

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

MICHAEL B. KENT, JR.\*

I. INTRODUCTION

Many modern-day Americans often think about rights in a dualistic fashion. On one side of the divide is the body of law that protects, enforces, and expands “human” or “personal rights.” Included here are venerable notions such as freedom of expression and equal protection under the law, as well as rules protecting an individual from personal injury and providing basic fairness in the litigation process. On the other side of the divide are so-called “property rights,” consisting of those (often arcane) requirements that define and regulate landed interests, or whatever else an individual rightfully may call her own. In the minds of many, these two categories – “personal rights” and “property rights” – are separate and distinct. Indeed, some use language suggesting that they are fundamentally at odds with one another.<sup>1</sup>

For this reason, at first blush, it may seem a bit incongruous to treat in a single volume both the right to privacy and the right to property. After all, given our individualistic tendencies, the right to privacy – long characterized as the right “to be let alone”<sup>2</sup> – perhaps qualifies as the archetypal “personal right” in

---

\* Assistant Professor of Law, John Marshall Law School. I would like to thank the editors and staff of the *John Marshall Law Journal*, especially Amanda Gaddis and John Duncan, for their editorial and research assistance.

1. See, e.g., Constitution of the National Lawyers Guild, Preamble (expressing goal that “human rights shall be regarded as more sacred than property interests”).

2. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888) (coining phrase in context of physical touching); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193,

modern American thinking. As one scholar has commented, “[p]rivacy is an abiding concern of the present age.”<sup>3</sup> This concern has become a fixed part of our culture, gaining traction not only in the common law of tort, but also in public policy and constitutional thought as well. The desire “to be let alone” has found expression in outcries against governmental requests for Internet data,<sup>4</sup> federal regulations protecting “health privacy,”<sup>5</sup> and court decisions endorsing “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>6</sup> Joining these ideas together with issues about property may appear, if not inappropriate, then at least a bit odd and out of place.

A deeper look, however, reveals that the two topics have very much in common. Indeed, as the title to this essay suggests, privacy rights and property rights derive from similar historical and philosophical underpinnings. They share a common structure, providing rules by which the law recognizes certain interests as uniquely personal. Likewise, they share the common goal of protecting those interests against interference by others, including (to varying degrees) interference by the state itself.<sup>7</sup> Moreover, in the words of one scholar, “they enjoy a mutually reinforcing relationship”<sup>8</sup> – i.e., the right of privacy originates in property-based ideas, whereas one of the functions of property law is to protect private interests. Thus, property and privacy should not be viewed as alien concepts; correctly understood, “the two rights are intimately intertwined.”<sup>9</sup>

---

195 (1890) (employing phrase to describe broader right to privacy).

3. William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 10 (2002).

4. See, e.g., Saul Hansell, *Online Trail Can Lead to Court*, N.Y. TIMES, Feb. 4, 2006, at C1.

5. See generally 45 C.F.R. pts. 160, 162 & 164 (promulgating “Privacy Rule” pursuant to Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (Aug. 21, 1996)).

6. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

7. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 418-28 (2000) (discussing substantive and structural similarities between constitutional property and privacy rights).

8. Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297, 302 (2003).

9. Rao, *supra* note 7, at 418. Indeed, some theorists, known as “reductionists,” argue that the right to privacy is in fact nothing more than a

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.*,<sup>10</sup> 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."<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

---

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.”<sup>15</sup> 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*.<sup>16</sup> In their article, Warren and Brandeis had argued that “a general right to privacy”<sup>17</sup> could be gleaned from existing cases – most notably, the common law’s treatment of manuscripts, works of art, and other types of intellectual property.<sup>18</sup> 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.*,<sup>19</sup> 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.<sup>20</sup> 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 . . . .<sup>21</sup>

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.”<sup>22</sup> 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.”<sup>23</sup> 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,<sup>24</sup> arguments that some commentators have criticized as unpersuasive and unsupported.<sup>25</sup> But *Pavesich* did more. As one scholar recently has posited, *Pavesich* “contributed something crucial”<sup>26</sup> 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.<sup>27</sup> Included in the *Pavesich* opinion are allusions to natural law and social compact theory, references to Blackstone and his

---

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.<sup>28</sup> 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.”<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup>

For this reason, Justice Cobb understood the right of privacy to derive from natural law.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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

---

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.<sup>35</sup> Accordingly, the rights enjoyed in the state of nature are to some degree indefinite because they are “constantly exposed to the invasion of others.”<sup>36</sup> 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*.”<sup>37</sup> Thus, for Locke, the primary purpose for which individuals create and submit to formal government “*is the preservation of their property*.”<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> “All property is a pledge to pay the necessary expenses of government,” said one Georgia court, “but the burthen must be equally born.”<sup>41</sup> Thus, when the public good mandates the yielding of individual property interests, those interests

---

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.<sup>42</sup> 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.”<sup>43</sup>

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.”<sup>44</sup> 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.”<sup>45</sup> 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*.”<sup>46</sup> 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.<sup>47</sup>

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

---

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."<sup>48</sup> 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."<sup>49</sup> It was in this area of the law that Warren and Brandeis found their best analogy for a right to privacy.<sup>50</sup> 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."<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

### *B. Blackstone and Fundamental Rights*

For many Americans, the mention of fundamental rights immediately invokes notions about an individual's entitlement to "Life, Liberty, and the Pursuit of Happiness."<sup>54</sup> For lawyers, however, at least those schooled in the eighteenth and nineteenth centuries, fundamental rights often invoked a similar, but slightly different, trinity – one penned not by Thomas Jefferson<sup>55</sup> but, rather, by Sir William Blackstone. In his *Commentaries on the Laws of England*, which "grounded the legal education of Founding-era Americans and remained enormously important throughout the nineteenth century,"<sup>56</sup> Blackstone identified three principal rights that belonged naturally to all mankind, and belonged "in a peculiar and emphatical manner" to the people of England.<sup>57</sup> The first of these rights, that of "personal security," encompassed an individual's "legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."<sup>58</sup> The second right, of "personal liberty," concerned "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without

---

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").

54. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

55. Of course, Jefferson was greatly influenced by Locke, who (as demonstrated above) identified the purpose of the commonwealth with the protection of its citizens' "lives, liberties, and estates." See LOCKE, *supra* note 33, § 123, at 66.

56. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007).

57. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*129.

58. *Id.*

imprisonment or restraint, unless by due course of law.”<sup>59</sup> Finally, Blackstone listed “the right of private property,” consisting of “the free use, enjoyment, and disposal of all [an individual’s] acquisitions, without any control or diminution, save only by the laws of the land.”<sup>60</sup> These three categories formed the core of an individual’s private rights in eighteenth-century English jurisprudence and, by extension, in the understanding of most American lawyers through the close of the nineteenth century.

Even a casual reading of *Pavesich* reveals that Justice Cobb and his colleagues on the Georgia court concurred in this understanding. Immediately after discussing privacy’s relationship to the social compact, Justice Cobb cited Blackstone as additional support for his argument, explicitly rooting the right of privacy in Blackstone’s conceptions of personal security and personal liberty.<sup>61</sup> Although Justice Cobb conceded that Blackstone made no express reference to a right of privacy, he maintained that the principles elucidated by the great English jurist logically led to the discovery of such a right. The idea of liberty, in particular, included sufficient room in which to ground legally cognizable privacy interests:

“Liberty,” in its broadest sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity . . . . Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him this liberty.<sup>62</sup>

Here, suggested Justice Cobb, lay the essence of the individual’s right to privacy.

At first blush, little about this analysis relates privacy to property. Inasmuch as Justice Cobb rooted the right of privacy

---

59. *Id.* at \*134.

60. *Id.* at \*129, \*138.

61. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905).

62. *Id.* (internal quotations and citations omitted).

in notions of security and liberty, he equally failed to mention the third of Blackstone's fundamental rights – that of private property. Should we conclude, then, that this portion of *Pavesich* operates as a sort of breaking point, separating privacy rights and property rights into distinct legal camps? Some Georgia precedent, indeed, could be read to do just that, describing the right of privacy as “an incident of the person, and not of property.”<sup>63</sup> Such a separation, however, ignores the prior precedent with which the *Pavesich* court must have been familiar, as well as the examples utilized by Justice Cobb himself. Properly considered, both sources demonstrate a deep philosophical connection between privacy and property.

As an initial matter, Georgia courts had long embraced the Blackstonian trinity, and rights to property clearly were included alongside those of security and liberty. Indeed, early Georgia courts seemingly viewed the three categories as inseparable. In 1879, for example, the Georgia Supreme Court followed Blackstone by grouping the rights of personal security, personal liberty, and private property together as “the three inherent, absolute rights of all men in civilized society.”<sup>64</sup> Three decades earlier, the court had approvingly quoted Justice Story's famous opinion for the United States Supreme Court in *Wilkinson v. Leland*, in which these rights again were considered together: “The fundamental maxims of free government seem to require, that the rights of personal security and private property should be held sacred.”<sup>65</sup> More to the point was the following passage from an 1851 opinion:

The right of accumulating, holding and transmitting

---

63. *Hudson v. Montcalm Publ'g. Corp.*, 379 S.E.2d 572, 576 (Ga. Ct. App. 1989) (quoting *McQueen v. Wilson*, 161 S.E.2d 63, 65 (Ga. Ct. App. 1968), *rev'd* 162 S.E.2d 313 (Ga. 1968), *overruled by* *Austin v. Carter*, 285 S.E.2d 542 (Ga. 1982)).

64. *Selma, Rome & Dalton R.R. Co. v. Gammage*, 63 Ga. 604, 609 (1879).

65. *In re Flournoy*, 1 Ga. 606, 608 (1846) (quoting *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829)). The Georgia court actually misquoted *Wilkinson*, which reads: “The fundamental maxims of a free government seem to require, that the rights of *personal liberty* and private property should be held sacred.” *See Wilkinson*, 27 U.S. (2 Pet.) at 657 (emphasis added). That the Georgia court could so easily substitute “personal security” for “personal liberty” adds credence to the idea that these rights were viewed as part and parcel one with another.

property, lies at the foundation of civil liberty. Without it, man nowhere rises to the dignity of a freeman. It is the incentive to industry, and the means of independent action. It is in vain that life and liberty are protected – that we are entitled to trial by Jury, and the freedom of the press, and the writ of *habeas corpus* – that we have unfettered entails, and have abolished primogeniture – that suffrage is free, and that all men stand equal under the law, if property be held at the will of the Legislature.<sup>66</sup>

Thus, for Georgia jurists, as for the early American legal culture in general,<sup>67</sup> the rights of security, liberty, and property were inextricably linked.<sup>68</sup> The mention of one, to some degree, necessarily involved aspects of the others.

This interconnectedness is also seen prominently in two of the examples utilized by Justice Cobb in *Pavesich* itself – the right to choose one’s calling and the right to live a life of publicity. Although Justice Cobb classified these examples as components of an individual’s liberty, Georgia cases both before and after *Pavesich* make clear that these rights have connections to property as well. Only three years prior to *Pavesich*, for example, the Georgia court explicitly linked an individual’s right to pursue a calling to both liberty and property: “This right to choose one’s calling is an essential part of that liberty which it is the object of the government to protect, and a calling, when chosen, is a man’s property and right.”<sup>69</sup> These ideas appear to have been nothing new to

---

66. *Parham v. Justices of Inferior Court*, 9 Ga. 341, 355 (1851).

67. See James W. Ely, Jr., “*To Pursue Any Lawful Trade or Avocation*”: *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 917 (2006) (“There may have been no eighteenth-century educated American who did not associate defense of liberty with defense of property.”) (quoting JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 27 (1986)); Stephen A. Siegel, *Lochner-Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 33 n.154 (1991) (“[I]n nineteenth-century America, property was considered among the most important civil liberties.”).

68. See also *Walker v. City Council of Dawson*, 66 S.E. 984, 986 (Ga. Ct. App. 1910) (describing “personal liberty, personal security, and private property” as “fundamental rights of the individual,” which are “entirely consistent and interdependent”).

69. *Brown v. Jacobs Pharm. Co.*, 41 S.E. 553, 560 (Ga. 1902) (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 116 (1872) (Bradley,

American thought on the subject. As early as 1792, James Madison associated property rights with the freedom to choose an occupation, explaining that such choices “not only constitute [an individual’s] property in the general sense of the word; but are the means of acquiring property strictly so called.”<sup>70</sup> Thus, an individual’s right to choose his own lawful means of earning a living was the product of both his right to liberty and his right of property.

The same can be said for an individual’s right of publicity. For the *Pavesich* court, this right (and the correlative right of privacy) resulted directly from the liberty “to live as one will.”<sup>71</sup> Subsequent Georgia decisions, however, demonstrate that publicity rights are equally associated with property. In 1966, for example, the Court of Appeals (following Dean Prosser)<sup>72</sup> explained that the right to privacy in reality encompasses four separate causes of action: (1) intrusion upon the plaintiff’s seclusion or solicitude; (2) public disclosure of embarrassing facts about the plaintiff; (3) public statements or depictions that place the plaintiff in a false light; and (4) appropriation of the plaintiff’s name or likeness for the defendant’s advantage.<sup>73</sup> According to the court, this last cause of action (which, incidentally, is the category in which the court would have placed the claim of Paolo Pavesich) raised issues concerning an individual’s right of publicity.<sup>74</sup> This right, said the court, is not primarily about the personal feelings or sensibilities of the plaintiff; rather, a cause of action based on publicity concerns “an appropriation of rights in the nature of property rights for commercial exploitation.”<sup>75</sup> In a subsequent decision, the Georgia Supreme Court tacitly agreed with this characterization,

---

J., dissenting)).

70. JAMES MADISON, PROPERTY (1792), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 598 (Philip B. Kurland & Ralph Lerner eds., 1987). For a thorough discussion of the association between property rights and legal protections for occupational freedom, see generally Ely, *supra* note 67, at 921-49.

71. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905).

72. Prosser, *supra* note 24, at 389.

73. *Cabaniss v. Hipsley*, 151 S.E.2d 496, 499-500 (Ga. Ct. App. 1966).

74. *Id.* at 503-04.

75. *Id.* at 504.

describing the right of publicity in terms markedly similar to those used in describing property rights: “The right of publicity may be defined as a celebrity’s right to the *exclusive use* of his or her name and likeness.”<sup>76</sup> Thus, in addition to its connection with liberty, the right of publicity—which Justice Cobb understood as being the flip-side of the right of privacy—has a proprietary dimension as well.

As with its tacit references to Locke and the social compact, *Pavesich*’s appeal to Blackstone’s formulation of fundamental rights shows that the right to privacy bears an inherent similarity to longstanding notions about property. By grounding the right to privacy in an individual’s right of personal liberty, Justice Cobb necessarily (if not overtly) connected privacy rights with rights in property, since liberty and property were “interdependent concepts.”<sup>77</sup> The United States Supreme Court endorsed this same understanding of the Blackstonian trinity in its famous opinion in *Griswold v. Connecticut*, where it referred to the “indefeasible *right* [singular] of personal security, personal liberty and private property” as the source of the privacy rights guaranteed by the Fourth and Fifth Amendments to the United States Constitution.<sup>78</sup> Finally, the specific examples of liberty interests utilized by *Pavesich* to support a right of privacy – the right to pursue a calling and the right of publicity – have been characterized by other Georgia courts in terms generally associated with property interests, reinforcing the conclusion that privacy and property have similar characteristics and derive from similar ideas.

### 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.”<sup>79</sup> Although a

---

76. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 700 (Ga. 1982) (emphasis added).

77. Ely, *supra* note 67, at 917.

78. 381 U.S. 479, 484 note (1965) (emphasis added; quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

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.<sup>80</sup> 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."<sup>81</sup> 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 . . . ."<sup>82</sup> 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."<sup>83</sup>

As indicated above, Justice Cobb's analysis, at first blush, does not seem to support the thesis proffered in this essay – that privacy and property share similar underpinnings. After all, Justice Cobb seemed to go out of his way to show that the referenced doctrines in reality implicated no property right at all, thus bolstering his implication that the law must be protecting something else (in a word, privacy). But Justice Cobb's description of these cases as not involving property

---

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 71-72.

seems more polemical than doctrinal.

It is difficult to believe, for example, that Justice Cobb and his colleagues really could not find “any other principle” than privacy on which to base the law’s prohibition against unreasonable searches and seizures. In the analogous context of the Fourth Amendment, the United States Supreme Court has recognized that constitutional protection against unreasonable searches and seizures extends to *both* privacy *and* property interests.<sup>84</sup> Moreover, just five years after *Pavesich*, the Georgia Court of Appeals connected the law of search and seizure directly with the “proud boast of the Anglo-Saxon that a man’s home is his castle,” such that the government officials who invaded the defendant’s home “committed a double trespass – a trespass against [the defendant’s] personal security, and a trespass against his private property.”<sup>85</sup>

Additionally, the nuisances referenced by Justice Cobb implicate property rights, despite his objections to the contrary. With regard to either nuisance, be it a bothersome noise or a common scold, the law’s primary concern seems to be the promotion of quiet enjoyment, a notion usually associated with property rights.<sup>86</sup> In the first case, the law seeks to protect from the bothersome noise an adjacent landowner’s right to use, control, and enjoy his neighboring parcel, as well as to maintain the value of that parcel in the event of transfer.<sup>87</sup> Although not as easily seen, comparable interests are at issue in the case of the common scold. There, the public at large exercises

---

84. *See, e.g.*, *Sodal v. Cook County*, 506 U.S. 56, 62-63 (1992).

85. *Walker v. City Council of Dawson*, 66 S.E. 984, 986-87 (Ga. Ct. App. 1910).

86. *See, e.g.*, *Thumbley v. Hightower*, 184 S.E. 331, 332 (Ga. Ct. App. 1936) (“The right to enjoyment of private property is an absolute right of every citizen, and every act of another which unlawfully interferes with such enjoyment gives rise to a cause of action. Any act which deprives the owner of personal property of the peaceful and quiet possession of such property is a tort for which the injured party may maintain an action.”).

87. *See, e.g.*, *Virginian Ry. Co. v. London*, 76 S.E. 306, 308 (Va. 1912) (“A private nuisance is the using or authorizing the use of one’s property, or of anything under one’s control, so as to injuriously affect an owner or occupier of property (1) by diminishing the value of that property; (2) by continuously interfering with his power of control or enjoyment of that property; (3) by causing material disturbance or annoyance to him in his use or occupation of that property.”).

dominion and control over individuals who interfere with the quiet enjoyment of general society, so as to preserve the social order against habitual disturbances of the peace.<sup>88</sup> In other words, in punishing the common scold, the law protects the right of each member of society to use, occupy, and enjoy the general functioning of that society in a quiet and peaceable manner, free from persistent interference with or disturbance of that right. When framed in this way, these nuisances appear to have been protecting interests similar to those associated with the well-worn metaphor of property as a “bundle of sticks” – i.e., an aggregation of component rights relating primarily to the possession, use, and disposition of the thing at issue, as well as the exclusion of others from exercising similar rights.<sup>89</sup> And this understanding of property as the rights of the owner in relation to a thing, rather than simply the thing itself, was already established at the time Justice Cobb penned *Pavesich*. In 1866, for example, the United States District Court for the Southern District of Georgia declared:

Property is the right of any person to possess, use, enjoy, and dispose of a thing. The term, although frequently applied to the thing itself, in strictness means only the rights in relation to it. And, indeed, after a most careful examination of all the authorities within my reach, I have failed to discover a definition of “property” stripped of the attributes of enjoyment and alienation. . . . The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself.<sup>90</sup>

Twelve years after *Pavesich*, this view was explicitly endorsed by the Georgia Supreme Court, which cited the above-referenced passage for the following proposition: “The term

---

88. *See, e.g.*, *State v. Paledrano*, 293 A.2d 747, 748 (N.J. Super. Ct. Law Div. 1972) (“A common scold is a troublesome and angry woman, who, by brawling and wrangling among her neighbors, breaks the public peace, increases discord, and becomes a nuisance to the neighborhood.”); *Commonwealth v. Barrett*, 47 Pa. D. & C.2d 462, 463 (Pa. Ct. C.P., Bucks County 1969) (same).

89. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Rabun County v. Mountain Creek Estates LLC*, 632 S.E.2d 140, 143 (Ga. 2006).

90. *Ex parte Law*, 15 F. Cas. 3, 7 (S.D. Ga. 1866) (internal quotations and citations omitted).

'property' is a very comprehensive one, and is used not only to signify things real and personal owned, but to designate the right of ownership, and that which is subject to be owned and enjoyed."<sup>91</sup> When "property" is viewed in these terms, it is difficult to uphold Justice Cobb's statements in *Pavesich* that the referenced nuisances affect no property rights at all.

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.<sup>92</sup> 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,"<sup>93</sup> 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.<sup>94</sup> 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:

---

91. *Wayne v. Hartridge*, 92 S.E. 937, 939 (Ga. 1917).

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.<sup>95</sup>

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

For this reason, despite its own suggestions to the contrary, *Pavesich* once again demonstrates that property and privacy share similar underpinnings. Just as property demarcates an individual's rights in the exclusive use, possession, and disposition of a thing, the right of privacy concerns an individual's rights to the exclusive use, possession, and disposition of her uniquely personal attributes. Put differently, both property rights and privacy rights are concerned primarily with the concept of sovereignty – that is, who has authority to decide whether, how and when to utilize some distinctive thing, feature, idea, characteristic, or piece of information. Just as the right to exclude others is essential to the concept of property,<sup>97</sup> so, too, is it essential to the concept of privacy. In either case, the ability to prohibit others from engaging in certain behavior vis-à-vis some interest declared to be personal to the holder is largely what defines the right itself. As one scholar has explained: “The core of both ‘privacy’ and ‘property’ involves the same abstract right: the right to exclude unwanted interference by third parties.”<sup>98</sup>

---

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.

97. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (calling right to exclude “one of the most essential sticks in the bundle of rights commonly characterized as property”); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (calling right to exclude “the *sine qua non*” of property).

98. Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 347 (1992). Not surprisingly, in the Fourth Amendment context, the United

## III. CONCLUSION

*Pavesich* and its progeny demonstrate that privacy rights and property rights are similar creatures with similar philosophical and historical origins. As traditionally understood, an individual's right to either property or privacy derives from natural law, and it is the procuring of protection for these rights that induce the individual to enter the social compact and form political society with others. Moreover, both property and privacy are rooted in those fundamental rights that have formed the core of Anglo-American legal thought since the time of Blackstone. Finally, despite its disjointed protestations to the contrary, *Pavesich* demonstrates that privacy and property operate in similar fashion to protect an individual's exclusive right to control interests deemed by the law to be his own.

Therefore, it is not at all peculiar to conceive of privacy and property as interconnected; as stated above, "the two rights are intimately intertwined."<sup>99</sup> Indeed, the more peculiar thinking may be that mentioned at the outset of this essay – viewing personal rights and property rights as distinct (and perhaps conflicting) interests. A careful look at the *Pavesich* opinion and the similarities it reveals between privacy and property, however, should diminish (if not dispel) such dualistic notions. As the United States Supreme Court has instructed: "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights."<sup>100</sup> In the comparable origins, structures and purposes of privacy rights and property rights, this statement finds one of its clearest expressions.

---

States Supreme Court has directly associated the right to exclude with an individual's legitimate expectation of privacy. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

99. Rao, *supra* note 7, at 418.

100. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).