

# Editorial

There is something horrifying and at the same time fascinating about destruction. It appeals to both our two primary Freudian emotions, ‘Eros’ and ‘Thanatos’ and the connected drives for love and death. Humans want to annihilate, Freud suggests, as much as they want to create. They want control just as much as they want freedom.<sup>1</sup> Although many people lose their faith in man over acts of war and aggression, even in the most dire circumstances, or perhaps in particular in those circumstances, people reach out and help those in need. The war in Ukraine may show mankind at its worst, but arguably also at its best. Thousands of citizens throughout Europe have helped set up charities, take Ukrainian refugees in their homes and even fought along Ukrainian soldiers.

Not only are love and hate intrinsically linked, as two sides of the same coin, these feelings are often complex and intermixed.<sup>2</sup> The feeling of the ‘Sublime’, for example, is described as a feeling of being overpowered, losing control, of trembling in the face of the enormity of beauty, for example a magnificent piece of art. It is a religious experience, where the presence of good can overjoy and terrify a person at the same time.<sup>3</sup> Destruction can also have an enormous appeal, as captured in Lars von Trier’s 2011 film *Melancholia*, where a planet is bound to hit the earth. Though many people are scared, some are fascinated by the upcoming destruction and can’t keep their eyes off the planet’s slow approximation.<sup>4</sup>

It is through this lens that the ongoing progress in AI could be understood. In a small number of months, many developments have rapidly succeeded each other. Progress has moved so quickly that a number of experts have raised alarm, pointing to the risk that, through self-learning and other capacities, AI will develop beyond human control. In a recent call, a number of high profile AI experts call for a temporary ban on research and development, in particular in relation to the large language models such as those that power ChatGPT.

‘Contemporary AI systems are now becoming human-competitive at general tasks, and we must ask ourselves: Should we let machines flood our information channels with propaganda and untruth? Should we automate away all the jobs, including the fulfilling ones? Should we develop nonhuman minds that might eventually outnumber, outsmart, obsolete and replace us? Should we risk loss of control of our civilization? Such decisions must not be delegated to unelected tech leaders. Powerful AI systems should be developed only once we are confident that their effects will be positive and their

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DOI: 10.21552/edpl/2023/1/3

1 Sigmund Freud, *Beyond the pleasure principle* (Penguin UK, 2003).

2 Jean Baudrillard, *The Spirit of Terrorism and Other Essays Telos*, (Verso, 2001) 134-142.

3 Edmund Burke, *A philosophical enquiry into the sublime and beautiful* (Penguin UK, 1998).

4 *Melancholia*, Lars von Trier, Nordisk Film, (2011).

risks will be manageable. This confidence must be well justified and increase with the magnitude of a system's potential effects. OpenAI's recent statement regarding artificial general intelligence, states that 'At some point, it may be important to get independent review before starting to train future systems, and for the most advanced efforts to agree to limit the rate of growth of compute used for creating new models.' We agree. That point is now. Therefore, we call on all AI labs to immediately pause for at least 6 months the training of AI systems more powerful than GPT-4. This pause should be public and verifiable, and include all key actors. If such a pause cannot be enacted quickly, governments should step in and institute a moratorium.<sup>5</sup>

Interestingly, when asked, most AI developers accept the risk that AI might go rogue. Though they do not stipulate that AI will necessarily develop in such a way that it will turn against humans or do something, intended or unintended, that would negatively impact the world as we know it, they do not exclude that possibility either. Most AI developers accept a small risk that a horrifying scenario will materialise. But that does not deter them in pushing these developments, perhaps rather the opposite. There is something inherently fascinating about creating one's own destruction.<sup>6</sup> In this sense, AI is different than most other technical instruments humans have developed. Firstly, although most myths concerning human hubris warn against mankind's attempt to par God's creation, this technology might lead to its destruction. In that sense, perhaps AI's only equal is the atom bomb. Secondly, different from that technology, and every other technology we have developed so far, AI is not only created by us, but will develop itself. Finally, the primary emotion with which most people regard the possibility of AI developing beyond our control is what may be called the techno-sublime: a combination of terror and awe, a deep longing to gamble with a potentially horrifying effect.

These more complex emotions are not accounted for in the dominant regulatory approach. By and large, humans are viewed as rational animals, leading to such approaches as the informed consent model, where individuals are deemed to be able to best protect their own interests as long as they have access to all relevant information and can invoke effective control rights. Much attention has gone to the question whether citizens indeed get the right information they need for making decisions, whether they understand that information and whether such information would level the information asymmetry. Equally, energy has been devoted to the question whether consent is viable in a world of consent-fatigue, a world in which companies and governmental organisations are so powerful and have access to so many resources that they can win almost any legal battle and in which there may simply be too many organisations processing data for an individual to effectively control those parties. Attention has also been paid to the risk of manipulation and the extent to which companies can steer our emotions through nudging, priming and subliminal messages.

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5 Future of Life Institute, 'Pause Giant AI Experiments: An Open Letter' (March 22, 2023) <<https://futureoflife.org/open-letter/pause-giant-ai-experiments/>> accessed 2 May 2023.

6 Hard Fork, 'AI Vibe Check with Ezra Klein and Kevin Tries Phone Positivity' (7 April, 2023) <<https://www.nytimes.com/2023/04/07/podcasts/ai-vibe-check-with-ezra-klein-and-kevin-tries-phone-positivity.html>> accessed 2 May 2023.

But the question whether, even supposing that a person has access to full information and can exert full control without any power- and information-asymmetry, when she is not nudged or subconsciously influenced, should be seen as a rational animal that wants and does what is best for her, is seldom taken into account. This is remarkable, because we all have had contrary experiences. Many people have an ambivalent relationship with their smart phone, acknowledging that way too much time is spent on the device, that it distracts them when having social encounters and negatively affects their attention span. Many people have experienced being glued to the television, binge-watching yet another meh-Netflix series, losing much needed sleep. Many people feel they have spent too much time responding to the daily myriad of WhatsApp-messages and Twitter-discussions that go nowhere. It is these feelings of wanting something that we know is bad for us, of doing something against our will, of finding beauty in destruction, of being fascinated and terrified at the same time by a power that might overwhelm us, that is unaccounted for under the current regulatory regime.

Perhaps the classic understanding of freedom in Western mythology can be found in the moment Odysseus has to pass the Sirens. He knows full well that when he would hear their voices, he would succumb, though he does not want to. Hence, he decides to put wax in his ears and have his friends tie him to the mast of the ship. Freedom, the story makes clear, is not unbound; to the contrary, it is only through limitations that freedom arises. Not only, as it is often suggested in liberal theories, does the freedom of one person end where the freedom of the other begins, but freedom proper also depends on self-control. Freedom is not: eating an unlimited amount of chocolate, drinking an unlimited amount of wine and sleeping all day; freedom is: controlling yourself, not only by restraining yourself from eating all the chocolate available, but also by not buying too much chocolate because you know that you might not be able to restrain yourself or even by asking your partner to stop you from reaching for yet another bar when you feel peckish.

Regulation can help us to attain this type of freedom by helping us to protect ourselves from our own emotions and drives. Instead, the current regulatory approach does the opposite. It invests in broadening individual control, therewith giving us tools to guard ourselves against unwanted actions of others, but leaving us even more exposed to our own unwanted desires. From this perspective, the call for a moratorium on developing AI, although clearly opportunistic and unrealistic, should not be immediately dismissed. The underlying philosophy of such a ban accounts for the fact that even if people know that their actions might lead to unwanted consequences, they might still continue down that path. It accounts for the fact that it might not always be advisable to leave it to people themselves to make the best decisions on the basis of all relevant information, not when their individual decisions may impact general interests and society at large, but perhaps also not when it comes to making decisions that affect their own lives.

Turning to this issue, we are proud to present yet again two forewords by two internationally renowned experts. First, Danielle Citron suggests that we need to treat intimate privacy not only as a human right, but also as a civil right because its protection

is essential for human flourishing. As a civil right, it guarantees our participation in a democratic society, and as a moral right, it cannot be traded away or denied without a good reason. Amy Gajda also emphasizes the importance of intimate privacy. Discussing the Dobbs decision, she suggests a less bleak picture than sometimes painted of American privacy protection, pointing a host of positive court findings, protection provided through tort law and a potential future move towards a constitutionally protected right to privacy.

In the articles section, we have three articles. Yuliya Miadzvetskaya tackles cross-border data transfers through the lens of both the General Data Protection Regulation and the Data Governance Act. She also critically engages with the phenomenon of the GDPR mimesis, according to which new EU regulatory initiatives for technology and digital life imitate the regulatory system established by the GDPR. Hannah Ruschmeier dives into the world of data brokers. She scrutinises the data broker business model and the resulting conflicts with data protection regulation. Finally, Bettina Bacher goes to the heart of automated decision making by private entities. Her taxonomy focuses on sociotechnical aspects, the optimisation promises embodied in automated decision making and the application parameters of automated decision systems.

As always, the reports section led by Mark Cole and Christina Etteldorf is packed with highly valuable insights on ongoing developments throughout Europe. Sandra Schmitz-Berndt provides us insights in the EDPB's approach to the ongoing difficulties in setting up a special regime for data transfers between the EU and the US and Maria Magierska dives into the EDPB's fascinating decisions under the article 65 regime. Pier Giorgio Chiara is touching on perhaps the most discussed topic in the privacy and data protection community: the Italian DPA's decision to impose a temporary limitation on data processing by ChatGPT. In the practitioners' corner, Florence D'Ath explains how data protection law can be utilized to combat discrimination in e-recruiting practices. Finally, in the case note section led by Maria Tzanou, Manos Roussos dives into the highly interesting CJEU case which looked at open data regimes through a data protection lens.

For those interested in submitting an article, report, case note or book review, please e-mail our Executive Editor Jakob McKernan ([mckernan@lexxion.eu](mailto:mckernan@lexxion.eu)) and keep in mind the following deadlines:

- Issue 2/2023: 30 April 2023;
- Issue 3/2023: 15 July 2023;
- Issue 4/2023: 15 October 2023;
- Issue 1/2024: 15 January 2024.

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