

11/7/2006

“Polanyi in Luxembourg: Market Participation, Embeddedness, and Rights in the
European Union”

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Paper prepared from Conference of International Political Economy Society (IPES),
Princeton, N.J., November 17-18, 2006

I have benefited from the comments by Renaud Dehousse, Nicholas Jabko, Joseph
Jupille, Liesbet Hooghe, and Gary Marks.

(Draft, please do not quote or circulate)
Abstract

This paper examines the linkages between the jurisprudence of the European Court of Justice (ECJ) and different types of market activity (market structures) described in terms of social embeddedness, externalities, and equality norms. The Rome Treaty and successor treaties make the case for market making in goods, services, labor, and capital. Indeed, the central rationale for the EU, embodied in the Treaties, is to foster the freedom of movement in goods, services, and productive factors. Yet, product and factor markets are far from homogenous. Transactions in portfolio capital are relatively arms-length (disembedded) while free movement of labor across borders is deeply implicated in social structure, particularly the social meaning of the family. Participation of women in the labor force raises concerns about equality, a normative property we expect not to be present in all economic transactions. Economic exchanges in sports such as soccer raise questions about community identity. The key questions investigated have to do with different patterns of rights as well as justifications of social rights that are generated out of various types of economic activity, exemplified by free movement of labor, gender equality, and tourism. I argue that these three issue areas embody different combinations of market properties that create different expectations for judicial reasoning and outcomes. I evaluate these expectations by analyzing the jurisprudence of the ECJ, interpreted by legal commentators as well as observable patterns of rights in these areas.

I. Introduction.

The European Union (EU) presents itself as a veritable Garden of Eden of economic exchange. The Rome Treaty had as its primary goals the creation of a free trade area and integrated customs union, goals that were accomplished ahead of schedule by July of 1968. Successor treaties, especially the Single European Act (SEA), confirmed this market integration and set in motion a plan to liberalize factor markets in capital and labor, a deregulatory and re-regulatory project that was in place by the beginning of 1993. Further, market-making in Europe was not simply part of a policy package reflecting a temporary coalition of political elites. Instead, the move to 1993 had a firm legal foundation in the Treaties themselves. As Carlos Ball put it, “The Treaty explicitly seeks to create, between Member States, an integrated common market through the elimination of barriers to the free movement of goods, persons, services, and capital. Community law elevates to the normative status of fundamental rights, capitalist principles that promote free trade and movement across national borders.” (Ball, 1996:308)

Nearly everyone recognizes these economic facts and many have debated their implications. From this recognition we could go in a number of different directions. The main line of research has been to debate and empirically evaluate the political significance of market integration. Neo-functionalism tries to show that the completion of the market has a strong basis in European society and economy and that a coalition of economic and political forces (including an important supranational actor, the Commission) was responsible for the re-launching of Europe. Secondary processes such as functional linkages and spillover were also important. Market integration was itself endogenous to political decisions made at both the domestic and European levels and this integration in turn created a demand for further political integration which eventually led to the Treaty on European Union (TEU). Liberal intergovernmentalism (Moravcsik, 1998), on the other hand, interprets these changes as driven by commercial and

productive interests which, while they may have both domestic and transnational origins, nevertheless work their way through the domestic political process and are consolidated in intergovernmental bargains. These bargains reflect the interests of the member states in the coordination of international economic and policy externalities.

There is a second direction, rarely taken, in which one could go. This has to do with examining the nature of the economic (or socio-economic) transactions with an eye toward discerning whether the content of these transactions makes a difference for a variety of outcomes, e.g. further political integration, development of market-related social policy, spread of citizenship rights etc. Let me briefly address what is meant by the vague phrase “nature of economic transactions”, leaving for later a more detailed account. In contrast to neoclassical economic theory, which sees economic exchanges as homogenous and occurring among atomistic agents, Polanyi’s approach is based on the idea of different forms of social embeddedness. (1992 [1957]; 1957) By “nature” I mean the quality of economic transaction, defined in terms of the degree of social embeddedness or the type of embeddedness in question. Economic transactions in sports might involve feelings of community, those in body organs might raise ethical and moral issues, and those relating to movement of workers involve questions relating to the structure and meaning of family. Even money, which is in many ways the most abstract, fungible, and impersonal of the factors of production, assumes many social forms, as Zelizer’s book **The Social Meaning of Money** suggests. (1997). I hope this gives at least a rough sense of how I intend to use the phrase “nature of economic transactions.”

The rest of the paper will be organized as follows. First, I will try to motivate the questions I am asking. In doing so, I will sketch two stylized views of markets, one of price-based markets in neoclassical economics and the other based on a view of markets derived from economic sociology. Second, I will try to provide the rudimentary foundation of a theory, once again drawing heavily on economic sociology for the broad conceptual framework and adapting this framework to the present research circumstances. Third, I will say a word about the cases chosen for closer study. Fourth, I will describe the broad patterns of evidence in gender equality and free movement of persons, emphasizing free movement of workers but also opportunistically drawing on examples from other areas of free movement, such as tourism.

II. Motivation, Two Views of Markets.

The main question I want to ask is “what is the relationship between different types of economic transactions and a variety of outcomes?” Two outcomes in particular are of interest. First, I am interested in the justifications found in the judgments of the justices of the European Court of Justice (ECJ) and associated legal commentary.¹ Second, I am interested in the actual spread of rights within specific “issue areas”, or within my framework, “areas of social economics”. I am particularly interested in the spread of rights beyond what is required by the efficiency yardstick.

Two things in particular motivate this broad framing of the question. First, it seemed to me that there is a huge gap—indeed empty space is a more appropriate term—in our knowledge about the relationship between market exchanges of certain types and numerous outcomes of interest. I would not elevate this motivation by calling it a puzzle, because a puzzle, used in the social scientific sense, signifies something anomalous from an expected pattern. The concern is more that of a barefoot empiricist troubled that we could ignore basic differences about the comparative nature of exchanges in labor, sports, gender, capital, and numerous goods and services ranging from Mickey Mouse to Mondrian, from Pushkin to pornography. Perhaps the market, as Marx put it, is the universal solvent but perhaps not. The case for looking (research) was strong. Second, it seemed to me, based on the research of others (see Leibfried and Pierson 1995; Stone Sweet, 2004; Alter and Vargas, 2000) that the EU had developed some social policy at the European level. Some would say precious little social policy has come into place but what has come into existence is far from trivial. In theoretical terms, the baseline expectation for a European Union-driven social policy, given the overwhelmingly economic content of the Treaty itself as well as the voting rules for social policy in the Council of Ministers (unanimity), is close to zero.

¹ Since beginning this project, I have found that it is extremely difficult to find evidence of this sort in the legal discourse of the Justices of the ECJ. There may be several reasons for this, chief of which is that judges in the continental tradition see their task quite differently from American judges. Their chief task is to identify what the law is and they are reluctant to make broader commentary “giving reasons” for their decisions grounded in a legal or moral philosophy. I have not given up on the task of searching the judgments of the ECJ in the relevant areas but preliminary research leads me to believe I will not get far with this effort.

Before going further, it may be helpful to sketch two views of the market, since much of what follows depends on how markets are theorized and interpreted.

If we ask about the social content of the market, in particular how and to what degree it is embedded, the ends of the spectrum to the answer can be defined by Leon Walras (standing in for neoclassical economics) and Karl Polanyi (standing in for economic sociology). For Walras, economic transactions are arms-length exchanges between self-contained economic agents. In Walrasian markets, we find atomistic actors who enter markets as anonymous holders of goods and productive factors. Markets are impersonal, dispersed structures of buyers and sellers in pursuit of private goals. Agents choose to sell (or not) in accordance with their exogenous preferences and opportunity sets. Buying and selling come to rest when opportunities for exchange are exhausted.

The Walrasian model contains a premise about the non-embeddedness of economic agents. This premise says that economic actors are atomistic not just in the methodological individualistic sense but in a stronger substantive (theoretical) sense. Actors are not encumbered by social relationships nor embedded within social structures that substantially affect their capacity and behavior for economic exchange. This view of markets is captured by Charles Schultz. "The market is the most important social invention mankind has achieved, in part because it effects a detachment [from the rest of society]. Market arrangements ...reduce the need for compassion, patriotism, brotherly love, and cultural solidarity" (cited p. 16 Bowles and Gintis, **Democracy and Capitalism**). (need cite on Schultz)

For Polanyi and economic sociologists, the market is embedded within social institutions. Of course, the market is itself an institution—not a state of nature. It is true

that markets have achieved a high degree of structural differentiation. Advanced capitalist societies have banks, firms, factories, trading houses, and physically specialized structures for producing and exchanging. There is extensive education, training, professionalization, and credentialing available in economics and business. The market is also motivationally distinct to some degree and is institutionally separated from the centers of government. Yet, as Polanyi argues, religion, culture, and government, family and networks, may be as important for the economy as monetary institutions. Economic sociology has carried this view further with the aim of integrating social structure with economic theory.

These two different views of economic exchange suggest different answers to the questions I pose with regard to the EU. The neoclassical approach suggests that the goal of market perfection based on negative integration can be realized, paying close attention to efficiency concerns. In short, it is possible to create economic Europe with minimal implications for politics and social rights. The optimal political design for Europe would be a minimal regulatory state consistent with the modest and carefully defined political functions of the EU. For the Polanyi approach, market exchange is likely to implicate social and political questions. This is the tension to be explored in what remains.

III. Theory

The basic theoretical framework of the paper is provided by economic sociology. Economic sociology can be seen as an extension of Polanyi's basic insight that social structure and economic exchange are related and that in the interest of a more comprehensive, and theoretically sound explanation, it behooves us to strive for a unified

account.² What are the basic components of economic sociology? I list some of the most important points of the economic sociology program, not attempting to limit myself to those of particular relevance to this paper.

- Economic structures, such as markets and firms, are social structures with roles, conventions, norms, and power groupings. They are not only embedded within society, they are themselves societal institutions and should be studied as such. (Fligstein, 2001).
- Many macro economies, such as France, the United States, Great Britain, Italy, Japan and Sweden, are strikingly different from one another in political and economic organization. For example, they are different in their reliance on banks vs. capital markets, how they organize control over monetary policy, whether or not they engage in sectoral intervention as opposed to aggregate controls such as money supply and exchange rate policies, and whether their labor markets have a high or low degree of government intervention. Either the iron laws of capitalism do not exist or there is ample latitude and institutional flexibility with regard to how the bottom line is reached. Even what constitutes the “bottom line” is contested. Is it profit, capital accumulation, market share, industrial or overall economic innovation, or simply the continuous capacity to consume more than the rest? As Frank Dobbin demonstrates in his research (Dobbin, 1994; 2004), even what would seem to be the core idea of economic efficiency has quite different institutional expressions in Great Britain, the United States, and France,

² I do not mean to say that economic sociology is merely an updating of Polanyi’s work. It is a rich field of literature with many strands, some of which are quite independent of Polanyi and even at odds with his work.

“...centering on entrepreneurialism, market mechanisms, and industrial coordination, respectively (Dobbin, 2004: 4)

- While many aspects of economic organization across countries are different (see above), some cross-country commonalities got that way because of power, imposition and imitation rather than as a result of a evolutionary tournament of survival of the fittest among practices that were independently invented in different country settings. While many of these differences are framed as technical and managerial in nature or as a matter of picking the “best practices” to organize the world more efficiently, from an economic sociology viewpoint, these disputes are a natural consequence of the presence of conflict and power in markets conceived as social structures. (Dobbin, 2004:21)

The inevitable conclusion of economic sociology is that social structure plays a role in economic exchange and this role is not limited to a frictional one of slowing down or altering the direction of basic economic forces. This view comes in an overall counterpoint fashion to the economic view in which economic agents are atomized and disconnected from one another in their decision-making, except for strategic interdependence, which in turn is limited to oligopoly and duopoly. As James Coleman has shown, (Coleman, 1984:84-85) the atomized arms-length view of economic exchange, when linked to the sophisticated apparatus of micro economics, can pull off impressive explanatory achievements. The problems are most acute when making the transition to the macro level. Here economists are likely to use a “representative agent” or “principal” to stand in for a group of individuals. But when a relevant concept of economics, such as trust, is organized in complex ways, or when an individual attitude is formed through the use of proxies, or through social deliberation, or processes such as contingent cooperation (Taylor, 1987), it is perilous to model these processes through representative agents or additive functions (parallel to aggregate demand functions). The distilling example given by Coleman has to do with acceptance of bills of exchange, that in certain times and locations, were based on “trust chains” that closely tracked chains of

production, at the same time that trust in notes was based on confidence in a single institution, the bank (Coleman, 1984:85)

As a working hypothesis, I accept the basic premises of economic sociology and attempt to adapt this viewpoint to my research. What follows is an empirical probe based of economic activity in gender equality, free movement of labor and tourism.³

Why equal pay for men and women, free movement, and tourism? I selected cases with a strong economic component, to capture the operation of the market, but cases which also had some potential for going beyond what the market would dictate as minimal efficiency rights. Also, these are cases with at least the potential for conflict between logics (e.g. efficiency, equity, the social needs of persons). So the design is not structured to "test" a hypothesis. Rather these cases provide the raw material to probe, in an exploratory way, the relationship between rights and the functioning of markets.

Free movement of labor is meant to encourage the creation of a unified labor market at the regional level but because of ties of workers to family, friends, and the home culture and institutions, simple efficiency standards might not apply. The gender equality provisions of the Rome Treaty are meant to promote equality among men and women in the work force and to discourage social dumping. Thus Article 119 simultaneously incorporated equity and efficiency logics. Tourism is considered a service within the meaning of the Treaty and thus is subject to the free movement provisions. These three issue areas provide variation on three underlying dimensions: degree to which they exhibit market failures, degree of embeddedness (thus Polanyi), and the degree to which they reflect equality norms. Our theoretical expectations are shaped by the idea that different combinations of "scores" on the underlying dimensions will yield different outcomes in terms of the dependent variable, the pattern of social rights and the justification used in the judgments of the ECJ. Below is Figure 1, which presents a data cube giving the presumed locations of our three issue areas.

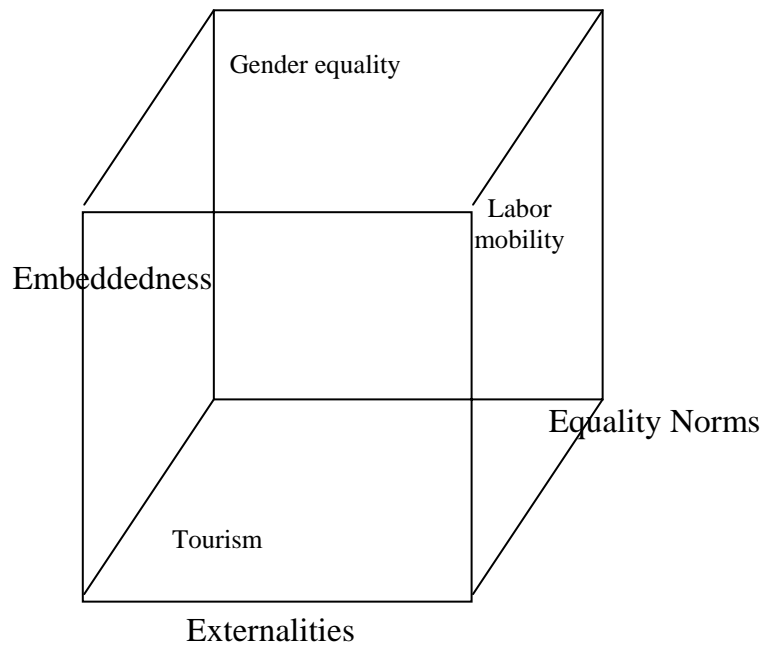
³ I was not able to finish enough research on tourism to report in this article. Indeed, a first cut at the jurisprudence in this area suggests that little case law exists on individuals traveling from one country to another. There are some cases of tourism offices and their efforts to establish services in other member states but they do not reflect the characteristics in which I am interested.

Figure 1 below attempts to locate the three issue areas along the three theoretical dimensions. We see labor mobility as based on a strong externality and market failure logic. For labor to be mobile across borders, barriers to mobility have to be removed (negative integration) or coordinated (positive integration). Stoppages at borders have to be eased and social security systems have to be coordinated or aggregated so as to integrate the working experiences in several countries.⁴ Labor is also embedded, in a way that capital (especially financial capital) is not. Workers have spouses, children, social networks etc. and they cannot move across borders to work without other life circumstances being affected. This “externality plus” position of labor implies that social rights will be interpreted broadly, beyond what is needed on narrow efficiency grounds. Completion of the market for tourism, by contrast, has only a limited basis in market failure (though it has some). It is not deeply embedded and has no special claim to the operation of equality norms. The Treaty treats tourism as a service subject to free movement so we expect to see market making norms. Gender equality, as the term implies, embodies equality and fairness norms, is highly embedded, and has a weak basis (though we argue an ambiguous one) in market failure.⁵

⁴ For example, a worker working in Italy for fourteen years and Germany for four would not be eligible for retirement insurance in either country (five years required in Germany and fifteen in Italy).

⁵ Gender equality was originally justified (Article 119 of Rome Treaty) to prevent social dumping. Norms of fairness may compete with or complement norms of efficiency.

Figure 1 Externalities, Embeddedness, and Equality



(1) Equal Pay for Equal Work, Article 119. The institutionalization of gender equality rights in the workplace would have been difficult to predict when the Rome Treaty brought the EEC into existence. The treaty basis for gender equality was thin, and it did not carry the same weight as free movement, tariff harmonization and other market completion objectives. Articles 117-122 set out the general objectives of the Treaty in the area of social policy, without laying down specific content measures. Even the rationale for inclusion of Article 119 was not one based on the independent value of equality so much as it reflected the desire of France (who already had such a provision in their national constitution) to forestall social dumping.

Article 119 of the Treaty of Rome states that each member state shall ensure and maintain "the application of the principle that men and women should receive equal pay

for equal work," going on to define pay as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer." The article was based on, but narrower than, earlier International Labor Organization (ILO) standards calling for equal pay for work of "equal value."

A landmark case in the field of equal pay is *Defrenne v. Sabena II* (Case 43/75, [1976] ECR 455). This is a case of forced job change. Having reached the age of 40, Ms. Defrenne, a Belgian national and airline stewardess for Sabena Airlines, was asked (i.e. told) to take another job with Sabena or be "let go" (fired). After working through the national judicial system unsuccessfully, Ms. Defrenne brought her case to the European Court of Justice. The ECJ ruled in Defrenne's favor, pointing out that a male steward in the same position was not required to switch jobs. The Court went beyond the particulars of the case to state that "the fact that certain provisions of the treaty are formally addressed to member states does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down" (Case 43/75, *Defrenne v. Sabena*, [1976] ECR 455, point 31). It went on to say that article 119 imposed a duty on states to ensure application of the equal pay principle and that, given the precise nature of that obligation, domestic courts could use the provision to enforce individual rights. What is interesting is that the ECJ did not make its case in terms of externalities, rather in terms of direct effect, obligation of states given Art 119 and direct effect, and equality of treatment.

The *Defrenne* case was the start of a long line of equal pay cases. The Court could have interpreted the equal pay provisions narrowly or broadly. The Court's jurisprudence

took two routes. First, the ECJ expanded the meaning of “pay”. Second, it gradually broadened the idea of discrimination to include indirect as well as direct forms.

Meaning of Pay. This was broadened to include statutory sick pay, payments under private occupational pension schemes, redundancy payments; rules that govern automatic passage to a higher salary grade, and paid leave or overtime pay for staff members participating in events or courses to further their skills. The Court also went on to include equal treatment (and pregnancy) under the meaning of equal pay for equal work.

The next big challenge for the ECJ lay in extending the concept of discrimination from direct to indirect forms. Direct discrimination is relatively simple and straightforward. Two people in same position in same factory are treated differently in pay. But indirect discrimination is more subtle. It need not be intended. Yet certain practices could be discriminatory in consequence even if not in intent. For example, there might be job segregation in a factory, or disproportionate numbers of women in part time labor force, where part time workers are not given full benefits.

The ECJ responded by bringing indirect discrimination under the provisions of equal pay and equal treatment. In doing so it tackled the issue of segmented labor markets. In the *Bilka* case, a German department store excluded part-time workers from its occupational pension scheme. From a strictly economic standpoint, it is easy to imagine why this might be attractive from the employer’s point of view. A dual labor market is created—full time workers and part-time workers—that can be manipulated by the employer, for example by intensifying work in the part-time sector and slowing it down in the full-time sector. Or one could use the part-time sector as an implicit threat to the wage demands of the full-time sector, and so on. Many options are available in this “flexible” labor market. The ECJ, however, took a moderate line and struck down the

department store's right to deprive part-time workers of pension benefits, but only because they had not demonstrated a real (material) justification.

To summarize a complicated process, the ECJ extended the "Equal Pay" provisions of Article 119 to include indirect discrimination, pensions, company perquisites such as company cars, vacations, and equal work for equal value, which was not part of the original language of the Treaty. Under the Equal Treatment Directive, the Court extended rights to women who became pregnant during their employment, arguing that deprivation of employment benefits on grounds of pregnancy constituted gender discrimination (see the Dekker and Webb cases). On the procedural level, the ECJ allowed for more generous standards regarding use of comparators (a male standard) and shifted the burden of proof in some cases in favor of female claimants. All in all, the ECJ pursued gender equality in an expansive way, and extended coverage under Article 119 to areas where it was neither obligatorily committed by the Treaty nor driven by the logic of externalities and social dumping. While the justices of the ECJ are not inclined to give expansive opinions for why they decide what they decide, nor do they couch their judgments in broad judicial philosophies, they have used the language of equality as a justification. In short, there is some evidence that the social dimension (equality of treatment) captured by gender relations is reflected in the ECJ's decisions.

Free Movement of Workers and Social Security. Beginning with the Rome Treaty, Article 48 [post-Amsterdam article 39] has established that workers in any member state have the right to move to another member state to work there, and to settle in another country with their families. The self-employed have the right of establishment under article 52 and the right to provide services under article 59. Furthermore,

secondary legislation (Regulation 1408/71) lays down that persons residing in the territory of one member state where certain provisions apply to nationals are subject to the same obligations and enjoy the same benefits under its legislation as nationals of that state (Cornelissen, 1996: 440). This principle, free movement of workers, is an economic right in that workers are entitled to move from country to country in search of work. This right is backed by specific Treaty provisions which have direct effect and which are enforceable in courts.

The jurisprudence of the ECJ can be divided into three phases, or components, which are however not neatly separated chronologically. The first phase was one of laying the foundations for free movement, giving the relevant Treaty provisions direct effect, and clearly establishing the meaning of worker. The Treaty says many things about a variety of issues, only some of which are given direct effect. The legal status of many Treaty provisions remains declaratory and non-binding.⁶ One interesting question about the Treaty, not examined here, concerns which provisions are given direct effect and which are not. The second phase of the Court's jurisprudence has to do with the use of the logic of externalities in expanding the scope of free movement. The third phase is the "externality plus" stage in which the social standing of workers and tourists is taken into account.

First phase, the foundation. The right to free movement has been interpreted as a fundamental right with direct effect. Direct effect means that provisions of the Treaty are directly effective (without national mediation) and that individuals can seek legal

⁶ For example, article 2 lists among its tasks to be pursued by the Member States the promotion of "a higher level of employment and social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among the Member States." While this provision is not unusually vague (one reason why provisions may not acquire direct effect), very little has been done by the ECJ to give effect to it.

recourse if they think their personal rights have been abridged under the Treaty. The ECJ established direct effect for workers and construed as violations of the Treaty efforts on the part of governments to establish conditions that intentionally or not, had the effect of restricting the access of foreign workers. The Court stated in *Royer* (case 48/75 *Joel Noel Royer*, 1976, E.C.R.) that articles 48, 52, and 59 “which may be construed as prohibiting Member States from setting up restrictions or obstacles to the entry into and residence in their territory of nationals of other Member States, have the effect of conferring rights directly on all persons falling within [in] their ambit.” (cited in *Ball*, 1996: 347) The Court also clarified the meaning of worker, refusing to allow the Dutch government to disallow the label “worker” to a person who worked only part-time in another country for a wage the Dutch government considered too low for subsistence. In doing so (in *Levin v. Staatssecretaris van Justitie*, 1981), the Court drew on earlier jurisprudence from a 1963 case in which it made clear that the definition of worker was a matter of Community law. This was not an arbitrary move on the part of the Court but was instead seen as a necessary for the implementation of the free movement provisions of the Treaty. If states could decide what it meant to be a worker, members could in effect escape the reach of EU law by defining workers in a narrow way.

Second phase, externality-driven jurisprudence. In a sense, the logic of market failure is the master variable behind the jurisprudence of the free movement of workers. The very reason the Treaties contain provisions for free movement of workers is the belief that the barriers to worker movements across borders are great, and that some of these barriers are legal and institutional, i.e. not due to a “failure of preferences” or the simple absence of job opportunities. A fundamental preference to remain inside one’s home country, employed or not, cannot be addressed by the Treaty. For a market failure to be categorized as such, preferences and opportunities must be present, yet there is a

failure of exchange. But when national practices exist, such as discriminatory treatment in favor of domestic workers, access to special benefits on the part of nationals, and failure to coordinate social security provisions across countries, Treaty provisions can be invoked by injured parties to claim redress. In this sense, the Treaty aims to correct failures of labor mobility when movement otherwise would have taken place. A fluid labor market requires non-discriminatory treatment.

Two striking examples of externality-driven jurisprudence concern the need for aggregation of the working lives of workers who labor in different countries and the Court's case law regarding the tying of benefits to residence. Consider the aggregation issue. What happens when a worker completes part of his or her life's work in one country and another part in a different country? It is quite possible that the minimum number of years required to collect benefits (or full benefits) will not be met in either country. A worker who works 14 years in Italy and 4 years in Germany satisfies the minimum conditions neither for an Italian pension (15 to 20 years) nor a German pension (minimum of 5 years) (Cornelissen, 1996:451). Here the market and nationally defined benefits are disconnected in such a way as to prevent benefits from being collected. Surely separate national treatment will result in market failures, and a less than optimal number of workers will cross national frontiers for this reason.

The Court has begun to tackle cases of this type. One recent case arose out of the denial by Dutch authorities of cash benefits to a Dutch woman, Ms. Klaus, who had worked successively in the Netherlands, Spain, the Netherlands, and Spain once again (C-482/93, Klaus, [1995], E.C.R.). She was denied benefits because of a provision of Dutch law stating that no cash benefits should go to a person who, at the moment of entry into the insurance scheme, was not capable of work. After being turned down by the Dutch social security institution, she appealed her case to a Dutch Tribunal who put

questions to the ECJ under the Article 177 procedure. The Court rendered a Judgment that supported Ms. Klaus, saying that "the working life of the person concerned should be seen *as a whole*, and not just from the limited standpoint of a particular job in one country, at one period of time (Cornelissen, 1996:453).

What about the link between residence requirements and the distribution of pensions? Some states require residence in the country of employment in order for pensions to be paid. This would mean that a Danish worker who had worked his or her entire life in Denmark could not choose to retire in Portugal, and collect benefits. Such territorially-based provisions are obviously prejudicial to migrant workers. Having taken advantage of the region-wide market, and having accumulated a pension, the worker must choose between the benefits and preferred place of living. Legislation passed by the Council of Ministers (Article 10 of Regulation 1408/71) has waived residence requirements and the ECJ has aggressively interpreted Council Regulations so as to broaden the scope of their application. The Court has decided, again using the free movement provisions of the treaty as well as secondary legislation that a pension already acquired cannot be subject to a residence condition. Also one cannot be denied entitlement to a pension solely because of residence in another member state (Cornelissen, 1996:455).

These are straightforward examples of case law that is intended to further the free movement of workers. But the logic of externalities can only be pushed so far. There is a "bridge case" that I think captures the limits of the externality rationale. The case is *Cowan v. Tresor Public*. (Case 186/87, *Cowan v. Tresor Public*, 1989 E.C.R.) Mr. Cowan, a British national, was mugged on a trip (holiday) to Paris. He applied for monetary compensation under a provision of the French criminal law. That provision allowed for compensation only for French nationals, or if there were a reciprocal

agreement between France and the victim's country (which there was not). The French Administrative Tribunal referred the case to Luxembourg, where the French government argued that compensation was a right which is a manifestation of national solidarity. The Court rejected France's efforts to couple benefits with nationality since free movement of persons was involved. Instead, the ECJ found in favor of Cowan, arguing that freedom of services implies the right to be protected from harm in the member states in question, and on the same basis as the nationals residing there. (Ball, 1996:204)

The ECJ apparently showed some concern that discriminatory treatment would create disincentives for tourists, thus raising the externality flag, but this must surely be the most expansive interpretation of externality on historical record. In any case, the Court made no effort to explore the nature of these incentives. It was enough for the ECJ that Mr. Cowan was a Community citizen and that he was seeking access to services which were his right under Community law. (Ball, 1996:204) While this does not necessarily argue in favor of the embedded hypothesis, it does argue against a strict economic interpretation. The Cowan case may represent the exhaustion of externality-driven jurisprudence in free movement. In any event, I use it as the bridge to the next section.

Third phase, externality plus social considerations. The construction of social policy through the legislative route has not been an area of success for the EU. This is not surprising for several reasons. First, social policy often involves redistribution and redistribution is by definition conflict-laden. Second, the national member states jealously guard their turf on welfare issues. Third, the voting rules in the Council of Ministers regarding social policy require unanimity. Getting agreement from all members on matters of some dispute is not easy. Yet, the Court has been able to stitch together a social policy through its case law. This is in no way a substitute for statutory

social policy. This can be readily seen in the fact that Court led social policy is grounded in the principle of non-discrimination and free movement – not in the harmonization of national policies. Any country can make just about any social policy it likes, so long as it applies such policies uniformly to nationals of all member states.

It may have been the intention of the Treaty's framers to separate free movement from social policy but this was difficult in practice. This point can be made in a variety of ways since the Court's jurisprudence is quite extensive in this regard. One context in which family and other social considerations are in evidence relates to access to benefits for non-national workers with family.

What happens when a person employed in a foreign member state becomes unemployed? Whose laws apply? How long does the worker have to work in a different member state before he or she becomes eligible for benefits? Do these benefits apply fully? Suppose the worker has a spouse and dependents? Do the full allowances apply, including increased support for spouse and dependents, and if they do apply, does this coverage extend to the circumstance in which dependents live in the home country (not the country where the worker is employed)? These are tricky questions for which no full-blown answer is provided, either by the Court, the treaties or by secondary legislation. Many countries have provision for increased benefits for workers with dependents, including migrant workers with dependents, as long as they reside in the state in question. Dutch legislation, for example, ties such increases for dependents to the requirement that these dependents actually live in the Netherlands.

The Court has begun to test these national legislative requirements and while it is still too early to know what the outcome will be, there are some indications. In some

ways, the Court has interpreted the right to unemployment benefits restrictively, e.g. an unemployed person can claim the right to unemployment benefits only under the legislation of the state in which he or she became unemployed (Cornelissen, 1996:457). However, the free movement provisions of the Treaty are quite powerful and exchange of persons (i.e. wage contracts across borders) implicates a host of social phenomena not likely to be anticipated. Perhaps it is not surprising that the Court takes a broad view of them as applied to the movement of workers.

Provisions of the Treaty dealing with free movement of workers could have a narrow or broad scope, depending on the jurisprudence of the ECJ. In order for workers to move freely from country to country, the Court has decided that similar guarantees, protections, and safety nets must exist among countries as within. Countries have different social security plans, so worker movement from country to country raises questions that cannot be easily solved in the absence of harmonization of laws. Nevertheless, concrete problems arise when individuals cross borders and full effect of the free movement provisions of the Treaty would not exist unless some coordination of laws took place.

The first case considered is *Commission v. Italy*. (case 63/86, 1988 European Court Reports). While this case does not directly involve family considerations relating to free movement, it does interpret free movement in a broadly social way, that is, in such a way as to take into account the social situation of workers who cross national boundaries. This case involved an Italian law that required that persons who rented or bought property which was itself renovated with public funds by Italian nationals, on the

not unreasonable rule that consumption of benefits and payment for the goods should be linked. The Court rejected the position of the Italian government and made a quite broad defense of free movement, by arguing that the Treaty's position on free movement "is concerned not solely with the specific rules on the pursuit of occupational activities but also with the rules relating to the various general facilities which are of assistance in the pursuit of those activities." (Opinion of Advocate General Da Cruz Vilaca in Case 63/86, *Commission v. Italy* E.C.R., p. 53; as cited by Ball, 1996:357) In the same opinion of the Advocate General, it was noted that for free movement to be effective, access to broad benefits was necessary to foster integration of "self-employed workers and their families into the host country..." (Opinion of Advocate General Da Cruz Vilica in Case 63/86, p. 42, as cited by Ball, 1996: 358).

From here the Court's jurisprudence moved into cases that more directly involved family considerations. This is illustrated in the *Acciardi* case (Case C-66/92, [1993] ECR I-4567). Mr. Acciardi, an Italian national who worked in the Netherlands, received Dutch unemployment benefits and special benefits for persons with partial incapacity to work. A provision of the Dutch legislation stated that the amount of the benefits was to be increased for dependents, so long as the members of the family of the unemployed worker resided in the Netherlands. Mr. Acciardi's wife and child resided in Italy. The ECJ ruled that residence was irrelevant to the reception of benefits and ordered the Dutch agency to pay the additional allowances (Cornelissen, 1996: 458).

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The final case has to do with free movement by a person who never tried to exercise his right to access services in another country, *Mary Carpenter v. Secretary of State* 1. (Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, [2002] E.C.R.) This is a complex case which suggests the intricate relationship between law, markets, and social institutions. Ms. Carpenter was not a national of any EU state. She visited the U.K. for six months and overstayed her permit and subsequently married Peter Carpenter, a U.K. national. Then Ms. Carpenter applied for permission to stay in the U.K. as the spouse of Mr. Carpenter. Her application was refused and the Secretary of State decided to deport her to the Philippines. Ms. Carpenter argued that her right to reside in the U.K. derived from Mr. Carpenter's freedom to provide services to other E.U. states (under Art 49EC). Her deportation would either require Mr. Carpenter to give up his business or separate his family. The ECJ decided that even if the derivative right of residence is not provided by secondary legislation, it can be imputed from the clause "protection of the family life of nationals of member states in order to eliminate obstacles to exercise of fundamental freedoms". This is a good example of the embedded nature of economic relationships, even in a case where the citizen of the member state never tried to exercise his rights with regard to freedom of services.

Discussion .

In this paper I have explored some relationships between types of socio-economic transactions and the jurisprudence of the ECJ. In so doing I have found the literature on economic sociology helpful. Both gender equality and free movement of workers suggest a pattern of social rights that goes beyond what we would expect based on a narrow, market-making view of the Treaties. While I have nothing close to “conclusions” to offer, the initial results are encouraging. To move more in the direction of evaluating hypotheses, cases need to be added where little social embeddedness is hypothesized, such as transactions in portfolio capital. Such a design would provide greater leverage on the questions I am trying to answer.

Yet the simple hypothesis of Polanyi and economic sociology, that markets are not of one cloth, and that more sociality enters market transactions than we normally allow for in our models, seems to be born out in this exploratory probe. With apologies to Charles Beard, the Rome Treaty and its successors provide as close an example of an economic constitution as we are likely to find. Yet, more than purely economic forces seem to push the EU’s legislative and judicial output. Let me close with a few summary observations.

As a general proposition, there can be little doubt about the link between markets and rights. Yet, as the case materials suggest, there are openings for the expansion of rights beyond the efficiency logic. First, it is often overlooked that market-based rights can be important per se. The phrase "rights tied only to the market" surely understates

the importance of market-driven rights. The market is a broad and intrusive institution, reaching into numerous aspects of our lives.

Second, the Court has often rendered judgments that require more than the minimum to make the market work efficiently. The inclusion of pensions under equal pay, as well as sick leave, vacation allowances, bonuses, part-time work and housing benefits, may aid the creation of the market but these measures are by no means necessary. The ECJ has gone beyond market-making in some of its judgments. Even a critical observer such as Catherine Hoskyns concedes that the ECJ has expanded the meaning of workers and equal pay in the areas of pregnancy and part-time work. (Hoskyns 1996:159) It has decided that discrimination against women who are pregnant is illegal, even when pregnancy is known at the time of hiring, this despite the fact that training multiple persons to fill the same position is costly, duplicative, and inefficient. It has also made inroads against indirect discrimination, thus taking some of the economic advantage out of segmented labor markets, which are after all, highly flexible and respond to cyclical fluctuations in the economy. In the area of free movement, it has brought cases such as compensation for mugging in a foreign country under Community law, denying France the right to offer compensation only to victims who are French citizens, even though this is surely insignificant as an obstacle to intra-European tourism.

In addition, the Court's jurisprudence regarding free movement of workers tracks a course in which the legal foundations for a unified labor market are created first, followed by an ample externality-driven jurisprudence, which is in turn followed by extensive case law (of which only a small amount is dealt with here) on the relationship between family and workers. While this process is open-ended, it appears that family

considerations are taken into account in a broad way. Whether doing so gives full meaning to externality or reflects a non-economic logic is somewhat beside the point.

Many areas are untouched or less so by the ECJ's jurisprudence. Sexual harassment outside the workplace, pornography outside the workplace, and reliance on the dual earner model remain areas where little has been done. (Elman 1996:57) Yet, an overall assessment of rights beyond efficiency includes some areas of progress too. As Carlos Ball puts it:

"...it has not been possible to maintain a strict separation between economic policy (as represented by the need to guarantee freedom of movement of capital, services, and goods, and the existence of a free labor market) and social policy....The actual enforcement of rights associated with freedom of movement, however, has provided those same individuals with legal protection against discrimination that go beyond strictly economic matters and spill over into areas of social policy" (Ball 1996:360)

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