PAVESICH, PROPERTY AND PRIVACY: THE COMMON ORIGINS OF PROPERTY RIGHTS AND PRIVACY RIGHTS IN GEORGIA

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II. *PAVESICH V. NEW ENGLAND LIFE INSURANCE CO.*

The interconnection between property and privacy is unmistakable when one considers how these rights have developed in Georgia. And Georgia law (regarding this subject, at any rate) is quite significant. In 1905, with the state Supreme Court's unanimous decision in *Pavesich v. New England Life Insurance Co.*,[10] Georgia became the first jurisdiction to recognize privacy as a specific, remediable common-law right.

Pavesich arose when the defendant life insurance company published a photograph of artist Paolo Pavesich in a newspaper advertisement. The company had acquired the picture from an Atlanta photographer, who gave it to the insurance company without Pavesich's permission. In the advertisement, Pavesich was portrayed as a vigorous and responsible individual that had purchased life insurance from the company "in [the] healthy and productive period of life."[11] By virtue of this apparently intelligent decision, the advertisement portrayed Pavesich as resting easy, not only because his family would be protected after his demise, but also because of the annual dividends he received from the policies during his lifetime.[12] Next to the picture of Pavesich, the advertisement contained the photograph of "an ill-dressed and sickly looking person," who purportedly did not have Pavesich's foresight and now, unable to secure insurance, realized his mistake.[13] Of course, the portrayal of Pavesich was entirely fictitious, as he had neither purchased a life insurance policy from the company nor made the statements attributed to him. Thus, Pavesich complained that the advertisement was "peculiarly offensive to him" and had a tendency to "ridicule him before the world, and especially with his friends and acquaintances" who knew the substance of the advertisement to be false.[14]

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label attached to other rights – most notably those of property and contract – and, therefore, "is superfluous" as a separate legal doctrine. *See* Amy Peikoff, *No Corn on this Cobb: Why Reductionists Should be All Ears for* Pavesich, 42 BRANDEIS L. J. 751, 751-52 (2004).

10. 50 S.E. 68 (Ga. 1905).
11. *Id.* at 69.
12. *Id.*
13. *Id.* at 68-69.
14. *Id.* at 69.

As a result, Pavesich filed suit against the company, its general agent, and the photographer. Although Pavesich accused the defendants of acting maliciously in a manner that adversely affected his reputation, he did not assert an explicit action for defamation. Rather, Pavesich claimed that the advertisement constituted a "trespass upon [his] right of privacy."[15] The trial court rejected this claim, a result that, given the state of the legal landscape at the time, could not have been too surprising for Pavesich's lawyer. Although some courts previously had hinted that a right to privacy might exist, none had explicitly recognized such a right as an independent ground for legal action.

Indeed, the most prominent argument for an independent privacy right came not from the case law, but rather from an article by Samuel Warren and Louis Brandeis published more than a decade earlier in the *Harvard Law Review*.[16] In their article, Warren and Brandeis had argued that "a general right to privacy"[17] could be gleaned from existing cases – most notably, the common law's treatment of manuscripts, works of art, and other types of intellectual property.[18] At the time *Pavesich* was decided, however, no court of last resort had yet agreed.

In fact, the most famous court to have addressed the issue refused to recognize an independent right of privacy on very similar facts. In *Roberson v. Rochester Folding Box Co.*,[19] the New York Court of Appeals rejected a privacy claim brought by a woman whose picture had been used, without her consent, on flyers advertising the defendant's flour.[20] Even though the lower court had sustained her cause of action based on "the right to be let alone," the Court of Appeals balked due to the lack of legal precedent supporting such a right:

> Mention of such a right is not to be found in Blackstone, Kent, or any other of the great commentators upon the law; nor, so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was

15. *Id.*
16. *See generally* Warren & Brandeis, *supra* note 2, at 193-220.
17. *Id.* at 198.
18. *Id.* at 205.
19. 64 N.E. 442 (N.Y. 1902).
20. *Id.* at 442.

> presented with attractiveness, and no inconsiderable ability, in the Harvard Law Review . . . .[21]

Thus, the New York court insisted that the only authority for recognizing a right to privacy was that offered by Warren and Brandeis, and the precedents relied on by those authors admittedly did not recognize a right to privacy as such. Rather (as the Georgia Supreme Court would point out), all of the cases on which Warren and Brandeis could have relied were "based either upon the recognition of a right of property, or upon the fact that the publication would be a breach of contract, confidence, or trust."[22] By the time Paolo Pavesich's case reached the Georgia high court, it faced a decidedly uphill battle. The question confronting the court – a question which no other court of last resort had answered affirmatively – was "whether an individual has a right of privacy which he can enforce, and which the court will protect against invasion."[23] Answering that question in the affirmative, Justice Andrew J. Cobb, writing for a unanimous court, made history.

Unfortunately, *Pavesich* has not always received the attention it deserves. Many commentators have glossed over the decision as a mere endorsement of the arguments made by Warren and Brandeis,[24] arguments that some commentators have criticized as unpersuasive and unsupported.[25] But *Pavesich* did more. As one scholar recently has posited, *Pavesich* "contributed something crucial"[26] to the debate over privacy – a justification grounded not only in appeals to prior precedent or pragmatic policy concerns, but in political and moral philosophy as well.[27] Included in the *Pavesich* opinion are allusions to natural law and social compact theory, references to Blackstone and his

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21. *Id.* at 443.

22. *Pavesich*, 50 S.E. at 75.

23. *Id.* at 69.

24. *See, e.g.*, William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 386 (1960) (suggesting that *Pavesich* "accepted the views of Warren and Brandeis"); *see also* Haeji Hong, *Dismantling the Private Enforcement of the Privacy Act of 1974: Doe v. Chao*, 38 AKRON L. REV. 71, 75 (2005) (stating that *Pavesich* "embraced the right to privacy set forth by Warren and Brandeis").

25. *See, e.g.*, Peikoff, *supra* note 9, at 773.

26. *Id.* at 755.

27. *Id.* at 783-91 (analyzing *Pavesich* decision).

conception of absolute or fundamental rights, and the use of precedent and language littered with deep-rooted, property-based associations. These various elements of the opinion supported legal recognition of a right to privacy in a manner that was different from (and, in my opinion, more persuasive than) what had come before.[28] More importantly for present purposes, a careful evaluation of these different elements, in light of both prior and subsequent authority, demonstrates the close relationship between the rights of privacy and property.

A. Natural Law and the Social Compact

Because no precedent affirmatively supported an independent right of privacy, Justice Cobb and his colleagues on the Georgia court had to look elsewhere for the foundations of their argument. Importantly for our purposes, the first place they turned was to the branch of political philosophy characterized by social compact theory. "The individual," explained Justice Cobb, "surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society."[29] Thus, at the outset, Justice Cobb grounded his analysis in the idea that individuals enjoy certain rights under natural law, regardless of any action or inaction by the state. Individuals agree to yield some of these natural rights in order to promote the soundness of the commonwealth (i.e., "as a member of society"), in exchange for which they gain greater protection for those rights retained by them. And Justice Cobb made clear that the individual keeps certain fundamental rights bestowed by natural law, even after having entered into political society:

> But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved, than he has to violate the valid regulations of the organized government under which he lives.[30]

For Justice Cobb, then, political society was founded upon an

28. *Cf. id.* at 755 (noting that "it was not until after the *Pavesich* decision that the movement in favor of the right [to privacy] gained momentum").

29. *Pavesich,* 50 S.E. at 69.

30. *Id.*

agreement whereby each individual freely limits certain natural rights (and concomitantly assents to the rules of the social order) in exchange for the government offering him better security for those rights that he continues to hold.

The question becomes, of course, whether the right to keep certain matters private is included in those rights provided by natural law and retained by the individual after entering the social compact. Justice Cobb viewed the answer to this question as obvious:

> The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature.[31]

For this reason, Justice Cobb understood the right of privacy to derive from natural law.[32] For him, it existed as a first principle, and it was not surrendered (at least not entirely) by the social compact made between the individual and society as a whole.

When viewed in this light, the right to privacy bears obvious similarities to long-held notions about rights in property. As an initial matter, Justice Cobb's explanation of the social compact is virtually identical to the theories articulated more than two centuries earlier by English philosopher John Locke. According to Locke, all persons initially are in a state of nature, that is, they are lacking organized political society.[33] In this natural state, people enjoy the freedom to decide for themselves how to arrange their affairs, including the use and disposition of their possessions and persons.[34] So long as individuals remain in the state of nature, however, this freedom lacks stability because every individual enjoys the exact same freedom, with none having authority to settle disputes or regulate conduct for the

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31. *Id.* at 69-70.

32. *Id.* at 70-80.

33. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 4, at 8 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

34. *Id.*

mutual benefit of all.[35] Accordingly, the rights enjoyed in the state of nature are to some degree indefinite because they are "constantly exposed to the invasion of others."[36] To obtain greater security for these rights, people unite together "for the mutual *preservation* of their lives, liberties and estates," which Locke calls "by the general name, *property*."[37] Thus, for Locke, the primary purpose for which individuals create and submit to formal government "*is the preservation of their property*."[38] The parallels between Locke's theory and Justice Cobb's discussion in *Pavesich* are striking. For both, political society results from individual desire to better protect those rights (whether property or privacy) enjoyed by the laws of nature.

At the time *Pavesich* was written, these ideas enjoyed a long pedigree in American legal thought, especially as applied to property rights.[39] Perhaps of primary importance were the Georgia decisions that presumably would have influenced Justice Cobb's thinking most directly. The law of eminent domain, for example, was often explained by reference to the social compact, pointing out that the individual tacitly agrees (when necessary for the common good) to release his property for public use, but only where the government upholds its tacit agreement to provide just compensation for the taking.[40] "All property is a pledge to pay the necessary expenses of government," said one Georgia court, "but the burthen must be equally born."[41] Thus, when the public good mandates the yielding of individual property interests, those interests

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35. *Id.* § 4, at 8; *see also id.* § 123, at 66.

36. *Id.* § 123, at 66.

37. *Id.* (emphases in original).

38. *Id.* § 124, at 66 (emphasis in original).

39. *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (Paterson, Circuit Justice) (echoing Locke that "preservation of property . . . is a primary object of the social compact"); Crenshaw v. Slate River Co., 27 Va. (6 Rand.) 245, 276 (1828) (Green, J.) (stating that "security of private property . . . is one of the primary objects of Civil Government").

40. *See, e.g.*, Parham v. Justices of Inferior Court, 9 Ga. 341, 344 (1851); *see also* Heard v. Callaway, 51 Ga. 314, 318 (1874) ("[I]t is contrary to reason and justice, *and to the fundamental principles of the social compact*, to take one man's property and give it to another without compensation.") (emphasis added).

41. *Parham*, 9 Ga. at 352.

nonetheless receive protection in the form of remuneration to the owner. This was so, said the Georgia courts, by virtue of the social compact itself, even where no piece of positive legislation expressly required it.[42] As explained in another context, "independently of written constitutions, there are restrictions upon the legislative power, growing out of the nature of the civil compact and the natural rights of man."[43]

These brief examples demonstrate that, by 1905, social compact theory had long been associated with the law pertaining to an individual's rights in property. A leading reason for this association, as explained by an early Justice of the United States Supreme Court, was because "[n]o man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry."[44] This idea, too, was Lockean in nature. Just as Locke identified the social compact with the preservation of individual property interests, he identified property primarily with an individual's personhood and labor. Locke asserted that "every man has a *property* in his own *person*," which "no body has any right to but himself" and which includes "[t]he labour of his body, and the works of his hands."[45] Thus, by laboring, an individual extends the scope of his property beyond himself to reach the things he produces: "Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*."[46] From the individual's vantage point, the social compact is designed primarily to safeguard both those interests he already has and those interests he might acquire, via his labor, in the future.[47]

A similar rationale is implicit in Justice Cobb's promotion of privacy rights. The notion that an individual possesses a property interest in her person and labor logically leads to the conclusion that she has some right to be protected from interference by others – that is, to be let alone. With regard to

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42. *Id.* at 344-345; Young v. McKenzie, 3 Ga. 31, 41-42 (1847).

43. Campbell v. State, 11 Ga. 353, 369 (1852).

44. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (Paterson, Circuit Justice).

45. LOCKE, *supra* note 33, § 27, at 19.

46. *Id.* (emphases in original).

47. *Id.* §§ 123-124, at 66.

the person itself, Locke's ideas "are inextricably linked to the protection of privacy, because they suppose the ability to exclude others from bodily invasion, suggesting that protection of bodily privacy also involves a metaphor for ownership itself."[48] Moreover, Locke's theory suggests that an individual might also possess some right in her own thoughts, affairs, and personal information. In fact, one scholar has described Locke's ideas as "the backbone of intellectual property law," which protects "the individual who mixes her unique personality with ideas, who most displays originality and novelty in her creations."[49] It was in this area of the law that Warren and Brandeis found their best analogy for a right to privacy.[50] This makes sense when one thinks in Lockean terms: "[I]ntellectual property embodies Locke's idea that one gains a property right in something when it emanates from one's self."[51] Thus understood, privacy (as an extension of one's personhood) plays a very similar (if not identical) role to that of property with regard to the nature of the social compact. Indeed, *Pavesich* implied as much when it equated encroachments upon an individual's privacy with the withdrawal of basic societal benefits – that is, those benefits that induce the individual to enter into the social compact in the first place.[52] If entering political society necessarily meant that each individual forfeited her right to keep certain matters private, Justice Cobb seemed to be suggesting that no one would do it.

Although *Pavesich* does not make it explicit, it seems that it is this similarity between property and privacy – the relative value of each vis-à-vis the reasons for becoming a party to the social compact – that (in the minds of Georgia jurists) linked them together as deserving of legal protection. In this line of thinking, individuals surrender certain rights (including in some instances aspects of their rights to property and privacy) in order to provide more stable and effective protection for their rights as a whole. Chief among the rights retained, and for which

48. Katyal, *supra* note 8, at 303.

49. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1112 (2002).

50. Warren & Brandeis, *supra* note 2, at 205.

51. Solove, *supra* note 49, at 1112.

52. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69-70 (Ga. 1905).

protection is sought, are the bulk of each individual's property and privacy interests. Unless these interests receive protection, the social compact is violated and stands worthless to the individual. For this reason, at least in Georgia, both property and privacy were viewed early on as fundamental rights worthy of recognition by any civilized society.[53]

53. *Id.* at 80 (explaining that protection of privacy rights is "thoroughly in accord . . . with the principles of the law of every civilized nation"); In re Flournoy, 1 Ga. 606, 608 (1846) (declaring legal protections for vested property rights "to occupy a place in the estimation of civilized states, anterior to, and above, constitutions and laws").

C. "The Bundle of Sticks" and "The Right to be Let Alone"

This similarity between privacy and property finds equal support in the final thread of *Pavesich*'s reasoning. After connecting privacy to Blackstone's conception of fundamental rights, Justice Cobb focused his attention on providing common law support for "a legal right to be let alone."[79] Although a

79. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 71 (Ga. 1905) (internal quotations omitted).

surface reading of this portion of *Pavesich* might suggest that property and privacy share little in common, a closer review demonstrates that, in fact, Justice Cobb's argument in support of a privacy right overflows with themes and language familiar to the law of property.

Justice Cobb relied primarily on three common law examples in support of the "right to be let alone." The first and second both were found in the common law of nuisance—specifically, the enjoining of noises under the law relating to private nuisance and the punishment of a common scold, which the common law treated as a public nuisance. For Justice Cobb, the enjoining of noises (even those associated with lawful occupations) that interfere with an individual's enjoyment of his home presented "a conspicuous instance" of the law's protection of privacy.[80] With regard to such interferences, Justice Cobb indicated that "there is really no injury to the property, and the gist of the wrong is that the individual is disturbed in his right to have quiet."[81] So, too, the case of the common scold or gossip. "[T]he reason for the punishment of such a character," wrote Justice Cobb, "was not the protection of any property right of her neighbors, but the fact that her conduct was a disturbance of their right to quiet and repose . . . ."[82] As his third example, Justice Cobb pointed to the common law right of persons to be secure from unreasonable searches and seizures, in which he found implicit recognition for privacy rights: "[T]he law on the subject . . . cannot be based upon any other principle than the right of a person to be secure from invasion by the public into matters of a private nature, which can only be properly termed his right of privacy."[83]

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 71-72.

Indeed, a closer look at *Pavesich* reveals that privacy's "right to be let alone" shares much in common with the figurative "bundle of sticks" that characterizes our concept of property. Although in places, *Pavesich* appeared to reject the idea that property theory provides a basis for the right of privacy, other portions of the opinion clearly suggested otherwise. Perhaps the most striking example occurred in connection with Justice Cobb's discussion of the New York case of *Roberson v. Rochester Folding Box Co.* After criticizing the majority's failure to recognize a right of privacy in that case, Justice Cobb quoted extensively from the dissenting opinion in *Roberson*, which itself was rife with property-based language.[92] First, the *Roberson* dissent rooted the right of privacy in an individual's entitlement "to be protected in the exclusive use and enjoyment of that which is his own,"[93] language that has obvious similarities to the conception of property as an amalgam of rights relating to one's exclusive use and possession of a particular thing. Second, the *Roberson* dissent repeatedly noted the commercial context of that case, which (like *Pavesich*) arose from the defendant's unauthorized use of the plaintiff's likeness in advertisements for the defendant's product.[94] Implicit in this discussion was the idea that the plaintiff (and she only) had the ability to profit from her likeness, suggesting that she also possessed the exclusive right to alienate or otherwise transfer that ability. Finally, and most obviously, the *Roberson* dissent directly equated property and privacy as flowing from analogous ideas:

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92. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 78-79 (Ga. 1905).

93. Roberson v. Rochester Folding Box Co., 64 N.E. 442, 561 (N.Y. 1902) (Gray, J., dissenting). This portion of Judge Gray's dissent was quoted in *Pavesich*, 50 S.E. at 78.

94. *Roberson*, 64 N.E. at 563-64, 566 (Gray, J., dissenting). These portions of Judge Gray's dissent were quoted in *Pavesich*, 50 S.E. at 78-79.

> Property is not, necessarily, the thing itself which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. . . . It seems to me that the principle which is applicable is analogous to that upon which courts of equity have interfered to protect the right of privacy in cases of private writings, or of other unpublished products of the mind.[95]

Not only did *Pavesich* quote all of these statements, what's more, it explicitly adopted the reasoning of the *Roberson* dissent as its own.[96]

95. *Roberson*, 64 N.E. at 564 (Gray, J., dissenting). This portion of Judge Gray's was quoted in *Pavesich*, 50 S.E. at 78-79.

96. *Pavesich*, 50 S.E. at 79.