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Capabilitarian Social Justice in EU: Care, Dependency, and the Conception of the Person

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Table of Contents

A. Introduction 190
B. The Capability Approach 191
C. Nussbaum's Conception of The Person 194
D. The Person in EU Law 200
E. The Disabled Person in EU Law 205
I. Models of Disability 205
II. The Disabled Legal Subject as Construed From The EU Law ..... Definition of Disability 215
III. Pitfalls of Constructing the Disabled Legal Subject Along ..... Productivity Lines 218
1. Sheltered Employment 218
2. Care Work and Dependency 221
3. Activation Policies 224
F. Who is EU Law For? 227

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Abstract

While the European Union (EU) is nominally committed to the promotion of social justice by virtue of Article 3 of the Treaty on the Functioning of the EU (TFEU), the substantive meaning of this objective remains an open question. By first presenting an ideal of social justice for the EU, and then comparing it to the acquis, this paper hopes to make a small contribution to a (necessarily larger) debate about the substantive content of the social justice objective and about the place of political philosophy within legal scholarship more broadly. To do so, Martha Nussbaum's capabilities approach (CA) is used as a starting point. Nussbaum proposes a list of ten central human capabilities, all of which must be ensured (at least) at a threshold level in order for a given polity to be considered minimally just. Rather than considering the individual capabilities, the analysis focuses on the conception of the person underlying Nussbaum's CA, contrasting it with the conception which emerges from the analysis of the legal subject in EU law. It argues that the latter is not only unrealistic but unjust. Focusing on the construction of the disabled legal subject, as well as its intersections with the statuses of 'worker' and 'migrant', the paper contrasts EU law and policy with Nussbaum's normative ideal. It finds that the conception of the person underlying the construction of the EU legal subject is insufficiently receptive to care and vulnerability as constitutively human traits, and moreover struggles to conceive of personhood outside of a productivity framework.

A. Introduction

While the European Union (EU) is nominally committed to the promotion of social justice by virtue of Article 3 of the Treaty on the Functioning of the EU (TFEU), the substantive meaning of this objective remains an open question – a question ill-suited for consideration from a purely doctrinal perspective for two reasons. For one, social justice can be considered an essentially contested concept. It is inherent in the notion of social justice that there are multiple competing and potentially mutually exclusive conceptions. Secondly, there is no official definition of social justice or its implications in either the treaty texts, secondary legislation, or case law; its use in institutional practice is ambiguous. Similarly, the documents of the Convention on the Future of Europe reveal little as to any intended meaning of the objective. Thus, not much can be gleaned from textual or teleological interpretation. Instead, this paper builds on political philosophy and its rich tradition of theorizing social justice. In doing so, it aims to demonstrate the value of normative approaches to EU law and, in particular, of approaches which take as their basis theories of justice, showing how they can embed intuitive diagnoses of injustice in EU law within a coherent normative framework. Moreover, political philosophy can help us consider which ends European integration should ultimately serve, a question which can easily recede into the background in positivist analyses but which is of immense importance at this junction. In times of Euro-skepticism and exit, crises of social legitimacy and of trust in European institutions, it is imperative to ask the question, "Whom is EU law for?"

To do so, the paper utilizes a theory of social justice developed by Martha Nussbaum and, in particular, the understanding of personhood it is based upon. Relying on Nussbaum's theory, this paper argues that the conception of the person underlying EU law is not only unrealistic but unjust. The analysis focuses specifically on the issues of care and dependency, as manifest in the conception of disability. This is because Nussbaum's treatment of these problems constitutes the most pertinent difference between her conception of the person and that which forms the basis of the various contract-based theories of justice predominant in the liberal tradition. Of course, by focusing on what is lacking, the paper cannot provide a full account of how capabilitarian social justice might be implemented in the EU. Instead, highlighting how the conception

of disabled persons[1] specifically fails to do justice to personhood as understood by Nussbaum, it shines a light on the *injustice* inherent in a conception of the person which does not sufficiently consider vulnerability and dependency. It is submitted that this can provide a starting point for thinking about what a legal system which aims to "promote social justice" ought to incorporate. The paper does so by first introducing the capabilities approach more generally before focusing on Nussbaum's iteration (section A), contrasting the conception of the person at the basis of her theory of social justice with those found in other social justice theories (section B). Having established the normative framework for assessing the conception of the person underlying the manner in which EU law constructs its legal subject, the following section argues for the relevance of analyzing EU law from this perspective and presents some general findings about the EU legal subject (section C). Subsequently, the analysis considers the specific case of disabled persons as particularly pertinent both for Nussbaum's theory and social justice in the EU more widely, demonstrating how the definition of disability in EU law betrays a reductionist and instrumentalist understanding of human beings which is not only problematic as a matter of principle but also arguably fails to capture the true nature of human beings (section D). Lastly, it is argued that the conception of the person outlined in this paper has concrete effects in EU (disability) law and policy, using the examples of sheltered employment, care work, and activation policies (section E).

B. The Capability Approach

Martha Nussbaum's theory of justice is based on the capabilities approach (CA), first developed by Amartya Sen in the context of development economics. Objecting to Gross Domestic Product (GDP) being considered the most important measure for quality of life, Sen put forth the CA as an approach which centers the real freedoms of people.[2] The CA holds that the most

1 There is some disagreement within both activist and scholarly communities regarding the correct nomenclature. Some prefer person first language and so speak of (and call themselves) "persons with disabilities". The idea here is to place the focus on the individual rather than their disablement. Others, including myself, use "disabled persons" in order to convey that disablement is an *active process* rather than a static identity. While impairments may of course be innate, the process of disablement is societal, environmental, and political – it occurs in interaction with a world that is ill-prepared to accommodate disabled persons.

2 A. Sen, 'Equality of What?', in *Tanner Lectures on Human Values* (1982) [Sen, 'Equality']; A. Sen, *Inequality Reexamined* (1992) [Sen, *Inequality*]; A. Sen, *Commodities and*

pertinent metric for assessing well-being is "what people are actually able to do and be";[3] that is, their real opportunities for certain 'beings and doings'. These real freedoms or opportunities are termed capabilities. The focus on capabilities rather than income or resources is because not only do humans have varying needs, they also vary in their ability to convert resources into capabilities. For example, a pregnant woman will require more nutrients than the average person, and a person in a wheelchair may not need additional resources to be mobile but rather require changes to the built environment. In focusing on capabilities rather than humans' factual achievements, the CA moreover centers human agency, rendering it a liberal theoretical framework.

Since its origin in human development studies and economics, the CA has been fruitfully applied in a number of scientific fields, including within political philosophy, as the basis for theories of justice.[4] Whereas Sen rejects the possibility of a comprehensive theory of justice based on capabilities,[5] Nussbaum uses the capability framework to develop an account of core human entitlements necessary to lead a life commensurate with human dignity. She reasons that, in order to use capabilities as the basis of a theory of social justice, we must select those capabilities which define the minimum conditions for a dignified life.[6] Thus, she compiles a list of what she considers the ten central human capabilities which are indispensable to this end and should therefore be implemented by governments everywhere, guaranteed to each and every person at a threshold level.[7] The fact that her theory of justice only obliges states to provide each capability up to an appropriate minimum level renders her theory sufficientarian, or minimum theory of justice – that is to say, anything above the threshold may be conducive to the good life but is not required by justice and therefore does not form part of her theory. Human dignity is a foundational

Capabilities (1999) [Sen, *Commodities and Capabilities*]; A. Sen, *The Idea of Justice* (2009) [Sen, *Idea of Justice*].

3 M. Nussbaum, *Frontiers of Justice* (2006), 70 [Nussbaum, *Frontiers of Justice*]; M. Nussbaum, *Creating Capabilities* (2011), 20 [*Creating Capabilities*].

4 The most prominent accounts of justice within the capability framework being E. Anderson, 'What is the Point of Equality?', 109 *Ethics* (1999) 2, 287; Nussbaum, *Frontiers of Justice, supra* note 3; Sen, *Idea of Justice*, *supra* note 2; R. Claassen, *Navigational Agency* (2018). Note, however, that Sen rejects the possibility of a comprehensive theory of justice.

5 Sen, *Idea of Justice*, *supra* note 2.

6 Nussbaum, *Frontiers of Justice*, *supra* note 3, 166.

7 *Ibid.*, 70. The ten capabilities are: 1) Life, 2) Bodily Health, 3) Bodily Integrity, 4) Senses, Imagination and Thought, 5) Emotions, 6) Practical Reason, 7) Affiliation, 8) Other Species, 9) Play, and 10) Control over One's Environment. *Ibid.,* 76-77; Nussbaum, *Creating Capabilities, supra* note 3, 33.

concept to Nussbaum's theory of justice, insofar as it grounds the central human capabilities and legitimizes their presentation as fundamental entitlements. At the same time, she rejects dignity as a starting point in its own right, instead focusing on an account of dignity which emphasizes a life worthy of dignity, where such a life is constituted by the capabilities on her list.

Nussbaum's understanding of dignity is Aristotelian rather than Kantian insofar as she rejects rationality as the singular foundation of human dignity.[8] Instead, she stresses that her CA "sees the rational as simply one aspect of the animal, and […] not the only one that is pertinent to a notion of truly human functioning".[9] To her, the sociability and, crucially, the vulnerability of human beings are equally important characteristics. Nussbaum's concept of personhood understands need and dependency to be intrinsic to the human condition, which is why rationality is viewed not as the necessary condition of dignity but as one temporal characteristic of human beings. Besides capturing the fact that rationality, in all humans, is a feature which grows, matures, and declines,[10] Nussbaum's account of the person can accommodate the mentally and physically impaired as it does not insist on a baseline of rationality or on 'roughly equal abilities' for inclusion in the community of justice. Conversely, theories resting on the assumptions of rough equality and mutual advantage, that is, theories that build on the social contract tradition, cannot.

Moreover, Nussbaum's political person has other motives for cooperation besides mutual advantage, as it is understood to be, with Aristotle, "a political and social animal".[11] The bases of cooperation in Nussbaum's account are thus multiple and include the desire for justice and the pursuit of shared ends — the good of others is viewed as part of one's good. Lastly, and following from this conception of the person, care, as a foundational human activity, pervades the list of capabilities and Nussbaum's theory of justice.

C. Nussbaum's Conception of The Person

Having discussed Nussbaum's capability approach more generally, this section focuses specifically on the conception of the person that forms the basis of her theory. As the remainder of this paper will demonstrate, EU law fails to

8 *Ibid*., 159.
9 *Ibid*.
10 *Ibid*.
11 *Ibid.,* 158.

respect the person as conceived by Nussbaum. While EU law could certainly be fruitfully analyzed with regards to its performance in securing one, several, or all of the central capabilities for its citizenry, the paper at hand focuses on the underlying conception of the person for two reasons. First, it is submitted that, while demonstrating a failure of the EU to provide one or more capabilities at a threshold level would certainly point to the EU not promoting (capabilitiarian) social justice,[12] revealing the divergence between the conceptions of the person in EU law and Nussbaum respectively points towards a more fundamental incompatibility of Nussbaumian justice with the philosophical foundations of EU law. Second, a focus on personhood highlights what renders Nussbaum's theory more convincing than alternative liberal-egalitarian accounts and what is one of its greatest strengths: its ability to include human beings of all abilities in the community of justice and its sensitivity to care and (inter)dependency as central to human nature. These are also features which EU law (along with most, if not all, national legal systems) lacks and which cannot easily be incorporated within conceptions of personhood built on mutual advantage and rough equality, as will be shown below. For now, the core features of Nussbaum's person will be presented.

The starting point of Nussbaum's conception of the person is that all human beings are moral equals. In other words, everyone inherently possesses dignity and equal moral worth, which in turn requires that everyone is treated with the respect that this moral equality demands. Though this conception is widely shared by contemporary political philosophers, Nussbaum refers to the Stoics for this insight.[13] It follows from this that governments are obliged to treat every person as an end in their own right and, crucially, that they must acknowledge everyone's entitlement to the support necessary to realize this inherent moral worth.[14]

However, while Nussbaum shares with the Stoics the foundational belief of equal moral worth originating in intrinsic human dignity, her substantive understanding of dignity differs from the Stoic conception in two important ways, which we will investigate in turn.

12 Such an analysis would consequently have to decide on an appropriate threshold for the relevant capabilities. While this may be possible, such questions should arguably be left to a democratic forum.

13 See e.g. Nussbaum, *Creating Capabilities*, *supra* note 3, 129; M. Nussbaum, 'Human Dignity and Political Entitlements', in A. Schulman (ed.), *Human Dignity and Bioethics* (2008), 355 [Nussbaum, 'Human Dignity'].

14 M. Nussbaum, *Women and Human Development* (2000), 58 [Nussbaum, *Women and Human Development*].

The first difference concerns the distinction between animality and rationality proffered by the Stoics. The Stoics considered rationality, or the human capacity for practical reasoning, to be the basis of each person's equal worth. According to Stoic thought, it is this ability which separates us from animals and thus imbues us with (specifically human) dignity.[15] This line of thinking is by no means exclusive to ancient Greek philosophy – Kant famously makes a similar distinction between the realm of reason and the realm of nature, where humans belong to the former and non-human animals to the latter.[16] Like the Stoics, Kant thus understands human dignity to be a consequence or the product of the (supposedly) uniquely human capacity for practical reason.

Nussbaum, conversely, rejects any sharp distinction between the two realms of animality and rationality. Quite the opposite, she understands "rationality and animality as thoroughly unified."[17] According to her, to attempt any sharp separation between the two is impossible, seeing as our intellect and our rationality are embedded in our physical body (that is, our animal parts) and crucially depend on it. Human nature thus cannot be said to reside only in one facet of our being, such as our rationality, but is characterized precisely by the fact that we are both intellectual beings, and beings characterized by physicality, vulnerability, and need.[18]

More than being only practically unhelpful, Nussbaum argues that any attempt to neatly distinguish between animality and rationality is insulting both to the dignity of non-human animals, as it suggests a categorical difference or superiority, and to the animal parts of ourselves, leading us to devalue vulnerability and interdependence.[19]

Instead, Nussbaum's conception of the person acknowledges that rationality and vulnerability are inseparably intertwined.[20] This requires us to acknowledge that "we are needy temporal animal beings who begin as babies and end, often, in other forms of dependency"[21] whether that is due to old age or disability. It is this understanding of human beings as inherently vulnerable and interdependent, rather than as primarily free and independent, which allows

15 Nussbaum, 'Human Dignity', *supra* note 11, 354.
16 I. Kant, *Metaphysics of Morals* (1797).
17 Nussbaum, *Frontiers of Justice*, supra note 3, 159.
18 P. Bernadini, 'Human Dignity and Human Capabilities in Martha C. Nussbaum', 4 *Justum Aequum Salutare* (2010) 4, 45, 46.
19 Nussbaum, 'Human Dignity', *supra* note 13, 355.
20 J. M. Alexander, 'Social Justice and Nussbaum's Conception of the Person', in F. Comim & M. Nussbaum (eds), *Capabilities, Gender, Equality* (2014), 420.
21 Nussbaum, *Frontiers of Justice*, supra note 3, 160.

Nussbaum's theory to accommodate also severely disabled persons as original members of the community of justice and to better recognize the centrality of care work for human functioning. Other liberal-egalitarian approaches, and in particular those in the social contract tradition, conceive of persons as fully cooperating members of society, who are primarily motivated to engage with one another because it promises to be advantageous to them.[22] These theories thus struggle to include persons who are unable to fully cooperate as original subjects, as members of the constitutive community. They may be entitled to assistance due to principles of charity or benevolence, but they cannot make claims based on justice.[23] Besides being exclusionary towards persons who cannot fully cooperate, such as in particular severely cognitively disabled persons, Nussbaum rightly points out that theories based on full cooperation for mutual advantage paint a rather bleak picture of humanity – any theory based primarily on mutual advantage values human beings first and foremost for their productive potential, or their actual productive contribution, rather than for their equal moral worth, supposedly a foundational value to all these theories. By contrast, Nussbaumian justice insists that "we do not have to win the respect of others by being productive. We have a claim to support in the dignity of our human need itself."[24]

The second difference between Nussbaum's conception of dignity and that of the Stoics connects to the principle of *apatheia*. The Stoics famously held that there is no value to what they term 'external goods', and that therefore we should encounter them from a stance of indifference (*apatheia*).[25] Besides contending that external goods have no intrinsic worth, the Stoics also held that they cannot impact on our inherent dignity. External goods, in Stoic philosophy, refer to anything outside of our own thoughts and actions, including material factors such as wealth or income, but also less tangible goods such as social status, physical and mental health, and even connection and family ties. Since they believed that these external goods cannot diminish our equal dignity, the Stoics also deny any obligation upon government to secure such external goods for their citizenry.[26]

22 This is true in particular of the social contract tradition, going back to Hobbes, but the conception (in a slightly more refined version) is also present in more modern theories, like that of John Rawls: See e.g. J. Rawls, *Justice as Fairness* (2001) [Rawls, *Justice as Fairness*].

23 Alexander, *supra* note 19, 421.

24 Nussbaum, *Frontiers of Justice*, supra note 3, 160.

25 Nussbaum, *Creating Capabilities*, supra note 3, 131.

26 *Ibid.*

Nussbaum rejects this position. She points out that the Stoic view insufficiently distinguishes between human dignity on the one hand and human flourishing or fulfilment on the other. Whereas she shares the contention that external circumstances can never tarnish, reduce, or revoke our inherent dignity, she understands that they matter tremendously for human flourishing.[27] This is also where the two differences between the Nussbaumian and Stoic conceptions of dignity connect: the Stoic principle of *apatheia* follows precisely from their rejection of our animal nature and vulnerability as relevant human characteristics. By contrast, Nussbaum, following Aristotelian thought, conceives of us as social and political animals, whose pervasive need and vulnerability place an obligation on governments to enable the external conditions for flourishing (*eudaemonia*).[28] From this, Nussbaum reasons that, while our dignity is untouched by external ill fortune, a life *commensurate with dignity* requires that governments provide each of the ten central capabilities to each person, up to the minimum threshold.

This leads us to another important feature of Nussbaum's conception of the person which she traces back to Aristotelian thought: the centrality of agency and choice. Indeed, Nussbaum goes so far as to explicitly link human dignity to our capacity for exercising agency, stating that "human beings have a worth that is inalienable, *because* of their capacities for various forms of activity and striving."[29] Clearly, agency is central to Nussbaum's understanding of a life worthy of human dignity, a fact that is reflected in the structure of her capabilities list: the injustice of denying a person any of the central capabilities consists of impeding her ability to exercise active choice and lead a life of her own choosing. This also explains the CA's focus on capabilities over functionings: whereas it is the responsibility of government to guarantee everyone the real opportunity to realize each capability, whether or not to make use of this opportunity is left to the individual. Moreover, Nussbaum's liberal commitment to a plurality of values and the importance of individual agency in devising a conception of the good life is reflected in the fact that the capabilities are plural rather than singular and can neither be traded off against one another nor converted into a single metric such as resources or wealth.

The last feature of Nussbaum's conception of the person discussed here concerns the motives for cooperation ascribed to the person. As touched upon above, whereas contractualist theories confine themselves to derive principles of justice based on rational persons acting exclusively for their own advantage, and

27 Nussbaum, 'Human Dignity', *supra* note 13, 356, 357.
28 Nussbaum, *Creating Capabilities*, supra note 2, 128.
29 Nussbaum, 'Human Dignity', *supra* note 13, 357 (emphasis added).

thus only agree to participate in a cooperative scheme such as society in so far as it can be said to serve their own interests, Nussbaum envisions a greater range of motives for her prototypical person. In her view, while self-interest certainly makes up a good portion of the reasons for human action, to portray this as the only driving force would be reductive. Instead, Nussbaum's person "shares complex ends with others at many levels",[30] ends which include, crucially, the good of others as their own. In this vision, certainly, others' interests may act as constraints on one's own interests but not exclusively. Nussbaumian personhood accounts for a sense of justice which exists alongside humans' proclivity to act only where it is advantageous to themselves. This person, who is by nature interested also in community and connection, thus acts out of a range of motives, which include both self-interest and the good of others.[31]

It should be stressed that contractualist accounts do not rely on cooperation based exclusively on mutual advantage because they deny the existence of altruistic motives in human nature; rather, they consider these sentiments 'less stable' than self-interest and that theories of justice which rely exclusively on advantage-seeking are more convincing for that reason.[32] Essentially, they argue, that principles of justice which do not require persons to act selflessly are less likely to fail due to a lack of selfless behavior. While this sounds intuitively convincing, and it is true that Nussbaum's conception is more demanding insofar as it requires a degree of compassion or other-regarding behavior, it is submitted here that principles of justice which ignore this side of human nature also run the risk of diminishing these behaviors. As Nussbaum points out, there is a mutually reinforcing relationship between the way in which we design our institutions and the development of public compassion: compassion, like other emotions, is socially taught and shaped, both directly through education and indirectly through the social imaginaries in a given society.[33] Thus, "compassionate individuals construct institutions that embody what they imagine; and institutions, in turn, influence the development of compassion in individuals."[34] That is to say that public institutions, including the legal system and public policy, are both shaped by and shape our perception

30 Nussbaum, *Frontiers of Justice, supra* note 3, 85, 158.

31 *Ibid.,* 156.

32 See e.g. Rawls, *A Theory of Justice* (1979), who lets the parties in his original position assume a stance of mutual disinterest. While moral sentiments are supposedly accounted for by other features of his original position, this nevertheless limits the range of motives ascribable to the parties in his theory [Rawls, *Theory of Justice*].

33 Nussbaum, *Frontiers of Justice, supra* note 3, 500.

34 M. Nussbaum, *Upheavals of Thought* (2001), 405.

of who does (not) deserve their misfortune, and who therefore is (or is not) deserving of public compassion and entitled to assistance. To give a very practical example, the manner in which unemployment benefits are structured is a product of societal conceptions of who is at fault in cases of unemployment but also any given system will influence this public understanding of which unemployed persons deserve benefits. Welfare to work programs are a prime example of a framework which reflects the belief that unemployment is largely a consequence of lack of individual motivation or qualifications rather than a reflection of structural problems and it can certainly foster the public perception of unemployed persons as not trying hard enough to find a job or improve their education. In the same way that public disregard for the unemployed, poor, disabled, or persons otherwise in need of assistance fosters punitive and harshly conditional welfare policies, compassion has the potential to create structures which respect the dignity of those in need. Thus, Nussbaum argues, law and policy geared towards ensuring the basic capabilities for each person has the potential to educate and direct our compassion with regards to the things no one should be deprived of. Ultimately, we are therefore confronted with the question of which person we model our legal system and public institutions on, and thus of which values we consider most important to human life – the self-reliant, invulnerable individual only guided by their own interest, or an interdependent and at times vulnerable person who is able to strive both for her own good and that of others.

To summarize, Nussbaum's conception of the person is multifaceted and can occasionally appear contradictory. She starts out from the fundamental tenet of each person being imbued with equal moral worth and therefore with equal dignity and the attendant claims to equal respect. While acknowledging rationality as a central human feature, she adds that human nature is characterized also by (physical, psychological, and social) vulnerability and sociability, which requires accommodation through the guarantee of capabilities. The result is an understanding of personhood which is arguably more realistic than the independent seeker of advantage of liberal theorists. Undoubtedly, it is normatively preferable insofar as it allows for the inclusion of all humans rather than only those who can cooperate fully within the community of justice.

Having examined Nussbaum's conception of the person, the following section turns to the conception of the person underlying EU law and policy, first on a general level and subsequently with regard to disabled persons specifically.

D. The Person in EU Law

Why should we study the conception of the person underlying EU law? The answer is rather straightforward: because the characteristics we assume to be inherent in human nature influence the manner in which we regulate human conduct and relations. The conception of the person can thus have tremendous (even if largely implicit) impact on the law. First, it is an important element in defining the law's personal scope. The definition of a disabled person, a worker, or a citizen, impacts directly on who can fall into those categories. Those who do not fit within any legal categories might be without status and therefore without rights. Defining legal subjects is thus always an exclusionary practice and it is crucial to consider in detail the boundaries of this exclusion.

Second, the imagined addressee shapes *how* we legislate. As mentioned above, Nussbaum, writing about the role of public institutions in the development of compassion, notes that the way we regulate certain social practices informs our thinking about these practices and our judgements concerning the deservingness of those benefiting from them.[35] For example, the structure of a system of unemployment benefits may shape societal ideas about who deserves unemployment benefits (only those that can prove their efforts to find work), and those intuitions will in turn influence the manner in which benefits are regulated. The same is true more broadly speaking: the manner in which we conceive of a worker, a student, or an unemployed person will influence the manner in which we regulate their lives *and vice versa*. Considering in detail the manner in which the EU conceives of the person (and of certain groups of persons) is thus a matter of both the law itself and the underlying philosophical imaginaries.

The EU, in autonomously defining these statuses, is doing more than creating legal categories, it is constitutive of identity. It defines "what it means to live a life of dignity in Europe and a decent life within society."[36] At the same time, it is hard to speak of 'the' legal subject in EU law – the person is not regarded as a whole or as a single concept but rather as her specific status in a given situation. EU law "fragments that concept according to the legal positions

35 Nussbaum, *Upheavals of Thought, supra* note 34, 418, see also section B of this article at 8.

36 L. Azoulai, S. Barbou des Places & E. Pataut, 'Being a Person in the European Union', in L. Azoulai, S. Barbou des Places & E. Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016), 11.

the person assumes in the context of legal relations between individuals."[37] For that reason, the analysis at hand focuses on one status under EU law and considers it with respect to the underlying conception of the person.

Nevertheless, some general observations can be made on the EU legal subject. EU law, and in particular internal market law, relies on the person as an active agent; that is, as one that brings about cross-border interactions and engages in transnational activities. This view is certainly compatible with one facet of the Nussbaumian person. As we have seen, Nussbaum values choice and the human capacity for 'active striving' as central to human flourishing.[38] This idea finds expression in the fact that the CA demands that everyone's central *capabilities* (that is, their real opportunities to be or do things) are guaranteed, leaving the choice of whether to take up those opportunities to the individual. In this instance, the ideological underpinnings of EU law line up well with Nussbaum's philosophy: the EU provides free movement rights to its citizens, which allows EU citizens to move freely between member states and take up residence elsewhere, greatly expanding individuals' personal freedom and opportunities. Given the centrality of agency to capabilitarian justice, this is an enormous benefit. As Floris de Witte has highlighted elsewhere, the free movement rights can also have significant emancipatory effects.[39] Specifically, one function of free movement rights is to free individual citizens from the often coercive claims nation-states make over their citizens. By providing the opportunity to relocate to another member state, and by prohibiting discriminatory, exclusionary, or assimilatory norms and practices in the new state of residence,[40] EU law contributes to weakening the authority of individual member states and provides citizens with the possibility of choosing their life path more freely, according to their own beliefs and identity.[41] Additionally, and perhaps even more importantly, free movement rights constitute a significantly enlarged economic opportunity space for individuals. By enabling them to seek

37 G. Alpa, 'The Meaning of 'Natural Person' and the Impact of the Constitution for Europe on the Development of European Private Law', 10 *European Law Journal* (2004) 6, 734, 735.

38 Nussbaum, 'Human Dignity', *supra* note 13, 357.

39 F. de Witte, 'Freedom of Movement Needs to Be Defended as the Core of EU Citizenship', in R. Bauböck (ed.), *Debating European Citizenship* (2019), 93.

40 Previously an interpretation of the general equal treatment principle attached to the free movement rights, this now follows directly from Article 16(1) of the Citizenship Directive with regard to conditions imposed on permanent residency.

41 See D. Kochenov, 'EU Citizenship Without Duties', 20 *European Law Journal* (2014) 4, 482, 486 [Kochenov. 'EU Citizenship Without Duties'].

better work or to establish themselves in another member space, EU citizens can tangibly improve their livelihood. In this way, EU free movement law provides actual material benefits to its citizens – a function which is of particular significance to nationals from the EU's periphery.[42]

The legal subject in free movement law is a clear expression of the value of human agency. It presupposes a person that can form her own life plan and actively pursue it. Crucially, however, in its focus on agency and active choice, the conception of the person in free movement law neglects other important human characteristics such as our vulnerability, our occasional dependency and need for care, and, perhaps most importantly, the tenet of equal worth. This is because free movement law does not benefit all EU citizens equally. The capabilities mentioned above are not deserving of their name or at least not for everyone. Because the notion of capability implies the *real* freedom or opportunity to achieve functionings such as 'moving freely', these capabilities are not in truth realized for every EU citizen. Rather, the EU divides its citizenry into two factions: economically active citizens are still much more capable to move freely as they benefit from the rights attached directly to the relevant economic freedom. Conversely, the situation of economically inactive EU citizens cannot convincingly be construed as one characterized by the capability (the *real* freedom) to move. They do not enjoy full equal treatment rights and this can diminish their capability to move insofar as the act of moving could leave them without any social protection. Similarly, the situation of economically active citizens who happen to have never moved is not comparable to that of economically active mobile citizens.[43] Because, while they are free to move or not move,[44] they are not usually entitled to equal enjoyment of protection from EU law and such freedom (to stay at home) then cannot be a *real* freedom in the capability sense. While equality of EU citizens and the right to move freely are solemnly proclaimed in the treaties,[45] in reality, the citizens are divided into

42 D. Kukovec, 'Law and the Periphery', 21 *European Law Journal* (2015) 3, 406.

43 See e.g. A. Tryfonidou, *Reverse Discrimination in EC Law* (2009).

44 The option not to choose an available functioning being regarded as a valuable functioning in itself. See on this e.g. A. Sen, 'Capability and Well-Being' in M. Nussbaum & A. Sen (eds) *The Quality of Life* (1993) 39: "freedom may have intrinsic importance for the person's well-being achievement. Acting freely and being able to choose may be directly conducive to well-being, not just because more freedom may make better alternatives available" [Sen, 'Capability and Well-Being'].

45 Article 9 TEU: "In all its activities, the Union shall observe the principle of the equality of its citizens", Article 20 TFEU: "Citizens of the Union shall enjoy (…) the right to move and reside freely within the territory of the Member States".

those enjoying the protection of EU law, and thus securing the capability to freely move and enjoy equal treatment and those who are not.

This is even more problematic since the line separating the two groups is more often than not drawn rather arbitrarily. Arguably, this phenomenon can be regarded as a mere symptom of what Weiler has described as "the culture of the market"[46] and Scharpf as the "asymmetry of integration",[47] namely the inherent bias in the logic of EU law towards economic rationales. This is visible in the social *acquis* insofar as most of the genuine social policies adopted at EU level, such as the first non–discrimination provisions and arguably most of modern EU equality law, can be explained by the economic benefits derived from equality rather than by reference to the intrinsic value of equality. As O'Brien highlights, with regard to sex and disability, EU equality legislation appears based on a 'logic of activation', in that it aims at integrating persons into the labor market *as is* rather than at structural reforms which would help accommodate the needs of disadvantaged groups in employment.[48] Similarly, the 'good EU citizen' that emerges from the framework governing social benefits is first and foremost the citizen–worker.[49] This conceptualization of citizens in terms of their economic contribution mirrors the construct of Market Citizenship insofar as the latter restricts access to the enjoyment of EU rights generally to the economically active.[50] It seems, then, that Market Citizenship itself violates the demands of Nussbaum's theory.

46 J. H. H Weiler, *The Constitution of Europe — "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (1999), 89.

47 F. Scharpf, 'The Asymmetry of European Integration, or why the EU Cannot be a 'Social Market Economy', 8 *Socio-Economic Review* (2010), 211.

48 See C. O'Brien, *Unity in Adversity* (2019), chapter 5 [O'Brien, *Unity*].

49 A term borrowed from G. Peebles, '"A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law', 22 *Law & Social Inquiry* (1997) 3, 581, 608.

50 See, on the concept: D. Kochenov, 'The Oxymoron of 'Market Citizenship' and the Future of the Union', in F. Amtenbrink *et al.* (eds), *The Internal Market and the Future of European Integration* (2019) [Kochenov, 'Market Citizenship']; E. Spaventa, 'Earned Citizenship – Understanding Union Citizenship Through Its Scope', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (2017) [Kochenov (ed.), *EU Citizenship and Federalism*]; C. O'Brien, 'Civis Capitalist Sum: Class as the new Guiding Principle of EU Free Movement Rights' 53 *Common Market Law Review* (2016) 4, 937 [O'Brien, 'Civis Capitalist Sum']; P. Caro de Sousa, 'Quest for the Holy Grail — Is a Unified Approach to the Market Freedoms and European Citizenship Justified?', 20 *European Law Journal* (2014) 4, 499; N. N. Shuibhne, 'The Resilience of EU Market Citizenship', 47 *Common Market Law Review* (2010) 6, 1597.

As it currently operates, EU citizenship benefits primarily a small group of (usually already privileged) transnationally mobile citizens and overlooks the most vulnerable and disadvantaged.[51] Similarly, and as already elaborated above, while it is clear that the free movement provisions and EU citizenship generally foster the capabilities of some, many are left behind. The capability to 'move and reside freely' is in truth no capability at all but merely a formal right of no substantive value for many individuals as they are unable to make use of that right. This betrays a reductionist conception of the person in EU law, similar to the instrumentalist tendency Nussbaum recognizes in Rawls' and other contractualist approaches to justice: to conceive of human beings primarily in terms of their productive contribution denies the dignity and equal worth of those that are not productive. While it is certainly logical to some extent that the EU legal subject "was treated as *homo economicus*, the manufacturer or recipient of goods, services and capital",[52] given the origins of the EU as an economic project, it is high time to revisit this conceptualization. It is submitted here that, in light of the nature of today's EU, which is far more than an economic union and which pervasively influences individuals' life paths, it is indeed a matter of justice that the imagined legal subject is more than merely an economic actor. This is why a comparison with the fuller Nussbaumian person can be helpful – her conceptualization of human beings as both animal and rational, as social and political animals, is not only more realistic in the sense that it comes closer to what truly characterizes human beings but it is also normatively desirable.

It is true, of course, that to the extent that EU law engenders non-market driven characteristics, there are hints of the 'fuller' Nussbaumian person. Nevertheless, as long as these entitlements are tied to economic activity, they still betray a legal subject valued in the first instance for her productive contribution to the internal market.

Keeping in mind these observations pertaining to the conception of the person in EU law, the analysis now moves towards an examination of one specific status under EU law and the conception of the person that is revealed by its construction in legislation, policy, and case law. This is because, as we have noted above, EU law rarely addresses the person 'as a whole', but rather the person in her specific function or role – the person as a worker, a student, a consumer, and so on. By examining one of these statuses, we can gain insight into the manner in which EU law understands personhood, the *Menschenbild*

51 Kochenov, 'Market Citizenship', *supra* note 50, 224-225.
52 Alpa, *supra* note 37, 736.

that is constructed through these statuses. The remainder of this paper thus considers one of these statuses: that of disability.

E. The Disabled Person in EU Law

There are several reasons for selecting disability as the status to be examined in this analysis. For one, disability is an integral part of Nussbaum's theory: it is one of four problems she identifies in Rawls' *A Theory of Justice* which led her to formulate an alternative approach to social justice, one that is, among other things, inclusive of disabled people. It is one of the reasons that vulnerability, need, and care are central themes in her theory and built into her conception of the person: only an understanding of personhood which incorporates these characteristics can be truly inclusive of disabled people. Considering the conception of disabled persons underlying EU law can therefore prove revealing as to the manner in which these dimensions of humanness are taken into account (or not) in the construction of the EU legal subject.

Moreover, the status of 'disabled person' intersects with that of both worker and migrant in the context of EU law. Due to EU law's limited personal scope, those disabled persons who come within its ambit will usually be economically active, involved in some cross-border activity, or both. An analysis of the disabled legal subject can thus also shed some light on two other central statuses, as well as how they can intersect to exacerbate their exclusionary effects.

I. Models of Disability

It is prudent to begin with an examination of the definition of disability in EU law since it concerns the essence of our inquiry. The manner in which we define disability for the purpose of EU law reveals much about how EU law conceives of the disabled person herself.

Historically speaking, the prevalent conception of disability (in the West) was heavily informed by a medicalized view of disability. Specifically, disability was considered an individual medical problem, a personal tragedy.[53] Following this medical model, disability is the result of medical conditions or impairments which hinder the disabled person from participating in society on par with non-disabled persons. As Oliver puts it, the medical model "locates the 'problem' of disability within the individual and […] sees the causes of this problem as

53 C. Barnes, 'Understanding the Social Model of Disability - Past, Present and Future', in N. Watson & S. Vehmas (eds), *Routledge Handbook of Disability Studies* (2019), 14.

stemming from the functional limitations or psychological losses which are assumed to arise from disability".[54] This view thus focuses on the medical condition itself, which is contrasted with the 'normal', able-bodied person and which is considered an individual health problem to be cured or alleviated.[55] Leaving aside the fact that such a view perpetuates a negative stigma against disabled people, it also disregards entirely the role of social and environmental barriers in disabling individuals. In response to these deficiencies, disability rights activists in the 1970's introduced the distinction between impairment and disability, where impairment denotes the limitations arising from a physical or mental condition, and disability the loss or limitation of opportunities for participation in society.[56]

Building on this, Oliver first presented the social model of disability, which reframes disability as a form of social oppression.[57] Following the social model, disability arises not from the individual impairment but rather from the interaction of the impairment with the social environment and the way in which society fails to take into account these impairments in designing these environments.[58] Thus, for example, it is not the inability to walk which disables the wheelchair user, but rather the lack of accessible infrastructure such as ramps and lifts. Crucially, the social model does not deny the role of medical intervention in alleviating illness and impairments. Instead, it criticizes the limited usefulness of medical treatment in addressing disability understood as the inability to participate in (all areas of) social and political life.[59] It would be misleading to characterize the social model of disability as a monolith, seeing as there are various conceptions that can be broadly subsumed under the social model. They differ in points such as how much (if any) importance they give to the impairment itself in constituting a disability, or whether disability

54 M. Oliver, 'The Individual and Social Models of Disability' (1990), available at https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Oliver-in-soc-dis.pdf (last visited 19 August 2024).

55 S. Favalli & D. Ferri, 'Defining Disability in the European Union Non-Discrimination Legislation: Judicial Activism and Legislative Restraints', 22 *European Public Law* (2016) 3, 541, 542.

56 UPIAS, 'Fundamental Principles of Disability' (1976) available at https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/UPIAS-fundamental-principles.pdf (last visited 19 August 2024).

57 A. Lawson & A. E. Beckett, 'The Social and Human Rights Models of Disability: Towards a Complementarity Thesis', 25 *The International Journal of Human Rights* (2021) 2, 348.

58 Oliver, *supra* note 54, 2.

59 Barnes, *supra* note 53, 20.

is considered a minority status or rather a universal human condition.[60] For the present purpose, 'the social model of disability' denotes those views which consider disability to be the result of an individual impairment in interaction with various social, environmental, or political barriers.

Already from this brief discussion, the overlaps between the social model of disability and Nussbaum's conception of the person generally, and of disability in particular, become apparent. First, the idea, present in some forms of the social model, that disability is less of an extraordinary affliction that concerns a minority of humans but rather a universal human condition,[61] resonates with Nussbaum's assertion that human beings are fundamentally characterized by vulnerability and dependency. Just as many disability advocates hold that some form of disability will affect most people at some point in their lives, be it due to illness, accidents, or old age, Nussbaum recognizes that, over the course of a lifetime, all human beings experience need and dependency to varying degrees. Secondly, the social model posits that disability, in terms of diminished ability or complete inability to participate in social life on an equal basis with others, arises primarily from the interaction of the individual impairment with societal and environmental factors. Similarly, the concept of 'combined capabilities' describes the relationship between individual attributes and external factors for attaining basic capabilities. Nussbaum differentiates between internal capabilities and combined capabilities: the former refer to characteristics of a person such as "personality traits, intellectual and emotional capacities, states of bodily fitness and health, internalized learning, [and] skills of perception and movement",[62] whereas combined capabilities denote those freedoms or opportunities that arise from such personal abilities in combination with a suitable political, social, and economic environment.[63] It is those combined capabilities that are relevant for an assessment of whether or not a polity can be considered just – all ten central capabilities on Nussbaum's list are combined capabilities. Considering disability within this framework, we can see that Nussbaum's understanding is closely aligned with the social model.

The individual impairment thus reflects a person's internal capabilities, which may be reduced due to the impairment. However, it is the environmental

60 D. Wasserman *et al.*, 'Disability: Definitions, Models, Experience', in E. N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2016), https://plato.stanford.edu/archives/sum2016/entries/disability/ (last visited 19 August 2024).

61 See I. Zola, 'Toward the Necessary Universalizing of a Disability Policy', 67 *The Milbank Quarterly* (1989) 2, 401.

62 Nussbaum, *Creating Capabilities*, *supra* note 3, 21.

63 *Ibid*.

factors (be they social, political, or economic) interacting with the impairment which create the individual's inability to participate in public life on an equal basis with others, thereby creating the disability. As Carolin Harnacke puts it, "disability is thus an (unjust) lack of capability."[64]

The social model of disability was immensely influential in the negotiation of the UN Convention of the Rights of Persons with Disabilities (UNCRPD), to which the EU is a party.[65] UNCRPD's conception of disability is closely modelled on the social model: in its first article, the Convention states that "'[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".[66] It is clear from this article, and a similarly phrased paragraph in the preamble,[67] that the UNCRPD claims to be grounded in a social model of disability. At the same time, it should be noted that the human rights approach to disability, as manifest in the UNCRPD, is not without problems. As highlighted recently by Jan Grue, within the paradigm of the human rights model there remains a 'gap' between what is demanded of the individual disabled person and what the state or private parties are obliged to provide under the concept of reasonable accommodation. If what a disabled person requires to fully participate in all areas of life on equal basis with others is deemed too costly an imposition, employers or other relevant actors are not legally obliged to make the accommodation. As Marta Russel aptly remarked, "the disabled person's theoretical right to an accommodation is really no right at all; it is dependent upon the employer's calculus." The result of this is that the work required to close the gap falls on the disabled individual or their friends, family, or other caregivers. Of course, it would be difficult to argue that any necessary accommodation, no matter how costly or burdensome, ought to be mandated by law: in a world of scarce resources, this would have

64 C. Harnacke, 'Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention', 41 *Journal of Law, Medicine and Ethics* (2013) 4, 768, 773.

65 G. de Búrca, 'Experimentalism and the Limits of Uploading – The EU and the UN Disability Convention', in J. Zeitlin (ed.), *Extending Experimentalist Governance? The European Union and Transnational Regulation* (2015), 295, 296.

66 *Convention on the Rights of Persons with Disabilities*, 3 May 2008, Art. 1, 2515 UNTS, 3 [UNCRPD].

67 *Ibid.*, preamble para. e) affirms that: "[d]isability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

the effect of privileging the needs of one person over those of potentially many others. At the same time, it cannot be ignored that the human rights model and disability rights instruments such as the UNCRPD, despite claiming to be the first comprehensive human rights treaties in the 21st century,[68] cannot address this economic injustice. While the present article is first and foremost concerned with highlighting how the conception of disabled persons in EU law falls short even of this standard, we must not forget that, even if the UNCRPD was perfectly implemented within the EU, these gaps would remain, effectively sanctioning a portion of disabled persons (those without sufficient resources, be they material or social) to a life in which they are unable to participate in the world on equal footing with others or indeed at all. Keeping this in mind, the rest of this section considers the development of the conception of disabled persons in EU law.

Prior to the UNCRPD's adoption, the task of defining disability for the purpose of EU law fell to the Court of Justice of the EU (CJEU). As there was no definition in the EU treaties or relevant legislation, national courts asked the Court to clarify what could be considered to fall within the scope of disability.[69]

The first reference of this kind reached the CJEU in 2006, in the *Chacon Navas* judgment.[70] The applicant in the case had been unable to work for a prolonged period due to illness and was subsequently dismissed. The national court made a preliminary reference to the CJEU, asking whether the claimant's illness fell within the scope of the definition of disability in the Employment Equality Directive.[71] The Court held that, in the context of the Directive, disability ought to be understood as "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."[72] As Waddington

68 See https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-Disabilities.html (last visited 19 August 2024).

69 Note that the present discussion refers primarily to the definition of disability within the context of the Employment Equality Directive. This is both because the majority of preliminary references that reached the Court concerned said Directive and because different fields of law might require different definitions. For example, within the field of social benefits, it may well be sensible to adhere closer to medical facts in assessing disability. However, barriers should certainly be considered in that area as well.

70 *Sonia Chacón Navas v. Eurest Colectividades SA*, Case No. 13/05, Judgment of 11 July 2006, [2006] ECR I-6467 [*Chacón Navas*].

71 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), OJ 2000 L 303/16.

72 *Ibid.,* para. 43.

points out, the Court's definition of disability in *Chacon Navas* clearly reflects the medical model of disability insofar as it focuses on the individual impairment as the exclusive cause of a person's limitation, thus ignoring the societal and environmental factors which may contribute to, or be the sole cause, of the limitation.[73] In the later *Coleman* case, the Court confirmed this restrictive definition of disability,[74] and it would remain the official definition until after the ratification of the UNCRPD. In the first case which reached the CJEU thereafter, *HK Denmark*, the Court seemed to change its tune.[75] Reconsidering its definition from *Chacon Navas*, it stated that disability is "a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers."[76] This definition is taken almost verbatim from Article 1 of the UNCRPD with two slight (but relevant) differences. First, the Convention refers to participation in society rather than participation in professional life. Second, whereas the Convention speaks of disability as "impairments […] in interaction with various barriers",[77] the Court defines it as a "limitation which results […] from […] impairments." The relevance of these distinctions becomes apparent from some of the subsequent cases concerning the definition of disability.

In *Z,*[78] the issue at stake was whether a woman who had a child through surrogacy, due to her inability to conceive herself, was entitled to maternity leave. The applicant, who because of a medical condition does not have a uterus, became a 'commissioning parent'; that is, she had her genetic child carried to term by a surrogate mother in California, where surrogacy is extensively regulated. While the national legislation in her state of residence, Ireland, provided for both maternity and adoptive leave, the applicant did not qualify for either. In light of this, the Irish court referred to the CJEU the question whether this

73 L. Waddington, 'Saying all the Right Things and Still Getting it Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law', 22 *Maastricht Journal of European and Comparative Law* (2015) 4, 576, 579 [Waddington, 'Definition of Disability'].

74 *S. Coleman v. Attridge Law and Steve Law*, C-303/06, Judgment of 17 July 2008, ECLI:EU:C:2008:415, para. 45 refers to Chacon Navas as the relevant definition of disability.

75 *HK-Danmark v. Dansk Arbejdsgiverforening and Others,* Joined Cases Nos C335/11 and C337/11, Judgment of 11 April 2013, ECLI:EU:C:2013:222.

76 *Ibid.,* para. 38.

77 UNCRPD, *supra* note 66, Art 1.

78 *Z. v. A Government Department and The Board of Management of a Community School,* C-363/12, Judgment of 18 March 2014, ECLI:EU:C:2014:159.

constituted discrimination on the basis of disability, and further, in case that the answer to this question was negative, whether the relevant directive was valid in light of, *inter alia*, the UNCRPD.[79] Considering the question whether the denial of maternity (or adoptive) leave constituted disability discrimination, the CJEU recalled its definition from *HK Denmark* and acknowledged that the woman's condition constituted a limitation arising from an impairment.[80] Crucially, however, the Court added that, for the purpose of the Employment Equality Directive, the limitation at hand must hinder the person's participation in *professional life*.[81] Thus, it reasoned, following the opinion of AG Wahl, that the woman's impairment (i.e. her inability to have a child) did not constitute a disability within the meaning of the Directive as it did not hinder her ability to work *per se*.[82]

As has been pointed out by several authors, this is a rather narrow view of the matter.[83]

It is clear that not being granted surrogacy leave does in fact impact the applicant's participation in professional life. Maternity leave is an employment-related benefit and the inability to take maternity leave leaves the applicant with the choice of sacrificing either her career progression or the ability to personally care for her child. Thus, the Court could have easily come to the conclusion that, for this reason, the impairment does constitute a disability within the professional sphere.

It is only as a result of the CJEU's narrow definition of disability as a limitation, which *in itself* hinders participation in professional life, that the applicant was denied benefits which fall within the material scope of the Directive.[84]

Moreover, the reasoning of the Court, while paying lip service to the social model, focuses on the individual impairment over the interaction of the impairment with barriers created, for example, by social and environmental factors. As Waddington points out, in this case, the barrier is "the absence of a

79 *Ibid*., para. 45.
80 *Ibid*., para. 79.
81 *Ibid*., para. 80.
82 *Ibid*., paras 81-82.
83 Waddington, 'Definition of Disability', *supra* note 73, 585; C. O'Brien, 'Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability', in Kochenov (ed.), *EU Citizenship and Federalism*, *supra* note 50, 519-520 [O'Brien, 'Union Citizenship'].
84 A. Broderick & P. Watson, 'Disability in EU Non-Discrimination Law', in D. Ferri & A. Broderick (eds), *Research Handbook on EU Disability Law* (2020), 14.

statutory regime providing for a period of paid leave following the birth of a child through surrogacy."[85] It is the fact that she is not granted leave, despite being in a comparable situation to other new mothers, which creates the hindrance to her participation in professional life. Instead of recognizing this interplay between the legal framework and the woman's impairment, the CJEU chalked her situation up to personal choice: She is able to participate in professional life, so long as she does not have children. This is patently unjust. As O'Brien puts it, "this relocates the responsibility of creating disability – from society and societal structures, to the person's own choices."[86] Furthermore, the Court is arguably confusing the personal and material scope of the Directive by defining disability with reference to professional life – while the Directive only applies to professional life, it does not inevitably follow from the text that the disability *itself* must hinder participation in professional life.[87] As Bado points out, the aim of anti-discrimination law is compatible with including as many people within its scope as possible, thus there is no prima facie reason for narrowing the personal scope in such a manner.[88] Some have explained the reluctance of the Court to consider the Irish legal framework discriminatory with reference to the diverse legal regimes governing surrogacy in the member states, arguing that extending maternity protection to surrogate parents is a question to be resolved through the political process rather than judicial intervention.[89] While this may well explain the CJEU's assessment, it does not alter the fact that the current state constitutes a clear injustice towards disabled women.

A subsequent case further illustrates how the Court, while nominally adhering to the social model underlying the UNCRPD, and in line with a capabilitarian conception of the person, struggles to apply it to real-life instances of discrimination. In *Kaltoft*,[90] the Court was essentially asked to determine whether obesity could constitute a disability within the scope of the Employment Equality Directive. The case concerned an obese man employed

85 Waddington, 'Definition of Disability', *supra* note 73, 585.

86 O'Brien, 'Union Citizenship', *supra* note 83, 522.

87 Favalli & Ferri, *supra* note 55, 559; Waddington, 'Definition of Disability', *supra* note 73.

88 R. Bedő, 'The Notion of "Person with Disability" in Employment Discrimination Law – An Analysis of Laws in Hungary and the United States', 12 *Romanian Journal of Comparative Law* (2021) 1, 66, 78.

89 G. de Baere, 'Shall I Be Mother? The Prohibition on Sex Discrimination, the UN Disability Convention and the Right to Surrogacy Leave under EU Law', 74 *Cambridge Law Journal* (2015) 1, 44, 47.

90 *Fag og Arbejde (FOA) Acting on Behalf of Karsten Kaltoft v. Kommunernes Landsforening (KL)*, C-354/13, Judgment of 18 December 2014, ECLI:EU:C:2014:2463 [*Kaltoft*].

as a child minder, who was officially dismissed for reasons unrelated to his weight. However, the applicant claimed that the real reason for his dismissal was the employer's prejudice towards his obesity, since they had previously indicated an interest in his weight loss.[91] The national court therefore referred to the CJEU the question whether obesity could qualify as a disability under the Employment Equality Directive. To this, the Court responded that, while obesity is not considered a disability in itself, it might fall within the ambit of disability discrimination if certain circumstances obtain, namely where "the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers".[92] The Court thus focused again on the existence of a limitation arising *from the impairment itself*.[93] It provided some examples of such limitations in the context of obesity, such as reduced mobility or the onset of medical conditions which would prevent the person from working or cause discomfort in carrying out their work.[94] Discrimination might occur, however, not only because of such actual limitations to a person's capacity to work, but also, as in the present case, due to the negative image or stereotypes an employer might hold towards obese people. Indeed, the UNCRPD recognizes the potential for discrimination due to discriminatory attitudes or perceived rather than actual disability, and it specifically obliges its parties "to combat stereotypes, prejudices and harmful practices relating to persons with disabilities […] in all areas of life".[95] While the CJEU did not explicitly exclude the possibility of disability arising from the negative perceptions or stereotypes held by the disabled person's environment, the phrase "limitation arising from an impairment" as well as the fact that, in giving examples, the Court referred solely to limitations which would be a direct result of obesity, such as reduced mobility, strongly suggests that indeed those people that are primarily or exclusively disabled by their environment are not protected from discrimination. Waddington and Broderick come to the same conclusion, namely that the Court "seems to exclude from the definition of disability individuals who are disabled by socially-created barriers, such as

91 *Ibid.*, para. 20.
92 *Ibid.*, para. 59.
93 See also Bado, *supra* note 88, 79.
94 *Ibid.*, para. 60.
95 UNCRPD, *supra* note 66, Art. 8 b.

false assumptions and prejudices about an individual's ability, and possibly even barriers in the physical environment."[96]

Such a stance is worrying for several reasons. Not only does it serve to demonstrate the CJEU's difficulties in adhering to the social model it nominally embraces, and thus, arguably, renders the EU definition of disability incompatible with the UNCRPD but it also has important real-life consequences. Excluding from the ambit of disability discrimination those individuals who suffer limitations due to societal prejudice would exclude *tout court* entire groups of people, namely those with disabilities which do not necessarily entail functional limitations but face severe stigma, such as individuals with HIV or AIDS. As McTique notes, HIV and AIDS are now treatable to the point that individuals may not be hindered at all from participating in professional life due to any functional limitations. However, they remain vulnerable to discrimination based on false assumptions about their condition.[97] Similarly, persons with mental health conditions could plausibly be disabled by the prejudice they face from their environment rather than due to any *actual* loss of capacity caused by their impairment – think of the persistent stigma against individuals with personality disorders, for example. In a similar vein, it seems that non-disabled people who are falsely perceived by their employers as disabled would not receive any protection under this interpretation of the Directive.[98]

II. The Disabled Legal Subject as Construed From The EU Law Definition of Disability

Having discussed some of the cases which, taken together, constitute the current definition of disability for the purpose of EU law,[99] we can collect some initial findings about the manner in which EU law conceives of the disabled legal subject.

96 L. Waddington & A. Broderick, *Combating Disability Discrimination and Realising Equality: A Comparison of the UNCRPD and EU Equality and Non-Discrimination Law* (2018), 58.

97 P. McTigue, 'From *Navas* to *Kaltoft*: The European Court of Justice's Evolving Definition of Disability and the Implications for HIV-Positive Individuals', 15 *International Journal of Discrimination and the Law* (2015) 4, 241, 248.

98 D. Hosking, 'Fat Rights Claim Rebuffed: *Kaltoft v Municipality of Billund* , 44 *Industrial Law Journal* (2015) 3, 460, 470.

99 Note that there are a number of cases pertaining to the distinction between illness and disability, the discussion of which would go beyond the scope of this paper.

We have established that the social model fits well with the Nussbaumian view of the person: both recognize that it is not (only) innate characteristics (i.e. the impairment) which create disability but rather the interplay between impairment and external factors, such as social, environmental or attitudinal barriers. At first glance, therefore, one might think that, with the accession of the EU to the UNCRPD, the matter of disability definition would be resolved satisfactorily from the perspective of Nussbaum's theory.

However, as we have seen, the CJEU, while nominally bringing its own definition in line with that of the Convention, struggles to apply it correctly. An important contrast between the medical and social model pertains to the role of barriers which, according to the social model, create disability in interaction with the impairment. The Court seems to have integrated this when, following the accession of the EU to the UNCRPD, it amended its definition to include a reference to barriers. However, despite changing the official definition, the CJEU fails to take into account the interaction between such barriers and the impairment. Instead, it remains focused on the impairment itself to establish disability. This is evident from *Kaltoft*, where the Court, when establishing whether or not the applicant could be considered disabled for the purpose of the Directive, focused on the medical consequences of the applicant's obesity, citing reduced mobility or the onset of related medical conditions as factors which could render his obesity a disability for the purpose of the Employment Equality Directive, and implicitly denying that the employer's discriminatory attitude towards obesity might be sufficient for that purpose. Similarly, in *Z*, the Court found that the applicant's impairment did not render her disabled for the purpose of the Directive since the fact that she was unable to conceive a child did not in itself impact her capacity to work. Had the Court seriously considered the interplay between her impairment and existing barriers, namely the lack of a system of surrogacy leave, it would likely have found differently. In both cases, the CJEU constructs a person which is innately either capable or disabled, apparently independently from her environment. One is inherently disabled or not. This is in stark contrast not only to the social model of disability but arguably to reality. As Nussbaum recognizes, all human beings depend on their social and political environment to develop and make use of their innate capabilities. Dignity, in a Nussbaumian understanding, is inviolable but not indifferent: our material circumstances do not diminish our dignity, but they are certainly important to dignity's flourishing. It matters, simply put, whether we are poor or do not have to worry about money, whether we are socially well-regarded or shunned, whether our systems are set up with our needs in mind or not. These factors do not change our equal worth and deservingness, but a

life *worthy* of human dignity will require them. One of the ways Nussbaum expresses this idea is through the concept of combined capabilities. Combined capabilities refer to those capabilities which are not only present internally; that is, they are not the capabilities of a person who is only theoretically able to do something (on account of her skills, talent, health), but those of a person also enabled by her social and political environment. They are the relevant capabilities for the pursuit of justice as it would not do for a government to foster a person's internal capabilities, for example by providing her with education and thus nourishing her intellect, but to then deny her combined capability for free speech through failing to protect it in the state's legal system. If disability can be conceptualized as an unjust lack of capability, then we would do well to acknowledge that this refers to *combined* capabilities, that is, innate capabilities in interplay with social, political, and environmental factors. Hence, in defining disability, it is only sensible to consider not only a person's internal capabilities (the impairment itself) but also the manner in which the impairment interacts with environmental, socio-political, or attitudinal barriers to disable that person.

The manner in which the CJEU conceives of disability as related to the professional sphere is telling as well: it is true that the Employment Equality Directive only covers discrimination in that sphere – this is a well-known criticism which concerns many other grounds of discrimination as well.[100] The fact that the envisaged horizontal discrimination directive has stalled in the political process is unfortunate but to demand that this gap be bridged by the Court might legitimately raise concerns of judicial overreach. However, this is not what is suggested here. While the material scope of the directive is explicitly limited to employment, the same cannot be said of the personal scope. Nevertheless, the Court decided to apply the requirement of the disability constituting a hindrance to a person's equal participation in professional life to the definition of disability itself, thereby excluding impairments which do not, in themselves, constitute such a limitation. This reveals something about the imagined addressee of these provisions – the relevant disabled person (that is, the disabled person worthy of protection from discrimination) is disabled

100 See the failed proposal for a Horizontal Equality Directive: EU Commission, *Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, COM(2008) 426 final. See further A. Broderick & D. Ferri, *International and European Disability Law and Policy* (2019), 357; L.Waddington, 'The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law', in U. Belavusau & K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (2019) [Waddington, 'Influence'].

for the purposes of employment. Intentional or not, this is the consequence of defining disability in the manner as it is currently done. And, as we have seen, this outcome is not inevitable from the text of the Employment Equality Directive itself. The Directive speaks of combatting *discrimination* (on the grounds of disability) in the sphere of employment, not of disability concerning the sphere of employment. It follows that the discriminatory act must be related to the employment, not the disability itself. And, as is evident from the *Z* case, it is indeed possible to be disabled by a condition which is not directly impacting negatively on one's capacity to work, but still be discriminated against in the employment sphere. The protection of people whose disability does not directly restrict their productivity is thus being denied by the exclusionary manner in which the CJEU applies its definition of disability.

This is telling – it constructs a deserving (and an undeserving) disabled legal subject. The disabled person only appears for the purposes of EU law where she is disabled with respect to her ability to work. To put it more pointedly, the only relevant person for the purpose of discrimination law is the economically productive disabled person, or rather the potentially productive disabled person who, through discrimination legislation, can be restored to productivity. Those who are able to work but are forced to make sacrifices in their personal life due to discriminatory conditions fall through the cracks. As O'Brien put it, this "fixation upon people with impairments suffering direct work function-effects reflects the Union's expectations of labor market conformity and unwillingness to re-evaluate social structures."[101] By defining disability as it does, that is, as directly related to one's employability, the Court thus perpetuates a reductive conception of the person, one which ignores the plurality of ends which is characteristically human, the fact that we strive for a multiplicity of worthy goals, and require this plurality for a life worthy of human dignity. In Nussbaumian terms, the CJEU promulgates an instrumental view of the person insofar as it appears to value a person primarily for her productive contribution towards the cooperative scheme that is the EU.[102] This is not only reductive and insulting towards the dignity of disabled persons but has real consequences in law and policy as will be shown in the next section.

101 O'Brien, 'Union Citizenship', *supra* note 83.
102 Nussbaum, *Frontiers of Justice*, *supra* note 3, 160.

III. Pitfalls of Constructing the Disabled Legal Subject Along Productivity Lines

We have seen that EU law struggles to conceive of the disabled legal subject in terms other than of economic productivity and to give proper significance to environmental, social, or attitudinal barriers in defining disability. This section demonstrates some consequences of this conception of the person, using the examples of sheltered employment, care work, and activation policies.

1. Sheltered Employment

Sheltered or rehabilitative employment are those forms of work specifically designed to support people who are unable to participate in the 'normal labor market' - disabled persons frequently make up the majority of employees in such schemes.[103] Usually, two types are distinguished: those schemes aimed at helping persons to reintegrate into the ordinary labor market (rehabilitative employment), and those which provide permanent employment for those unable to find work on the open market (sheltered employment).

There is some discussion as to whether sheltered employment is actually desirable from a disability rights perspective or whether it can contribute to the 'ghettoization' of disabled workers, thus further exacerbating the exclusion of disabled persons from social and economic life.[104]

While those who argue that it is contrary to the aim of inclusion of disabled persons to permanently employ them in schemes which will often lead to segregation from the normal workforce certainly have a point, it must be recognized that there are persons who may never be able to be in ordinary employment. That is why it is of great importance that sheltered employment is recognized as work, with all the rights that derive from this status. However, under current EU law, sheltered employment is only recognized as conferring worker status under narrow conditions, namely where it is 'of some economic

103 M. Jesús Segovia-Vargas *et al.*, 'Sheltered Employment Centres: Sustainability and Social Value', 13 *Sustainability* (2021) 14, 7900; S. Beyer, F. de Borja Jordán de Urríes, M. A. Verdugo ,'A Comparative Study of the Situation of Supported Employment in Europe', 7 *Journal of Policy and Practice in Intellectual Disabilities* (2010) 2, 130.

104 See e.g. M. Bell, 'People with Intellectual Disabilities and Labour Market Inclusion: What Role for EU Labour Law?' (2019), 11 *European Labour Law Journal* (2020) 1, 3, 10 [Bell, 'EU Labour Law']; L. Waddington, 'Evolving Disability Policies: From Social Welfare to Human Rights: An International Trend from a European Perspective', 19 *Netherlands Quarterly of Human Rights* (2001) 2, 142 [Waddington, 'Evolving Disability Policies'].

value'. As the term 'worker' has autonomous meaning in the EU legal system but is not defined in any legislation or treaty provision, the task of defining the concept has fallen to the CJEU. The result is an amalgamation of criteria which make up the EU worker with the basic formula being that they must perform services under the direction of another for remuneration.[105] An exception from these criteria was carved out already in the 1989 *Bettray* case,[106] which concerned employment for individuals unable to work in the normal labor market for an indefinite time. The Court held that the employment relationship could not be considered "effective and genuine economic activity" and could therefore not qualify the applicant for protection under the free movement of workers provisions.[107] In the later *Trojani* case, the Court seemed to reconsider the possibility of sheltered or rehabilitative work leading to worker status, ultimately leaving the assessment up to the referring court. It did, however, add that, for such work to be considered genuine and effective, it would have to be "capable of being regarded as forming part of the normal labor market".[108] More recently, in *Fenoll*, the CJEU appeared to reconsider its ruling in *Bettray* insofar as it did find the applicant (working in sheltered employment) to be a worker for the purposes of EU law.[109] Importantly, however, the Court based this finding on the fact that the work carried out within the sheltered employment scheme was not merely "marginal and ancillary" but had "a certain economic value" as the organization derived some economic benefit from the activities carried out under the scheme.[110] Thus, while the Court appears to be more willing to recognize work performed outside of the open labor market, it continues to rely on an assessment of economic value for recognizing an activity as work.[111]

This is concerning for several reasons. First, it seems at odds with the normally broad interpretation of the worker status by the CJEU. For example, those undergoing vocational training have regularly been recognized as workers

105 *Deborah Lawrie-Blum v. Land Baden-Württemberg*, C-66/85, Judgment of 3 July 1986, ECLI:EU:C:1986:284, para. 17.

106 *I. Bettray v Staatssecretaris van Justitie*, C-344/87, Judgment of 31 May 1989, ECLI:EU:C:1989:226 [*Bettray*].

107 *Ibid.*, para. 17.

108 *Michel Trojani v Centre Public d'Aide Sociale de Bruxelles*, C-456/02, Judgment of 7 September 2004, ECLI:EU:C:2004:488 [*Trojani*].

109 *Gérard Fenoll v Centre d'Aide par le Travail „La Jouvene" and Association de Parents et Personnes Handicapées Mentales (APEI) d'Avignon*, C-316/13, Judgment of 26 March 2015, ECLI:EU:C:2015:200 [*Fenoll*].

110 *Ibid.*, para. 40.

111 M. Bell, 'Disability, Rehabilitation and the Status of Worker in EU Law: Fenoll' 53 *CMLRev* (2016) 197, 204 [Bell, 'Fenoll'].

in free movement provisions, even though they will usually not be of significant economic benefit to their employer during that period. Nevertheless, the Court in *Fenoll* was at pains to differentiate the case from the facts of *Bettray*, suggesting that, without economic value, sheltered or rehabilitative employment cannot confer worker status.[112] The disparity in treatment between trainees and those in sheltered employment is in stark contrast to the general principle of equal treatment - non-disabled workers do not have to convince the Court of the economic value of their employment relationship to receive worker status and the protections afforded thereunder.[113] Moreover, even if the criteria were consistently applied to both disabled and non-disabled persons, this would nevertheless ignore the barriers disabled persons face which may prevent them from taking up 'ordinary employment' in the open labor market. Again, EU law is 'disability blind' as it applies a model of work which is ill-suited for many disabled persons and it appears to overlook the manner in which disability is created through the interplay of impairment and various environmental, social, or attitudinal barriers.[114]

Secondly, and more generally, it can be questioned whether economic value should be the guiding line demarcating if someone engaged in occupational activity is worthy of the law's protection. Some disabled persons may never be able to work in the 'normal labor market' due to the nature of their impairment or because their accommodation would be too onerous. This should not mean, however, that they are not entitled to equal protection. Again, such an approach betrays a conception of the person which values human beings first and foremost for their productive contribution. Instead of considering the many valuable ends that may be attained through sheltered employment, such as social integration and community, as well as engaging disabled person's skills and talents, the differentiation along lines of economic value reduces human worthiness to economic productivity. Arguably, the same ends could be achieved by affording equal protection rights to all EU citizens, regardless of economic status, and indeed this would be preferable from the perspective of Nussbaumian social justice. For those who would nevertheless uphold the worker/non-worker distinction, Bell suggests an alternative way of assessing what constitutes

112 See *Fenoll*, *supra* note 109, para. 38.

113 Consider e.g. the facts in *Udo Steymann v Staatssecretaris van Justitie*, C-196/87, Judgment of 5 October 1988, ECLI:EU:C:1988:475 [*Steymann*], which concerned someone in a religious community essentially performing plumbing services for room and board, who was nevertheless considered a worker for the purposes of EU law.

114 C. O'Brien, 'Social Blind Spots and Monocular Policy Making', 46 *Common Market Law Review* (2009) 4, 1107 [O'Brien, 'Social Blind Spots'].

work, which could rely on an assessment of social utility instead of economic value, giving regard to the benefit derived both by the individual in sheltered employment and society as a whole.[115]

It is clear how the conception of the disabled person we have identified above impacts on the (non-) recognition of sheltered employment. Such a conception is blind to the fact that disability is the result of the interaction of an impairment and a person's environment, thus necessitating accommodations to be made for enabling equal capabilities up to a threshold. Instead, current EU law uses those accommodations (in this case, sheltered employment) as a disqualifying reason for recognizing the equal status of disabled workers. Moreover, the fact that the CJEU has proven more willing to recognize sheltered employment where it is convinced of its economic value demonstrates an understanding of the (disabled) legal subject primarily in terms of productive contribution.

2. Care Work and Dependency

The issue of care work and the legal status of dependent (or conversely, primary carer) are closely connected to disability rights. Some disabled persons require part-time or full-time care and often this task falls to close family members who reduce their work hours or leave employment entirely to care for their relatives. Of course, the relevance of these issues goes beyond the sphere of disability – care for non-disabled children and the elderly are of equal significance from the perspective of Nussbaumian social justice. Thus, while the present discussion examines the topic primarily from the perspective of disability, many of the findings are applicable to other care-giving and care-receiving statuses as well.

The central issue with regard to care work and EU law concerns the rights of the care-giver. While this section therefore focuses on their legal position, the legal construction of the care relationship can provide insights with respect to the conception of the person and of disability and the importance that care and vulnerability are afforded more generally. This also shows how the treatment of disability can reveal more fundamental beliefs about personhood, such as precisely whether vulnerability and dependency are considered part of the human condition or an aberration. The most pertinent situation with regard to care-givers and EU law occurs where the person in need of care is an

115 Bell, *supra* note 111, 204. Note that also from an economic perspective, economic value is usually defined as utility or welfare, rather than exclusively monetary value.

EU citizen but their care-giver is not. For safeguarding the capabilities of the person requiring care, it is crucial that their carer enjoys residence and equal treatment rights. These rights are primarily regulated under the Citizenship Directive, which determines, *inter alia*, the conditions for obtaining residence and equal treatment rights for family members of EU citizens.[116] Usually, such rights are tied to requirements of economic activity or financial self-sufficiency, dependency, and cross-border movement.[117] Already, this is problematic from the Nussbaumian perspective: disabled persons (and others requiring care) are entitled to have their capabilities to be emotionally and physically nourished and taken care of realized, regardless whether they themselves or their care-givers are economically productive. Indeed, EU law is not entirely blind to the importance of care: in the seminal *Ruiz Zambrano* case, it granted residence rights to the parents of an EU national despite the conditions laid out in the Citizenship Directive not being satisfied, on the basis of ensuring the enjoyment of the 'substance' of EU citizenship rights to said EU national.[118] While this is a positive development from the perspective of Nussbaumian social justice, the manner in which the Court has construed such relationships of care must be assessed critically. The CJEU has interpreted the dependency requirement to mean exclusively financial dependency, resulting in overly narrow conditions under which disabled persons can rely on EU law to extend protection to their care-givers. While dependency in life can manifest in various dimensions, such as emotional or physical dependency, the CJEU has construed the dependency requirement as found in Article 2 of the Citizenship Directive to be (exclusively) material.[119] Such an understanding of the care-dependency relationship again betrays a reductive view of the person: it supposes that, where a person is

116 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member, OJ 2004 L 158/77.

117 *Ibid.*, Art 7; N. Cambien, 'EU Citizenship and the Right to Care', in Kochenov (ed.), *EU Citizenship and Federalism*, *supra* note 50.

118 *Gerardo Ruiz Zambrano, v. Office National de l'Emploi (ONEm)*, C-34/09, Judgment of 8 March 2011, ECLI:EU:C:2011:124 [*Ruiz Zambrano*].

119 *Yunying Jia v Migrationsverket*, C-1/05, Judment of 9 January 2007, ECLI:EU:C:2007:1, para. 35 [*Jia*]; Flora May Reyes v Migrationsverket, C-423/12, Judgment of 16 January 2014, ECLI:EU:C:2014:16, para. 21 [Reyez]; see also *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C-200/02, Judgment of 19 October 2004, ECLI:EU:C:2004:639, paras 43-46 [*Zhu and Chen*, Judgment]; the AG opinion of the latter case explicitly excludes emotional dependency: *ibid.*, Opinion of AG Tizziano delivered on 18 May 2004, ECLI:EU:C:2004:307, para. 84 [*Zhu and Chen*, Opinion Tizziano].

financially secure, they are sufficiently cared for. Nussbaum helps us understand that our needs are instead plural and incommensurable, that they cannot be substituted by a single metric such as financial means. Care relationships are emotionally complex and, besides providing financial stability, the more important attributes of a care-giver may be their capacity to ensure emotional stability and the social ties they have with the dependent. Nussbaum's conception of the person does not disregard the importance of material security. Indeed, it emphasizes that dignity is not indifferent, meaning that it is of great importance for its flourishing that a person has the material preconditions for living well. Nevertheless, she recognizes that the lack of one capability (in this case, the capability for emotion) cannot be remedied by a sufficient amount (or even a surplus) of another. To deny someone the care they require, even if this concerns emotional rather than financial care, is thus unacceptable from the perspective of the CA. Moreover, the refusal to recognize care work as work proper (which would then engender the application of more favorable provisions for residence and equal treatment rights) is an injustice towards those engaged in unpaid care work. Not only does EU law deny them equal treatment *vis-a-vis* workers in the traditional sense, but it arguably impinges on the social recognition and, ultimately, the dignity of those engaged in unpaid care work.[120] There are two plausible solutions to this. Care work could be recognized as work, with those providing care then enjoying the more extensive rights afforded under the free movement of workers provisions.[121] Alternatively, as argued by Cambien, the 'substance of rights' enjoyed by EU citizens as first pronounced in *Ruiz Zambrano* could be understood to encompass a right to care, thus engendering residence and equal treatment rights for the primary carers of EU citizens, irrespective of the conditions enumerated in the Citizenship Directive.[122] While they would achieve virtually the same outcome, it is submitted here that it would be preferable, in terms of Nussbaumian justice, to reconsider the concept of work in EU law so as to include care work. This is because, in the alternative, the rights of care-givers would be derivative: their rights (to residency, to equal treatment) are granted so that the EU citizen they care for is not deprived of the genuine enjoyment of the substance of rights attached to citizenship. They are thus not accepted as full subjects in their own right but rather are conceived of as a means to an end.

120 See Nussbaum, *Frontiers of Justice, supra* note 3, 212; E. Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (1999).

121 M. Bell, *supra* note 111, 204.

122 As Argued by Cambien, *supra* note 117.

3. Activation Policies

Lastly, activation policies aimed at increasing the participation of disabled persons in the open or 'normal' labor market are further indicative of the narrow definition of personhood that EU law affords disabled persons. Labor market activation policies constitute a general trend observable in EU social policy – whereas early social policy on the EU level was primarily concerned with harmonizing workers' rights and introducing health and safety regulations,[123] EU social and, in particular, labor policy has transformed in the 21st century. Informed both by an increasingly globalized economic environment and the crisis of the welfare state, political emphasis shifted from demand-side policies to supply-side policies.[124] This move from harmonizing employees' rights towards coordinating employment policies was first visible in the European Employment Strategy (EES), continued to be central to the Lisbon Strategy and which also underlies the Europe 2020 strategy.[125]

There is, however, some concern relating to the shift away from ensuring individual rights at a European level towards coordination of member state employment strategies. This is because, as Börner points out, "individuals are not legally entitled to any active labor-market policies".[126] Thus, whether the adopted policies will in fact 'reach' those citizens in greatest need are left to the discretion of national legislators. Furthermore, the tandem of labor market activation on the one hand and reform of the welfare state on the other is frequently implemented by recourse to punitive strategies rather than by investment in positive activation. That is, activation measures are linked to welfare entitlements and, where

123 See e.g. Council Directive (EEC) 91/533 on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, OJ 1991 L 288/32; Council Directive (EEC) 92/85 on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who Have Recently Given Birth or are Breastfeeding , OJ 1992 L 348/1; Council Directive (EC) 93/104 Concerning Certain Aspects of the Organization of Working Time, OJ 1993 L 307/18; Council Directive (EC) 94/33 on the Protection of Young People at Work, OJ 1994 L 216/12.

124 C. Barnard, 'EU Social Policy: From Employment Law to Labour Market Reform', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (2011), 657.

125 See e.g. Commission, 'Green Paper – Modernising Labour Law to Meet the Challenges of the 21st Century', COM(2006) 708 final, 7-9; Commission, 'Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth', COM(2010) 2020 final, 17-19.

126 S. Börner, 'Marshall Revisited: EU Social Policy From a Social-Rights Perspective', 30 *Journal of European Social Policy* (2020) 4, 421, 429.

individuals do not comply with requirements aimed at their reintegration into the labor market (frequently, this consists simply of an obligation to search and apply for employment), this will entail sanctions in the form of cuts to social benefits.[127]

The trend towards activation is also observable in the Union's disability strategy. The European Commission's 2010-2020 Disability Strategy bemoans the fact that only about 50% of disabled persons are employed and suggests that, for the EU to hit its growth targets, more disabled persons need to be employed in the open labor market.[128] Similarly, the 2021-2030 strategy asserts that increased labor market participation of disabled persons will be "for the benefit of the individuals, the economy, and society as a whole".[129] Notably, both documents stress the economic value to be derived from integrating disabled persons into the labor market. This is not in itself problematic, but there is reason to be cautious with regard to activation policies where they are considered as an alternative for the provision of social benefits. The 2010-2020 strategy spoke of helping member states to "fight those disability benefit cultures and traps that discourage [disabled persons] from entering the labor market".[130] Such rhetoric is worrisome in that it frames benefit recipients as deviant and suggests that the provision of social benefits is responsible for low labor market participation rather than the continued existence of barriers and the lack of accommodation. While the direct reference to 'benefit cultures' is absent in the most recent strategy, the general tenor remains one of activation as the natural solution to low employment of disabled persons. Not only does this betray an instrumental attitude towards disabled persons, it suggests that the low labor

127 This approach has been advocated at EU level since the Amsterdam Treaty, and still persists, Cf. European Commission, 'Proposal for Guidelines for Member States Employment Policies 1998' (1997), D/97/22, available at https://ec.europa.eu/commission/presscorner/detail/en/DOC_97_22 (last visited 7 September 2024) and European Commission, 'Making Work Pay – A Conceptual Paper' (2016), Research Note 3/2016, available at https://ec.europa.eu/social/BlobServlet?docId=16330&langId=en (last visited 7 September 2024). See further S. Betzelt & S. Bothfeld (eds), *Activation and Labour Market Reforms in Europe: Challenges to Social Citizenship* (2011); A. Daguerre, 'Activation Policies at the EU Level: A Workfarist Turn?', in A. Daguerre, *Active Labour Market Policies and Welfare Reform* (2007), 130-150.

128 EU Commission, *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, COM/2010/0636 final, 7, section 4: Employment [EU Commission, *European Disability Strategy 2010-2020*].

129 EU Commission, *Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030*, COM(2021)101 final, 13-14.

130 EU Commission, *European Disability Strategy 2010-2020*, *supra* note 128, 7, section 4.

market participation of disabled persons is ultimately a matter of personal choice rather than of their disabling environment. This is painfully ignorant of the of the systemic barriers faced by marginalized groups, such as disabled persons, and contributes to the further stigmatization of those in need of social support. It entirely disregards that we all depend on our environment for realizing our capabilities – our environment just happens to be built with non-disabled persons in mind.

Hence, the turn toward active labor market policies merits some skepticism from the vantage point of the CA. This is so in particular where these policies are implemented through a regime of sanctions, which prioritizes (any) employment. It is appropriate to ask *which* capabilities are promoted and whether they come at the expense of other, equally valuable capabilities. Indeed, frequently such measures "emphasize employability, competitiveness and economic return" rather than fostering "individual autonomy and capability to be active citizens".[131] While one's evaluation of these effects will necessarily depend on one's understanding of the purpose of social policy, this does not mean the evaluation should not be undertaken in the first place. Moreover, labor market activation policies do not truly aim at ensuring capabilities, but rather at *functioning* – activation policies are successful where they result in actual labor market participation as opposed to enabling individuals to choose whether or not they want to pursue 'normal' employment. Not only is this arguably illiberal, insofar as it imposes an understanding of the good life (one characterized by economic productivity), but it again implies that a (disabled) person is worthy only in terms of their productive contribution. This is true in any case where such policies function with the threat of punitive consequences if the desired outcome (i.e. employment) is not achieved. This is not to argue against activation policies *per se*, but rather to stress the importance of multi-pronged approaches, which do not promote work on the normal labor market as the only sensible choice but are considerate of the fact that it is one option out of many, none of which determine a person's worthiness. In particular with regard to disabled persons, but also more generally, if we conceive of human beings as inherently vulnerable, we can more easily allow for mechanisms of care and support without demonizing those that have to rely on them.

131 M. A. Yerkes *et al.*, 'From the Capability Approach to Capability-Based Social Policy', in M. A. Yerkes, J. Javornik & A. Kurowska (eds), *Social Policy and the Capability Approach* (2019), 148.

F. Who is EU Law For?

As we have seen, the manner in which we conceptualize human beings determines what we consider to be the requirements of justice. An approach based on an understanding of persons as essentially rational, self-interested, and independent from their social and political environment will prescribe different demands and entitlements than one based on the idea that we are social animals characterized by our rationality as much as by our pervasive vulnerability and dependency.

It is argued here that the latter approach is not only normatively more desirable, as it can include also the most marginalized groups, but it is also a closer approximation of human nature. Indeed, most of us would recognize that we flourish in social relations, that we experience periods of dependency and of care-giving, and that we are motivated by our self-interest as well as by a desire for community and a sense of justice. Thus, it is sensible to construct and regulate society with such a person in mind, rather than with the rational profit-maximizer described above. Indeed, it becomes an imperative to do so when we realize that not only are our social institutions a product of our understanding of human nature but that the relationship is cyclical: our judgements of deservingness, worthiness, and justice are deeply influenced by the social order as we have constructed it.

In the context of EU law, we have seen how the person is constructed through the legal statuses she is afforded – or indeed, rather than a whole person, what is constructed are fragments, specific identities which determine access to and benefits from EU law. The conception of the person which emerges from these statuses is reductive – it appears overly focused on human beings as economic actors, disregarding our multi-faceted nature, our capacity to engage in relationships characterized by justice, and our complex dynamics of care and dependency. The construction of the disabled legal subject is a pertinent example of this. Disabled persons are reduced to their impairment in so far as EU law still fails to account for the importance of external (environmental, social, or political) factors in their disablement, maintaining a false distinction between them and able-bodied persons. Moreover, the disabled legal subject is conceived of in an instrumental manner insofar as EU law is primarily concerned with the reduced economic productivity that may follow from their disability and with providing avenues for restoring their productive potential. We have seen how these conceptions pervade in EU law and policy, as well as how they produce real consequences for disabled persons and their care-givers.

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Thus, we are confronted with a simple question: who do we want EU law to serve? Those that fit more or less comfortably within the inherently reductionist conception of the person presented above? Or do we want to consider reforming EU law so as to address human beings that can be economically productive as well as dependent on care and assistance, who are both self-interested and deeply invested in sustaining social and communal relationships? Admittedly, doing so would require radical change at both the EU and member state levels, but this in itself should not be a reason to not consider these questions. Ultimately, we will have to decide whether we want EU law to address and benefit only those who fit the profile underlying current EU law, thereby excluding all those who do not (often the most marginalized), or whether we are willing to reconsider fundamentally whom EU law is for.