public order could include the exclusion of non-citizens on the ground of their political activity. But unlike the relevant EC rules prior to the adoption of the Citizenship Directive 2004/38, the 1955 Convention envisaged a system of graduated security of residence. Interestingly, the Convention provided that lawful residents for a period of at least two years could only be expelled on "imperative considerations of national security," and that these residents could challenge a decision and appeal against it before a competent authority of the host state.[104] Legal residence of over ten years strengthened the required expulsion reasons to "reasons of national security or for the commission of offences of a particularly serious nature against *ordre public* or morality."[105]

Subsequent conventions, such as the European Social Charter[106] and the Revised European Social Charter,[107] include the right of migrant workers and their families to protection and assistance. Article 19(8) of the Revised European Social Charter states that lawful residents should not be expelled "unless they endanger national security or offend against public interest or morality." On the other hand, Articles 4(3) and 9(5)(a) of the European Convention on the Legal Status of Migrant Workers[108] reiterate, respectively, the grounds of "reasons of national security, public policy or morals" as exceptions to the rights of migrant workers to admission and non-withdrawal of the residence permit. In addition to this regional regime of protection, Article 4 of the Fourth Protocol to the ECHR prohibits the collective expulsion of foreigners.

In the early 1970s, Uganda expelled the Asian population, shattering people's lives overnight. This highlighted the need for a more robust protection of migrant

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[100] *See* GEN. CONF. INT'L LABOR ORG., Recommendation No. 86, Migration for Employment Recommendation (July 1, 1949) art. 18(2).

[101] European Convention on Establishment, July 13, 1955, 529 U.N.T.S. 141.

[102] *Id.* art. 1.

[103] *See id.*, Protocol, at §§ I & III(a).

[104] *Id.* art. 3(2).

[105] *Id.* art. 3(3).

[106] European Social Charter, Counc. Eur., Oct. 18, 1961, CETS No. 35.

[107] European Social Charter (Revised), Counc. Eur., May 3, 1996, CETS No. 163.

[108] European Convention on the Legal Status of Migrant Workers, Counc. Eur., Nov. 24, 1977, CETS No. 93.

workers against arbitrary expulsions. The UN looked at the possibility of taking steps to protect the human rights of non-citizens, and Baroness Elles produced a draft declaration on the human rights of individuals who are non-citizens of the country in which they live ("Elles draft declaration") in 1974.[109] Article 4 of the Elles draft declaration included the rights of non-citizens to "freedom of movement and residence within the territory of the host country, subject, however, to such restrictions as are absolutely necessary for compelling reasons of public policy, public order, national security, or public health or morals." Subsequently, Article 7 of the Draft Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the open-ended working group of the UN General Assembly stated, "the collective expulsion of aliens on the ground of criteria of race, religion, culture or any other discriminatory criterion is prohibited."[110]

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families privileged migrant workers' residence security over states' power of exclusion. This Convention affirmed the right of migrant workers to leave their home state without any illegitimate restrictions. Restrictions are only legitimate if they are provided by law, are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and are consistent with the other rights recognized in the Convention (Article 8(1)). Migrants should not be subject to collective expulsions, and expulsion decisions must comply with strict procedural safeguards.[111] Moreover, Article 56(2) of the Convention provides an additional tier of protection for documented workers, stating:

> Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorization of residence and the work permit . . . . In considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.[112]

More innovative and protective provisions have been brought forward in the new millennium. The Council of Europe's Committee of Ministers' Recommendation Rec (2000) 15 on the security of residence of long-term migrants states:

> [M]ember states may provide that a long-term immigrant should not be expelled . . . after ten years of residence, except in the case of conviction

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[109] *See* RICHARD LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 51 (1984).

[110] United Nations, Draft Declaration on the Human Rights of Individuals who are not Citizens of the Country in Which They Live, U.N. Doc. A/C.3/38/11 (1983).

[111] *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 93, art. 22.

[112] The Convention was adopted in 1990 by the UN General Assembly (Resolution 45/158 of Dec. 18, 1990). No EU Member State has ratified it yet. For a discussion of the reasons, see generally PAUL DE GUCHTENEIRE, ANTOINE PECOUD, & RYSZARD CHOLEWINSKI, MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHTS (2009).

> for a criminal offence where sentenced to in excess of five years of imprisonment without suspension . . . . After twenty years of residence, a long-term immigrant should no longer be expellable.[113]
>
> [L]ong-term immigrants born on the territory of the member state or admitted to the member state before the age of ten, who have been lawfully and habitually resident, should not be expellable once they have reached the age of eighteen. Long-term immigrants who are minors may in principle not be expelled.[114]

Arguably, the EU could readily utilize such provisions.

Similarly, the Council of Europe Parliamentary Assembly Recommendation No. 1504 (2001) on the non-expulsion of long-term immigrants invited national executives to:

> [T]ake the necessary steps to ensure that in the case of long-term migrants the sanction of expulsion is applied only to particularly serious offences affecting state security of which they have been found guilty . . . [and] guarantee that migrants who were born or raised in the host country and their under-age children cannot be expelled under any circumstances.[115]

In light of the foregoing discussion, it is evident that international migration law contains important resources that could be utilized to reform Article 28 of the Citizenship Directive. A case for greater isomorphism between EU law and international migration law could be defended and actualized by either confining Article 28(3) (i.e., the expulsion of EU citizens following ten years of residence in the host Member States and of minors) to national security grounds alone, or by making long-term resident EU citizens and minors non-expellable "except if the expulsion is necessary for the best interests of the child."[116] Certainly, for minors who have been born or raised in the country, expulsion constitutes such a seriously harmful act that it is impossible to justify from a normative point of view. Such a normative and legal "spillover" would enhance the fundamental status of Union citizenship and make a concrete difference to the private and social lives[117] of those beneficiaries of Directive 2004/38. After all, as Akerlof and Kranton have observed in another context, "some of the most dramatic examples of regime change involve changes in norms regarding who is an insider and who is an outsider."[118]

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[113] COUNC. EUR. COMM. MNSTRS., Recommendation to Member States Concerning the Security of Residence of Long-Term Migrants, CM/Rec(2000)15, (Sept. 13, 2000), at 4(b)

[114] *Id.* at 4(c).

[115] PARL. ASS. COUNC. EUR., Recommendation No. 1504 (Mar. 14, 2001), *available at* http://assembly.coe.int/Documents/AdoptedText/ta01/EREC1504.htm.

[116] *See* Parliament and Council Directive 2004/38/EC, *supra* note 9, art. 28(3)(b).

[117] The ECtHR has acknowledged that the expulsion of settled migrants may interfere with the enjoyment of their right to private life which includes the social ties forged between settled migrants and the community in which they live, in addition to possible interferences with the right to respect for their family life under Article 8 ECHR; *see* Mikulić v. Croatia, Eur. Ct. H.R. App. No. 53176/99 (2002), ¶ 53.

[118] George A. Akerlof & Rachel E. Kranton, IDENTITY ECONOMICS; HOW OUR IDENTITIES SHAPE OUR WORK, WAGES AND WELL-BEING 125 (2010).

V. WHY NATIONAL PARTICULARISM IS COUNTERPRODUCTIVE: PROPOSALS FOR LAW AND POLICY REFORM

The foregoing discussion highlighted the impact of humanitarian considerations and norms on the progressive enhancement of the security of residence of migrant workers in host countries and defended the case for a greater parallelism between EU and international migration law. The discussion underscores the logic of circumscribing state discretion regarding expulsion of long-term migrant residents and recognizing in law newcomers' complex entanglement with the host society. Such entanglement with the host society makes these residents *de facto* members, entitled to conduct their business and lives without the threat of forced removal or revocation of their residence statuses under the "flexible" standards of public policy or public security. Ten years of residence, which is also the period required for eligibility for naturalization and acquisition of citizenship in several Member States, provides a reasonable cut-off point for the removal of long-term EU migrant offenders.[119]

The growing significance of European Union citizenship and its increasing alignment with fundamental rights also lends support to the above argument. Surely, the continued removal of long-term resident EU offenders cannot be justified in light of the truly fundamental status of EU citizenship. Indeed, if EU citizens can be turned into expellable "foreigners," notwithstanding their longstanding entanglement with, and participation in, the host society that EU law has facilitated through a variety of free movement provisions including the permanent resident status established by Directive 2004/38,[120] then one could possibly argue that theirs was always a second class membership.

There has also been a progressive realization in Europe of the need to provide unequivocal protection to migrant children born or raised in the host country. Many are taking note of the necessity to bridge the dissonance between children's own perception of themselves as "insiders" ("one of us") and governments' perception of them as continued "outsiders" ("not one of us"), even when children are on the wrong side of the law. Migrant children who have spent all or most of their childhood in a society, who have been brought up and educated in line with its guiding principles and frameworks, who reside there, should not be treated as "non-belongers" or undeserving residents when they violate the laws. After all, there is hardly any evidence to suggest that delinquency is a consequence of "alien" nationality. To pretend that such a relationship exists would be to uncritically tolerate nationalistic proclamations about "dangerous aliens" contaminating the alleged purity of the national society or discursive narratives about undeserving EU

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[119] Elspeth Berry defends an argument for the existence of a presumption against the deportation of "virtual" nationals, that is, migrants who were born or raised in the host Member State. She argues that this would improve legal certainty and enhance non-discrimination. *See* Elspeth Berry, *The Deportation of "Virtual National" Offenders: The Impact of ECHR and EU Law*, 23 J. IMMIGR., ASYLUM & NATIONALITY LAW, 11–23 (2009).

[120] *Cf.* Parliament and Council Directive 2004/38/EC, *supra* note 9, recital 18, which states that "in order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right to permanent residence, once obtained, should not be subject to any conditions."

citizens who violated a country's hospitality rules and therefore must be expelled. As Judge Martens observed in *Beldjoudi*, "[M]ere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards expulsion."[121]

Children who have spent all or most of their childhood in a certain country are so intimately connected with their social surroundings that their removal not only shatters their social world, but also destroys their personal identities formed within this social world. In the same way that it would be regarded as disproportionate and deeply troubling for a state to decide to revoke a person's citizenship status because he/she committed a criminal offense, it is equally disproportionate and troubling if a migrant child's membership status were automatically erased after committing the same offense. Punishment[122] in both cases cannot, and should not, result in erasing societal membership status. Thus, powerful reasons exist to treat national minors and migrant minors equally. We should question the assumption that law-compliance and the possession of a certain nationality are incommensurable.

To date, EU law has provided the most comprehensive system of ensuring security of residence for EU citizens. But, as we saw in Section 2, the correct implementation of Directive 2004/38 remains a challenge.[123] International migration law can furnish ideas and insights for reform that is consistent with EU law norms, and it is capable of enhancing EU law's integrity and effectiveness in national arenas. In this respect, a revised Article 28(3) of Directive 2004/38 should limit states' power to expel long-term resident EU citizens or minor EU citizens. Under a new framework, states should only be able to expel these citizens on grounds of imperative national security or "along the lines of preserving the integrity of the

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[121] Beldjoudi v. France, 234 Eur. Ct. H.R. (ser. A) (1992).

[122] It is noteworthy here that the ECtHR has ruled that expulsion following criminal conviction does not constitute double punishment, and states have the power to expel regardless of whether the alien entered the country as an adult, or at a young age, or was perhaps born there; *See* Uner v. Netherlands, Eur. Ct. H.R. App. No. 46410/99 (2006), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i =001–77542. Uner was a Turkish migrant resident in the Netherlands since the age of twelve, and, as he was settled and married to a Dutch national and fathered children, had a strong entitlement to reside in the Netherlands. In fact, "he had integrated to society to the extent that he did not think of himself as a stranger." The ECtHR relied on the margin of appreciation enjoyed by states in assessing migration cases and asserted the differential position of nationals from non-national residents belonging to the category of second generation or long-term immigrants in terms of rights of residence. However, it also outlined a number of considerations that should be taken into account in such migration decisions, such as the age of children of the marriage, the difficulties that either the spouse or the children may experience in the country to which the individual is to be expelled, as well as the solidity of social, cultural and family ties with the host country and the country of destination. *Id.* ¶¶ 57–58. *See also* Baghli v. France, Eur. Ct. H.R. App. No. 34374/97 (1999). In Omojudi v. United Kingdom, Eur. Ct. H.R. App. No. 1820/08 (2009), the ECtHR acknowledged that the totality of social ties between settled migrants and the community should be taken into account. It ruled that the deportation of a Nigerian national who had lived in the UK for twenty-four years interfered with his family life as well as his private life. *But cf.* Maslov v. Austria, Eur. Ct. H.R. App. No. 1638/03 (2008); Bousarra v. France, Eur. Ct. H.R. App. No. 25672/07 (2010); A.W. Khan v. UK, Eur. Ct. H.R. App. No. 47486/06 (2010); in these cases, the ECtHR did find a violation of Article 8 ECHR.

[123] *See Communication from the Commission to the European Parliament and the Council: On Guidance For Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States,* COM (2009) 313 (Feb. 7, 2009).

territory of a Member State and its institutions,"[124] or, alternatively, these citizens should not be expellable at all. Additionally, the inclusion of a fourth paragraph in Article 28 of Directive 2004/38 stating that, "collective expulsions, including expulsions of ethnic groups, are prohibited," is necessary in view of the expulsion of Roma in Italy and France.

The alternative is national divergence. This may be consistent with the doctrine of statist positivism, but it results in creating layers of injustice as well as holes in EU law's system of protection for EU citizens. Because Member States have such wide discretion, as many as 28 differing legal provisions exist concerning the definitions of public policy and public security. Indeed, the ECJ has acknowledged that the term "public policy" is a national law concept subject to national interpretation.[125] For example, in *Gaydarov*, the Court found:

> While Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the European Union context and particularly as a justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union.[126]

Further, the progressive development of Union citizenship and its constitutional metamorphosis into a fundamental status[127] challenges the status quo. EU citizenship, which has been developed mainly outside the domain of state sovereignty, cannot be compromised by acts designed to preserve state sovereignty and nationalistic understandings of societal membership and belonging.

In addition, although all Member States recognize that long-term residents and certain groups ought to have a more secure residence status and stronger procedural guarantees against their expulsion from the host state, their respective provisions differ with regard to personal scope, the stipulated duration of residence, and the degree of respect for ECtHR case law. As such, there is no universal interpretation of "public policy" or "public security," no universal definition of "imperative grounds of public security," and no consensus over the kind of protection afforded to minors

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[124] *Id.* at 10.

[125] Case C-268/99, Jany v. Ministre de l'Interieur, 1975 E.C.R. I-8615, ¶ 60.

[126] Case C-430/10 Gaydarov v. Direktor na Glavan direktsia "Ohranitelna politsia" pri Ministerstvo na vatreshnite raboti, 2011 E.C.R. I-11639, ¶ 32.

[127] *See generally* Dora Kostakopoulou, *The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions*, *in* THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES (2012); *see also* Dora Kostakopoulou, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, 65 MODERN L. REV. 233, 233–267 (2005). On the post-*Rottmann* developments, see Koen Lenaerts, *"Civis Europeus Sum:" From the Cross-Border Link to the Status of Citizens of the Union*, ONLINE J. ON FREE MOVEMENT OF WORKERS WITHIN THE EUR. UNION 3, (Dec. 2011), *available at* www.ec.europa.eu/social/BlobServlet?docId=7281&langId=en (last visited Oct. 23 2012); Dimitry Kochenov, *A Real European Citizenship: The Court of Justice Opening a New Chapter in the Development of the Union in Europe*, 18 COLUM. J. EUR. L. 55, 55–109 (2012); *New European Citizenship: A Move Beyond the Market Bias*, *in* RICHARD BELLAMY & UTA STAIGER, EU CITIZENSHIP AND THE MARKET (2011).

with few or no links to their original home state. For example, in Germany, the length of residence, residence status, or birth as second- or third-generation offspring does not guarantee security of residence, while in Belgium, settled migrants are only removed if they have gravely harmed public order and security.[128] Additionally, in Belgium, state officials may not expel those who were born in Belgium or who have lived there since the age of 12.[129] This means that second or third-generation migrant children are entitled to full security of residence despite never having acquired Belgian nationality. Besides Belgium, Austria, France, Hungary, Portugal, and Sweden also prohibit the deportation of second-generation migrants if deportation is based on a migrant's criminal record. In these states, migrants who arrived in the host country as children are also protected, though the states diverge as to the precise age of newcomers. Conversely, under the German Residence Act (AufenthG),[130] a migrant child born in Germany would not enjoy security of residence if she committed even a relatively minor offense.

In light of the foregoing discussion, it is clear that national regulatory autonomy in this field leads to the creation of several "tiers" of protection of EU citizens. Because the current system is unpredictable, EU citizenship status has been rendered a weak and feeble overlay or, perhaps, even a fiction. The task is to maintain the gravity of liberal norms, the importance of the fundamental status of EU citizenship, and the new and broader social space it has created. This can only be done if between the fictional and the real, between "foreignness" and EU citizenship, between the state and the individual, and between sovereignty and security, space emerges for critical reflection and institutional change. The continued expulsion of long-term resident EU citizens and minors should not be viewed as a mere manifestation of Member States' prerogatives regarding migration and security. This kind of deportation tests the meaning and significance of European Union citizenship and undermines the ideals underpinning liberalism and the European integration project.[131] Adherence to these ideals, at the very minimum, requires that no interpretation of the Citizenship Directive should be arbitrary, especially when doing so harms human beings and creates injustice.

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[128] *See* Loi relative à l'accès au territoire, au séjour, à l'établissement et à l'éloignement des étrangers [Belgian Immigration Law] of Dec. 15, 1980, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Dec. 31, 1980, 14584, art. 20.

[129] *Cf.* Lord Justice Sedley's remark in SSHD v. HK (Turkey), [2010] EWCA Civ 583 (appeal taken from Eng.), ¶ 35 ("The number of years a potential deportee has been here is always likely to be relevant; but what is likely to be more relevant is the age at which those years began to run. Fifteen years spent here as an adult are not the same as fifteen years spent here as a child. The difference between the two may amount to the difference between enforced return and exile.")

[130] Aufenthaltsgesetz [AufenthG] [Germany Residence Act], Jun. 30, 2004, Bundesgesetzblatt [BGBI] [Federal Law Gazette] at 41 2004 I (Ger.).

[131] *Cf.* Advocate General Jacobs' statement of "civis europaeus sum" in Case C-168/91, Konstantinidis v. v Stadt Altensteig - Standesamt & Landratsamt Calw - Ordnungsamt, 1993 E.C.R. I-1198, ¶ 46.