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Chapter 3
Pavesich v New England Insurance Co (1905)

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Introduction

It is no coincidence that the first three landmark privacy cases in this volume concern photography, a cutting-edge technology that emerged in the mid-19th Century and raised profound questions about image, identity and how the law should respond. Like *Pollard v Photographic Company* (1889)[1] and *Roberson v Rochester Folding-Box Co* (1902)[2], *Pavesich v New England* entailed the judiciary dealing with what Barbas has termed 'the crisis of the circulating portrait',[3] i.e. unauthorised use of an individual's image in ways very much against their wishes. And in a pleasingly ironic narrative flourish, the privacy action was brought by an artist – a painter in the tradition that new photographic technology was rapidly replacing.

Despite *Pavesich's* legal influence and a reasonable body of American academic literature discussing the case, as Kent claims, it 'has not always received the attention it deserves.'[4] The reasons for this are unclear, though *Pavesich* does tend to be overshadowed by *Roberson*.[5] *Roberson*'s reputation is perhaps sealed by its distinctive facts; a sympathetic plaintiff who found herself co-opted into 'Flour of the Family' adverts and whose case instigated America's first privacy statute.[6] Yet, ultimately, the *Roberson* court controversially denied a privacy right whereas the *Pavesich* court took the bold, activist step of upholding one.

As this chapter argues, *Pavesich* is a fascinating and intriguing landmark judgment, and not only because it was the first case where a state Supreme Court upheld a common law privacy right (though this is surely sufficient to seal its landmark status). *Pavesich*'s significance also lies in two related points. First, by articulating in detail the founding political philosophy for privacy - Lockean natural rights - the *Pavesich* court made its own intellectual contribution to the development of the doctrine; in particular, the great influence of Lockean notions of 'property' and individual self-ownership are revealed. Second, by articulating these Lockean roots the *Pavesich* judgment aptly reveals the culturally- and historically-specific nature of the privacy right that emerged. Despite its noble, rhetorically-appealing universalist natural law claims, this was a privacy that primarily respected, protected and reflected white, middle-class men; men like artist Paolo Pavesich. This chapter discusses

[1] 40 Ch D 345
[2] 171 N.Y. 538 (1902)
[3] Samantha Barbas, *Laws of Image, Privacy & Publicity in America* (2015, Standford Law Books), ch 3.
[4] Michael B Kent Jr, 'Pavesich, Property & Privacy: The Common Origins of Property Rights & Privacy Rights in Georgia' (2009) John Marshall Law Journal, vol 2(1), 1-22, 5.
[5] (n 2)
[6] Chapter 132 of the Laws of 1903 ('An act to prevent the unauthorised use of the name or picture of any person for the purposes of trade'). This later became the New York Civil Rights Law, ss. 50-51. For a discussion of this, see: Rebecca Moosavian, 'Public Image (Un)Limited: Privacy Rights of the Photographic Subject in England and New York Compared' in *Comparative Privacy & Defamation* (ed: Andras Koltay & Paul Wragg) (2020, Edward Elgar) ch 9.

these points in detail, as well as providing new information about the hitherto elusive plaintiff himself. But let us commence with an overview of the background events that preceded the case.

[1] Historic & Legal background

The emergence of photographic technology in the mid-19th Century spurred the popularisation of professional photographic studios where individuals could pay to get their portraits taken. Portraits became a popular middle-class activity, forming a means to express one's identity and social standing.[7] From the 1880s the reach of photography extended further as the practice came to be undertaken by amateur photographers using the new Kodak camera (which proudly claimed '*you press the button, we do the rest*'). But with these developments, some individuals' portraits came to be used without their knowledge or consent – the 'crisis of the circulating portrait' - prompting widespread public anxieties about this new technology.[8] Such unauthorised uses of image, particularly for commercial purposes like advertising, offended traditional elite Victorian sensibilities.[9]

It was against this background that in 1905 Justice Cobb delivered the judgment of the Georgia Supreme Court in *Pavesich*. Up to this point there had been nascent calls for privacy rights to be respected, but legal precedent was mixed and, arguably tilted against a privacy right. Even following Warren & Brandies's seminal 1890 article calling for a privacy right,[10] claims brought by the subjects of photographs were commonly rejected by the courts for two reasons. First, courts routinely held that a privacy right did not exist at common law. In *Atkinson v Doherty* (1899) a plaintiff failed in her action to prevent her deceased husband's name and image being used on a brand of cigars. Hooker J admitted that taking a photograph may be 'impertinent', but this was one of the ills law could not redress as the claimed right in one's image was not proprietary or contractual and lacked legal authority.[11] The New York Court of Appeals put forward similar reasoning in its controversial *Roberson* majority ruling, denying relief for the young plaintiff whose image had been used without her consent in the defendant's advertising campaign. In the majority judgment, Chief Judge Parker held there was no previous case where a plaintiff's privacy right had been explicitly recognised. He claimed that 'the so-called 'right of privacy' has not yet found an abiding place in our jurisprudence' and incorporating such a right into common law would 'do violence to settled principles of law'. Instead, it was for the state legislature to enact such a right.[12]

The second reason for the failure of many privacy claims was that the law did not provide redress for free-standing emotional harms. Though the motives driving plaintiffs' claims were not always articulated in these early judgments, it is evident that most (if not all) were brought for dignitary harms caused by the use of their image, including distress and humiliation etc.[13] As Barbas claims, such feelings of violation were driven by an emerging 'sense of image consciousness' and the increasing social and personal importance attached to public image.[14] In particular, the notion that one might sell

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[7] Peter Hamilton & Roger Hargreaves, *The Beautiful & The Damned, The Creation of Identity in Nineteenth Century Photography* (Lund Humphries & National Portrait Gallery, 2001) 20, 29-43

[8] Robert Mensel, 'Kodakers Lying in Wait: Amateur Photography & the Right to Privacy in New York 1885-1915' (1991) American Quarterly, vol 43(1), 24-45, 29-30, 32.

[9] *Barbas* (n 3) 56-57. For an account of Warren & Brandeis's patrician sensibilities, see: James Barron, 'Warren & Brandeis, The Right to Privacy, 4 Harv L.Rev. 193 (1890): Demystifying a Landmark Citation' (1979) 13 Suffolk U L Rev 875, 904, 913-916;

[10] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4(5) *Harvard Law Review* 193.

[11] *Atkinson v John E Doherty & Co* (1899) 121 Mich 372, 375, 382.

[12] *Roberson* (n2) 545, 556.

[13] For example: *Roberson v Rochester Folding Box Co* (1901) 64 A.D. 30 (plaintiff suffered great humiliation, scoffs and jeers of others, her good name was attacked and she suffered a severe nervous shock); *Munden v Harris* (1911) 153 Mo. App. 652 (plaintiff suffered humiliation, annoyance and disgrace); *Henry v Cherry & Webb* (1909) 30 R.I. 13 (plaintiff suffered great humiliation, public ridicule and mental anguish).

[14] Samantha Barbas, 'The Laws of Image' (2012) 47 New England Law Review 23, 27.

one's likeness to make money offended prevailing cultural sensibilities of the day.[15] Despite a shift away from this attitude by the first decades of the 20th Century,[16] early image cases, including *Atkinson* and *Roberson*,[17] did deal with claims for emotional harm caused by publication, quoting an influential passage by Lumpkin J which confirmed that the law would not permit damages for such injuries:

> "*The law protects the person and the purse. The person includes the reputation. The body, reputation and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But outside these protected spheres, the law does not attempt to guard the peace of mind, the feelings or the happiness of everyone, by giving recovery of damages for mental anguish … There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling.*"[18]

Yet, despite the prevailing legal consensus around this time being generally unreceptive to image-based privacy claims, there were some notable isolated instances of judicial support for privacy in the form of sporadic plaintiff successes and dissenting judgments. As Part 4 explains, the *Pavesich* court skilfully built a legal argument for a privacy right from these strands and took care to minimise this not-insubstantial body of contrary precedents.

[2] Who Was Paolo Pavesich?

It was against this backdrop that Paolo Pavesich brought his privacy action. Yet one knowledge gap in the *Pavesich* case has been the plaintiff himself. The court judgment informs us that Paolo Pavesich was an artist, but provides scant detail beyond this intriguing fact. Numerous academics, including Davis in his excellent historic account of the case, have deemed Paolo Pavesich 'lost to history'[19] or merely recounted the bare known facts about him. But this chapter reveals that Pavesich is not 'lost to history' and a fuller account of the colourful plaintiff can be pieced together from local newspapers of the day.[20] Nevertheless, one must take account of the likelihood that certain reported biographical facts evidently came directly from Pavesich himself and so the possibility of some self-mythologising or reinvention cannot be discounted.

Paolo Pavesich was born in Trieste, Austria.[21] He claimed to have trained in the best European art schools in Florence and Milan, later undertaking work for the Czar in St Petersberg, before coming to

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[15] Barbas (n 3) 56.

[16] Numerous authors have noted that by the earliest decades of the 20th Century fewer plaintiffs were claiming embarrassment and humiliation due to unauthorised use of their image and more were simply seeking recompense for appropriation. George Armstrong, The Reification of Celebrity Persona as Property (1991) 51 Louisiana Law Review 443, 459, 461. See also: Jessica Lake, *The Face That Launched a Thousand Lawsuits, The American Women Who Forged a Right to Privacy* (Yale, 2016) 151-3.

[17] *Atkinson v Doherty* (n 11) 380-381; *Roberson* (n 2) 552-553. Also quoted in *Murray v Gast Lithographic & Engraving Co* (1894) 8 Misc. 36, 37.

[18] *Chapman v Western Union Telegraph Co* (1891) 88 Ga. 763, 772-773. NB: this was a negligence case.

[19] Jefferson James Davis, 'An Enforceable Right of Privacy: Enduring Legacy of the Georgia Supreme Court' (1994) 3 Journal of Southern Legal History 97, 98-99; Anita Allen, 'The Natural Law Origins of the American Right to Privacy: Natural Law, Slavery & the Right to Privacy Tort' [2012] Fordham Law Review vol 81, 1187-1216. 1194

[20] All US newspapers cited are accessible via newspapers.com. Thanks to an anonymous user with the handle 'jdelombard' who had already identified many of the clippings referenced here and did not respond to the author's request to establish contact. 'jdelombard' undoubtedly saved the author some search time.

[21] *The Atlanta Constitution* (Atlanta, Georgia) 11 April 1920, p 17.

the United States around 1878.[22] He became a US citizen and lived there until his death in April 1920 in Kentucky, leaving a wife, one son and two daughters.[23] Pavesich was an itinerant and successful fresco artist who travelled the country undertaking commissions to decorate the large mansions of wealthy, high society families and public buildings (including numerous churches, the Grand Theatre in Atlanta, the state capitol in Lincoln, Nebraska and Pensacola City Hall).[24] In the early 1880s Pavesich travelled to various cities including Los Angeles, Denver and Dallas, advertising his services in local newspapers upon arrival.[25] Between 1888-1889 he stayed in St Joseph, Missouri, again advertising his services in local papers[26] and undertaking fresco work in private homes. The local newspaper noted 'The gentleman will remain in the city for a short time if sufficient work is furnished him';[27] such work must have been forthcoming because two months later he had opened an office in the city centre of St Joseph.[28] But by 1892 he was based in Chicago.[29]

Barbas writes that Pavesich 'was not famous by any means' and that his picture was probably used in the New England advert 'because it suggested health, wisdom, and respectability; the robust, bespectacled Pavesich bore a resemblance to Theodore Roosevelt, who was president at the time.'[30] Yet newspapers of the day do indeed suggest that Pavesich was an artist of some renown at the time of his privacy suit. In 1904 the Florida-based *Tampa Tribune* referred to him as 'the famous fresco artist' and 'one of the greatest artists of the country in his line',[31] and this renown continued in the years that followed.[32] Pavesich's reputation was founded on his artistic skill; his work was highly regarded and he was described 'as an artist of such rare merit'[33] and, elsewhere 'a master' whose work was 'simply beautiful'.[34] His commissions involved flowers, roses, cherubs and sky scenes in the style of Louis XIV and *The Tampa Tribune* heaped lavish praise upon his designs for the exclusive Rey and Clewis family residences.'[35] So Pavesich was clearly no 'civilian' and enjoyed some cross-state renown for his work. But this is not to suggest that the defendants used his image because the plaintiff was well-known; the advert did not name Pavesich or refer in any way to his artistry. But this new information does shed light on Pavesich's motives for bringing the privacy action which, to date, have been shrouded in some uncertainty.[36] The judgment indicates that Pavesich claimed use of his image was 'peculiarly offensive to him'.[37] Furthermore, according to Davis, Pavesich's petition document stated that the

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[22] *St Joseph Gazette-Herald* (St Joseph, Missouri) 8 April 1888, p 4; *The Tampa Tribune* (Tampa, Florida) 1 April 1915, p 5. See also: *The Orlando Sentinel* (Orlando, Florida) 7 March 1917, p 8. In 1917 *The Orlando Sentinel* reported that Pavesich had lived in America for 37 years (1880).
[23] *Atlanta Constitution* (n 21) p 17.
[24] *ibid*; *The Pensacola News Journal* (Pensacola, Florida) 11 July 1909, p 2; 14 July 1909, p 7
[25] *The Los Angeles Herald* (Los Angeles, California) 2 March 1881, p 3; *The Dallas Daily Herald* (Dallas, Texas) 30 July 1884, p 5.
[26] *St Joseph Gazette-Herald* (St Joseph, Missouri) 10 July 1888, p 3
[27] *St Joseph Gazette-Herald* (St Joseph, Missouri) 11 March 1888, p 5; 10 July 1888 p 3; 28 January 1891 p 3.
[28] *St Joseph Gazette-Herald* (St Joseph, Missouri) 7 May 1888, p 5.
[29] *The Lincoln Journal Star* (Lincoln, Nebraska) 27 June 1892, p 5. See also: *St Joseph Gazette-Herald* (n 22) p 4 ('His home is in Chicago, but he is called to every portion of the United States, and there is scarcely a large city but contains some samples of his skill, so that a permanent residence at any point is entirely out of the question with him.')
[30] *Barbas* (n 3) 60
[31] *The Tampa Tribune* (Tampa, Florida) 23 October 1904, p 1.
[32] He was described as a 'well-known mural decorator … who has decorated some of the handsomest residences in America': *The Tampa Tribune* (Tampa, Florida) 8 December 1907, p 3. Elsewhere Pavesich was referred to as 'a mural artist of considerable renown': *The Pensacola News Journal* (Pensacola, Florida) 19 July 1909 p 2.
[33] *St Joseph Gazette-Herald* (St Joseph, Missouri) 14 July 1888, p 5.
[34] *St Joseph Gazette-Herald* (n 27) 11 March 1888, p 5.
[35] *The Tampa Tribune* (Tampa, Florida) 21 April 1909, p 3; (n 22) p 5.
[36] It also does also render curious some comments in Justice Cobb's judgment about public character, e.g.: '*The mere fact that he is an artist does not of itself establish a waiver of this [privacy] right. If he displayed in public his works as an artist, he would of course subject his works and his character as an artist, and possibly his conduct as a man, to such scrutiny and criticism as would be legitimate and proper… The plaintiff was in no sense a public character*'. *Pavesich v New England Insurance Co* (1905) 122 Ga. 190, 217.
[37] *ibid* (head notes).

advert brought him 'into ridicule before the world and especially with his friends and acquaintances'.[38] Yet despite this explicit emphasis on emotional damage, Pavesich claimed $25,000 in damages, 'a tremendous sum' for the time according to Barbas.[39] Pavesich's motive for bringing the action is thus ambiguous; Davis has suggested that it was perhaps a mix of principle and avarice.[40] Yet the newspaper reports above support the proposition that embarrassment or humiliation would have been a concern. The reports depict Pavesich as an 'Old World' gentleman artist, undertaking tasteful, exquisite work for high society clients with genteel sensibilities. His kudos and future commissions would arguably depend on maintaining this reputation, and thus appearing in a 'vulgar' advert would not have accorded with the bourgeois cultural sensibilities of his client base.

Newspapers of day shed new light on a further interesting fact about Paolo Pavesich; they indicate that he was engaged with another legal dispute at the same time as his privacy action. In October 1904 *The Tampa Tribune* reported that Pavesich was 'in the city on business of a legal nature' and he had filed suit for $1,100 for fresco work done for one John A. Graham.[41] However, the outcome of this dispute was less successful than his privacy case; a couple of years later the same newspaper briefly noted that Pavesich 'reports having lost his suit against John A Graham.'[42] So Pavesich was of a class that could afford to hire lawyers to protect his legal interests where necessary, and he was by no means shy to do so. His decision to litigate in 1903 led to the landmark case that has etched his name into privacy law history, despite its fade into obscurity in the world of art.

[3] The Case

The facts of Pavesich's famous case are only preserved in outline. The dispute arose when Paolo Pavesich posed for a portrait in the studio of commercial photographer J Quinton Adams in Atlanta (this remained a popular activity of the day, despite the emergence of the Kodak camera). Adams passed the negative to Thomas Lumpkin, an agent of New England Insurance. It was made into an advert for New England Insurance (see Figure A) and published in *The Atlanta Constitution* newspaper on 15 November 1903.[43] *The Atlanta Constitution* was Georgia's leading newspaper that 'promoted economic revitalisation of Atlanta and the South'. It competed for readers and all-important advertising revenue against its rival, *The Atlanta Journal*. Pavesich saw his photograph published in *The Atlanta Constitution* and brought an action for libel and privacy against the insurance company, Adams and Lumpkin. He filed his petition with the City Court of Atlanta on 15 December 1903, one month after the advert's publication. The defendants filed a response rejecting both claims on the basis that libel was not made out and there existed no legally enforceable privacy right.[44]

At first instance the case was decided by Justice Harry Reid at the City Court of Atlanta in May 1904. Though this initial judgment was unreported, Davis uncovered the court records and notes that:

> '*[Reid] apparently made quick work of Pavesich's novel theory; he ruled simply, 'After hearing argument the general demurrers are sustained and the petition is dismissed.'*'[45]

Pavesich appealed Justice Reid's decision to the Georgia Supreme Court. The Supreme Court heard legal argument on 3 February 1905 and delivered its judgment one month later on 3 March. The court

[38] Official record, quoted by *Davis* (n 19) 103.
[39] *Barbas* (n 3), 60; *Davis* (n 19) 99.
[40] *Davis* (n 19) 103.
[41] *The Tampa Tribune* (n 31) p 1.
[42] *The Tampa Tribune* (Tampa, Florida) 24 November 1906, p 7.
[43] *Davis* (n 19) 99.
[44] *ibid* 105.
[45] *ibid* 106.

bench was comprised of 6 justices: Chief Justice Thomas J. Simmons, Presiding Justice William H Fish, Associate Justice John S Candler, Beverly D Adams, Joseph R Lamar and finally Associate Justice Andrew Jackson Cobb who delivered the unanimous judgment of the court. This bench, unsurprisingly, was a remarkably homogenous group; all the justices were Georgian-born white men and all were Democrats. All had qualified for the bar via legal practice, except for Justice Cobb who had completed a law degree.[46] Yet Davis identifies one 'unusual' feature of the Pavesich bench that may have 'unconsciously influenced the innovative result'; the bench was a relatively young one. Davis writes:

> '*The average age of the justices was fifty, with Chief Justice Simmons at sixty-seven the only one in his sixties. The reason for this youth was probably the Civil War, which had decimated Simmons's generation*.'[47]

Justice Andrew Jackson Cobb, then aged 47, wrote the court's judgment. Cobb came from a prominent and politically active slave-owning family.[48] Both his father and uncle had been leading Confederates, supporting the collective of southern states that resisted the union of all American states and sought to maintain the institution of slavery.[49] His father, Howell Cobb, had served as a Confederate General in the American Civil War (1861-1865) and his uncle, Thomas Cobb, had drafted the Confederate Constitution.[50] Justice Andrew Cobb's politics were thankfully more moderate than his elders; he did not share their views on slavery[51] and strongly criticised Georgia's failure to properly investigate and punish lynching.[52] But he was, nevertheless, 'a moderate social conservative' and a strict Baptist who supported alcohol prohibition laws.[53] Cobb had joined the Georgia Supreme Court bench in 1896 aged 39, one of its youngest ever appointments. Before this he had been a practising lawyer. He had had also run for office (as a Representative in General Assembly of Georgia) and in the 1890s taught at local law schools including the University of Georgia and Atlanta Law School, becoming Dean of the latter.[54]

The Georgia Supreme Court upheld Pavesich's libel and privacy claims; it found that Justice Reid had erred in dismissing Pavesich's claim and reversed his judgment. The court held that the defendant's actions amounted to libel. Pavesich did not have an insurance policy so the advert would lead people to assume he had been paid to lie and he would thus 'become odious to every decent individual.' But even if Pavesich had not been paid for the lie, 'he would receive and merit the contempt of all persons having a correct conception of moral principles.'[55] Consistent with the wider culture outlined in Part 1, this finding reveals judicial distaste for activities such as advertising; it was looked down upon by decent 'right-thinking' people to such an extent that involvement in it could be deemed reputationally-damaging. In holding the defendant's actions libellous, the Georgia court did not have to uphold a privacy right to enable Pavesich to succeed … and yet it did. The court boldly claimed 'The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition.'[56] Justice Cobb employed some bold and creative reasoning to enable him to confirm the existence of a privacy right and tort; it is to this reasoning that discussion now turns.

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[46] *ibid* 106,
[47] *ibid* 107.
[48] *Allen* (n 19) 1204.
[49] *Davis* (n 19) 106; *Allen* (n 19) 1204-1206.
[50] *Davis* (n 19)106.
[51] *Allen* (n 19) 1206.
[52] Andrew J Cobb, 'The Right to Live: Will the State Protect It or Must We Rely on Federal Authority?' Georgia Historical Quarterly (1922) vol 6(3), 189-196.
[53] T.W. Reed, Men of Mark in Georgia, Volume 5 (ed: William Northern) (Caldwell, 1910) p 5-9. Accessible via: <http://srvg.org/Members-Only/Library/Publications/Men-of-mark-in-Georgia---Volume-5--1912-.pdf> [last accessed 21 April 2021].
[54] *ibid*.
[55] *Pavesich* (n 36) 221-222.
[56] *ibid* 201.

[4] The Judgment

In a rich and wide-ranging judgment, Justice Cobb put forward numerous layers of inventive argument to justify the court's conclusion. This part undertakes a close reading of the judgment. It shows how Justice Cobb wove natural law rights into the *Pavesich* judgment and the great influence of John Locke's work upon the structure and content of the natural right of privacy. This Part also highlights three crucial features of Locke's work that found their way into the privacy right, in particular: the self-possessive individual, a shifting and ambiguous use of the term 'property' and claims of universal equal right.

Pavesich was a creative judgment that was not weighed down by the dearth of earlier supporting cases. Justice Cobb's approach shunned the legal formalism that had dominated American adjudication since the 1860s. In broad terms, such formalism entailed: a narrow deductive interpretive approach; autonomous, logical legal reasoning without recourse to matters 'outside' of law; explicit avoidance of generalised policy-making; and strict adherence to *stare decisis*.[57] By the turn of the 20th Century, such formalist reasoning was coming to be denounced as 'mechanical' and insufficiently responsive to the needs of a rapidly changing industrial society.[58] In keeping with this emerging anti-formalism, Justice Cobb was critical of excessive judicial conservatism, in particular a preoccupation with precedent as epitomised by the *Roberson* majority's earlier approach. Though he accepted such judicial conservatism could be 'valuable', in this context it had resulted in undue caution and failure to recognise a privacy right.[59]

Cobb took a less slavish approach to prior privacy case law. He drew upon a slender cluster of favourable precedents[60] and took great care to limit the relevance of unfavourable authorities, skilfully distinguishing them on facts or *ratios*.[61] But the *Roberson* decision was more difficult to marginalise; Cobb therefore simply claimed 'we are utterly at variance with' the majority's conclusion and instead endorsed Justice Gray's dissenting opinion as the correct approach, before quoting a lengthy passage from it.[62] In short, Cobb constructed an approximate legal justification that was broadly defensible, though evidently a reasonable conclusion in the opposite direction could also have been extrapolated from these mixed authorities. Cobb's legal argument, expressed in modest terms as a double-negative, was that 'nothing in judicial decision … can be called to demonstrate … [privacy's] non-existence as a right.' The absence of a firm favourable precedent was thus not fatal to upholding a privacy right, though Cobb conceded that it should lead the courts to 'proceed with caution'.[63]

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[57] Neil Duxbury, *Patterns of American Jurisprudence* (Oxford, 1997) ch 1; Brian Leiter, 'Legal Formalism and Legal Realism: What is the Issue?' (University of Chicago Public Law & Legal Theory Working Paper No 320, 2010).

[58] Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 Columbia Law Review, 605-623; O W Holmes, 'The Path of The Law' (1897) vol 10(8) Harvard Law Review 457-478; Holmes, 'The Common Law' (1881) in *American Legal Realism* (eds: William Fisher, Morton Horwitz & Thomas Reed) (Oxford, 1993) 9.

[59] *Pavesich* (n 36) 213. Justice Cobb also quoted the dissenting Justice Gray in *Roberson* thus: the 'absence of exact precedent … upon the subject are of no material importance in awarding equitable relief' and the majority were 'unduly influenced by a failure to find precedents in analogous cases … which would precisely apply,' at 214.

[60] Including *Manola v Stevens* (1890) (unreported) and *Pollard* (n 1), both of which had been cited by Warren & Brandeis (n 10). To this Cobb added *Marks v Jaffa* 6 Misc 290, 292 (1893). *Pavesich* (n 36) 205-207.

[61] The following unfavourable authorities were reconciled as follows: *Schuyler v Curtis* (1895) 147 N.Y. 434 (deemed inconclusive on the existence of a privacy right during one's lifetime); *Corliss v E W Walker Co* (1894) 64 F. 280 and *Atkinson v Doherty* (n 11) (both deemed to have denied relief on the basis that the image used was of a deceased public figure); *Murray v Gast* (n 17) (deemed a correct finding that a privacy action could not be brought by a parent).

[62] *Pavesich* (n 36) 211-212, 213-217.

[63] *ibid* 193, 213.

Justice Cobb buttressed his defensible, if borderline, legal argument with two other wider sources that he claimed justified a privacy right. First, Cobb looked to legal 'side lights', namely other areas of law that indirectly upheld a 'right to be let alone'. He recounted diverse examples from Roman law to common law nuisance, trespass, eavesdropping and protection against search and seizure. The latter represented 'instances where the common law had both tacitly and expressly recognized the right of an individual to repose and privacy.'[64] Second, Cobb noted that though the facts of the *Pavesich* dispute may have been novel, the principles at stake were not. Where there was an absence of precedent, Cobb stated 'the common law will judge according to the law of nature and the public good.'[65] In this way, Justice Cobb filled the precedential 'gap' that he had created with natural law.

A Natural Right to Privacy

Natural law looms large in *Pavesich*. To justify upholding the privacy right, Justice Cobb advanced a three-pronged argument based upon natural law, the constitution and regular law.[66] Cobb's upholding of the privacy right was (at least partly) based upon natural law in that it deemed privacy an eternal God-given right bestowed upon individuals. In particular, he drew closely on Lockean notions of social contract, natural right and property whose influence run strongly throughout the judgment.[67]

According to Cobb, there exist 'laws sometimes characterised as immutable 'because they are natural, and so just at all times, and in all places, that no authority can either change or abolish them', and he confirmed that privacy was one such right. Yet this grand claim had an arguably modest basis; it was a matter of instinct (specifically, the instinct of those with 'normal' intellect):

> '*The right of privacy has its foundation in the instincts of nature.* ***It is recognised intuitively*** *... Any person whose* ***intellect*** *is in a* ***normal condition*** *recognises 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 ...* ***A right of privacy*** *in matters purely private* ***is therefore derived from natural law***.'[68]

Drawing upon the essential features of Locke's social contract, Cobb claimed that this natural right of privacy was enjoyed by the individual in the lawless state of nature and was retained when they surrendered many – but not all – of their rights and liberties in exchange for the benefits of civil society.

Justice Cobb depicted the natural right of privacy as an element of two other absolute natural rights, namely personal security and liberty. Security encompassed uninterrupted enjoyment of life and body and played a fairly peripheral role in the judgment. But Cobb's linkage of privacy to liberty was a crucial aspect of his reasoning. He put forward a very wide conception of the natural right to liberty. It was not merely concerned with the absence of physical restraint, but embraced 'the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct' (in modern parlance, freedom of movement) and 'the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator'.[69] Cobb propounded a conception of liberty as respect for individual autonomy over a range of life choices generally, and over the extent to which one engages with society in particular:

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[64] *ibid* 197-198. In taking this approach, he was following the argument put forward by Warren & Brandeis (n 10).
[65] *Pavesich* (n 36) 193-194.
[66] Justice Cobb claimed the privacy right is '*derived from natural law, recognised by the principles of municipal law, and guaranteed ... by the constitutions of the United States and the State of Georgia, in those provisions which declare that no person shall be deprived of liberty*': *ibid* 197.
[67] Such influences have been widely noted. See, e.g.: *Kent* (n 4) 6-10.
[68] Emphasis added. *Pavesich* (n 36) 194.
[69] *ibid* 195.

> '*Liberty includes the right to live as one will … One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. … Each is entitled a liberty of choice as to his manner of life*'[70]

This assumed a close link between privacy and individual autonomy, a view shared by numerous modern commentators.[71] By respecting and encompassing a wide range of the individual's choices, liberty thus included both publicity ('The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner') *and* privacy ('The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law'). Liberty thus necessarily embraced privacy and Cobb emphasised this relationship by repeatedly referring to the 'liberty of privacy' across the judgment.[72] By employing this rhetorical device, he subtly linked privacy with a right that enjoyed greater pedigree and explicit recognition in the US Constitution.[73] Yet this link with liberty also led to the most controversial claim in the judgment, discussed in Part 5, where Cobb likened the unauthorised use of Pavesich's image to 'slavery'.

The preceding natural law-based reasoning enabled Justice Cobb to downplay any appearance of undesirable judicial overreach by maintaining that the court was not creating a new right, but simply finding and articulating a right that already existed.[74] This rationale was already coming to be condemned as a misleading fiction by select early forerunners to legal realism who argued, on the contrary, that judges *do* in fact make law.[75] The modern secular lawyer schooled in such debates (as well as Hume's guillotine and modern restatements of natural law) may read Justice Cobb's natural law reasoning with some justifiable circumspection. Cobb's exalted claims based upon 'instinct' and 'normal' intellect should be treated with caution as a textbook example of - if not 'nonsense on stilts' – then subjective judicial preferences clothed in grand universalist claims.[76] However, there have been spirited defences of this natural law aspect of the *Pavesich* judgment. First, Justice Cobb's approach must be viewed in its intellectual-cultural context. According to Peikoff, ethical intuitionism was popular at the start of the 20th Century, and certain rights were widely accepted in the U.S. as inalienable and self-evident.[77] Furthermore, references to natural law were not uncommon in Georgian judgments.[78] Against this background, Cobb's claims would have been intellectually respectable and uncontroversial. Indeed, for Peikoff it is precisely the Pavesich judgment's 'appeal to political and moral philosophy' that makes its contribution to privacy law so 'distinctive' and 'compelling'.[79] Furthermore, even shorn of its natural law grandeur, Allen argues that Cobb's account of privacy as a fundamental human need inherently linked to liberty is highly persuasive *per se*.[80]

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[70] *ibid* 196.
[71] Alan Westin identifies protecting autonomy as the first function of privacy: *Privacy & Freedom* (Ig Publishing, 1967). See also: James Rachels, 'Why Privacy is Important' (1975) vol 4(4) Philosophy & Public Affairs 323-333; C Bryant, 'Privacy, Privatisation and Self-Determination' in *Privacy* (ed: JB Young) (John Wiley, 1978) ch 3, 80.
[72] *Pavesich* (n 36) 196, 200, 201,
[73] The 14th Amendment to the U.S. Constitution states 'nor shall any state deprive any person of life, liberty or property, without due process of law'.
[74] *Pavesich* (n 36) 201.
[75] See, e.g. John Chipman Gray, 'The Nature and Sources of the Law' (1909) in *American Legal Realism* (n 58) 36-38.
[76] See, e.g.: OW Holmes, 'Natural Law' (1918) vol 32(1) Harvard Law Review 40-44.
[77] Amy Peikoff, 'No Corn on This Cobb: Why Reductionists Should be All Ears for Pavesich' (2004) 42 Brandeis LJ 751, 787. See e.g.: The Declaration of Independence (4 July 1776) which states: '*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness*.'
[78] *Allen* (n 19) 1198.
[79] *Peikoff* (n 77) 790, 791.
[80] *Allen* (n 19) 1212, 1215.

The Influence of Lockean Property

This Lockean natural law core discussed above sets up what is, in my view, the most significant feature of the *Pavesich* judgment; its use of property. To be sure, similar notions of property were present and influential in other similar cases of the time, but Justice Cobb's systematic and detailed natural law reasoning articulated the privacy right's theoretical basis, especially its Lockean roots, more fully. In particular the judgment adopted a shifting and ambiguous use of the term 'property', applying it to the individual to create the 'self-ownership' upon which the privacy right was initially based.

Cobb's reasoning brought in earlier privacy cases where property notions had been employed, including *Corliss* where the court viewed the privacy in one's portrait as a property right akin to copyright as well as a personal right.[81] The influence of property notions in early privacy cases has been noted by select commentators. Post, for example, has drawn out such issues in Warren & Brandeis' seminal article, showing how the authors 'disentangled' privacy from existing property laws.[82] More specifically, Kent discusses the property notions in *Pavesich*, claiming that the judgment 'overflows with themes and language familiar to the law of property' and 'demonstrate[s] that privacy rights and property rights are similar creatures with similar philosophical and historical origins.'[83]

Two examples of property notions at work in Justice Cobb's judgment are worthy of particular attention. First, is his explicit endorsement and quotation of Justice Gray's dissent in *Roberson*, specifically a passage where Gray deemed the search for a property right 'unduly restrictive', before going on to claim:

> *'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 … is property'*[84]

This statement is a textbook illustration of how notions of property were changing around this time. Vandervelde argues that by the end of the 19th Century understandings of 'property' had transformed from the traditional Blackstonian conception of absolute dominion over physical things to a de-physicalised understanding concerned with protecting value rather than 'things'. This newer approach was often justified by reference to natural law or public policy.[85] Justice Gray's comment adapted 'property' in this way, to construct it as an individual right in relation to a 'thing' *or* 'privileges', thus enabling it to potentially cover a new and wider range of circumstances; Cobb adopted this reasoning wholesale and justified it with reference to higher natural law.

A second related passage in the *Pavesich* judgment is also significant. Justice Cobb stated:

> '*The form and features of the plaintiffs are* ***his own****. The [defendant] .. had no more authority to display them in public for the purpose of advertising … than they would have had to compel the plaintiff to place himself upon exhibition for this purpose.*'[86]

This is yet another aspect of the judgment in which Locke looms large, albeit implicitly. In claiming that Pavesich's appearance belonged to him Cobb was utilising established Lockean notions of individual self-ownership. A core premise of Locke's social contract was that each individual 'owned'

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[81] *Pavesich* (n 36) 208-209.
[82] Robert C Post, 'Rereading Warren and Brandeis: Privacy, Property, and Appropriation' (1991) Case Western Reserve Law Review, vol 41, 647, 648-649. See also: Ben Bratman, 'Brandeis & Warren's Right to Privacy & the Birth of the Right to Privacy' (2002) vol 69 Tennessee Law Review, 623.
[83] Kent (n 4) 17, 21-22.
[84] *Pavesich* (n 36) 215.
[85] Kenneth Vandervelde, 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, (1980) 29 Buffalo Law Review 325, 328-335.
[86] Emphasis added. *Pavesich* (n 36) 217.

himself. This was expressed at various points in his Second Treatise, but was encapsulated in the claim that 'every man has a 'property' in his own 'person'. This nobody has a right to but himself.'[87] So, for Locke, the individual 'owns' his person and what his person does (its labour) and this is a natural right prior to the formation of civil society. Justice Cobb logically extended this reasoning; 'owning' his body also necessarily entailed 'owning' what that body looked like, its appearance. This rationale applied to such an extent that displaying Pavesich's image against his will was tantamount to physically displaying him to the public against his will, despite the fact that physical coercion would clearly be necessitated by the latter but not the former.

So, as *Pavesich* demonstrates, concepts of property were evolving and could include a Lockean-based right of ownership over one's physical person (and its appearance) upon which a privacy right could be based. A crucial aspect of the Lockean natural right to 'own' one's person is that it was universal; the right was enjoyed equally by all men in the state of nature.[88] MacPherson explains that this aspect of Locke's theory reflected traditional Christian notions of the moral equality and the equal natural rights of man.[89] Consistent with this, Justice Cobb confirmed the universal applicability of privacy, claiming it was a natural right 'which every man is entitled to enjoy, whether out of society or in it', and later stating 'Each *person* has a liberty of privacy'.[90] The notion of individual self-ownership reflected in equal rights universally held by all (use of male terminology notwithstanding) has a clear moral appeal and forms a core tenet of political liberalism. But were such claims all they appeared? Did the *Pavesich* reasoning – and the Lockean theory on which it was primarily based – live up to their stated ideals? It is to this question that discussion now turns.

[5] A Universal Natural Right?

For all its universal natural right rhetoric, the privacy propounded by the *Pavesich* court was - in reality - a limited, culturally-specific right to be primarily enjoyed by wealthy middle-class white men, to the (silent) exclusion of other groups. This Part demonstrates the gap between the formal stated ideal set out in *Pavesich* and the substantive real-life effect of privacy law more generally across less powerful social groups. Furthermore, it argues that this gulf between *de jure* and *de facto* privacy is entirely consistent with a similar rupture in the Lockean theory upon which it was based.

A Bourgeois Right?

The proposition that, at its inception, the privacy right was (at least in part) an expression of class-related interests is relatively uncontroversial. As has been well-documented, Warren & Brandeis' elite social background, associated patrician values and even personal experiences with the press of the day clearly informed their articulation of the privacy 'problem' and their proposed solution of a privacy right.[91] Such genteel, middle-class concerns were articulated at select points in the *Pavesich* judgment, for example in the court's libel finding (outlined in Part 3) that use of the plaintiff's photograph for payment would make him 'odious to every decent individual'. They are also evident in Justice Cobb's disdainful references to the defendant's 'mercenary' profit motive which reflect a suspicion about the

[87] John Locke, *Two Treatises of Government*, (Everyman's Library, 1989) Book II [27], [173]. Elsewhere, Locke writes: '*man (by being master of himself, and proprietor of his own person, and the actions and labour of it) had still in himself the great foundation of property*', at [44].
[88] *ibid* [3], [4].
[89] C.B. Macpherson, The Political Theory of Possessive Individualism (2011, Oxford University Press), 243-244
[90] Emphasis added. *Pavesich* (n 36) 194, 200.
[91] See the particularly critical take in: Barron (n 9). See also: Amy Gadja, 'What if Samuel D Warren Hadn't Married A Senator's Daughter: Uncovering the Press Coverage That Led to the Right of Privacy' (2008) 2008 Mich St L Rev 35.

market.[92] Elsewhere the court expressed passing concern that the plaintiff's photograph might end up hanging in a place of ill-repute such as – God forbid - 'the bar of the saloon-keeper' or 'the walls of a brothel'.[93] This brief yet telling remark is a strong indicator that the court viewed the interest at stake as (at least partly) maintaining a particular 'respectable' identity or reputation. Clearly, not all social groups would have such a standing to protect.

This gap between stated equal universal rights and substantive inequality also beset Locke's possessive individualism upon which the privacy right in *Pavesich* was based. Macpherson notes a tension in Locke's work between two conflicting visions of society; on one hand, the traditional Christian natural law values of the moral equality of all men (outlined above) and, on the other, a new market society comprised of those with real property (i.e. estates) and those without.[94] He shows that Locke managed to maintain equal, universal rights whilst justifying vastly unequal ownership of wealth via three related tactics. First, Locke employed subtle strategic shifts in the meaning of 'property', from wide (encompassing persons, lives, liberties and estates) to narrow (covering only estates).[95] Second, Locke projected the prevailing social assumptions of his day back into the nature of man, assuming that an individual owed nothing to society for their abilities or talents, nor formed part of a wider community.[96] Finally, Locke assumed that men were not just equal in natural rights, but in their capacity to manage their lives. Yet he also claimed there were differences in the rationality and industry of individuals so that estates would come to be justifiably held by the more willing and able. So, as Macperson shows, Locke's theory was at heart, a defence of emerging capitalism and an attempt to maintain the rhetoric of the formal equality of all men whilst simultaneously justifying substantive inequality.[97] Relevant feminist and critical race literature confirms the presence of just such a gulf between the formal universal natural right to privacy articulated in *Pavesich* and the wider substantive inequality of privacy outside and beyond it.

A Patriarchal Right?

Privacy has long been a key target for feminist critique,[98] and numerous academics argue that the privacy right was gendered from its very inception.[99] For example, Allen notes privacy's 'origins in nineteenth century [gender] bias'. She argues that 19th century notions of privacy were cast in distinctly masculine terms (solitude, retreat from the public realm) which did not account for women's experiences or privacy needs (e.g. with respect to marital and reproductive autonomy, or household labour where 'Women had enjoyed few meaningful forms of personal privacy').[100] Furthermore, when it did directly concern women, the privacy advocated by Warren & Brandeis and set forth in early case law was influenced by prevailing paternalist attitudes that feminine modesty should be protected and

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[92] *'[O]ne who, **merely** for advertising purposes and from **mercenary motives**, publishes the likeness of another without his consent……*'; '*the publication of one's picture without his consent by another as an advertisement, for the **mere** purpose of **increasing the profits and gains** of the advertiser, is an invasion of this right'*: Emphasis added. *Pavesich* (n 36) 219-220.

[93] *ibid* 218.

[94] *Macpherson* (n 89) 243-244.

[95] *ibid* 198, 220, 247-251

[96] *ibid* 3, 197

[97] *ibid* 256, 257, 220-1, 247.

[98] A full account of such critiques is beyond the scope of this chapter, but for an overview of some such criticisms see: Ruth Gavison, 'Feminism & the Public/Private Distinction' (1992) vol 45(1) Stanford Law Review 1-45.

[99] See, e.g.: *Lake* (n 16); Susan E Gallagher, 'Privacy & Conformity: Rethinking 'The Right Most Valued by Civilized Men' (2017) Touro Law Review, vol 33(1) 159-175.

[100] Allen notes '*the problem of women's privacy within the home. That problem was the problem of too much of the wrong kinds of privacy – too much modesty, seclusion, reserve and compelled intimacy – and too little individual modes of personal privacy and autonomous, private choice*.' Anita Allen & Erin Mack, 'How Privacy got its Gender' (1990) vol 10, Northern Illinois University Law Review, 441-478, esp 477. See also: *Gallagher* (n 98).

'the ideal of the cloistered lady.'[101] The patriarchal approach of the *Roberson* court has been widely noted and its latent feminine ideals are evident in the language of the majority judgment.[102] Yet despite centring on a male plaintiff, the *Pavesich* case also supports the proposition that early privacy laws were inherently gendered.

Lake astutely points out that Pavesich is unusual because 'It was one of the very few cases at this time in which a man's image was used purely because it was pleasing to the eye.'[103] Most early photography-based image disputes concerned women plaintiffs[104] as their images were more frequently used in advertising and by the media (objectification being, of course, another feminist concern). Where a man's image was used, it tended to be due to their public renown or achievements rather than their 'beautiful countenance'.[105] Commenting on the *Pavesich* case in 1905, *The Philadelphia Inquirer* drew parallels with *Roberson* and confirmed the plaintiff 'was a vigorous, good-looking young fellow'.[106] Yet Lake identifies crucial differences that distinguish Pavesich from the attractive female plaintiffs in other similar cases. The first crucial difference is, of course, outcome:

> '*In an area of law dominated and shaped by female plaintiffs, it is notable that the first superior court case to recognise a right to privacy at common law was brought by a man*.'[107]

The second crucial distinction of *Pavesich* lies in the language and reasoning employed by Justice Cobb. Here the Georgia Supreme Court moved away from privacy-as-protection-of-female-modesty as employed in *Roberson* and similar cases. Instead, as Lake argues, the court adopted 'strikingly different' language to 'momentarily reconfigure the doctrine in masculine terms'. This is evidenced via Justice Cobb's linking of privacy to liberty (discussed earlier) so that Pavesich's claim became one of a natural right of autonomy over his life and actions rather than, e.g., protection of his modesty.[108] So *Pavesich* shows the inherently gendered understandings that permeated privacy discourse from the outset in subtle but significant ways. It highlights the partial, selective nature of a supposedly 'universal' privacy right that remained blind to the many pressing privacy problems faced by countless women beyond the narrow issue of 'the circulating portrait'. Furthermore, it reveals the courts adopting culturally divergent modes of reasoning depending on whether the privacy was concerned with protecting a man's liberty or a woman's modesty.

A White Right?

Race also arises in *Pavesich*, most notably in Justice Cobb's controversial slavery analogy. In this passage, written only 40 years after slavery was abolished by the Thirteenth Amendment in 1865, Cobb stated:

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[101] *Allen & Mack* (n 100) 457. Later in this piece the authors write '*Women appear in the Warren & Brandeis article as seduced wives and daughters*', at 459.
[102] For example: '*she [the plaintiff] has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes*'. *Roberson* (n 2) 543.
[103] *Lake* (n 16) 70. Lake notes that the other 2 cases were: *Henry v Cherry* (n 13) and *Munden v Harris* (n 13).
[104] *Pollard v Photographic Company* (n 1); *Manola v Stevens* (n 60); *Roberson* (n 2).
[105] The plaintiff's argument in *Roberson* ran: '*If the plaintiff has such a beautiful countenance that her photographic likeness is saleable in the markets, who is entitled to the proceeds of such sales?*' Quoted in Lake (n 16) 58-65.
[106] *The Philadelphia Inquirer* (Philadelphia, Pennsylvania) 24 July 1905, p8
[107] Lake (n 16) 4, 70, 74.
[108] *ibid* 14, 71-72.

> '*The knowledge that one's features and form are being used for … advertisements … brings …[one] to a realization that his liberty has been taken away from him and … he can not be otherwise than conscious of the fact that he is, for the time being, under the control of another, that he is no longer free, and that he is in reality a slave without hope of freedom, held to service by a merciless master*'.[109]

This claim that unauthorised use of one's image is akin to slavery has been deemed 'remarkable'[110] and 'at once both offensive and appealing'.[111] Two initial points about this analogy should be noted. First, Justice Cobb's slavery claim is the correlative of his liberty-based framing of privacy. If privacy is understood as freedom to present oneself or retreat from the crowd as one chooses, such liberty is eradicated by unauthorised use of one's image because it takes the decision out of one's hands. Second, the slavery claim should be viewed in the light of Justice Cobb's family background. As Part 4 outlined, Cobb's family had been active Confederates and slave-owners. Furthermore, his father and uncle authored well-known pro-slavery literature and Allen suggests he would have been exposed to such views in childhood. Yet, as we have seen, Cobb did not share his elder family members' views on slavery. Allen accepts that likening the cruelty and degradation of slavery to a relatively trivial misuse of an affluent subject's image is on one level 'hyperbolic and highly offensive'. But she nevertheless defends it as powerful, attention-grabbing rhetoric employed to protect a fundamentally important right that people need and value.[112]

Even so, the problematic nature of Justice Cobb's slavery analogy is cogently demonstrated by the selective and distorted way in which laws concerning privacy and identity were deployed in relation to race across this broad era. A particularly striking and egregious instance is *State v Mann* (1829) where the Supreme Court of North Carolina reversed the earlier conviction of a slave owner who had shot and wounded a slave woman on the basis that great 'danger' that would arise if the courts became involved in policing master-slave relations that enjoyed 'impunity by reason of [their] privacy'.[113] Elsewhere, Osucha draws out the racial elements in early privacy discourse which understood privacy as 'a distinctive property right and cultural privilege' concerned with maintaining white dignity and white femininity in particular.[114] She situates the bourgeoise concerns expressed by Warren, Brandeis and the *Roberson* dissenters against the backdrop of widespread racial stereotyping in the era's commercial visual culture. The concern to preserve the honorific value of (white) portraits such as Abigail Roberson's stands in stark contrast to the proliferation of 'grotesque' black caricatures in advertising and the mass media which consolidated racial difference, e.g. the famed 'Aunt Jemima' pancake mix trade mark based on Nancy Green, a servant and former slave.[115] Osucha terms this 'commodity racism', a phenomenon that lay beyond the interest of privacy discourse 'which was strictly concerned with representations of individuals, not types'. Yet this racially-loaded understanding of 'publicity as commodification' also influenced white anxieties about the circulating portrait.[116] Though Osucha does not cover *Pavesich*, she offers further grim context by which to view Justice Cobb's slavery analogy; beyond the obvious 'surface' claim about deprivation of liberty lie racial connotations about cultural-social status.

Khan also draws out the racial bias inherent in *Pavesich* by undertaking a comparison with racial defamation cases and *Plessy v Ferguson* (1896) where the U.S. Supreme Court upheld racial segregation on railway carriages as constitutional.[117] Railway segregation laws empowered train conductors to

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[109] *Pavesich* (n 36) 220.
[110] Jonathan Kahn, 'Controlling Identity: Plessy, Privacy, and Racial Defamation' 54 DePaul L Rev 755 (2005), 758.
[111] *Allen* (n 19) 1209.
[112] *ibid* 1206, 1209-1210.
[113] *State v Mann* 13 N. C. 263 (1829)
[114] Eden Osucha, 'The Whiteness of Privacy: Race, Media, Law' (2009) Camera Obscura, vol 24(1), 66-107, 72, 73, 97.
[115] *ibid* 75-76, 78-9, 86-91, 98.
[116] *ibid* 79-80, 82, 97.
[117] 163 US 537 (1896)

determine whether passengers were 'white' or 'coloured' for the purposes of travel and Plessy, a mixed race passenger, challenged his arrest for sitting in a white first-class carriage. Khan argues that despite their doctrinal differences, both *Pavesich* and *Plessy* were about controlling identity. The *Plessy* court essentially approved the state's authority to categorise the race of individuals, and in doing so it denied black people the ability to control their own racial identity. Yet merely 9 years later, 'Cobb forcefully invoked the specter of slavery' so that a white man could control *his* identity.[118] Khan thus draws out the racial undercurrents of Cobb's slavery analogy, thus:

> '*To deny Pavesich control of his image did not simply enslave his identity in some abstract sense, rather it relegated him to the status of a black person in society – someone who had no access to legal control over his own identity. In making a claim to control his identity, Pavesich was implicitly … 'performing whiteness'*'[119]

Yet, in a final potential twist to the tale, it is possible that Paolo Pavesich may have been Jewish.[120] Whether this was the case or not, as an immigrant in his exclusive line of work for socially elite clients there would have been professional advantages to Pavesich 'performing whiteness' and there is perhaps some evidence of this; he was occasionally referred to as the anglicised 'Paul' Pavesich, for example in his obituary and certain society pages.[121]

So as with gender, in terms of race the natural right to privacy was far from the 'universal' equal right it claimed to be. Again, it was selective; concerned with certain forms of the 'circulating portrait' whilst disregarding other more pernicious modes of image commodification. Furthermore, *Pavesich* was at odds with other legal doctrines that denied other groups the ability to control their identities. One may legitimately question whether the *Pavesich* judgment would have reached the same outcome or adopted the same liberty- and self-ownership-based reasoning had the plaintiff been black; Khan's account of *Plessy* and racial defamation cases suggests not. Such matters indicate that the content of the early privacy right reflected the power inequalities and implicit assumptions of the day, and that it was at least partly concerned with upholding the standing of 'respectable' white elites.

[6] Reception & Legacy

Despite the preceding shortcomings and limitations of the privacy right set out in *Pavesich*, the judgment had a range of significant impacts. Most obviously, the *Pavesich* decision had direct consequences for the parties to the dispute, particularly the plaintiff himself. However, as this Part explains, its impact extended far beyond the litigants, capturing the attention of the wider public and media of the day and, ultimately, creating a longer-term legal legacy.

Little is known of what happened to those most closely involved in the Pavesich dispute. Davis confirms that the Georgia Supreme Court's reversal of outcome would have normally led to a new trial at the City Court of Atlanta. Unfortunately, the case files from this period have been lost and Davis thus suggests one of two possible outcomes; either the trial was held and neither side appealed or, more likely, the parties settled out of court.[122] In any event, an intriguing newspaper story from July 1906 perhaps provides a clue as to the outcome of the dispute. It reported that Paolo Pavesich was back in Tampa for a few days, and claimed 'Prof Pavesich has not relinquished his ambition to own an orange

[118] *Kahn* (n 110) 759-760, 762-763, 768, 772, 776-777.
[119] *ibid* 781.
[120] Reports recount his daughter performing at a meeting of the Council of Jewish women in Atlanta: *The Atlanta Constitution* (Atlanta, Georgia) 30 January 1916, p 3. But it should be noted that that Judaism tends to be matrilineal, so it may be the case that Pavesich married a Jewish woman.
[121] *Atlanta Constitution* (n 21) p 17; 1 December 1911, p 6
[122] *Davis* (n 19) 117-118.

grove in this section and may make a purchase on this visit.'[123] Coming just over a year after the successful judgment in his favour, was this purchase to be made with his settlement from the case? We do not know, but we do know that in the years following his case, Pavesich's fresco work continued; in 1909 he worked in Florida[124] and spent winters there, with *The Tampa Tribune* reporting on his rattle-snake hunting prowess. [125]

The wider public reception of *Pavesich* is better documented and the consensus, even among media commentators with strong interests in free expression, was generally supportive of the decision. Barbas writes that the case 'was celebrated nationally',[126] and a select summary of contemporary newspaper reports confirms this. *The New York Times* compared *Pavesich* favourably with the much-maligned *Roberson* case, writing that the Georgian Supreme Court had 'shown itself the more trustworthy organ of civilization' than the New York Court of Appeals. The paper continued that the Georgian court's conclusion

> '*is that which most open-minded men, including a formidable part of the bench and bar, reached in the discussion [of Roberson, but] which the decision of our Court of Appeals [in that case], instead of closing, merely opened.*'[127]

The Philadelphia Inquirer made a similar comparison between *Roberson* and *Pavesich*, concluding on the latter:

> '*That's fair. It satisfies alike the dictates of reason and the sense of justice, for if one has no property right in one's own features how can there be any ownership whatever?*'[128]

Elsewhere, *The Atlanta Constitution*, the very newspaper where the disputed advert was printed, perhaps understandably, offered more neutral treatment. It provided only a basic factual account of the case (with no reference to its role in the dispute) under the headline 'Supreme Court Holds Pavesich Entitled to Damages'.[129] Finally, select academic law journals also provided some coverage of the decision. The *Michigan Law Review* provided a favourable summary of the legal arguments justifying a privacy right and praised the *Pavesich* court for 'brush[ing] away the cobwebs of legal reasoning' that had hitherto obstructed recognition of 'this instinctively recognised right.'[130] Elsewhere, a case note in the *Harvard Law Review* afforded *Pavesich* cursory treatment, noting it was the first time a higher court had upheld a privacy right and contrasting its outcome with the regrettable *Roberson*, before predicting (in somewhat understated terms) 'It seems probable … that [Pavesich] will have a following.'[131]

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[123] *The Tampa Tribune* (Tampa, Florida) 14 July 1906, p 8

[124] *Tampa Tribune* (Tampa, Florida) 27 January 1909, p 4; (n 35), p 3.

[125] Pavesich '*makes a speciality while visiting Florida of killing rattlesnakes, quite a number of which fell victim to his prowess last winter. He expects to break all past records before 'gentle springtime' again puts in appearance*': *The Tampa Tribune* (n 32) p 3. Of that earlier trip, it was reported: '*Among other trophies of the hunt, ... [Pavesich] brought to Tampa with him last night the rattles of a big rattle-snake, which came very near ending the career of the fresco artist. Prof Pavesich stepped directly over the snake, which immediately assumed its death-dealing coil. Hearing the rattle, the professor turned to see the big fellow striking at him. He emptied the contents of his gun into the snake, killing it instantly*.' *The Tampa Tribune* (Tampa, Florida) 14 November 1906, p 6.

[126] *Barbas* (n 3) 61.

[127] Author's addition. *The New York Times* (New York) April 23 1905, p 8.

[128] *Philadelphia Inquirer* (n 106) p 8.

[129] *The Atlanta Constitution* (Atlanta, Georgia) 4 March 1905, p 7.

[130] 'The Right of Privacy', (1905) vol 3, Michigan Law Review, 559-563.

[131] 'Right of Privacy – Infringement – Unauthorized Use of Portrait for Advertising Purposes', Harvard Law Review (1905) vol 18, 625. A further brief note in the Harvard Law Review (some two years later) afforded Pavesich somewhat more equivocal treatment, claiming 'this case turns the scale of American authority in what is probably the right direction'; 'Right of Privacy' Harvard Law Review (1907) vol 21, 63.

Beyond its initial reception, *Pavesich* did indeed 'have a following' and its enduring legal legacy arguably cements its place as a landmark privacy case. Following the decision, Justice Cobb wrote to Louis Brandeis, drawing the judgment to his attention and predicting that similar judgments would follow.[132] Justice Cobb's optimism was borne out by subsequent events. Though there remained isolated instances of courts in other states refusing to uphold a privacy right,[133] judicial and legislative support for such a right gained momentum in the years that followed. Peikoff claims *Pavesich* was 'indispensable in the drive to persuade the country's courts to adopt a common-law right to privacy'.[134] By the mid-20th Century the courts across 24 American states had recognised a right of privacy, and 3 states had enacted privacy-protecting statutes.[135] The *Pavesich* decision has also occasionally been cited by the US Supreme Court,[136] most notably in *Griswold v Connecticut* by the dissenting justices Black and Stewart who, ironically, refused to find a privacy right in the U.S. Constitution and accused the majority of giving constitutional status to a private tort.[137]

Conclusion

The impact of any individual case in isolation, including those in this volume, must not be overstated. Instead, when viewed in its wider social and historic context, we see that any case is necessarily an expression of pre-existing dominant political values or ideas, rather than simply a free-standing instigator of social change. As such *Pavesich* is just one piece of the privacy law jigsaw, but it is a crucial one, and not only because it laid the groundwork for privacy law's protection of the photographic subject which remains a live issue over a century later.[138] *Pavesich* also represents a privacy law landmark for the two related reasons argued in this chapter.

First, *Pavesich* fully articulated the classical liberal Lockean model upon which the privacy right was founded and, in so doing, helps to expose the shared assumptions that underlie both. *Pavesich* adopted the terminology of 'property', but represented part of a shift away from traditional constructions of that term towards de-physicalised interpretations of it as an individual right in relation to a 'thing' (the body?) or 'privileges'. This shifting and ambiguous use of 'property' – also present in Locke's *Second Treatise* – enabled it to become a valuable judicial tool to respond to new developments in a rapidly-changing society; the formation of the privacy right is one notable example of this. Closely linked to this point, *Pavesich* entrenched and expanded Locke's notion of the possessive individual who (somehow) 'owned' their physical person as a form of property and, therefore 'owned' its appearance also. This enabled the court to find that unauthorised use of the plaintiff's image was a 'trespass' of sorts in the form of a privacy right violation.

Second, the *Pavesich* judgment was beset with latent (and sometimes not-so-latent) assumptions about gender, race and class that simultaneously undermined Justice Cobb's perfectionist depiction of a privacy right that is 'eternal', 'immutable' and 'just at all times and in all places'. The universal privacy right upheld by the *Pavesich* court reflected 'intuitive' truths as discerned by 'normal intellects'. Yet these intellects – such as those of the Georgian Supreme Court bench and its like – were not a conduit to some higher eternal law, but unavoidably a product of their time, place and culture. The court could thus understand and recognise the concern that a 'respectable' man would feel were his photo to hang in a saloon, or be used to endorse a product (for payment or otherwise). It inevitably viewed privacy

[132] *Kahn* (n 110) 756-757. See also: *Davis* (n 19) 118.
[133] See, e,g: *Henry v Cherry* (n 13).
[134] *Peikoff* (n 77) 757.
[135] *Davis* (n 19) 119
[136] *Cox Broadcasting Corporation v Cohn* 420 U.S. 469 (1975); *Goldman v United States* 316 U.S. 129 (1942), cited by Murphy (dissenting).
[137] *Griswold v Connecticut* 381 U.S. 479 (1965).
[138] For a current discussion, see: Rebecca Moosavian, 'Stealing 'Souls'? Article 8 and Photographic Intrusion' (2018) 69(4) Northern Ireland Legal Quarterly 531-558.

as a crucial aspect of a man's liberty, rather than focusing on (e.g.) his modesty or vulnerability. Finally, it could equate a relatively trivial misuse of a white man's image with the inhuman institution of slavery whilst elsewhere courts denied black litigants similar control over aspects of their identity. In this sense, the *Pavesich* privacy right was not universally or equally enjoyed despite Justice Cobb's grand claims to the contrary. Instead, this was a privacy that tended to respect, protect and reflect a white, male social elite.

Ultimately, the discussion of *Pavesich* in this chapter encourages us to consider the extent to which modern privacy law may still contain historic sediments of the ideas and assumptions set out in that case (and any resulting wider implications). Furthermore, it invites us to be attentive to the contemporary sub-conscious beliefs or blind-spots that may continue to silently shape our current understandings of the privacy right.

Figure A: The Pavesich Advert

"In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass, and today my family is protected and I am drawing an annual dividend on my paid up policies."

"When I had health, vigor and strength I felt the time would never come when I would need insurance. But I see my mistake. If I could recall my life I would buy one of the New England Mutual's 18-Pay Annual Dividend Policies."