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# Rethinking the Rules Against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law

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## ARTICLES

# RETHINKING THE RULE AGAINST CORPORATE PRIVACY RIGHTS: SOME CONCEPTUAL QUANDRIES FOR THE COMMON LAW

ANITA L. ALLEN\*

### INTRODUCTION

How defensible is the prevailing doctrine that ordinary business corporations have no common law right to privacy?<sup>1</sup> Perhaps because fully explicating the reasons for denying common law privacy rights to corporations is an occasion for abstract jurisprudence of a sort for which few have the time or temperament, the doctrine has yet to be persuasively defended.<sup>2</sup> Almost twenty years ago, a survey of authorities citing the doctrine concluded that it had been mechanistically adhered to by leading privacy commentators and should be abandoned.<sup>3</sup> My own survey yields the same conclusion today, for throughout the 1970's and 1980's courts and others confronted with opportunities to consider corporate privacy rights have repeated the rule against them without deeply illuminating their basis in good legal theory or practice.<sup>4</sup>

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1. See RESTATEMENT (SECOND) OF TORTS § 651 I comment c (1981) (corporations, partnerships and unincorporated associations have no privacy rights and no cause of action for invasion of privacy). But see *H&M Assocs. v. City of El Centro*, 109 Cal. App. 3d 399, 167 Cal. Rptr. 392 (1980) (limited partnership may state a cause of action for privacy invasion).

2. See, e.g., S. HOFSTADTER & G. HOROWITZ, *THE RIGHT OF PRIVACY* 35 (1964), where the doctrine is mentioned but not explained. See also F. HARPER & F. JAMES, *THE LAW OF TORTS* 684 (1956).

3. Comment, *Corporate Privacy: A Remedy for the Victim of Industrial Espionage*, 1971 DUKE L.J. 391 (1971).

4. See e.g., *L. Cohen & Co., Inc. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425, 1430 (D. Conn. 1986); *Barr v. Arco Chem. Corp.*, 529 F. Supp. 1277, 1281 (S.D. Tex. 1982); *CNA Financial Corp. v. Local 743, Int'l Bhd. of Teamsters*, 515 F. Supp. 942, 946 (N.D. Ill. 1981); *Clinton Community Hospital Corp. v. Southern Maryland Medi-*

The courts' refusals to extend common law privacy rights to corporations have often been accompanied by formalistic recitation of rationales, elaborated in this article, relating to the nature of the corporation, the purposes of the invasion of privacy tort, and the adequacy of existing remedies. Nonetheless, conceptual problems in the case for corporate privacy rights lend genuine support to their refusal. For example, in notable respects, ascription of privacy rights to corporations flies in the face of traditional understandings of the concept of rights that are reflected in constructive accounts moral and legal theorists have given of what we mean by "rights," who may have them, and why they are important.<sup>5</sup>

Still, judicial opinions refusing to extend the common law action for privacy invasion to the corporation have not addressed the somewhat anomalous character of the doctrine in its contemporary setting. Nor have they extensively and realistically examined the importance of particular forms of privacy to the business sector. Arguments in favor of corporate privacy rights, stressing the value of impartial adjudication, the need for sufficient flexibility in the common law to meet the demands of policy, and the importance of respect for moral rights, merit clearer answers than those currently found in the case law. The conceptual issues implicated by the question of whether corporations should have common law privacy rights have been broached but inadequately developed by writers on corporate law and policy, some of whom believe corporations are properly ascribed all of the rights natural persons possess,<sup>6</sup> others of whom view the ascription of individual privacy rights to corporations as taking a mere fiction too far.<sup>7</sup> I believe fuller development of the conceptual issues can help explain both the frailty and the residual appeal of the major recurrent conceptual grounds cited for denying

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cal Center, 374 F. Supp. 450, 456 (D. Md. 1974); *N.O.C., Inc. v. Schaefer*, 197 N.J. Super 249, 250, 484 A.2d 729, 730 (1984); *Ion Equipment Corp. v. Nelson*, 168 Cal Rptr. 361, 366 (1980). See also R. SACK, *LIBEL, SLANDER AND RELATED PROBLEMS* 398 (1980); B. SANFORD, *LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION* 279 (1983); 9 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 4255 (rev. perm. ed. 1985). Cf. Annotation, *Right of Privacy*, 168 A.L.R. 446 (1974); 62 AM. JUR. 2d *Privacy* § 11 (1972); Annotation, *Invasion of Privacy-Name or Likeness* 30 A.L.R. 3d 203 (1970); Annotation, *Right of Privacy*, 138 A.L.R. 22, 54 (1942) (repeating rule against corporate privacy action).

5. Cf. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1981); D. LYONS, *RIGHTS* (1979); R. TUCK, *NATURAL RIGHTS THEORIES* (1979); J. WALDRON, *THEORY OF RIGHTS* (1984). Cf. Rachels, *Why Privacy is Important*, 4 PHIL. PUB. AFF. 321 (1975); Reiman, *Privacy, Intimacy and Personhood*, 6 PHIL. PUB. AFF. 2 (1976).

6. See, e.g., R. HESSEN, *IN DEFENSE OF THE CORPORATION* 40-41 (1979) ("When individuals join together in a voluntary venture they neither gain nor lose any rights. Regardless of the legal form they choose for their organization . . . it can only acquire and exercise those rights which its members possess as individuals—nothing more and nothing less").

7. See, e.g., R. STEVENSON, *CORPORATIONS AND INFORMATION: SECRECY, ACCESS AND DISCLOSURE* 69-75 (1980).



privacy actions to corporations. My discussion of the doctrine against corporate privacy rights calls particular attention to conceptual difficulties inherent in an aspect of jurisprudence I term the "theory of ascription." We engage in the theory of ascription whenever we systematically offer or criticize reasons of principle and expediency for refusing to ascribe particular legal rights enjoyed by some to new classes of entities.

The doctrine opposing the ascription of common law privacy rights to corporations is not yet a hundred years old.<sup>8</sup> The aim of this article is to assess the origins and justification of the doctrine towards a heightened appreciation of the sense it could make to rely upon it in a second century.

## I. THE ORIGINS AND LIMITATIONS OF PRIVACY RIGHTS

### A. *The Right to Privacy*

In 1890, Samuel Warren and Louis Brandeis published *The Right to Privacy* in the Harvard Law Review.<sup>9</sup> They called for the general recognition of a novel cause of action that had already begun to gain ground.<sup>10</sup> The new tort action was characterized as distinct from defamation which, they said, protected reputational and economic interests from the injury of false publication. In terms attributed to Judge Cooley, the separate new right of privacy was to be a right "to be let alone."<sup>11</sup> Warren and Brandeis argued that privacy rights were needed to protect humankind's spiritual nature from mass media and other intruders by safeguarding the interest in "involute personality."<sup>12</sup> Concretely, privacy rights would provide a basis of redress for those whose personal writings, appearances, sayings, acts, or domestic or other relations had been hurled before the public eye to satisfy "idle or prurient curiosity."<sup>13</sup>

Most states now recognize common law privacy rights along the lines Warren and Brandeis proposed. The First Restatement of Torts acknowledged a general right of privacy protecting a diverse variety of interests in seclusion, anonymity and secrecy.<sup>14</sup> Many ju-

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8. *Vassar College v. Loose-Wiles Biscuit Co.*, 197 F. 982, 984-85 (W.D. Mo. 1912) appears to be the earliest directly relevant case.

9. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

10. *Cf. DeMay v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881) (right to privacy at childbirth).

11. Warren and Brandeis, *supra* note 9, at 195.

12. *Id.* at 205. *But see Green, The Right of Privacy*, 27 U. ILL. L. REV. 237, 238-39 (1952) (privacy right not sufficiently distinguished by assertion that it protects interest in personality).

13. Warren and Brandeis, *supra* note 9, at 213, 220.

14. RESTATEMENT (FIRST) OF TORTS, § 867 (1939) ("A person who unreasonably and seriously interferes with another's interest in not having his affairs known to

risdictions<sup>15</sup> and the Second Restatement of Torts<sup>16</sup> rely on William Prosser's analysis,<sup>17</sup> whereby the invasion of privacy tort actually consists of four separate torts: intrusion upon seclusion, publication of private facts, publicity placing another in a false light, and commercial appropriation of name, likeness or identity. In New York, the cause of action for commercial appropriation of name, likeness or identity was created by statute.<sup>18</sup> In New York and many other jurisdictions, plaintiffs who seek to protect interests in a commercially valuable name, likeness, or identity may be required to rely on common law rights of publicity rather than statutory or common law privacy rights.<sup>19</sup>

Under prevailing theories of recovery, a privacy claim should succeed if the preponderance of the evidence proves a significant, nonconsensual, and nonprivileged act of intrusion, publication or commercial appropriation by the defendant that would be highly offensive to the feelings and sensibilities of a reasonable person.<sup>20</sup> Some courts require that plaintiffs plead special damages in addition to bare injury to feelings and sensibilities in order to state an action for tortious privacy invasion.<sup>21</sup> An array of conduct has been held to invade privacy, including searching through a person's clothing in a public place,<sup>22</sup> prying into an employee's sexual affairs,<sup>23</sup> and publishing an account of a family's financial hardships.<sup>24</sup>

### B. *Limitations on the Tort: No Corporate Privacy Rights*

Limitations associated with the common law privacy action include the restriction that privacy rights are "purely personal" and can only be held by a living person.<sup>25</sup> By "purely personal" it is

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others or his likeness exhibited to the public is liable to the other").

15. Pennsylvania is such a jurisdiction. See *Chicarella v. Passant*, 494 A.2d 1109 (Pa. Super. 1985).

16. RESTATEMENT (SECOND) OF TORTS, §§ 652A(2), 652B-E (1981).

17. Prosser, *Privacy*, 48 CALF. L. REV. 383 (1966).

18. CIVIL RIGHTS LAW, §§ 50, 51 (McKinney 1976). New York has not expressly adopted Prosser's other privacy tort actions. See *Birnbaum v. United States*, 588 F.2d 319, 323 (2d Cir. 1978).

19. Cf. *Southeast Bank, N.A. v. Lawrence*, 104 A.D. 2d 213, 438 N.Y.S.2d 218 (1984) (distinguishing right of publicity from right of privacy).

20. See *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976) (newsworthiness and virtual consent bar recovery against sports magazine for publishing photograph of football fan who posed with trousers unzipped); *Midwest Glass v. Stanford Dev. Co.*, 34 Ill. App. 3d 130, 132-34, 339 N.E.2d 274, 276-78 (1975) (corporation's privacy injury insufficiently offensive to support an actionable claim).

21. See *Fogel v. Forbes Inc.*, 500 F. Supp. 1081, 1088 (E.D. Pa. 1980).

22. *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959); *Bodewig v. K-mart*, 54 Ore. App. 480, 635 P.2d 657 (1981).

23. *Phillips v. Smalley Maintenance Services, Inc.*, 435 So.2d 705 (Ala. 1983).

24. *Harris by Harris v. Easton Pub. Co.*, 335 Pa. Super. 141, 483 A.2d 1377 (1984).

25. RESTATEMENT (SECOND) OF TORTS, § 651 I (1981). See *Moore v. Charles B.*



meant that the right to privacy cannot be alienated to others by sale, assignment or attachment, and is not descendible property. The right of publicity, by contrast, is deemed to be heritable commercial property which can be freely traded in the marketplace. According to the Second Restatement, the privacy action for commercial appropriation is an exception to limitations against survival and alienation.<sup>26</sup> But this now seems to be true only in jurisdictions where there is no wholly distinct common law or statutory publicity right and the commercial appropriation privacy action must do double duty as the remedy for injuries to both emotional and proprietary interests in name, likeness, or identity.<sup>27</sup>

The Second Restatement categorically asserts that corporations and other nonnatural persons are not accorded a personal right of privacy.<sup>28</sup> While a few courts have expressed or implied a willingness to extend privacy rights to corporations,<sup>29</sup> many more have opined that corporations do not have rights of privacy, cannot acquire them from others, and lack standing to assert the privacy rights of their employees.<sup>30</sup>

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Film Enterprises, 589 S.W. 489, 491 (Civ. App. 1979); Rosemont Enterprises Inc. v. Random House, Inc., 58 Misc. 2d 1, 294 N.Y.S.2d 122 (N.Y. Sup. Ct. 1968); Haines v. Public Finance Corp., 1 Ohio App. 2d 89, 218 N.E.2d 727, 36 Ohio Op. 2d 198 (1966).

26. RESTATEMENT (SECOND) OF TORTS Sec. 652 I (1981) ("Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual where privacy is invaded").

27. Cf. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) (commercial appropriation has been misclassified as a privacy tort by the courts); Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc., 627 F. Supp. 856, 862 (E.D. Pa. 1985) (publicity right derived from privacy right); Martin Luther King Jr. Center for Social Change Inc. v. American Heritage Products, 508 F. Supp. 854, 862 (N.D. Ga. 1981) (several states have recognized that right to publicity, while analogous to right of privacy, in fact protects different interest and should be separated from other three privacy rights).

28. See RESTATEMENT, *supra* note 1.

29. E.g., E.I. DuPont de Nemours & Co., Inc. v. Christopher, 431 F.2d 1012, 1016 (5th Cir. 1970) (commercial privacy must be protected); Socialist Workers' Party v. Attorney General of the United States, 463 F. Supp. 515 (S.D.N.Y. 1978) (privacy right should apply to incorporated association); H&M Assocs. v. City of El. Centro, 109 Cal. App. 3d 399, 406, 167 Cal. Rptr. 392, 399 (1980) (limited partnership may assert privacy action); Midwest Glass, 34 Ill. App. 3d at 134, 399 N.E.2d at 278 (corporation could bring privacy claim if appropriate kind and degree of injury alleged); Dayton Newspapers, Inc. v. City of Dayton, 23 Ohio Misc. 49, 61, 259 N.E.2d 522, 534, 52 Ohio Op. 100, 112 ("right of privacy applies to individuals, corporations, associations, institutions and to public officials"); Waring v. WDAS Broadcasting station, 327 Pa. 433, 445, 194 A. 631, 643 (1937) (Maxey, J., concurring) (privacy rights supported individual's and entity's appropriation claims).

30. See, e.g., cases cited, *supra* note 4.; Eagle's Eye Inc., 627 F. Supp. 856 (corporation has no protected privacy interest in its tradename); CNA Financial Corp. v. Local 743, Int'l Bhd of Teamsters, 515 F. Supp. 942 (N.D. Ill. 1981) (corporation has no standing to assert privacy rights of its employees); Copley v. Northwestern Ins. Co., 295 F. Supp. 93 (S.D. W.Va. 1968) (disclosure of facts and statistics concerning matters of business nature not subject to privacy right protection); Oasis Nite Club v. Diebold, Inc., 261 F. Supp. 1173 (D. Md. 1966); Maysville v. Ort, 296 Ky. 524, 177 S.W. 369 (1944); Ass'n. for Preserv. of Freedom of Choice v. Nation Co. 228 N.Y.S.2d

Suggesting that limitations applicable to the right to privacy should be determined by experience and by analogies to the law of defamation and literary and artistic property, Warren and Brandeis took no position on whether business entities should be entitled to the privacy action.<sup>31</sup> Under the law of defamation, a corporation may state a cause of action when publicized falsehoods injure its reputation.<sup>32</sup> On the one hand, a case could be made by analogy to defamation that corporate claimants should not be barred from the privacy action. Warren and Brandeis expressly denied that protecting reputations was to be the primary purpose of the privacy tort. But they could nonetheless have maintained on other grounds that the value of privacy to business firms, fully discernable in the 1890s,<sup>33</sup> argues for recognition of corporate privacy rights. On the other hand, the emphasis of Warren and Brandeis on "private life" as the preserve of humankind's spiritual nature and personality could be read as carrying the implication that the action they conceived belongs uniquely to human beings. Yet, to quickly infer as much would be to beg a question that proves to be central when the issue of ascribing legal rights to corporations arises: ought the reality behind the corporate fiction, namely that the corporation is a enterprise of human spirit and personality, created, managed, owned, and operated by flesh and blood persons, derivatively entitle it to the legal rights and remedies humans enjoy in their individual capacities?

## II. THE CASE AGAINST CORPORATE PRIVACY RIGHTS

### A. *The Weight of Precedent*

The weight of precedent is sometimes given as the reason for denying that corporations may be ascribed privacy rights. Upon examination, the case precedents cited prove to be neither numerous nor compelling. The action for tortious invasion of privacy is a comparatively recent phenomenon in Anglo-American law and few corporate claimants in the United States have ever asked a court to consider common law privacy claims on their behalf. One frequently cited early authority is a case in which the court took it upon itself to impute and speculate about common law privacy claims the parties denied having brought.<sup>34</sup> Moreover, New York cases holding

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628, 631 (1962), *Ass'n for Free. of Choice v. Emergency Civil Lib. Comm.* 236 N.Y.S 2d 216, 218 (1962).

31. Warren and Brandeis, *supra* note 9, at 214.

32. See Sack *supra* note 4, at 398.

33. See *Ex Parte Clarke*, 126 Cal. 235, 58 P. 546, 547 (1899) (disclosure of books and papers can embarrass a businessman and ruin his business).

34. *Vassar College v. Loose-Wiles Biscuit Co.*, 197 F. 982, 984-85 (W.D. Mo. 1912).



that that state's commercial appropriation-related privacy statute did not create a privacy action for partnerships and corporations have been too readily cited as authorities for the doctrine that corporations may not be ascribed common law privacy rights.<sup>35</sup> Terse remarks in *United States v. Morton Salt*,<sup>36</sup> which concerned the investigatory powers of the federal government rather than common law principles, are too readily adduced as support for the doctrine that corporations ought not be ascribed common law privacy rights to redress unwanted intrusions, publications and commercial appropriation by private parties.

### B. *Three Strikes Against Corporate Privacy Rights*

Beyond precedent, courts and other authorities have offered three distinct but interrelated grounds for rejecting corporate privacy rights. These grounds pertain to the nature of corporate personhood (the "metaphysical" ground); the purpose of the action in tort for privacy invasion (the "teleological" ground); and the adequacy of existing remedies (the ground of "parsimony").

#### 1. *The Metaphysical Ground*

The metaphysical ground for rejecting corporate privacy rights maintains that corporations cannot be coherently ascribed privacy rights because they are creations of public law and lack traits by virtue of which it makes sense to ascribe privacy rights. I refer to this as the "metaphysical" ground for short, because it reflects a theoretical conception of the fundamental essence of corporate existence. Reliance on the metaphysical ground is a striking illustration of the ease with which courts will assume that common law jurisprudence is limited by the paradigm of the natural person as the bearer

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35. See *Dauer & Fittipaldi, Inc. v. Twenty First Century Communications, Inc.*, 43 A.D.2d 178, 349 N.Y.S.2d 736 (1973); *Univ. of Notre Dame v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 256 N.Y.S.2d 310 (1964), *rev'd*, 256 N.Y.S.2d 301 (1965), *aff'd* 259 N.Y.S.2d 832 (1965); *Ass'n for Preserv. Freedom of Choice v. Emergency Civil Lib. Comm.*, 236 N.Y.S. 2d 216 (1962); *Ass'n for Preserv. of Freedom of Choice v. Nation Co.*, 228 N.Y.S.2d 628 (1962); *Shubert v. Columbia Pictures Corp.*, 189 Misc. 734, 72 N.Y.S. 2d 851 (N.Y. Sup. Ct. 1947); *Jaggard v. R. H. Macy & Co.*, 176 Misc. 88, 26 N.Y.S.2d 829 (N.Y. Sup. Ct. 1941) (statute does not protect corporations); *Rosenwasser v. Ogoglia*, 172 A.D. 107, 158 N.Y.S. 56 (1916) (privacy statute does not protect partnerships).

36. *United States v. Morton Salt*, 338 U.S. 632, 652 (1950) (validity of investigatory subpoena duces tecum) ("corporations can claim no equality with individuals in the enjoyment of privacy. . . . They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities"). An earlier case slightly developed the point. *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 204-06 (1946) ("it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters").



of legal rights. My concern is not to question the paradigm but to question reliance upon it as a rationale for limiting the legal capacity of artificial entities.

It has been argued that, even though corporations are in many respects treated as private institutions by our legal system and should be permitted to "shroud some of their activities in secrecy," their essential natures, as nonhuman creations of state law render it nonsensical to ascribe privacy rights to them.<sup>37</sup> Corporations are deemed incapable of possessing privacy rights both because of what they are and because of what privacy is:

*Privacy properly understood, comprehends a complex of social values that are embedded in the relationship between an individual and society, values to which the fictional corporate "person" can lay no claim. Corporations can no more be injured by an invasion of their "privacy" than they can swear, scratch, make love, or engage in any of the other flesh-and-blood activities the walls of privacy serve to protect from unwanted observation.*<sup>38</sup>

Support for the doctrine opposing corporate privacy rights is taken from implicit adherence to the narrow conception of privacy cited above which excludes nonnatural persons from privacy's purview. As a matter of definition, "privacy" is presumed to refer to human privacy. Courts imply that as a purely conceptual matter of which the common law should take notice, privacy applies only to human seclusion, anonymity and secrecy, never properly to any analogous state of corporate inaccessibility. These assumptions give an air of logical necessity to the doctrine against corporate privacy rights which dissipates when one is reminded that more inclusive conceptions of privacy are not only coherently defended by academic privacy theorists,<sup>39</sup> but are routinely utilized in other areas of state and federal law, examples of which I will shortly mention.

How, precisely, have courts explained the metaphysical limitation on corporate privacy rights? They have said that corporations are merely creations of government and are therefore essentially public in nature.<sup>40</sup> Corporations substantially lack human traits. In this regard it has been stressed that corporations have no feelings, no emotions, and no capacity for emotional suffering.<sup>41</sup> Corporations

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37. STEVENSON, *supra* note 7, at 6.

38. *Id.* at 69 (emphasis in original).

39. See, e.g., A. WESTIN, *PRIVACY AND FREEDOM* (1967); R. POSNER, *THE ECONOMICS OF JUSTICE* (1981). See generally ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1987) (analyzing theoretical accounts of meaning of "privacy").

40. *Vassar College* at 197 F. at 984. Cf. *Morton Salt*, 338 U.S. at 652 (corporations endowed with public attributes).

41. See *N.O.C. Inc.*, 197 N.J. Super. at 249, 484 A.2d at 729; *Copley v. Northwest*, 295 F. Supp. 93 (S.D.W.Va. 1968); *Maysville*, 269 Ky. at 524, 177 S.W.2d at 369 (1944).

have no peace of mind to be disturbed by privacy invasions because they have no mental existence.<sup>42</sup> One court asserted that the "essential character of business does not require for its work a right of privacy which is afforded to an individual as a private person."<sup>43</sup> In like vein, other courts have opined that certain business and educational corporations do not require privacy, but instead require publicity and accessibility to the public.<sup>44</sup>

Although metaphysically dissimilar, corporations and natural persons alike possess reputations. Corporate reputations have commercial value in the form of good will. Injury to corporate reputations can correspondingly injure the community standing of natural persons closely associated with the corporation. Nevertheless, having reputational interests has not enabled corporations to overcome the limitation barring their privacy claims. Nor has the reality behind the corporate fiction, that as goes the reputation of a corporation so goes the reputations of those who run it, seemed to help. Courts have argued that because corporations lack feelings, their interests in privacy rights to ward off and redress injury to reputation are not on a par with that of humans.<sup>45</sup> When combined with the argument that the law of defamation already provides a remedy for a corporation suffering damage to reputation, this lack of parity argument weighs heavily against the argument for corporate privacy rights that relies only on an analogy to the law of defamation.

## 2. *The Teleological Ground*

The second, closely related ground for denying privacy rights to corporations is that doing so is inconsistent with the purpose of ascribing such rights. I denote this the "teleological" ground, since it depends upon a view about the design or purpose of ascribing particular rights. The teleological ground is that corporations cannot be ascribed privacy rights because the purpose of common law privacy actions is to compensate those whose feelings and sensibilities have been wrongfully injured.<sup>46</sup> Privacy rights were not designed simply to compensate those who have suffered injuries to business or property as a consequence of wrongful access. Nor were they designed to

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42. *Rossenwasser*, 172 A.D. at 108, 158 N.Y.S.2d. at 57.

43. *Id.*

44. *Oasis Nite Club*, 261 F. Supp. at 175; *Vassar College*, 197 F. at 985.

45. See *L. Cohen & Co. Inc. v. Dun & Bradstreet, Inc.*, 629 F. Supp 1425, 1430 (D. Conn. 1986)

46. See 62 AM JUR. 2D, *Privacy*, Sec. 11 at 692 (1972) ("The protection of the right of privacy afforded by the law is primarily designed to protect personal feelings and sensibilities rather than business or pecuniary interests"). Accord *Nizer, The Right to Privacy: A Half Century's Developments*, 29 MICH. L. REV. 526 (1941) (generally agreed that corporations and partnerships lack privacy rights because purpose is to enhance human peace and happiness).



protect corporations from disclosure of information collected or maintained in the regular course of business.<sup>47</sup> Whereas the meta-physical ground presumes that it is incoherent to ascribe privacy rights to entities that are by nature nonhuman, the teleological ground presumes that the common law includes a distinct purpose for the privacy invasion tort, that that purpose is not advanced by recognition of corporate privacy rights, and that therefore no reasonable basis exists for extending privacy rights to corporations.

The difficulty with the teleological ground is twofold. First, it implies that rights of action are strictly limited by the purposes for which they have been recognized in the past, seemingly and implausibly rejecting the possibility that they may acquire similar or analogous new purposes. Second, it implies that the privacy tort has a distinct purpose which became a matter of settled doctrine early in the life of the action, rather than a developing set of purposes subject to flexible interpretation in response to and demanded by practical concerns. Courts began to announce the purposes of the privacy action very early in its history. They appeared to rely on their understandings of the exact purposes to which the privacy action was put when first recognized as a distinct cause of action in the late nineteenth century, and on their reading of previous courts' and authorities' self-understandings as evidenced by their writings. However, it would be a mistake to assume that the privacy tort action must be forever limited by its original application to the protection of the personal interests of natural persons; or by the assertions of courts, some of which, as I noted earlier, were not squarely faced with the task of deciding a common law corporate privacy claim. The implausibility of inflexible conventionalism in adjudication has been exposed by contemporary efforts to elucidate how judges determine what the law is and how they bring about doctrinal expansion and change in the common law.<sup>48</sup>

Resting on early authorities or on a narrow interpretation of the principles embodied in privacy cases, recent courts have concluded that the purpose of privacy rights makes it impossible to ascribe them to the corporate fiction. However, there is little cause to be satisfied with this conclusion. For it seems equally fair to conclude, taking a broader view, that, if the privacy tort has a purpose, it is to protect against losses stemming from unwanted intrusions, publications and commercial appropriations. Faced with corporate privacy claims, courts today reasonably view themselves as having a choice of whether to construe the general purpose of the privacy tort nar-

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47. *CNA Financial*, 515 F. Supp. at 946.

48. See generally R. DWORKIN, *LAW'S EMPIRE* (1986) (theory of law, legal interpretation and adjudication).

rowly, for the benefit of human individuals alone, or broadly, extending its protection to corporations and other nonhuman entities. Courts may consider intermediate selections as well. They may choose to construe the purpose of the action as consistent with its application to nonnatural entities that are more easily analogized to natural persons than are mega-corporations and conglomerates. These entities would include small partnerships and small, closely held corporations. Courts have a choice, not because our jurisprudence always gives them a broad range of credible choices, but because in this instance neither precedent nor other constraints rule out a broad construction of the principle and the purpose of the cause of action in question.

### 3. *The Ground of Parsimony*

Generally speaking, if a party has a remedy for an injury, courts exercise parsimony and refrain from devising additional remedies for the same injury. Common law courts also refrain from devising additional remedies where federal law preemptively governs and demands that they must.<sup>49</sup>

The third ground for refusing privacy rights to corporations is the ground of parsimony, that ascribing corporations privacy rights would serve to create a redundant basis of liability. Courts have asserted that to the extent that corporations have what are called "privacy" interests, those interests are adequately protected by the common law and statutes pertaining to defamation, unfair trade practices, patent, copyright, appropriation, and trespass.<sup>50</sup>

The redundancy claim that corporations do not need the privacy action has been disputed on the ground that a privacy action would provide unique advantages to the corporate victim of industrial espionage.<sup>51</sup> According to one commentator, privacy rights

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49. Cf. *Bender, Protection of Computer Programs: The Copyright/Trade Secret Interface*, 47 U. PITT. L. R. 903, 911-12 (1986) ("For a decade there was a gnawing doubt that the state trade secret law may be preempted by the federal patent law").

50. See, e.g., *L. Cohen & Co.*, 629 F. Supp. at 1430 (no right of action for privacy invasion because defamation adequate remedy).

51. Comment, *supra* note 3. Cf. *E.I. Dupont de Nemours & Co., Inc. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) (action for appropriation of trade secret available to victim of aerial industrial espionage). Industrial espionage is any attempt at covert information gathering the purpose of which is to obtain useful facts about another's business. Industrial espionage is generally accomplished by obtaining direct or indirect sensory access to another's property or premises. In contrast, "reverse engineering," which could be viewed as wrongful appropriation of valuable business information, merely involves "subjecting a product [which may have been lawfully obtained] to analysis so as to discern secrets in its manufacture, operation, or structure." *Bender, supra* note 49, at 915 n. 23.



would be superior to traditional trade secret rights<sup>52</sup> and rights of trespass because they would not require proof of actual damages as a condition of recovery, and because they would allow recovery for theft of commercially valuable secret information that did not meet the strict definition of a trade secret.<sup>53</sup> A privacy right with these effects would indeed provide a potentially useful (to plaintiffs) and not wholly redundant basis of action.

Nevertheless, it must be pointed out that some courts require that special damages, in addition to mere acts of intrusion, publication or commercial appropriation, be pleaded as a condition of going forward on a privacy claim.<sup>54</sup> Moreover, in the past, privacy actions have been successful in limited instances where the information sought, taken, or publicized was either embarrassing or involved the intimacies of domestic or sex life. I have uncovered no tort case in which a plaintiff recovered from a defendant simply because the defendant used an offensive search or surveillance to obtain useful or commercially valuable information.

The privacy tort has been described as merely trespassary;<sup>55</sup> but in fact it has functioned more complexly to compensate unprivileged intrusions of a particular sort, i.e., those that create negative emotions and touch on the socially defined sphere of the personal. Courts could begin to ascribe the privacy to corporations which have lost, through industrial espionage, valuable information that is neither embarrassing nor concerned with the intimacies of personal identity. But this move would involve extending the right to a new class of entities, and also assigning it a markedly new purpose. Corporate victims of industrial espionage will not be able to hop a ride on the privacy wagon until and unless the courts first permit them to adjust the rig.

In recent years commercial developers, marketers and purchasers of computer technology and information have expressed concern about the existence of adequate legal protections to prevent unwanted accessing, usage, copying, appropriation and reverse engineering.<sup>56</sup> Could a corporate privacy action prove to be among the

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52. See RESTATEMENT OF TORTS § 757 comment b (1939) (trade secret characterized as "any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it"). See generally, *Uniform Trade Secrets Act*, 14 U.L.A. 541 (1980).

53. Comment, *supra* note 3 at 407-21.

54. See *Fogel v. Forbes*, 500 F. Supp. 1081, 1088 (E.D. Pa. 1980).

55. Comment, *supra* note 3, at 421-28.

56. See generally, *Symposium, The Future of Software Protection*, 47 *PITT. L. REV.* 903 (1986) (exploring advantages and disadvantages of applying new law and traditional law—e.g., copyright, patent, and trade secret—to task of protecting proprietary interests in computer programs, algorithms, machine readable information and computer generated works).

deterrents and remedies needed? Corporate concern over computer-related information and intellectual property losses have not yet resulted in significant efforts to convince courts to make the privacy tort action available to corporations to protect their interests in ways copyright, trade secret, patent, trespass, and conversion do not.

I suspect the main reason privacy tort law has not been a serious contender for the job of protecting the intellectual property of the computer age is that corporate attorneys do not view losses of software, algorithms, machine readable information, and computer generated works as stemming from intrusion, publication or commercial appropriation sufficiently analogous to recognized common law privacy invasions. Alternatively, they view the injuries as sufficiently analogous but reckon that the judicial doctrine opposing corporate privacy rights is inimicably and irrevocably frozen in place. It is also possible that lawyers view corporate intellectual property losses as sufficiently analogous to privacy losses, but judge it more worthwhile to pursue novel, tailor-made remedies; existing federal statutory remedies, such as patent and trademark law; or state statutory remedies and common law remedies under theories traditionally available to commercial entities, such as the common law of trade secrets.

Duncan Davidson has identified the privacy principle, "that information may only be gathered or used to a reasonable limit based upon the scope of . . . intent," as among the legal underpinnings of his proposal that a "misappropriation of expression" action be available to protect unpublished computer software, on-line data-bases and other information and new technologies.<sup>57</sup> Since corporations are among those asserting proprietary interests in computer information technologies, his proposal implicitly contains the notion that corporations have genuine privacy interests that are not adequately protected by existing actions but that ought to be protected.

Davidson's proposal fell short of a specific proposal that the privacy tort action as presently constituted be opened up to corporations and others wishing to claim "misappropriation of expression." Reliance on the metaphysical and teleological arguments I considered earlier would give common law courts a basis for rejecting proposals that commercial entities and interests be protected under the privacy right rubric. The lower courts could be expected to argue, as they have in the past, that only entities with feelings can suffer privacy invasions; that privacy consists of restricted access to the zone of intimacy and delicate feelings rather than simply restricted access to information, property and expressions; and that the purpose of

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57. Davidson, *Common Law, Uncommon Software*, 47 *PITT. L. REV.* 1037, 1109 (1986).



the privacy action is to redress injuries to the feelings and sensibilities of natural persons. Since a number of courts have insisted that Prosser's commercial appropriation tort is improperly included among the invasion of privacy torts,<sup>58</sup> additional misappropriation-oriented privacy torts, intended for the protection of commercial and proprietary interests claimed in new technology, would doubtless be greeted with controversy as perhaps equally improper.

#### 4. *Parsimony Revisted: Why Firms Bring Privacy Claims*

Notwithstanding the doctrinal obstacles and the availability of other legal theories, corporations and their lawyers have from time to time gone to the trouble of pressing privacy claims. Moreover, they have bothered to appeal dismissed or failed privacy claims. This expenditure of resources suggests that some firms have rejected the courts' perspective that corporate privacy interests are already adequately protected in the law. A more cynical possibility is that corporate claimants have understood that the privacy action is redundant, but have sheepishly hoped to capitalize on procedural and strategic advantages that can be won through privacy claims. If it were obvious that corporations have brought—and would continue to bring—privacy claims only for their nuisance value or as procedural ploys, the ground of parsimony constitutes a genuinely good reason to refuse to extend the privacy right to them.

However, corporations have brought ill-fated privacy claims to achieve a variety of objectives. Privacy claims have been brought in an effort to buttress publicity, tradename, trespass and abuse of process claims;<sup>59</sup> to escape the effects of the statute of limitations that applies to the action for defamation;<sup>60</sup> and to be compensated for surveillance, publications, and intrusions resulting in lost profits, lost economic opportunities, damaged reputation, civil suits and criminal charges.<sup>61</sup> Corporations have attempted to bring claims under each of Prosser's four privacy tort categories—intrusion upon seclusion, publication of private facts, false light, and commercial appropriation. Again, doctrinal argumentation based on premises about corporate nature, the design of privacy law, and redundancy have largely prevented corporations from preserving their common law claims beyond motions to dismiss and summary judgment motions.

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58. See cases cited *supra* note 27.

59. See *Eagle's Eye, Inc.*, 627 F. Supp. at 862 (tradename); *Oasis Nite Club*, 261 F. Supp. at 173 (trespass, abuse of process); *Ion Equipment Corp.*, 168 Cal.Rptr. at 361, 110 Cal. App. 3d at 868.

60. See *L. Cohen & Co.*, 649 F. Supp. at 1430.

61. See *id.*; *N.O.C.*, 484 A.2d 729 (regulatory and zoning violations).

a. *Intrusion Upon Seclusion*

Natural persons may bring actions for intrusion upon seclusion when they have been subjected to highly offensive surveillance or searches. Although the general rule is that "[a] corporation, partnership or unincorporated association has no . . . cause of action for any of the four forms of privacy, including intrusion upon seclusion,"<sup>62</sup> a political association in New York and a city council in Ohio have been held to have privacy rights against unwanted interference with seclusion.<sup>63</sup>

Apparently, no case has held that a business corporation has a cause of action for unreasonable intrusion upon seclusion. A number of cases have held that it does not. For example, a federal district court has held that a corporation has an action for trespass against a party who entered corporate premises and broke into a safe, but not an action for privacy invasion.<sup>64</sup> In *N.O.C., Inc. v. Schaefer*,<sup>65</sup> the New Jersey Superior Court rejected privacy intrusion claims brought by a corporation whose activities were subjected to detailed scrutiny by an adjoining landowner.<sup>66</sup> The corporation was an oil transfer, treatment and storage facility.<sup>67</sup> When an adjoining landowner began to suspect the corporation of regulatory violations and privacy torts, she used a back-yard tree house, binoculars, a camera, a telescope, and a diary to observe and record the movements of plaintiff's employees and owners.<sup>68</sup> Because she did not set foot on corporate property the corporation could not allege trespass and was led to attempt the unsuccessful privacy invasion action.<sup>69</sup>

A mere legal fiction cannot be observed or searched. This premise would seem to support refusing to countenance wrongful intrusion claims brought in the name of a corporation. The refusal is less plainly warranted when we consider that such tangibles as a corporation's real estate, factories, personalty, directors, officers, and employees can be observed and searched. However, when a particular metaphysical understanding of the kind of thing the corporation is,

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62. RESTATEMENT (SECOND) OF TORTS § 652 (1981).

63. *Socialist Workers' Party v. Attorney General of the United States*, 463 F. Supp. 515 (S.D.N.Y. 1978) (no previous case has been cited recognizing damage action for corporation or association for privacy invasion, but right of action should apply as matter of reason and principle to associations); *Dayton Newspapers, Inc. v. City of Dayton*, 23 Ohio Misc. 49, 61, 259 N.E. 2d 522, 534, 52 Ohio Op. 2d 100, 112 (1974) (privacy right applies to corporations, associations, institutions and public officials).

64. *Oasis Nite Club*, 261 F. Supp. 173.

65. 197 N.J. Super. 249, 484 A.2d 729 (1983).

66. *Id.*

67. *Id.*

68. *Id.* at 250, 484 A.2d at 730.

69. *Id.* at 251, 484 A.2d at 731.



is combined with particular understandings of what "privacy" means and the purpose of privacy rights, it lends sense to the perspective that a corporation has neither privacy interests of its own to be injured by intrusion nor derivative privacy interests obtained through the human beings who own and operate it.

The complete doctrinal argument against a corporate privacy action for intrusion includes points of parsimony opposing dual or redundant protection. Human individuals personally harmed by search or surveillance of corporate property or activities may bring privacy claims in their individual capacities; the corporation may sue to protect its interests under trespass, trade secret or other appropriate common law theories of recovery. Consequently, the argument goes, corporations do not need the action for intrusion.

#### b. *Publication of Private Facts*

Early cases denied that a corporation could claim privacy invasion stemming from the publication of embarrassing secrets or confidences. In a Kentucky case, *Maysville v. Ort*,<sup>70</sup> a city commissioner obtained copies of the confidential state tax reports of the Maysville Transit Company and included them in reports and records of the commission.<sup>71</sup> Maysville's corporate tax reports found their way into local newspapers.<sup>72</sup> While Maysville brought statutory rather than common law privacy claims against the commissioner, the court took time to express its view that "if the case at bar turned upon the violation of a right of privacy, then the company's cause would fail, because such a right is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business or other pecuniary interests."<sup>73</sup>

Twenty years after *Maysville*, a New York court held that an incorporated association could not maintain an action for invasion of privacy arising out of an allegedly libelous publication since "no authority is furnished to the court which grants to a corporation a cause of action for invasion of privacy."<sup>74</sup> There, the court did not stress the general nature of corporate existence or the purposes of privacy law as much as the bare existence of precedent, along with the particular nature of the plaintiff as an organization whose express aims necessitated reliance upon "public good will" and an "ability to influence public opinion."<sup>75</sup> The Court seemed to imply

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70. 296 Ky. 524, 177 S.W.2d 369 (1944).

71. *Id.*

72. *Id.* at 525, 177 S.W.2d 369, 370 (1944)

73. *Id.*

74. *Ass'n. for the Preserv. of Free. of Choice, Inc. v. The Nation Co.*, 228 N.Y.S. 2d at 630.

75. *Id.* at 629.

that such a corporation has no reasonable expectations of privacy with respect to its affairs. But it plainly does not follow that having aims that involve working with and on behalf of the general public obliterates any social or business need for privacy in the form of limited access to certain discrete business affairs.

In *Copley v. Northwestern Mutual Life Insurance Co.*,<sup>76</sup> a diversity action decided under West Virginia law, business partners alleged that the communication of " 'facts and statistics concerning their business' to competitors constituted an invasion or 'breach' of their 'rights to privacy.' " <sup>77</sup> The court upheld defendant's motion to dismiss for failure to state a claim on the ground that "the protection of the right of privacy afforded by law is primarily designed to protect personal feelings and sensibilities rather than business or pecuniary interests . . . ." <sup>78</sup>

Two cases involving publication of private or embarrassing facts suggest that corporations should be able to bring common law privacy actions. *Midwest Glass Co. v. Stanford Development Co.*<sup>79</sup> was an appeal of a trial court's dismissal of a counterclaim alleging invasion of privacy by public disclosure of private facts.<sup>80</sup> The "private fact" at issue was the disputed existence of an overdue debt for the cost of installing mirrors.<sup>81</sup> Faced with an action to recover the alleged debt, Stanford Development counterclaimed that plaintiff had "intentionally and maliciously published orally to various parties, including a customer and purchaser, . . . that payment was overdue and a lien would be filed . . . ." <sup>82</sup> Surprisingly, the question of the ability of corporations to bring a privacy action did not arise as a threshold matter in the court's opinion.<sup>83</sup> This signifies that the court believed the corporate counterclaimant had properly stated a cause of action for privacy invasion. Indeed, the court concluded that "although an action for invasion of privacy based on the public disclosure of private debts may be brought in Illinois, the allegations contained in the counterclaim do not substantiate such a tortious offense." <sup>84</sup>

In *H&M Associates v. City of El Centro*,<sup>85</sup> perhaps the most extensive opinion ever written on the question of common law privacy rights for business entities, a California court permitted a lim-

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76. 295 F. Supp. at 93, 95 (S.D. W.Va. 1968).

77. *Id.*

78. *Id.* at 95.

79. 34 Ill. App. 3d 130, 339 N.E.2d 274.

80. *Id.*

81. *Id.*

82. *Id.* at 132, 339 N.E.2d at 276.

83. *Id.* at 130, 339 N.E.2d at 274.

84. *Id.* at 134, 339 N.E.2d at 278.

85. 109 Cal. App. 3d 399, 167. Rptr. 392.



ited partnership to go forward with a cause of action for invasion of privacy stemming from the publication of private facts.<sup>86</sup> Plaintiff was the owner and operator of a large apartment complex who fell behind in making water payments assessed by the city of El Centro.<sup>87</sup> Hoping to force foreclosure to enable the public authorities to acquire plaintiff's real estate cheaply, the city manager terminated water service without notice and after most of the sums owed had been tendered.<sup>88</sup> The official then telephoned the press and plaintiff's creditors to announce that plaintiff owed money and had permanently lost municipal water services.<sup>89</sup>

Explaining the novel holding, the court described the question of whether business entities ought to have common law privacy rights as unsettled in the law, rather than as well-established.<sup>90</sup> The court rejected the metaphysical and teleological arguments that have captured other courts:

Plaintiff does not seek damages for hurt feelings because of "its" right to be left alone for how can a partnership, distinct from its members, suffer humiliation or embarrassment. Here, however, the damages requested relate to the partnership's economic losses—the real property it owned has been foreclosed.

In the commercial world, businesses, regardless of their legal form, have zones of privacy which may not be invaded.<sup>91</sup>

### c. *False Light*

A very recent case holds that corporations do not enjoy the false light privacy right under Connecticut law.<sup>92</sup> L. Cohen & Company alleged that Dun & Bradstreet prepared and distributed a credit report which erroneously indicated that the company had been dilatory in meeting its financial obligations.<sup>93</sup> The false light privacy tort was expressly invoked as the theory of recovery.<sup>94</sup> Emphasizing the Restatement position that the interests of the *individual* in not being made to appear before the public in an objectionable light is the basis of the false light action, the court stated that "the law of privacy is thus concerned with the reputational interests of individuals rather than the less substantial reputational interests of corpo-

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 406, 167 Cal. Rptr. at 399.

91. *Id.*

92. *L. Cohen & Co.*, 629 F. Supp. 1425.

93. *Id.*

94. *Id.* at 1430.

rations."<sup>95</sup> The court also surmised that plaintiff's privacy claim was a ploy to "circumvent the shorter statute of limitations applicable to actions for defamation."<sup>96</sup>

#### d. *Commercial Appropriation*

The earliest frequently cited case for the rule that corporations are without privacy rights was decided in 1912.<sup>97</sup> The case concerned the appropriation of the Vassar College name, emblem, and seal in connection with candy manufactured and sold as "Vassar Chocolates."<sup>98</sup> A New York corporation, Vassar College, alleged that public contempt and ridicule injured its business and graduates, after its name and symbols were appropriated for chocolates manufactured by a unrelated Missouri firm.<sup>99</sup> Vassar denied intent to claim a right to privacy as such, and claimed simply that it had a right to be left alone for other than public purposes.<sup>100</sup> Arguing that the principle of non-interference Vassar invoked was essentially a privacy principle derived from cases involving privacy claims, the court concluded that by virtue of being both a corporation and a public entity "depending upon and inviting wide-spread publicity" Vassar "could not well invoke the right of privacy."<sup>101</sup>

After a New York court denied recovery in 1902 to a young woman whose photograph was used without her consent for the purpose of advertising flour,<sup>102</sup> the state legislature promptly enacted its privacy statute to protect against commercial appropriation of name, likeness or identity. In 1916, a New York court held that the statute does not apply to a co-partnership but could be applied "at the instance of a private individual to enhance his peace and happiness."<sup>103</sup> Subsequent cases have held that corporations are not protected by the statute.<sup>104</sup> States adopting an identical right of action through judicial opinion have followed New York's unwillingness to extend the appropriation action to business entities.

The separate and distinct common law right of publicity recognized by the courts is sometimes described as having been "derived"

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95. *Id.*

96. *Id.*

97. *Vassar College v. Loose-Wiles Biscuit Co.*, 197 F. 982 (W.D. Mo. 1912)(no privacy interest in corporate name and symbols). *Cf. Nizer, supra* note 49, at 560 (monetary value of corporate names impaired by indiscriminate use).

98. *Vassar College*, 197 F. at 983.

99. *Id.* at 984.

100. *Id.*

101. *Id.* at 985.

102. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

103. *Rossenwasser*, 172 A.D. at 108, 158 N.Y. Supp. at 57.

104. *See cases cited supra* note 34.



from the common law commercial appropriation privacy right.<sup>105</sup> The right of publicity is envisioned as protection for celebrities' commercial and proprietary interests.<sup>106</sup> It gives individuals and groups exclusive rights to profit by their names, likenesses, achievements, identifying characteristics, and actual performances.<sup>107</sup> A major difference between the right to privacy and the right to publicity is that the latter survives the death of persons who have achieved notoriety in their lifetimes and exploited its commercial value. Corporations can acquire publicity rights by sale or assignment,<sup>108</sup> but one court has held that they have no right of publicity in their own tradenames other than those afforded under trademark laws designed to protect against consumer product confusion.<sup>109</sup>

### III. MAKING THE CASE FOR CORPORATE PRIVACY RIGHTS

#### A. Doctrinal Anomaly

Preliminarily, it is worth noting that the doctrine against corporate privacy rights appears anomalous from some vantage points. Common law courts and authorities premise denial of corporate privacy rights in large part on conceptual beliefs about the inherent nature of corporate existence and the narrow meaning of the term "privacy." Yet all around, under many areas of state and federal law, corporations and other business entities are afforded privacy protection against unwanted access to information, property and personnel.<sup>110</sup> Outside of privacy tort law, it is not widely thought

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105. *Eagle's Eye*, 627 F. Supp. at 862 (publicity rights derived from privacy right); *Martin Luther King Jr. v. American Heritage Center for Social Change Inc.*, 508 F. Supp. 824, 862 (N.D. Ga. 1981) (several states have recognized that publicity right analogous to privacy right but protects different interests and should be separated).

106. *Carson*, 698 F.2d at 835.

107. *Id.* at 836.

108. *See Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2nd Cir. 1953), cert. denied, 346 U.S. 816 (1963).

109. *Eagle's Eye, Inc.*, 627 F. Supp. at 862.

110. While aspects of corporate privacy are widely protected in the law, corporations do not have all of the privacy rights natural persons have and labor under numerous disclosure requirements. Many statutes that protect individual privacy do not offer the same protection to corporations. *See generally* PITT & H. WACHTELL, PRESERVING CORPORATE CONFIDENTIALITY IN LEGAL PROCEEDINGS (1980) (outlining corporate rights to control over business information). The Privacy Act, 5 U.S.C. § 552 (a), which bars disclosure of records held by certain government entities without prior written consent of the individual to whom the record pertains, does not include the corporation in its definition of "individual." Under the Right to Financial Privacy Act, 12 U.S.C. § 3402 et seq. (1980) (Supp. 1985), the government may not have access to the records of "any customer" of a financial institution unless the records are reasonably described, the customer has given authorization, or other conditions are met. "Customer" is defined at § 3401 (5) of the Act to exclude corporations and partnerships with more than five individual partners.

Business was subject to new federal regulation in the 1970s in many areas. The

that there is a purely conceptual bar either to ascribing privacy protection rights to corporations or to calling them "privacy" rights.<sup>111</sup>

For example, appealing to the concept of privacy, courts often show deference for the confidentiality of corporate records sought through investigatory subpoenas<sup>112</sup> and ordinary discovery.<sup>113</sup> The provisions of a number of state statutes, federal statutes, and state constitutions that were enacted to protect aspects of privacy extend their protections to corporations. Corporations have a right to privacy under California<sup>114</sup> and Pennsylvania<sup>115</sup> wiretapping statutes. In Utah, corporations are granted certain rights of privacy by statute.<sup>116</sup> Corporations have been held to have a right to informational

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Truth in Negotiations Act, the Truth in Lending Act, the Interstate Land Sales Full Disclosure Act, the Magnuson Moss Warranty Act, the Real Estate Settlement Procedures Act, the Employee Retirement Income Security Act, and the Fair Credit Reporting Act all required reporting or disclosure of information. In addition to federal regulations, business also faced new state regulation in the 1970s related to toxic waste, water resources, nuclear wastes, corporate ownership of farmland, products packaging and child advertising. With these new regulations came fresh demands for information disclosure.

111. *But see STEVENSON, supra* note 7, at 69-75.

112. *See Ex Parte Clarke*, 126 Cal. 235, 236, 58 P. 546, 547 (1899). The court in *Clark* stated:

The privacy of private books and papers is not only of inestimable value to the owner on account of various personal and sentimental reasons, but is of the greatest value also from mere business considerations. The exposure of a man's methods of business would frequently be injurious to him, and although really solvent, might produce embarrassments as would ruin him. His right therefore to the sole possession and knowledge of his private books and papers is not to be violated except where the power to do so clearly appears.

*Id. See also* Premium Service Corp. v. Sperry & Hutchinson Co., 511 F.2d 225 (9th Cir. 1975) (subpoena issued to a non-party regarding antitrust violations); *In re Electric Weld Steel Tubing Antitrust Litigation*, 512 F. Supp. 81 (N.D. Ill. 1981) (subpoena issued in connection with a grand jury investigation of alleged antitrust violations). *But see* FTC v. Markin, 391 F. Supp. 865 (W.D. Mich. 1974) (subpoena issued by Federal Trade Commission upheld); *In re Rozas Gibson Pharmacy of Eunice, Inc.*, 382 So.2d 929 (La. 1980) (subpoenas issued by state in Medicaid fraud investigation upheld); Commonwealth of Pa., *Packel v. Shults*, 26 Pa. Commw. 129, 362 A.2d 1129 (Pa. 1976) (subpoena issued by Bureau of Consumer Protection upheld). *Cf. Roberts v. Whitaker*, 287 Minn. 452, 178 N.W.2d 869 (Minn. 1970) (necessity of evidence outweighed any invasion of privacy).

113. *See Blake v. Blake*, 102 N.M. 354, 695 P.2d 838 (N. Mex. App. 1985) (discovery of corporate records limited to spouse's interest in corporation); *Rifkind v. Superior Court of Los Angeles*, 123 Cal. App. 3d 1045, 177 Cal. Rptr. 82 (1981) (discovery order vacated due to confidentiality of corporate information contained in papers sought in divorce proceeding); *Palmer v. Servis*, 393 So.2d 653 (Fla. 1981) (corporation entitled to protective order). *But see Merns v. Merns*, 185 N.J. Super. 529, 531, 449 A.2d 1337, 1339 (1982) (corporate form should not be used as shield behind which parties can conceal assets to avoid equitable distribution); *Gerson v. Gerson*, 148 N.J. Super. 194, 372 A.2d 374 (1977) (where complex estate existed, there was a good cause shown for additional discovery).

114. *See Ion Equipment*, 168 Cal. Rptr. 361, 110 Cal. App. 3d 868 (1980) (construing "any person" in statute to include corporations).

115. *See Barr*, 529 F. Supp. 1277 (statute contemplates that corporations have a right of privacy limiting wiretapping).

116. UTAH REV STAT. (1933) §§ 103-4-7 to 103-4-9.



privacy under the Montana state constitution.<sup>117</sup>

Turning to federal statutes, the Federal Trade Secrets Act criminalizes unauthorized disclosures by federal employees of corporate trade secrets and confidential business information.<sup>118</sup> The Tax Reform Act of 1976 imposed confidentiality requirements that the Internal Revenue Service interpreted to apply to most information relating to and including individual and corporate tax returns.<sup>119</sup> Federal statutes impose confidentiality rules on information obtained from corporations by the Consumer Product Safety Commission.<sup>120</sup> The Omnibus Crime Control Act, which safeguards against unauthorized wiretapping and other intrusions, extends its protections to "any individual, partnership, association, joint stock company, trust, or corporation."<sup>121</sup>

The doctrine opposing common law privacy rights for corporations seems particularly anomalous in view of the privacy protection against government intrusion corporations enjoy under the fourth amendment to the United States Constitution.<sup>122</sup> The fourth amendment, which has been characterized as the closest thing Americans have to an express constitutional right of privacy,<sup>123</sup> has its historical roots in strong colonial sentiments for the privacy and security of business enterprises accomplished through limitations on the exercise of governmental power. The fourth amendment appears in the Bill of Rights as a reaction to writs of assistance issued and enforced by the English Crown during the colonial era. The writs authorized officials to forcibly enter and search homes or commercial establishments suspected of harboring smuggled goods.<sup>124</sup> Merchants and businessmen were placed at risk by the procedure inasmuch as, once entered, their premises and products were subject to inspection for compliance with the Stamp Act of 1765, the Tea Tax of 1773, and other parliamentary revenue measures. The 1787 Constitutional Convention drafted the fourth amendment as a response to the experience of arbitrary inspections by British agents.<sup>125</sup>

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117. See *Mont. States Tele. and Tel. Co. v. Dept. of Pub. Serv. Reg.*, 634 P.2d 181 (Mont. 1981) (corporate trade secrets protected from disclosure by public authorities under constitutional privacy protection provisions).

118. 18 U.S.C. § 1905 (1982). The Freedom of Information Act exempts trade secrets and commercial financial information from mandatory disclosure. *Cf. Chrysler v. Brown*, 441 U.S. 281 (Administrative Procedures Act authorizes judicial review of agency decisions to disclose corporate business information).

119. 26 U.S.C. § 6103 (1982)(Supp. 1985).

120. 15 U.S.C. § 2055 (1982).

121. 18 U.S.C. §§ 2510 (6) and (11), *et seq.* (Cum. Supp. 1985).

122. See generally, D. O'BRIEN, *PRIVACY, LAW, AND PUBLIC POLICY* (1979).

123. *Id.* at 39-41.

124. See N. LASSON, *HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT* 51-63, 67-69 (1937). See also *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-12 (1977).

125. See J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 40-42 (1966).

Corporations are entitled to fourth amendment privacy protection where, first, there has been an actual search or seizure,<sup>126</sup> or a demand to make one by a government official; or second, there has been a constructive search, most often where a subpoena duces tecum has been served upon a corporation in order to compel production of corporate records.<sup>127</sup> Lower courts have sometimes held that corporations have fourth amendment privacy rights in a third situation, namely where corporate papers have been lawfully acquired for legal proceedings but the corporation requests that they be withheld from public disclosure.<sup>128</sup> The stated purposes of fourth amendment privacy and common law privacy are admittedly not the same. The former aims to limit arbitrary state power on the theory that wanton governmental intrusion is a political evil; the latter has been interpreted as aiming to guard feelings and sensibilities, on the theory that emotional well-being and human personhood ought to be preserved. Still, the coherence of fourth amendment doctrines whereby corporations are ascribed privacy rights protecting seclusion, confidentiality, and secrecy highlight the implausibility of the argument that common law privacy rights for corporations are ruled out because "privacy" and "corporations" are conceptually inconsistent terms. In practice, corporations' fourth amendment privacy rights are less extensive than those enjoyed by natural persons. Courts de-

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126. See *Marshall v. Barlow's Inc.*, 426 U.S. 307 (1978) (OSHA inspectors must acquire warrants before searching corporate premises for safety hazards and violations); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1976) (IRS's warrantless entry of corporate offices and seizure of books and records violated fourth amendment); *See v. City of Seattle*, 387 U.S. 541 (1967) (warrant needed for fire code inspections); *Go-Bart Co. v. United States*, 282 U.S. 344 (1931) (warrantless investigative search of company offices unconstitutional). But see *Dow Chemical Co. v. United States*, 106 U.S. 1819 (1986) (aerial inspection not violative of warrant requirement); *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974) (warrantless inspection of "open field" area of corporate property does not violate fourth amendment). Warrantless searches of commercial property in connection with industries or activities long subject to close supervision, inspection or regulation have been frequently upheld. See, e.g., *United States v. Biswell*, 406 U.S. 311 (1971) (upholding warrantless search of storeroom containing unlicensed firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1969) (upholding warrantless search of corporation violating liquor laws).

127. See *G.M. Leasing v. United States*, 429 U.S. 338 (1976); *Morton Salt*, 338 U.S. 632 (subpoena valid so long as inquiry within authority of agency, demand not too indefinite, and information sought is relevant); *Okla. Press. Pub. Co. v. Walling*, 327 U.S. 186 (1946) (subpoena is valid if agency has authority and matters specified are relevant). See also *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (order for production of books and papers may constitute an unreasonable search and seizure within fourth amendment).

128. *Tavovlareas v. Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984) (fourth amendment protects corporation's privacy interest in avoiding public disclosure of information not used at trial). Cf. *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980) (fourth amendment protects church corporations' expectation of privacy in materials seized in criminal investigation). But see *Court Ruling May Limit Corporate Secrecy Rights: Documents Unsealed in Agent Orange Case*, *Washington Post*, June 24, 1987, at B12, col. 1.



ciding corporate privacy claims brought under the fourth amendment have entertained a plenitude of considerations of policy and principle against particular corporate privacy claims.<sup>129</sup> These have never resulted in the absolute doctrinal bar against corporate privacy rights we find in the common law. We find instead a presumption of at least nominal fourth amendment protection coupled with case by case or industry by industry assessment of the worth of corporate privacy claims relative to particular governmental and private ends.

### B. Corporate Preferences

Blanket refusal to extend the common law privacy right to corporations can seem anomalous from the perspective just delivered. It can seem simply wrong upon consideration of the special value various modes of privacy have for corporations and those who manage, own, and work for them. To be sure, seclusion, secrecy and confidentiality in business can shield corporate wrongdoing such as environmental damage and employment discrimination.<sup>130</sup> However, physical seclusion and information non-disclosure can also serve respected ends which corporations value.<sup>131</sup>

The subjective importance of privacy is readily apparent in corporate conduct. The preference for privacy can lead a corporation to sue a federal agency,<sup>132</sup> pull out of a financial transaction,<sup>133</sup> or seek a protective order in litigation.<sup>134</sup>

Directors and officers of closely held corporations extol the relatively greater efficiency, managerial freedom and personal privacy they have when compared to their counterparts in heavily regulated public corporations.<sup>135</sup> Full and complete disclosure in many areas is

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129. See, e.g., *Dow Chemical v. United States*, 106 U.S. 1819 (1986) (warrantless aerial surveillance of corporate facility not a violation of fourth amendment).

130. Nader, *Corporate Disclosure: The Public Right to Know*, 7 J. CONT. BUS. 25 (1925).

131. See generally STEVENSON, *supra* note 7; F. BALDWIN, *CONFLICTING INTERESTS: CORPORATE-GOVERNANCE CONTROVERSIES* (1980).

132. *S&L Withdraws Suit Against FHLBB*, Washington Post, July 30, 1987, at B1, col. 1. ("Lincoln Savings & Loan of Irvine, California accused the bank board of leaking trade secrets and other confidential data obtained during a federal audit of the S&L.") (suit withdrawn when agency promised not to leak confidences to press).

133. Mintz, *Manufacturers Pulls Out of Robbins Syndicate*, Washington Post, August 5, 1987, at F3, col. 3. (Manufacturers Hanover Trust Co. withdrew as syndicate leader in A.H. Robbins bankruptcy reorganization rather than reveal to attorneys of Dalkon shield-plaintiffs secret bank examiners' reports held by Federal Reserve system and Federal Deposit Insurance Corp. which concluded bank could make good on \$1.675 billion letter of credit).

134. Mintz, *Court Ruling May Limit Corporate Secrecy Rights: Documents Unsealed in Agent Orange Case*, Washington Post, June 24, 1987, at B12, col. 1.

135. See Levy, *The Free World of Private Companies*, 112 DUN'S REVIEW 56-62 (Sept. 1978).

required of publicly held corporations. Quarterly and annual reports, investment disclosures to the Securities and Exchange Commission, annual meetings, and proxy statements all entail revelation of "innermost financial secrets."<sup>136</sup> Some managers view government disclosure requirements as tantamount to letting "your competition walk though your plant."<sup>137</sup> Corporate managers must live in the "executive goldfish bowl,"<sup>138</sup> even though, "for many reasons that touch at the heart of laissez-faire individualism, businessmen prize their privacy more than anything else."<sup>139</sup>

### C. Economic Policy

Richard Posner has argued that because society has even more of a value at stake in the protection of the privacy of commercial entities than that of natural persons, businesses ought to have much of the privacy and privacy protection it wants.<sup>140</sup> According to Posner, in private life secrecy is more likely to conceal "bad" facts that cause others to overvalue what one is or does. In business, secrecy often conceals "good" facts, facts pertaining to the methods of socially productive activity. Firms whose commercial privacy is protected can profit from their investments in research and innovation. The ability to profit creates incentives for firms to invest resources in useful innovation. Moreover, with secrecy it is possible to avoid unwanted publicity that can stymie communications that are a part of efficient corporate decisionmaking. Presumably, in the long run, such efficiencies benefit the greater society.

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136. *Id.* Also, corporations' own discretionary business transactions inevitably disperse corporate secrets. See New York Times, May 18, 1986, at C1 (merger and acquisition practices result in dissemination of corporate secrets to host of participants, including corporate insiders, investment banks, lenders, public relations advisors, law firms, bond dealers, proxy solicitors, document printers, secretaries, families, friends, arbitrageurs).

137. Levy, *supra* note 135.

138. McGrath and Flanagan, *The Executive Goldfish Bowl*, 135 FORBES 154 (Feb. 11, 1985). Information about corporate executives, like other middle-and upper-income bracket Americans, is in the hands of credit bureaus, credit card companies, retailers, banks, utility companies, landlords, oil companies, insurers, government agencies, and motor vehicle bureaus. However, if an individual is a top executive of a publicly traded firm, the Securities and Exchange Commission will maintain salary and stock ownership information. If the firm is a defense contractor or subcontractor, the Department of Defense will know income, medical history, educational and military records, job history, family tree, foreign travel, and reputation in the community.

139. Levy, *supra* note 135.

140. R. POSNER, *ECONOMICS OF JUSTICE* (1981). See also Posner, *The Right to Privacy*, 12 GA. L. REV. 393 (1978); Posner, *Privacy, Secrecy and Reputation*, 28 BUF. L. REV. 1, 50-53 (1979) (business organizations should have their innovative facts shielded from involuntary disclosure). But see Bloustein, *Privacy is Dear*, 12 GA. L. REV. 429, 440-41 (1978); D'Amato, *Comment on Posner*, 12 GA. L. REV. 497, 499-500 (1978).



If the corporate privacy action were wholly redundant, offering plaintiffs the same prophylactic protection and remedies offered by existing remedies, there would be little cause for thinking that a corporate privacy right would promote new economic efficiencies. *Ex hypothes*, case corporations would already have all the legal privacy protection the privacy right could give them. We thus expect an economic policy argument for extending the privacy tort to corporations to specify the privacy-related economic goals that should be but are not protected under existing law.<sup>141</sup> Proponents of an economic policy argument would still have to contend with the force of the conceptual metaphysical arguments against corporate privacy rights, a point I will return to later.

It is not clear under what circumstances a judicial decision to extend privacy protections to corporations would promote economic values about which the public generally cares. Consider *H&M Associates*, the path-breaking California case extending privacy rights to a limited partnership whose potential financing and sales contracts fell through when a city manager seeking foreclosure maliciously publicized its indebtedness. Is the case an example of a court interpreting legal rules in a way calculated to promote economic efficiency?<sup>142</sup> It could be argued that indebtedness is generally a "bad" fact about which others ought to know so they can protect themselves from wasted contracts, collaboration and investment? Is secrecy about a present debt desirable, however, if it has the potential to prolong the life of a business, enabling it to prosper and contribute? The *H&M Associates* court may have had this in mind. But the case could be seen as an effort to punish malicious disclosure for its own sake.

*A priori*, one cannot be too sure that a common law right of corporate privacy would significantly contribute to helping the business community achieve the freedom from intrusion, publicity and commercial appropriation it collectively desires. It is conceivable that a number of court decisions holding companies liable for surreptitious theft of business information or obtaining confidential information from employees hired away from competitors, could make these practices less prevalent and thereby increase the rewards of research and innovation. However, the business community is dependent upon competitive information gathering and could therefore be expected to respond to new legal rights to enforce an eco-

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141. Protection against monetary losses associated with industrial espionage and loss of control over new technology are two possible such interests.

142. M. KUPERBERG AND C. BEITZ, *LAW, ECONOMICS, AND PHILOSOPHY* 3 (1983) (positive thesis of economic approach is that development of Anglo-American law can be understood as a continuing accommodation to changing social and economic circumstances by judges interpreting legal rules to produce economically efficient outcomes).

nomic policy or management preference for privacy with ambivalence. After all, a right protecting privacy is also a right which potentially leads to liability for invading privacy.

A survey of American firms conducted a number of years ago measured the incidence of competitive information gathering. The survey, which also identified the methods of information gathering companies used and the type of information sought, suggested that management regards information about product styling, manufacturing processes, patents and infringements, pricing, expansion plans, competitive plans, promotional strategies and cost data as "extremely important" to what they do.<sup>143</sup> While utilizing published sources to obtain the information management feels it needs to know was reportedly the most typical method of information gathering, undercover espionage and hiring away employees privy to competitive information were significantly employed.<sup>144</sup>

#### D. *Generic Arguments for Corporate Privacy Rights*

At least three generic clusters of colorable arguments oppose the prevailing doctrine and lend support to the recognition of common law corporate privacy rights. They are the "equivalent injury" argument, the "social policy" argument, and the "moral rights" argument. I will briefly offer perspectives on how well arguments developed along these lines could be expected to stand up to scrutiny.

##### 1. *Equivalent Injury*

The "equivalent injury" argument proceeds as follows. Quantitatively significant losses of privacy by individual human beings that are proximately caused by others' highly offensive intentional acts of intrusion, publication or appropriation are injuries for which compensation may be brought through common law civil actions for privacy invasion. Like human individuals, corporations can and do experience significant losses of privacy proximately caused by others' highly offensive intentional acts. Therefore, corporations ought similarly to be able to seek compensation through the common law civil action for privacy invasion.

If the equivalent injury argument has the ring of formalism, it is chiefly due to the simplistic manner in which I have sketched what could be developed into a more complete and compelling argument of principle. The equivalent injury argument need not be understood as mere formalism; it can be read, more charitably, as capable

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143. Wall, *What the Competition is Doing: Your Need to Know*, 52 HARV. BUS. REV. 22 (1974).

144. *Id.* at 24.



of elaboration from a point of view that treats law as, in Ronald Dworkin's sense, integrity.<sup>145</sup>

The equivalent injury argument assumes that judges in common law privacy right jurisdictions are constrained both by an obligation to respect institutional traditions concerning the use of precedent and by principles of fairness and reasonability. The argument maintains that adherence to these constraints point to ascribing privacy rights to corporations. Fairness demands that like cases be treated alike. Reasonability demands that the logical entailments of principled thinking be accorded due weight.

According to the equivalent injury argument, since corporations can suffer some types of privacy losses which when suffered by natural persons entitle them to seek compensation under a privacy theory, corporations are also entitled to seek compensation under a privacy theory. This argument must be understood as presuming it irrelevant, when it comes to measuring the similarity of injury, that losses of corporate privacy result only in economic and reputational damages, never emotional pain to the corporation itself. This is not a trouble-free presumption, since, as those who rely on the metaphysical ground for opposing corporate privacy rights point out, there is an undeniable respect in which, for example, publicizing the contents of a intimate diary and thereby causing embarrassment is quite unlike publicizing the contents of an account ledger and thereby causing the loss of a real estate deal. Indeed, it could be argued that corporate privacy losses are never "highly offensive" in the way intentional diminutions of individual privacy sometimes are, precisely because corporations lack feelings and sensibilities to be injured by such diminutions.

The most troubling aspect of the argument is its assumption that so long as two categories of entities can experience "equivalent injury," no legitimate reason exists for drawing distinctions among them for the purpose of ascribing rights. Evaluating this assumption invites the perspective of the theory of ascription. As indicated, the "theory of ascription" refers to the important corner of jurisprudence which comes into play whenever the question arises whether a right recognized as belonging to one group (e.g., whites, males, adults, natural persons) ought to be extended to another (e.g.,

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145. R. DWORKIN, *LAW'S EMPIRE* 95-96 (1986) Dworkin stated:  
[L]aw as integrity accepts law and legal rights wholeheartedly . . . . It supposes that law's constraints benefit society not just by providing predictability or procedural fairness or in some other instrumental ways but by securing a kind of equality among citizens that makes their community more genuine and its moral justification. . . . It argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from principles of personal morality explicit decisions presupposed by way of justification.

blacks, females, children, non-natural legal persons). Articulating good reasons of principle or policy for the ascription of rights across socially significant categories of claimants is one of the factors that can make hard legal cases hard.<sup>146</sup>

The metaphysical ground courts have given for rejecting corporate privacy rights takes on greater plausibility when viewed as a serious proposition about judicious ascription. It asserts that a certain category of plaintiffs lack traits presupposed by a certain right and hence should be denied the right.

There are plain respects in which a right can indeed logically presuppose possession of particular traits. Rights of free speech presuppose a capacity or potential for speech acts; the right to life presupposes living; and the right to common law privacy, presupposes the ability to achieve states of at least partial inaccessibility to others. The *Vassar* and *Oasis Nite Club* courts refused to ascribe privacy rights to an educational and recreational corporation respectively on the ground that they required wide accessibility to the public in order to survive as viable ventures. If the metaphysical rationale of these cases fails, it is because isolating limited aspects of corporate life and property for privacy protection is not logically inconsistent with the character of a corporation as open for public business and contribution.

An equivalent injury theorist could resort to the contention that there are natural persons behind the corporate fiction whom corporate privacy loss can effect on an emotional level. The point would then be not that two diverse entities experience equivalent injuries, but that two essentially identical entities experience equivalent injuries. But it surely counts against this point that the privacy interests of those who own, manage and are employed by corporations are not identical to the corporations' own interests. This is best evidenced by privacy invasion actions corporations have attempted to bring, never successfully, against their own employees.<sup>147</sup> Thus, if corporations should have privacy rights it is not simply or primarily because the intangible whole can be reduced to its tangible human parts.

## 2. *The Social Policy Argument*

The social policy argument maintains that society would be better off, that is, happier, wealthier, more secure, and/or more just if corporations enjoyed freedom from highly offensive intrusion, publication, and appropriation.<sup>148</sup> It contends that the availability of a

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146. DWORKIN, *HARD CASES, TAKING RIGHTS SERIOUSLY* (1977).

147. *Barr*, 529 F. Supp. at 1277 (employer may not recover against employee who tape recorded meeting in which employment termination occurred).

148. I am using "social" here in its most inclusive sense. The "social policy ar-



civil action for invasion of privacy would lessen if not the likelihood, then the consequences of highly offensive injurious privacy losses; and concludes, therefore, that the common law action for invasion of privacy should be extended to corporations. I have already had occasion to hint at economic versions of the social policy argument in my discussion of the corporate preference for privacy.

As presented, the argument implies that judges should decide common law cases with an eye toward the broad ends served by the law. It can be read to imply that, when there are questions about the ascription of old rights to new classes of common law claimants, courts should be guided by specific policy considerations for the benefit of the aggregate, rather than by abstract principles gleaned from prior case law narrowly construed.

The minor premise of the "social policy argument" syllogism is that the availability of a civil action for invasion of privacy would lessen either the likelihood or the consequences of highly offensive privacy losses. There is cause to doubt the truth of this premise, as we have already seen. It is open to question whether the invasion of privacy tort as currently conceived can significantly affect the occurrence or consequences of unwanted corporate privacy losses. Other bodies of law protect corporate interests in seclusion, secrecy, reputation and publicity, though not perfectly. Extra-legal market balances and accommodations among competitors probably have protective impact.

The social policy argument has a second Achilles heel. The conclusion that corporate privacy ought to be further protected has been vigorously challenged by Ralph Nader and others. "Corporate privacy" is sometimes asserted as a shield behind which lurk failures of corporate accountability, responsibility and efficiency. Strikingly, two of the few cases decided in the past several years in which corporations have brought privacy claims are cases in which the alleged privacy invader utilized surveillance in order to bring to light wrongdoing for which the corporation later faced civil or criminal prosecution.<sup>149</sup> If rights are to be ascribed where doing so will promote social "goods," the precise "goods" to be won through the extension of the privacy right call out for closer definition.

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argument" I refer to is a composite of an indefinite number of possible arguments with logically identical structures but relying on diverse conceptions of social good. Posner's economic defense of corporate privacy is a social policy argument that defines social good in terms of promoting net wealth.

149. *Barr*, 529 F. Supp 1277 (tape recordings of employment termination used to support age discrimination claim); *N.O.C.*, 484 A.2d 729 (surveillance of corporate operations reveal possible zoning violations and improper operation of a hazardous waste facility).

### 3. *Moral Rights*

Doctrinal uncertainty about common law rights is sometimes resolved by reference to the putative moral or natural rights of the litigants. The privacy theories of Professors Bloustein<sup>150</sup> and Westin<sup>151</sup> suggest that business organizations have something akin to a moral claim to legal privacy rights, because privacy is desired by and beneficial to legitimate business. They seem to suggest that as a matter of political freedom in a democratic setting organizational privacy ought to be respected. Should corporate moral claims be recognized, and, if so, should they be deemed to support common law privacy rights for corporation? A moral rights argument for common law corporate privacy protection is this one. Corporations are morally entitled to legal rights of privacy adequate to the task of protecting their reasonable expectations of freedom from others' highly offensive acts of intrusion, publication and commercial appropriation. Therefore, courts ought to permit actions for privacy invasion to lie on behalf of corporations.

This argument can have no appeal to positivists who deny that legal rights flow directly from any moral or natural rights we may have.<sup>152</sup> But the belief that there are rights, knowable by moral reasoning or intuition and useful for justifying and criticizing positive law, still occupies an important place in American life and jurisprudence.<sup>153</sup>

However, were the natural law perspective true, it would not follow automatically from the fact that human individuals possess background pre-legal rights that corporations possess them as well. Corporations are "invisible, intangible, and artificial."<sup>154</sup> Human-kind is said to be endowed with moral or natural rights because human beings have traits of rationality, free will, and self-conscious understanding. They are persons. Human personhood gives rise to reciprocal obligations of good treatment and good behavior because it constitutes an inherent reason for according deference to individual needs and desires.

This popular account of moral or natural rights renders it problematic to ascribe extra-legal rights to non-natural persons. But perhaps there is an argument of a different type to be made for moral rights, one which does not exclude corporations. This argument be-

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150. E. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* (1979).

151. A. WESTIN, *PRIVACY AND FREEDOM* (1967).

152. Cf. P. SOPER, *A THEORY OF LAW* 132 (1984) (equating concepts of moral rights and legal rights in critical discussion of their relevance law).

153. See generally sources cited *supra* note 5.

154. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819) (Marshall, J.).



gins with the premise that moral rights arise out of participation in a social practice. Corporations are real participants in a social practice of independent players which includes a system of laws. This system of laws imposes numerous duties and burdens of citizenship on the corporation, including tax burdens and liability for injuries to others. It also ascribes numerous legal rights to the corporation, to protect its interests, for example, in profitability, growth and innovation. The social practice of reciprocal benefits and burdens is the source of legitimate expectations that ground claims of a moral right to the protection of corporate interests.<sup>155</sup>

Further steps are needed to establish that among the moral rights of the corporation is a moral right of the legal protection of privacy interest in the form of a common law privacy right. Here is where "moral rights" arguments must join forces with "equivalent injury" and "social policy" arguments in order to complete the case for the right sought. Perhaps the best argument that can be made is that the moral status of the corporation as a social participant demands that its "equivalent injuries" be compensable; and that social justice demands the fullest protection of corporate privacy no less than of individual privacy.

### CONCLUSION

The arguments courts have made for denying common law privacy rights to corporations are in some respects anomalous and fail to realistically address corporate needs and preferences. However, as I have tried to show, the courts' arguments from corporate nature, legal purpose and the adequacy of existing remedies are not wholly without a reasonable basis. They make a good deal of sense if one accepts what I find difficult to accept, namely that "privacy" can only mean human privacy and that the privacy torts have the sole, settled purpose of guarding human feelings.

Any praise to be gleaned from this assessment of arguments against common law corporate privacy rights is admittedly faint. Praise for the arguments on the other side, in favor of corporate rights, must also be faint. The "equivalent injury," "social policy" and "moral rights" arguments for corporate privacy rights I have sketched unavoidably contain premises that are philosophically controversial and empirically uncertain. Moreover, the excitement of the largely unexplored possibility that corporate privacy rights could be recognized and put to use for legitimate corporate purposes, per-

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155. George Fletcher has argued that the moral basis of tort liability is reciprocity, and includes corporations among those who should be liable to others for imposing non-reciprocal burdens on individuals and other business entities. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

haps related to new computer and information technologies or old-fashioned industrial espionage, is diminished by the presence of case law revealing that corporate privacy has been used ignobly to shield wrongdoing.

The importance of privacy to business is plain, the social worth of the corporate privacy action, in view of the actual uses to which it has been put, less so. Corporate privacy actions attempted as a way of "getting back" at whistle-blowing citizens, as in *Schaefer*, or disgruntled employees, as in *Barr*, suggest that the corporate privacy right might do more to injure the public than to benefit society by promoting competition, innovation, and market fairness.

The question of extending privacy rights to corporations must look for a part of its answer in realistic understandings of what corporations are and what they need by way of legal support to sustain profitability and to have a beneficial role in American life. There are questions of incentive, business practices and actual markets to think through.

But the question of corporate privacy rights must look for the most fundamental part of its answer in conceptual accounts of what we mean by "privacy" and who or what may have moral and legal rights of their own. It must look to the theory of ascription. Legal theorists should turn their attention to general, recurrent quandries about how hard questions of ascription are best answered. For the general quandries, which cannot be sufficiently managed as we reflect with particularity on the validity of specific doctrine, loom large in our assessments of judicial allocation of particular legal rights in common law cases.