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**EQUITY, “REVENGE PORN,” & CAMBRIDGE ANALYTICA:  
THE DOCTRINE OF CONFIDENCE AS A PROTECTION FOR HUMAN  
DIGNITY IN THE TECHNOLOGICAL AGE**

RAÚL MADDEN\*

*Breach of confidence is an equitable action that is increasingly significant for the protection of human dignity in the technological age. Its scope extends beyond the economic interests which more frequently invoke equity, to protecting dignity where an individual's privacy interests have been violated. This paper considers the history of case development that consolidated the ability of confidence to protect dignity in its own right. It then looks at two contemporary contexts where new technologies necessitate the application of confidence to dignitary concerns: specifically, “revenge porn” cases where an individual abuses an intimate partner's trust and privacy and in “data breach” situations where much larger entities release information of a data subject improperly. It is finally theorised that equity's basis in conscience makes confidence well suited to protecting interests that are dignitary, rather than economic, in character. The contribution of this paper to the existing field of literature is to establish the growing utility of the doctrine of confidence as a private law action to deter and redress misuses of private information that are facilitated and amplified by technological advances.*

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## I INTRODUCTION

As technology develops, so do opportunities to inflict emotional injury and degradation on another person in ways more drastic and further reaching than previously imagined. The type of interest concerned in these cases is often an individual's privacy, which is usually categorised as having its basis in human dignity.<sup>1</sup> The equitable doctrine of breach of confidence, particularly in Australia, is one private law cause of action that has been invoked successfully to redress dignitary abuses. This paper is about the ability of the confidence doctrine to adapt, along with technological evolution, to protect human dignity. It begins by outlining the relationship between personal information, dignity, and confidence (Part II). Next, it traces a history of the application of confidence in relation to privacy, establishing a significant personal and dignitary space within its scope of protection beyond its commonly recognised capacity to protect commercial and proprietary interests (Part III). Following that, our discussion looks at how confidence has developed a deeply necessary private law response to "revenge porn" cases as well

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<sup>1</sup> *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 227 (Gleeson CJ) ('*Lenah*'); *Campbell v MGN Ltd* [2004] UKHL 22, 50–51; Luciano Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 *Philosophy and Technology* 307, 308.

as instances of how new technologies can facilitate egregious emotional abuse in relationships between individuals (Part IV). Beyond protecting dignity in interpersonal relationships, confidence might provide solutions in “data” contexts where business or government entities misuse personal information with which they have been entrusted (Part V). Finally, it is theorised that equity’s foundation in conscience might explain why confidence has, and may further, protect dignity (Part VI). The contribution of this paper is to establish the usefulness of breach of confidence as a private law action, to address increasing opportunities presented by technological advancements for individuals and larger entities to misuse information in a manner which abuses the dignity of the subject.

## II DIGNITY, PERSONAL INFORMATION, & CONFIDENCE

In the broad context of personal information and data, dignity is considered a foundational interest forming the basis of privacy protections. As distinct from economic or proprietary interests, dignitary interests are predicated on the inherent value of a human being. Immanuel Kant theorised that ‘what has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity’.<sup>2</sup> Kant distinguishes:

[W]hat is related to general human inclinations and needs [which] has a *market price* [and] that which constitutes the condition under which alone something can be an end in itself [which] has not mere relative worth, that is, a price, but an inner worth, that is *dignity*.<sup>3</sup>

For Kant, autonomy — being what gives us the capacity for morality — confers upon us an ‘unconditional, incomparable worth’.<sup>4</sup> Luciano comments that ‘the protection of privacy should be based directly on the protection of human dignity, not indirectly through other rights such as that to property or to freedom of expression’.<sup>5</sup> Though there is no shortage of theories attempting to explain the content of human dignity,<sup>6</sup> it is satisfactory for now, to proceed on the basis that the interests of human dignity constitute

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<sup>2</sup> Immanuel Kant, *Groundwork for the Metaphysics of Morals*, tr Mary J Gregor (Cambridge University Press, 2006) [trans of: *Grundlegung zur Metaphysik of Morals* (1785)] 42.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid 43.

<sup>5</sup> Floridi (n 1) 308.

<sup>6</sup> See Ariel Zylberman, ‘Human Dignity’ (2016) 11 *Philosophy Compass* 201.

a primary value from which personal privacy derives, as differentiated from economic or proprietary interests.<sup>7</sup>

Warren and Brandeis, in the classic 1890 American privacy article, advocated that tort law should protect privacy interests on the basis of ‘inviolable personality’,<sup>8</sup> which Bloustein in 1964 conceived as positing ‘the individual’s independence, *dignity* and integrity ... [defining] man’s essence as a unique and self-determining human being’.<sup>9</sup> They reasoned that this principle — distinct from that of private property — already protected personal writings and productions not just against theft and physical appropriation, ‘but against publication in any form’, and its logical extension is ‘to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds’.<sup>10</sup> As these advances in technology ‘rendered it possible to take pictures surreptitiously’, they theorised that ‘doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to’.<sup>11</sup> While American case law has subsequently produced four separate privacy torts,<sup>12</sup> in Australia, the development of confidence has afforded the predominant private law privacy protection.

The elements of confidence are usually: that the information is confidential; that it was originally imparted in circumstances that attach an obligation of confidence; that there has been, or threatened, an unauthorised use of the information to the detriment of the party communicating it.<sup>13</sup> However, that information was obtained by means (such as theft) other than it being confidentially imparted by the subject is not fatal to a confidence action, as it is ‘unconscionability’ that forms the basis for finding a breach of confidence.<sup>14</sup> According to Gleeson CJ in the High Court case of *Lenah*, ‘[t]he real task is to decide what

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<sup>7</sup> It is not inconceivable that in some factual circumstances, however, both interests could intersect or be difficult to separate: see *Campbell v MGN Ltd* [2004] UKHL 22, 51, 53, 57 (Lord Hoffmann).

<sup>8</sup> Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193, 205.

<sup>9</sup> Edward J Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ (1964) 39 *New York University Law Review* 962, 971 (emphasis added).

<sup>10</sup> Warren and Brandeis (n 8) 205.

<sup>11</sup> *Ibid* 211.

<sup>12</sup> *Lake v Wal-Mart Stores Inc*, 582 NW 2d 231, 235 (Minn, 1998).

<sup>13</sup> *Lenah* (n 1) 222 (Gleeson CJ), quoting *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J).

<sup>14</sup> *Franklin v Giddins* [1978] Qd R 72, 80; *Lord Ashburton v Pape* [1913] 2 Ch 469; See also Megan Richardson, ‘Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law’ (1994) 19 *Melbourne University Law Review* 673.

a properly formed and instructed *conscience* has to say about publication'.<sup>15</sup> Some types of personal information — such as that ‘relating to health, personal relationships or finances’ and ‘certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved’ — are identifiable as private.<sup>16</sup> In many instances, ‘that disclosure or observation of information or conduct would be highly offensive to a reasonable person or ordinary sensibilities’ is a ‘useful practical test of what is private’.<sup>17</sup>

In Australia, it has been acknowledged that ‘the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is *human dignity*’.<sup>18</sup> As Australia’s appellate courts have not established (nor conclusively rejected) a privacy tort, Gleeson CJ stated that ‘the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence’.<sup>19</sup> Not only is breach of confidence relevant to how an individual might use digital technology to abuse the trust or privacy of another individual, but also to how larger — private and public — entities might do the same. The European Parliament has acknowledged the link between data and dignity by approving the *General Data Protection Regulation*, which requires that measures be taken ‘to safeguard the data subject’s *human dignity*’.<sup>20</sup>

Stephen Kennedy writes that ‘[t]he protection of human dignity cannot be divorced from the protection of human data’.<sup>21</sup> He identifies three social threats to the protection of personal data: objectification, commodification, and politicisation. These categories help us to conceive why confidence is a pivotal private law action in relation to misuses of personal information by larger entities — potentially private and public — that are driven by the interests of profit or politics. This article now discuss how confidence came to be of utility in privacy litigation, before looking at the specific ‘revenge porn’ and data

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<sup>15</sup> *Lenah* (n 1) 227 (Gleeson CJ) (emphasis added).

<sup>16</sup> *Ibid* 226 (Gleeson CJ).

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* (emphasis added).

<sup>19</sup> *Ibid* 224, citing *Hellawell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807 (Laws J).

<sup>20</sup> *Position (EU) No 6/2016 of the Council at First Reading with a View to the Adoption of a Regulation of the European Parliament and of the Council on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ C 159/1.

<sup>21</sup> Stephen Kennedy, ‘Data and Dignity — Protecting the Truth of Real Things’ (2017) 7 *Journal of Christian Legal Thought* 20, 20.

breach contexts of how confidence might apply to when individuals and larger entities can use new technologies to assail dignitary interests.

### III A HISTORY OF CONFIDENCE AS A PROTECTION OF PERSONAL INFORMATION

*'Three things are to be helpt [sic] in Conscience,  
Fraud, Accident and things of Confidence'.<sup>22</sup>*

Confidence is an old, but not antiquated, doctrine with relevance beyond the commercial. From Sir Thomas More's explanatory couplet, it appears that in the sixteenth century a few things were known about 'confidence': its basis was in equity's underpinning concept of conscience, and it was of core significance to Chancery as one of three conceived categories of equitable actions. *'Things of confidence'*, as More used the term, refers — more broadly than the doctrine of confidence itself — to the jurisdiction of equity to intervene when a party had placed their trust in another and this trust was betrayed.<sup>23</sup> Our present discussion focuses on the narrower notion of confidence, the specific cause of action, having its basis in 'an obligation of conscience arising from the circumstances in or through which the information was obtained'.<sup>24</sup>

Private and personal information was the subject matter of many of the early reported English confidence cases. These cases illustrate how equity developed to protect privacy in technologically simpler times. In a series of early cases, confidence was invoked to protect privacy, although it tended to restrain publication on contractual or proprietary bases.<sup>25</sup> Even where it was claimed that publication of private letters 'was intended to

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<sup>22</sup> *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 46 (Megarry J), quoting Sir Thomas More (Lord Chancellor). Notably, 'confidence' here referred to a broader principle of 'trust' 'extending to all cases where one party placed reliance on another's good faith': see, eg, Mike Macnair, 'Equity and Conscience' (2007) 27 *Oxford Journal of Cultural Studies* 659, 677.

<sup>23</sup> Macnair (n 22) 677: '*Confidence*', as an equitable jurisdiction, as referred to in More's couplet, 'is a synonym for trust, but this was wider than technical trusts, extending beyond fiduciary relations in the narrow sense (agency and partnership) to all cases where a party placed reliance on another's good faith ... As the equity jurisdictions expanded and developed ... they never completely lost their conceptual links to this core'.

<sup>24</sup> *Moorgate Tobacco v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 438 (Deane J).

<sup>25</sup> *Prince Albert v Strange* (1849) 41 ER 1171, 1178: The employee of a printing business, engaged by the royal family to make copies of private family sketches, made unauthorised copies and sold them to a third party who wished to hold a showing of the sketches and publish a catalogue describing them. It was held that '*the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his own private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others*' (emphasis added); *Pollard v Photographic Company* (1888) 40 Ch D 345, 350: 'the bargain between the customer and the

wound [the plaintiff's] feelings, and could have no other effect',<sup>26</sup> it was held that the sender retained 'sufficient property in the original letters to authorise an injunction unless she has by some act deprived herself of it'.<sup>27</sup>

In *Argyll v Argyll*, which concerned secrets orally confided in a marital relationship, restraint was imposed even in the absence of contractual or proprietary elements.<sup>28</sup> A 1966 article observed that in most of the earlier cases, it was accepted that breach of confidence *could* merit restraint of publication in its own right.<sup>29</sup> Where there was a proprietary or contractual right at law, there was really no need to have *equity* act in the situation,<sup>30</sup> aside from providing an injunctive relief which is especially useful in matters when a non-fungible interest such as privacy is at stake. Indeed, in later trade secret cases too, where there was no contract, confidence alone was deemed sufficient.<sup>31</sup> Dickie concludes that while trade secrets have financial value and [false] attacks on reputation can be protected by tort, 'it is clearly the sentiments or sensitivity of the plaintiff that alone are being protected' in some early confidence cases.<sup>32</sup> Reflecting on *Argyll*, he noted that if the court were to allow a:

successful petitioner in a divorce action to breach confidences of trust that occurred during the marriage, it would not only provide the petitioner with double relief — divorce and divulgence — but would also cause many presently happily married couples to speak with a far more guarded tongue, foreseeing the dismal day when bliss has fled and such disclosures are the cause of a union's dissolution.<sup>33</sup>

Confidence, clearly, has a capacity to protect dignity in interpersonal, or intimate, relationships, which are the subject of Part IV. Equity's conscience endeavours to 'enforce a communal moral standard' and developed in response to injustices that the common

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photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only'.

<sup>26</sup> *Gee v Pritchard* (1818) 36 ER 670, 671 (Lord Eldon).

<sup>27</sup> *Ibid* 678 (Lord Eldon).

<sup>28</sup> *Duchess of Argyll v Duke of Argyll* [1967] 1 Ch 302.

<sup>29</sup> Hans J Dickie, 'Restraint of Breach of Confidence: *Duchess of Argyll v Duke of Argyll*' (1966) 24 *Faculty of Law Review* 115, 120, citing *Prince Albert v Strange* (1849) 41 ER 1171, 1178.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Saltman Engineering v Campbell Engineering* (1947) 65 RPC 203.

<sup>32</sup> Hans J Dickie, 'Restraint of Breach of Confidence: *Duchess of Argyll v Duke of Argyll*' (1966) 24 *Faculty of Law Review* 115, 122.

<sup>33</sup> *Ibid*.



law was unequipped to rectify.<sup>34</sup> As privacy interests became the subject of increasing concern in society and of litigation, unsurprisingly the ability of confidence to protect privacy interests was discovered. It eventually became clear that these interests need not be articulated as something with profit-generating potential.<sup>35</sup>

A series of mostly 1980s English and Australian cases illustrate the versatility of confidence in protecting privacy interests. Significantly, in England in 1988, it was affirmed that confidence applies to information about non-marital intimate relationships.<sup>36</sup> In the same year, an injunction was granted to prevent defendants from publishing that two doctors had contracted AIDS.<sup>37</sup> In Australia, confidence protected the identity of an informant.<sup>38</sup> It also restrained publication of secret Aboriginal cultural knowledge.<sup>39</sup> These cases concern sexual, health-related, safety, and cultural subject matters, the privacy of which courts deemed suitable for protection via confidence. Collectively, they suggest a continuation of *Argyll's* trajectory of elucidating the utility of confidence as a dignitary protection. Also significant for confidence in relation to dignity is the finding that a duty of confidence may arise independently of 'a transaction or a relationship between the parties', when in the circumstances there is sufficient 'notice' that it would be just to preclude publication.<sup>40</sup> This solidifies the understanding of confidence as an action that goes beyond the contractual and into the personal aspects of life.

There are a couple of English cases from the 2000s about celebrities and the media where not a lot of the damage claimed could be described as dignitary.<sup>41</sup> *Douglas v Hello!* concerned a celebrity wedding where the couple, who planned to sell exclusive photographs to one media outlet, successfully complained that photographs were

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<sup>34</sup> Richard Hedlund, 'The Theological Foundations of Equity's Conscience' (2015) 4 *Oxford Journal of Law and Religion* 119, 123, 139.

<sup>35</sup> Jennifer Stuckey, 'The Equitable Action for Breach of Confidence: Is Information Ever Property?' (2003) 26 *Sydney Law Review* 402, 404 and 406: 'the analysis that confidential information is a species of intangible property is juristically misguided and unhelpful'. This is 'revealed in the situation where the confidential information disclosed or misused is of a personal nature for such information may have no appreciable commercial value'.

<sup>36</sup> *Stephens v Avery* [1988] Ch 449.

<sup>37</sup> *X v Y* [1988] 2 All ER 648.

<sup>38</sup> *G v Day* [1982] 1 NSWLR 24.

<sup>39</sup> *Foster v Mountford and Rigby Ltd* (1976) 29 FLR 233.

<sup>40</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281.

<sup>41</sup> See, eg, I D F Callinan, 'Privacy, Confidence, Celebrity and Spectacle' (2007) 7 *Oxford University Commonwealth Law Journal* 1.

surreptitiously taken by another.<sup>42</sup> *Campbell v MGN*, despite concerning a celebrity, shows that a person’s privacy can be protected in response to media publication of their drug addiction and rehabilitation efforts.<sup>43</sup> The “public interest” defence did not defeat the confidence claim despite the plaintiff’s high profile and previous denial of drug use.<sup>44</sup> Taking influence from UK human rights legislation,<sup>45</sup> and citing *Douglas*,<sup>46</sup> Lord Hoffman identified that, in private information contexts, the ‘underlying value which the law protects’ is ‘the protection of human autonomy and dignity — the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people’.<sup>47</sup> Like *Prince Albert* and *Argyll’s* invocation of confidence by aristocracy, *Douglas* and *Campbell* might give the impression that confidence is more useful for the rich and famous than for ordinary members of the public. They did, however, lead to further developments which galvanised confidence as a protection for the dignity of ordinary people.

In *Campbell*, Nicholas LJ acknowledged that English equity protected against wrongful use of private information via breach of confidence but argued that in these contexts the action should be considered as a tort of ‘misuse of confidential information’,<sup>48</sup> on the basis that the action has ‘firmly shaken off the need for an initial confidential relationship’, having ‘clearly changed its nature’.<sup>49</sup> *Google Inc v Vidall-Hall* endorses this view, asserting that ‘there are now two separate causes of action: an action of breach of confidence and one for misuse of private information’,<sup>50</sup> characterising the latter as a tort.<sup>51</sup> At the least, English courts acknowledge the role of confidence in producing the tort that protects against misuse of private information, if not satisfied that confidence is conceptually or practically adequate for the task. Arguably, however, equity should have continuing influence on the development of privacy protection; even if tort is the preferred basis of English privacy protection, there is no need to sever the tort from its equitable roots.<sup>52</sup>

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<sup>42</sup> *Douglas v Hello! Ltd* [2006] QB 125.

<sup>43</sup> *Campbell v MGN Ltd* [2004] UKHL 22.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Human Rights Act 1998* (UK) cl 42. This had a significant impact on the development of English confidence and tort in relation to privacy, which although interesting, is a discussion for another time.

<sup>46</sup> *Douglas v Hello! Ltd* [2001] QB 977.

<sup>47</sup> *Campbell v MGN Ltd* [2004] UKHL 22, [50]–[51].

<sup>48</sup> *Ibid* [14].

<sup>49</sup> *Ibid* [15].

<sup>50</sup> *Google Inc v Vidall-Hall* [2015] EWCA Civ 311, [21].

<sup>51</sup> *Ibid* [43].

<sup>52</sup> As English approaches are less stringent about fending off what might be called ‘fusion’.

This is not farfetched, since equity ‘emerged out of the Lord Chancellor’s power to hear complaints from those whom the common law had failed’,<sup>53</sup> and since equitable confidence was the first cause of action in England to step in to protect personal privacy when tort historically did not. Privacy interests are coloured by the changing social and technological circumstances by which they are surrounded. As flexibility and adaptability are hallmarks of equity, it is perhaps well equipped in relation to privacy. Perhaps even beyond the scope of confidence, then, we could plausibly suggest that equity might be the most appropriate source of law to protect privacy interests, given its more evolutionary nature as compared with the common law and its ability to expand organically without the dilatory process of legislative reform.<sup>54</sup>

In Australia, confidence remains the primary private law privacy protection. As Gleeson CJ stated in *Lenah*, dignity is also the underpinning value of personal privacy as protected by confidence in Australia.<sup>55</sup> In *Doe v ABC*, confidence was applied where the ABC broadcasted the identity of a woman who was raped by her estranged husband, noting that victims of sexual assault often experience feelings of ‘humiliation, shame and guilt’ which can be compounded when inflicted by a former partner.<sup>56</sup> The ‘highly offensive’ test is useful, but not determinative.<sup>57</sup> The essence of what is protected against is not the offensiveness of the information itself, but the offensiveness of the behaviour of publishing information, which would ‘rob the person to whom the information relates of their right to keep their personal or confidential information private’.<sup>58</sup> Importantly, Hampel J rejected the view that equitable damages cannot include ‘distress type damages’.<sup>59</sup> She identified the type of loss claimed as ‘damages for personal injury, the affront to the plaintiff’s feelings, and the effect on her personally of the breach of

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<sup>53</sup> Hedlund (n 34) 123.

<sup>54</sup> Law reform commissions have been commendably productive in generating reports concerning the creation of a statutory cause of action for serious invasions of privacy since 2008. However, no legislation has materialised so far pursuant to these reports: New South Wales Law Reform Commission, *Remedies for the Serious Invasion of Privacy in New South Wales* (Report No 57, 3 March 2016); Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, 3 September 2014); Victorian Law Reform Commission, *Surveillance in Public Places* (Report No 18, May 2010); Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, 12 August 2008).

<sup>55</sup> *Lenah* (n 1) 226.

<sup>56</sup> *Doe v ABC* [2007] VCC 281, 36, 39, 49.

<sup>57</sup> See Part II above. ‘The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private’: *Lenah* (n 1) 226 (Gleeson CJ).

<sup>58</sup> *Doe* (n 56) 38, [115].

<sup>59</sup> *Ibid* 48 [143].

confidence’, as distinct from ‘loss of a commercially exploitable idea or process ... or a commercially exploitable reputation or image, as was the case in *Campbell and Douglas*’.<sup>60</sup> The most appropriate compensatory method was to award monetary damages for pain and suffering caused by the actionable breach, and loss occasioned by it.<sup>61</sup> Although presiding in a lower court, Hampel J was willing to utilise the space left open by *Lenah* and hold that the facts in *Doe* also gave rise to damages in tort.<sup>62</sup> She acknowledged that this development is ‘intertwined with the development of the cause of action for breach of confidence’ and that the value of privacy ‘springs from the importance of the law recognising and protecting human dignity’.<sup>63</sup>

*Doe* illustrates how things of emotional impact can concern equity’s conscience which fastens upon parties who are careless of the impact of divulging another’s sensitive personal information. As technology has enabled media to reach a broad audience through electronic communication including televised reports, the need for a private law action — namely, confidence — to protect the dignitary interests of autonomy to determine to whom they impart sensitive personal facts is vividly apparent. This section has outlined how, over time, confidence has protected private information and developed a distinctly dignitary aspect to its protective scope. The next section, in the context of the internet and social media, reaffirms how breach of confidence protects dignity alongside changing social and technological surroundings.

#### IV CONFIDENCE & DIGNITY IN INTIMATE RELATIONSHIPS: INTERNET, SOCIAL MEDIA, & REVENGE PORN

What is referred to by the term “revenge porn” exemplifies how technological change enables new means of inflicting emotional abuse in the context of relationships between individuals. It is often:

characterised as an act in which one ex-partner exerts revenge on another by maliciously, and without consent, distributing sexually-explicit photos online, most commonly by

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<sup>60</sup> Ibid 48 [145].

<sup>61</sup> Ibid 48 [145].

<sup>62</sup> Ibid 61 [157].

<sup>63</sup> Ibid 49 [148].

either uploading onto a “revenge porn” website or simply distributing by email or smartphone.<sup>64</sup>

Undoubtedly, non-consensual distribution is nonetheless reprehensible and actionable without malice.<sup>65</sup> ‘Image-based sexual abuse’ is a more broadly encompassing term to refer to ‘non-consensual creation and or distribution of private sexual images’.<sup>66</sup> It is important to recognise that “revenge porn”, although a media-friendly and attention-grabbing term, is just one type of many image-based sexual abuses and not a catch-all phrase.<sup>67</sup> Bambauer remarks that ‘[t]he cost of distributing analog photos was an effective barrier to most non-consensual sharing [of explicit images]; it was simply too much work ... But, as sexting proves, the smartphone has made intimate media ubiquitous’.<sup>68</sup> The internet presence of “revenge porn” is far-reaching, with over 3,000 websites being estimated to have existed in 2015.<sup>69</sup> An Australian Parliamentary committee has undertaken an expansive discussion of the issue in terms of its prevalence, its impact, as well as existing and suggested avenues for legal responses.<sup>70</sup> The magnitude of image-based sexual abuse and ‘revenge porn’ as a social issue in turn makes it a pressing legal issue.<sup>71</sup>

A good Australian litigation lawyer, when approached by a client who had been subjected to the dignitary insult of their former intimate partner having uploaded private sexual images online, would have breach of confidence in mind (aside from advising them that the matter should be reported to the police).<sup>72</sup> *Giller v Procopets* is appellate authority for

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<sup>64</sup> Ian Ward, ‘A Revenger’s Tragedy’ (2017) 11 *Pólemos* 437, 441.

<sup>65</sup> *Ibid* 441.

<sup>66</sup> Clare McGlynn and Erika Rackley, ‘Image-Based Sexual Abuse’ (2017) 37 *Oxford Journal of Legal Studies* 1, 1.

<sup>67</sup> See, eg, McGlynn and Rackley (n 69) 2; See also Clare McGlynn, Erika Rackley and Ruth Houghton, ‘Beyond “Revenge Porn”: The Continuum of Image-Based Sexual Abuse’ (2017) 25 *Feminist Legal Studies* 25.

<sup>68</sup> Derek Bambauer, ‘Exposed’ (2012) 98 *Minnesota Law Review* 2025, 2029.

<sup>69</sup> McGlynn, Rackley and Houghton (n 57).

<sup>70</sup> Senate Legal and Constitutional References Committee, Parliament of Australia, *Phenomenon Colloquially Referred to as ‘Revenge Porn’* (Report, February 2016).

<sup>71</sup> Melanie Ehrenkranz, ‘Facebook Revenge Porn Case Shows How Police Let a Predator Get Away’ *Gizmodo* (online, 14 January 2018) <<http://gizmodo.com/facebook-revenge-porn-case-shows-how-police-let-a-perpe-1822024163>>; Jenny Kleeman, ‘YouTube Star Wins Damages in Landmark UK ‘Revenge Porn’ Case’, *The Guardian* (online, 17 January 2018) <<https://www.theguardian.com/technology/2018/jan/17/youtube-star-chrissy-chambers-wins-damages-in-landmark-uk-revenge-porn-case>>.

<sup>72</sup> Some jurisdictions have already enacted criminal provisions to specifically respond to ‘revenge porn’: See, eg, *Crimes Amendment (Intimate Images) Act 2017* (NSW). Governments of others have indicated an intention to do so: Felicity Caldwell, ‘Revenge Porn to Become a Criminal Offence under Labor’, *Brisbane*

applying confidence to “revenge porn” and consequently awarding equitable compensation for emotional distress, arising from a factual situation that occurred in 1996 where videotape was the means through which explicit footage was recorded.<sup>73</sup>

A significant aspect of *Giller* in relation to equity’s ability to protect dignitary interests is the court’s discussion of the applicability of equitable compensation as a remedy. Equitable compensation was the only way in which the majority considered that justice could be done on the facts following the High Court’s prescribed approach of adapting recognised actions — rather than creating new ones such as a privacy tort — to meet new situations and circumstances.<sup>74</sup> Only Maxwell P upheld Giller’s separate tort claim for ‘intentional infliction of emotional distress’.<sup>75</sup> There are three findings integral to the applicability of confidence and the corollary capacity to award equitable compensation in a case where the publication of private information constituted distress damage rather than damage to an economic interest. First, the Court of Appeal overturned the trial judge’s finding that — because Giller did not (and could not, as the damage had been done) seek an injunction — she could not recover damages under Victoria’s version of the *Lord Cairns Act*,<sup>76</sup> a version of the legislation that conferred on the Chancery court a discretionary ability to grant damages (equitable compensation) in addition to or instead of specific performance or an injunction.<sup>77</sup> Neave JA said of the provision (s 38) that it gives the court jurisdiction to award ‘damages’ ‘if the cause of action is such as to give the court jurisdiction to grant an injunction’ even if the injunction would have been refused on the discretionary factors, and that nothing in the section suggests ‘that the power was intended to be exercisable only where an application for injunction had actually been made.’<sup>78</sup>

Second, the Court rejected the view of the trial judge. Victoria’s appeal court in *Giller* held that “mere distress”, short of a demonstrated psychiatric injury, could form the basis for

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*Times* (online, 22 November 2017) <<https://www.brisbanetimes.com.au/queensland-election-2017/revenge-porn-to-become-a-criminal-offence-under-labor-20171122-p4yx5i.html>>.

<sup>73</sup> *Giller v Procopets* (2008) 24 VLR 102: The events complained of occurred in 1996, significantly before 2008 by which time videotapes had been rendered technologically redundant.

<sup>74</sup> *Ibid* 255 (Gleeson CJ).

<sup>75</sup> *Ibid* 114 [478] (Neave JA), as distinct from a conceivable privacy tort.

<sup>76</sup> *Supreme Court Act 1986* (Vic) s 38.

<sup>77</sup> *Giller* (n 73) [137] (Ashley JA), [406]–[407] (Neave JA).

<sup>78</sup> *Ibid* 96 [406]–[407].

awarding damages in breach of confidence.<sup>79</sup> Neave JA explained that equitable principles provide a basis for ordering equitable compensation for ‘distress or embarrassment’ as a consequence of a breach of confidence. He noted the availability of equitable remedies, especially injunctions, to restrain the publication of material because of its private nature without having to demonstrate the potential consequence of psychiatric injury or financial loss.<sup>80</sup> It would be inconsistent, then, to impose a barrier to equitable compensation for the harm the plaintiff has suffered once the breach has occurred.<sup>81</sup> To refuse equitable relief by way of granting compensation where no other remedy was available ‘would illustrate that something was wrong with the law’,<sup>82</sup> as ‘[a]n inability to order equitable compensation to a claimant who has suffered distress would mean that a claimant whose confidence was breached before an injunction could be obtained would have no effective remedy’.<sup>83</sup> The Victorian *Lord Cairns Act* would also be satisfactory to provide a basis for damages,<sup>84</sup> which ‘can be awarded in some circumstances where common law damages are not recoverable’, and is not limited to protecting property interests.<sup>85</sup>

Third, aggravated damages were considered appropriate since the breach was deliberate and had the effect of humiliating, embarrassing, and distressing the plaintiff.<sup>86</sup> The affirmation of the applicability of equitable compensation as a remedy for breach of confidence in a “revenge porn” abuse in *Giller* illustrates and provides an optimistic authority for the application of equity to protect a person’s dignity where the common law would leave the injustice without remedy. This is not surprising given equity’s, and thus confidence’s, basis in conscience (as reminded in *Lenah*) and its nature of flexibility and adaptability to novel circumstances.

More recently, *Wilson v Ferguson* revisited — and affirmed — the application of confidence to “revenge porn”.<sup>87</sup> During the course of a romantic relationship, the couple, who were also colleagues, exchanged sexual photographs and videos on the

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<sup>79</sup> *Ibid* 1 [1] (Maxwell P), 31 [143], 32 [148], 34 [159], 34 [160] (Ashley JA), 96 [408] (Neave JA).

<sup>80</sup> *Ibid* 100 [423].

<sup>81</sup> *Ibid* 100 [423].

<sup>82</sup> *Ibid*, quoting *Cornelius v De Taranto* [2001] EMLR 12 [66]–[77], [69].

<sup>83</sup> *Ibid* 100 [424].

<sup>84</sup> *Supreme Court Act 1986* (Vic) s 38.

<sup>85</sup> *Giller* (n 73) 101 [428].

<sup>86</sup> *Ibid* [1], 34, [159], 34 [160], 105 [442], 106 [446].

<sup>87</sup> *Wilson v Ferguson* [2015] WASC 15.

understanding that these were to be kept private. In retaliation for the plaintiff terminating the relationship, the defendant sought revenge by publishing 16 explicit photographs and two explicit videos of the plaintiff on his Facebook page.<sup>88</sup> Mitchell J of Western Australia's Supreme Court held that the appropriate relief was an injunction to prohibit further publication of the images, which had been removed by this point and equitable compensation 'to compensate ... as far as money can, for the humiliation, anxiety and distress which has resulted [from the breach]'.<sup>89</sup>

This type of abuse is obviously of a dignitary nature. The defendant's actions were clearly driven by a desire to cause 'extreme embarrassment and distress', or in his own words, to see the plaintiff 'fold as a human being'.<sup>90</sup> She was 'absolutely horrified, disgusted, embarrassed, and upset' by the publication, and particularly 'humiliated, distressed, and anxious because her and the defendant worked at the same site' and many of their friends and colleagues would view the images.<sup>91</sup> Mitchell J had no difficulty in applying the elements of confidence.<sup>92</sup> Importantly, he applied *Giller* in relation to awarding equitable compensation for 'noneconomic loss comprising the embarrassment or distress occasioned by the disclosure of private information in breach of confidence'.<sup>93</sup> He found that the applicable version of the *Lord Cairns Act* does not prevent this and that *Giller* 'represents a development in the equitable doctrine in Australia'.<sup>94</sup>

Reflecting on post-*Giller* technological advancement, Mitchell J observed that in 1996 'it would have been difficult to predict the current pervasiveness in Australian society of the internet, social media platforms utilising the internet and the portable devices which interface the internet and those platforms'.<sup>95</sup> The fact that these changes have so 'dramatically increased the ease and speed with which communications and images may be disseminated to the world' often means that 'there will be no opportunity for

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<sup>88</sup> Ibid [17]-[42].

<sup>89</sup> Ibid [1]-[2].

<sup>90</sup> Ibid [33].

<sup>91</sup> Ibid [33].

<sup>92</sup> Ibid [55]-[59].

<sup>93</sup> Ibid [71].

<sup>94</sup> Ibid [74], [76]; citing *Doe v ABC* [2007] VCC 281 and *Australian Broadcasting Corporation v Lenah Game Meats* (2002) 208 CLR 119.

<sup>95</sup> Ibid [79].



injunctive relief to be obtained between the time the defendant forms the intention to distribute the images of the plaintiff and the time when he or she achieves that purpose'.<sup>96</sup>

He reflected that:

[N]ot uncommonly for a young couple in a sexual relationship, [the plaintiff and defendant] shared intimate images with each other using their mobile phones during their relationship. This practice has introduced a relatively new verb — sexting — to the English language.<sup>97</sup>

These contemporary conditions, and the 'damaging distress and embarrassment' caused by broader dissemination of such communications, 'should inform the way in which equity responds to a breach of the obligation of confidence'.<sup>98</sup> Equitable compensation was thus appropriate as:

the relief which is given in response to a breach of that obligation should, however, accommodate contemporary circumstances and technological advances, and take account of the immediacy with which any person can broadcast images and text to a broad, yet potentially targeted, audience.<sup>99</sup>

*Giller's* approach of awarding compensation not only 'avoids the obligation being effectively unenforceable in many cases' but also 'may be seen as giving effect to the "cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts"'.<sup>100</sup> The development of confidence in these types of dignitary cases is an 'incremental adaptation of an established equitable principle'.<sup>101</sup> On that note, it might be worth considering whether punitive damages might be applicable in similar cases.<sup>102</sup>

The relationship between equity and other areas of law is relevant. Confidence has the advantage, as held in *Wilson*, that it is unnecessary to prove that the plaintiff suffered any

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<sup>96</sup> Ibid [80].

<sup>97</sup> Ibid [79].

<sup>98</sup> Ibid [81].

<sup>99</sup> Ibid [81].

<sup>100</sup> Ibid [82], quoting *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559 (emphasis added).

<sup>101</sup> Ibid [82].

<sup>102</sup> However, *Harris v Digital Pulse* (2003) 56 NSWLR 298 presents hurdles for recognition of exemplary damages in equity; Cf *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 for the Canadian position. See also David Morgan, 'Harris v Digital Pulse: The Availability of Exemplary Damages in Equity' (2003) 29 *Melbourne University Law Review* 377.

psychiatric injury, as the reasonableness of the plaintiff’s reaction to what happened to her ‘are matters within ordinary human experience’.<sup>103</sup> It would be unjust to require a plaintiff to prove actual damage such as a psychiatric illness as is required to establish the tort of intentional infliction of emotional distress.<sup>104</sup> Evolution or legislation of a privacy tort need not be mutually exclusive, or diminutive, of the continued significance of breach of confidence. It might make conceptual sense to have two separate causes of actions, which operate side-by-side when appropriate: invasion of privacy, a tort, for the obtainment of information if wrongful; and breach of confidence as the traditional equitable response to the publication of the information regardless of how the information was obtained. The English approach of a tort evolving *from* equity is a possibility but could offend those who warn sternly against ‘fusion fallacy’ — that is, the alteration of common law or equity principles by reference to the principles of the other.<sup>105</sup> Alternatively, as suggested earlier,<sup>106</sup> an expansion of equity further into the realm of privacy might be most appropriate given the dynamic nature of privacy interests. This seems sensible in light of the common law’s relative rigidity and legislative hesitancy. It has been suggested that, to capture the general law protections, a statutory cause of action might supplant, thereby abolishing, equitable and common law developments.<sup>107</sup> This, however, would uproot the organic ability of equity to grow as a privacy protection, in favour of planting legislative protections — which, given the rate at which Parliament tends to respond to privacy interests — might not grow in response to future social and technological changes and observations.

Without expectation of confidence, interpersonal relationships of all kinds — familial, friendships, romantic, sexual — would be stifled or severely hindered because of the nature of matters that are discussed and shared in these types of relationships. Jeffrey Rosen considers this type of privacy as:

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<sup>103</sup> *Wilson* (n 87) [102].

<sup>104</sup> See *Wilkinson v Downton* (1897) 2 QB 57; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 417; *Wainwright v Home Office* [2004] 2 AC 406; *Giller* (n 73).

<sup>105</sup> It is thought that perpetrators of this fallacy would conclude that the *Judicature Acts* were ‘not devised to administer law and equity concurrently but to ‘fuse’ them into a new body of principles comprising neither of law nor of equity but of some new jurisprudence conceived by accident, born by misadventure and nourished by sour but high-minded wet nurses’: R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (Butterworths, 4<sup>th</sup> ed, 2002) 57.

<sup>106</sup> See page 9 of this article.

<sup>107</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, 3 September 2014) 72.

indispensable to freedom ... necessary for the formation of intimate relationships, allowing us to reveal parts of ourselves to friends, family members, and lovers that we withhold from the rest of the world. It is, therefore, imperative as a precondition for friendship, individuality, and even love.<sup>108</sup>

People trust their intimate partners with a lot of things, including their dignity. Fittingly, breach of confidence is demonstrably capable of playing a role in protecting dignity in interpersonal relationships.<sup>109</sup>

#### V FILLING IN THE GAPS: CONFIDENCE & DATA

Given the enormity of recent “data breach” events that have attracted media attention, breach of confidence might have potential as a powerful private law protection in situations where a social media company, or other private or government entity, abuses (or loses) their control over data entrusted to it by its users, clients, customers, or subjects. The utility of confidence when these entities disseminate information unconscionably is especially worth considering since equitable compensation is not fettered by common law notions of foreseeability and remoteness.<sup>110</sup> Hobbes characterised the state as a ‘Leviathan’, wielding ultimate powers, derived from and comprised by the surrendered powers of its subjects.<sup>111</sup> Today though, the state is not the only entity with Leviathan-like powers, nor the only entity that could be theorised similarly.

Could social media companies, and companies with the power to harvest and analyse multitudes of data, be conceived as holding state-like powers over their (data) subjects, which was (often unwittingly) generated by the user signing up to and conducting parts of their lives on these companies’ platforms? The relationships between these parties are of further concern. As Cambridge Analytica demonstrates, it is far from unimaginable that a social media entity would — whether by design or mismanagement — allow a third party access to a data subject’s private information. It is also not unimaginable that this data could be used politically, in the process of a political campaign, to harvest millions

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<sup>108</sup> Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (Vintage Books, 2000) 11, quoted in *Australian Broadcasting Corporation v Lenah Game Meats* (2002) 208 CLR 119, 324.

<sup>109</sup> See, eg, *Kwok v Thang* [1999] NSWSC 1034.

<sup>110</sup> See, eg, Teck H Ong, ‘Equitable Damages: A Powerful but Often Forgotten Remedy’ (1999) 4 *Deakin Law Review* 61, 63; *Commonwealth Bank of Australia v Smith* (1991) ALR 453.

<sup>111</sup> See, eg, Thomas Hobbes, *The Leviathan* (Cambridge University Press, first published 1651, 1909 ed).

of psychological profiles of data subjects. Were this to happen, it is, again, not unimaginable that a government could gain access to this information in a seismic power grab of control over its citizens.

Stephen Kennedy’s analysis proffers three categories of social factors that generate disrespect for the dignity of data subjects. First, “*objectification*” is the ‘ensemble of social factors that cause more and more distance between people so that we more readily regard one another as mere objects, statistics rather than real people’.<sup>112</sup> It follows that those who hold our data are more likely to abuse it because they will never have to justify this to us, face to face.<sup>113</sup> Second, “*commodification*” is the ‘ensemble of social factors that further alienates us into viewing one another as mere bundles of economic desires’. Privacy is thus undermined by values of contemporary marketing, where information that actually ‘give(s) shape and substance to who we are’ is conceived as neutral and depersonalised.<sup>114</sup> Third, “*politicisation*” is the ‘ensemble of social factors that increases alienation by training us to regard one another as mere bundles of political preferences’.<sup>115</sup> Rather than participants in rational engagement with political issues, we are treated as ‘mere objects for mass manipulation’.<sup>116</sup> The activities of Cambridge Analytica exemplify all three of these factors and indicate the sweeping significance of data breaches as a social and legal issue.

Cambridge Analytica is a company — a ‘data analytics’ firm — that worked on Donald Trump’s presidential campaign.<sup>117</sup> In 2018, revelations emerged that Cambridge Analytica gained unauthorised access to tens of millions of Facebook accounts.<sup>118</sup> This information was used to build psychological profiles of voters so they could be more specifically targeted, or manipulated.<sup>119</sup> That decision-making figures in a company

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<sup>112</sup> Kennedy (n 21) 20.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid 20–21.

<sup>115</sup> Ibid 21.

<sup>116</sup> Ibid.

<sup>117</sup> Carol Cadwalladr and Emma Graham Harrison, ‘Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach’, *The Guardian* (online, 18 March 2018) <<https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>>.

<sup>118</sup> Ibid.

<sup>119</sup> Carol Cadwalladr, “‘I Made Steve Bannon’s Psychological Warfare Tool’: Meet the Data War Whistleblower”, *The Guardian* (online, 18 March 2018) <<https://www.theguardian.com/news/2018/mar/17/data-war-whistleblower-christopher-wylie-faceook-nix-bannon-trump>>; Paul Lewis, ‘Trump Adviser John Bolton Worked with Cambridge Analytica on Youtube Voter Experiment’, *The Guardian* (online, 24 March 2018) <<https://www.theguardian.com/us-news/2018/mar/23/john-bolton-cambridge-analytica-videos-donald-trump>>.

would undertake such an activity, disregarding the sensitivity of the information they sought to use, demonstrates an '*objectification*' where the basic respect owed to another person is ignored, a '*commodification*' where this is ultimately done as a matter of "business as usual", and '*politicisation*' where those who seek powerful offices are on the purchasing end of this type of data analysis. These categories, in this context, not only spur consideration of the wrongfulness of, motivations for, and the products of, violating a data subject's *privacy*, but they are also especially relevant to the *autonomy* of an individual, conceivably the root of human dignity,<sup>120</sup> in the sense that a thorough data profile can be created to enable third parties to consolidate data profiles for the purpose of surreptitiously subverting an individual's decision making as a dignified participant in a democracy. Alarming, Cambridge Analytica's parent company holds contracts with the United States State Department, with its key former employee reporting that:<sup>121</sup> "The company has created psychological profiles of 230 million Americans. And now they want to work with the Pentagon? It's like Nixon on steroids."<sup>122</sup> Cambridge Analytica exemplifies all three threats to personal data *par excellence* (*objectification*, *commercialisation*, and *politicisation*) and demonstrates the increasing exigency for the private law to protect the dignitary concerns of data subjects that are held legitimately, or, in this case, illegitimately.

Cambridge Analytica spawns several legal issues concerning data protection and the need for members of the public to have some form of private law recourse, not least the breach of confidence that occurs if such information is imparted or misused by "data analytics" firms. The relevance of confidence in terms of how this information is used is strikingly obvious in light of the ability of private companies, through highly advanced technology, to subjugate human dignitary interests on such a broad and deep scale for commercial and political gains. The Office of the Australian Information Commissioner has released a statement that the Office 'is making inquiries with Facebook to ascertain whether any

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<sup>120</sup> Kant (n 2) 43.

<sup>121</sup> Cadwalladr (n 119).

<sup>122</sup> Ibid; Australia's acting Privacy Commissioner has reported that, following confirmation from Facebook, that 'the information of over 300,000 Australian users may have been acquired and used without authorisation': Office of the Australian Information Commissioner, 'Investigation into Facebook Opened' (Media Release, 5 April 2018) <<https://www.oaic.gov.au/media-and-speeches/statements/facebook-and-cambridge-analytica>>.

personal information of Australians was involved'.<sup>123</sup> The Commissioner stated that he 'will consider Facebook's response and whether any further regulatory action is required', listing powers conferred by the *Privacy Act 1988* (Cth).<sup>124</sup> These include: investigating an alleged interference with privacy, exercising regulatory action powers or powers to accept an enforceable undertaking, making a determination, or applying to the court for civil penalty provisions.<sup>125</sup> Subsequently, the Acting Commissioner has opened an investigation under the Act.<sup>126</sup> As Richardson points out, though, the main limitation of statutory data protections is that these rely on decisions of public officials, rather than allowing individuals the 'power directly to vindicate their legal rights'.<sup>127</sup>

The general law — comprised of common law and equity — might be well equipped to 'produce a set of data protection norms'.<sup>128</sup> Torts of negligence and intentional infliction of emotional distress may occasionally be applicable, but are not easily invoked, in 'information' contexts.<sup>129</sup> In England, a product of the evolution of confidence, the 'misuse of private information' tort, might be readily applicable.<sup>130</sup> The Cambridge Analytica debacle may generate further support for legislative reform or judicial progress towards an Australian 'invasion of privacy tort', which would provide more reason for companies to be careful about illegitimately gaining access to data in the first place.<sup>131</sup>

Confidence, however, should be considered as one cause of action, within a framework of potential privacy protections, that itself allows for private law redress whereby individuals can personally take action when their data is abused. It has equity's advantage of the potential to look at the issue from outside the immediately apparent lenses of

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<sup>123</sup> Office of the Australian Information Commissioner, 'Statement from the Australian Information and Privacy Commissioner on Facebook and Cambridge Analytica' (Media Release, 20 March 2018) <<https://www.oaic.gov.au/media-and-speeches/statements/facebook-and-cambridge-analytica>>.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Privacy Act 1988* (Cth).

<sup>126</sup> Office of the Australian Information Commissioner, 'Investigation into Facebook Opened' (Media Release, 5 April 2018) <<https://www.oaic.gov.au/media-and-speeches/statements/facebook-and-cambridge-analytica>>.

<sup>127</sup> Megan Richardson, 'The Battle for Rights — Getting Data Protection Cases to Court' (2015) 2 *Oslo Law Review* 23, 24.

<sup>128</sup> *Ibid.* 29.

<sup>129</sup> *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464; *James Rhodes v OPO* [2015] UKSC 32.

<sup>130</sup> *Google Inc v Vidall-Hall* [2015] EWCA Civ 311.

<sup>131</sup> See Tanya Alpin, 'The Future of Breach of Confidence and the Protection of Privacy' (2007) 7 *Oxford University Commonwealth Law Journal* 137; Megan Richardson, 'Whither Breach of Confidence: A Right to Privacy for Australia' (2002) 26 *Melbourne University Law Review* 381.

contract and formal consent and could apply to both the social media entity that initially held and passed on the data as well as the data analytics firm that subsequently divulged it. The application of its elements is of course dependent on, and open to further analysis in each factual situation.<sup>132</sup> Even so, *prima facie*, that a data-subject would fairly think information to be viewable to only a selected group of people would indicate that the information is, first, of a confidential nature and, second, imparted in circumstances attaching such an obligation. That modern formulations of confidence do not even require a pre-existing relationship, or expression of confidentiality, between parties — especially given the imbalanced power relationship between data-holders vis-a-vis equity's protection of the vulnerable — invites consideration that people assume that their data will not be used for the purpose of manipulating deeply personal information in an objectifying, commodifying, and politicising manner.<sup>133</sup> Equity might even be willing to set aside 'terms and condition' agreements — which are considered perfunctory and rarely read or understood by users — on the basis that it would be unconscionable to enforce them. The third element of confidence — that publication caused detriment — could be satisfied by the distress or dignitary harm inflicted by abusing the data subject's privacy interests. Significantly, this element does not impose the burden on the plaintiff of having to prove economic or psychiatric damage. Finally, and importantly, remembering that 'the real task is to decide what a properly informed conscience has to say about publication' indicates that the profit motive should not be looked on as a satisfactory excuse for using a data subject's private information in a way that objectifies, commodifies, or politicises their information in the manners described by Kennedy.<sup>134</sup>

Interestingly, in English law, surreptitious access to a person's computer hard drive appears to, in itself, entail a breach of confidence, rather than any subsequent misuse of that information.<sup>135</sup> As Lord Neuberger states: 'It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence'.<sup>136</sup> Helpfully, courts have considered information to remain confidential,

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<sup>132</sup> See also *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* [2001] 208 CLR 199, 222 (Gleeson CJ), quoting *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J).

<sup>133</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281.

<sup>134</sup> See also *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* [2001] 208 CLR 199, 222 (Gleeson CJ).

<sup>135</sup> *Imerman v Tchenguiz* [2011] 2 WLR 592.

<sup>136</sup> *Ibid* 619–620 (Lord Neuberger MR).

even if conveyed to a limited audience, unless it has reached the ‘public domain’, being ‘so generally accessible that, in all the circumstances, it cannot be regarded as confidential’.<sup>137</sup> Thus, limited publication to online ‘friends’ might not in itself defeat a plaintiff’s confidence claim when their data was non-consensually passed on by a social media platform. The broad protective scope of confidence may posit ‘something quite significant by way of a [general law] data protection right, despite the constraints on the doctrine’s focus on confidential, not just personal, information’.<sup>138</sup> Further, the prospect of having to defend against multiple individual actions, or against ‘class actions’, might have more of a preventative impact on potential data abusers.

## VI CONSCIENCE AND CONFIDENCE

The confidence cases about dignitary interests cited in this paper — concerning material from private sketches,<sup>139</sup> letters,<sup>140</sup> print photographs,<sup>141</sup> news publications,<sup>142</sup> television reports,<sup>143</sup> video footage,<sup>144</sup> to the advent of internet technologies such as social media and smartphones<sup>145</sup> — show the trajectory of technological development leading into the digital age and the parallel exigency for the law to maintain pace alongside these developments and their potential to aid in the abuse of human dignity — ‘[e]quity, after all, is about more than the vindication of monetary interests’.<sup>146</sup> Equity’s basis in “conscience” can explain its ability to protect dignity. The courts accept that “conscience” is the basis for invoking the doctrine of confidence.<sup>147</sup> Underlying this must be an implicit acceptance that our conscience is the “alarm” in our head that tells us, even if we were to contemplate abusing the confidence of a person who had imparted sensitive personal information, that there is a basic level of respect — dignity — that constitutes a line that we do not cross even in moments of fury or in pursuit of profit. Equity’s conscience is

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<sup>137</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281–282 (Lord Goff).

<sup>138</sup> Richardson (n 127) 32.

<sup>139</sup> *Prince Albert v Strange* [1849] Eng R 255.

<sup>140</sup> *Gee v Pritchard* (1818) 36 ER 670.

<sup>141</sup> *Pollard v Photographic Company* (1888) 40 Ch D 345.

<sup>142</sup> *Campbell v MGN Ltd* [2004] UKHL 22; *Douglas v Hello! Ltd* [2006] QB 125.

<sup>143</sup> *Doe v ABC* [2007] VCC 281.

<sup>144</sup> *Giller* (n 73)

<sup>145</sup> *Wilson* (n 87)

<sup>146</sup> Duane Rudolph, ‘Workers, Dignity, and Equitable Tolling’ (2017) 15 *Northwestern Journal of Human Rights* 126, 159.

<sup>147</sup> *Moorgate Tobacco v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 438 (Deane J); *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* [2001] 208 CLR 199, 227 (Gleeson CJ).



reflective of the human conscience, the inner court in our head that issues a mental injunction that tells us that the envisaged conduct is unacceptable.<sup>148</sup> Equity is a product of a human need for a space in the law that uses conscience to fill in the voids in the common law that would otherwise allow unconscientious treatment of others. Similarly, equity in Aristotle's logic is what fills the gaps in "law" where its application would deliver an unforeseen injustice.<sup>149</sup> Having a private action that enables a person — in a personal relationship, or as a data subject in relationships with data holders — to take private action against the party who abuses their trust over sensitive personal information is one such area of law where equity had developed a concept that the law sorely needs to protect human dignitary interests.

## VII CONCLUSION

As technological development has shown, this action is of increasing relevance. It has potential as a social counterbalance against technological advancement. Section III traced the history of confidence developing as a privacy protection, which gradually became more clearly applicable to dignitary abuses. Section IV discussed a contemporarily relevant way in which confidence protects dignity, with regard to the recent phenomenon of "revenge porn", a context concerning interpersonal relationships where an individual abuses the trust and privacy of another. Section V considered breach of confidence in contexts where the abuser of personal information (or data) is a corporate or government body, which — as the Cambridge Analytica outrage illustrates — bears drastic social significance. If one thing should be taken from this paper, it is that confidence presents a means of redressing, and potentially deterring the types and scope of dignitary abuses that can, now in the digital age, easily be inflicted on people by other individuals, or companies, or governments.

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<sup>148</sup> Irit Samet, 'What Conscience Can Do for Equity' (2012) 3 *Jurisprudence* 13, 33.

<sup>149</sup> See Eric Zhand, 'The Application of Universal Laws to Particular Cases: A Defence of Equity in Aristotelianism and Anglo-American Law' (1996) 59 *Law and Contemporary Problems* 263.

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