

# Editorial

In his short novel *A beautiful young woman*, Dutch author Tommy Wieringa describes a love affair between a young woman and an older man, a virologist working at a university. Although the relationship starts as relationships suppose to do, slowly, small cracks appear. Things escalate when she blames him for doing lab experiments on rodents: how does he feel about inflicting pain on innocent animals? The critique he has been hearing for years haunts him, not so much because the love of his life challenges the way he has been doing research for years, but primarily because he finds that he is unable to verify or falsify the claim. The thought that he inflicts pain on the animals is itself based on a feeling and subjective interpretation – there is no objective, let alone scientific, way to measure or determine pain, not even with humans. ‘The only method there is to measure the pain human patients are suffering from is to let them indicate on a scale from 1 to 10 how intense the pain is they are experiencing, but there is no instrument such as a thermometer that could read and measure pain in tissue and organs. To arrive at a new taxonomy, thought Edward, pain must be measurable. The pain-stimulus may be objective (pulling out a nail, cutting out an eye), the experience of that stimulus was personal.’<sup>1</sup>

This thought is one of the main arguments directed at classic utilitarianism as proposed by Jeremy Bentham. Going against classic forms of ethics, Bentham proposed to ground a new understanding of ethics on hard, measurable and objective vectors. He proposed to determine the moral value of an act not on the basis of preset moral principles, such as ‘thou shalt not kill, steal or lie’, but on the question of what effects a certain act brings about. If the effects are positive, Bentham suggested, the act should be considered good; if the effects are negative, the act should be considered bad. An act is bad if it causes more pain than joy and an act is good if it causes more joy than pain. Thus, in order to arrive at a moral evaluation of an act, the negative and positive results of an act, pain and pleasure, must be weighed and balanced against each other. To arrive at such balance, Bentham, in *An Introduction to the Principles of Morals and Legislation*, identifies seven vectors to determine the level of pain and/or pleasure, namely: (1) intensity; (2) duration; (3) certainty or uncertainty; (4) nearness or remoteness; (5) fecundity, ie its chance of being followed by sensations of the same kind (pleasure by pleasure, pain by pain); (6) its purity, ie its chance of not being followed by sensations of the opposite kind (pleasure by pain, pain by pleasure); (7) its extent, ie the number of persons to whom it extends or (in other words) who are affected by it.<sup>2</sup>

Although Bentham wanted to develop a type of ethics that was based on objective and measurable facts, the critique is that even despite his seven vectors, pain and pleasure remain inherently personal and subjective experiences that cannot be objectively ver-

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1 Tommy Wieringa, *A beautiful young woman* (Bezig Bij 2014) 63-64.

2 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* <<http://www.earlymoderntexts.com/assets/pdfs/bentham1780.pdf>> accessed 5 April 2017.

ified or measured. Such critique is also aimed at the methodology for determining whether an act has done more good than bad, which is done through the so called utilitarian or felicific calculus: the positive and negative consequences of an action are weighed and balanced against each other. Here again, the rhetoric of measurability and exactitude is adopted – it is based on a metaphor inspired by the physical realm, in which matters do have a weight and there does exist a reliable scale to measure those weights. The problem, of course, is that in the moral realm there are no objects – the things being ‘balanced’ are ideas, values and interests which have no weight other than the figurative ‘weight’ that is attributed to it. In addition, there is no set scale or method to weigh moral principles, as there is in the physical realm.

The most effective critique of balancing concerns the assumption of a common metric in the weighing process. The metaphor says nothing about how various interests are supposed to be weighted and this silence reflects the impossibility of measuring incommensurable values by introducing a mechanistic, quantitative common metric.<sup>3</sup>

Again, although the utilitarian calculus suggests objectivity and measurability, the critique is that it delivers the exact opposite: vagueness and subjectivity.

A final opposition against such an approach in the legal realm is that it is unfit for answering moral questions. The point is not whether A gets more pleasure from hitting B than the pain that is inflicted on B – the point is that hitting someone is just not ok. In addition, law aims at protecting the rights and interests of minorities, while in a utilitarian calculus, the risk is that the benefits of a certain act for the majority will often outweigh the disadvantages for the minority. Law, in short, should not be based on weighing and balancing the different interests at stake, but on providing a counterpoise against this approach. Instead of balancing relative interests, law prioritises interests – it makes a hierarchy and lays down that value A is more important than value B or that in most circumstances, value A prevails, except for specified circumstances #1, #2 and #3, in which value B is given priority. In this line, Habermas has suggested that the legal realm is founded in deontological ethics, and provides a counterpoise against utilitarian based policy arguments: ‘For if in cases of collision all reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses.’<sup>4</sup>

The notion of balancing has entered the juridical realm, including the human rights framework, in the last 30 years or so. It is already seen by some as the main tool for judges to determine the outcome of a case; others have suggested that we live in the ‘age of balancing’.<sup>5</sup> What is ‘balanced’ in these types of cases is not the pleasure an

3 Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (Jean Monnet Working Paper 09/08, 2008) <<http://jeanmonnetprogram.org/paper/proportionality-an-assault-on-human-rights-2/>> accessed 5 April 2017.

4 Jürgen Habermas, *Between Facts and Norms* (Polity 1996) Citation taken from Robert Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16(2) *Ratio Juris*. See also: Steven Greer, ‘“Balancing” and the European Court of Human Rights: A contribution to the Habermas-Alexy Debate’ (2004) 63 *The Cambridge Law Journal*.

5 T Alexander Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *The Yale Law Journal*.

act brings about against the pain it causes; instead, rights are balanced against each other, or the individual interest of a rights holder is 'balanced' against the general interest, for example national security, invoked to curtail the right. This means that the first critique on the utilitarian calculus – pain and pleasure are inherently subjective and unmeasurable – does not apply directly, although some have suggested that the notion of 'interests' is equally vague. The other two arguments – that there is no scale or method for balancing non-physical objects and that the idea of balancing interests goes against the *raison d'être* of the legal regime – apply in any case.

The last issue of EDPL contained an article by Raphaël Gellert titled 'We have always managed risks in data protection law'. It was selected as one of the five best papers that were submitted for our Young Scholars Award. Gellert's paper was in fact selected as one of the three best papers – which meant that he, together with Istvan Borocz and Worku Gedefa Urgessa, could present his paper at CPDP – the Computer, Privacy and Data Protection Conference. I was the chair of the jury and found Gellert's paper one of the best submissions; at the same time, I couldn't disagree more. My disagreement was triggered by multiple statements, such as that risk assessments and risk management should be seen as requiring cost-benefit analyses, in which the harms associated with the risks of a data processing operation are balanced against the benefits associated with it. But my main hesitation was with Gellert's assertion that 'balancing' has always been engrained in data protection law and is the essence of many of the data protection principles, such as the impact assessment, the requirement to have a legitimate ground, the data quality principles, the requirement to store data safely and confidentially, etc, etc, etc.

Apart from the arguments against balancing as discussed earlier, my concern is that this statement may simply be untrue, or at the very least, there is another, more viable interpretation for assessing the fundamental rights to privacy and data protection and the various principles contained in the General Data Protection Regulation (GDPR). To begin with, both the Data Protection Directive (DPD) and the GDPR only use the terminology of balancing in this sense two times,<sup>6</sup> namely in their recitals and not in the operative part of the legal instruments. The Directive specifies that

in order to maintain a balance between the interests involved while guaranteeing effective competition, Member States may determine the circumstances in which personal data may be used or disclosed to a third party in the context of the legitimate ordinary business activities of companies and other bodies,<sup>7</sup>

which is consequently not an interpretation of the articles in the DPD itself, but a margin of discretion left to the Member States. This also holds true for the second time the notion of balancing is used, namely when it is held that Member States should lay

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6 The GDPR uses it a third time but in an unrelated fashion, to refer to the imbalance of power between different parties. Recital 43 GDPR.

7 Recital 30 DPD.

down exemptions and derogations necessary for the purpose of balance between fundamental rights as regards general measures on the legitimacy of data processing, measures on the transfer of data to third countries and the power of the supervisory authority.<sup>8</sup> The GDPR adopts the fundamental rights rhetoric now commonly heard and stresses that the right to protection of personal data is not absolute but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.<sup>9</sup> The second reference to balancing in a recital of the GDPR again refers to the margin of discretion afforded to Member States. 'Therefore, Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights.'<sup>10</sup>

Consequently, there are no material provisions in either the DPD or the GDPR that refer directly to balancing and even the recitals that do use that concept are not an interpretation of the material provisions, but regard the margin left to the Member States and the general approach to fundamental rights. In addition, neither the European Convention on Human Rights of the Council of Europe nor the Charter of Fundamental Rights of the European Union use the term balancing in this respect. As is well known, Article 8 ECHR holds:

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>11</sup>

And the general limitation clause contained in the Charter specifies:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.<sup>12</sup>

Although obviously, both the European Court of Human Rights and the Court of Justice of the European Union have used the term 'balancing', it is clear that the method of balancing goes against the intention of the authors of the ECHR and the Charter. For example, adopted against the backdrop of the Second World War, the ECHR set min-

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8 Recital 37 DPD.

9 Recital 4 GDPR.

10 Recital 153 GDPR.

11 art 8 ECHR.

12 art 52 Charter.

imum requirements against the abuse of power by states. It was not so much meant as providing subjective rights to individuals, but to lay down minimum requirements for the use of power by states. Because the goal was not to protect private interests of natural persons through subjective rights, the idea of balancing these rights and interests against the rights and interests of others or society as a whole did not occur to the drafters of the Convention.

Rather, the Convention focuses on the conditions for the use of power. (1) There are some absolute prohibitions for states in the ECHR; for example, they may never use their power to torture someone or to subject people to degrading punishment. (2) There are rights which may only be curtailed in times of war or emergency, such as the right to a fair trial. (3) And there are rights which may be curtailed if specific conditions apply, such as the right to privacy and the freedom of expression. The fact that the latter rights are relative does not mean, however, that balancing should occur. Rather, this means that conditions are set out which must be fulfilled – the action by the state should be (3a) prescribed for by law, (3b) in one of the interests contained in the article and (3c) necessary in a democratic society. The necessity test – which for the authors of the convention did not equate to the balancing of interests – is a binary test: curtailing a right is either necessary or not. The same counts for the other requirements - either the government's action is or it is not prescribed for by law - either it serves one of the interests set forth or it does not - no balancing takes place. The three types of obligations for states are the logical equivalent of the situation in which for the first time, an adolescent is left at home alone without a babysitter and his parents set three conditions for this privilege: (1) Never enter our bedroom, (2) only leave the house when there is a fire or another emergency and (3) do not watch TV, except when (3a) you have done your homework, (3b) the television programme is educational in nature and (3c) you have informed us in advance.

In the context of the ECHR, there is no need to balance the interest of the individual whose home is entered by the police against the potential society interest served by entering the home of the individual. Whether this is necessary or not depends on the situation – this may be the case when the police suspects that the person is a murderer and hides a murder weapon in his home; this may be unnecessary when a police officer wants to see how his neighbours or a famous football player lives. Note that this is a hierarchy of norms and interests; obviously, if the person is a murderer and hides a murder weapon, entering his home is more important than the privacy of his home; obviously, when the police officer is only curious to know how the person lives, this is less important than the privacy of the person's home. Normative decisions in this sense a matter of hierarchy. It is possible to weigh the amount of sugar against the amount of milk you put in your coffee; but whether you prefer milk over sugar is a question of a different nature.

The same can be said about data protection law. Its core, in my opinion, and I presume in contrast to Gellert's believe, is not, and certainly was not, protecting individual interests through granting subjective rights to natural persons, but laying down du-

ties of care for data controllers: if you gather personal data, collect no more than necessary, ensure that the data are stored safely and confidentially, ensure that the data are correct and kept up to date, if you no longer need the data, delete them, be as transparent as you can be, etc. These obligations are phrased in a similar way as those contained in the European Convention on Human Rights. They lay down conditions and prohibitions when people want to process personal data. Data controllers have to respect the data protection principles, even when there is no data subject requiring them to do so.

As has been stressed, none of the material provisions in the DPD or the GDPR use the metaphor of balancing. Still, it could be argued, the idea of balancing is implicit in the data protection principles. Such an argument is often progressed on two accounts. On the one hand, it is suggested, there are exceptions to the principles, and this means that there should be a balancing exercise on the question of when and how these exceptions should be applied. On the other hand, there are conditions for the application of the different data protection principles, and determining whether these are fulfilled or not requires an assessment of proportionality and balancing, so it is said. As to the first argument, an example may be that the obligation to provide information to data subjects does 'not apply where and insofar as the data subject already has the information',<sup>13</sup> similarly, there is an exception for certain obligations for micro, small and medium-sized enterprises (SMEs) in the GDPR, there are exceptions for, inter alia, archiving purposes in the public interest, scientific or historical research purposes or statistical purposes<sup>14</sup> and there are general restrictions on the application of the GDPR,<sup>15</sup> and the household exception.<sup>16</sup> Again, I think these types of exemptions are not phrased in a relative way that requires balancing. Either data are processed for statistical purposes or they are not, either they are used for purely household purposes or they are not, either they are gathered by SMEs or they are not.

The same is the case for the conditions in the material provisions themselves. A provision that is referred to by Gellert is the data accuracy principle, which holds that personal data must be 'accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay.'<sup>17</sup> Gellert suggests the following:

The second balancing test [the first one being the requirement to have a legitimate ground for processing] is enshrined in the data quality principle. Predicated upon the assumption that the goal of the processing is sufficiently legitimate, its goal is to determine, whether and to what extent the processing can take place. Very much like the risk man-

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13 art 13.4 GDPR.

14 art 89 GDPR.

15 art 23 GDPR.

16 art 2 GDPR.

17 art 5(d) GDPR.

agement step, it is composed of a balancing test *per se* associated with risk reduction measures, which in the legal context are referred to as safeguards.<sup>18</sup>

I'm not sure how to read Gellert's statement; obviously, in a certain sense, every legal principle, law and regulation is aimed at tackling a certain problem or 'risk'. If there was no issue, there would be no need for a law. So I suppose Gellert is trying to convey something deeper here, but I'm not quite sure what. Maybe his arguments are influenced by the fact that 'every reasonable step must be taken' to comply with the principles is regarded as an open norm, but determining whether it is reasonable to take certain measures or not is just as binary as determining whether it is necessary to enter someone's home or not.

The Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data from 1981 was the first legal instrument to contain an article with the various 'data quality principles', such as that data must be processed legitimately; stored for specified and legitimate purposes and not used in a way incompatible with those purposes, adequate, relevant and not excessive in relation to the purposes for which they are stored; accurate and, where necessary, kept up to date; preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.<sup>19</sup> The explanatory report stresses:

The different provisions of this article aim at the fulfilment of two fundamental legal standards. On the one hand the information should be correct, relevant and not excessive in relation to its purpose. On the other hand its use (gathering, storage, dissemination) should likewise be correct.<sup>20</sup>

It is clear that these principles are meant to lay down the minimum conditions for processing personal data. In this sense, the data quality principles are essentially the same as: if you have a restaurant and want to serve fruit, ensure that the fruit is qualitatively good – every reasonable step must be taken by the restaurant to ensure that rotten fruit is removed – and the fruit must be used and served in an equally adequate manner. This does not mean that if the damage done to people eating rotten fruit is relatively limited, the restaurant owner may decide to allow for a margin of error or balance this harm against the financial benefits it has for him not implement adequate procedures. The restaurant must always take every reasonable step to ensure that the fruit is of good quality.

The final and perhaps strongest argument for balancing in data protection law is based on two specific doctrines. The first is Article 6 GDPR, containing the six grounds for

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18 Raphaël Gellert, 'We Have Always Managed Risks in Data Protection Law: Understanding the Similarities and Differences Between the Rights-Based and the Risk-Based Approaches to Data Protection' (2016) 2(4) EDPL 481-492, 485.

19 art 5 Convention.

20 Council of Europe, 'Explanatory Report to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data' (1981), 9 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ca434>> accessed 5 April 2017.

legitimate processing, such as consent, contract, legal obligation, public interest and, ground (f), which specifies:

processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

It is common belief that ground (f) requires a balancing test; *inter alia*, the Article 29 Working Party has adopted this terminology.<sup>21</sup> Again, however, the provision does not use the terminology of balancing or weighing. Rather, it resembles the logical structure of Article 8 ECHR. Article 8 ECHR begins with the right to privacy and in paragraph 2 specifies the conditions under which an exception may apply. Article 6(f) GDPR turns it around. It takes as starting point that the processing of personal data may be legitimate if in the interest of the data controller, but sets three conditions: (1) the data controller should have a legitimate interests, (2) the processing should be necessary for achieving this goal and (3) the data subject's interest should not override this interest. Again, I think, the first step is a binary one. Either the data controller has a legitimate interest or not. What makes it difficult perhaps is that there is no exhaustive list of what qualifies as a legitimate interest or not, such as is provided in Article 8 ECHR. But this does not mean that this first point is a relative one – clearly, an adopted son has a legitimate interest in gathering personal data about his presumed biological parents – clearly, gathering personal data in order to conduct fraud or bribery is not legitimate. For other interests, it is perhaps more difficult to determine whether they are legitimate or not; but that it is more difficult to answer does not change the question. The second step is a binary one as well. Either processing personal data for achieving a certain goal is necessary or it is not. That means, for example, that if the goal is very important (preventing or curing a certain disease), processing personal data that are not necessary for achieving the goal is still not allowed. And the third and final step is a matter of hierarchy. Either one interest is conceived of as higher than the other or it is not. The interest of the child to know who his biological parents are may or may not be conceived of as higher than the interest of the biological parent to remain anonymous. The need for the World Health Organization to monitor the location of groups that may be affected with Ebola may be conceived as more important than the interest of the data subjects to remain anonymous. It is a matter of hierarchy of interests.

Consequently, although I know it is going against the grain, I think Article 6(f) GDPR does not require a balancing act. Perhaps it is pushing the argument too far, but I'm even inclined to say that the risk assessment does not require us to resort to the method of balancing, in this case, balancing the risks associated with the data processing against its perceived benefits. The GDPR specifies:

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21 Article 29 Working Party, 'Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC' (9 April 2014) WP 217 <[http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp217\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf)> accessed 5 April 2017.



Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks.<sup>22</sup>

Such an assessment shall contain at least: '(a) a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller; (b) an assessment of the necessity and proportionality of the processing operations in relation to the purposes; (c) an assessment of the risks to the rights and freedoms of data subjects referred to in paragraph 1; and (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation taking into account the rights and legitimate interests of data subjects and other persons concerned.'<sup>23</sup> Obviously, such an assessment is aimed at addressing risks, but I'm not sure whether it requires balancing. I do not even see a reference to the potential benefits of a processing operation, so I'm not sure whether I agree with Gellert when he stresses that it is 'widely accepted that the decision of whether or not to take a risk takes the form of a cost-benefit analysis, that is, a balancing of the harms associated to the risk with the benefits associated thereto. Accordingly, at its core, risk management amounts to a balancing test.'<sup>24</sup>

For me, the article is the logical equivalent of the following. Restaurants that store and serve food in a manner that entails more risks should do a risk assessment. Suppose a restaurant promotes itself as serving food only that is nearing the expiration date. In this way, it can promote itself as eco-friendly, as it prevents waste, and it can make more revenue, because it can buy those products on the market for a lower price. Obviously, working with such products entails a high risk of serving food that is no longer good to eat. It is not prohibited to work with such food, but it requires additional standards of care. Thus, the restaurant must do a risk assessment – for example, fruit passing the expiration date may be rotten and hence dangerous to eat, while pasta or beer past the expiration date may have less detrimental effects. The restaurant, the impact assessment requires, should adopt standards and protocols to mitigate the risk. For example, it may develop a protocol in which the expiration date on the packages of food such as pasta or beer is checked every day and it may require for food that each piece of fruit must be cut in half and inspected by a knowledgeable person to ensure that no rotten fruit is served. Obviously, if the costs for implementing these procedures are

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22 art 35.1 GDPR. See on the point of risk assessments also: Claudia Quelle, 'The Data Protection Impact Assessment, or: How the General Data Protection Regulation May Still Come to Foster Ethically Responsible Data Processing' (2015) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2695398](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695398)> accessed 5 April 2017.

23 art 35.7 GDPR.

24 Gellert (n 18) 484.

conceived as too high, the restaurant may decide not to go through with its plan, but that is something different from weighing the benefits of the plan against the risks for the consumers. It is not so, in this case, that the restaurant may decide to go through with its plan without taking mitigating measures and take the high risk that customers get food poisoning if the benefits of the plan, eg the profits for the restaurant, are high enough. If the risks for food poisoning are high, the restaurant should assess these risks and develop plans to mitigate them or prevent them, no matter how low or high the potential profit for the restaurant is.

All in all, there is no need to resort to notions such as balancing or other terms inspired by the utilitarian calculus when interpreting or applying data protection principles. And there are relevant reasons not to do so. As has been stressed, the utilitarian calculus typically relies on weighing pain and pleasure, while these feelings are inherently subjective and unmeasurable. In addition, applying the metaphor of balancing in the moral or legal realm is of little use, because moral principles have no weight and because there is no scale or device to balance them. And finally, it is often stressed that law's purpose is precisely to move away from cost-benefit analyses; instead of weighing different relative interests, it is based on a hierarchy of principles and values. As has been stressed, the first critique is mostly inapplicable to the use of balancing in the data protection realm, because it does not rely on pain and pleasure, but on interests. However, in how far these interests can be objectively established remains a point of discussion. In any case, when impact assessments are perceived as cost-benefit analyses, this critique may gain new ground. Impact assessments have been critiqued for decades to rely on inherent vague notions such as 'impact' and 'risk', which are again highly subjective, and method sufferings from the same critique as 'balancing'. As Black already wrote in 2005, an impact assessment 'is a highly political decision masked in the technical and apparently neutral language of the risk assessment model. For determining impact thresholds is an art, not a science.'<sup>25</sup>

This edition of EDPL contains three, instead of two forewords. Two discuss the matter of Big Data. The first is by *Bill Binney*, who is sometimes said to be the inventor of Big Data and meta-data analytics.<sup>26</sup> He is, in principle, still in favour of gathering as much as data as possible, but prefers smarter decisions being made on the selection of the data points actually being analysed. The second foreword is written by *Bjørn Erik Thon* and *Catharina Nes*, both from the Norwegian Data Protection Commission. It was the first data protection authority to issue a big and comprehensive study on Big Data in the light of privacy and data protection,<sup>27</sup> and has since been highly influential in drafting the Mauritius Declaration,<sup>28</sup> the Berlin Group on Data Protection in Telecommu-

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25 Julia Black, 'The emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom' (2005) Public Law 532. Citation taken from Tony Posser, *The regulatory enterprise: government, regulation and legitimacy* (Oxford University Press 2010), 215.

26 'William Binney (U.S. intelligence official)' <[https://en.wikipedia.org/wiki/William\\_Binney\\_\(U.S.\\_intelligence\\_official\)](https://en.wikipedia.org/wiki/William_Binney_(U.S._intelligence_official))> accessed 5 April 2017.

27 Norwegian Data Protection Authority, 'Big Data – privacy principles under pressure' (2013) <[https://www.datatilsynet.no/globalassets/global/04\\_planer\\_rapporter/big-data-engelsk-web.pdf](https://www.datatilsynet.no/globalassets/global/04_planer_rapporter/big-data-engelsk-web.pdf)> accessed 5 April 2017.

28 36<sup>th</sup> International Conference of Data Protection and Privacy Commissioners, 'Resolution Big Data' <<http://www.privacyconference2014.org/English/aboutconference/Documents/Resolution/Resolution-Big-Data.pdf>> accessed 5 April 2017.

nications<sup>29</sup> and other important subsequent reports. We are very honoured that they, like Bill Binney, took the time to share their thoughts on this topic and we are equally proud to include the continued foreword by the sensei of Data Protection, *Paul de Hert*.

This issue includes three articles which deal with Big Data and associated topics. *Ugo Pagallo* suggests that seeing the developments known as Big Data, it is time to widen our perspective to include not only the hard laws of EU governance, but also to consider the role played by the secondary rules of the law. His article examines four types of secondary rules at work in the GDPR and attempts to show how the mechanisms and procedures of flexibility provided by such rules may shed light on the kinds of primary rules needed within the field of Big Data. *Abu Bakar Munir*, *Siti Hajar Mohd Yasin* and *Siti Sarah Abu Bakar* discuss the developments over mass surveillance and data retention in the EU. They zoom into the jurisdiction of the United Kingdom to show new dilemmas and questions arising for Big Data practices on this point. Finally, *Marc Rotenberg* discusses the role and opportunities of the Special United Nations Rapporteur on the Right to Privacy, especially in the wake of the US National Security Agency revelations and the developments connected to it.

What makes the European Data Protection Law Review special is that it provides the reader with a full update on all developments in privacy and data protection law. The Foreword section invites leading figures to share their views on new developments, the Article section provides academic insights in topical issues, the Report section signals important national developments in Member States of the EU, the Case Law section includes discussions on the most important cases of the European Court of Human Rights and the European Court of Justice and the Book section selects the most important books that have appeared in the last months in the field of privacy, data protection and information technology. This issue contains national reports on the United Kingdom, Germany, European and US developments; it also contains two practitioners' reports, therewith strengthening our Practitioner's Corner. We still invite practicing lawyers, data protection officers, politicians and others working in data protection practice to share their insights in new developments they are encountering in their work. The Case Note section contains a commentary on the *Breyer* case and the Book Review section contains three book reviews done by Jef Ausloos, Dirk Müllman and Michael Collyer.

As a final announcement, we are proud to have Tal Zarsky on board of our editorial team. Tal is a Professor and Vice Dean of Haifa University. For those interested in submitting a paper for the Articles section of EDPL, our special focus in the next editions (which does not mean we exclude papers on other topics) is on:

- EDPL 2017/2: Smart Applications (1 May 2017);

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29 International Working Group on Data Protection in Telecommunications, 'Working Paper on Big Data and Privacy - Privacy principles under pressure in the age of Big Data analytics' (2014) <[https://datenschutz-berlin.de/attachments/1052/WP\\_Big\\_Data\\_final\\_clean\\_675.48.12.pdf?1407931243](https://datenschutz-berlin.de/attachments/1052/WP_Big_Data_final_clean_675.48.12.pdf?1407931243)> accessed 5 April 2017.

- EDPL 2017/3: Law Enforcement (1 August 2017);
- EDPL 2017/4: Young Scholars Award 2017 (15 October 2017).

For those interested in writing an article, report, case note or book review, please email our executive editor, Nelly Stratieva at <stratieva@lexxion.de>.

We hope you will enjoy reading EDPL's first edition of 2017!

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