

## COMMENT

### Privacy, Personhood, and the Courts: FOIA Exemption 7(C) in Context

Must federal agencies consider the “personal privacy” of corporations in determining whether to release records pursuant to the Freedom of Information Act<sup>1</sup> (FOIA)? The U.S. Court of Appeals for the Third Circuit recently answered this question affirmatively in a decision that the Supreme Court will review this Term. The case, *AT & T v. FCC (AT&T)*,<sup>2</sup> comes in the midst of a heated public debate over the proper scope of corporate personhood that was sparked by the Supreme Court’s recent pronouncement that artificial entities, like natural persons, enjoy a right to free speech that is protected by the First Amendment.<sup>3</sup> The Court’s decision in *Citizens United* has been subjected to withering criticism by President Obama, members of Congress, and Court-watchers for allegedly failing to recognize that the policy justifications for a robust right of individual expression are not readily translatable to the corporate context.<sup>4</sup> Supporters of the decision respond that

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1. 5 U.S.C. § 552 (2006).

2. 582 F.3d 490 (3d Cir. 2009), *cert. granted*, 2010 WL 1623772 (U.S. Sept. 28, 2010) (No. 09-1279).

3. See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

4. Among the most biting critiques of the Court’s position was Justice Stevens’s impassioned dissent. *Id.* at 929, 972 (Stevens, J., dissenting) (“[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires . . . . [T]hey are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”); see also Patricia J. Williams, *Corpus Ex Machina*, THE NATION (Jan. 28, 2010), <http://www.thenation.com/article/corpus-ex-machina?page=full> (“It takes either the most simple-minded or the most cynical state of mind to conclude from this basis that corporations are entitled to the same panoply of civil and dignitary rights as actual, fully endowed people.”). *But see* Lawrence Lessig, *Citizens Unite*, NEW REPUBLIC (Mar. 16, 2010, 12:00 AM), <http://www.tnr.com/article/politics/citizens-unite> (“[T]he Court’s entire *Citizens United* opinion hung upon the

there is a long tradition in Anglo-American law of analogizing corporations to natural persons for the purposes of establishing their rights and duties<sup>5</sup> and cite 1 U.S.C. § 1 in support of this contention.<sup>6</sup>

At first glance, one might be tempted to understand the Third Circuit's decision in *AT&T* as compelled by the understanding of corporate personhood embraced by a majority of the Supreme Court in *Citizens United*. Although the Court of Appeals reached its decision before the Court's landmark campaign finance opinion was released, the appeals court's opinion discussed at length the meaning of personhood in concluding that AT&T could invoke FOIA's "personal privacy" exception to prevent the disclosures. Early press coverage of the Supreme Court's certiorari grant has likewise tended to associate *FCC v. AT&T* with the issue of corporate personhood that the Court confronted in *Citizens United*. To take one particularly revealing example, a blogger on the website of *The Atlantic* recently suggested that *Citizens United* might provide insight into the Court's likely holding in *AT&T*, since "both cases have at their core the issue of corporate 'personhood' and the rights that accompany it."<sup>7</sup> The implicit understanding among those who emphasize the *Citizens United* connection is that the robust conception of corporate personhood evidenced by a majority of the Court in that case is likely to dictate an outcome favorable to AT&T.

But this need not and (as I argue below) should not be the case. What neither the Third Circuit's opinion nor the analogy to *Citizens United* recognizes is that it is the term "privacy," not the term "personal," that most severely limits the scope of § 552(b)(7)(C) (Exemption 7(C)). Indeed, as I argue below, a more nuanced understanding of the concept of privacy—as it is

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fact that the First Amendment says nothing about who or what is to get the benefit of its protection. It simply bans certain kinds of regulation.").

5. Stephen M. Bainbridge, *Citizens United v. FEC: The First Amendment Rights of Corporate "Persons,"* PROFESSORBAINBRIDGE.COM (Jan. 21, 2010, 8:35 AM), <http://www.professorbainbridge.com/professorbainbridge.com/2010/01/citizens-united-v-fec-the-first-amendment-rights-of-corporate-persons.html>.
6. 1 U.S.C. § 1 (2006) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").
7. Nicole Allan, *Supreme Court Will Decide Whether Corporations Have Right to Privacy*, THE ATLANTIC (Sept. 28, 2010, 5:14 PM) <http://www.theatlantic.com/politics/archive/2010/09/supreme-court-will-decide-whether-corporations-have-right-to-privacy/63711/>; see also Adam Liptak & Duff Wilson, *Supreme Court Takes Cases on Corporate Rights*, N.Y. TIMES, Sept. 20, 2010, at A20 (describing *AT&T* as presenting issues of corporate rights "follow[ing] the court's decision in January in *Citizens United v. Federal Election Commission*").

employed in FOIA and elsewhere in American law—would lead the Supreme Court to conclude that Exemption 7(C) is inapplicable to AT&T. This is so, not because a corporation cannot be a “person” for the purposes of the statute, but because “privacy” is a concept that has meaning only when applied to natural persons.

In the Part that follows, I recount the facts giving rise to *AT&T* and provide a short summary of the Third Circuit’s decision and reasoning. Part II goes beyond the court’s decision, developing a more robust notion of privacy by examining occurrences of the term within the FOIA statute. Parts III and IV provide support for my reading of the statute by noting that other sources of law, as well as theoretical explorations of privacy, conceive of it as a right particular to individuals.

## I. THE THIRD CIRCUIT DECISION

*AT & T v. FCC* grew out of an investigation by the Federal Communications Commission (FCC) into allegations that AT&T had overcharged the federal government for certain telecommunications equipment. As part of that investigation, the FCC required AT&T to produce sensitive information, including internal e-mails, billing information, and invoices. The matter terminated with a consent decree, but in 2005 a group of AT&T’s competitors filed a FOIA request aimed at obtaining “[a]ll pleadings and correspondence contained in” the Commission’s investigative file.<sup>8</sup>

AT&T opposed the request on the grounds that the records were protected by FOIA Exemption 7(C). That provision authorizes federal agencies to withhold “records or information compiled for law enforcement purposes,” the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>9</sup> AT&T argued that the purpose of the exemption was to prevent embarrassment and stigmatization as a result of FOIA disclosures and that the corporation ran such a risk if the challenged documents were in fact released.<sup>10</sup> The FCC rejected this position after concluding that corporations lack “personal privacy” under the exemption.

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8. E-mail from Mary C. Albert, Comptel, to FCC (Apr. 4, 2005, 10:52 EST) (on file with author).

9. 5 U.S.C. § 552(b)(7) (2006).

10. Declaration of Leslie Bowman at 5, *AT & T v. FCC*, 582 F.3d 490 (3d Cir. 2009) (No. 08-4024). Specifically, AT&T suggested that evidence regarding the alleged misconduct “could . . . be used by competitors or others to attempt to embarrass, harass, and stigmatize AT&T publicly by, for example, citing such information in press releases, advertisements, or news

AT&T filed a petition for review of the FCC's order, arguing that the Commission's interpretation of Exemption 7(C) was incorrect as a matter of law. In reviewing the petition, the Third Circuit relied heavily on the plain text of the Act. The court found it particularly relevant that FOIA "defines 'person' to 'include an individual, partnership, corporation, association, or public or private organization other than an agency.'"<sup>11</sup> Although the statute does not define "personal privacy," the construction that is at the heart of Exemption 7(C), the court reasoned that "[i]t would be very odd indeed for an adjectival form of a defined term not to refer back to that defined term."<sup>12</sup>

Consistent with this reading of the text, the Third Circuit rejected the FCC's attempt to analogize Exemption 7(C) to § 552(b)(6) (Exemption 6). That provision, which covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,"<sup>13</sup> has been interpreted by a number of courts to apply only to individuals.<sup>14</sup> The Third Circuit questioned the accuracy of these decisions but also noted that, even if the government's characterization of Exemption 6 as inapplicable to artificial entities was correct, "[t]his does not mean that *each and every component phrase* in that exemption, taken on its own, limits Exemption 6 to individuals."<sup>15</sup> Because only individuals may be the subjects of "personnel and medical files," that phrase, rather than the "personal privacy" language, could limit Exemption 6 to individuals. The court reasoned that Exemption 7(C), which does not contain the reference to "personnel and medical files," might therefore be available to a wider class of claimants.

In holding that Exemption 7(C) may be invoked by corporations, the Third Circuit also sought to distinguish several precedents in the D.C. Circuit that suggested that court would apply the exemption only where a disclosure was likely to implicate an individual's privacy interests. Although the FOIA decisions of the D.C. courts, which have universal though not exclusive jurisdiction in this area,<sup>16</sup> are generally given substantial weight by other

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reports. . . . Disclosure would, as a result, harm AT&T's reputation and goodwill." *Id.* app. at 65.

11. 582 F.3d at 492 (quoting 5 U.S.C. § 551(2) (2006)).

12. *Id.* at 497.

13. 5 U.S.C. § 552(b)(6).

14. See, e.g., *Sims v. CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); *Hodes v. HUD*, 532 F. Supp. 2d 108, 119 (D.D.C. 2008) ("As a threshold matter, both Parties fail . . . to acknowledge that only individuals (not commercial entities) may possess protectible privacy interests under Exemption 6.").

15. 582 F.3d at 497.

16. See 5 U.S.C. § 552(a)(4)(B).

courts, the Third Circuit dispensed with the competing precedents in a footnote.<sup>17</sup>

While most of the D.C. Circuit cases concerned the meaning of “personal privacy” in the context of Exemption 6,<sup>18</sup> upon which Exemption 7(C) was in part modeled, *Washington Post Co. v. U.S. Department of Justice*<sup>19</sup> was more directly on point. In *Washington Post Co.*, Judge Abner Mikva, writing for an ideologically diverse panel that also included Judges Patricia Wald and David Sentelle, concluded that Exemption 7(C) does not prevent the disclosure of “[i]nformation relating to business judgments and relationships.”<sup>20</sup> The *Post* sought records from the Food and Drug Administration concerning an investigation into whether the Eli Lilly Company had failed to disclose adverse reactions to an arthritis drug that it marketed. Lilly attempted to block the disclosure on several grounds, including that it would compromise the company’s “personal privacy” as protected by Exemption 7(C). In rejecting the claim, the D.C. Circuit noted that “[t]he disclosures with which the statute is concerned are those of ‘an intimate personal nature’ such as marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation.”<sup>21</sup>

The Third Circuit did not discuss *Washington Post Co.* in detail, noting only that, like an individual, a corporation has “a strong interest in protecting its reputation.”<sup>22</sup> The panel then added, “to the extent that [the D.C. Circuit’s] cases can be read to conflict with our textual analysis, we decline to follow them.”<sup>23</sup> But, as this Comment argues below, even engaging the Third Circuit on its own textualist terms, there were strong arguments for Exemption 7(C)’s inapplicability that neither the court nor the litigants adequately considered. These arguments turn on the meaning of the term “privacy,” a matter to which the court devoted only passing attention.

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17. *AT&T*, 582 F.3d at 498 n.6.

18. *Multi Ag Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1228 (D.C. Cir. 2008) (“[B]usinesses themselves do not have protected privacy interests under Exemption 6 . . . .”); see also *Sims*, 642 F.2d at 572 n.47 (“Exemption 6 is applicable only to individuals.”); *Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976) (“The sixth exemption has not been extended to protect the privacy interests of businesses or corporations.”).

19. 863 F.2d 96 (D.C. Cir. 1988).

20. *Wash. Post Co.*, 863 F.2d at 100.

21. *Id.* (quoting *Sims*, 642 F.2d at 573-74).

22. *AT&T*, 582 F.3d at 498 n.6.

23. *Id.*

## II. FOIA PRIVACY

The Third Circuit's analysis of Exemption 7(C)'s plain language is open to the same critique to which the court subjected the FCC's Exemption 6 analogy. In emphasizing the broad statutory definition of the term "personal," the court overlooked the possibility that the noun that it modifies—"privacy"—might itself restrict the scope of the exemption. Indeed, careful attention to the term "privacy," as it is used both in the statute and in the law more generally, reveals the court's holding to be anomalous. Privacy, as it is properly understood, is an interest that is unique to individuals. Therefore, the Third Circuit erred in holding that Exemption 7(C) removed the AT&T files from FOIA's reach.

While corporations clearly have an interest in maintaining the confidentiality of certain information, that interest is not a privacy interest. Confidential business information is protected by another FOIA provision, Exemption 4, which limits disclosure by federal agencies of "trade secrets and commercial or financial information obtained from a person and privileged or confidential."<sup>24</sup> It was precisely because the billing information that AT&T's competitors requested from the FCC did not fall within the scope of Exemption 4 that the company was forced to claim the personal privacy exception.

The treatment of the term "privacy" in FOIA itself is an instructive place to begin this inquiry. The word appears only three times in the statute and each time is modified by the adjective "personal." Two of these appearances come in the context of the statutorily defined exemptions to FOIA's generally permissive disclosure regime. Exemption 7(C), the provision at issue in *AT&T*, is one; the other is Exemption 6, which, as was noted above, is widely viewed as applying only to individuals. The recurrence of this phrase in the two exceptions provides strong evidence for concluding that Exemptions 6 and 7(C) should be read to complement one another. If we accept the validity of prior constructions of Exemption 6, this complementarity would suggest that both exemptions should be restricted to natural persons.

While the Third Circuit pointed to Exemption 6's reference to "medical and personnel files" as a basis for distinguishing the two provisions, that language describes the type of record to which the provision applies, not the nature of the harm that it contemplates. There is no question that Congress intended Exemptions 6 and 7(C) to govern different types of records. As noted above, Exemption 7(C) applies only to "records or information compiled for

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24. 5 U.S.C. § 552(b)(4) (2006).

law enforcement purposes.”<sup>25</sup> Exemption 6, as the Third Circuit noted, is directed at a different subset of government records—medical, personnel, and “similar” files.<sup>26</sup> But although the types of records that come within the two provisions may differ, the harm from disclosure that they contemplate is the same: an “unwarranted invasion of personal privacy.”<sup>27</sup> This phrase gives scope both to Exemption 6’s reference to “similar files” and to the circumstances under which Exemption 7(C) should operate to block the release of records. As noted above, there is wide agreement that Exemption 6’s open-ended reference to “similar files” does not make it available to artificial entities.<sup>28</sup> This, in turn, suggests that like Exemption 6, Exemption 7(C) should be understood to be available only to individuals.

In addition to the textual similarities, there are also structural reasons to read the two provisions and their references to “personal privacy” in parallel. Exemption 6 protects the individual’s privacy interest in documents generated in connection with the government’s role as an employer and a provider of social services. Exemption 7 then deals separately with “records or information compiled for law enforcement purposes.” Documents in this latter class are publicly available subject to specific carve-outs, so section C provides specific protection to ensure that the “individual’s control of information concerning his or her person,”<sup>29</sup> to which Exemption 6 attends, is not compromised in the law enforcement context. This structural relationship has been recognized by the Department of Justice, whose *Guide to the Freedom of Information Act* has long noted that Exemption 7(C) is “the law enforcement counterpart to Exemption 6.”<sup>30</sup>

Admittedly, there are important textual differences between the exemptions. In addition to referencing different classes of records, two features of Exemption 7(C) suggest that it may be triggered more easily than Exemption 6. First, whereas Exemption 6 requires that any invasion of privacy that would result from disclosure be “clearly unwarranted,” Congress removed the modifier from Exemption 7(C) in response to executive branch concerns

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25. *Id.* § 552(b)(7)(C); *see supra* note 9 and accompanying text.

26. *Id.* § 552(b)(6).

27. *Id.* §§ 552(b)(6), (b)(7)(c).

28. *See supra* note 18.

29. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989).

30. U.S. DEP’T OF JUSTICE, *GUIDE TO THE FREEDOM OF INFORMATION ACT* 561 (2009).

about law enforcement efficacy and individual privacy.<sup>31</sup> Second, Exemption 6 requires that the asserting agency find that the disclosure in question “would constitute” an invasion of privacy, while Exemption 7(c) requires only a finding that the disclosure “could reasonably be expected to constitute” such an invasion.<sup>32</sup> Consequently, as the Supreme Court recognized in its only decision addressing the exemptions in detail, “the standard for evaluating a threatened invasion of privacy interests” in the context of Exemption 7(C) is somewhat broader than the standard that attaches to personnel, medical, and similar files.<sup>33</sup>

But these differences go to the severity of the privacy threat that must be shown to avoid disclosure. They do not speak to the nature of the threatened violation nor, most importantly, to whom it may occur. Of course, as the Third Circuit recognized, “Corporations, like human beings, face public embarrassment, harassment, and stigma because of [their] involvement [in criminal investigations].”<sup>34</sup> But the harm to an individual of an embarrassing disclosure is fundamentally different from the harm that a corporation suffers under similar circumstances. While a corporation may experience financial loss due to the circulation of compromising information, disclosures that impinge on “the individual’s control of information concerning his or her person”<sup>35</sup> may implicate the subject’s thoughts, sentiments, and emotions in a deep and unpredictable manner. Although it might be efficacious to provide corporations with broad protections under Exemption 7(C) as a means of “encouraging [them]—like human beings—to cooperate and be forthcoming in such investigations,”<sup>36</sup> the exemption’s core concern is not with assuring compliance so much as with protecting an interest that, as I argue in Part IV, is unique to human beings.

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31. See Letter from President Gerald R. Ford to Senator Edward M. Kennedy (Aug. 20, 1974), reprinted in 120 CONG. REC. 33,158 (1974); Letter from President Gerald R. Ford to Representative William Moorhead (Aug. 20, 1974), reprinted in 120 CONG. REC. 34,162-63 (1974).

32. 5 U.S.C. § 552.

33. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 756; see also *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991) (noting that Exemption 7(C) authorizes the categorical withholding of information that identifies third parties in law enforcement records whereas the modifier in Exemption 6’s reference to a “clearly unwarranted invasion” is generally understood to incorporate notions of balancing public and private interests).

34. *AT & T v. FCC*, 582 F.3d 490, 498 n.5 (3d Cir. 2009).

35. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 763 (describing, in dicta, “the common law and the literal understandings of privacy”).

36. *AT&T*, 582 F.3d at 498 n.5.

### III. LEGAL PRIVACY

Recognizing, perhaps, that the harms stemming from disclosure of confidential information are more fundamental for individuals than they are for business or political entities, the law outside of the FOIA context has tended to analyze “privacy” as an individual interest rather than an institutional one. Although a broad survey of the law on corporate privacy is beyond the scope of this Comment, reference to prominent statutes and common law doctrines that incorporate notions of privacy provides support for this position. To take just one example, Congress has chosen to exclude artificial persons from the safeguards embodied in the Privacy Act of 1974, which establishes fair practices for the government’s handling of personally identifiable information.<sup>37</sup> The legislative history makes clear that this was a conscious decision. Congress found that the collection, maintenance, use, and dissemination of personal information by federal agencies posed a threat to the privacy of “individuals” specifically.<sup>38</sup> The strong implication is that, in refusing to extend the protections of the Act to artificial entities, Congress determined that such entities lack a protectable privacy interest.

State courts and legislatures across the United States have reached a similar conclusion in the private law context. The topic of privacy has figured prominently in tort law since 1890, when Samuel Warren and Louis Brandeis published their seminal article arguing that a series of seemingly unrelated court decisions on subjects as disparate as defamation, trespass, and breach of implied contract were implicitly concerned with protecting the plaintiff’s right to privacy.<sup>39</sup> The “complex of four” privacy torts, as outlined by William Prosser in an influential law review article<sup>40</sup> and later incorporated into the *Restatement (Second) of Torts*, include: intrusion upon seclusion, public disclosure of private information, publication of information that places an individual in a false light, and appropriation of a person’s name or likeness.<sup>41</sup> Following Prosser and the *Restatement*, most states now recognize some or all of the privacy torts either as a matter of common law or statute.<sup>42</sup>

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37. Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(1), 88 Stat. 1896, 1896 (codified as amended at 5 U.S.C. § 552a (2006)).

38. *Id.* (reciting congressional findings).

39. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

40. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 388-89 (1960)

41. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

42. See ANITA L. ALLEN, *PRIVACY LAW AND SOCIETY* 32 (2007).

Despite the wide diffusion of the tort law of privacy, however, there is currently no American jurisdiction in which corporations possess a right to sue under the classic privacy torts.<sup>43</sup> As one Massachusetts judge recently noted, “A corporation is not an individual with traits of a highly personal or intimate nature.”<sup>44</sup> Thus, actions that were intended to remedy wrongs such as “damage[d] feelings and sensibilities” are inapplicable to entities that are incapable of experiencing this type of harm.<sup>45</sup> The consensus among state courts thus seems to be that, although corporations have an interest in protecting their reputations and their secrets, to do so they must rely on the law of defamation, trademark, copyright, trade secrets, and unfair trade practices. This understanding in the state court system fits nicely with the interpretation of FOIA’s structure that I advanced above. Exemption 4, which provides protection for “privileged or confidential” trade secrets and information, is the statutory analogue of common law actions that protect commercial interests. The concept of privacy is simply inapplicable to artificial entities in either context.

The law in the Fourth Amendment context is not inconsistent with statutory and common law schemes that uniformly restrict privacy claims to natural persons. It is true that the Supreme Court, in a 1977 decision, explicitly characterized a warrantless seizure of documents as violative of the possessor corporation’s “privacy.”<sup>46</sup> But this reference must be understood in light of the Court’s tendency to use the word “privacy” as a term of art in discussing the scope of the Fourth Amendment’s coverage. This practice finds its origins in *Katz v. United States*, a case that required the Justices to pass on the constitutionality of a warrantless wiretap of a public phone booth.<sup>47</sup> Rejecting a line of prior decisions in which the applicability of the Fourth Amendment turned on whether the government had committed common law trespass, the *Katz* Court pronounced the government’s conduct unconstitutional, declaring

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43. See, e.g., *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 594 (Ind. 2001) (holding that a university, as an artificial entity, could not assert a privacy claim for appropriation against a former employee who attached its name to his website); RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (“A corporation, partnership or unincorporated association has no personal right of privacy.”).

44. *Warner-Lambert Co. v. Execuquest Corp.*, 691 N.E.2d 545, 548 (Mass. 1998) (internal quotation marks omitted) (quoting *Bratt v. International Business Machs. Corp.*, 392 Mass. 508, 518 (1984)) (upholding a summary dismissal on the grounds that, as a corporation, the plaintiff lacked standing to bring a privacy action).

45. ALLEN, *supra* note 42, at 113.

46. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977).

47. *Katz v. United States*, 389 U.S. 347 (1967).

that “the Fourth Amendment protects people, not places.”<sup>48</sup> Justice Harlan’s concurring opinion in that case established the now-dominant test for determining the scope of the Fourth Amendment’s protections. That test requires that the party asserting a constitutional violation exhibit a subjective expectation of privacy in the information at issue and that the expectation be one that society is prepared to recognize as reasonable.<sup>49</sup> In recent years, however, the Court’s “reasonable expectation of privacy” test has come under attack as jurists and commentators have recognized both that the term “privacy” has become a misleading label for the way that Fourth Amendment doctrine operates in practice and that, at the same time, it has constrained the constitutional jurisprudence in ways that might be undesirable.

The first basis for critique—that the “privacy” label fails to describe accurately how the court assesses the coverage of the Fourth Amendment—arises from the observation that a significant amount of information that is popularly considered to be private has been determined by the Court to fall outside of the Fourth Amendment’s scope. Thus, for example, although the Supreme Court ruled in 1978 that bank records are not private within the meaning of the Fourth Amendment,<sup>50</sup> Congress has subsequently acted through the Right to Financial Privacy Act to limit the ability of law enforcement to obtain these records without judicial supervision.<sup>51</sup> The name of the statute demonstrates quite clearly that the popular notion of what constitutes private information differs substantially from what the Court labels as private for constitutional purposes. The dynamic between Congress and the Court on display in the bank records cases has been replicated in the context of telecommunications privacy law as well as in any number of other areas in which the Court has spoken to the Fourth Amendment’s applicability.<sup>52</sup> The proliferation of statutory and common law schemes that, like the Privacy Act and the statutes mentioned above, aim to secure an individual’s confidential information, attests to the fact that our shared conception of privacy as a value is much broader than the interests secured by the Constitution. Indeed, Orin Kerr has argued recently that, despite the Court’s persistent claims that it decides Fourth Amendment cases involving new technologies on the basis of

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48. *Id.* at 351-53.

49. *Id.* at 361 (Harlan, J., concurring).

50. *United States v. Miller*, 425 U.S. 435, 443 (1976).

51. *See* Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (2006).

52. *See*, for example, the Pen Register and Trap and Trace Devices Act, 18 U.S.C. §§ 3121-3127 (2006), which Congress passed to protect the privacy of numbers dialed from a telephone after the Supreme Court ruled in *Smith v. Maryland*, 442 U.S. 735 (1979), that such numbers were not “private” in the Fourth Amendment sense.

what would constitute a “reasonable expectation of privacy,” the Court in fact often relies on property-based principles that are traceable to the pre-*Katz* era.<sup>53</sup> Thus, privacy in the Fourth Amendment context is not the conceptually thick, socially laden notion that underlies popularly enacted statutes and incrementally developed common law. Rather than being understood as “an overarching value,” Fourth Amendment privacy is “a quantifiable fact that can be used to help resolve concrete legal disputes.”<sup>54</sup>

Nor is it clear that it would be desirable if the scope of the Fourth Amendment were, as the Court claims it is, determined by social expectations as to what constitutes private information. Indeed, the other major critique of Justice Harlan’s privacy test is that, in purporting to import a set of norms developed to govern private persons, the test fails to account for the ways in which state actors are both authorized to intrude into individuals’ lives in a way that an average member of society is not, and a greater threat to individual autonomy due to their distinctive power.<sup>55</sup> Moreover, by linking the Fourth Amendment exclusively to social conventions, we run the risk that the increasingly nonprivate nature of our modern world will erode any limitations that the Amendment might impose on government action.

These observations have led some judges and commentators to suggest that, rather than privacy, the individual interest at stake in the Fourth Amendment context might more appropriately be described as an interest in being free from unjustified or discriminatory government infringement on autonomy.<sup>56</sup> Dissenting in *Illinois v. Andrea*—a case holding that, once searched, a container falls outside the scope of Fourth Amendment protections<sup>57</sup>—Justice Brennan took pains to remind the majority that “the right of the people to be secure” includes a right not only to protect the privacy of information but also to be free from the unnecessary interference of government actors specifically, whether or not that interference threatens to

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53. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 838 (2004).

54. Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1760 (1994) (emphasis omitted).

55. See, e.g., Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 117-19 (2008) (arguing for the abandonment of the “reasonable expectation of privacy” test in favor of a “repoliticized” Fourth Amendment).

56. See Timothy Casey, *Electronic Surveillance and the Right To Be Secure*, 41 U.C. DAVIS L. REV. 977, 1030-31 (2008); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 737 (1989); Sundby, *supra* note 54, at 1777-85.

57. 463 U.S. 765, 773 (1983).

reveal confidential information.<sup>58</sup> Indeed, one might understand the Supreme Court's recent decision in *Kyllo v. United States*,<sup>59</sup> which held that the Fourth Amendment was violated where police used a thermal camera to photograph the exterior of a home without first obtaining a warrant, as a recognition that information that might generally be considered not to be private (such as the heat emanating from a wall exposed to the world) could nevertheless fall within the Fourth Amendment's proscription of unreasonable searches and seizures.

Recognizing that privacy in the Fourth Amendment context is not equivalent to the concept of privacy as it is understood popularly and in other legal contexts allows us to understand better why the Court has seen fit to distinguish between individuals and corporations in the way that it analyzes Fourth Amendment interests. The Court has acknowledged that the privacy interest envisioned by the Fourth Amendment where an individual is concerned is qualitatively different from the rights against unreasonable search and seizure possessed by a corporation. As Justice Jackson wrote in *United States v. Morton Salt Co.*,<sup>60</sup> “[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy.”<sup>61</sup> Indeed, one federal district court has recently rejected the argument that corporations enjoy “full blown” privacy rights under the Constitution, reading the Fourth Amendment to provide corporations with only a limited “right to attack general warrants, which the Framers abhorred, or with a basic due process right against clearly abusive government searches and seizures.”<sup>62</sup> Decisions such as these, that limit the ability of corporations to lay claim to privacy rights, are consistent not only with the understanding of the Fourth Amendment that I advanced above but also with the large body of theoretical literature—to which I turn in the next Part—that views privacy as an interest that is unique to natural persons.

#### IV. PRIVACY THEORY

Although “the question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual’s interest in privacy is

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58. 463 U.S. 765, 775 (1983) (Brennan, J., dissenting).

59. 553 U.S. 27 (2001).

60. 338 U.S. 632 (1950).

61. *Id.* at 652.

62. *United States v. Agriprocessors, Inc.*, 2009 U.S. Dist. LEXIS 65165, at \*4 (N.D. Iowa July 28, 2009).

protected by the Constitution,”<sup>63</sup> reference to these related areas of the law helps us to see that “privacy” is a concept that is intimately tied up with the individual and her relationship to the world. This understanding is confirmed by the vast body of critical literature that attempts to grapple with the concept of privacy, its substance, and its limitations.

Theorists differ somewhat on the exact meaning and scope of the right to privacy. Nevertheless, there is a widely shared consensus that privacy claims are potent for the very reason that they are so tightly bound up with what it means to be a freestanding and autonomous individual. This view is quite clearly on display in Samuel Warren and Louis Brandeis’s above-mentioned article in the *Harvard Law Review*, the *locus classicus* of legal privacy theory.<sup>64</sup> Solitude and privacy, they argue, are “essential to the individual” in an increasingly intense and complex world.<sup>65</sup> Legal protections for privacy are necessary in order for individuals to enjoy their lives to the fullest and thereby achieve their full personhood. Warren and Brandeis’s emotionally tinged account contains little suggestion that they would favor expanding privacy protections to artificial persons. Indeed, it is precisely the naturalness of the individual that they seek to protect from an increasingly mechanized and bureaucratized modern world.

Warren and Brandeis’s notion—that privacy is important for constructing an image of oneself in relation to the chaos of the outside world—intersects with another important and slightly different theory of privacy’s function. This is the widely shared idea that the value of privacy lies primarily in its utility as a tool for structuring relations with other persons and, in particular, for controlling one’s self-presentation. As a legal construct, privacy goes beyond the law of search and seizure or defamation to ensure that an individual may “rely on others to complete the picture of him of which he himself is allowed to paint only certain parts.”<sup>66</sup> Robert Post, for example, suggests that by allowing an individual “to press or to waive territorial claims” or “to choose respect or

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63. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 n.13 (1989).

64. See Warren & Brandeis, *supra* note 39, at 196 (“The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.”).

65. *Id.*

66. Erving Goffman, *The Nature of Deference and Demeanor*, in INTERACTION RITUAL: ESSAYS IN FACE-TO-FACE BEHAVIOR 47, 84 (Transaction Publishers 2005) (1967).

intimacy,” privacy is “deeply empowering for his sense of himself as an independent or autonomous person.”<sup>67</sup>

This odd state of affairs, in which an individual’s “sense of himself as an independent or autonomous person” is vindicated only through the collective actions of the community that he inhabits,<sup>68</sup> is entirely inapplicable to corporations, which are both defined and circumscribed by the positive law that creates them. Certainly, corporations have an interest in controlling perceptions of themselves in much the same way that individuals do. As has already been noted, however, the stakes in this game of self-presentation for the individual are significantly different from those that confront corporations. While corporations’ financial fortunes may rise and fall with public perceptions of them, “the ability . . . to construct out of the multiplicity of one’s experience and expectations an individual personality” is a fundamentally human feature, indeed “the definitive characteristic of human beings.”<sup>69</sup>

Another function of privacy, alluded to by Post above, is its important role in facilitating interpersonal intimacy, a uniquely human good. By providing the possibility that some aspects of ourselves may be kept from the public at large, privacy allows us to maintain a stock of intimate, secret information that we may disclose to whomever we choose. These confidences in turn may serve, in Charles Fried’s terms, as “moral capital” that promotes feelings of love and friendship unique to the human condition.<sup>70</sup>

Finally, Jed Rubenfeld’s conception of privacy as an antitotalitarian principle is particularly useful for understanding the inapplicability of the concept to corporate persons. In Rubenfeld’s view, privacy is important because it “prevents the state from imposing on individuals a defined identity.”<sup>71</sup> Exemption 7(C) fits this conceptualization nicely, since the provision is quite clearly intended to avoid disclosures of items, such as evidence of a criminal or civil investigation, that would lead the claimant to be viewed in a negative or undesirable light by the general public. However, Rubenfeld’s account has purchase only where those persons claiming a privacy

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67. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 973 (1989).

68. *Id.* at 986 n.141.

69. Rubenfeld, *supra* note 56, at 754.

70. CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 142 (1970) (“To be friends or lovers persons must be intimate to some degree with each other. Intimacy is the sharing of information about one’s actions, beliefs or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.”).

71. Rubenfeld, *supra* note 56, at 794.

right are freely constituted—with values and desires that exist independent of (and prior to) the state. Corporations, however, are “legal persons.” They have no existence independent of the law; accordingly, their identity, such as it exists, will always be shaped by official power.

## CONCLUSION

Although the legal issue that confronted the Third Circuit in *AT&T* might have appeared complicated in light of the rapidly evolving federal jurisprudence of corporate personhood, this Comment has suggested that it need not have been. This is because a proper understanding of the term “privacy” makes resolution of the personhood question, at least in this context, unnecessary. As I argued above, the text and structure of FOIA provide strong evidence that the notion of privacy embodied in the statute is a uniquely human one. This view only gains support from the host of legal doctrines in other fields that deny artificial persons the right to claim a privacy interest in the true sense. Finally, as I demonstrated above, privacy as a theoretical and philosophical concept only has meaning when applied to natural persons. In the context of *AT&T*, a more comprehensive understanding of the notion of “privacy,” one that was informed by a serious consideration of the intratextual and extratextual uses of the term that this Comment has sought to highlight, would have compelled the conclusion that, to the extent that Exemption 7(C) is clear on its face, that clarity weighs in favor of the agency’s disclosure order.

Although the Third Circuit’s holding in *AT&T* may seem narrow, its implications are broad. FOIA was enacted with the promise of “ensur[ing] an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>72</sup> As recent events have demonstrated, corporate malfeasance has the ability to affect the citizenry well beyond any damage that it might cause to shareholders or business associates. It is a key function of government to investigate and punish such malfeasance. The effect of the circuit court’s decision, however, is to remove an important tool through which the citizenry can ensure that government is performing its designated function. In the wake of *AT&T*, the “personal privacy” exemption will now be available to actors whose misdeeds may sweep substantially broader than those of a single individual. Congress’s creation of the “personal privacy” exemption represents a carefully calibrated effort to strike a workable balance between the right of the public to know and the rights of individuals to control their self-

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72. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

presentation. This exemption to the statute's general bias in favor of open government should not be allowed to expand to the point at which it overwhelms both the statute itself and our morally grounded, common-sense notions of what "privacy" should mean.

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