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### Incongruent Selves in Social Media and Privacy law: Proposing a humanistic psychological intervention

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# Incongruent Selves in Social Media and Privacy law: Proposing a humanistic psychological intervention

## Abstract

In our present culture of information fetishism and the frivolous pursuit of visibility, the parameters of the private sphere are shifting in unusual ways. Rather than staunchly guarding one's private life, many are seemingly complicit in the demise of their own privacy through, for example, the sharing of personal matters to large social media audiences, or via a more passive participation in networked technologies. The fragmentary, and somewhat feeble, state of privacy law in Australia is illustrative of law's ambivalence towards this contemporary privacy subject. As extant doctrines and discourses struggle to accommodate the incongruences surrounding our engagement with privacy in the networked digital era, this article aims to bring to the law of privacy a more nuanced understanding of subjectivity and the conditions needed to pursue its purported aims. Specifically, this article seeks to explore the potential of Rogerian humanistic psychology to generate an alternative framework within which to critique, re-conceive and transform the dispositions of law's imagined privacy subject.

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# Incongruent selves in social media and privacy law: Proposing a humanistic psychological intervention

Yvonne Apolo\*

*In our present culture of information fetishism and the frivolous pursuit of visibility, the parameters of the private sphere are shifting in unusual ways. Rather than staunchly guarding one's private life, many are seemingly complicit in the demise of their own privacy through, for example, the sharing of personal matters to large social media audiences, or via a more passive participation in networked technologies. The fragmentary, and somewhat feeble, state of privacy law in Australia is illustrative of law's ambivalence towards this contemporary privacy subject. As extant doctrines and discourses struggle to accommodate the incongruences surrounding our engagement with privacy in the networked digital era, this article aims to bring to the law of privacy a more nuanced understanding of subjectivity and the conditions needed to pursue its purported aims. Specifically, this article seeks to explore the potential of Rogerian humanistic psychology to generate an alternative framework within which to critique, re-conceive and transform the dispositions of law's imagined privacy subject.*

## I An introduction to contemporary privacy concerns

*When you look at the kind of information that people publish about themselves it makes you wonder. I used to think that a telephone conversation was normally private but you can't walk down the street without hearing a number of telephone conversations.<sup>1</sup>*

— Former Chief Justice of the High Court of Australia,  
Murray Gleeson

If there were any doubts remaining as to the societal value placed on privacy,<sup>2</sup> they were recently put to rest in the form of the #DeleteFacebook

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1 Speech to the National Press Club, August 2008, reported by Nicola Berkovic, 'Why privacy just isn't what it used to be', *The Australian*, 22 August 2008, 17.

2 In 2010, eg, Facebook CEO Mark Zuckerberg (in)famously stated that 'privacy is no longer a social norm': Emma Barnett, 'Facebook's Mark Zuckerberg says privacy is no longer a "social norm"', *The Telegraph* (online), 11 January 2010 <[www.telegraph.co.uk/technology/facebook/6966628/Facebooks-Mark-Zuckerberg-says-privacy-is-no-longer-a-social-norm.html](http://www.telegraph.co.uk/technology/facebook/6966628/Facebooks-Mark-Zuckerberg-says-privacy-is-no-longer-a-social-norm.html)>, 11 years after Sun Microsystems CEO Scott McNealy proclaimed that '[y]ou have zero privacy anyway. Get over it': Polly Sprenger, 'Sun on Privacy: "Get Over It"', *WIRED* (online), 26 January 1999 <[www.wired.com/1999/01/sun-on-privacy-get-over-it](http://www.wired.com/1999/01/sun-on-privacy-get-over-it)>.

movement; an online movement sparked by the ‘Cambridge Analytica scandal’,<sup>3</sup> which has thus far encouraged one quarter of Facebook members to either delete or change the privacy settings of their accounts.<sup>4</sup> Paradoxically, however, statistics also suggest that the average daily engagement of Facebook users increased in the wake of #DeleteFacebook, and that other key Facebook metrics remain steady.<sup>5</sup> As such, the recent debate regarding the manner in which social media giants and third-party data brokers utilise personal information further illuminates the complex contradictions that characterise much of our contemporary engagement with privacy. In light of such inconsistencies (and against the backdrop of Australia’s ambivalent privacy law framework),<sup>6</sup> this article seeks to shed new light on our seemingly pathological relationship with privacy and explore the conceptual tools required for law to adequately understand and respond to this contemporary privacy concern. In doing so, this article will introduce to the law of privacy a humanistic psychological framework, premised upon a nuanced understanding of the ideal processes and conditions within which the goals of self-actualisation and human flourishing can be fostered. The thesis of this article is that by better understanding its human subject and our material engagement with privacy, privacy law could more effectively achieve its purported aims of nurturing human dignity, autonomy and flourishing.<sup>7</sup>

While the character of this article is conceptual — seeking to elucidate a model of subjectivity that the legal protection of privacy should seek to recognise and promote — a brief consideration of the various privacy-related issues surrounding the Cambridge Analytica scandal will serve to illustrate and contextualise the problems that the legal protection of privacy currently faces. These are problems that appear to be qualitatively different from those contemplated by Samuel Warren and Louis Brandeis, when they famously penned the ‘right to privacy’ in 1890,<sup>8</sup> or by Cottenham LC when, in 1849, he sowed the seeds for the recognition of privacy at common law.<sup>9</sup> As such, the remainder of this Part will be divided into two sections. The first section will discuss the privacy concerns associated with the Cambridge Analytica scandal. The second section will briefly locate these contemporary concerns in

3 The details of which will be briefly set out in Part I(A).

4 See, eg, John Glenday, *#DeleteFacebook movement builds up steam* (18 June 2018) The Drum <[www.thedrum.com/news/2018/06/18/deletefacebook-movement-builds-up-steam](http://www.thedrum.com/news/2018/06/18/deletefacebook-movement-builds-up-steam)>.

5 See, eg, Jake Kanter, *The backlash that never happened: New data shows people actually increased their Facebook usage after Cambridge Analytica scandal* (20 May 2018) Business Insider <[www.businessinsider.com.au/people-increased-facebook-usage-after-cambridge-analytica-scandal-2018-5?r=US&IR=T](http://www.businessinsider.com.au/people-increased-facebook-usage-after-cambridge-analytica-scandal-2018-5?r=US&IR=T)>.

6 To date, Australia has been reluctant to protect privacy rights at common law: see *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (‘*Lenah*’); cf *Giller v Procopets* (2008) 24 VR 1 and *Wilson v Ferguson* [2015] WASC 15 (16 January 2015). In addition, despite recommendations to the contrary, Australia lacks a statutory tort of privacy: see, eg, Australian Law Reform Commission (‘ALRC’), *Serious Invasions of Privacy in the Digital Era: Final Report*, Report No 123 (2014).

7 Aims entrenched within the Western philosophical roots of privacy: see, eg, Carolyn Doyle and Mirko Bagaric, *Privacy Law in Australia* (Federation Press, 2005) 26–56; Andrew McStay, *Privacy and Philosophy: New Media and Affective Protocol* (Peter Lang, 2014).

8 Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.

9 *Prince Albert v Strange* (1849) 1 H & Tw 1; 47 ER 1302.

the context of the historical relationship between legal discourses of privacy and the development of technologies that contest 'conventional understandings of individual subjectivity'.<sup>10</sup> At the close of this section the role of humanistic psychology in unravelling the complexities that currently impact upon the legal protection of privacy will be foreshadowed.

The remainder of this article will then proceed in the following way. As a necessary preface to the application of humanistic concepts in the context of Australian privacy law,<sup>11</sup> Part 2 will describe the key legal problems to which humanistic psychology is poised to respond. While a detailed account of Australia's privacy law framework is beyond the scope of this article,<sup>12</sup> the overview provided in this Part exposes the shortcomings of an increasingly informational account of privacy in responding to contradictory privacy behaviours. In Part 3, key humanistic psychological concepts (particularly drawn from the works of Carl Rogers) will be introduced in an attempt to enhance privacy law's understanding of human subjectivity and the relationship between subject-formation and material experiences. In particular, this Part will describe the concepts of 'congruence' and 'empathetic relationality', which illuminate the significance of consistency between one's understanding of self and actual experience as well as the important role that relationships and social institutions play in fostering the attainment of self-consistency. Part 4 will then deploy these concepts in the context of privacy law in order to expose our incongruence. Importantly, this Part will demonstrate how a humanistic psychological intervention can present a challenge to the prevalent logic in privacy law and literature that so readily reduces the concept of privacy to an informational dimension and, in so doing, struggles to recognise the privacy interests of individuals once information has been transacted.

### A The 'Cambridge Analytica scandal': A vignette

The recent furore over Facebook's questionable privacy practices was reignited on 17 March 2018, when *The New York Times* and *The Guardian's Observer* exposed how the London-based data analytics firm, 'Cambridge Analytica', harvested personal information from over 50 million Facebook users, to allegedly predict and influence voters in the US election and Brexit referendum.<sup>13</sup> Contributing to the public outcry that emanated from these

10 David Lindsay, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy' (2005) 29 *Melbourne University Law Review* 131, 141.

11 The choice of jurisdiction for the focus of this article is a product of: (i) the jurisdiction from which the author is writing and (ii) the hesitance and ambivalence that surround the legal protection of privacy in Australia (discussed in Part II).

12 For a more detailed account of the legal protection of privacy in Australia, see, eg, ALRC, *Serious Invasions of Privacy in the Digital Era*, above n 6; Doyle and Bagaric, *Privacy Law in Australia*, above n 7; Barbara McDonald, 'A statutory action for breach of privacy: Would it make a (beneficial) difference?' (2013) 36 *Australian Bar Review* 241; David Rolph et al, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2<sup>nd</sup> ed, 2015) pt 5.

13 Matthew Rosenberg, Nicholas Confessore and Carole Cadwalladr, 'How Trump Consultants Exploited the Facebook Data of Millions', *The New York Times* (online), 17 March 2018 <[www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html](http://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html)>; Carole Cadwalladr and Emma Graham-Harrison, 'Revealed: 50 million Facebook profiles

revelations was the seemingly deceptive manner in which this information was acquired. To condense a quite complicated series of events, the data used by Cambridge Analytica was obtained in 2014 by way of a personality quiz called ‘thisismydigitallife’, which was originally designed by Dr Aleksandr Kogan,<sup>14</sup> and hosted on Facebook. Through the use of an ‘informed consent’ process, when 270 000 people took this personality quiz the app was able to gain access not only to their Facebook profiles but also to the profiles of their (unwitting) Facebook friends.<sup>15</sup> This allowed the initially modest data set to increase to a projected total of 87 million profiles, including those of 311 112 Australians. The data Cambridge Analytica eventually obtained<sup>16</sup> was detailed enough to build robust ‘psychographic’ models capable of understanding the personality of both the subjects of the data and a much larger collection of similar people on Facebook.<sup>17</sup> By combining the harvested information with quantitative psychological techniques,<sup>18</sup> Cambridge Analytica was able to identify the kinds of micro-targeted advertisements that would be most effective to persuade specific personalities or specific geographic regions for particular political purposes.<sup>19</sup> In the words of whistleblower Christopher Wylie, Cambridge Analytica collected the personal information of millions of Facebook users to create a powerful ‘psychological warfare tool’.<sup>20</sup>

This scandal has incited much public debate as to the ethical obligations owed by social media giants, related third-party data brokers and, more broadly, renewed interest in the legal right to privacy. Aside from serving as a cautionary tale for the weakness of Australian privacy laws,<sup>21</sup> the Cambridge Analytica scandal draws our attention to three interrelated facets of the Gordian knot confronted by the law of privacy today. These facets include: (i) the increasing commodification of individual privacy; (ii) the normalisation of

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harvested for Cambridge Analytica in major data breach’, *The Guardian* (online), 18 March 2018 <[www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election](http://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election)>.

14 In his capacity as founder of the commercial Global Science Research (‘GSR’) enterprise.

15 Evidence to House Committee on Energy and Commerce, 115<sup>th</sup> Congress of the United States, Washington, DC, 11 April 2018, 2 (Mark Zuckerberg).

16 This data included friend networks, ‘likes’, newsfeed posts and locations.

17 For a more detailed account of this process, see Jacob Metcalf, *Facebook may stop the data leaks, but it’s too late: Cambridge Analytica’s models live on* (9 April 2018) MIT Technology Review <[www.technologyreview.com/s/610801/facebook-may-stop-the-data-leaks-but-its-too-late-cambridge-analyticas-models-live-on/](http://www.technologyreview.com/s/610801/facebook-may-stop-the-data-leaks-but-its-too-late-cambridge-analyticas-models-live-on/)>.

18 In which the ‘Big Five’ personality traits of openness to experience, conscientiousness, extraversion, agreeableness and neuroticism are correlated against people’s behaviours on Facebook, such as ‘like’ patterns, across millions of people: *ibid.*

19 Rosenberg, Confessore and Cadwalladr, above n 13.

20 Carole Cadwalladr, “‘I made Steve Bannon’s psychological warfare tool’: meet the data war whistleblower”, *The Guardian* (online), 18 March 2018 <[www.theguardian.com/news/2018/mar/17/data-war-whistleblower-christopher-wylie-faceook-nix-bannon-trump](http://www.theguardian.com/news/2018/mar/17/data-war-whistleblower-christopher-wylie-faceook-nix-bannon-trump)>.

21 Including the fact that individuals do not have the right to enforce privacy laws and that ‘registered political parties’ are exempt from the operation of the *Privacy Act 1988* (Cth) (‘the Act’), as are the ‘acts and practices’ of political representatives and contractors/subcontractors for political parties and representatives (s 7C). As a result, if a company like Cambridge Analytica was contracted to a political party or member of Parliament in Australia, the *Privacy Act* may not govern their activities.

digital transparency; and, most significantly for the focus of this article, (iii) the seeming complicity of the individual in the demise of their own privacy. Since their impact is cumulative, each of these issues is briefly explained below.

First, the Cambridge Analytica scandal highlights the historical impact of social media practices on the commodification of individual privacy. The details of this sophisticated data harvesting exercise have provided a reminder that individuals are now products as well as consumers.<sup>22</sup> Since the personal information, behaviours, identities and subjectivities we increasingly divulge to social media and other online sites are valuable to government agencies and commercial organisations alike, privacy is increasingly commodified in an attempt to ameliorate its obstructive impact on various economic and political activities.<sup>23</sup> As a consequence of the increasing ‘tradability’ of information privacy, ‘any aspect of privacy now suffers guilt by association, making protection of other aspects of privacy far less likely’.<sup>24</sup>

Such commodification fortifies the second privacy challenge exemplified in this scandal: in our networked information society,<sup>25</sup> individuals are captured in webs of forced transparency. The Cambridge Analytica incident vividly demonstrates that as the sale and analysis of personal information become the dominant business model of many Internet companies,<sup>26</sup> it is increasingly difficult to shield oneself from the effects of networked technologies.<sup>27</sup> As a result, individualistic accounts of privacy may overlook the fact that we are increasingly reliant upon our friends, family, colleagues and organisations for the protection of individual privacy. Moreover, the response to this incident highlights a corollary of forced transparency in the digital age: it is difficult to escape the unwanted effects of the network. As mentioned at the outset, the backlash against Facebook in the aftermath of the Cambridge Analytica scandal manifested in the form of a #DeleteFacebook movement, which encouraged users to leave Facebook while using a hashtag convention that ironically emerged through, and depends upon, high levels of participation on social media.<sup>28</sup> Thus, the societal response to the incident appears to oversimplify and overlook the extent to which Facebook and networked

22 After all, ‘there’s no such thing as a free lunch’: Milton Friedman, *There’s No Such Thing as a Free Lunch* (Open Court, 1975).

23 Sebastian Seignani, ‘The commodification of privacy on the Internet’ (2013) 40 *Science and Public Policy* 733, 735.

24 Erwin Chemerinsky, ‘Rediscovering Brandeis’s Right to Privacy’ (2007) 45 *Brandeis Law Journal* 643, 651.

25 For a more comprehensive account of the nuances of a networked society, see, eg, Julie E Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press, 2012).

26 See, eg, Jan Whittington and Chris Jay Hoofnagle, ‘Unpacking Privacy’s Price’ (2012) 90 *North Carolina Law Review* 1327.

27 This is demonstrated by the fact that only 0.3 per cent of the 87 million Facebook users whose profiles were harvested by Cambridge Analytica had directly consented to the collection of their personal information (albeit for academic research purposes). The remainder of the profiles accessed by the analytics firm were made available as a result of the actions of those within their networks.

28 Sandra González-Bailón, *Want to change Facebook? Don’t delete your account — use it for good* (4 April 2018) Quartz <<https://qz.com/1244750/the-delete-facebook-movement-is-ultimately-self-defeating/>>.



technologies, more broadly, have become embedded into the fabric of our everyday lives.<sup>29</sup> As Whittington and Hoofnagle observe, 'Facebook has become what Mark Zuckerberg said he intended the service to become: a utility'.<sup>30</sup>

In addition to the challenges presented by a more passive participation in networked technologies, the Cambridge Analytica scandal highlights a third complication for contemporary privacy: individuals are seemingly complicit in the demise of their own privacy. Whether it is via accepting certain permissions sought when installing a new app, agreeing to the terms and conditions contained in privacy policies when using an online service or more overtly pursuing visibility on social media, the information at the centre of many allegations of breach of privacy has been willingly provided by the individuals in question.<sup>31</sup> In the context of Cambridge Analytica, for example, the psychographic information used by the company was acquired through the 'informed consent' of the 270 000 participants of Kogan's online quiz, as well as the privacy settings that the participants and members of their network had selected on Facebook. Notwithstanding the limitations of consent in this context,<sup>32</sup> our increasing entanglement in the erosion of individual privacy unearths an interesting paradox. In the present digital era, our expressed personal value of privacy<sup>33</sup> appears to be inconsistent with our behavioural tendencies towards visibility.<sup>34</sup> The backlash received by Facebook in the aftermath of this event is indicative of the anxiety that is experienced by individuals when confronted with the ramifications of their inconsistent privacy practices.

Left unscrutinised or uncontested, the issues illustrated within the Cambridge Analytica incident threaten to undermine the goals of privacy law while reifying claims made by those who stand to profit from privacy's demise.<sup>35</sup> In particular, it is argued that in the absence of a more nuanced and

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29 Whittington and Hoofnagle, above n 26, 1365.

30 Ibid.

31 See, eg, Alice E Marwick and danah boyd, 'Networked privacy: How teenagers negotiate context in social media' (2014) 16 *New Media and Society* 1051.

32 Among these, the fact that it is difficult to weigh up the immediate benefits associated with using online services or apps against the more elusive future detriments caused by a very complex process of data aggregation and accumulation: Daniel J Solove, 'Introduction: Privacy Self-management and the Consent Dilemma' (2013) 126 *Harvard Law Review* 1880, 1891.

33 See, eg, Christena Nippert-Eng, *Islands of Privacy* (University of Chicago Press, 2010); Chris Hoofnagle et al, 'How Different are Young Adults from Older Adults When It Comes to Information Privacy Attitudes & Policies?' (Departmental Paper, Annenberg School for Communication, University of Pennsylvania, 14 April 2010) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1589864](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1589864)>.

34 See, eg, Mary Madden et al, 'Teens, Social Media, and Privacy' (Report, Pew Research Center, 21 May 2013) <[www.pewresearch.org/wp-content/uploads/sites/9/2013/05/PIP\\_TeensSocialMediaandPrivacy\\_PDF.pdf](http://www.pewresearch.org/wp-content/uploads/sites/9/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf)>.

35 Such as Facebook CEO Mark Zuckerberg, who in a 2010 interview with TechCrunch, stated that '[p]eople have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something [that has] evolved over time'. Details of this interview can be found, for instance, at *Facebook CEO Challenges the Social Norm of Privacy* (12 January 2010) Reuters <[www.reuters.com/article/urnidgns852573c400693880002576a80069db04/facebook-ceo-challenges-the-social-norm-of-privacy-idUS174222527820100112](http://www.reuters.com/article/urnidgns852573c400693880002576a80069db04/facebook-ceo-challenges-the-social-norm-of-privacy-idUS174222527820100112)>.



phenomenal understanding of its human subject, the entanglement of individuals in the erosion of their privacy will continue to adversely provoke the functionality of privacy law; which is largely premised upon a view of the legal subject as an immaterial and detached individual who possesses presupposed autonomy and self-interested rationality.

## B Paradoxical privacy and the complication of technology: A brief historical overview

Since its inception in the mid to late 19<sup>th</sup> century, the legal protection of privacy has been concerned with emerging technologies and associated practices that contest conventional understandings of individual subjectivity.<sup>36</sup> This is illustrated by the fact that the reproduction of private images and the reporting practices of pamphleteers elicited the protection of privacy in ‘the most famous of the English privacy cases of the nineteenth century ... *Prince Albert v Strange*’;<sup>37</sup> while in the United States, the arrival of the handheld, portable camera and the associated practice of sensational journalism provided the impetus for Warren and Brandeis’ 1890 landmark article on ‘The Right to Privacy’.<sup>38</sup> In the latter half of the 20<sup>th</sup> century, following its recognition as a universal human right,<sup>39</sup> legislative attention was once again devoted to the protection of privacy<sup>40</sup> in response to the advent of the computer, and its information processing capabilities. As such, 21<sup>st</sup> century anxieties associated with the privacy implications of smart devices in our pockets, the increasing use of drones and the indestructibility and profitability of digitised, networked information<sup>41</sup> are not historically exceptional.

On the other hand, current socio-technical practices appear to be presenting a unique challenge for the legal protection of privacy. In the foregoing vignette it was indicated that beneath the veneer of the short-lived #DeleteFacebook campaign lies an uneasy contradiction between the

36 Lindsay, above n 10, 141.

37 (1849) 1 H & Tw 1; 47 ER 1302; Megan Richardson, *The Right to Privacy: Origins and Influence of a Nineteenth-Century Idea* (Cambridge University Press, 2017) 3.

38 Drawing interesting parallels with 21<sup>st</sup> century privacy concerns, Warren and Brandeis were particularly concerned with the media’s increasing interest in gossip and proclivity for revealing personal things about individuals without their consent, stating that ‘[t]he press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery’: Warren and Brandeis, above n 8, 196.

39 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 12; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17 (‘ICCPR’); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8 (‘ECHR’).

40 In Australia, such attention resulted in the implementation of informational privacy laws, including: *Privacy Act 1988* (Cth); *Health Records (Privacy and Access) Act 1997* (ACT); *Health Records and Information Privacy Act 2002* (NSW); *Privacy and Personal Information Act 1988* (NSW); *Information Act 2002* (NT); *Personal Information Protection Act 2004* (Tas); *Information Privacy Act 2000* (Vic); *Health Records Act 2001* (Vic).

41 These were among the issues identified as key community concerns in the Standing Committee on Law and Justice, Legislative Council, Parliament of New South Wales, *Remedies for the serious invasion of privacy in New South Wales* (2016).

privacy-related attitudes and behaviours of individuals in the digital era. Despite claiming to value privacy, and therefore demonstrating outrage when confronted with the consequences of a breach, through our engagement with social media and other networked technologies we are often participants in privacy's dissolution. As Sarikakis and Winter note, the vast number of social media users who publicise their personal information 'pose[s] new challenges to privacy and thus, social media usage actively shapes and challenges notions of privacy'.<sup>42</sup> While it is trite to observe that serious invasions of privacy can occur with increasing ease in the digital era,<sup>43</sup> this apparent complicity significantly complicates the traditional view of the legal protection of privacy as guarding an autonomous, Cartesian subject against intrusions by the state, or private organisations and other legal persons.

Given that numerous proposals for privacy law reform in Australia continue to be premised upon the protection of individual autonomy,<sup>44</sup> and more specifically, ensuring that individuals do not 'lose control over what others may do with ... [their] personal data',<sup>45</sup> attention must be devoted to conceptualising the nature and source of our paradoxical engagement with privacy and exposing its impact on the functionality of privacy law. By doing so the development and application of privacy law could be founded upon a sound understanding of the relationship between individual subjects of privacy law and their material environment, and armed with a more robust mechanism for making normative judgments about the appropriate extent of shifting norms of transparency and exposure.

Of course, this paradoxical engagement with privacy has not gone unnoticed by influential scholars in the field. Research conducted by Alessandro Acquisti and Jen Grossklags, for instance, has provided empirical support for an often dichotomous relationship between privacy attitudes and behaviours, finding that 'individuals' generic [privacy] attitudes might often appear to contradict the frequent and voluntary release of personal information in specific situations'.<sup>46</sup> Drawing upon the insights of behavioural economics, Acquisti and Grossklags challenge core assumptions of privacy law — including the presumption of already autonomous privacy subjects — by demonstrating that these dichotomies most often arise as a result of 'incomplete information, bounded rationality, and systematic psychological

42 Katharine Sarikakis and Lisa Winter, 'Social Media Users' Legal Consciousness about Privacy' [2017] *Social Media + Society* 1, 3 <<https://journals.sagepub.com/stoken/default+domain/cem2tUGgXY37eEjBqIfA/full#article>>.

43 Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41 *University of New South Wales Law Journal* 490, 490, citing ALRC, *Serious Invasions of Privacy in the Digital Era*, above n 6, 17.

44 See, eg, ALRC, *Serious Invasions of Privacy in the Digital Era*, above n 6; *Lenah* (2001) 208 CLR 199, 256 [125] (Gummow and Hayne JJ). Studies also reveal that individuals' accounts of privacy are built around a sense of personal autonomy: see, eg, Sarikakis and Winter, above n 42, 11.

45 Hon Nicola Roxon MP, 'Ensuring your right to privacy prevails from the use of personal data' (Media Release, 25 May 2012) quoted in Zach Meyers, 'Autonomy as a Fantasy: Applying Psychoanalysis to Australian Privacy Law' (2013) 22 *Griffith Law Review* 122, 122.

46 Alessandro Acquisti and Jens Grossklags, 'Privacy and Rationality in Individual Decision Making' (2005) *IEEE Security and Privacy* 26, 29.

deviations from rationality'.<sup>47</sup> In addressing the shortcomings of legal frameworks premised upon a system of 'privacy self-management', Daniel Solove similarly notes that cognitive limitations on rational decision-making combined with structural asymmetries in individual privacy decisions mean that 'people routinely turn over their data for very small benefits'.<sup>48</sup> Rather than supporting the market contention that we no longer care about privacy, however, Solove asserts we must rethink the tasks and parameters of individual rationality and consent in this area of law.

Specifically responding to the need to reconceptualise privacy in a digital era, Helen Nissenbaum has developed a normative account of informational privacy as 'contextual integrity'.<sup>49</sup> By premising privacy on 'context-relative informational norms',<sup>50</sup> Nissenbaum's account is able to explain why one might wish to disclose certain aspects of their personal life in one particular circle, but may wish to keep such information private in others.<sup>51</sup> While Nissenbaum's approach to privacy is compelling and influential,<sup>52</sup> it largely presumes the existence of a rational and autonomous privacy subject 'who "arrives" in a social context'<sup>53</sup> with an awareness of appropriate and inappropriate norms of information flow.<sup>54</sup> Moreover, in the context of an increasing complicity of individuals in the dissolution of privacy, Nissenbaum's reliance on evolving social norms may, counterproductively, provide a weak mechanism with which to combat dystopian claims regarding the diminishing value of privacy.<sup>55</sup>

Cognisant of the contradictory behaviours of contemporary privacy subjects as well as the limitations of the assumed liberal subject of privacy law,<sup>56</sup> Julie

47 Ibid 26. See also Alessandro Acquisti and Jen Grossklags, 'What Can Behavioral Economics Teach Us about Privacy?' in Alessandro Acquisti et al (eds), *Digital Privacy: Theory, Technologies, and Practices* (Taylor and Francis, 2007) 363.

48 Solove, 'Privacy Self-management and the Consent Dilemma', above n 32, 1886.

49 See, eg, Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford University Press, 2010).

50 Thereby, eschewing reliance on static understandings of the public-private divide: ibid 15.

51 As articulated in Federica Fornaciari, 'Pricey privacy: Framing the economy of information in the digital age' (2014) 19(12) *First Monday* s 2.1 <<https://firstmonday.org/ojs/index.php/fm/article/view/5008/4184>>.

52 Particularly in the context of US privacy law and scholarship: see, eg, NYU Steinhardt, *Inside NYU Steinhardt: Helen Nissenbaum on White House Bill to Protect Consumer Online Privacy* (24 February 2012) NYU Steinhardt News: At a Glance <<https://steinhardt.nyu.edu/site/ataglance/2012/02/inside-nyu-steinhardt-helen-nissenbaum-on-the-white-house-bill-to-protect-consumers-online.html>>.

53 Meyers, above n 45, 128.

54 It therefore fails to take seriously the contingent, embodied and developmental nature of autonomy and the constitutive role of privacy in such development; a perspective broadly adopted within the social sciences and evident in constitutive accounts of privacy such as Anita L Allen, 'Coercing Privacy' (1999) 40 *William and Mary Law Review* 723; Julie E Cohen, 'Examined Lives: Informational Privacy and the Subject as Object' (2000) 52 *Stanford Law Review* 1373; Robert Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort' (1989) 77 *California Law Review* 957; Paul M Schwartz, 'Privacy and Democracy in Cyberspace' (1999) 52 *Vanderbilt Law Review* 1609; Daniel J Solove, *Understanding Privacy* (Harvard University Press, 2010).

55 See above n 35.

56 Importantly, Cohen challenges the reliance of US privacy law and scholarship on first-order liberal commitments 'to individual autonomy, to an abstract and disembodied vision of the self, and to the possibility of rational value-neutrality — that derive from the tradition of

Cohen offers a constitutive account of privacy as ‘breathing room for socially situated processes of boundary management’.<sup>57</sup> Far from signifying the death of privacy, the propensity of ‘networked selves’ to divulge aspects of their personal life, in both online and offline realms, is said to form part of the ‘play of everyday practice’: a process crucial to the ongoing development of evolving and contingent subjectivity.<sup>58</sup> Thus, Cohen calls for privacy law and policy to ensure that ‘collective practices of surveillance and information processing cohere with other collective aspirations for self-development’<sup>59</sup> by providing an unscrutinised space for flourishing. Relatedly, Lisa Austin suggests that many of the tensions present in contemporary privacy jurisprudence<sup>60</sup> can be ameliorated by conceptualising privacy as guarding the conditions for self-presentation and the evolving process of identity formation. By justifying the legal protection of privacy on the basis of identity as opposed to traditional harm- or coercion-based accounts,<sup>61</sup> Austin argues that privacy law will be better able to ‘understand a wide range of privacy claims’.<sup>62</sup>

While both Cohen and Austin take important steps forward in deconstructing and decentring the liberal legal self that privacy laws are presumed to protect — ‘[i]n particular, the understanding of selfhood as autonomous, fully individuated, and essentially immaterial’<sup>63</sup> — their respective accounts provide limited insights as to the means by which emergent subjectivity or identity develop in a direction of human flourishing. As a result, inadequate attention is devoted to examining the impact of our divergent privacy values on the process of adaptive subject formation and articulating the role privacy law may play in either inhibiting or facilitating this process. Consequently, by deploying a humanistic psychological framework (and particularly the works of Carl Rogers), this article seeks to bring to the law of privacy a more nuanced understanding of subjectivity and the conditions necessary to pursue its purported aims.

As a rebellious field of psychology that devotes significant attention to challenging the objectifying impulses of liberal thought and analysing the variables that may facilitate or inhibit the human capacity for self-actualisation,<sup>64</sup> humanistic psychology has an uncharted potential to provide both a language and normative orientation for the analysis of law’s

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liberal political theory within which legal academics are primarily trained’: Cohen, *Configuring the Networked Self*, above n 25, 2. Conversely, Cohen suggests that privacy law and policy should attempt to understand the material reality of ‘evolving, socially situated subjectivity’: Cohen, *Configuring the Networked Self*, above n 25, ch 6, 2.

57 See generally *ibid.*

58 *Ibid* ch 6.

59 *Ibid* ch 6, 20.

60 In particular, a ‘containment anxiety’ whereby ‘the privacy impulse surfacing in case law [throughout the common law world] is undercut by a justificatory dilemma’: Lisa M Austin, ‘Privacy and Private Law: The Dilemma of Justification’ (2010) 55 *McGill Law Journal* 165, 209.

61 The former deriving from the Millian account of harm and the latter deriving from the Kantian notion of autonomy: *ibid* 188–99.

62 *Ibid* 210.

63 Cohen, *Configuring the Networked Self*, above n 25, ch 6, 5.

64 See, eg, Christopher M Aanstoos, ‘The Relevance of Humanistic Psychology’ (2003) 43(3) *Journal of Humanistic Psychology* 121, 122.

response to privacy in the context of complex, and often contradictory privacy practices.<sup>65</sup> Specifically, by utilising Rogers' notion of 'congruence',<sup>66</sup> this article will diagnose the pathology that is associated with holding contradictory privacy attitudes (pursuant to which privacy is valued, while transparency is practised), and will expose the involvement of privacy law in reinforcing this pathology. Moreover, by drawing upon Rogers' 'necessary and sufficient conditions' for human flourishing,<sup>67</sup> premised upon the importance of empathetic relational encounters, this article will begin to articulate conditions that the nascent law of privacy in Australia ought to observe if it is to perform its purported function of nurturing human dignity, autonomy and flourishing.

Before such an analysis can be undertaken, however, it is important to first consider the legal framework into which a humanistic psychological understanding of human subjectivity can usefully intervene.

## II Problems of privacy in Australian law: From the relational to the informational

*[B]ecause privacy is a focal point for political struggles over identity and because the struggles take place, in part, through privacy laws — the legal protection of privacy is a litmus test for the orientation of contemporary legal systems ...*<sup>68</sup>

— David Lindsay

While the Cambridge Analytica vignette serves to illustrate that our engagement with privacy continues to evolve in response to rapidly emerging, networked technologies,<sup>69</sup> the law of privacy in Australia remains suspended in a state of hesitation and ambivalence. Unlike other common law jurisdictions,<sup>70</sup> Australian law neither recognises a constitutional right to privacy, nor offers civil remedies for the invasion of privacy. This is in spite of the fact that: Australia is a signatory to various international human rights instruments that expressly incorporate rights to privacy;<sup>71</sup> the High Court of

65 This was also argued in Yvonne Apolo, 'Privacy, Pathologised Subjectivity and the Secrecy/Transparency Dialectic' (Paper delivered at Secrecy, Law and Society Workshop, Sydney, 6–7 February 2014); Yvonne Apolo, 'Incongruent Selves in Social Media and Privacy Law: Proposing a Humanistic Intervention' (Paper delivered at Posting Law: Emerging Narratives of Law and Justice within Social Media Discourses Symposium, University of Wollongong, 13 September 2017).

66 See, eg, Carl R Rogers, *On Becoming a Person: A Therapist's View of Psychotherapy* (Houghton Mifflin, 1961) 339.

67 See, eg, Carl R Rogers, 'The Necessary and Sufficient Conditions of Therapeutic Personality Change' (1957) 21 *Journal of Consulting Psychology* 95; Donald Moss, 'The Roots and Genealogy of Humanistic Psychology' in Kirk Schneider, Fraser Pierson and James Bugental (eds), *The Handbook of Humanistic Psychology: Theory, Research and Practice* (SAGE, 2<sup>nd</sup> ed, 2014) 3, 13.

68 Lindsay, above n 10, 143.

69 For an ethnographic account of such changes see, eg, Marwick and boyd, above n 31.

70 Such as, the United Kingdom (see *Campbell v MGN Ltd* [2004] 2 All ER 995 ('*Campbell*')); United States (see American Law Institute, *Restatement (Second) of Torts* (1997) § 652D); Canada (see *Jones v Tsige* (2012) 108 OR (3d) 241, regarding intrusion upon seclusion); and New Zealand (see *Hosking v Runting* [2005] 1 NZLR 1).

71 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen

Australia left open the possibility of a tort of unjustified invasion of privacy in 2002;<sup>72</sup> and in 2014, the Australian Law Reform Commission made recommendations for a carefully limited statutory tort of privacy.<sup>73</sup>

Both definitional and justificatory uncertainties are among the reasons commonly advanced for the reluctance of Australian law to recognise a cause of action in privacy. With the former, Australian superior courts have referenced the ‘lack of precision of the concept of privacy’,<sup>74</sup> whose legal protection requires the ‘resolution of substantial definitional problems’.<sup>75</sup> Regarding the latter, legal scholarship has noted that ‘the generally unsympathetic treatment of privacy by the Australian legal system ... is linked to the overwhelmingly consequentialist orientation of Anglo-Australian society’,<sup>76</sup> where a dominant utilitarian ideology renders Australia ‘more conflicted in attitudes to privacy’.<sup>77</sup> The absence in Australia (unlike, for example, the United Kingdom, United States and New Zealand) of a Bill or charter of rights has to date prevented the importation of a dignitarian approach to privacy; thus, although we might say that privacy is about personal dignity, integrity and flourishing, we do not necessarily adhere to this in the sense of providing specific legal support.<sup>78</sup>

Though it is not the intention of this article to provide a detailed account or appraisal of the law of privacy in Australia,<sup>79</sup> this Part will draw attention to key characteristics of this legal framework in order to interrogate the capacity of Australian privacy laws to respond to issues surrounding our contradictory

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mtg, UN Doc A/810 (10 December 1948) art 12; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16 (‘*UNCRC*’). For a brief critique of the commitment to privacy within these international instruments, see Richardson, above n 37, 112–19.

72 *Lenah* (2001) 208 CLR 199.

73 ALRC, *Serious Invasions of Privacy in the Digital Era*, above n 6. Recent state-based recommendations for increased privacy protection have also been ignored: Standing Committee on Law and Justice, above n 41. See also ALRC, *For Your Information: Australian Privacy? Law and Practice*, Report No 108 (2008); New South Wales Law Reform Commission (‘NSWLRC’), *Invasion of Privacy*, Report No 120 (2009); Victorian Law Reform Commission (‘VLCRC’), *Surveillance in Public*, Final Report No 18 (2010).

74 *Lenah* (2001) 208 CLR 199, 226–7 [43].

75 *Giller v Procopets* (2008) 24 VR 1, 35 [167]. Indeed, as early as 1873, Sir James Fitzjames Stephen concluded that ‘[t]o define the province of privacy distinctly is impossible’: James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Cambridge University Press, 1967) 160.

76 Lindsay continues by stating that ‘a society that is obsessed with maximising material welfare is unlikely to be sympathetic to the values underpinning the protection of privacy’: Lindsay, above n 10, 153.

77 Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 3. While ‘England can be seen as the first home of utilitarianism’ (at 2), premising privacy not upon the dignitarian right-based approach of continental Europe but ‘as a species of liberty’ (at 262) instrumental to the attainment of individual flourishing, the implementation of the *Human Rights Act 1998* (UK) (‘*HRA*’) has injected into English privacy law a greater concern for the ‘right’ to privacy. On the other hand, both the United States and the European Union adopt a more explicitly dignitarian account of privacy, albeit with diverging results: *ibid* 1–3, 261–3.

78 *Ibid*.

79 See, above n 12.



privacy attitudes and behaviours. The first characteristic pertains to the increasingly informational conceptualisation of legal privacy, which can be seen to facilitate rather than obstruct privacy's commodification. The second, and interrelated characteristic is the manner in which this informational reading of privacy elides a meaningful understanding of the material self, or sense of subjectivity, that exists beyond private information.<sup>80</sup> It is in response to these shortcomings that Part III will propose a humanistic psychological intervention.

### A Privacy as information: The *Privacy Act 1988* (Cth)

As stated in Part I(B) of this article, the advent of computer technology and information processing capabilities in the 1960s provided the impetus for a surge in privacy law and literature throughout the West. Thus, whereas the seminal writings of Jürgen Habermas on the 'new public' persuasively conceptualised privacy according to a spatial dimension (that is, a realm free from unwanted intervention, within which individual autonomy and identity could flourish),<sup>81</sup> from the late 20<sup>th</sup> century onwards many theorists began to conceptualise privacy according to an informational dimension, largely premised upon the individual's control of their personal information.<sup>82</sup> Although it has proven crucial to posit more nuanced, targeted and contextual accounts of privacy in the context of the digital information age, this informational focus has risked reducing and dehumanising the nature and emphasis of privacy's legal protection. In the context of Australia, the concentration on informational privacy has shaped privacy laws that can aptly be described as 'information laws, protecting data before people'.<sup>83</sup>

Aside from the largely incidental protection afforded to privacy via a bundle of existing common law and equitable principles,<sup>84</sup> the most significant form of privacy protection in Australia is provided by way of the *Privacy Act 1988* (Cth) ('the Act').<sup>85</sup> Premised upon a model of 'privacy self-management'<sup>86</sup>

80 Examined in Yvonne Apolo, 'A Queen, Her Etchings and Strange Behaviour: Reflecting upon Privacy's Relational Origins' (Paper delivered at the Law, Literature and Humanities Association of Australasia Conference, *Complicities*, Sydney, 9–12 December 2015).

81 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger trans, MIT Press, 1989) [trans of: *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (first published 1962)].

82 See, eg, Alan F Westin, *Privacy and Freedom* (Athenaum, 1967) 7; Arthur R Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (University of Michigan Press, 1971) 25; Charles Fried, 'Privacy [a moral analysis]' in Ferdinand D Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1978) 203, 209–10; Richard B Parker, 'A Definition of Privacy' (1974) 27 *Rutgers Law Review* 275, 280; Carolyn Doyle and Mirko Bagaric, 'The right to privacy: appealing, but flawed' (2005) 9(1) *International Journal of Human Rights* 3, 6.

83 Simon Davies, 'Re-Engineering the Right to Privacy: How Privacy Has Been Transformed from a Right to a Commodity' in Philip E Agre and Marc Rotenberg (eds), *Technology and Privacy: the New Landscape* (MIT Press, 1997) 143, 156.

84 Such as trespass, nuisance, defamation, passing off, injurious falsehood, the action in *Wilkinson v Downton* [1897] 2 QB 57 and breach of confidence: see, eg, Doyle and Bagaric, *Privacy Law in Australia*, above n 7; McDonald, above n 12; and Rolph et al, above n 12, 429–547.

85 State-based privacy legislation includes *Health Records (Privacy and Access) Act 1997*



developed in the late 1970s in response to advances in data processing practices,<sup>87</sup> the Act addresses the risk of misuse of personal information by establishing privacy principles to set minimum standards on the collection, use, disclosure and handling of personal information by government agencies and commercial organisations alike.<sup>88</sup> However, rather than addressing the substantive implications of increasing data collection and use, the Act creates a regime that is narrowly focused on improving technocratic procedures of information management.<sup>89</sup> This is largely reflected in the first Australian Privacy Principle ('APP'), which states that '[t]he object of this principle is to ensure that APP entities manage personal information in an open and transparent way.'<sup>90</sup> Additionally, while the Act allows individuals to make a complaint to the Office of the Australian Information Commissioner, if it appears personal information governed by the Act has been mishandled,<sup>91</sup> those individuals cannot instigate legal action for alleged invasions of privacy. As a result, the Act provides a mediated and transactional form of privacy protection, whereby individuals acquire only partial control over personal information, and are increasingly dependent upon governments and markets for the protection of their privacy. For these reasons, among others, the Hon Michael Kirby has described the law in Australia as 'a weak reed in providing protection for the privacy of individuals'.<sup>92</sup>

Although the weaknesses of Australia's *Privacy Act* are well-documented,<sup>93</sup> it is important to highlight the particular limitations of this legislative framework in responding to the contemporary privacy challenges described in Part I of this article, specifically: the commodification and normalisation of individual transparency, and increasing inconsistencies in privacy attitudes and behaviours. With respect to the former, the Act creates a framework within which one's personal information is recognised as valuable and, as a result, is subject to trade. As opposed to appraising the exact *manner* in which personal information is acquired by government agencies and private entities, or the *reasons* for which such information is sought in the first place, the Act is premised upon a consequentialist understanding of the social benefits of data processing. For instance, according to APP 3 the acquisition of personal information is legitimised so long as it is 'reasonably necessary for one or

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(ACT); *Health Records and Information Privacy Act 2002* (NSW); *Privacy and Personal Information Act 1988* (NSW); *Information Act 2002* (NT); *Personal Information Protection Act 2004* (Tas); *Information Privacy Act 2000* (Vic); *Health Records Act 2001* (Vic).

86 For a critique of 'privacy self-management', see Solove, 'Privacy Self-management and the Consent Dilemma', above n 32.

87 This Act gave effect to Australia's agreement to implement information privacy guidelines adopted by the Organisation for Economic Co-operation and Development ('OECD') in 1980: OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (1980).

88 *Privacy Act 1988* (Cth) sch 1. The Act applies to government agencies (s 16) and organisations (s 16A). However, 'organisation' excludes (among other things) a small business (see s 6D). The Act does not apply to individuals, that is, interpersonal privacy.

89 Lindsay, above n 10, 165.

90 *Privacy Act 1988* (Cth) sch 1 APP 1.

91 *Ibid* ss 36, 40.

92 Hon Michael Kirby, 'Publication privacy: Action at last?' (2012) 17 *Media and Arts Law Review* 202, 209.

93 See, eg, Stephen, above n 75.

more of the entity's functions or activities'.<sup>94</sup> Problematically, however, that which is 'necessary' for many agencies and organisations to function in the information economy is access to more personal information and sophisticated data processing techniques. Consequently, Australia's *Privacy Act* is imbued with a transactional attitude towards the privacy of one's personal information and is bereft of an understanding of privacy as a condition associated with nurturing dignity, autonomy or flourishing. Thus, instead of challenging the increasing commodification and normalisation of individual transparency in the digital information age, the Act reifies the tradeability and contingency of privacy.

With respect to the latter issue, the Act is limited in its capacity to question, navigate or contest the apparent inconsistencies that manifest between one's expressed personal value of privacy and behavioural tendency towards visibility. This is largely a result of the fact that in producing an economy of information, the Act reduces individuals to data subjects, consumers or products 'incorporated in impersonal market-based processes'.<sup>95</sup> As such, this legislative framework is devoid of a meaningful point of connection with the materiality of the human subject that exists beyond transacted information. Furthermore, in addition to entangling privacy in a trade relation, wherein 'privacy is *not a right* but a *commodity*, to be exchanged in return for specific benefits',<sup>96</sup> the Act creates a regime that largely presupposes the willingness of the data subject to volunteer or exchange their personal information. As reflected in APP 3 regarding the 'collection of solicited personal information'<sup>97</sup> and APP 6 regarding the 'use or disclosure of personal information',<sup>98</sup> the Act presumes that the personal information solicited by agencies and organisations is readily and rationally proffered by the subject of that information, and in the event this has not occurred, the Act allows consent to legitimise all other forms of collection, use or disclosure.<sup>99</sup> Thus, to the extent that the Act promotes the interests of the individual subject of privacy, this is founded upon a view of the subject as an immaterial and detached individual who possesses a form of presupposed autonomy and self-interested rationality.<sup>100</sup> From this perspective, the Act constructs a feeble shield with which to resist the incessant nature of data collection and question the willingness of our seeming complicity in the demise of our own privacy.<sup>101</sup>

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<sup>94</sup> *Privacy Act 1988* (Cth) sch 1 APP 3.

<sup>95</sup> Lindsay, above n 10, 178.

<sup>96</sup> *Ibid* 2.

<sup>97</sup> *Privacy Act 1988* (Cth) sch 1 APP 3.

<sup>98</sup> *Ibid* sch 1 APP 6.

<sup>99</sup> *Ibid* sch 1 items 3.6, 6.1.

<sup>100</sup> Writing from a US perspective, Cohen goes further to say that the 'networked information society appears to be the autonomous, rational, disembodied self's natural milieu, transcending the particularities of bodies, cultures, and spaces with equal ease': Cohen, *Configuring the Networked Self*, above n 25, 14.

<sup>101</sup> Similar criticisms can also be levelled towards the Australian Government's newly proposed 'Consumer Data Right', which aims to enhance competition, and consumer control of data, within banking, energy and telecommunications sectors. While the Consumer Data Right does not explicitly concern privacy, the 'right' will be implemented by way of amendments to the *Privacy Act 1988* (Cth) as well as the *Competition and Consumer Act 2010* (Cth). Somewhat paradoxically, the proposed laws will attempt to bolster consumer control of

## B From the relational to the informational: *Breach of confidence*

Beyond the regulation of the use and disclosure of personal information under the *Privacy Act 1988* (Cth), there is some authority to suggest that Australian common law provides for the indirect protection of privacy through the doctrine of breach of confidence.<sup>102</sup> The language of breach of confidence is most commonly used to denote the action that was recognised by Megarry J in *Coco v AN Clark (Engineers) Ltd*<sup>103</sup> as consisting of three limbs.<sup>104</sup> First, there must be information that is confidential in quality. Second, the information must have been imparted in circumstances where the defendant was under an obligation not to disclose, or otherwise use, the information. Third, there must be an unauthorised use or disclosure, or proposed use or disclosure of that information to the detriment of the claimant.

Nevertheless, although the decision in *Coco* represented a modern formalisation of the principles of breach of confidence as a *sui generis* cause of action, the equitable doctrine has provided common law jurisdictions with some legal protections of privacy since at least the 1849 Court of Chancery decision in *Prince Albert v Strange*.<sup>105</sup> In this seminal decision, Cottenham LC found that the plaintiff (Prince Albert) was entitled to an injunction on the basis of a ‘breach of trust, confidence or contract’<sup>106</sup> by the defendants (Strange and Judge), and articulated that ‘privacy was the right invaded’.<sup>107</sup> Since the materials used by the defendants to compile and publish a 30-page catalogue describing 63 etchings by Prince Albert and Queen Elizabeth were of a ‘private character’ and had been ‘surreptitiously and improperly obtained’,<sup>108</sup> Cottenham LC invoked the language of breach of ‘trust’, not to describe an equitable title to property, but ‘to reflect the ordinary dictionary concept of “trust”, namely reliance on the integrity, ability or character of a person’.<sup>109</sup> In light of the language that was deployed by Cottenham LC — in a judgment written in the aftermath of Jeremy Bentham’s

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personal data by encouraging the sharing of such data with third-party innovators. In addition, this information sharing will be premised upon the consent of the consumer, who must balance concerns of privacy, efficiency and competition when faced with the promise of, for instance, lower electricity bills.

<sup>102</sup> See *Giller v Procopets* (2008) 24 VR 1; *Wilson v Ferguson* [2015] WASC 15 (16 January 2015). In *Breen v Williams* (1996) 186 CLR 71, 128 Gummow J confirmed that ‘equity’s restrain on the misuse of confidential information as to a person’s personal affairs and private life may, in that sense, be “protective of privacy”’: G E Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2014) 64. Only two lower court decisions have recognised direct claims for ‘invasion of privacy’: *Grosse v Purvis* (2003) Aust Torts Reports 81-706; *Doe v Australian Broadcasting Commission* [2007] VCC 281 (3 April 2007).

<sup>103</sup> (1968) 1A IPR 587 (*‘Coco’*).

<sup>104</sup> *Ibid* 590, citing *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203.

<sup>105</sup> (1849) 1 H & Tw 1; 47 ER 1302.

<sup>106</sup> *Ibid* H & Tw 24; ER 1311.

<sup>107</sup> *Ibid* H & Tw 26; ER 1312.

<sup>108</sup> *Ibid* H & Tw 23; ER 1311.

<sup>109</sup> Dal Pont, above n 102, 26.

utilitarian writings<sup>110</sup> and during the time in which John Stuart Mill was formulating his influential argument in support of private life and individual flourishing<sup>111</sup> — Richardson and Hitchens suggest that we can find in this judgment an understanding that ‘the choice not to publish “private” information “kept private” may be a matter of *personal choice* which *others should be trusted* to respect’.<sup>112</sup> As such, within this early breach of confidence decision we find the germ of a conception of privacy premised upon not only the protection of individual autonomy, but also upholding interpersonal expectations of trust and integrity. Within this equitable doctrine, therefore, we find a hint of privacy’s relational origins.<sup>113</sup>

While only two state-based superior courts have adapted breach of confidence to more overtly vindicate violations of privacy,<sup>114</sup> the ‘indication thus far is that ... Australian courts will prefer to develop and strengthen existing causes of action, such as breach of confidence’<sup>115</sup> in order to bolster the protection of privacy in the contemporary digital era. In this sense, Australia is poised to follow the path already travelled in the United Kingdom where, under the influence of the *Human Rights Act 1998* (UK) (*‘HRA’*),<sup>116</sup> the law of confidence has experienced ‘an explicit reorientation of the underlying normative values of the action’<sup>117</sup> and is thus an action ‘recognizing a right to privacy in virtually all but name’.<sup>118</sup> Interestingly, however, attempts in the United Kingdom to shoehorn confidentiality into privacy (or vice versa) have shifted the focus of the action from a relationally oriented account of privacy protection to an informational one.<sup>119</sup>

By way of illustration, this shift towards an informational reading of privacy was most overtly witnessed in the House of Lords decision of *Campbell v MGN Ltd*,<sup>120</sup> in which Naomi Campbell successfully restrained MGN from publishing, in breach of confidence, details of her drug addiction and a photograph of her attending a Narcotics Anonymous meeting. In order

110 See, eg, Philip Schofield (ed), *First Principles to Preparatory to Constitutional Code* (Clarendon Press, 1989).

111 John Stuart Mill, ‘On Liberty’ in John Stuart Mill, *Utilitarianism: On Liberty: Essay on Bentham* (Collins, 1962) 126.

112 Megan Richardson and Lesley Hitchens, ‘Celebrity Privacy and Benefits of Simple History’ in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 250, 261 (emphasis added).

113 Apolo, ‘A Queen, Her Etchings and Strange Behaviour’, above n 80.

114 *Giller v Procopets* (2008) 24 VR 1; *Wilson v Ferguson* [2015] WASC 15 (16 January 2015).

115 Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 225.

116 Which gives effect to rights within the *ECHR*, including art 8 (the right to privacy) and art 10 (the right to freedom of expression).

117 Gavin Phillipson, ‘Privacy in England and Strasbourg Compared’ in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 184, 199.

118 Neil M Richards and Daniel J Solove, ‘Privacy’s Other Path: Recovering the Law of Confidentiality’ (2007) 96 *Georgetown Law Journal* 123, 171–2.

119 See, eg, *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] All ER (D) 12 (May); *McKennitt v Ash* [2006] All ER (D) 200 (Dec); *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57; *PJS v News Group Newspapers Ltd* [2016] AC 1081 (Lord Mance SCJ).

120 [2004] 2 All ER 995.

to strengthen the ability of breach of confidence to provide privacy protection in the circumstances of this case,<sup>121</sup> the House of Lords transformed the first limb of *Coco* (requiring the information to have a 'quality of confidence') to include information that is 'private' or 'personal' in character and disposed of the second limb entirely; stating that '[the] cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship.'<sup>122</sup> While the amputation of a need for an initial duty of confidence has arguably fashioned a cause of action more readily deployable in the context of invasions of privacy, it has also placed a greater emphasis on the need to determine whether the character of the information in question is worthy of privacy protection, and has explicitly reconceptualised privacy as 'the right to control the dissemination of information about one's private life'.<sup>123</sup>

Although the English evolution of breach of confidence has occurred against the backdrop of human rights legislation not shared by Australia, in the High Court decision of *Lenah* Gleeson CJ demonstrated a willingness to adopt the private information approach to breach of confidence.<sup>124</sup> Thus, what is of interest for current purposes is the extent to which the simultaneous removal of relational obligations and the emphasis placed on the character of private information arms the law of confidence with the conceptual tools required to navigate the challenges presented by the increasing complicity of individuals in the demise of privacy. Given that the information at the centre of the *Campbell* decision concerned medical treatment and was thus 'obviously private',<sup>125</sup> Ms Campbell was able to vindicate her personal privacy. However, in the absence of 'obviously private' information (such as medical data or information concerning a person's sexual activities),<sup>126</sup> the relevant enquiry within the extended action in breach of confidence is whether the information in question is private: that is, whether there was a reasonable expectation of privacy with respect to that information.<sup>127</sup>

Interestingly, in shifting the centre of gravity of breach of confidence towards the protection of private information,<sup>128</sup> we witness conceptual difficulties analogous to those present in the context of information privacy

121 A scenario absent of any circumstances that could impose an obligation of confidence upon the respondent photographer, as required by the second limb of *Coco*.

122 *Campbell* [2004] 2 All ER 995, 1002 [14].

123 *Ibid* 1010 [51].

124 Stating '[i]f the activities filmed were private, then the law of breach of confidence is adequate to cover the case': *Lenah* (2001) 208 CLR 199, 225 [39]. However, in the absence of further High Court authority it remains to be seen whether the law of confidence in Australia will undergo the same metamorphosis as that which has taken place within the United Kingdom.

125 *Campbell* [2004] 2 All ER 995, 1020 [95]. In *Lenah* (2001) 208 CLR 199, Gleeson CJ also expressed that information relating to 'health' was 'was to identity as private': *ibid* 225–6 [41].

126 See, eg, *Mosley v News Group Newspapers Ltd* [2008] EMLR 20; *ETK v News Group Newspapers Ltd* [2011] All ER (D) 197 (Apr).

127 This test was referred to in *Doe v Australian Broadcasting Commission* [2007] VCC 281 (3 April 2007) [101]–[119]. For examples of the application of this test in the United Kingdom, see, eg, *Douglas v Hello! Ltd [No 3]* [2005] 4 All ER 128; *McKennitt v Ash* [2006] All ER (D) 200 (Dec); and *Hutcheson v News Group* [2011] All ER (D) 172 (Jul).

128 As expressed by Lord Hoffman in *Campbell* [2004] 2 All ER 995, 1010 [51].

legislation. Whereas the equitable action for breach of confidence historically provided information protection on the basis of upholding interpersonal expectations of trust and integrity, the metamorphosed doctrine is driven by the objective of protecting 'the individual's informational autonomy'.<sup>129</sup> As Raymond Wacks explains, such an objective must focus both on the *quality* of the information in question and the objective social norms governing the *reasonable expectations of the individual*.<sup>130</sup> In combination, these twin enquiries are demonstrative of a view of privacy as an informational artefact that can be readily transacted and, consequently, lost. Thus, in *Theakston v MGN Ltd*,<sup>131</sup> a case heard at the time the courts in England were transitioning from the test of confidentiality to that of private information, Ouseley J held that a famous television and radio presenter should be taken to have consented to the publication of information about his behaviour at a brothel because he had previously given publicity to aspects of his private life, including his intimate relationships, for the purpose of cultivating a particular public image.<sup>132</sup> Similarly, in *Author of a Blog v Times Newspapers Ltd*,<sup>133</sup> Eady J held that a police officer who sought to restrain the defendant from publishing his identity as the author of a blog, in which he expressed strong opinions on issues relating to the police and the administration of justice, did not have a reasonable expectation of privacy due to the fundamentally public nature of 'blogging'.<sup>134</sup> While the action in breach of confidence has been modified in an attempt to provide more explicit protection to individual privacy, the concern is that the reduction of privacy to an informational dimension, wherein privacy is easily transacted and subject to shifting social norms, provides limited tools with which to interrogate and challenge norms of individual transparency.

Moreover, to the extent that this doctrine attempts to understand the behaviour of the human subjects of disclosed information, it is evident that it does so from within a liberal perspective, according to which the legal subject is: i) 'definitionally [and unconditionally] autonomous'; (ii) granted the capacity for 'rational deliberation'; and (iii) 'transcendent and immaterial',<sup>135</sup> much like the Cartesian thinking subject detached from the social and material world.<sup>136</sup> This atomistic and immaterial view of the privacy subject is evident not only via the reorientation of the action as one protecting 'informational autonomy', wherein the values of 'human autonomy and dignity' are conceived as 'the right to control the dissemination of information about one's private life',<sup>137</sup> but also in the attenuation of the relational dimensions of

129 Ibid, cited in *Douglas v Hello! [No 3]* [2005] 4 All ER 128, 149–50 [79].

130 Raymond Wacks, 'Why There Will Never be an English Common Law Privacy Tort' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 154, 179–80.

131 [2002] All ER (D) 182 (Feb).

132 Ibid [68].

133 [2009] EMLR 22.

134 Ibid [11], [33].

135 Cohen, *Configuring the Networked Self*, above n 25, 11.

136 Richard Mohr, 'Identity crisis: Judgment and the hollow legal subject' (2007) 11 *Law Text Culture* 106, 122.

137 *Campbell* [2004] 2 All ER 995, 1010 [51], 1016 [81].



privacy. Although courts have indicated that the existence of a relationship of confidence remains an important contextual factor in assessing one's reasonable expectation of privacy,<sup>138</sup> it is emphasised that 'the primary focus has to be on the nature of the information'.<sup>139</sup> In this sense, the action for breach of confidence has shifted quite dramatically from its equitable 'origins', where the privacy of an individual claimant was more explicitly associated with 'a subterranean network of families, friends and other[s]'<sup>140</sup> and legal intervention occurred on the basis of upholding conscientious interpersonal comportment.<sup>141</sup> In addition to this focus on a definitionally autonomous and detached subject of privacy, it is discernable within the preceding description of the doctrine that this area of law presupposes the capacity of individuals to engage in rational deliberation regarding their privacy, such that consent to the loss of privacy may be 'implied' on the basis of past behaviour,<sup>142</sup> or 'inferred' from surrounding circumstances.<sup>143</sup> Problematically, the assumption of an atomistic, autonomous and rational privacy subject, within a legal doctrine that has traditionally frowned upon the claimant who has 'courted publicity',<sup>144</sup> does not readily accommodate the privacy concerns of individuals who, in the interconnected digital age, appear to willingly pursue increased visibility.

Thus, although definitional and justificatory uncertainties are common explanations for the primitive nature of Australian privacy law, the above characteristics also serve to reinforce and contribute to the hesitation and ambivalence that currently surround this area of law. In particular, by increasingly adopting an informational understanding of privacy, wherein the commodification of privacy is legitimised and the materiality of the privacy subject is reduced, existing legal doctrines provide limited conceptual tools with which to navigate the paradoxes that surround our contemporary engagement with privacy. With respect to the challenges articulated in the context of the Cambridge Analytica scandal, a significant concern associated with legal discourses deploying transactional language to account for privacy is that personal information is commodified in the mind of individuals and this 'may contribute to shifting one's attention away from the intrinsic value of privacy and directing it towards a more instrumental understanding'.<sup>145</sup> So, while in 2006 leading Australian privacy scholars propounded the importance of elucidating the relationship between the rights to privacy and freedom of expression,<sup>146</sup> by 2018 popular discourses of privacy have tended to interrogate 'whether protecting our privacy is worth sacrificing

138 See, eg, *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] All ER (D) 12 (May) [29].

139 *McKennitt v Ash* [2006] All ER (D) 200 (Dec) [15].

140 Richardson, above n 37, 122.

141 See, eg, *Prince Albert v Strange* (1849) 1 H & Tw 1; 47 ER 1302.

142 *Theakston v MGN Ltd* [2002] All ER (D) 182 (Feb) [68].

143 *Murray v Express Newspapers plc* [2008] 2 FLR 599, 613 [36].

144 See, eg, *A v B* [2002] 2 All ER 545, 555 [11]. For pre-HRA examples, see also *Woodward v Hutchins* [1977] 2 All ER 751; *Lennon v News Group Newspapers Ltd* [1978] FSR 573.

145 As explained in Fornaciari, above n 51, s 4.4.

146 Especially in light of the changing nature of journalism; with Kenyon and Richardson stating that such an inquiry 'lays a base for future privacy research': Kenyon and Richardson, above n 77, 9.



convenience'.<sup>147</sup> Over time then, privacy understood in informational terms is subject to exchange with progressively more insignificant values.

Of further concern, however, is the fact the reductive assumptions embedded in liberal legal theory — which view the subject of law as an *ego cogito* detached from experience<sup>148</sup> — are ossified within this prevalent informational privacy paradigm. By largely dehumanising our understanding of privacy; isolating the privacy subject from their relational networks; and assuming that autonomous selves 'spring full-blown from the womb',<sup>149</sup> extant doctrines of privacy are limited in their ability to account for the entanglement between individual privacy, on the one hand, and the current culture of visibility and relentless information exchange, on the other. In order to provide meaningful protection to privacy, and give effect to a notion of privacy designed to promote the development of autonomy and the pursuit of human flourishing, the law of privacy in Australia requires a more nuanced appreciation of human subjectivity and the relationship between subject formation and material experiences. To this end, Part III of this article will propose a humanistic psychological intervention in privacy law.

### III A humanistic psychological intervention

*We will not find Utopia here. Just humanity.*

— Gary Watt<sup>150</sup>

Given that psychology, whatever its subject matter, is inherently person-centred and that theorists from both Kantian and Millian schools of thought have identified autonomy, dignity and human flourishing as values underpinning the recognition of privacy,<sup>151</sup> insights from psychology have obvious (yet under-utilised) implications for any theory of privacy and privacy law. The relevance of psychology to legal discourses of privacy is heightened by the fact that identity formation (or, relatedly, the development of subjectivity)<sup>152</sup> is increasingly acknowledged as the value upon which an account of privacy protection ought to be justified.<sup>153</sup> Specifically, however,

147 The pitting of privacy against convenience is particularly evident in reports concerning the Cambridge Analytica scandal: Maya Kosoff, 'Cambridge Analytica is Just the Tip of the Iceberg': *Why the Privacy Crisis is Bigger Than Facebook* (16 April 2018) Vanity Fair <<https://vanityfair.com/news/2018/04/why-the-privacy-crisis-is-bigger-than-facebook>>. Findings to this effect can also be seen in Fornaciari, above n 51.

148 For a comprehensive critique of the Enlightenment subject detached from experience, see especially Giorgio Agamben, *Infancy and History: The Destruction of Experience* (Liz Heron trans, Verso, 2<sup>nd</sup> ed, 2007) [trans of: *Infanzia e storia: Distruzione dell'esperienza e origine della storia* (first published 1978)].

149 Cohen, 'Examined Lives: Informational Privacy and the Subject as Object', above n 54, 1424.

150 Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Hart Publishing, 2009) 248.

151 For an overview of traditional justifications for the right to privacy, see, eg, Doyle and Bagaric, *Privacy Law in Australia*, above n 7, 26–56; Austin, above n 60; Schoeman, above n 82. For a discussion of both utilitarian and dignitarian conceptions of legal privacy throughout the West see Kenyon and Richardson, above n 77.

152 See, eg, Cohen, *Configuring the Networked Self*, above n 25.

153 At n 6, Austin references academic work outside of legal scholarship that focuses on the relationship between privacy and identity: Austin, above n 60, 168–9.

this article argues that the field of humanistic psychology is particularly well-placed to navigate the complexities currently surrounding the legal recognition of privacy. It proposes this for three key reasons. The first relates to the mutual goal that has historically enlivened these respective fields of inquiry: a desire to foster adaptive human functioning and development.<sup>154</sup> The second relates to the historical role of humanistic psychology in challenging and reconstructing the diminished model of human nature produced by positivist ideologies.<sup>155</sup> The third reason relates to the insights that can be obtained from humanistic psychology regarding the processes by which one may develop ‘an integrated personal structure and identity, and ... individual autonomy’.<sup>156</sup>

Humanistic psychology is often referred to as the ‘Third Force’ in modern psychology,<sup>157</sup> and is attributed with rebelliously returning the notions of ‘self’ and ‘human subjectivity’ to the center stage of psychological enquiry.<sup>158</sup> This is because the discipline first emerged, during the 1950s–70s, as a theoretical protest against the dehumanising, reductive and deterministic orientations of the prevailing ‘forces’ of behaviourism and psychoanalysis.<sup>159</sup> In contrast to more positivistic psychological traditions,<sup>160</sup> humanistic psychology is characterised by an overarching concern with the experience of

154 For a discussion of the goals of humanistic psychology, see, eg, Aanstoos, above n 64. For a discussion of the philosophical roots of privacy, see, eg, McStay, above n 7.

155 Moss, above n 67, 3–18.

156 Qualities that have been identified as central to the protection of privacy in the context of Australian law: Peter Hamilton Bailey, *Human Rights: Australia in an International Context* (Butterworths, 1990) 284.

157 An early example of this reference is provided by J F T Bugental, ‘The Third Force in Psychology’ (1964) 4 *Journal of Humanistic Psychology* 19, 22.

158 By adopting a starting premise that persons are not simply objects but self-conscious subjects of experience, humanistic psychology is rooted in the humanism that infused ancient Greek thought and that was revived during the European Renaissance. In this way, it shares much in common with many humanist approaches to law that have equally challenged the manner in which post-Enlightenment legal positivism emphasises objectivity and, thereby, distances questions of law from the experiences of the human subject. It is important to note that while existing humanistic inquiries in law open up new ways of thinking about the nature and function of law and the imagined legal subject, humanistic psychology (as a person-centred scientific discipline) takes a crucial step further in theorising and analysing variables associated with the process of self-actualisation. A selection of works adopting a humanist approach to questions of law include, eg: Judith Butler, *Bodies That Matter: On the Discursive Limits of ‘Sex’* (Routledge, 1993); John M Conley and William M O’Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press, 1990); Richard Mohr, ‘Flesh and the Person’ (2008) 29 *Australian Feminist Law Journal* 31; Jennifer Nedelsky, ‘Embodied Diversity and the Challenges to Law’ (1997) 42 *McGill Law Journal* 91; Cassandra Sharp and Marett Leiboff (eds), *Cultural Legal Studies: Law’s popular cultures and the metamorphosis of law* (Routledge, 2015); Charles Taylor, ‘To Follow a Rule ...’ in Craig Calhoun, Edward LiPuma and Moishe Postone (eds), *Bourdieu: Critical Perspectives* (Polity Press, 1993) 45.

159 In response to behaviourism, humanistic psychologists reinforced the fact that persons are not simply objects capable of being mechanistically studied or manipulated; in response to psychoanalysis, they argued that persons are not slaves to unconscious drives operating in the dark depths of the psyche. Rather, humans are self-conscious subjects of experience: C William Taveson, *Humanistic Psychology: A Synthesis* (Dorsey Press, 1982) 7; James T Hansen, ‘Humanism as Ideological Rebellion: Deconstructing the Dualisms of Contemporary Mental Health Culture’ (2006) 45 *Journal of Humanistic Counseling* 3.

160 Including current ‘positive’ and ‘cognitive’ psychological paradigms.

‘self’ and the human attribute of ‘self-consciousness’,<sup>161</sup> as well as an endeavour to promote and facilitate optimal human development.<sup>162</sup> Since humanistic psychology ‘care[s] deeply about what it means to be fully human’,<sup>163</sup> and devotes significant attention to analysing the ideal conditions within which self-actualisation or human flourishing can occur, it provides a conceptual toolkit capable of not only challenging the objectifying impulses of informational privacy paradigms, but also ‘generat[ing] a different theory of the self that privacy protects’.<sup>164</sup>

Of particular significance to the present enquiry into the impact of our seemingly discordant privacy attitudes and behaviours on privacy law — a phenomenon heightened through participation in social media environments — are the key concepts of Carl Rogers who, alongside the likes of Abraham Maslow and Rollo May, is most responsible for the creation of humanistic psychology.<sup>165</sup> While the adoption of a phenomenological approach that emphasises the human desire and capacity for self-actualisation is a unifying theme throughout humanistic psychology, Rogers spent much of his career identifying the ‘necessary and sufficient conditions’ that enable humans to flourish,<sup>166</sup> and articulating the processes by which resistances or blocks towards such progress may be overcome.<sup>167</sup>

For Rogers, and humanistic psychologists generally, individuals exist in a constant state of becoming (seeking meaning, value and creativity) and possess a fundamental motivation towards positive growth (an actualising tendency).<sup>168</sup> Thus, contrary to the more static characteristics of the assumed liberal legal subject of privacy,<sup>169</sup> the self and the human capacity for rational autonomy are fluid, developmental concepts. Importantly, however, Rogers identified that our tendency for growth, or self-actualisation, is complicated by an entrenched need for: (i) ‘self-consistency’, (ii) a sense of ‘congruence’, and

161 See, eg, Donald Polkinghorne, ‘The Self and Humanistic Psychology’ in Kirk Schneider, Fraser Pierson and James Bugental (eds), *The Handbook of Humanistic Psychology: Theory, Research and Practice* (SAGE, 2<sup>nd</sup> ed, 2014) 87.

162 See, eg, Abraham H Maslow, *Motivation and Personality* (Van Nostrand Reinhold, 1954).

163 Moss, above n 67.

164 Cohen, *Configuring the Networked Self*, above n 25, 109.

165 See generally, Tageson, above n 159.

166 While Rogers’ work, first formulated in the 1950s, appears to favour a universalist account of subjectivity, contemporary applications of Rogerian humanistic concepts are sensitive to the role of race, gender and sexuality and the politics of interpersonal power in the development of subjectivity: see, generally, Schneider, Pierson and Bugental, above n 67. It is also notable that a universalist account of subject formation is often adopted in the context of privacy scholarship in light of the finding that while privacy norms differ across cultures, the need for privacy seems to be a universal trait: Alessandro Acquisti, Laura Brandimarte and George Loewenstein, ‘Privacy and human behavior in the age of information’ (2015) 347(6221) *Science* 509, 512.

167 See, eg, Rogers, ‘The Necessary and Sufficient Conditions of Therapeutic Personality Change’, above n 67; Moss, above n 67, 13.

168 This differs from Freudian psychoanalysis which views human behaviour as primarily determined by unconscious and destructive drive states.

169 Also critiqued by Cohen, *Configuring the Networked Self*, above n 25 and Austin, above n 60. Outside of privacy law scholarship, Richard Mohr provides a critique of the abstract nature of the assumed legal person, as ‘frozen in time, lacking any account of agency or experience’: Mohr, ‘Flesh and the Person’, above n 158, 47.

(iii) the 'positive regard' of others.<sup>170</sup> These needs are interrelated and, since they provide an insight into the attitudinal and behavioural tendencies of the legal privacy subject, they are each explained below.

According to the phenomenon of self-consistency, individuals function to maintain consistency (an absence of conflict) within their developing self-concept (an 'individual's conceptualized awareness of the sort of person he or she is').<sup>171</sup> To this end, individuals cultivate an *organismic valuing process*, according to which they organise their values, perceptions and behaviours in a manner that preserves the consistency of their internal self-concept.<sup>172</sup> In line with the phenomenon of congruence, individuals are more capable of positive and constructive growth when there exists an accurate matching between their self-concept and their ongoing material experiences.<sup>173</sup> To provide a simple example used by Rogers, if a person is at a social gathering that they find to be boring but they communicate to the host (or perhaps, large digital audiences) that they are having a fun time, there is a lack of congruence between this person's subjective experience and their outward representation. Rogers calls the discrepancy between two discordant conceptions of self, or between one's external reality and subjective experience, *incongruence*. Rogers, like Nuttin before him,<sup>174</sup> holds that where this incongruence is large, the seeds of maladaptive development are sown.<sup>175</sup> This is because incongruence — manifesting as tension, anxiety or disorientation — undermines one's desire for self-consistency and may, therefore, trigger the operation of defense mechanisms that either distort one's organismic valuing process or deny ongoing experiences.<sup>176</sup> Incongruence, therefore, represents a significant obstacle in the ongoing process of individual flourishing.

Given our status as relational beings, situated in webs of connection with and dependence upon others, Rogerian theory posits that the importance of the organising concepts of self-consistency and congruence emerges from a more basic and powerful psychological need for positive regard; a need that can only be satisfied by others.<sup>177</sup> In an environment where an individual

170 See, eg, Carl R Rogers, *Client-Centred Therapy* (Houghton Mifflin, 1951); Daniel Cervone and Lawrence A Pervin, *Personality: Theory and Research* (John Wiley & Sons, 10<sup>th</sup> ed, 2007) 176–8.

171 Tageson, above n 159, 62. This is an emergent and subjective view of self, formed on the basis of past and present experiences as well as future expectancies; Richard L Evans, *Carl Rogers: The Man and His Ideas* (E P Dutton, 1975).

172 See, eg, Carl R Rogers, 'A Theory of Therapy, Personality and Interpersonal Relationships as Developed in the Client-Centered Framework' in Sigmund Koch (ed), *Psychology: A Study of a Science — Volume 3: Formulations of The Person and the Social Context* (McGraw-Hill, 1959) 184, 222.

173 Rogers, *On Becoming a Person*, above n 66, 339.

174 See, eg, Joseph Nuttin, *Psychoanalysis and Personality: A Dynamic Theory of Normal Personality* (George Lamb trans, Greenwood Press, 1975) [trans of: *Psychoanalyse en spiritualistische opvatting van de mens* (first published 1953)].

175 Tageson, above n 159, 96.

176 See, eg, Carl R Rogers and B F Skinner, 'Some Issues Concerning the Control of Human Behavior' (1956) 124(3231) *Science* 1057; Robert Frager and James Fadiman, *Personality and Personal Growth* (Pearson Education, 6<sup>th</sup> international ed, 2005) 320–1.

177 Carl Rogers and John Wood, 'Client-Centered Theory' in Arthur Burton (ed), *Operational Theories of Personality* (Brunner/Mazel, 1974) 211; Tageson, above n 159.

experiences unconditional acceptance and respect from significant social others, they are, theoretically, able to grow in accordance with their actualising tendency; evaluating experiences in a manner consistent with intrinsic needs, free from the encumbrances of distortion and denial.<sup>178</sup> On the other hand, when individuals are exposed to social environments that impose upon them 'conditions of worth', according to which certain aspects of one's self-concept are valued or rewarded while others are not, their capacity for actualisation may be thwarted via the *introjection* of such conditions into identity.<sup>179</sup> When these values are introjected they operate as an internalised social other, impacting upon or 'replacing organismic valuing as the principle governing the individual's attitudes and behavior'.<sup>180</sup> Thus, in the pursuit of self-consistency, individuals subject to conditional regard may selectively interpret subjective experiences and, as a consequence, encounter greater discrepancies between their 'real' value system, or awareness of self, and their distorted self-concept.<sup>181</sup> For Rogers, this type of incongruence is the single most significant source of psychopathology, as it perverts the natural directions of the actualising tendency.

To summarise, Rogerian humanistic psychology maintains that humans are self-actualising beings, motivated towards (but not always realising) positive growth, psychological resilience and the ideal of autonomous, rational functioning. As part of this process of becoming, we seek to maintain a sense of congruence between our self-concept and our experiences. Nevertheless, we are relational beings and, as a result, this actualising tendency is contingent upon and subject to the vicissitudes of one's interpersonal, social and institutional environment. The seeds of maladjustment and pathology are sown when exposure to conditions of worth triggers incongruence and leads to the increasing introjection of external values, and the denial or distortion of subjective experience.<sup>182</sup> Thus, while the unimpeded (or aspirational), 'fully functioning person' has characteristics that tend towards increasing rationality, autonomy and constructive social relations (attributes possessed by the assumed subject of privacy law), on the opposing side of the continuum, the pathologised self is characterised by a bifurcated actualisation tendency: 'functioning to preserve and enhance both the real experiencing self and the somewhat discrepant self-concept'.<sup>183</sup>

Importantly, while Rogers acknowledged the adverse impact of overtly dehumanising environments on the process of self-actualisation, his account is

178 Rogers, 'A Theory of Therapy, Personality and Interpersonal Relationships as Developed in the Client-Centered Framework', above n 172, 235.

179 Carmel Proctor, Roger Tweed and Daniel Morris, 'The Rogerian Fully Functioning Person: A Positive Psychology Perspective' (2016) 56 *Journal of Humanistic Psychology* 503, 506.

180 Thomas G Patterson and Stephen Joseph, 'Person-Centered Personality Theory: Support from Self-determination Theory and Positive Psychology' (2017) 47 *Journal of Humanistic Psychology* 117, 121–2.

181 David Murphy et al, 'Unconditional Positive Self-Regard, Intrinsic Aspirations, and Authenticity: Pathways to Psychological Well-Being' (2017) *Journal of Humanistic Psychology* 1, 3.

182 See, eg, Rogers, 'A Theory of Therapy, Personality and Interpersonal Relationships as Developed in the Client-Centered Framework', above n 172. Empirical support for these concepts is outlined in *ibid*.

183 Tageson, above n 159, 179.

more concerned with the incongruence that emanates in the context of subtle and accepted kinds of domination, which nevertheless functions to place people under the control of others.<sup>184</sup> Since 'networked' privacy subjects are more frequently engaging in behaviours of exposure and visibility, that both facilitate and accede to aspects of private life coming under the control and/or manipulation of others, Rogerian insights can aid in understanding the impact of such behaviours on individual subjectivity and the role that laws of privacy play in either facilitating or inhibiting positive subject formation. These insights may enhance the ability of privacy law to move in the direction of its liberal aspirations, committed to the desirability of individual self-determination and autonomy (however illusory these values may be).<sup>185</sup> To this end, the remainder of this article will explore the implications of a humanistic psychological understanding of subjectivity for the legal protection of privacy in the Australian context.

#### IV Incongruent selves and privacy law

*How is it that a person can be consciously struggling toward one goal while her [or his] whole organic direction is at cross-purposes with this?*<sup>186</sup>

— Carl Rogers

Brought into dialogue with privacy law scholarship, Rogerian humanistic psychology provides a lens through which we can better understand 'the self that privacy is supposed to benefit'.<sup>187</sup> As if responding to Austin's concern that '[a]lthough identity ... is always constructed in relation with and to others, it is problematic from the perspective of liberalism to posit that this identity is *fully* constructed by others',<sup>188</sup> Rogers articulates a dynamic, embodied and dialectical process of self-development. While individuals possess an internal organismic valuing process motivated by a fundamental tendency towards fulfilment and actualisation (and, as such the capacity for rationality, autonomy and self-determination), this process is always partially determined by context and by others.<sup>189</sup> Consequently, a dialectical interface exists between an individual's actualising tendency and the social, political and legal

184 Ibid 121; Frager and Fadiman, above n 176, 319–20; Carl R Rogers, *Carl Rogers on Personal Power: Inner Strength and Its Revolutionary Impact* (Bantam Doubleday Dell, 1977). In the latter half of his career, Rogers began to pay more attention to preventative efforts aimed towards rehumanising powerful social and political institutions.

185 That is, many post-structuralist accounts of identity or subjectivity, often influenced by the work of Michel Foucault, question the existence of an autonomous self, capable of self-determination. Nevertheless, while acknowledging the contingent nature of these liberal values, studies in psychology (including humanistic psychology) support the notion of these liberal values as psychological needs or goals towards which individuals aim: see, eg, Alexios Arvanitis and Konstantinos Kalliris, 'A self-determination theory account of self-authorship: Implications for law and public policy' (2017) 30 *Philosophical Psychology* 763.

186 Rogers, *Carl Rogers on Personal Power*, above n 184, 244.

187 Cohen, *Configuring the Networked Self*, above n 25, ch 5, 3.

188 Austin, above n 60, 203.

189 Daniel B Sleeth, 'The Self and the Integral Interface: Toward a New Understanding of the Whole Person' (2006) 34 *Humanistic Psychologist* 234, 257.



environment, which can either facilitate or hinder this process.<sup>190</sup> Understood in this way, the formation of subjectivity is partly intersubjective: one draws into their self-concept the conditions and values emanating from others.<sup>191</sup>

### A Incongruence in the contemporary privacy milieu

Applied to the current privacy milieu, Rogerian humanistic psychology exposes our incongruence. The discrepancy that manifests between, on the one hand, our expressed value of privacy and, on the other, our behavioural tendencies towards visibility, can be conceptualised as a ramification of our positionality in a society that increasingly commodifies personal information, normalises digital transparency and reinforces and promotes self-disclosure.<sup>192</sup> While research reveals that individual privacy is valued,<sup>193</sup> performing a vital role in the development of critical, constructive and differentiated subjectivity,<sup>194</sup> individuals are nevertheless enmeshed within a socio-technical environment increasingly premised upon the benefits of individual transparency. Within this context our everyday interactions are often mediated by surveillant digital landscapes that reward acts of self-disclosure and visibility with promises of convenience, entertainment, social recognition and/or security;<sup>195</sup> as such, we are frequently exposed to conditions of worth, according to which transparency is prized while privacy is commodified. Thus, as a corollary of our status as relational beings existing in a constant state of becoming and possessing a basic need for the positive regard of others, these conditions of worth provide the fertile ground for introjection: a process through which externally imposed conditions (problematically premised upon a reductive and objectified view of the human subject) are internalised, leading to the distortion or fragmentation of one's intrinsic valuing system.

Importantly, however, to submit that increasing acts of self-disclosure or visibility are manifestations of a process of internalisation is not to suggest that the behavioural tendencies of privacy subjects are a result of environmental conditioning and, therefore, an incontrovertible and innocuous indication of shifting social norms. Given that humans are 'self-conscious subjects of experience', as opposed to mere objects of stimulus-response associations,<sup>196</sup> the introjection of external conditions of worth does not simply reshape our thoughts and actions; it can introduce inconsistency into the self-system. Pursuant to Rogerian humanistic psychology, while one's

190 Richard M Ryan and Edward L Deci, 'An Overview of Self-Determination Theory: An Organismic-Dialectical Perspective' in Edward L Deci and Richard M Ryan (eds), *Handbook of Self-Determination Research* (University of Rochester Press, 2002) 3, 8.

191 Sleeth, above n 189.

192 On the emergence of a culture of confession and visibility see, eg, Harry Blatterer, Pauline Johnson and Maria R Markus (eds), *Modern Privacy: Shifting Boundaries, New Forms* (Palgrave MacMillan, 2010).

193 See above n 153.

194 For an overview of the commonly cited benefits of privacy, see, eg, Trina J Magi, 'Fourteen Reasons Privacy Matters: A Multidisciplinary Review of Scholarly Literature' (2011) 81 *Library Quarterly* 187.

195 Kevin D Haggerty and Richard V Ericson, 'The surveillant assemblage' (2000) 51 *British Journal of Sociology* 605, 614–15.

196 Tageson, above n 159, 7.



unimpeded self-concept (and intrinsic value system) will remain in conscious awareness,<sup>197</sup> the need to maintain consistency within the self-system can encourage the formation of distorted behavioural tendencies that accord with introjected conditions (for instance, of individual transparency and commodification) and, eventually, prompt the development of an 'external locus of evaluation', according to which an individual loses trust in their own internal judgments and increasingly defers to the external judgments of others.<sup>198</sup> It is the resulting divergence between those attitudes and behaviours that are consistent with one's actualising internal value system ('I value privacy and think it is important') and those that satisfy introjected conditions of worth premised upon an objectified view of the privacy subject as a commodity ('I must divulge personal matters to exist in our networked digital era'), which produces the state of incongruence.

There are three main reasons as to why this state of incongruence ought to be conceptualised as a pathology for the legal protection of individual privacy. First, incongruence, which is commonly experienced as tension or anxiety, can trigger defence mechanisms, such as distortion, denial or rationalisation, which paradoxically operate to reinterpret subjective experiences in a manner consistent with one's compromised self-concept.<sup>199</sup> As such, if unaccompanied by facilitative social conditions, anxieties associated with privacy-invasive behaviours may be deflected by rationalising such behaviours as a necessary corollary of the purported benefits of individual transparency. Moreover, since an incongruent individual is one who becomes estranged from their internal valuing system and acquires an 'external locus of evaluation', that individual is more likely to seek out and defer to the views of others, now readily available through online social networks. Such phenomena therefore operate to further reinforce diminishing privacy. These processes of rationalisation and external evaluation are evident in the above discussion of the Cambridge Analytica incident, in the aftermath of which anxious and concerned individuals ironically turned to social media, using a hashtag convention to express their privacy concerns. As one commentator observed, this simultaneous demonisation of and reliance upon the social media platform is indicative of the 'further normalisation of surveillance and the lack of privacy that comes with being an internet user nowadays'.<sup>200</sup>

Second, since incongruence is the product of a distorted self-concept it fragments one's actualisation tendency and, therefore, blocks or perverts the attainment of values that have traditionally justified the legal protection of privacy. While Rogers posits that under favourable environmental conditions the unimpeded self is theoretically free to actualise in the direction of intrinsic needs, moving towards the full attainment of embodied rationality, autonomy and self-determination,<sup>201</sup> a state of unresolved incongruence undermines the development of these qualities. Thus, contrary to the goals of liberal accounts

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197 Rogers, *Client-Centred Therapy*, above n 170, 484.

198 Patterson and Joseph, above n 180, 122.

199 Cervone and Pervin, above n 170, 194.

200 Ivan Manokha, 'Cambridge Analytica's closure is a pyrrhic victory for data privacy', *The Conversation* (online), 3 May 2018 <<https://theconversation.com/cambridge-analyticas-closure-is-a-pyrrhic-victory-for-data-privacy-96034>>.

201 Carl R Rogers, *Freedom to Learn* (Merrill, 1969).

of privacy law, incongruence impedes the natural directions of adaptive human flourishing.<sup>202</sup>

Third, as Rogers observed, the state of incongruence most commonly manifests as ‘discordant or incomprehensible behaviors’,<sup>203</sup> and this pattern of behaviour radically collides with the exercise of rational choice expected of the legal subject of privacy law.<sup>204</sup> Armed only with an understanding of subjectivity as static, already autonomous, fully individuated and detached from experience, legal doctrines of privacy may read seemingly voluntary acts of transparency,<sup>205</sup> visibility or exposure<sup>206</sup> as further evidence of diminished or unreasonable expectations of privacy.<sup>207</sup> What is more, the ‘incomprehensible behaviors’ associated with incongruence present particular difficulties for the development of privacy law in Australia, where a utilitarian account of legal privacy positions this value as a choice that may be, and frequently is, outweighed by other legitimate choices such as commerce, convenience or public security.<sup>208</sup> While utilitarian accounts recognise and support the value of privacy in promoting ‘self-development’ and ‘individual flourishing’, such accounts are more susceptible to the logic that ‘the fact that people surrender [privacy] for rather small gains is a sign they don’t really, or most people don’t really, value it that much’.<sup>209</sup>

Thus, by deploying the language and key concepts of humanistic psychology we can more fully appreciate that paradoxical privacy behaviours are not the product of a ‘rational chooser’<sup>210</sup> for whom privacy is a largely insignificant value, but are signs and symptoms of a state of incongruence, which emerges within and is perpetuated by the inescapable network effects of the digital information age. In this way, the contradictions surrounding, for

202 Since incongruence is ‘experience-specific and context-bound’, it is being deployed to describe the privacy-related attitudes and behaviours of subjects of privacy law, as opposed to representing a general ‘diagnosis’: see, eg, Devang Vaidya, ‘Re-visioning Rogers’ Second Condition — Anxiety as the face of ontological incongruence and basis for the principle of non-directivity in PCT therapy’ (2013) 12 *Person-Centered & Experiential Psychotherapies* 209, 213–15.

203 Rogers, ‘A Theory of Therapy, Personality and Interpersonal Relationships as Developed in the Client-Centered Framework’, above n 172, 197–203.

204 Cohen, eg, uses the term ‘rational chooser’ to describe the assumed subject of information privacy law: Cohen, *Configuring the Networked Self*, above n 25, ch 5, 4. More generally, Mohr critiques the character of the legal subject as ‘frozen in time’ and ‘cut off from others’: Mohr, ‘Flesh and the Person’, above n 158.

205 Eg, adopting and participating in networked technologies that leave data trails.

206 Eg, actively posting, commenting and sharing images on social media.

207 As Part II illustrated, a reasonable expectation of privacy is a threshold requirement that a plaintiff must demonstrate in order to vindicate their claim to privacy within the extended doctrine of breach of confidence. This test was referred to in *Doe v Australian Broadcasting Commission* [2007] VCC 281 (3 April 2007) [101]–[119]. For examples of the application of this test in the United Kingdom, see, eg, *Douglas v Hello! [No 3]* [2005] 4 All ER 128; *McKennitt v Ash* [2006] All ER (D) 200 (Dec); and *Hutcheson v News Group* [2011] All ER (D) 172 (Jul).

208 See, eg, Kenyon and Richardson, above n 77.

209 A statement made by legal economist Richard Posner in Big Think, Interview with Richard Posner (Video Interview, 21 November 2007) <<https://bigthink.com/videos/judge-richard-posner-privacy>>.

210 A term used by Cohen to refer to the privacy claimant assumed within US information privacy laws: Cohen, *Configuring the Networked Self*, above n 25, ch 5, 4.

instance, the behaviour of individuals who were either involved in or responded to the privacy breaches by Cambridge Analytica and Facebook, can begin to be unraveled.

## B The incongruency impasse and the role of privacy law

The emergence of incongruent selves in the context of privacy protection does not only challenge the functionality of privacy law. Rather, the assumptions embedded in legal doctrines of privacy serve to further reinforce incongruence in a manner that illogically stymies the historical aims of this area of law. As Part II articulated, the legal protection of privacy in Australia is reliant upon the logic of information exchange and control. With specific reference to the key characteristics of both the *Privacy Act 1988* (Cth) and the doctrine of breach of confidence, Part II demonstrated how an informational reading of privacy not only elides a meaningful point of connection with the material subject of privacy law, it also reifies the reductionistic attributes of the liberal legal subject. Pursuant to this dominant account, the presupposed subject of privacy protection is a fully autonomous and self-interested individual, largely divorced from the material world, who thinks and acts in a logical manner, and parts with personal information following rational deliberation.<sup>211</sup> Nevertheless, far from being ‘an Aristotelian “unmoved mover” or the Cartesian ego hovering above its affairs’,<sup>212</sup> those who seek the benefits of privacy protection are embodied individuals situated in webs of connection with others, in both material and digital worlds; for whom the capacity to practice autonomy, rationality and self-determination is evolving and contingent and for whom participation in privacy-erosive activities, such as active social media use, forms part of the ‘play of everyday practice’.<sup>213</sup> By reflecting back to the privacy claimant a commodified account of privacy and a largely distorted, static and qualified understanding of subjectivity, privacy law is complicit in perpetuating incongruence; a state that ‘demands resolution’<sup>214</sup> in order to restore one’s actualising tendency.

How, then, ought the law of privacy overcome this incongruency impasse? Given that humanistic psychology is grounded by a desire to promote positive human development, it holds the view that pathologised states of incongruence or internal antagonism are capable of constructive resolution if accompanied by facilitative social-environmental conditions.<sup>215</sup> According to Rogers’ ‘necessary and sufficient conditions’ for human flourishing,<sup>216</sup> the answer lies in the radical power of an empathetic relational encounter. Since the formation of subjectivity is partially intersubjective, when an individual in

211 These attributes are reflected in the way in which the *Privacy Act 1988* (Cth) presumes the willingness of the data subject to exchange his or her personal information and allows consent to legitimise all other forms of collection, use or disclosure. These attributes are also visible within the assessment of the claimant’s ‘reasonable’ expectation of privacy in the doctrine of breach of confidence.

212 Vaidya, above n 202, 214.

213 Cohen, *Configuring the Networked Self*, above n 25.

214 Frager and Fadiman, above n 176, 321.

215 Patterson and Joseph, above n 180, 122.

216 Widely considered to be his most enduring contribution to psychology: see, eg, Cervone and Pervin, above n 170, 194.

a heightened state of incongruence is brought into a relational encounter with a genuine and empathetic other, in the absence of conditions of worth:

previously denied or distorted experiences will once again emerge into awareness, become accurately symbolized and integrated into the self-concept, and allow the actualizing tendency to operate in a unitary, more holistic way. Harmony will be restored, where before there was division, and the ideal of the fully functioning person will be approached.<sup>217</sup>

Thus, as contemporary research findings continue to support,<sup>218</sup> empathetic relational encounters are central to a reduction of incongruence, an increased trust in the experiencing self and an adaptive reintegration of one's actualising tendency. Importantly, however, Rogerian humanistic psychology posits that the facilitative relational conditions of empathy, genuineness and unconditional positive regard are not only crucial to the creation of constructive interpersonal encounters; they are also applicable to broader political and social contexts.<sup>219</sup>

Since the law of privacy in Australia is deficient, in comparison with other Commonwealth legal systems, its future development may assume a variety of shapes. Some of these include: implementing a statutory cause of action for the invasion of privacy,<sup>220</sup> recognising a tort of privacy at general law,<sup>221</sup> or extending the action for breach of confidence.<sup>222</sup> This article contends that the future development of Australian privacy law and scholarship should be premised upon a path that best allows law to empathetically and responsively encounter the materiality of its privacy subjects. That is, a path that promotes an understanding of privacy claimants as individuals in a fluid state of becoming, enmeshed in webs of connection with and dependence upon others, and whose capacity for self-actualisation is situated in a dialectical relationship with the social environment. In this way, by becoming cognisant of the commodifying proclivities of an informational reading of privacy, and eschewing the reductionistic expectations of the liberal legal subject, doctrines and discourses of privacy will be able to more effectively pursue (as opposed to unconsciously hinder) the goals of nurturing human dignity, autonomy and flourishing.

While it is beyond the scope of this article<sup>223</sup> to articulate the model of privacy law that might best achieve the 'necessary and sufficient conditions' for human flourishing, hints of such an approach can be found within the equitable origins of breach of confidence. Interestingly, within a series of early

<sup>217</sup> Tageson, above n 159, 97; Rogers, *On Becoming a Person*, above n 66.

<sup>218</sup> See, eg, Howard Kirschenbaum and April Jourdan, 'The Current Status of Carl Rogers and the Person-Centred Approach' (2005) 42 *Psychotherapy* 37; George Silberschatz, 'Comments on "The necessary and sufficient" conditions of therapeutic personality change' (2007) 44 *Psychotherapy* 265.

<sup>219</sup> Rogers, *Carl Rogers on Personal Power*, above n 184; Frager and Fadiman, above n 176, 319.

<sup>220</sup> As recommended by various law reform commissions, including ALRC, *Serious Invasions of Privacy in the Digital Era*, above n 6.

<sup>221</sup> Following, for instance, the New Zealand Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1.

<sup>222</sup> The preference for which was confirmed by the House of Lords in *Campbell v MGN Ltd* [2004] 2 All ER 995.

<sup>223</sup> But not forthcoming research by the author.

19<sup>th</sup> century cases,<sup>224</sup> before the relational requirements of breach of confidence were formalised and delimited by Megarry J,<sup>225</sup> we witness an approach to privacy protection that both acknowledges and upholds the centrality of conscientious interpersonal relationships. In *Prince Albert v Strange*, for instance, an injunction was successfully granted to vindicate the privacy interests of Prince Albert and Queen Victoria due to the fact that the etchings in question were symbolic of an intimate pastime enjoyed by the Royal couple and, as a result, the defendants Strange and Judge engaged in disingenuous interpersonal behaviour by ‘surreptitiously and improperly’ obtaining these.<sup>226</sup> Given the significant role that genuine and empathetic relational encounters play in the process of self-integration and personal flourishing, the law of privacy should not lose sight of the importance of upholding expectations of conscientious interpersonal comportment, including in the context of information relationships.<sup>227</sup> As Richardson observes:<sup>228</sup>

we might find real benefit in recognising the right to privacy as a right not just for discrete individuals, or even particular groups, but as a right that also serves the needs and concerns of multiple connected individuals — opening up a prospect of a right which can function effectively in an interconnected world ...<sup>229</sup>

Of course, as the preceding analysis warns, whichever path the future development and deployment of privacy law adopts it must be accompanied by a nuanced understanding of subject-formation, and attend to the causes and effects of discordant privacy behaviours, so as to not perpetuate the pathology of incongruence nor unduly strip the pathologised subject of all privacy protection.<sup>230</sup>

## V Conclusion

*If this is the age of information, then privacy is the issue of our times ...*<sup>231</sup>

— Alessandro Acquisti, Laura Brandimarte  
and George Loewenstein

At the outset of this article, the Cambridge Analytica scandal was utilised to illustrate the problems that the legal protection of privacy currently faces.

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<sup>224</sup> Such as *Gee v Pritchard* (1818) 2 Swan 402; 36 ER 670; *Abernethy v Hutchinson* (1825) 1 H & Tw 28; 47 ER 1313; and *Prince Albert v Strange* (1849) 1 H & Tw 1; 47 ER 1302.

<sup>225</sup> In *Coco* (1968) 1A IPR 587.

<sup>226</sup> (1849) 1 H & Tw 1, 24; 47 ER 1302, 1311.

<sup>227</sup> For a discussion of *information relationships*, see Neil Richards and Woodrow Hartzog, ‘Privacy’s Trust Gap: A Review’ (2017) 126 *Yale Law Journal* 1180, 1185.

<sup>228</sup> In her comprehensive overview of early attempts to fashion legal privacy: Richardson, above n 37.

<sup>229</sup> *Ibid* 122.

<sup>230</sup> It is appropriate to note here that the Australian Government’s proposed Consumer Data Right, discussed at above n 105, is poised to perpetuate such incongruence by explicitly drawing privacy protection into a complex relationship with competition and consumer protection. The ‘four key principles’ of this legal framework simultaneously encourage consumers to share data (so as to drive innovation) and safeguard their privacy and security: Treasury (Cth), *Consumer Data Right* (9 May 2018) <<https://treasury.gov.au/consumer-data-right/>>.

<sup>231</sup> Acquisti, Brandimarte and Loewenstein, above n 166, 509.

While a cursory glimpse of relevant history demonstrates that the legal protection of privacy has always been concerned with challenges posed by emerging socio-technical practices, it was suggested that the controversy surrounding Cambridge Analytica serves to draw our attention to three unique complications of privacy in the contemporary, digital information age. These complications were described as the cumulative commodification and normalisation of individual transparency, and the increasing contradiction of the privacy claimant — an individual who professes to value privacy, but will still click ‘install’ without reading the fine print, or post intimate content to ‘friends’ they know little about.

Nevertheless, implicit within the conceptual framework subsequently adopted in this article is perhaps the most important lesson that privacy law can learn from this recent furore. As whistleblower Christopher Wylie explained, crucial to the ‘success’ of Cambridge Analytica’s data harvesting exercise was its ability to draw from the insights of personality psychology in order to create and deploy a ‘psychological warfare tool’. In response, this article contends that as social media giants and third-party data brokers turn to knowledge within psychology to find new ways to encourage participation in networked technologies and enhance the profitability of personal information, the law of privacy would do well to draw upon such knowledge in the course of formulating a proposed solution.

In particular, this article has argued that the field of humanistic psychology is especially well-placed to navigate the complexities currently surrounding the legal recognition of privacy and respond to the shortcomings of Australia’s ambivalent privacy law framework. By adopting the dissenting humanism of humanistic psychology, it is suggested that we can challenge positivistic tendencies to divorce issues of law from the experiences of its human subject, or to reduce human subjects to an *ego cogito* detached from experience.<sup>232</sup> More specifically, however, by deploying the empirically-informed concepts of humanistic psychology, we can bring to law an enhanced understanding of the privacy subject.

Armed with an account of adaptive subject formation as a dynamic, embodied and dialectical process, subject to the pathologising effects of incongruence, privacy law and scholarship will be better placed to unravel the complex contradictions that characterise much of our contemporary engagement with privacy. While this article has been mostly conceptual, in order to locate the problem and lay the foundations for a potential way forward, future research will need to focus on what a humanistic psychological intervention into privacy law might look like practically. As a first step, in contrast to the current informational paradigm, such an intervention will have to call upon privacy’s relational roots.

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232 Agamben, above n 148.