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**‘DIVORCE WITH DIGNITY’ AS A JUSTIFICATION FOR PUBLICATION
RESTRICTIONS ON PROCEEDINGS UNDER THE *FAMILY LAW ACT 1975*
(Cth) IN AN ERA OF LITIGANT SELF-PUBLICATION**

GEORGINA DIMOPOULOS*

Upon its enactment, the Family Law Act 1975 (Cth) closed the Family Court of Australia to the general public and imposed a total prohibition on the publication of proceedings. Such privacy protection, together with the advent of ‘no-fault’ divorce, were intended to serve the objective of ‘divorce with dignity’ by ridding divorce of its stigma which had made it a public spectacle and prime media fodder. Subsequent legislative amendments opened the Family Court to the media and permitted the publication of non-identifying accounts of proceedings. In their current form, the publication restrictions imposed by section 121 of the Family Law Act 1975 (Cth) prohibit the publication or dissemination of identifying details of family law proceedings. Adopting a personhood account of privacy, this paper asks whether the privacy protection embodied by section 121 remains justifiable in terms of human dignity, in light of litigants self-publishing details of their family law litigation on digital and social media platforms. It considers how the balance between privacy and free speech should be struck in these circumstances and explains how online self-publication by litigants may violate privacy as well as be an affront to dignity. The paper argues that, notwithstanding the privacy paradox, section 121 can still be justified by ‘divorce with dignity’ to which the Family Law Act 1975 (Cth) aspired but should be redrafted to make explicit that it captures litigant self-publication on digital and social media.

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I INTRODUCTION

Upon its enactment, the *Family Law Act 1975* (Cth) (‘the Act’) placed a presumptive weight on privacy by closing the Family Court of Australia to the general public, along with imposing a total prohibition on the publication of proceedings. These privacy measures were intended to serve the objective of ‘divorce with dignity’ to which the Act aspired. Subsequent legislative amendments opened the Family Court to the media and the public, permitting the publication of non-identifying accounts of proceedings. In their current form, the publication restrictions imposed by section 121 of the Act prohibit the publication or dissemination of an account of family law proceedings that could identify a party, witness, or other person associated with the proceedings.

The underlying rationale for imposing publication restrictions on family law proceedings — to uphold the dignity of separating spouses and their children, by shielding them from the harms of mainstream media publication — has been challenged by the ‘privacy paradox’ permeating contemporary liberal societies. People now insist upon the protection of their privacy yet freely divulge intimate details of their lives on a multitude of digital and social media platforms. As a Family Court judge has duly noted, ‘the Facebook and Twitter generation ... seems to horde information about other people and other things as much as they share information about themselves’.¹ Crucially, I ask: is the privacy protection offered by section 121 of the Act still justifiable in terms of human dignity in the contemporary media and communications environment?

To answer this question, I begin with an overview of the meaning and value of the broad and contested notion of privacy (Part II). I elaborate on the argument that the value of privacy inheres in protecting human dignity, which features in ‘personhood’ accounts of privacy. I then adopt a personhood account to explain the impetus for the introduction of privacy protection for litigants in proceedings under the Act (Part III). I highlight the indignity which previously attended divorce proceedings, stemming from the social and moral stigma attached to fault-based divorce, which made it a public spectacle that encouraged salacious media coverage. With this historical understanding, I challenge the ‘divorce with dignity’ justification for publication restrictions in section 121 of the Act in light of the ‘privacy paradox’ afflicting Australian family law (Part IV).

I argue that section 121 of the Act is out of step with a phenomenon that the drafters of that provision clearly did not anticipate: litigants (and sometimes their children) self-publishing details of their family law litigation online. Litigant self-publication invokes the fraught task of balancing privacy and free speech. While section 121 has been held to capture self-publication on social media platforms,² I submit that the provision should be redrafted to make this explicit.³ In developing this argument, I respond to two criticisms of the personhood account of privacy.

¹ *Gaylard & Cain* [2012] FMCAfam 501 (30 May 2012) [85].

² *Sloan & Stephenson* [2011] FMCAfam 771 (9 February 2011) [52]: ‘Section 121 specifically refers to publication in a newspaper or periodical, or by radio broadcast, television, or other electronic means. That would clearly capture Facebook, My Space, Twitter and any other social networking site.’

³ In support of this argument, see Sharon Rodrick and Adiva Sifris, ‘The Reach and Efficacy of s 121 of the Family Law Act’ (2017) 7(1) *Family Law Review* 30, 53; Australian Law Reform Commission (ALRC), *Family*

The first criticism is that the personhood account is silent on how to balance free speech interests — which can also be justified in terms of protecting and promoting human dignity — against privacy interests in circumstances of litigant self-publication. I argue that the nature of family law proceedings (particularly those involving children) weighs in favour of privacy protection in the form of restrictions on publication, even where it might be considered to violate the free speech interests of litigants who desire to self-publish. The second criticism to which I respond is that the personhood account of privacy fails to identify when a privacy violation would amount to an indignity, in circumstances where litigants themselves share the intimacies of their private lives online. I explain that legitimate privacy interests are at stake even when one voluntarily discloses and shares information about his or her family law proceedings online. I suggest that litigant self-publication may constitute both a privacy violation and an indignity to both the litigant himself or herself (in regards to control over the information that is published) and to other participants in those proceedings (in terms of knowledge of or consent to the publication).

Notwithstanding the conceptual and practical challenges posed by litigant self-publication to ‘divorce with dignity’ as a justification for the value of privacy in proceedings under the Act, I conclude that the privacy protection embodied by section 121 must be strengthened. To do otherwise — that is, to maintain the *status quo*, or more radically, to do away with the publication restrictions on family law proceedings — would swing the pendulum in favour of free speech. This would enable the media dragon that preyed on litigants and their children prior to the enactment of the Family Law Act (albeit in a different form) to again rear its voyeuristic head. Given the realities of contemporary family law litigation, to ignore the perils of social media publication would indeed amount to an affront to the dignity of those involved.

Law for the Future — An Inquiry into the Family Law System (Report No 135, March 2019), 441-2 [14.73], [14.75]-14.76] and submissions cited therein.

II THE MEANING AND VALUE OF PRIVACY

Privacy is often labelled as an ‘umbrella term’, capturing a broad range of interests.⁴ Some theories endeavour to explain privacy’s meaning through a single defining feature. The most enduring and influential of these accounts include: the right to be let alone;⁵ secrecy;⁶ limited access to the self;⁷ control over information;⁸ intimacy;⁹ and personhood.¹⁰ Recent privacy law scholarship has emphasised theories which position social context as pivotal to understanding, defining, and justifying privacy.¹¹ A minority of scholars has argued against an independent right to privacy.¹²

The widespread disagreement about ‘privacy’ as a concept emanates from disagreements about the values that privacy serves and how those values are conceptualised. Consequentialist approaches view privacy as instrumental to something which is assumed or known to be valuable. The value of privacy lies, for instance, in its ability to foster intimate relationships,¹³ to enable individual autonomy,¹⁴ to protect human

⁴ Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics and the Rise of Technology* (Cornell University Press, 1997) 13; Daniel Solove, ‘A Taxonomy of Privacy’ (2006) 154(3) *University of Pennsylvania Law Review* 477, 486; Annabelle Lever, *On Privacy* (Routledge, 2012) 4, 7.

⁵ Samuel Warren and Louis Brandeis, ‘The Right to Privacy’ (1890) 4(5) *Harvard Law Review* 193, 193, 195 (citation omitted).

⁶ Sissela Bok, *Secrecy: On the Ethics of Concealment and Revelation* (Vintage Books, 1983) 11; Sidney Jourard, ‘Some Psychological Aspects of Privacy’ (1966) 31(2) *Law and Contemporary Problems* 307, 307.

⁷ Ruth Gavison, ‘Privacy and the Limits of Law’ (1980) 89(3) *Yale Law Journal* 421, 423; Hyman Gross, ‘The Concept of Privacy’ (1967) 42(1) *New York University Law Review* 34, 35–36.

⁸ Alan Westin, *Privacy and Freedom* (Atheneum, 1967) 7; Arthur Miller, *The Assault on Privacy: Computers, Data Banks and Dossiers* (University of Michigan Press, 1971) 25; Jerry Kang, ‘Information Privacy in Cyberspace Transactions’ (1998) 50(1) *Stanford Law Review* 1193, 1205; Charles Fried, ‘Privacy’ (1968) 77(3) *Yale Law Journal* 475, 482.

⁹ Julie Inness, *Privacy, Intimacy and Isolation* (Oxford University Press, 1992) 56; Robert Gerstein, ‘Intimacy and Privacy’ in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984) 265, 265, 270-71.

¹⁰ Stanley Benn, ‘Privacy, Freedom and Respect for Persons’ in Schoeman (n 9) 223, 228-9; Jeffrey Reiman, ‘Privacy, Intimacy and Personhood’ (1976) 6(1) *Philosophy and Public Affairs* 26, 37.

¹¹ Daniel Solove, ‘Conceptualizing Privacy’ (2002) 90(1) *California Law Review* 1088; Solove, ‘A Taxonomy of Privacy’ (n 4); Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Law Books, 2010).

¹² See Judith Jarvis Thomson, ‘The Right to Privacy’ (1975) 4(4) *Philosophy and Public Affairs* 295, 306, 312-13: Thomson argues that privacy is a ‘cluster of rights’ and is ‘derivative’ of other, more fundamental rights, particularly property rights and rights over the person, and so should be reduced to these other rights.

¹³ James Rachels, ‘Why Privacy is Important’ (1975) 4(4) *Philosophy and Public Affairs* 323, 326; Fried (n 8) 477-8.

¹⁴ Beate Rossler, *The Value of Privacy* (Polity, 2005) 1, 75; Joseph Kupfer, ‘Privacy, Autonomy and Self-Concept’ (1987) 24(1) *American Philosophical Quarterly* 81, 81.

dignity,¹⁵ and to facilitate the effective functioning of democratic governments.¹⁶ Privacy is worthy of protection for its beneficial consequences. By contrast, deontological approaches treat privacy as inherently or intrinsically valuable; privacy derives its value for what it 'is', rather than what it 'does'.¹⁷ The instrumental and intrinsic values of privacy are not necessarily mutually exclusive. Indeed, the claim that privacy is valuable for the protection of human dignity is defensible on both consequentialist grounds (dignity is valuable because it maximises the individual's capacity to construct and act upon his or her own set of values and life goals in pursuit of the good life)¹⁸ and deontological grounds (dignity is an end in itself, valued for its own sake).¹⁹ In this paper, I adopt a personhood account of privacy to elucidate and critique the justification offered by the original drafters of the Act for the privacy measures introduced — namely, that privacy's value inheres in respect for human dignity.

A Privacy as Personhood and Respect for Human Dignity

Human dignity as a justification for privacy's value is a common feature of 'personhood' accounts of privacy: the protection of 'those attributes of an individual which are irreducible to his [or her] selfhood'.²⁰ Privacy, on such accounts, serves to shield individuals from conduct that is 'demeaning to individuality' and 'an affront to personal dignity'.²¹ In their seminal article which formulated privacy as the 'right to be let alone', Samuel Warren and Louis Brandeis wrote that the principle of 'an inviolate personality' underscored the right to privacy.²² Ferdinand Schoeman described a 'specific privacy interest, connected in a profound way with the recognition of human moral character'.²³ A right to privacy, on this understanding, is a moral right, possessed by all humans by

¹⁵ Edward Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39(1) *New York University Law Review* 962, 973–74.

¹⁶ Priscilla Regan, *Legislating Privacy: Technology, Social Values and Public Policy* (University of North Carolina Press, 1995) 225–27.

¹⁷ Lever (n 4) 17. See, for example, Katrin Schatz Byford, 'Privacy in Cyberspace: Constructing a Model of Privacy for the Electronic Communications Environment' (1998) 24(1) *Rutgers Computer and Technology Law Journal* 1, 6 (privacy has an 'inherently positive value'); Benn (n 10) 243; Inness (n 9) 95.

¹⁸ Eric Mitnick, *Rights, Groups, and Self-Invention: Group-Differentiated Rights in Liberal Theory* (Ashgate, 2006) 21; David Cummiskey, 'Dignity, Contractualism and Consequentialism' (2008) 20(4) *Utilitas* 383, 383; Philip Pettit, 'Consequentialism and Respect for Persons' (1989) 100 *Ethics* 116, 120, 124.

¹⁹ See Bloustein (n 15) 973–74; Benn (n 10) 229.

²⁰ Professor Paul Freund, quoted in J Braxton Craven Jr, 'Personhood: The Right to Be Let Alone' (1976) 4 *Duke Law Journal* 699, 702 (n 16).

²¹ Bloustein (n 15) 973.

²² Warren and Brandeis (n 5) 205.

²³ Ferdinand Schoeman, 'Privacy: Philosophical Dimensions of the Literature' in Schoeman (n 9) 1, 14.

virtue of their shared humanity.²⁴ It protects an individual's 'interest in becoming, being, and remaining a person'.²⁵ In the United States, the conceptualisation of privacy as personhood has found concrete expression as a legal right in Supreme Court constitutional cases regarding family decision-making in matters of reproductive control.²⁶

The essence of the privacy-dignity nexus in liberal societies is that the 'very essence of personal freedom and dignity' is the individual's ability to control access to (certain aspects of) himself or herself.²⁷ The liberal concept of privacy is constructed around three domains,²⁸ which are predicated on an ideological separation of life into seemingly opposite spheres of 'private' and 'public' responsibilities and activities. The spatial domain of privacy covers personal space and relationships, selective access to certain areas, as well as the intimate and the family. The informational domain encompasses an individual's ability to control and access information about himself or herself. The decisional domain protects an individual's ability to make decisions which contribute to defining his or her identity, free from the interference of other individuals or the state.²⁹ It creates an area for choices, the development of 'plans of life'³⁰ and a sense of self. Through its three domains, privacy delineates the realms required to protect human dignity and the inviolability of the person.³¹ Each domain of privacy serves the value of human dignity in different ways, by regulating access to the individual; by regulating the selective withholding and disclosure of information by, and about, the individual; and by protecting the individual's capacity to make decisions, behave, take action, and pursue a way of life of his or her choosing.

²⁴ Fried (n 8) 478 (privacy is one of the 'basic rights in persons, rights to which all are entitled equally, by virtue of their status as persons').

²⁵ Reiman (n 10) 44.

²⁶ See *Griswold v Connecticut*, 381 US 479 (1965); *Eisenstadt v Baird*, 405 US 438 (1972); *Roe v Wade* 410 US 113 (1973). In *Planned Parenthood v Casey*, 505 US 833, 851 (1992), the Supreme Court explained that the constitutional right to privacy protected 'matters ... involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy ... At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood where they formed under compulsion of the State'.

²⁷ Bloustein (n 15) 973.

²⁸ DeCew (n 4) 75-8; Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Rowman & Littlefield, 1988) 15; Rossler (n 14) 9; Kang (n 8) 1202-03.

²⁹ DeCew (n 4) 77-8.

³⁰ John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 407-15, §63.

³¹ Rossler (n 14) 70.

According to Edward Bloustein, ‘our Western culture defines individuality as including the right to be free from certain types of intrusions’.³² However, in my view, personhood is not merely a negative freedom — the absence of unwanted intrusion and interference — but also a positive freedom, in the sense of an individual having the ‘capacity to choose his or her own roles and identities, and to rethink those choices’.³³ Privacy in liberal societies is valuable and necessary for both freedom *from* intervention by the state and other individuals; and freedom *to* forge a life plan and fulfil that plan in pursuit of a rewarding life.³⁴ Stanley Benn’s personhood conception of privacy refers to ‘respect for someone as a person, as a chooser’.³⁵ On Benn’s view, this implies respect for the individual as ‘one engaged on a kind of self-creative enterprise, which could be disrupted, distorted, or frustrated even by so limited an intrusion as watching’.³⁶ The notion of self-presentation illustrates the active role that individuals play in constructing their social identity, by acting so as to be seen by others in the way they want to be seen.³⁷ So the clandestine observation of an individual — the classic ‘Peeping Tom’ — would amount to a violation of privacy, even in the absence of any actual harm to the individual being observed, because it would be an affront to the individual’s dignity.³⁸ Both secret observation (Peeping Tom) and known or obvious, yet unwanted, observation of an individual (such as by others reading an account of the individual’s family law proceedings in a newspaper or on the internet) would, on the personhood account, violate the individual’s privacy and also his or her dignity. They would do so by fundamentally altering the conditions in which the individual acts and makes choices.³⁹ Understood thus, human dignity has an integral connection with human agency, and the ability of individuals to exercise free will. Privacy justified in terms of human dignity does indeed overlap with autonomy and liberty,⁴⁰ yet they remain distinct concepts and justifications for privacy’s value.

³² Bloustein (n 15) 973.

³³ Helen Reece, *Divorcing Responsibly* (Hart Publishing, 2003) 13.

³⁴ Rossler (n 14) 44.

³⁵ Benn (n 10) 242. For an analysis of the notion of respect for persons as an ethical principle, see Stephen D Hudson, ‘The Nature of Respect’ (1980) 6(1) *Social Theory and Practice* 69.

³⁶ Benn (n 10) 242.

³⁷ Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989) 15–16.

³⁸ Benn (n 10) 228–30.

³⁹ Reimann (n 10) 37.

⁴⁰ DeCew (n 4) 44; Michael Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Harvard University Press, 1996) 93.

A distinction must also be drawn between a dignity interest and a reputation interest. Some judges have identified a connection between dignity and reputation, conceptualising reputation as part of the individual's inherent or innate dignity.⁴¹ However, Robert Post has noted that 'it is not immediately clear how reputation, which is social and public, and which resides in the "common or general estimate of a person," can possibly affect the "essential dignity" of a person's "private personality"'.⁴² Post adds that a 'gulf' separates reputation and dignity, as well as the 'the private and public aspects of the self'.⁴³ A case that illuminates the distinction between the two interests well is *Bonome v Kaysen*.⁴⁴

In *Bonome*, Joseph Bonome, the ex-partner of prominent author Susanna Kaysen (of *Girl, Interrupted* fame), brought an action against Kaysen and the publisher of Kaysen's memoir, *The Camera My Mother Gave Me*, alleging an invasion of privacy. Bonome's complaint arose out of several passages from Kaysen's memoir, which recounted details of the intimate relationship between the two. Kaysen's memoir did not refer to Bonome by name and changed details of his life (such as his occupation and place of origin). However, following publication, Bonome discovered that many of his friends and family members had read the memoir and understood that the portrayal of 'the boyfriend' therein depicted him. Muse J accepted that 'undoubtedly, the information revealed was of an intensely intimate and personal nature' and 'lay at the core of the most intimate and highly personal sphere of one's life', describing as it did, in at times graphic detail, the sexual relationship between Bonome and Kaysen.⁴⁵ The exposure of this information violated Bonome's dignity, by revealing what Daniel Solove has called 'certain physical and emotional attributes ... that people view as deeply primordial',⁴⁶ which caused Bonome to suffer 'severe personal humiliation'.⁴⁷ The information disclosed about Bonome in Kaysen's memoir (albeit not identifying him by name) simultaneously offended Bonome's reputation interest, in that it revealed information about Bonome that

⁴¹ See, for example, *Hill v Church of Scientology* (1995) 126 DLR (4th) 129, 162-3 (Cory J); *Reynolds v Times Newspapers* [2001] 2 AC 127, 201 (Lord Nicholls of Birkenhead).

⁴² Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74(1) *California Law Review* 691, 708 (citation omitted).

⁴³ *Ibid.*

⁴⁴ 17 Mass L Rep 695 (2004).

⁴⁵ *Ibid.* 4.

⁴⁶ Solove, 'A Taxonomy of Privacy' (n 4) 536.

⁴⁷ *Bonome v Kaysen*, 17 Mass L Rep 695 (2004) 2.

was used by others to judge his character — in particular, the depiction of Bonome as ‘being emotionally unavailable and insensitive to Kaysen's condition [severe vaginal pain]’ and ‘the suggestion that he raped her’.⁴⁸ The Court found that Bonome’s reputation had been ‘severely damaged among a substantial percentage of his clients and acquaintances’.⁴⁹ The intimate, embarrassing details that Kaysen revealed in her memoir about her relationship with Bonome thus adversely impacted both Bonome’s dignity (affecting his subjective sense of self) and his reputation (the ‘public’ aspect of the self, causing him to lose friends and clients).

Personhood accounts of privacy have been labelled insufficient or problematic for their reductive nature (to say that privacy is inherently valuable by equating it with human dignity makes a separate theory of privacy redundant),⁵⁰ and for their lack of clarity regarding the concepts of ‘personhood’ and ‘dignity’.⁵¹ Another challenge is that the dignity justification for privacy’s value is silent on how to accommodate or balance competing rights or interests — in particular, free speech — which can also be justified in terms of protecting and promoting human dignity.⁵² An additional criticism of personhood accounts of privacy is that they are vague about when a privacy violation would be an indignity, and which privacy protections are required to preserve human dignity.⁵³ I respond to these criticisms in Part IV below through an analysis of the privacy paradox afflicting contemporary family law proceedings. But first, I adopt the aforementioned personhood account of privacy to elucidate the ‘divorce with dignity’ justification for privacy’s value in the development of the Act.

⁴⁸ Ibid 4.

⁴⁹ Ibid 2. See also Benn (n 10) 226, who refers to ‘publishing details of someone's sex life and ruining his career’.

⁵⁰ Rossler (n 14) 71.

⁵¹ Solove, ‘Conceptualizing Privacy’ (n 11) 1118; Post (n 42) 715. See also Dieter Grimm, Alexandra Kemmerer and Christoph Mollers (eds), *Human Dignity in Context: Explorations of a Contested Concept* (Hart, 2018).

⁵² Mark Tunick, *Balancing Privacy and Free Speech: Unwanted Attention in the Age of Social Media* (Routledge, 2014) 57.

⁵³ Ibid 56–7; Daniel Solove, *Understanding Privacy* (Harvard University Press, 2008) 85–6; Eugene Volokh, ‘Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People from Speaking About You’ (2000) 52(1) *Stanford Law Review* 1, 53; Gavison (n 7) 438. Ruth Gavison has argued that an individual’s dignity may be affronted in ways other than by violating the individual’s privacy. She gives as examples begging and selling one’s body in order to survive.

III NO-FAULT DIVORCE, NO MORE SALACIOUS STORIES – PROMOTING ‘DIVORCE WITH DIGNITY’ WITH
THE *FAMILY LAW ACT 1975* (CTH)

The regulation of media publication of proceedings under the Act was directed to protecting family law litigants and their children from the humiliation, indignities, and tarnished reputations that arose in divorce proceedings in the state courts prior to its enactment. In this Part, I contextualise the justification articulated by the original drafters of the legislation for two legal mechanisms that sought to protect litigant privacy: restrictions on access to the Family Court and a total prohibition on the publication of its proceedings.

A The Public Spectacle of Divorce prior to the Family Law Act 1975 (Cth)

Prior to the enactment of the Act, the social and moral stigma attached to fault-based divorce made divorce a public spectacle: media reports of adultery, cruelty, and desertion, replete with ‘gory details’, thrived.⁵⁴ State courts exercising family law jurisdiction had a symbiotic relationship with the mainstream press,⁵⁵ as the ‘disgrace of publicity’ was intended to act as a deterrent to divorce and to have a ‘salutary effect’ on family life,⁵⁶ upholding the sanctity of marriage as a significant social institution. The absence of privacy reflected public policy goals of family law to deter misconduct in marriage through ‘punishment, stigma and public shaming’ of ‘blameworthy’ spouses.⁵⁷ The punitive purpose of fault-based divorce was thus for the ‘guilty’ party to think less of himself or herself when contemplating how he or she was perceived by others.⁵⁸

Separating spouses were degraded by having their lives exposed to public view. On the personhood account of privacy, the damage was ‘to an individual’s self-respect in being made a public spectacle’.⁵⁹ For separating spouses to seek the legal termination of their marriage was to have information about them — such as details of their sexual

⁵⁴ Shurlee Swain, *Born in Hope: The Early Years of the Family Court of Australia* (UNSW Press, 2012) 11.

⁵⁵ Deborah Cohen, *Family Secrets: Shame and Privacy in Modern Britain* (Oxford University Press, 2013) 45. See also Lisa Waller and Kristy Hess, ‘The Pillory Effect: Media, the Courts and the Punitive Role of Public Shaming in Australia’ (2001) 16(3) *Media and Arts Law Review* 229, 237.

⁵⁶ Cohen (n 55) 39. See also Gail Savage, ‘Erotic Stories and Public Decency: Newspaper Reporting of Divorce Proceedings in England’ (1998) 41(2) *Historical Journal* 511.

⁵⁷ John Dewar and Stephen Parker, ‘English Family Law since World War II: From Status to Chaos’ in Sanford Katz, John Eekelaar and Mavis Maclean (eds), *Cross Currents: Family Law and Policy in the US and England* (Oxford University Press, 2000) 123, 126.

⁵⁸ James David Velleman, ‘The Genesis of Shame’ (2001) 30(1) *Philosophy and Public Affairs* 27, 28.

⁵⁹ Bloustein (n 15) 981.

behaviours and drinking habits — disclosed to a broad, undefined audience, which was unlikely to align with how the parties sought to present themselves to other known or even unknown individuals. An aim of some family law reform advocates was to eliminate this unsavoury aspect of divorce proceedings by ‘tak[ing] away the dreadful stories’.⁶⁰ The genesis of privacy protection lay in the fundamental philosophical shift in family law which occurred with the introduction of the Act. This legislation was a response to Australia’s changing social mores, including increasing urbanisation and industrialisation, the growing number of married women entering the paid workforce, and the diminishing role of religion in society.⁶¹ Also influential were the lessening stigma of de facto relationships and ‘illegitimate’ births amidst a sexual revolution.⁶² Public sentiment largely favoured ridding existing divorce laws, which were described as ‘archaic, unrealistic, cruel, and so completely at variance with modern thought’,⁶³ of matrimonial fault. The Act sought to transform a punitive, fault-based divorce regime and thereby rid divorce of its public shame and stigma.

B Overcoming Indignity Through Closed Courts and Prohibition on Publication of Proceedings

Then Commonwealth Attorney-General, Lionel Murphy, had aspired that the Act would offer a solution to problems arising from marriage breakdown that was ‘compatible with the dignity of the individual’.⁶⁴ Parliamentary debates over the Family Law Bill stressed that the inquiry into fault under the existing family law legislation, the *Matrimonial Causes Act 1959* (Cth), involved ‘indignity and humiliation’ to the parties. By contrast, a ‘good’ divorce law would remove the provisions ‘that crush the human dignity of those who face the courts in sorrow of marriage dissolution’.⁶⁵ Dignity in this context invoked the value

⁶⁰ Swain (n 54) 11-12, 85.

⁶¹ For a detailed overview of the changes in society that provided an impetus for the reforms introduced by the *Family Law Act 1975* (Cth), see Leonie Star, *Counsel of Perfection: The Family Court of Australia* (Oxford University Press, 1996) 51–71. See also Elizabeth Evatt, ‘Foreword’ in Henry Finlay, *To Have, But Not To Hold: A History of Attitudes to Marriage and Divorce in Australia, 1858–1975* (Federation Press, 2005) viii–ix.

⁶² Helen Rhoades and Shurlee Swain, ‘A Bold Experiment? Reflections on the Early History of the Family Court’ (2011) 22 *Australian Family Lawyer* 1, 2.

⁶³ Commonwealth, *Parliamentary Debates*, Senate, 29 October 1974, 2017 (Petition, Family Law Bill).

⁶⁴ Commonwealth, *Parliamentary Debates*, Senate, 1 August 1974, 760 (Lionel Murphy, Attorney-General). See also Star (n 61) 137; Lawrie Moloney, ‘Lionel Murphy and the Dignified Divorce: Of Dreams and Data’ in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 245, 245–48, 255–56.

⁶⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 1975, 182 (Phillip Lynch); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 February 1975, 928 (Ralph Hunt).

of privacy to the 'core self'⁶⁶ and privacy protection was considered vital because it demonstrated that family law litigants deserved respect during an emotionally fraught period of their lives. Many shared the view that '[p]eople should have the right to go through this unfortunate, sad, depressing, dismal business of divorce ... with a maximum degree of privacy and the retention of such dignity as they may possibly hope to retain in the circumstances'.⁶⁷ This view echoed Bloustein's argument that an individual whose thoughts, desires, and 'private' realms of life are exposed to public scrutiny 'has been deprived of his [or her] individuality and human dignity'.⁶⁸ Henceforth, the aspiration for 'divorce with dignity' became something of a mantra for the promotion of the Act.

To this end, the Act abolished the various fault-based matrimonial offences as grounds for divorce and replaced these with a single, no-fault ground: irretrievable breakdown of the marriage evidenced by 12 months' separation.⁶⁹ This ground would, according to legislators, introduce a significant feature into Australian family law, namely, that 'adult people should be given the credit and the dignity of being able to make decisions for themselves'.⁷⁰ The Act also dramatically altered the media's traditional role in relation to court proceedings. Section 97 provided that proceedings in the Family Court of Australia, or in another court exercising jurisdiction under the Act, shall be heard in closed court. Section 121 imposed a total prohibition on the publication of any statement or report that proceedings had been instituted under the Family Law Act, and any account of evidence given or other particulars in proceedings. These two prohibitions — no public access and no publication — reflected Bloustein's understanding that '[p]hysical intrusion upon a private life and publicity concerning intimate affairs are simply two different ways of affronting individuality and human dignity'.⁷¹ These provisions were a legislative pronouncement that relationship breakdown, while previously 'the preserve of public morality'⁷² and a matter of public shame, was now a private process deserving of respect, in which the media and the general public had no legitimate interest. Sections 97 and 121

⁶⁶ Westin (n 8) 32.

⁶⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1385 (Bill Graham).

⁶⁸ Bloustein (n 15) 1003.

⁶⁹ *Family Law Act 1975* (Cth) ss 48, 49(2). For a more detailed overview of the history of legislative change in Australian family law, including the advent of the *Family Law Act 1975* (Cth), and the underlying policy of its provisions, see Kep Enderby, 'The *Family Law Act*: Background to the legislation' (1975) 1(1) *University of New South Wales Law Journal* 10.

⁷⁰ Commonwealth, *Parliamentary Debates*, Senate, 19 May 1975, 2419 (Kep Enderby).

⁷¹ Bloustein (n 15) 982.

⁷² Elizabeth S Scott, 'Rehabilitating Liberalism in Modern Divorce Law' (1994) 2 *Utah Law Review* 687, 706.

served to maintain the dignity of separating spouses by restricting — and indeed eliminating — publicity, which would otherwise make them a public spectacle. This subversion of open justice signalled a major shift in what society regarded as both an invasion of privacy and an affront to dignity.

The Act was subsequently amended by the *Family Law Amendment Act 1983* (Cth) to provide for proceedings to be held in open court. Privacy remained the prerogative of separating spouses, while secrecy — which had manifested itself most notably with the closure of the Family Court — was considered destructive, particularly for the Court's integrity.⁷³ The reporting restrictions imposed by section 121 now permitted the publication of reports of family law proceedings, provided that participants were not identified. The amendments made to sections 97 and 121 struck what legislators considered to be a 'fair balance between the conflicting, but equally valid, needs for public scrutiny of courts and for personal privacy' in this 'delicate area' of personal relationships.⁷⁴ In its current form, section 121 of the Act prohibits the publication or dissemination of an account of family law proceedings that could identify a party, witness, or other person associated with the proceedings. Section 121 relevantly provides:

(1) A person who publishes in a newspaper or periodical publication, by radio broadcast or television, or by any other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:

(a) a party to the proceedings;

(b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or

(c) a witness in the proceedings;

⁷³ Swain (n 54) viii, 85-6; Star (n 61) 138; John Fogarty, 'Thirty Years of Change' (2006) 18 *Australian Family Lawyer* 4, 7; Peter Nygh, 'Publicity and the Family Court' (1998) 12 *Australian Journal of Family Law* 1, 1.

⁷⁴ Commonwealth, *Parliamentary Debates*, Senate, 20 October 1981, 1373-74 (Peter Durack).

is guilty of an offence punishable, upon conviction by imprisonment for a period not exceeding one year.⁷⁵

The term ‘other electronic means’ was inserted into sub-section 121(1) in 2000,⁷⁶ intended to capture ‘all forms of electronic means in order to cover current forms of dissemination of information’.⁷⁷ Sub-section 121(3) lists the particulars sufficient to ‘identify’ a person for the purposes of violating the publication restrictions imposed by that section.⁷⁸

Neither the original drafters of section 121 of the Act, nor those who subsequently amended that provision, anticipated the phenomenon of litigants (and sometimes their children) self-publishing details of their own involvement in family law proceedings on digital and social media platforms. Technological developments have transformed the issue of *whether* individuals involved in family law proceedings should be known and identified, into one of *how* individuals involved in those proceedings are known and identified — by whom, to whom, how, and for what purpose they are made visible.⁷⁹ In light of this phenomenon, can it still be said that the value of privacy for family law litigants lies in promoting ‘divorce with dignity’? I grapple with this question in Part IV and argue that the publication restrictions in section 121 of the Act remain justifiable in terms of human dignity — notwithstanding the privacy paradox.

⁷⁵ Section 121(2) of the Family Law Act contains a further prohibition: ‘A person who, except as permitted by the applicable Rules of Court ... publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means (otherwise than by the display of a notice in the premises of the court), a list of proceedings under this Act, identified by reference to the names of the parties to the proceedings, that are to be dealt with by a court commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.’ Prosecutions for breach of section 121 are extremely rare, with only seven such prosecutions completed since that provision was enacted: see ALRC (n 3) 437 [14.57].

⁷⁶ *Family Law Amendment Act 2000* (Cth) s 100. ‘Electronic means’ is defined in section 121(11) of the Family Law Act.

⁷⁷ Explanatory Memorandum, Family Law Amendment Bill 1999 (Cth) item 100.

⁷⁸ These particulars include the person’s: name, title, pseudonym or alias; address of residence or work; physical description or dress style; any employment, occupation or profession engaged in; relationship to identified relatives or association with identified friends or acquaintances; recreational interests or political, philosophical or religious beliefs or interests; and any property interests. In a written or televised account of proceedings, a picture of the person is a particular considered sufficient to identify the person; as is the inclusion of the person’s voice in a broadcast or televised account of proceedings: see *Family Law Act 1975* (Cth) s 121(3).

⁷⁹ David Phillips, ‘From Privacy to Visibility: Context, Identity, and Power in Ubiquitous Computing Environments’ (2005) 23(2) *Social Text* 95, 95.

IV MAKING SENSE OF THE PRIVACY PARADOX: LITIGANT SELF-PUBLICATION IN PROCEEDINGS UNDER
THE *FAMILY LAW ACT 1975* (CTH)

Thus far in this paper, I have offered a conceptualisation of privacy in terms of personhood in the context of Australian family law and have explained its value as protecting and upholding human dignity. I have shown that protecting the privacy of separating spouses and their children — initially through the closure of the Family Court to the general public and by prohibiting publication of accounts of its proceedings — was intended to serve the objective of ‘divorce with dignity’ to which the Act aspired. In this Part, I argue that the privacy paradox permeating contemporary liberal societies has challenged the underlying rationale for protecting the privacy interests of litigants in proceedings under the Act. This paradox enlivens two criticisms of the personhood account of privacy noted in Part II: first, that it does not satisfactorily accommodate competing interests such as free speech; secondly, that identifying when a privacy violation will amount to an indignity, and the form of privacy protection required to preserve human dignity, are problematic. I now turn to respond to these criticisms. I propose some factors that may be used to balance free speech and privacy in the context of litigant self-publication on social media in family law proceedings and suggest that privacy should outweigh free speech in these circumstances. I also propose two ways in which online self-publication by litigants about their family law proceedings can violate privacy and be an affront to dignity. In doing so, I advance the argument that the publication restrictions imposed by section 121 of the Act may appear difficult to reconcile with the phenomenon of litigant self-publication, but those publication restrictions can still be justified in terms of human dignity. I also argue, from a practical perspective, that section 121 should be redrafted to make explicit that the provision captures litigants who self-publish details of their own litigation on social media.

A The Privacy Paradox: Demanding both Privacy and Publicity

The rapid development of digital and social media technologies has threatened to disrupt, and in many instances has disrupted, settled expectations of audience segregation and of ‘public’ and ‘private’ realms of life. As Daniel Solove has noted, ‘our activities often take

place in the twilight between public and private'.⁸⁰ Individuals now act in contexts where there are ambiguous social practices (such as with social media sites) or in which established social practices are disturbed (such as the nature of exposure in 'public'). Litigant self-publication illustrates what has been described as the 'privacy paradox' permeating contemporary liberal societies.⁸¹ People now insist upon the protection of their privacy, yet freely divulge intimate details of their lives on digital and social media which facilitate the free and ongoing availability of information. In the words of an unattributed 'meme' that appeared recently on my Facebook news feed: 'People used to keep diaries, and got mad when anyone read them. Now we post stuff online, and get mad when people don't read it'. Jill Lepore has described the privacy paradox as

[a] ... culture obsessed, at once, with being seen and with being hidden, a world in which the only thing more cherished than privacy is publicity. In this world, we chronicle our lives on Facebook while demanding the latest and best form of privacy protection ... so that no one can violate the selves we have so entirely contrived to expose.⁸²

Australian family law is experiencing this privacy paradox too, particularly in proceedings under Part VII of the Act which deals with children's matters, including the making of parenting orders. In some cases, parents have self-published details of their family law proceedings online (in *prima facie* breach of section 121)⁸³ and in others, they have sought permission from the Family Court to publish or to restrain publication by the other parent.⁸⁴ Parents have also sought to procure publication of accounts of their litigation in mainstream media outlets.⁸⁵ Judges have made orders restraining parents

⁸⁰ Daniel Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007) 166.

⁸¹ See Patricia A Norberg, Daniel R Horne and David A Horne, 'The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors' (2007) 41(1) *The Journal of Consumer Affairs* 100.

⁸² Jill Lepore, 'The Prism: Privacy in an Age of Publicity', *New Yorker* (online, 24 June 2013) <<https://www.newyorker.com/magazine/2013/06/24/the-prism>>. See also Robert Carey and Jacquelyn Burkell, 'A Heuristics Approach to Understanding Privacy-Protecting Behaviours in Digital Social Environments' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 65, 67-8; Nissenbaum (n 11) 104-05; Cohen (n 55) xv, xviii, 252.

⁸³ For example, *Lackey & Mae* [2013] FMCAfam 284 (4 April 2013); *Xuarez & Vitela* [2012] FamCA 574 (25 July 2012); *Prentice & Bellas* [2012] FamCA 108 (24 February 2012); *Ellershaw & Servant* [2013] FamCA 510 (9 July 2013); *Longford v Byrne* [2015] FCCA 2504 (28 August 2015).

⁸⁴ For example, *Seaward & MacDuff (No 4)* [2012] FamCA 1147 (19 October 2012).

⁸⁵ For example, *Denny & Purdy* [2009] FamCA 547 (26 June 2009); *Samuels & Errington (No 2)* [2007] FamCA 507 (5 June 2007); *Love & Shillington (No 2)* [2007] FamCA 566 (5 April 2007); *G & B* [2007] FamCA 343 (20 April 2007).

from digital or social media publication,⁸⁶ and requiring removal of already published material.⁸⁷ The impact on children's privacy and dignity of their parents' social media usage in this context is a topic for another paper. My present concern is to consider how litigant self-publication bears on the 'divorce with dignity' justification for imposing publication restrictions on proceedings under the Act, as a means of protecting the privacy of litigants.

However, viewed in this light, section 121 can be understood as 'coercing privacy'⁸⁸ for those litigants who desire to self-publish details of their family law proceedings on digital and social media, by impeding selective and self-controlled information disclosure. 'Coercing privacy' is a phrase coined by Anita Allen to describe the problem of the law imposing privacy norms to ensure that individuals live according to a particular understanding of privacy as a 'foundation' or 'precondition' of a liberal society.⁸⁹ Allen asks, 'Are we forced to be private? Should we be? Should liberals urge government to force people to ... keep sexual and family matters confidential...?'.⁹⁰ In circumstances where individuals themselves are willing to share with their online networks (of hundreds, potentially thousands) that they are engaged in family law proceedings, could this proclivity for publicity be said to violate the dignity of those individuals?

The privacy paradox, then, enlivens an interest that seemingly tugs in the opposite direction to privacy: free speech. In the following section, I consider how privacy interests may be weighed against free speech interests in family law proceedings that involve litigant self-publication on social media.

B Balancing Act: Privacy and Free Speech as 'Flip Sides of the Same ... Coin'

If privacy interests legitimately are at stake in cases of litigant self-publication,⁹¹ whether free speech interests should outweigh those privacy interests in proceedings under the Act will involve a balancing exercise. The task will be influenced by factors such as the

⁸⁶ For example, *Darcy & Cameroon (No 4)* [2010] FamCA 351 (16 April 2010); *Snell & Snell (No 5)* [2015] FamCA 420 (12 May 2015).

⁸⁷ For example, *Sullivan & Tyler* [2015] FamCAFC 167 (28 August 2015); *Darcy & Cameroon (No 3)* [2010] FamCA 347 (25 March 2010); *Snell & Snell (No 5)* [2015] FamCA 420 (12 May 2015).

⁸⁸ Anita Allen, 'Coercing Privacy' (1999) 40(3) *William and Mary Law Review* 723, 728-9.

⁸⁹ *Ibid* 740, 756.

⁹⁰ *Ibid* 728. See also Anita Allen, 'Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm' (2000) 32(1) *Connecticut Law Review* 861, 871-72.

⁹¹ Cf Tunick (n 52) 130.

extent to which the free speech discloses or exposes private, intimate details of the lives, feelings, thoughts, or activities of others,⁹² including the self-publishing litigant's former spouse or children (which may tend towards salacious gossip of the kind that thrived in reports of divorce proceedings prior to the Act); and the extent to which the free speech addresses a matter of public concern (and how broadly or narrowly this might be construed).⁹³ In cases where the Family Court of Australia has been tasked with balancing privacy and free speech interests, the need to protect the best interests of children involved in the proceedings has weighed heavily in favour of curtailing the free speech interests of the parties.⁹⁴

Where Family Court litigation involves public figures, should the balance between privacy and free speech be calibrated differently? In my view, the status of the participants should not shift the balance between these two interests. Privacy concerns and the desire to maintain anonymity through the maintenance of publication restrictions have been made explicit in proceedings under the Act involving public figures of 'international repute'.⁹⁵ This includes prominent people for whom media publication of information about even the fact of their involvement in Family Court proceedings would purportedly cause embarrassment and reputational damage.⁹⁶ Whilst a stronger argument might be made that publication is a matter of legitimate public interest in these cases, for free speech to outweigh privacy would be to violate the dignity of those public figures by transforming an aspect of their private lives (which they may not want showcased) into an object of public interest.⁹⁷ In the process, the public figures

⁹² Steven J Heyman, *Free Speech and Human Dignity* (Yale University Press, 2008) 155.

⁹³ *Ibid.*

⁹⁴ *Hermann & Hermann* [2014] FamCA 213 (28 March 2014) [31]; see also *Monticelli & Campbell* (1995) FLC 92-617 (13 April 1995) [111]–[114] (noting that 'the court engages in what has been called a "balancing exercise", in which the child's welfare is considered together with other interests and policies' and citing UK authorities where the child's welfare has been balanced against other interests, including free speech (at [111])).

⁹⁵ *In the Marriage of Simpson* (1978) 4 FamLR 679, 683.

⁹⁶ These were arguments advanced by the applicants in the cases of *In the Marriage of Simpson* (1978) 4 Fam LR 679; *In the marriage of Gibb & Gibb* (1978) FLC 90-405; and *In the Marriage of Gibb & Gibb (No 2)* (1979) FLC 90-694. The applicants in these cases — who were high-profile figures in the music industry — sought injunctions against their former spouse or other family members, or against media organisations, to prevent the publication of details of their personal lives and the fact of their involvement in Family Court proceedings.

⁹⁷ Cf *In the Marriage of Simpson* (1978) 4 Fam LR 679, where Frederico J referred to 'the difficulties and frustrations inherent in any attempt to prevent the dissemination by the press of information relating to matters which might be broadly described as being of public interest': at 682–83.

themselves would be transformed into means of entertainment, amusement, pity or ridicule.⁹⁸

Accepting the relationship between privacy and free speech as a 'symbiotic' one, Sonja West has argued that they are difficult interests to reconcile largely because 'they are in essence the same interest': "the right to withdraw from the public gaze at such times as a person may see fit", and "the right of one to exhibit oneself to the public" are ... flip sides of the same ... coin'.⁹⁹ The value of privacy and the value of free speech can both be justified on dignity grounds. The communicative activities that free speech entails,¹⁰⁰ including posting on digital and social media about one's involvement in Family Court proceedings, contribute to the individual's engagement in what Benn has called a 'self-creative enterprise'¹⁰¹ and the individual's ability to define his or her own self-presentation to others. Yet as I explained earlier, privacy protection also enables individuals to express themselves to others in different roles and in different ways, uninhibited by feelings of 'embarrassment, self-consciousness, shyness, the desire not to offend, the fear of boring others, or of exposing our ignorance'.¹⁰² While the publication restrictions imposed by section 121 of the Act do impede the free speech of litigants who desire to self-publish information about their family law proceedings, the disclosure of such information may very well 'inhibit the very interests free speech protects'.¹⁰³

The obvious difficulty in balancing free speech and privacy, given that they can be understood as 'flip sides ... of the same coin', is that the lives of separating spouses and their children engaged in family law proceedings are inextricably interlinked. Even post-separation, a litigant posting or blogging about his or her Family Court litigation — in the exercise of his or her free speech — will simultaneously (and inevitably) implicate the privacy interests of that litigant's ex-partner and/or children (as publication of the memoir did in *Bonome v Kaysen*, discussed earlier). As already noted, digital and social

⁹⁸ As Beate Rossler has observed, 'not *everywhere* is everything talked about, and not everywhere does everyone *want* to talk about everything': Rossler (n 14) 177 (emphasis in original).

⁹⁹ Sonja R West, 'The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Information Privacy' (2010) 67(2) *Washington & Lee Law Review* 589, 604-05, citing *Pavesich v New England Life Insurance Co*, 50 SE 68, 70 (Ga 1905).

¹⁰⁰ Jan Oster, 'Theory and Doctrine of "Media Freedom" as a Legal Concept' (2013) 5(1) *Journal of Media Law* 57, 73; see also Solove, 'A Taxonomy of Privacy' (n 4) 532.

¹⁰¹ Benn (n 10) 242.

¹⁰² Lever (n 4) 36.

¹⁰³ Solove, 'A Taxonomy of Privacy' (n 4) 532.

media have blurred the boundaries between ‘public’ and ‘private’ realms of life. Where this blurring becomes problematic is where human dignity is devalued in an individual’s social relations.¹⁰⁴ As Mark Tunick has observed, what individuals in any given society consider to be an invasion of privacy or an insult to human dignity are historically and culturally variable.¹⁰⁵ In the context of section 121 of the Act, free speech is — and I argue should continue to be — limited by privacy, which is founded on respect for the dignity of participants in Family Court proceedings. This is so even in light of the diminishing stigma attached to divorce in contemporary Australian society, considering the objective of the Act is to shed divorce from its ‘shameful connotations’ and to make it a socially acceptable ‘administrative process in the transition from marriage to single life’.¹⁰⁶

I have now articulated the ‘privacy paradox’ and its manifestation in balancing privacy interests and free speech interests in proceedings under the Act involving litigant self-publication. In the final section below, I propose two circumstances in which self-publication by a family law litigant might be said, on the personhood account of privacy, to amount to both a privacy violation and an affront to dignity to the litigant himself or herself, and to others.

C Litigant Self-Publication as a Violation of Privacy and an Affront to Dignity

An understanding shared among philosophers who ascribe to a personhood account of privacy is that a failure to show respect to a person amounts to an indignity.¹⁰⁷ Unwanted media attention can amount to a violation of privacy, on the personhood account, by failing to show respect for an individual as a person.¹⁰⁸ It does so by violating the negative freedom of the individual, by intruding on his or her private realm, and also the individual’s positive freedom, by impairing his or her ability to make decisions that contribute to defining and shaping the individual’s identity. The individual’s positive freedom includes freedom from the ‘interpretative sovereignty’ of others (whether in the form of commentary, criticism, objections, or influence) that may restrict or hamper the

¹⁰⁴ Rossler (n 14) 178-9.

¹⁰⁵ Tunick (n 52) 57.

¹⁰⁶ Helen Rhoades, ‘Children, families and the law: A view of the past with an eye to the future’ in Hayes and Higgins (n 64) 169, 170. See also Finlay (n 61) 414, 419.

¹⁰⁷ See Benn (n 10); Thomas Hill, *Dignity and Practical Reason in Kant’s Moral Theory* (Cornell University Press, 1992); Denise Réaume, ‘Indignities: Making a Place for Dignity in Modern Legal Thought’ (2002) 28(1) *Queens Law Journal* 61, 79.

¹⁰⁸ Tunick (n 52) 155.

individual in his or her decision-making, behaviour, and way of life.¹⁰⁹ Publication by a litigant on his or her own social media about his or her involvement in family law proceedings may constitute both a privacy violation and an indignity not only to the self-publishing litigant, but also to other participants in those proceedings.

Addressing first the privacy and dignity of the self-publishing litigant, a valid question that arises in this context, foreshadowed earlier, is whether a privacy interest is legitimately at stake if an individual willingly discloses and publishes information. Self-publication by family law litigants of information about their court proceedings may be considered both shameless and public behaviour: that is, in revealing the intimate details of their relationship breakdown and its consequences, litigants freely relinquish both their privacy and their shame. Yet the act of self-publication alone, on the personhood account of privacy, would not amount to the litigant having ceded his or her privacy (although it might constitute an indignity, depending on the nature of the information shared, and it would likely violate the privacy of others).

It would not be a sweeping statement to assert, as Lior Strahilevitz has, that courts have displayed ‘substantial uncertainty with respect to how much disclosure can occur before ... information becomes “public”’.¹¹⁰ Recall the wording of section 121(1) of the Act, which refers to publication or dissemination ‘to the public or to a section of the public’. The Family Court of Australia has interpreted the phrase ‘dissemination to the public’ to mean ‘widespread communication with the aim of reaching a wide audience’.¹¹¹ In its recent inquiry into Australia’s family law system, the Australian Law Reform Commission (ALRC) recommended that section 121 be redrafted to explicitly clarify that it *can* apply to ‘dissemination on social media or other internet-based media ... if the potential audience is sufficiently wide in the circumstances’.¹¹² A challenge for judges in determining what amounts to a ‘section of the public’ for the purposes of this provision simultaneously enlivens the broader question of where the boundary between ‘private’

¹⁰⁹ Rossler (n 14) 84, 88.

¹¹⁰ Lior Jacob Strahilevitz, ‘A Social Networks Theory of Privacy’ (2005) 72(1) *University of Chicago Law Review* 919, 973.

¹¹¹ *Re Edelsten; Ex parte Donnelly* (1988) 18 FCR 434, 436, cited with approval in *Hinchcliffe v Commissioner of the Australian Federal Police* [2001] FCA 1747 (10 December 2001) [54].

¹¹² ALRC (n 3) 436 [14.54].

and ‘public’ information is, and should be, drawn, in light of the law’s conventional binary distinction between the two.

In the US, courts have held that limited or selective disclosure of private information by the plaintiff does not necessarily make that information ‘public’ for the purposes of the privacy torts of public disclosure of private facts and intrusion upon seclusion.¹¹³ By contrast, in Canada, the Ontario Superior Court of Justice in *Murphy v Perger*¹¹⁴ and *Leduc v Roman*¹¹⁵ inferred the existence of relevant and discoverable content on a limited access Facebook profile on the basis that some information on that profile was publicly available. The Court in *Leduc* went further, holding that ‘[the respondent] exercised control over a social networking and information site to which he allowed designated “friends” access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how [the respondent] has been able to lead his life since the accident’.¹¹⁶ The mere existence of a Facebook profile and the individual’s ability to control access to that profile, according to the Court, suggested that the individual had waived his or her privacy interests by posting information to the profile. However, in the more recent decisions of *Stewart v Kempster*,¹¹⁷ and *Knox v Nathan Applebaum Holdings Ltd*,¹¹⁸ the same Court recognised a privacy interest in information that an individual posts to a restricted audience of his or her Facebook ‘friends’. The following observation of Justice Heeney in *Stewart* suggests a judicial appreciation of control over information as a vital component of privacy:

At present, Facebook has about one billion users. Out of those, the plaintiff in the present case has permitted only 139 people to view her private content. That means that she has excluded roughly one billion people from doing so, including the defendants. That supports, in my

¹¹³ See, for example, *Times Mirror Co v Superior Court*, 244 Cal Rptr 556 (Ct App 1988); *Multimedia WMAZ, Inc v Kubach*, 443 SE 2d 491 (Ga Ct App 1994); *Y G v Jewish Hospital*, 795 SW 2d 488 (Mo Ct App 1990). Cf *Sipple v Chronicle Publishing Co*, 201 Cal Rptr 665 (Ct App 1984); *Duran v Detroit News, Inc*, 504 NW 2d 715 (Mich Ct App 1993).

¹¹⁴ [2007] OJ No 5511.

¹¹⁵ [2009] OJ No 681.

¹¹⁶ *Ibid* [32].

¹¹⁷ [2012] OJ No 6145.

¹¹⁸ [2013] OJ No 5981.

view, the conclusion that she has a real privacy interest in the content of her Facebook account.¹¹⁹

It is important to elaborate on how the privacy interests of a self-publishing litigant might be implicated if the litigant knew that by revealing information to others, the disclosure might cause that information to be shared with a broader audience. Consider litigant self-publication on Facebook, which is Australia's most widely-used social media platform.¹²⁰ The litigant's act of posting on his or her Facebook profile is not a secret (indeed, quite the opposite!), nor is it unwanted by the self-publisher. However, the self-publishing litigant's privacy might be infringed if what is published is subsequently shared by others beyond the audience intended — known as 'context collapse'.¹²¹ Facebook offers an 'audience selector' for status updates, photographs, and other material posted. It also enables users to 'organise' their 'friends' using 'lists', and to post updates for specific groups of people; the default lists are 'close friends' and 'acquaintances'. Yet the material posted might be 'shared' by friends of the self-publisher, depending on the privacy settings of the original post.

The sharing of (perhaps only parts of) the self-publishing litigant's online account of the family law litigation, beyond that litigant's intended audience of 'friends' or 'followers', would amount to both a privacy violation and an indignity to that litigant. As discussed earlier, privacy offers the individual the ability to 'compartmentalize information' about himself or herself,¹²² and in doing so protects human dignity by promoting 'respect for someone as a person, as a chooser'.¹²³ Benn's notion of the individual as a 'chooser' — choosing what information to disclose and to whom — is vital to the argument that the personhood account of privacy would still apply if an individual knowingly self-published with respect to his or her own dignity. The harm in this instance, the violation of human dignity, lies in the 'spreading of information beyond expected boundaries'.¹²⁴ In the case

¹¹⁹ *Stewart v Kempster* [2012] OJ No 6145, [24].

¹²⁰ Roy Morgan, 'Facebook on top but Instagram and Pinterest growing fastest' (Press Release No 7979, 17 May 2019) <<http://www.roymorgan.com/findings/7979-social-media-trends-march-2019-201905170731>>.

¹²¹ Jenny L Davis and Nathan Jurgenson, 'Context Collapse: Theorizing Context Collusions and Collisions' (2014) 17(4) *Information, Communication & Society* 476. See also Tunick (n 52) 130.

¹²² Tunick (n 52) 45; see also Bloustein (n 15) 973.

¹²³ Benn (n 10) 242.

¹²⁴ Solove, 'A Taxonomy of Privacy' (n 4) 535; see also Strahilevitz (n 110) 921, who argues that the law should focus on 'the extent of dissemination the plaintiff should have expected to follow his disclosure of ... information to others'.

of individuals who knowingly self-publish private and intimate details of their lives on a website or on a social media profile that is freely accessible to all internet users, it would be difficult to argue that a privacy interest is legitimately at stake. A Family Court judge described the ‘particularly insidious nature’ of a parent’s publication on a website about the Family Court litigation, the fact that the information was ‘available for any person, anywhere in the world, to access ... quickly and easily at any time of the day or night on an ongoing basis’.¹²⁵ However, for those individuals who actively seek to restrict the disclosure of information that they post online, whether by having a ‘private’ Facebook profile or by limiting the ‘friends’ who can view their posts, then contrary to the views of the Ontario Superior Court of Justice in *Murphy* and *Leduc*, the fact that recipients of that information might subsequently share it with a broader audience does not diminish the self-publishing litigant’s privacy interest. Indeed, on a personhood account, a privacy violation can occur not only where previously concealed information is revealed but also where information already made available is made more accessible.¹²⁶

Turning to consider other participants in family law proceedings that are the subject of a litigant’s online publication. The insult to the privacy and dignity of those other participants is clearer: their privacy and dignity would be violated by the self-publishing litigant disseminating information about them without their consent — unwanted media attention (much like the tabloid press of accounts of divorce proceedings prior to the Act). This commonly occurs in Part VII proceedings where one parent posts (usually disparaging) remarks about the other parent on social media. In one such case, a judge lambasted a parent for making ‘derogatory, cruel and nasty comments (regularly peppered with disgusting language and equally vile photographs)’ on Facebook about the Family Court, the other parent, and the court process, seemingly encouraged by an online audience ‘that waits to join the ghoulish, jeering crowd in the nether-world of cyberspace’.¹²⁷

The indignity attending the privacy violation in the instances presented derives from the self-publishing litigant or the individual referred to (or derided) in the self-publishing litigant’s account of the family law proceedings (as the case may be), being deprived of

¹²⁵ *Xuarez & Vitela* [2012] FamCA 574 (25 July 2012) [55].

¹²⁶ Solove, *The Future of Reputation* (n 80) 170; Tunick (n 52) 151.

¹²⁷ *Lackey & Mae* [2013] FMCAfam 284 (4 April 2013) [10].

the ability to determine the 'self' that he or she seeks to present to others, what information he or she seeks to disclose, and to whom. That the litigant may be unaware that others beyond his or her 'friends' or 'followers' have read the self-published post, update, or tweet (in the first scenario) or that the individual may be unaware that information about his or her involvement in family law proceedings has even been published online (in the second), would not diminish the violation of that individual's dignity. Both scenarios illustrate the Kantian view that privacy protection emanates from the imperative to respect individuals as human beings by treating them as ends in themselves, not as means to ends,¹²⁸ such as entertainment, edification, pity, ridicule, or amusement.¹²⁹ I have sought to show, through these two scenarios of litigant self-publication in family law proceedings, that the 'divorce with dignity' justification for privacy's value in this context has been challenged by the privacy paradox but remains defensible from privacy as a personhood perspective. In these circumstances (and enforceability issues aside), section 121 of the Act is ripe for amendment to specify that it applies to publication by litigants on digital and social media platforms.

V CONCLUSION

The ALRC, in its final report, *Family Law for the Future — An Inquiry into the Family Law System*, noted that

[m]any of the provisions of the Family Law Act as originally enacted, and as subsequently amended, illustrate how the objectives of informality, privacy, and respect for the dignity of separating couples were translated into legislation. They illustrate Parliament's intention to identify and treat family law as being different in character from other areas of civil law because of the emotional and financial consequences of relationship breakdown, and its public policy impacts on the wider society.¹³⁰

The ALRC also acknowledged the reality that 'social media and similar technologies will continue to evolve and pose difficult questions for the law generally, well beyond the

¹²⁸ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, tr and ed Mary Gregor (Cambridge University Press, 1997) 42 [4:435].

¹²⁹ Lever (n 4) 34.

¹³⁰ ALRC (n 3) 357 [12.1].

family law context'.¹³¹ The advent of the printing press, the circulation of newspapers, and other forms of mass media and communication made the destruction of human dignity and individuality through public disclosure of the intimacies of private life a 'legally significant reality' in the context of divorce.¹³² The same can now be said of digital and social media technologies: they, too, undermine human dignity where private details are made public. The fundamental difference, I have proposed in this paper, is that it is litigants themselves who now make those details public. The litigant self-publication phenomenon does not, I have argued, necessitate doing away with the publication restrictions in section 121 of the Act in favour of free speech. These restrictions remain justifiable as a form of privacy protection concerned with promoting 'divorce with dignity'. The phenomenon demands a redrafting of section 121, to make clear that this provision captures litigant self-publication on digital and social media platforms. Ultimately, if we accept Beate Rossler's observation that 'the history of privacy may include more than what counts as "private" at any particular time',¹³³ then the challenge for Australian family law lies in better understanding and responding to the differences between the privacy problems of old and new.

¹³¹ Ibid 441 [14.75]. See also Rodrick and Sifris (n 3) 53. Writing of section 121 of the Family Law Act, Rodrick and Sifris have suggested that 'it is difficult to draft legislation to contain the ubiquitous internet, which, in turn, makes it difficult to maintain the integrity and purpose of the section'.

¹³² Bloustein (n 15) 984.

¹³³ Rossler (n 14) 4.

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