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# Gauging the Cumbersomeness of EU Law

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# Gauging the Cumbersomeness of EU Law

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# Gauging the Cumbersomeness of EU Law

## 1. Introduction

Europe matters. We know it matters because whenever reference is made to the presence of an EU provenance, lay perceptions of a legal provision change. Debate shifts to its general economic costs,<sup>1</sup> the economic benefits or costs for particular individuals;<sup>2</sup> how it threatens or reinforces perceptions of nationhood;<sup>3</sup> and the degree of national political unity or disunity it generates.<sup>4</sup> These extra associations constitute the cumbersomeness of EU law. They are the added significance or resonance attributed to a provision simply by virtue of its having an 'EU' tag. How to explain them? They cannot be said to emerge simply by reason of EU law's imposing too high regulatory costs, being culturally insensitive or politically divisive. These may be true of individual provisions but there is an inversion of cause and effect in such assertions as they beg the question as to the standards by which EU law is judged and why these standards are such powerful frames in its evaluation. Explanations referring to the 'foreign-ness' of EU law are equally unsatisfactory. This quality may impose higher duties of justification on EU law but its presence can say little about the content of EU law's associations.

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<sup>1</sup> D. Chalmers, 'The Positioning of EU Judicial Politics within the United Kingdom' (2000) 23 *West European Politics* 169, 188-190.

<sup>2</sup> M. Gabel, 'Public Opinion and European Integration: An Empirical Test of Five Theories' (1998) 60 *Journal of Politics* 333. J. Schild 'National v. European Identities? French and Germans in the European Multi-Level System' (2001) 39 *JCMS* 331; T. Christin, 'Economic and Political Basis of Attitudes toward the EU in Central and Eastern European Countries in the 1990s' (2005) 6 *EUP* 29.

<sup>3</sup> J. Medrano, *Framing Europe: Attitudes to European Integration in Germany, Spain, and the United Kingdom* (2003, Princeton University Press) Chapters 3 & 9; A. Menéndez-Alarcón, *The Cultural Realm of European Integration: Social Representations in France, Spain, and the United Kingdom* (2004 Westport, Conn); C. Kentmen, 'Determinants of Support for EU Membership in Turkey: Islamic Attachments, Utilitarian Considerations and National Identity' (2008) 9 *EUP* 487

<sup>4</sup> L. Hooghe & G. Marks, 'Calculation, Community and Cues: Public Opinion on European Integration' (2005) 6 *EUP* 419; M. Gabel & K. Scheve, 'Mixed Messages: Party Dissent and Mass Opinion on European Integration' (2007) 8 *EUP* 37.

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Instead, it will be argued that this cumbersomeness can only be understood by reference to the claims that EU law makes about itself. For, whilst subjects' understandings of how EU law acts on them may be as heterogeneous as the human psyche and the legal contexts to which EU law contributes, in all circumstances EU law must perform certain common tasks. It must justify reasons for its presence, put forward qualities by which subjects can identify it and seek to bring about changes in its subjects' behaviour.

To undertake these tasks, EU law must make claims about itself. It must set out what counts as a justification; with what it identifies itself and the behavioural ethos to which it appeals. Such claims are centred, it is argued, on a European *eudaimonia* which requires EU law is to grant individuals the structures, entitlements, responsibilities and protection to make better and more successful lives for themselves.<sup>5</sup> This idea of self-betterment underpins the justification for any EU legal norm; the sense of what any EU legal norm is about and the instruction that EU law provides to its subjects to how to handle their lives. The first half of this essay considers the distinctive features of this *eudaimonia* of EU law. It will be argued that not only there is a particularly intense relationship between it and EU law but that this *eudaimonia* imposes ambitious and irredeemable demands of EU law. If these elements are shrill and exigent, a further dimension of this *eudaimonia* is that it has not got to grips with the tensions and conflicts generated by these demands. For it is characterised by a conception of politics, which, it shall be argued, sets irresolvable terms of contestation but which simultaneously territorialises and entrenches that contestation, and by a conception of justice, which generates further alienation through the restricted nature and formality of its vision.

This *eudaimonia* also provides a vision of how EU law is to govern its subjects and the entitlements and claims it can ask of them. The second half of this essay considers these. It will be argued that EU law's *eudaimonia* has led to its providing few

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<sup>5</sup> The term is first found in Aristotle's *Nicomachean Ethics*. It means happiness as a state that is secured by rational and virtuous activities premised on an adequate supply of entitlements and resources. Aristotle, *Nicomachean Ethics* (1905, transl W. Ross, Clarendon, Oxford), Book I, paras. 4- 7.

entitlements whilst making many claims on its subjects. The need to offer something that cannot be offered by national law has led to EU law offering a very limited, unevenly distributed number of legal entitlements as most entitlements can easily be granted by national law. By contrast, the claim to regulate better than national law had led to EU law having to govern the most distant types of risks across a wide array of activities. It casts a cold hand across us, requiring us to consider dangers which are particularly difficult to gauge and which are thus hog-wired by anxiety.

A project demanding a lot, directly granting a little and always reminding us of our insufficiencies generates the style of reactions described at the beginning. Individuals may react by retreating into themselves, asking what is in it 'for me' or turning to false gods. None of this is to damn EU law. We are maybe condemned to seek better lives and EU law is simply a strong institutionalisation of this, which, notwithstanding these effects, brings many goods when viewed from a distance. But it does suggest that a central mission for EU law is not simply to better our lives but to mediate the cruelty of this by allowing individuals not just to lead better lives but to develop and realise accounts of their lives that they perceive as their own rather than set out for them.

## 2. A European Eudaimonia

To consider this *eudaimonia* less abstractly and in more detail, this essay examines three 2008 legislative proposals – those on carbon capture storage (CCS), patients' rights in cross-border health care (PR), and the provision of food information to consumers (FI) - which were chosen because of their significance and difference.<sup>6</sup>

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<sup>6</sup> The first two were mentioned in the 2008 programme as strategic initiatives, EC Commission, *Commission Legislative and Work Programme 2008*, COM (2007) 640, 14. The proposal on food information was in the 2007 Work Programme but only put forward in early 2008. It is one of the most significant 'simplifying' measures. EC Commission, *Commission Legislative and Work Programme 2007*, COM (2006) 629, 32

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The CCS proposal is concerned with the aversion of catastrophe on a global scale.<sup>7</sup> It forms part of a strategy to reduce EU carbon dioxide emissions by 30% by 2020 from 1990 levels. To that end, it is anticipated that twelve large-scale demonstration plants will be built by 2015 to 'capture' emissions and store them underground.<sup>8</sup> The proposal is concerned with regulation of these plants. It is about ecological risk and Man's relation to Nature. The risks are heterogeneous - those associated with emission of CO<sub>2</sub> into the atmosphere, but also those associated with the contamination of the CO<sub>2</sub> and those associated with leakage.

The PR proposal<sup>9</sup> consolidates the case law of the Court of Justice allowing EU nationals to seek publicly funded health care in another Member State where such care could not be provided within their own within a reasonable period of time.<sup>10</sup> This pre-existing legal framework sets expectations so that a central debate in the proposal is whether an individual should still have to wait a reasonable period before seeking treatment abroad.<sup>11</sup> The subjects of the proposal are wide-ranging as entitlements are all given to all persons who might be seeking medical treatment and are entitled to these as social benefits in their State of affiliation. The substance of the proposal is about the conferral of a social right, the right to transnational health care, rather than the regulation of ecological risk. Redistributive questions are thus strongly to the fore, as something, health care, traditionally considered a collective good, unitary and territorial, is unbundled and made a series of individual rights.<sup>12</sup>

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<sup>7</sup> EC Commission, *Proposal for a Directive on the geological storage of carbon dioxide and amending Council Directives 85/337/EEC, 96/61/EC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC and Regulation (EC) No 1013/2006*, COM (2008) 18 (CCS proposal).

<sup>8</sup> On this see EC Commission, *Limiting Global Climate Change to 2 Degrees Celsius, The way ahead for 2020 and Beyond*, COM (2007) 2, 5-6.

<sup>9</sup> EC Commission, *A Community framework on the application of patient's rights in cross-border health care*, COM (2008) 414 (PR proposal).

<sup>10</sup> The most recent case in a long line is Case C-372/04 *Watts v Bedford Primary Care Trust* [2006] ECR I-4325, para 120.

<sup>11</sup> *PR proposal*, article 6.

<sup>12</sup> The Commission is quick to argue that the proposal will only have a limited effect on the organisation and budgets of domestic health care, observing that over 90% of health care needs in the EU will be met by domestic systems. EC Commission, *Ibid*, 8. It quotes the estimates of unmet medical need provided by the European Statistics on Income and Living Conditions..

The *FI* proposal is, in turn, distinctive.<sup>13</sup> The substance of the proposal is consumer rights with the central innovation being more detailed nutrition labelling requirements so that it will be mandatory to declare energy, fat, saturates and carbohydrates levels in food.<sup>14</sup> Like the *PR* proposal, it takes place within the framework of a settled EU legal background. This is, however, that of detailed legislation with the proposal bringing together eight pieces of legislation. Whilst wide-ranging, it grants few, if any, directly effective entitlements to individuals. By contrast, extensive responsibilities are placed on the food industry.<sup>15</sup> The transnational economic dimension is more pressing than the other two proposals with intra-EU trade estimated to account for 75% of all food trade within the EU.<sup>16</sup> Another feature of this proposal is that it occurs in a field – unlike the other two – already governed extensively by EC law where national food information laws are considered the exception, and therefore may only be adopted if they meet the conditions of the proposed Regulation.<sup>17</sup>

How to look for commonality amongst such diversity? It is not unusual for common principles to be sought in heterogeneous laws which nevertheless enjoy the same formal pedigree. At the beginning of his Clarendon Law Lectures, Justice Breyer stated:

‘The United States is a nation built upon the principles of liberty. That liberty means not only freedom from government coercion but also the freedom to participate in the government itself.’<sup>18</sup>

Whether that is the case for the United States, these forms of liberty do not seem to be pivotal to informing and contouring the content of these legislative proposals. Instead, all proposals are concerned with securing the well-being of the EU citizenry. The *CCS* proposal’s objective is ‘permanent containment of CO<sub>2</sub> in such a way as to prevent or reduce as far as possible negative effect on the environment and any

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<sup>13</sup> EC Commission, *Proposal for a Regulation on the provision of food information to consumers*, COM (2008)40 (*FI* proposal).

<sup>14</sup> *FI* proposal, articles 29-34.

<sup>15</sup> *FI* proposal, article 1(3).

<sup>16</sup> *Ibid.*, 9.

<sup>17</sup> *FI* proposal, articles 37-43.

<sup>18</sup> S. Breyer, *Active Liberty* (2008, OUP) 9

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resulting risks to human health.<sup>19</sup> The *PR* proposal seeks to establish ‘a general framework for the provision of safe, high quality and efficient cross-border health care.’<sup>20</sup> The *FI* proposal is to provide the ‘basis for the assurance of a high level of consumer protection in relation to food information, taking into account the difference in the perception of consumers and their information needs whilst ensuring the smooth functioning of the internal market.’<sup>21</sup>

It is a particular form of well being that is being sought here. It is neither pleasure for EU citizens nor fulfilment of their desires nor securing of their contentment.<sup>22</sup> It is closer to the Aristotelian notion of *eudaimonia* - a form of self-fulfilment in which we flourish through exercising our human activities.<sup>23</sup> EU law becomes something enabling its subjects to fulfil their capacities to lead a successful and prosperous life. This life is not simply about flourishing but also about virtue as the idea of a prosperous life cannot readily be disentangled from that of a good life in the proposals.

The mission, therefore, at the heart of the *FI* proposal is to enable consumers to make more informed choices. Yet the information is not on the addictive qualities of food or how it can contribute to hallucinogenic experiences or be made into explosives or poisons. It is provided to enable consumers to lead healthy and ethical lives. The proposal, therefore, states that the information is a basis for consumers ‘to make safe use of food, with particular regard to health, economic, environmental, social and ethical considerations.’<sup>24</sup> Food choices are not therefore just about the avoidance of allergens or salts but also about active contribution to a better society. Moreover, a process of identity-formation is to take place in the process. Provision of nutrition

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<sup>19</sup> *CCS proposal*, article 1(2).

<sup>20</sup> *PR proposal*, article 1.

<sup>21</sup> *FI proposal*, article 1(1)

<sup>22</sup> An accessible and useful account of the literature on well-being can be found in D. Haybron, *The Pursuit of Unhappiness: The Elusive Psychology of Well-Being* (2008, OUP) 33-37.

<sup>23</sup> *Supra* n.5

<sup>24</sup> *FI proposal*, article 3(1).

information is seen as central to educating the public in that form and heightening awareness of the issue.<sup>25</sup>

The *PR* proposal follows a similar logic. The patient is to be an active guardian of her own health shopping around the single market for the best provider. She has both a freedom and a certain responsibility to secure the most healthy life for herself. For, if she does not, EU law provides no alternatives as to who will take care of it. The proposed Directive is therefore, *inter alia*, concerned to secure her accurate information about health care, clarity about the reimbursement rights, appropriate standards of care across the Union and administrative rights in her state of affiliation which allow her a quick decision to go abroad for treatment.<sup>26</sup> It is about enlarging the possibilities for EU citizens to secure a healthy life for themselves by enabling them to make reliable choices about the quality of care provided for them and providing the administrative and financial support for those choices. However, this active citizenship does not extend to destabilising the principles on which medical care is allocated where the perceived benefit is more contentious. They cannot seek treatment therefore that is not classified as a benefit in their State of affiliation, either because it is too costly or because its medical efficacy or ethics is challenged.<sup>27</sup>

The relationship between carbon capture and storage, an expensive, limited and tightly regulated process, and this idea of *eudaimonia* seems less apparent. Yet scratch below the surface and a similar story emerges. It is a technology central to the combating of climate change, a priority of the Sixth Environment Action Programme.<sup>28</sup> This programme seeks to decouple environmental pressure from economic growth and integrate ecological protection, balanced social development and economic prosperity of sustainable development in which each is valued and reconciled with the others.<sup>29</sup> The CCS proposal is not therefore about the imposition of some eco-centric straitjacket but allowing us to prosper according to received under-

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<sup>25</sup> *Ibid.*, Preamble, alinea 32.

<sup>26</sup> *PR proposal*, articles 5-10.

<sup>27</sup> *PR proposal*, article 6(1)

<sup>28</sup> Decision 1600/2002/EC, laying down the Sixth Community Environment Action Programme, OJ 2002, L 242/1.

<sup>29</sup> *Ibid.*, Preamble, alinea 6-8.

standings, albeit adapted to new ecological sensitivities. Its benefits are seen not only to be combating climate change but also contributing to the security of energy supply and to innovation and competitiveness.<sup>30</sup> To be sure, these goods are not individualised in the same way as the other two proposals but that is only because this proposal is underpinned by assumptions about the operations of the liberal market economy. Debates therefore revolve about the effects of this technology on individual energy bills and the liability of operators in case of mishap.<sup>31</sup>

### 3. The Qualities of European Eudaimonia

But is not *eudaimonia* at the heart of all modern government? It may be but *eudaimonia* is not about a politics of affect or politics of happiness. It is about combining a politics of virtue with a politics of success in which demands of government, society and the citizen are made to be ever better. This perfectionism leads to an escalation of expectations of government and of the citizen that will not only never be met but can also generate perceptions of breakdown or crisis.<sup>32</sup> In national systems, this vicious cycle is broken by the crucial distinction between state and government, which cuts across it in two important ways.

First, the distinction enables politics and competition for office to be the traditional palliative for the onset of a breakdown as it enables citizens to vote in or vote out governments without exiting from the political system of the state. If a government fails to meet expectations or the type of better life is too demanding or has too many costs, voters try a different medicine with a new government. They still remain part of the state, however. The personalisation of the process enables citizens to believe that their national political system can deliver a better life over time as it offers the regular possibility for political renewal. Yet, as has been remarked for some time, this

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<sup>30</sup> CCS proposal, 3.

<sup>31</sup> ICF, *Analysis and Interpretation of responses from the carbon capture and storage internet consultation: Submission to the European Commission* (2007, ICF International, London) 12-13 & 24-26.

<sup>32</sup> D. Haybron, *supra* n. 22 provides a particularly strong critique at 159-170

possibility to ‘kick the rascals’ out does not exist in the same way within the EU political system.<sup>33</sup> This absence not only weakens political accountability, but, more importantly for the purposes of this essay, deprives the EU of the possibility of political catharsis with all the possibility for renewal of belief offered by that.

Secondly, the idea of the nation state carries with it the idea of a ‘community of fate’. It is a community of strangers bound by a certain legacy. This legacy may generate a set of symbols or values for which citizens are willing to commit considerable sacrifices. Equally importantly, it generates a pragmatism by placing citizens in an institutional context which they simultaneously recognise as making them who they are but which also requires them to acknowledge limits on what is attainable. Put crudely, a British national would recognise the National Health Service as central to British political identity. Yet if it is a monument to the British political system, its historic under-funding compared to other Western health systems calibrates expectations accordingly. Nobody expects a British politician to realise German standards of public health care within a term of office. This absence of legacy catches EU law in a double bind. It compels it to offer more to compensate for the absence of affective ties whilst stripping away the historical context that could regulate expectations. The consequence is a heightened dependence on a *eudaimonia*, which is of a different scale and intensity, it will be argued, to the national one.

### 3.1. European Eudaimonia: Realising the Otherwise Unrealisable

The Union competes with other tiers of government for the exercise of legislative power and must always show that, by virtue of the scale or imperative of the problem, it is best placed to address the problem.<sup>34</sup> This competition is legally forma-

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<sup>33</sup> The point was made early on in J. Weiler, ‘To be a European citizen – eros and civilisation’ (2007) *JEPP* 4 495, 513-514. The strongest recent argument on how to hog-wire political competition more pervasively into the EU political system is in S. Hix, *What’s Wrong with the European Union and How to Fix It* (2008, Polity, Oxford).

<sup>34</sup> On the strength of this see G. Morgan, ‘European Political Integration and the Need for Justification’ (2007) 14 *Constellations* 332. See also the distinction made between performance legitimacy and polity legitimacy in N. Walker, ‘Constitutionalizing Enlargement, Enlarging Constitutionalism’ (2003) 9 *ELJ* 365, 368-370.

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lised through the duty to demonstrate compliance with the subsidiarity requirement.<sup>35</sup> This contest is, moreover, a perennial one that takes place not only at the moment of adoption of a law but throughout its lifecycle as there is a continual need for justification and an ongoing possibility of review.<sup>36</sup> The goods realised by EU law must therefore be goods that are and continue to be otherwise unattainable by these other tiers of government. This is not a simple question of scale in which EU law is able, for example, to counter trans-boundary effects in a way not possible through unilateral domestic action. EU law must also make a claim that it is ideologically best suited to realising this level of *eudaimonia*. It must show not simply that it is big enough to realise certain goods but also that it is good enough to do so through its legal and political propensities. Academics refer to the Union as a ‘special area of hope’,<sup>37</sup> an institutional expression of cosmopolitanism<sup>38</sup> or a special place for civic solidarity.<sup>39</sup> Resonant statements are made in EU mobilising documents about realising an unprecedented range, scale and standard of goods.<sup>40</sup>

This percolates through to the micro-level in the style of justification and reflexivity shown in each of the proposals. The central justification for the CCS proposal is that national action cannot secure a sufficiently high level of ‘environmental integrity’. In

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<sup>35</sup> Protocol on the application of the Principles of Subsidiarity and Proportionality, paragraph 4.

<sup>36</sup> The on-going duty to justify is present in the review provisions attached at the end of most EC legislation committing the legislature to revisit the legislation after a number of years. It is now present in a more concerted manner in the ‘Better Regulation’ initiative. EC Commission, *A Strategy for the Simplification of the Regulatory Environment*, COM (2005) 535. This has led to 164 initiatives leading to removal of or Commission proposals to remove 2500 legislative acts by the end of 2007. EC Commission, *Second strategic review of Better Regulation in the European Union*, COM (2008) 32, 2-3.

<sup>37</sup> A. Ferrara, ‘Europe as a “Special Area for Human Hope”’ (2007) 14 *Constellations* 315.

<sup>38</sup> Z. Baumann, *Europe: An Unfinished Adventure* (2004, Polity, Cambridge); 34-38; A. Giddens, *Europe in the Global Age* (2007, Polity, Cambridge) 233 U. Beck, & E. Grande, *Cosmopolitan Europe* (2007, Polity, Cambridge) esp 6-11.

<sup>39</sup> J. Habermas, *The Divided West* (2007, Polity, Cambridge) 80-81.

<sup>40</sup> The Treaty of Lisbon amends the TEU so that the Treaty is now to draw inspiration ‘from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law’ OJ 2007, C306/10. The European Union Charter of Fundamental Rights and Freedom seeks to assemble and synthesise fundamental rights and freedoms from an unprecedented array of documents - the constitutional traditions and international obligations common to the Member States, the TEU, the ECHR, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice and of the European Court of Human Rights (fifth paragraph of the Preamble). OJ 2000, C 364/1. Perhaps most notoriously, the Lisbon Agenda set out in 2000 the goal to be, by 2010, ‘the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.’ EU Bulletin 3-2000, I-5.

other words, there is more faith in EU law to set in play the appropriate ecological checks and balances than national law.<sup>41</sup> The justification for the *FI* proposal is not simply that it will realise a transnational good, the internal market, but that it will also lead to lower regulatory costs for transnational companies and secure greater equity between EU citizens through the creation of a floor of consumer rights.<sup>42</sup> Finally, the *PR* proposal is to establish a new transnational good, cross-border health care, which not only operates in a legally transparent framework but is high-quality, safe and efficient.<sup>43</sup>

The paradigm is not only set at an unusually high level, but EU law is also expected to demonstrate acute sensitivity to the heterogeneity of its *eudaimonia*. Appreciation is to be so elevated that EU law both has an awareness of when national laws are better placed to realise it and a capacity to incorporate these seamlessly within its normative schema. The *FI* proposal therefore allows national labelling laws to be taken for reasons relating to a limited number of public interests but these are subject to Community procedures of justification and authorisation.<sup>44</sup> In like vein, the *PR* proposal notes that universality, access to good quality care, solidarity have been the organising principles of national health systems across Europe. These ‘overarching principles’ are to be extended to patients from other Member States but not in such a way as to prioritise the latter or act to the detriment of patients in the host State.<sup>45</sup> EU law’s understanding of its *eudaimonia* must also be sensitive to its many hues and textures. All proposals are therefore subject to assessments measuring their economic, social and ecological impacts, which are, in turn, subject to procedures

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<sup>41</sup> *Supra* n., 6. Two other justifications are mentioned, namely the problem of transboundary storage sites and possible distortions of competition. The latter is explicitly couched as a secondary consideration, however, and the former would only justify legislation relating to transboundary sites.

<sup>42</sup> *FI* proposal, 9-10.

<sup>43</sup> *PR* proposal, 7.

<sup>44</sup> Additional mandatory national labelling laws may be adopted for reasons relating to public health, consumer protection, prevention of fraud and protection of intellectual property rights. They must be notified and justified to the Commission. If they are not approved by the Commission, the Commission’s draft decision is subject to the regulatory committee procedure. *FI proposal*, articles 38, 42(2) & 49.

<sup>45</sup> *PR proposal*, Preamble, alinea 12.

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verifying their own quality.<sup>46</sup> They are to pursue multiple goods and show sensitivity to surrounding goods. Mention has already been made of the CCS proposal, which posits itself as not just about limiting emissions, but also innovation and energy security.<sup>47</sup> The *FI* proposal not only insists that labelling laws are there to enable consumers to take account of a wide array of policies<sup>48</sup> but is consistent with the Better Regulation Policy and the EU's Lisbon and Sustainable Development Strategies.<sup>49</sup> In like vein, the *PR* proposal sees itself as not interfering with a number of other policies (smooth coordination of social security schemes, data protection laws or laws on the recognition of professional qualifications) and as contributing to a number of others, notably racial equality, e-health and sharing assessments of new technologies.<sup>50</sup>

To be sure, it might be said that much of this is rhetorical. Little is binding and maybe the EU does not mean what it says. Yet even such a sceptical approach would beg the question why the EU justifies and identifies itself in this way. It can only be because there is a perception that this assuages some extra need. If the response is that the polity is weak and therefore must legitimate itself in a particularly shrill and urgent way, this still begs the question as to why 'this way' was chosen and further consideration as to the consequences of the choice of binding EU law so tightly to such a demanding and multi-dimensional understanding of *eudaimonia*.

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<sup>46</sup> In 2006 the Commission set up an Impact Assessment Board to monitor the quality of impact assessments. For the report of its activities see EC Commission, *Impact Assessment Board Report for the Year 2007*, SEC (2008) 120. The Commission has also subjected the procedures to external evaluation, The Evaluation Partnership, *Evaluation of the Commission's Impact Assessment Procedures*, Final Report (2007, London) (available at [http://ec.europa.eu/governance/impact/docs/key\\_docs/tep\\_eias\\_final\\_report.pdf](http://ec.europa.eu/governance/impact/docs/key_docs/tep_eias_final_report.pdf)).

<sup>47</sup> *CCS proposal*, 3.

<sup>48</sup> *FI proposal*, article 3(1).

<sup>49</sup> *Ibid.*, 4. Indeed, read like this, it seems almost as if the *CCS* and *FI* proposals are pursuing the same regulatory objectives!

<sup>50</sup> *PR proposal*, 4-6 & 18-20. See also EC Commission, *A Community Framework on the Application of Patients' Rights in Cross-Border Healthcare*, COM (2008) 415, 2-3.

### 3.2. The Irredeemability of European *Eudaimonia*

A feature of such a stringent benchmark is there is no mechanism for setting limits to its ambition. The EU can, thus, never be successful enough and consequently the demands it imposes on citizens to make their lives better can never be too exigent. But there is a further twist. If EU law claims that the goods it seeks to attain cannot be realised, it also acknowledges, almost without exception, that they cannot be realised by EU law alone. Indeed, as the objectives of EU law have expanded, a model has emerged in which EU law sets the ends or objectives for a policy regime whilst the means involve a wide array of international, EU, national, regional and local laws or other policy instruments. The mix can vary, and, because of this it has been subject to a wide number of appellations.<sup>51</sup> In some cases, the mix is of one of formal EU laws and national laws and regulatory procedures. In other instances, EU law does little more than set general objectives within which Member States have considerable latitude both as to means and as to strategy. These two ends of the spectrum cannot be categorised, furthermore, according to the formal pedigree of the instrument. There are situations, on the one hand, where framework directives, devolve almost complete autonomy about not just ways and means but targets and plans to member States.<sup>52</sup> By contrast, there are other circumstances, such as multilateral surveillance of economic policy, where soft law has been found to be highly constraining and to place tight controls on national autonomy.<sup>53</sup>

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<sup>51</sup> The formal objectives may be incorporated in directives, framework directives, resolutions, recommendations, benchmarks, targets, best practice. The titles for these arrangements in the literature include governance, multi-level governance, networked governance, reflexive harmonisation, condominium, consortio. All these titles carry differences but significant overlap. For categorisations see L. Hooghe & G. Marks, 'Unravelling the Central State, but How? Types of Multilevel Governance' (2003) 97 *APSR* 233.

<sup>52</sup> An example is the wide-ranging and important Framework Water Directive whose centrepiece is the identification of administrative procedures for river basin management, but leaves considerable leeway to Member States as to how this is done and how to realise 'good water' status. Directive 2000/60/EC establishing a Community framework for the establishment of a Community Water Policy, OJ 2000, L 327/1.

<sup>53</sup> See the excellent piece by Schelkle which emphasises how the strengthening of the 'soft' procedures of multilateral surveillance whilst weakening the excessive deficit procedures actually led to a Communitarisation of economic policy. W. Schelkle, 'Hard Law in the Shadow of Soft Law in EU Economic Governance' (2007) 13 *CJEL* 705.

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This division of labour in which the EU sets out the *telos* of a regime and in which it is granted guardianship over the ends and commitments of multiple policy fields reached a new level following the development of the Open Method of Coordination and the Governance agendas at the turn of the millennium. These extended this division of labour to policy fields either not traditionally monitored by the Commission or ones that lay outside the formal Treaty limits.<sup>54</sup> A corollary escalation of expectations follows. European *eudaimonia* becomes unconfined in its demands and its dimensions! It sets ever more exacting demands across ever broader swathes of public life.

All this posits a particular relationship between EU law and national law. EU law becomes the *Superego* of public life in Europe. It becomes the benchmark of the institutional measurement of all political and economic activity. As such, because of the irredeemability of European *eudaimonia*, it is identified with the identification of failure and authoritative condemnation of public life across Europe.

In many cases, this is a failure of national laws or administration. This may be via enforcement actions, multilateral surveillance or peer review. So EU law is typically identified as having failed when it does not meet this minimum.<sup>55</sup> These processes of critique are also applied internally towards all EU law. The critique here is not that existing EU law does not seek *eudaimonia* but that it has done so inadequately. EU secondary legislation, therefore, invariably contains procedures for its own review. Yet this review habitually involves the paradox of subsequent legislation building upon existing law whilst critiquing its failure. The *PR* proposal follows the structure of the previous case law but does so on the basis that the latter is not sufficient to bring a general and effective application of the right to provide and receive health services, and is not sufficiently sensitive to the specificities of health services.<sup>56</sup> The *FI* proposal finds the extensive existing EU legislation on labelling to be piecemeal and

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<sup>54</sup> On the former see D. Hodson & I. Maher, 'The Open Method of Coordination as a New Mode of Governance: The Case of Soft Economic Policy Coordination' (2001) 39 *JCMS* 716. On the latter see J. Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 *CMLRev* 313.

<sup>55</sup> B. Laffan & C. Shaw, 'Classifying and mapping OMCs in different policy areas' *New Gov paper 02/D09*,

[http://www.eu-newgov.org/database/DELIV/D02D09\\_Classifying\\_and\\_Mapping\\_OMC.pdf](http://www.eu-newgov.org/database/DELIV/D02D09_Classifying_and_Mapping_OMC.pdf)

<sup>56</sup> *PR* proposal, 2.

labelling to be of limited effectiveness as a communication tool so seeks to remedy this by making it more detailed and extensive.<sup>57</sup> The CCS proposal is particularly apt. Two international conventions have been amended to allow storage of CO<sub>2</sub> under the seabed.<sup>58</sup> There is, in no sense, any acknowledgment that these amendments build on the goals sought by these treaties. By contrast, the CCS proposal acknowledges the failures of the previous EU legal regime. As reduction of emissions to EU targets may not be possible, mitigation options have to be harnessed.<sup>59</sup> The proposal also states that existing EU legal mechanisms – be they emissions trading or waste legislation or integrated pollution prevention and control (IPPC) – are insufficient to regulate the risks of carbon capture and storage.<sup>60</sup> If this is the justification for a special regime, however, it is accommodated within these regimes so any CCS plant has to meet waste, IPPC, environmental impact assessment and emissions legislation requirements as well as the further ones of the proposal.<sup>61</sup>

### 3.3. The Politics of the European Eudaimonia

A feature of a combination of laws or institutions being harnessed to realise a common good is that law acquires a pre-eminent coordinating role. Its coercive effects are less salient. Instead, the expectations set by it about roles, relationships, commitments and responsibilities of actors are more to the fore. Coordination creates its own form of politics. The common good and the tasks asked by it may be contested. A vibrant example is the EU's anti-terror strategy which has a whole array of civil society established to police it and curb it.<sup>62</sup> A politics might also emerge from the coordination generating new vectors and institutional relations which undermine traditional checks and balances and legal constraints. The Open Method

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<sup>57</sup> *FI* proposal, 5-7.

<sup>58</sup> The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972 London Convention) and the Convention for the Protection of the Marine Environment of the North East Atlantic (the 1992 OSPAR Convention)

<sup>59</sup> *CCS* proposal, Preamble, alinea 3.

<sup>60</sup> *Ibid.*, 5.

<sup>61</sup> *CCS* proposal, articles 29-35.

<sup>62</sup> The current state of play is set out in EC Commission, *Revised Action Plan on Terrorism*, SEC (2006) 686. The most interesting account and critical observatory on this is the Statewatch Observatory, <http://www.statewatch.org/observatory2.htm>

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of Coordination has thus been seen as allowing national administrations to avoid being tied down by the usual processes.<sup>63</sup> Finally, contestation might take place even in the absence of such formal networks. For EU laws provide powerful norms enabling and requiring institutional actors to take measures that may background other goals or *modi vivendi*.<sup>64</sup>

If politics is a necessary condition therefore surrounding EU law, EU law's *eudaimonia* has led to its being a politics of unfalsifiable claims. By requiring multiple actors to combine to realise stringent long-term goals, EU law renders it impossible for the contribution of any actor to be gauged. This both diffuses accountability and escalates it exponentially, as the actions of the actors are perceived in everything or nothing terms. The contribution becomes something, therefore, which is exposed to an intractable claim and counterclaim. Greenpeace and the European Renewable Energy Council have, thus, opposed the development of carbon capture and storage partly out of concerns about the safety and viability of the technology. They also, however, believe the cost of the technology will displace investment in renewable energy, and, insofar as it might be subsidised, lead to new fossil fuel developments.<sup>65</sup> Such a claim may or may not be true but will never be tested because it would have to be assessed against all the other abatement measures taken within the Union and then against the counterfactual of what these might have been without this technology. Similarly, the *FI* information proposal is part of regime designed to lead to more informed consumer choices and to healthier lifestyles. Even in a field governed so extensively by EU law, there is no information on how many people act on the information they read on labels, and the contribution of the latter takes place against a context of a blizzard of advertising and multifarious national health policies so that whilst, intuitively, labelling appears a good thing its contribution is highly uncertain. In terms of goods, all that can be measured in terms of each proposal is the

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<sup>63</sup> C. Joerges, 'Integration through de-legalisation' (2008) 33 *ELRev* 291, 310.

<sup>64</sup> Most persuasively on how EU legal frames cut across and disrupt national legal practices see C. Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Law: The example of book price fixing' (2000) 8 *European Review of Private Law* 155.

<sup>65</sup> Greenpeace/European Renewable Energy Council, *Energy [r]evolution: A sustainable global energy outlook* (2008, Brussels) 133-134

amount of carbon dioxide stored and the amount of label information read by consumers.

If the politics of unfalsifiable claims permeate all governance regimes, even exclusively national ones, EU law adds an idiosyncratic feature. As EU law is associated with the *telos* of any regime, even if others contribute to its ways and means, it territorialises these tensions. Whilst it may be difficult to hold individual actors to account, it is possible to make general statements about the effectiveness or ideology of the overall regime<sup>66</sup> and the overall regime is tagged as European Union because it contributes to the European *eudaimonia*, and its overall performance is seen as something European for the same reason. Thus, whilst curbing climate change, health policy etc are not seen as something on which the Union has a monopoly, it enjoys a hegemony over the particularly regulatory route to realise these goods. Criticism of this route or this goal becomes constructed, therefore, as *anti-European*, and experience of the disruption and the costs as *local*.<sup>67</sup> It is local constraints and controls that are lost; local people who suffer the risks of carbon capture and storage; local health services who might lose the capacity to operate under the principle of universality. To be sure, there is no *a priori* reason for this as these are experienced across the Union! It is the framing of the politics that makes it so!

To be sure, this territorialisation in which ideological adversaries coalesce and consolidate around European Union and national poles can render political issues more salient and more acute.<sup>68</sup> However, the mechanisms or containers for mediating it or transforming it into innovative solutions are not apparent. Only two routes seem available. One is to reform the EU policy in question through participation in the EU public sphere. Yet, how realistic is this in a polity of half a billion people with many veto players for the majority of actors? It requires them, moreover, to frame

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<sup>66</sup> E.g. The Lisbon strategy could be said not to have realised its goals or the war on terror be criticised for its stance on civil liberties.

<sup>67</sup> G. Teubner 'Legal Irritants: Good Faith in British Law and How Unifying Law Ends Up in New Divergences' (1998) 61 *MLR* 11.

<sup>68</sup> D. Chalmers, 'Reconciling European Risks and Traditional Ways of Life' (2003) 66 *MLR* 532, 558-562.

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their responses in pan Union terms – something that may not be readily accessible.<sup>69</sup> The alternative, because of the principle of the supremacy of Union law, is a decisionist logic in which opponents choose whether or not to comply with EU law and authorities decide whether or not to enforce it.

### 3.4. The Justice of the European Eudaimonia

The earlier quote from Breyer stated that the United States was not just founded upon the principle of liberty but was also a nation. As a political community of ‘free and equals’ the nation mediates the relationship between freedom and equality by insisting upon the public good securing a balance between the two. It is also important for reasons of identification as it sets out a series of claims as to why a particular interpretation of the good life with all its benefits and costs should be borne by a particular group of strangers at a certain place and time.<sup>70</sup> In this regard, the absence of a European Demos is significant. This is usually referred to as a form of sociological affect, an absence of sufficient belief in European-ness to see good reasons to bear significant sacrifices for the benefit of other Europeans.<sup>71</sup> Its absence is, however, also a failure of the imaginary. The absence of any idea of equivalent political community to that of the nation frames and limits the types of claim that EU law makes. It limits, in particular, the type of claim to justice it makes and the types of community for whose benefit it purports to act.

An immediate response might be that individual national laws do not justify themselves by references to vague notions of national political community and EU law is not insensitive to its distributive impacts and has distributive policies of its own. The argument is not that these are not present in EU law but that its notions of

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<sup>69</sup> An example of this is the decision of the Spanish Government not to comply with the requirement in Annex I of Directive 2007/23 on the placing of the market of pyrotechnic articles, OJ 2007, L 154/1, which requires the public to be at least 15 metres from certain types of fireworks. This is felt to compromise the nature of many Spanish festivals, most notably the Fallas of Valencia, notwithstanding that there are significant burns injuries in Spain every year because of this. It would be difficult for Spain to make a pan Union case here but the issue has generated considerable popular feeling in Eastern Spain.

<http://www.guardian.co.uk/world/2009/feb/21/spain-eu-fiestas-fires>

<sup>70</sup> On this objection and its refutation see J. Rubinfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (2001, Yale University Press, New Haven) 131-133.

<sup>71</sup> The famous point by F. Scharpf, *Governing in Europe: Effective and Democratic?* (1998, OUP) 8-9.

political community and social justice are markedly different from national ones. The starting point, drawn from Durkheim, is that two forms of social solidarity or justice are present in national systems.<sup>72</sup> These are mechanical solidarity, which is based on ideas of kinship and sameness (e.g. religion, ethnicity) and organic solidarity is based on the division of labour and notions of interdependence that flow from that and which lead interdependent parties to acknowledge mutual claims (e.g. employee rights, corporate law, consumer rights). National ideas of social justice and community rely on a dialectic between these two ideas of solidarity in which institutes the idea that there is something that binds a community beyond the division of labour and that the latter can never meet all the community's needs.<sup>73</sup> In this regard, ideas of nationhood have traditionally played an important role as the central receptacle for ideas of mechanical solidarity in modern societies with legal expressions of mechanical solidarity – family law, religious law, criminal law – all being predominantly governed by national law as these institutions have historically been seen as central to nation-building.

There is simply no equivalent at an EU level. The types of solidarity present in the European *eudaimonia* are centred around 'organic' ideas of solidarity generated by ideas of interdependence. In the three legislative proposals, those consulted and the impacts assessed were those considered to be most strongly affected by the proposals.<sup>74</sup> Within the proposals, notions of solidarity are, in turn, informed by the relations of interdependence between particular parties. The *FI* proposal recalibrates the relationship between food provider and final consumer;<sup>75</sup> the *PR* proposal that between the transnational patient, health care providers and public funders of health care; the *CCS* proposal that between operators and regulators but also, insofar as the processes will be governed by environmental impact assessment procedures, the

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<sup>72</sup> E. Durkheim, *The Division of Labour in Society* (1984, Macmillan, transl. L. Coser, London) Chapters II & III.

<sup>73</sup> R. Unger, *Social Theory: Its Situation and Its Task* (1987, CUP, Cambridge) 1-4. For a critique see M. Halberstam, *Totalitarianism and the Modern Conception of Politics* (1999, Yale University Press, New Haven-London) 22-26.

<sup>74</sup> For the impact assessment of the three proposals see [http://ec.europa.eu/governance/impact/cia\\_2008\\_en.htm](http://ec.europa.eu/governance/impact/cia_2008_en.htm)

<sup>75</sup> The proposal therefore states that the Regulation shall provide 'the basis for the assurance of a high level of consumer protection in relation to food information' *FI* proposal, article 1(1).

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public affected by the development.<sup>76</sup> The conception of justice as a form of *quid pro quo* is reflected in the policing of these regimes in which the central redress is restitutionary. Both the *PR* and *CCS* proposals rely on liability schemes. The *PR* proposal requires patients to have the possibility of making complaints and receiving compensation when they suffer harm from healthcare.<sup>77</sup> The *CCS* proposal provides for the extension of the environmental liability regime in Directive 2004/35/EC to apply to carbon capture and storage.<sup>78</sup> The *FI* proposal provides for no sanctions for non-compliance but does leave open the possibility that any contract would be void as a result of non-compliance and any harm suffered subject to redress under the Product Liability Directive.<sup>79</sup>

A feature of such solidarity is the formalism of its ties, with considerable attention to the effects of EU legislation on other interdependencies. The *FI* proposal therefore provides for special national regimes to continue to apply with regard to non-prepacked food, milk in glass bottles and most alcoholic beverages because it is accepted that it is either extremely disruptive and in some cases impracticable to impose labelling rules on these or that other effective means of imparting information have developed.<sup>80</sup> Likewise, food operators below a certain size have been given additional two years to implement some of the proposal's requirements in acknowledgment of the latter's regulatory cost.<sup>81</sup>

This vision is narrow by virtue of its lack of affect. It has no regard to the feelings or symbols that might generate empathy or a sense of common enterprise. It cannot explain why EU citizens in one region should feel a commitment to marginalised groups in geographically distant regions within or beyond the Union. It is narrow in another sense. Solidarity is conceived in highly individualistic terms. The *PR*

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<sup>76</sup> The requirements of environmental impact assessment are incorporated in *CCS* proposal, article 29. The duties of consultation are established in Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ 1985, L 175/40, Article 6(2).

<sup>77</sup> *PR* proposal, article 5(1)(d).

<sup>78</sup> *CCS proposal*, article 33.

<sup>79</sup> See in particular the test of strict liability for damage caused from defective products in Directive 85/374/EC on the approximation of laws concerning liability for defective products, OJ 1985, L 210/29, article 1.

<sup>80</sup> *FI proposal*, articles 39-41.

<sup>81</sup> *FI proposal*, article 53.

proposal refers to the 'patient' as a holder of entitlements<sup>82</sup> and the *FI* proposal is premised on the notion of the 'average consumer'.<sup>83</sup> This individualisation leads both to a disaggregation in which the private and the public are put on the same footing and to an assimilation in which insensitivity is shown either to context or to differences in resources, endowments or capacities. Solidarity is levelled down in all this and shorn of its hue and seductive appeal. Equally importantly, it is denuded of its creative and reflexive dimensions. For a feature of many forms of solidarity is an ongoing concern with the insufficiency of current arrangements to respond fully to the needs and desires of everybody, in which attention is focused recurrently not just on what is being distributed but on the singularity of different actors and their claims.<sup>84</sup>

#### 4. The Claims of European Eudaimonia

The traits described in the previous section of the *eudaimonia* through which EU law is identified and justified tell us little about how EU law is to realise this *eudaimonia*. Yet EU law does not just set out a resonant picture of the good life. It is also a regulatory institution which seeks to secure it. This entails that legal instruments must be configured and coordinated in such a way that they do not just recognise this *eudaimonia* but organise and direct behaviour towards it. This in turn generates those microprocesses which govern how EU law is experienced - the types of claim made on individuals; the entitlements, responsibilities and powers granted; and the form of rule generated.

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<sup>82</sup> *PR proposal*, article 4(f). Its definition excludes those who do not travel abroad for treatment!

<sup>83</sup> *FI proposal*, Preamble, alinea 38.

<sup>84</sup> The work of Axel Honneth therefore sees a commitment to symmetrical esteem in which the traits and values of each are symmetrically solidarity as a pre-requisite for solidarity. A. Honneth, *Struggle for Recognition. The Moral Grammar of Social Conflicts* (1995. Polity, Oxford) Chapter 5.

### 4.1. A Narrow Range of Entitlements

EU laws may benefit wide numbers of people but a feature of EU law is that it gives a very narrow range of positive entitlements which can be directly invoked and are actively invoked by its subjects. The following central entitlements are set out in the three proposals.

- The *CCS* procedure grants, subject to permits, operators the possibility to explore sites for carbon capture and storage and to store carbon dioxide at suitable sites.<sup>85</sup>
- The *PR* proposal grants persons covered by an EU public health scheme the entitlement to go to another Member State for health care for something that is covered as a benefit by the legislation in their State of affiliation, and to have a number of procedural and substantive rights associated with that.<sup>86</sup>
- The *FI* proposal proposes mandatory food information for consumers on the identity and composition of the food, on protection of consumer's health and safe use and on the food's nutritional characteristics.<sup>87</sup>

The *CCS* proposal is self-avowedly for a small number – twelve – of capital intensive installations who have the capacity to install, supervise and maintain costly and complicated technology. If the other two proposals seem wide-ranging insofar as they affect patients and consumers of food, the picture changes when one looks at the actual exercise of entitlements. With regard to food labelling, the number of consumers who look at labels is high and increasing. Most studies suggest that it is more than half of all consumers. More detailed studies, however, have suggested that self-reporting has exaggerated the extent to which consumers read labels with observational studies suggesting that the proportion of consumers who actually study labels rather than glance at 'sell by dates' being less than 20%. Whilst there is

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<sup>85</sup> *CCS* proposal, articles 5 & 8.

<sup>86</sup> *PR* proposal, article 6(1). These include, in the state of treatment, protection of personal data, equal treatment with that State's own nationals, information that will enable them to make an informed choice about the procedure; possibilities for complaints and remedies in the case of harm. *Ibid.*, article 5(1).

<sup>87</sup> *FI* proposal, article 4(1) & article 6.

no research on the number of the consumers acting on the labels, one study suggests only 1% read and understand nutritional information on labels – the central reform of the *FI* proposal.<sup>88</sup> The *PR* proposal is similar. The Commission is eager to minimise the resource implications, suggesting that very few individuals will exercise this transnational right. It notes that transnational care currently only accounts for about 1% of national health care budgets and that 90% of patient needs can be met through domestic systems.<sup>89</sup> To be sure, there is no comprehensive or reliable data on this.<sup>90</sup> Qualitative research suggests, however, that the patients who exercise their rights under the post *Kohll* case law to publicly funded health care abroad did so usually where they were both certified as fit to travel and for a narrow range of highly specialised health care.<sup>91</sup>

This all begs the question whether there is selection bias here. After all, it is possible to think of EU law entitlements that are widely distributed and reasonably egalitarian. EU labour law is the most obvious example, but VAT law might be another. Yet, if the diffuse benefits of EU law might be more widely spread, it does seem that the direct grant of entitlements is narrow and highly contested. Highly dated research by myself has suggested very little EU law is invoked in British courts. By the end of 1998, just 5 Directives accounted for 73% of the instances in which Directives were invoked before British courts. Litigation was focused, furthermore, in a very narrow area of EC law. Five sectors accounted for 61% of all the cases, and large policy areas, such as the single market, financial services, company law, consumer law, environmental law were marked by little or no litigation. Only 32.6% of EC litigation involved disputes between private parties, with two instruments, the

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<sup>88</sup> It was thus stated ‘Consumers reported that they did understand the terms ‘fat’, ‘calories/kilocalories’, ‘sugar’, ‘vitamins’ and ‘salt’. The concepts and terms reported as least well understood were the relationship between calories and energy; sodium and salt; sugar and carbohydrate; and the terms cholesterol and fatty acids. Consumers had difficulty in understanding the role that different nutrients mentioned on labels played in their diet. They also had difficulty converting information from g per 100 g to g per serving and serving size information also proved difficult to interpret...’ G. Cowburn & L. Stockley, ‘Consumer understanding and the use of nutrition labelling: a review’ (2005) 8 *Public Health Nutrition* 21,23.

<sup>89</sup> *PR* proposal, 8.

<sup>90</sup> European Commission, *High Level Group on Health Services and Medical Care* (2006, DG Health and Consumer Protection) 6

<sup>91</sup> M. Rosenmöller, M. McKee & R. Baeten (eds.) *Patient Mobility in the European Union: Learning from Experience* (2006, European Observatory on Health Systems and Policies, Brussels) esp. at 180.

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Sex Discrimination and the TUPE Directives, accounting for 64.5% of these instances.<sup>92</sup>

The reason for this derives from EU law's *eudaimonia* having to secure goods not realisable by domestic action alone. Most entitlements can simply be granted through national law. The only reason for the grant of EU legal entitlements is when these would realise some new transnational good. This may take the form of some transnational right (e.g. transnational health care) or the incidence of some collective good, which, as a collective good, rarely depends on litigation to be realised.

In other instances, the justification for EU legal involvement involves either a deontological claim – it is good just because it is – or a claim that EU law knows better how to recognise and realise an existing good than national procedures. Yet both arguments are ones that are only politically sustainable in the most exceptional circumstances, and cannot be used to justify a wide-ranging intervention.

Turning first to the deontological argument, if we recognise something as so good for its own sake, it does not matter at what level it is regulated. In such cases, the argument is for universal regulation and EU law becomes simply an institutional expression of cosmopolitan values. Arguments surrounding Union or European regulation of abortion, holocaust denial or hate speech often seem to be underpinned by this.<sup>93</sup> One difficulty is what happens if a party disputes the presence of the good or the basis on which it is justified as a good.<sup>94</sup> An even more substantive difficulty is that the programming facilities of cosmopolitanism are very thin. It does not extend to

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<sup>92</sup> D. Chalmers, *supra* n.1, 178-183.

<sup>93</sup> See the notion of European Union *demokratia* promoted by T. Garton Ash, 'We need a benign European hydra to advance the cause of democracy' *Guardian*, 17 April 2008.  
<http://www.guardian.co.uk/commentisfree/2008/apr/17/eu.usa> On a pan-European right to abortion see Parliamentary Assembly of the Council of Europe, 'Access to safe and legal abortion' Resolution 1607 (2008)  
<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta08/ERES1607.htm#1>

<sup>94</sup> On the European Union criminalising holocaust denial, the British *Daily Telegraph* stated, 'People who question the official history of recent conflicts in Africa and the Balkans could be jailed for up to three years for "genocide denial", under proposed EU legislation...' B. Waterfield, 'EU plans far reaching 'genocide denial' law' *Daily Telegraph*, 3 February 2007,  
<http://www.telegraph.co.uk/news/worldnews/1541411/EU-plans-far-reaching-genocide-denial-law.html>

defining the limit or ways or means of realising a good. It cannot set procedures for termination of a foetus or a complete definition of hate speech or denial.

The other argument is premised on a good only acquiring normative status upon awareness of it as a good. A goal of law is therefore enquiry into what is good for us to do. In this, EU law may have advantages over other legal processes in this form of enquiry. Variations of this argument have been found in EU equal opportunities law where authors have argued that EU law has been able to develop a more progressive agenda than its national counterparts because the Court of Justice offers an arena for marginalised interests to escape the hegemony and capture of domestic institutions by regressive majorities or elites.<sup>95</sup> Unhappy with these institutions and unable to obtain sufficient voice there, these interests have been able to use the Court to express arguments that were otherwise pushed aside. There has thus been a freer market of ideas less dominated by entrenched interests before the Court of Justice in these fields.

There is something in this, but this argument creates the conditions for its own demise. Its starting point is that there is uncertainty surrounding what we know as good. We cannot know whether basing levels of pay on length of service is bad because it discriminates against women so EU law is to take a determinative judgment on this as other venues are suspect.<sup>96</sup> As the example shows, it assumes not only high contestation surrounding any judgment but also an element of normative absence. We are not sure of the reasons for action one way or another. Alongside this, the argument is a consequentialist one as it is based on the idea of something as good when we are confident of its consequences – it will lead to good things. Yet a body as remote as the Court of Justice from the heterogeneity surrounding the lives of half a billion people simply cannot know whether it is good for all of them or how it is good for them. Whatever the substantive merits of this argument, it begets a

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<sup>95</sup> From different traditions see M. Poiaras Maduro, *We, the court: The European Court of Justice & the European Economic Constitution* (1998, Hart, Oxford) 166-174; K. Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' (2000) 54 *International Organization* 489.

<sup>96</sup> Case C-17/05 *Cadman v HSE* [2006] ECR 9583.

level of political contestation which suggests that EU law can only be deployed occasionally for this purpose.

### 4.2. The Unfair Distribution of Entitlements

The entitlements are not just narrowly confined but their distribution generates significant asymmetries. If the CCS proposal imposes significant responsibilities and costs on the operators of twelve installations, it also empowers them. Carbon Capture storage is estimated at having the potential to reduce the cost of stabilising CO<sub>2</sub> emissions by 30% - an astronomical value in any emissions trading scheme.<sup>97</sup> The effects on the structure of the energy market are significant. The costs of the technology are high and they therefore push towards development of larger coal-fired power plants because of the economies of the scale of the latter. All this suggests a considerable concentration of industrial power.<sup>98</sup> With regard to the *FI* proposal, research suggests that labels are far more likely to be read by those of 'high educational achievement' who were women and lived in smaller households.<sup>99</sup> Whilst the *PR* proposal is adamant that that health care should be distributed on the basis of equity, universality and solidarity,<sup>100</sup> a new test is introduced – that of non-discrimination on nationality and respect for free movement.<sup>101</sup> It is a curious notion of non-discrimination, however. For it can only be invoked by patients who move for care from one State to another.<sup>102</sup> There are no entitlements in the proposal for patients in the State of affiliation to require the same level of treatment as those who are moving. Nor is there any for those in the Member State of treatment to require the same level of care as mobile patients from other Member States. It is a legal entitlement just given to mobile patients. There is not only a differentiation in legal

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<sup>97</sup> On this see IPCC Special Report, *Carbon Capture and Storage: A Special Report of Working Group III of the Intergovernmental Panel on Climate Change* (2005, CUP, Cambridge) 12.

<sup>98</sup> *Ibid.*, 344 et seq.

<sup>99</sup> A summary of the research has been provided by the Foods Standards Agency, *Review and analysis of current literature on consumer understanding of nutrition and health claims made on food* (2007, FSA, London)

<http://www.food.gov.uk/multimedia/pdfs/healthclaims.pdf>

<sup>100</sup> *PR proposal*, Preamble, alinea. 12

<sup>101</sup> *Ibid.*, Preamble, alinea 12.

<sup>102</sup> *Ibid.*, article 5(1)(g).

entitlements between those who have the same ailment, but, perhaps more importantly, a significant asymmetry emerges between patients with different types of condition. Those with a condition which requires specialised treatment but allows mobility are privileged vis-à-vis patients with other conditions. The former can demand resources to be spent on them, in particular access to specialised care in a way that is not available to other conditions and in a way that will be at the expense of the resources deployed on the latter.

How could this be so? It goes to the restricted imaginary of justice in the *eudaimonia* of EU law. Conceived around formalistic notions of interdependence, it lacks the scale of vision to countenance different styles of claim. There is thus no vision of public health which allows the different claims of different conditions and their treatments to be evaluated against one another. This restriction is not just one of range but also one of affect. Put simply EU law lacks an affective capacity which would enable it to gauge the value of treating one versus the value of treating another.

### 4.3. Subjection to Unimaginable Risks

A feature of all three proposals is that the risks in question are incalculable. If a feature of traditional risks is that they are seen as managed uncertainties whose incidence can be subjected to some form of calculation, many of the dangers regulated by EU law sit at the penumbra of this spectrum of calculation. It is not that they are necessarily more remote but they are particularly difficult to assess in any meaningful way.

With regard to the CCS proposal, there is almost no basis by which to gauge the economic and ecological risks of the technology. Current estimates on the financial cost of carbon capture and storage are linked to the costs of surveying the territory in question and those of pumping and transporting the CO<sub>2</sub>. The costs of monitoring the site, post-closure obligations and remediation of any leak are impossible to tell.

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There is then the imponderable of how much of this can be passed on to the customer. The ecological risks are even more uncertain. There are concerns that storage can increase the possibility of earthquakes and that leakage can lead to mass poisoning of the surrounding landscape. It is also uncertain how responsibility can be ascribed given the ubiquitous presence of CO<sub>2</sub> in the atmosphere. These ecological risks are considered remote but it is acknowledged 'there is limited experience with geological storage, closely related industrial experience and scientific knowledge could serve as a basis for appropriate risk management.'<sup>103</sup> In other words, there is an element of speculation about the process because it is unprecedented and one has to proceed on the basis of apparently analogous processes. This was reflected in the Commission's consultation in which there was an extremely high proportion of 'don't knows' with parties unable to comment on the levels of ecological risk.<sup>104</sup> There is, consequently, increased emphasis on procedure. The CO<sub>2</sub> stream must be kept as pure as possible and registers must be kept of the qualities and quantities of the CO<sub>2</sub> streams.<sup>105</sup> She is responsible for monitoring the injection facilities, storage complex and surrounding environment for leakages or adverse ecological effects.<sup>106</sup> There must be regular reports to the authorities<sup>107</sup> and, in cases of significant irregularities or leakages, corrective measures must be taken.<sup>108</sup> These obligations all continue after closure of the site.<sup>109</sup>

The risks associated with the *PR proposal* derive from the patient being treated in another Member State. There is an issue of continuity of care. How is after-care provided or follow-up treatment? The proposal has little to say on this but focuses on other dangers, namely lack of familiarity with the foreign health system and commensurability of health care standards across the different national systems. On the former national contact points are to be established for cross-border health care. These are, *inter alia*, to provide patients with information on their rights and

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<sup>103</sup> IPPC supra n..., 13.

<sup>104</sup> ICF International, *Analysis and Interpretation of responses from the CCS consultation* (Sept 2007, Brussels) 10-12.

<sup>105</sup> *CCS proposal*, article 12.

<sup>106</sup> *Ibid.*, article 13.

<sup>107</sup> *Ibid.*, article 14.

<sup>108</sup> *Ibid.*, article 16.

<sup>109</sup> *Ibid.*, article 17(2).

guarantees of quality and safety as well as helping to protect their rights and obtain out of court settlements where called for.<sup>110</sup> To secure commensurability of health care standards, European reference networks are to be put in place which promote not only cooperation between health care provider and maximise cost-effectiveness, but which also share knowledge and provide quality and safety benchmarks spreading best practice.<sup>111</sup> Combined, these networks created integrated reference points for the provision and allocation of health care in the European Union. Allocation is to take place through coordination and specialisation. More broadly, they are also to change how health care is provided through enabling synergies between providers and the development of common approaches and methodologies, and these might be the most wide-ranging effects of the proposal.

A similar style of risk is found in the *FI* proposal. The central amendment is to provide labelling information on the nutritional qualities of food. All food must contain a nutrition declaration which provides information about the amounts of energy, fats, saturates and carbohydrates with specific reference to sugar and salt.<sup>112</sup> It may also include details on the amount of other nutrients which include protein, fibre, vitamins, transfats and mono- or poly-unsaturates.<sup>113</sup> A feature of nutrition is that it is the provision of cells, material and organisms to support life. A feature of almost all nutrients, and certainly all the ones on the mandatory list, is that none are bad or good *per se*. The problem arises if there is a deficiency or an excess. Nutritional science is notoriously inexact, therefore, as it must always look at the state of a body before and after the consumption of nutrients over a significant period during which a lot of other variables will come into play. Whilst there is of course evidence of poor nutrition, it is measured in outcomes, such as 30% of the EU population being overweight in 2006.<sup>114</sup> The EU strategy on nutrition is therefore one based on precautionary politics. No food is banned because of its nutritional qualities on the grounds that the *ex ante* risk of excess is too great. Instead, individuals are encou-

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<sup>110</sup> *Ibid.*, article 12(2).

<sup>111</sup> *Ibid.*, Article 15(2).

<sup>112</sup> *FI proposal*, article 9(1)(l) & article 29(1).

<sup>113</sup> *Ibid.*, article 29(2).

<sup>114</sup> EC Commission, *White Paper on A Strategy for Europe on Nutrition, Overweight and Obesity Related Health Issues*, COM (2007) 279, 2.

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raged to make healthy life style choices which integrate nutritional balance into this. Labelling has therefore become central to this strategy. If the *FI* proposal is about enabling individuals to make 'informed choices' by setting out the nutritional qualities of food, alongside it the Union has been eager to prevent manipulation of their choices by food providers, so we also find legislation not requiring the insertion of information but regulating the type of health or nutrition claims that may be made about food.<sup>115</sup>

The reasons for the management of this particular quality of risk lie in the European Union being concerned with the extension of *eudaimonia*. It does not reinvent the idea of a better life but aims to augment existing possibilities and understandings. This extension of opportunities is most obvious where it happens spatially. The *PR* proposal does not establish for the first time the idea of individual access to public health care but transnationalises that right by making it an entitlement that stretches across a broader territory with a wider range of providers and types of provision. Yet *eudaimonia* stretches EU law in a more profound sense. As stated earlier, its ambition requires EU law to enable us not only to do things would not otherwise be possible but to do them in a better way. This creates a particular relationship between EU law and risk. On the one hand, EU law is concerned to let us dare to do more things.<sup>116</sup> It enables us to experiment with biotechnology, complex financial markets, climate change, mass harvesting of fish stocks, diverse patterns of regulatory control such as mutual recognition precisely because it is confident of its capacity to manage these things. On the other, it is concerned to manage these dangers more effectively than other regimes. The justification for EU regulation is that it can avert dangers that national authorities cannot. Once again, this is not simply a question of scale but of regulatory capacity and disposition. Commitments are thus made to high levels of safety and regulation.<sup>117</sup> Furthermore, the EU is to regulate those risks over which there are doubts about individual national capacity either because there is mistrust

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<sup>115</sup> Regulation 1924/2006 on nutrition and health claims made on foods, OJ 2007, L 12/3.

<sup>116</sup> Risk is said therefore to derive from *risicare* from the Italian word to dare. On the development of the term see P. Bernstein, *Against the Gods: The Remarkable Story of Risk* (1996, John Wiley, New York) especially Chapters 6-11.

<sup>117</sup> The strongest statement is in Article 95(3) EC which commits EU market regulation to a high level of health safety, environmental protection and consumer protection.

between regulators to realise this effectively or because the incidence, nature or scale of the risk is seen as particularly challenging to gauge. This is reflected in the institutional features of EU law. Mutual mistrust between regulators has led to a system where national regulators seek high guarantees from EU law which often go to inspection and certification.<sup>118</sup> A parallel process has emerged in situations, such as pharmaceuticals, food safety and chemicals, where a European agency is set up to consider questions of market access. There is invariably provision for consultation of national regulators with the consequence that the agency acts as a meeting point for multiple regulators to reach a consensus and to verify each other's arguments.<sup>119</sup>

Substantively, this leads to EU law engaging with a particular style of activity in a particular way. EU law is granted guardianship over the most challenging form of risk because it claims a superior power of management. This power is justified in a claim to possess a better awareness of risk. This claim is founded partly on the authority of expertise – the use of multiple regulators – but it is also founded upon a claim to regulatory assurance in which the limits of scientific knowledge are perfectly understood. It is this which leads EU law to claim that it can regulate dangers whose parameters science or expertise does not fully understand or know. The most salient exposition of this is the prevalence of the precautionary principle in EU law, which allows for regulatory protection if the possibility of harm has been identified even if widespread scientific uncertainty persists.<sup>120</sup> A feature of this

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<sup>118</sup> The point has been made by Majone with regard to the evolution of insurance and pharmaceuticals regulation. G. Majone, *Mutual Trust, Credible Commitments and the Evolution of the Rules of the Single Market* (EUI Working Paper RSC 95/1, EUI, Fiesole). An equally strong case is the Whole Vehicle Type Approval process for the car market where since the early 1970s regulatory authorities have been required to comply with detailed testing and approval models. The process has been recast in Directive 2007/46 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, OJ 2007, L 263/1.

<sup>119</sup> This is formalised in duties upon Community agencies to resolve differences with and, in certain circumstances, liaise with national counterparts. Regulation 178/2002/EC establishing general principles for food safety and a European Food Safety Authority, OJ 2002, L 31/1, articles 22(7) & 30; Regulation 726/2004/EC laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ 2004, L 136/1, articles 47, 50 & 59(4); Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, OJ 2007 L 136/3, article 85(5) & 6(6).

<sup>120</sup> The literature is extensive but a particularly fine recent review is E. Fischer, 'Opening Pandora's box: contextualising the precautionary principle in the European Union' in M Everson & E. Vos (eds) *Uncertain Risks Regulated* (2009, Routledge-Cavendish, Abingdon).

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principle and analogous logics is that they are concerned not so much with gauging danger as managing the anxiety that arises from the failure to be able to do the former in a sufficiently compelling way. The principle allows recourse to heuristic and rule of thumb techniques on the grounds that expertise cannot provide the answer.<sup>121</sup> Yet what to do when having relied on expertise to secure jurisdiction, EU law rejects *a priori* the quest for scientific evidence as a model for decision-making?<sup>122</sup> Some have argued this space provides an opportunity for political participation<sup>123</sup> whilst others have decried the administrative freedom allowed by it.<sup>124</sup> Either political scenario is confronted with a context, however, which is the opposite to that promised. The promise of being allowed to do more things more safely is replaced by a reality of decision-makers and public having to confront unimaginable risks - dangers that cannot be fully gauged and for which only partial reassurances and incomplete normative structures can be offered. This is no longer a reassuring world but one in which law institutes anxiety and a counter-impulse to do nothing.<sup>125</sup>

### 4.4. The Responsibilities of the European Subject

These risks fall on EU legal subjects. One style of risk is borne by those responsible for managing the quality of the operation – the providers of food or hospital services and the operators of carbon capture storage facilities. The other bearers of risks – the patient, the consumer, the public affected by carbon dioxide escape – are those required to adopt precautionary life strategies taking into account the risk to which they are being exposed.

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<sup>121</sup> K. Haggerty, "From Risk to Precaution: The Rationalities of Crime Prevention" 193, 194-195 in R. Ericson & A. Doyle (eds) *Risk and Morality* (2003, University of Toronto Press, Toronto).

<sup>122</sup> C. Joerges, 'Sound Science in the European and global market: Karl Polanyi in Geneva' 415, 420 in M Everson & E. Vos (eds) *Uncertain Risks Regulated* (2009, Routledge-Cavendish, Abingdon).

<sup>123</sup> J. Scott & S. Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13 *CJEL* 565.

<sup>124</sup> V. Heyvaert, 'Facing the Consequences of the Precautionary Principle in European Community Law' (2006) 31 *E LRev* 185.

<sup>125</sup> On the politics of anxiety see D. Chalmers, 'Risk, Anxiety and the European Mediation of the Politics of Life' (2005) 30 *European Law Review* 649, 663-674.

The levels of responsibility for the former are high in all three proposals. The CCS proposal imposes strong duties on site selection. The geological formation must be such that there is no significant risk of leakage or significant negative environmental or health impacts are likely to occur.<sup>126</sup> Similar duties apply to management of the stream. The operator must ensure concentrations of substances other than CO<sub>2</sub> do not affect the integrity of the site or pose a significant risk to the environment.<sup>127</sup> The operator is strictly liable for any environmental damage that occurs, irrespective of compliance with the Directive.<sup>128</sup> In like ilk, the PR proposal imposes new duties on providers of health services. There is intended to be a levelling up of quality so Member State must create mechanisms to ensure compliance with recognised good medical practice. There must be monitoring and corrective action where this does not happen.<sup>129</sup> There must be systems of compensation and professional liability insurance schemes.<sup>130</sup> The standard of care in the FI proposal is also significant. Mandatory labelling has been introduced for more than nine nutrients (something estimated to be between seven to eleven times more costly than for three nutrients)<sup>131</sup> and minimum font sizes for all labels have been introduced to aid legibility – something also acknowledged as introducing significant extra cost for all industry.<sup>132</sup> There a strict responsibility for this on all operators who place food on the market for the first time.<sup>133</sup> Yet there is also a responsibility on operators engaged in retail and distribution activities which do not affect food information to take due care to ensure that the requirements are met.<sup>134</sup> The regime is sufficient onerous that there is a dispensation for five years from the nutrition elements for SMEs.<sup>135</sup>

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<sup>126</sup> *CCS proposal*, article 4(2).

<sup>127</sup> *Ibid.*, article 12.

<sup>128</sup> *Ibid.*, article 33.

<sup>129</sup> *PR proposal*, articles 5(1)(a) & (b).

<sup>130</sup> *Ibid.*, articles 5(1)(d) & (e).

<sup>131</sup> *FI proposal*, article 29 & Annex VI. See EC Commission, *Impact Assessment Report on General Food Labelling Issues*, SEC (2008) 92, 86.

<sup>132</sup> *Ibid.*, article 14(1). It will necessitate the redesign of 97% of all labels and the costs were estimated in the impact assessment at possibly €5.2billion. *Ibid.*, 43.

<sup>133</sup> *FI proposal*, article 8(3).

<sup>134</sup> *Ibid.*, article 8(4).

<sup>135</sup> *Ibid.*, article 53.

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If the levels of regulatory responsibility are high, the precautionary qualities of EU law add a twist by suggesting these can only ever be discharged in a partial way.<sup>136</sup> Dissatisfaction with orthodox calculative reasoning leads to recourse to multiple sources of validation in precautionary reasoning. The synthesis of these leads, in turn, to overall rule of thumb assessments beset by an element of contingency. In the CCS proposal, for example, as it is impossible for the operator to monitor the storage site itself for leakage, she is confined to monitoring the complex, the injection facilities and the surrounding environment in the hope that these will somehow provide indicative signs.<sup>137</sup> In the PR proposal, recourse to public funded treatment abroad will be had when sufficiently satisfactory specialised treatment is not available in the home State. This involves heuristic judgments by the specialist with the patient about the quality of treatment in the other hospital, the quality of the after-care, the availability of substitute treatment in the home State. With regard to the question of nutrition labelling in the FI proposal, it is not simply a question of fat and salt being bad and fibre being good. In all cases, labels have to be read in the light of the life style of the consumer – a process that is inevitable situated and highly personalised to that consumer – and something that the retailer or food processor cannot advise on.

This leads EU law to adopt a Janus-faced approach to those exposed to risk by these operations. On the one hand, these are the subjects of EU law whose lives it seeks to better. In this regard, it deliver goods to them but, above all, opportunities for them to better their lives as it sees it and to realise the European *eudaimonia*. On the other hand, EU law is concerned with the effective management of risk. The understanding that the operators of risk activities cannot be insurers of risk leads to it ask its subjects to develop individual risk strategies. This development of opportunity and management of risk are brought together in all three proposals through the provision of information to subjects so that they can orient their lives. This is most obvious with the FI proposal and the details it requires of food labels, but the PR proposal

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<sup>136</sup> On the qualities of this logic see B. Heberton & T. Seddon, 'From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Violent Age' (2009) 49 *British Journal of Criminology* (forthcoming).

<sup>137</sup> CCS proposal, article 13(1).

provides for the provision of information to enable patients to make informed choices about their treatment about their health care, including details on prices, outcomes, and liability coverage<sup>138</sup> by both the health care provider and through national contact points.<sup>139</sup> The CCS proposal provides, through incorporating the requirements of the integrated pollution prevention control and environmental impact assessment, that the public be consulted on the establishment of any installations or pipelines.<sup>140</sup> This right to be informed, on its face, is an entitlement enabling involvement and more aware life choices. Yet, in all cases, the exercise of this entitlement is not self-evident. It only makes sense to insist on consultation over carbon capture and storage if one is going to be actively involved in debate about the process. Similarly, acquiring information about treatment abroad involves a choice about two-centre treatment and questions of after-care that are not easy to resolve. Reading labels about nutrition is only meaningful if it contributes to leading an active and healthy life - something that is very challenging to do! Of course, individuals are free not to do this, but then they are simply disenfranchised. The legislation offers either no benefit to them or it is something to which they are simply exposed in some passive sense. In short, benefits are contingent on the exercise of significant responsibilities.

There is a strong paradox . EU law seeks to secure EU subjects a better life that is more effectively governed. The invocation of this better life leads it not only to expose its subjects to barely comprehensible dangers. It also creates asymmetries of power in which these dangers are created and governed for them by domineering processes – be it the energy operators in carbon capture and storage, health experts in the case of patients or the food industry in the case of labelling – which can provide only incomplete assurances about the dangers involved. Onerous duties are then placed on the subjects both to enable a better life for themselves and to deal with this absence of reassurance. Such a process, whatever its more diffuse benefits, lends itself to anomie and alienation.

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<sup>138</sup> *PR proposal*, article 5(1)(c).

<sup>139</sup> *PR proposal*, articles 5(1)(c) & 12(1).

<sup>140</sup> *CCS proposal*, articles 29 & 30.

## 5. Conclusion

An idea of self-betterment constitutes the cumbersomeness of EU law. Yet the idea of self-betterment is also central to the modern conception of the human condition and to government. And, indeed, if the EU were not there we would almost certainly reinvent equivalent processes to better ourselves. Yet, driven unrelentingly forward, self-betterment can become a pathology simultaneously making harsh demands and being blind to its costs. That is the danger for EU law. For it makes a number of harsh demands.

First, it drives its subjects on only to tell them they have never done sufficient. Secondly, if the benefits of EU law may at times be considerable (e.g. a clean environment) they are also diffused and hidden as collective goods. By contrast, direct entitlements are granted only occasionally as EU law will only provide these where others cannot provide them. Meanwhile, the justice behind the arrangements is uneven and the politics poorly mediated. Thirdly, if the entitlements granted by EU law are few, the range, incidence and nature of responsibilities are considerable, driven by the impulse to make us lead better lives and to regulate ever more activities ever more effectively. EU law creates therefore a law of fear in which through enabling us to do more, it also exposes us to more consequences, but provides limited assurances about the anxieties provoked and an insouciance about the sense of constraint it induces in the individual in the management of the entitlements and responsibilities established.

How to take this forward? The paper is at an end but other writers who have written more generally about these conditions indicate two routes that will only be touched upon. In his work, Sen argues for the notion of freedom over that of well-being because it incorporates the idea of process as central to realisation of a good life.<sup>141</sup> By this, he is not referring to ideas about the public sphere but to the more intimate notion that individual ownership and praxis is vital to defining rather than just enjoying the good things in life. Others have talked about processes in which

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<sup>141</sup> A. Sen, *Rationality and Freedom* (2002, Harvard University Press, Cambridge) 585-587.

individuals are given more leeway to give an account of their own lives as whilst such accounts may only be partial and contingent they are the central medium through which we bind ourselves to others.<sup>142</sup> Surely this would call for more leeway from EU law in allowing us to define 'better' lives for ourselves and whether we want such lives. Alongside this, Fromm has famously talked about the fear of freedom in which individuals demanded to lead lives that they feel are their own seek a number of false gods – be these comforting symbols of authoritarianism, the approval of others in material or political conformism or wanton destructiveness of the self or others.<sup>143</sup> Are these not many of the associations which arise in response to the claims of EU law? If so, this suggests that, irrespective of what is a better life, EU law must consider seriously what it demands subjects sacrifice of themselves in the collective pursuit of the distant horizon of betterment. And maybe what EU law needs to concern itself with is not its betterment or its reform but the conditions under which it allows individuals to escape from it to make their own lives.

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<sup>142</sup> J. Butler, *Giving an Account of Oneself* (2005, Fordham University Press, New York) 30-40.

<sup>143</sup> E. Fromm, *Fear of Freedom* (1942, Ark, London) Chapter V.

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