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COLLOQUIUM

**THE NATURAL LAW ORIGINS OF THE
AMERICAN RIGHT TO PRIVACY**

**NATURAL LAW, SLAVERY, AND THE RIGHT TO
PRIVACY TORT**

*Anita L. Allen**

In 1905 the Supreme Court of Georgia became the first state high court to recognize a freestanding “right to privacy” tort in the common law. The landmark case was Pavesich v. New England Life Insurance Co. Must it be a cause for deep jurisprudential concern that the common law right to privacy in wide currency today originated in Pavesich’s explicit judicial interpretation of the requirements of natural law? Must it be an additional worry that the court which originated the common law privacy right asserted that a free white man whose photograph is published without his consent in a city newspaper is like a slave in bondage?

I argue that the jurisprudence of Pavesich need not be troubling. Pavesich’s natural law argument was supplemented by several positive law arguments. The positive law arguments were a strong enough basis for finding a right to privacy in the common law, as indeed Samuel Warren and Louis Brandeis had previously argued. The observation that the Pavesich court’s natural law argument ran alongside positivistic arguments suggests that the arresting, high-toned natural law and slavery appeals in Pavesich are inessential rhetorical throwaways. But I maintain that the natural law argument and slavery analogy features of Judge Andrew Jackson Cobb’s opinion extolling the “liberty of privacy” are (1) of critical importance to a full contextual understanding of the decision and (2) illuminate the contemporary case for recognizing invasions of privacy as civil injuries to freedom and self-determination. One can poke holes in the logic of Thomas Aquinas and John Locke as scholars have done for centuries. But one can as easily choose to celebrate the spirit of the natural law tradition. The natural law tradition represents efforts rhetorically, rationally, and

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intuitively to derive principles of justice and goodness from basic facts about human characteristics, needs, and desires, where otherwise binding sovereign law may fall short.

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INTRODUCTION

In 1905, the Supreme Court of Georgia became the first state high court to recognize a freestanding “right to privacy” tort in the common law.¹ The famous case was *Pavesich v. New England Life Insurance Co.*² Judge Andrew Jackson Cobb³ penned a remarkable opinion on behalf of a unanimous bench. The opinion upholding the petitioner’s novel privacy claim began with a unique invocation to the demands of natural law⁴ and ended with an arresting analogy between privacy invasions and enslavement.⁵ The victorious petitioner alleging privacy invasion in the landmark case was an Atlanta artist, Paolo Pavesich.⁶

1. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

2. Commentators frequently contrast *Pavesich* with *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). The New York Court of Appeals in *Roberson* declined, on similar facts, to recognize a right of privacy in the absence of statute. *Id.* at 447. This position was also apparently taken by a Virginia court in 1906. See *Barker v. Richmond Newspapers Inc.*, 14 Va. Cir. 421 (1973) (citing *Cyrus v. Bos. Chem. Co.*, 11 VA. L. REG. 938 (1906)). For a contrary Virginia perspective, see *The Right to Privacy*, 12 VA. L. REG. 91, 93 (1906) (asserting, following *Pavesich*, that a right to privacy derives “from natural law” and is compelled by rights of “personal security and personal liberty”).

3. Judge Cobb served as an Associate Justice on the Georgia Supreme Court from 1897 to 1907. See SUPREME CT. GA., <http://www.gasupreme.us/history/#history> (last visited Nov. 16, 2012).

4. *Pavesich*, 50 S.E. at 70 (“A right of privacy in matters purely private is therefore derived from natural law.”).

5. *Id.* at 80 (“[A]s long as the advertiser uses him for these purposes, he cannot 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; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.”).

6. The description of the facts in this paragraph conforms to the facts as recited in the official syllabus and presupposed by the opinion. See *id.* at 68–69, 80.

As recited in the court opinion, Pavesich had his photograph taken by photographer J. Quinton Adams.⁷ Without Pavesich's knowledge or consent, Adams conveyed a negative of Pavesich's photograph to Thomas B. Lumpkin, an Atlanta-based general agent for New England Life Insurance Co.⁸ Despite lacking authorization from Pavesich, Lumpkin incorporated a photograph produced from the Adams negative into an advertisement for his employer's life insurance company, and subsequently published the advertisement in the *Atlanta Constitution* newspaper.⁹

Pavesich sued Adams, Lumpkin, and the insurance company in an action for libel and invasion of privacy.¹⁰ The libel claim was straightforward. The advertisement falsely stated that Pavesich had purchased insurance from the New England Life Insurance Co.¹¹ The privacy invasion claim was not so straightforward. To begin with, American common law did not yet clearly include an express "right to privacy"¹² and such a right applied to a newspaper publication was necessarily limited by constitutional privileges of speech and press. Pavesich's case was dismissed by an Atlanta trial court but was revived as a result of his successful appeal to the Georgia Supreme Court, which cited the putative precepts of natural law and aversion to slavery as grounds for its decision.¹³

Contemporary critics rarely think to discredit the common law right to privacy because of its natural law origins.¹⁴ Typical legal critics put it down because they deem it (1) inconsistent in principle with free speech and press;¹⁵ (2) duplicative of other torts such as trespass, defamation or

7. *Id.* at 68–69.

8. *Id.*

9. *Id.* The successor to the *Atlanta Constitution* is today's *Atlanta Journal Constitution*.

10. *Id.* at 68–69.

11. *Id.*

12. See *Schuyler v. Curtis*, 15 N.Y.S. 787 (Sup. Ct. 1891), *rev'd*, 42 N.E. 22 (N.Y. 1895) (noting that the right to privacy is a basis of liability for nonconsensual public display of a bust of a private citizen, but that such a right does not survive death). But see *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (no privacy right exists in the absence of a statute).

13. *Pavesich*, 50 S.E. at 70 ("A right of privacy . . . is therefore derived from natural law."); *id.* at 80 ("[A]nd, as long as the advertiser uses him for these purposes, he cannot 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.").

14. But see Amy Peikoff, *No Corn on This Cobb: Why Reductionists Should Be All Ears for Pavesich*, 42 BRANDEIS L.J. 751, 788 (2004) (crediting Judge Cobb for seeking to ground the right to privacy in "moral and political first principles" but rejecting his natural law reasoning as unsound); *id.* at 787 ("If a study is conducted showing that racism has its foundations in 'instincts of nature' that cause us to feel uncomfortable around people of different races, or to see those of other races as inferior, an enlightened person does not conclude that slavery and concentration camps are on that basis given one iota of justification.").

15. See, e.g., Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right To Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1122–24 (2000).

infliction of emotional distress;¹⁶ or (3) impractical, unwanted, and old fashioned in the age of computer, internet, and electronic technology.¹⁷ In 1998, a few journalistic commentators¹⁸ disparaged the common law right to privacy because of its natural law rationale after the Georgia Supreme Court in *Powell v. Georgia*¹⁹ embarrassed the U.S. Supreme Court by striking down the state sodomy statute that the Court had upheld in 1986 in the now overruled *Bowers v. Hardwick*.²⁰ Yet, interestingly, *Pavesich* has never inspired the high profile scholarly and juristic anti-natural law ire that *Griswold v. Connecticut*²¹ draws. The Supreme Court first recognized a free standing "right to privacy" in *Griswold*. Some opponents of *Griswold*'s distinctly formulated, penumbral²² constitutional right to privacy reject the right²³ on the ground that it was based not on a legitimate interpretation of

16. Diane Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1983).

17. Cf. Patricia Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 11–12 (2008) ("[F]urther clouding the incoherent development [of the privacy torts] is the fact that privacy expectations and norms are constantly challenged by technology. . . . [The] conventional view of privacy is inapplicable and misplaced in cyberspace, where there are no physical spaces or clear boundaries delineating behavior and propriety.").

18. See, e.g., Jim Wooten, Editorial, *Judicial Fiat a Stick in the Mud Justice Warns the Majority*, ATLANTA J., Nov. 25, 1998, at A14 ("Two weeks after the general election, a politically tuned Georgia Supreme Court handed down a ruling that aligns the state's judiciary with its activist brethren and sistren on benches around the nation. Straining to invent a constitutional right to privacy that would comport the law to their social views, six members of Georgia's highest court found grounds overlooked by the U.S. Supreme Court to declare the state's sodomy law unconstitutional."); cf. Bill Rankin, *Sodomy Decision Stems from 1905 Privacy Ruling*, ATLANTA J. & CONST., Nov. 27, 1998, at E01 (reporting that the Georgia high court struck down the state sodomy law upheld in *Bowers v. Hardwick*, citing *Pavesich* and quoting an expert doubting that Cobb contemplated this application of his analysis).

19. *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (striking down Georgia a statute criminalizing sodomy as applied to consensual adults).

20. 478 U.S. 186, 189 (1986) (upholding a Georgia statute criminalizing sodomy as applied to consensual adults).

21. 381 U.S. 479, 485–86 (1965) (striking down laws criminalizing the sale, provision, and use of contraceptives).

22. *Id.* at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citation omitted)); cf. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958) (introducing the concept of the penumbra of the law) ("We may call the problems which arise outside the hard core of standard instances or settled meaning 'problems of the penumbra'; they are always with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of a constitution.").

23. Cf. Charles A. Kelbley, *The Impenetrable Constitution and Status Quo Morality*, 70 FORDHAM L. REV. 257, 257–58 (2001) ("Unlike [Robert] George, who repeatedly criticizes Justice Douglas's use of the phrase 'penumbras formed by emanations' in explaining the source of the right of privacy, I find much to be said for that very language. . . . [Justice] Black also criticizes the separate opinions of Justices White, Harlan, and Goldberg for engaging in what Black thought was a 'natural law due process' methodology to justify the recognition of the right of privacy. In light of Justice Black's positivism, skepticism, and opposition to natural law and natural rights *tout court*, he is hardly an authority to rely upon to support George's thesis that under our Constitution the legislatures, not the courts, have

the text of the Constitution but on nothing more than judicial imaginings of “natural law.”²⁴ On its face, however, *Griswold* did not invoke natural law;²⁵ instead the majority opinion of Justice William O. Douglas argued that a right to privacy is implicit in the Bill of Rights and major court cases interpreting it.²⁶ To say that the *constitutional* right to privacy that began in *Griswold*—and that provided support for cases as socially transformative as *Loving v. Virginia*,²⁷ *Roe v. Wade*,²⁸ and *Lawrence v. Texas*²⁹—is grounded in natural law jurisprudence is argumentative. It sounds like an attack of the left from the right.³⁰ But to say that the *common law* right to privacy is grounded in natural law, is simply to state an empirical fact.³¹

the primary authority to give effect to natural law and to protect natural rights.”). See generally Dorothy J. Glancy, *Douglas’s Right of Privacy: A Response to His Critics*, in “HE SHALL NOT PASS THIS WAY AGAIN”: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 155, 162 (Stephen L. Wasby ed., 1990) (suggesting that limiting government interference with personal life lay behind Douglas’s right to privacy).

24. See generally Richard F. Gaebler, *Is There a Natural Law Right to Privacy?* 37 AM. J. JURIS. 319, 320 (1992) (arguing that a natural rights argument for privacy rights poses theoretical and normative problems).

25. Hon. Diarmuid F. O’Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1515 (2011) (“And, by the time *Griswold v. Connecticut* was decided, all nine of the Justices had decried the use of the natural law in judging. In *Griswold*, of course, the Court held that a ‘right to privacy’ in the Constitution forbade states from criminalizing the use of contraceptives by married couples. In dissent, Justice Black accused the majority of ‘Lochnerizing,’ that is, of importing a ‘natural law due process philosophy’ into the Constitution. Justice Black’s dissent insisted that the Court cannot rely on ‘any mysterious and uncertain natural law concept as a reason for striking down [the Connecticut] law.’ The majority, for its part, decried the use of natural law as well, in an effort to distance itself from *Lochner*. Accordingly, those who believe in judicial restraint are skeptical of natural law because, to them, it conjures up the judicial adventurism of the *Lochner* era and the Warren Court. So, we find the natural law under attack from both sides. To the left, it is an invention of mystics and religious conservatives. To the right, it is a dangerous invitation for judges to impose their own sense of justice on the country.” (alteration in original)).

26. *Griswold*, 381 U.S. at 485–86 (“The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . . We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”).

27. 388 U.S. 1 (1967).

28. 410 U.S. 113 (1973).

29. 539 U.S. 558 (2003).

30. Rejections of supposed “natural law” thinking in constitutional law can also amount to attacks of the left on the right. See, e.g., Nelson Tebbe, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 483–84 (2010) (“A more plausible case of corruption might be found in Chief Justice Burger’s resort to ‘Judeo-Christian moral and ethical standards’ in *Bowers v. Hardwick*. Never before had privacy jurisprudence turned so openly on the content of religious injunctions. In fact, the opposite was true: core precedents had abetted, in the name of privacy, an individual’s choice to resist efforts to inculcate religious or sectarian norms. Although drawing from natural law was once an accepted form of argumentation, the canons of particular faith traditions had for generations been treated as domains separate from secular law. In reaching for parochial standards to underpin the state’s police power and categorically reject *Hardwick*’s privacy claim, Burger introduced a new element into the ongoing dispute over the nature and scope of individual autonomy. The potential ramifications for constitutional liberty alone rendered the move noteworthy.”).

31. That is, it is to state an empirical fact about express language and, by extrapolation, ideology or belief.

Has the time come to hold the common law right to privacy to account? Although natural law discourse continued to appear in common law cases after the dawn of legal realism in the late nineteenth century,³² it has clearly gone out of style and out of favor.³³ Moreover, while invasions of privacy can have adverse ramifications for dignity, reputation, and opportunity, those ramifications are rarely perceived as on a par with the conditions of chattel slavery as practiced in the American South prior to the Civil War. It is one thing to assert that privacy invasions are as offensive as physical violence;³⁴ it is something else to assert that they are tantamount to enslavement. The *Pavesich* case established an important precedent, but the reasoning behind it is infused with what many would regard as myth (that universal natural laws binding on the courts are known to human reason) and hyperbole (that invasions of privacy are wrongs comparable to slavery).

Directly confronted, contemporary readers could easily be troubled by *Pavesich*'s myth and hyperbole. Must it be a cause for deep jurisprudential concern that the common law right to privacy in wide currency today originated in an explicit judicial interpretation of the requirements of natural law? Must it be an additional worry that the court which spearheaded the common law privacy right asserted that a free white man whose photograph is published without his consent in a city newspaper is like a slave in bondage? I argue that the jurisprudence of *Pavesich* need not be troubling at all.

Pavesich's natural law argument was supplemented by several positive law arguments. The positive law arguments were a strong enough basis for finding a right to privacy in the common law, as indeed Samuel Warren and Louis Brandeis had previously argued.³⁵ The observation that the *Pavesich* court's natural law argument ran alongside positivistic arguments could be the preface to an argument that the high-toned natural law and slavery appeals in *Pavesich* are inessential throwaways. But I want to suggest that the natural law argument and slavery analogy features of the court's opinion are (1) of critical importance to a full contextual understanding of the decision and (2) illuminate the contemporary case for recognizing invasions of privacy as civil injuries to freedom and self-determination. One can poke holes in the logic of Thomas Aquinas and John Locke as scholars have done for centuries. But one can also celebrate the spirit of the natural law tradition. The natural law tradition represents efforts rhetorically,

32. See generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (noting that the search for law is less a search for abstract principle than the set of experience-based predictions about what the courts will do).

33. See, e.g., Peikoff, *supra* note 14, at 787 (rejecting natural law reasoning in *Pavesich* and elsewhere in the law).

34. Cf. *Lyon v. Manhattan Ry. Co.*, 37 N.E. 113, 115 (N.Y. 1894) ("Mr. Justice Gray, in the Supreme Court of the United States, in the case of *Railway Co. v. Botsford*, remarked that 'The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow.'" (citation omitted)).

35. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198-215 (1890).

rationally, and intuitively to derive principles of justice and goodness from basic facts about human characteristics, needs, and desires, where otherwise binding sovereign law falls short.³⁶

Amy Peikoff, one of the few philosophers to problematize *Pavesich*'s natural law moorings, argued that Judge Cobb's effort to derive privacy rights from fundamental moral and political principles constitutes a neglected, original contribution to jurisprudence. She also acknowledged that *Pavesich* was "instrumental in the adoption of a legal right of privacy in other states" and that the natural law foundations of the privacy right may help to explain its initial influence.³⁷ But Peikoff raised an important set of challenges to the philosophical underpinnings of *Pavesich*:

[S]ince we are no longer in the age of the Founding Fathers, or of the ethical intuitionists, what are the proper moral and political first principles, and how are they defended? Second, what is the connection, if any, between privacy and these principles? If there is such a connection, how does it compare to the connection between those same basic principles and other rights one would have the law recognize—e.g., rights to life, liberty, and property?³⁸

In this article I engage these smart questions by one of *Pavesich*'s closest readers.

Part I briefly relates factual details underlying the *Pavesich* case, beyond those included in the reported opinion. Part II describes the implicit organization of the opinion, whose outmoded style contemporary readers may find hindering. Part III lays out the court's natural law argument. Part IV identifies both "soft" and "hard" positivist arguments that played central roles alongside Judge Cobb's natural law argument. Judge Cobb offered sufficient positivistic, precedent-based arguments to supplement his natural law argument in *Pavesich* for recognition of a privacy right. But, I suggest reasons for thinking that a purely positivistic case for privacy rights would have been intellectually unsatisfying for a man of Judge Cobb's ideals and background. Part V sets out Cobb's slavery analogy. At first glance, the analogy appears to be merely decorative; with closer examination, I argue that the analogy cannot be well-understood as literary flourish. Slavery and

36. Cf. MARTIN LUTHER KING, JR, *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 64 (New Am. Library 2000) (1963) (appealing to the natural law tradition to justify nonviolent disobedience to racist laws and legal authorities).

37. Cf. Peikoff, *supra* note 14, at 790–91 ("It is the appeal to basic political and moral philosophy that makes the *Pavesich* opinion distinctive. I also believe that it is this aspect that—despite the opinion's flaws—made it instrumental in the adoption of a legal right of privacy in other states. Note in this connection that the *Pavesich* opinion was a unanimous decision while the precedent-based arguments in *Roberson*—arguments resembling those made by Warren and Brandeis—resulted in a divided panel. An argument based on fundamental philosophy is more compelling than is an argument as to why precedent that seems on its face contrary to the desired outcome, really is after all compatible with satisfaction of 'society's demand' for a new right. And this principle as to which type of argument is more compelling applies not only to judges on one's own bench, but also to judges in other jurisdictions.").

38. Peikoff, *supra* note 14, at 791.

the recently abolished institution of African-American slavery had a special significance to Georgians in general and to Judge Cobb in particular. Part VI and my Conclusion explain why Cobb's contractarian natural law argument and slavery analogy can be viewed as causes for celebration rather than worry when understood as aids to making the case that our privacy rights are dimensions of our basic social and political liberty. Indeed, Cobb's characterization of the right to privacy as a demand of natural law meshes well with extant normative perspectives that many forms of informational and physical privacy are, what I call, "foundational goods"—just demands of the government and social order, in all liberty-loving regimes, for realms of freedom and self-determination that may be goods in themselves and that are certainly prerequisites of other goods.³⁹ Personal freedom and self-determination are recognized contemporary values potentially furthered by individual privacy rights. We often want and need our privacy, and it is often inhumane and unjust to deny us what Cobb labels our "liberty" to experience it.

I. AN UNAUTHORIZED PUBLICATION

As previously noted, the plaintiff and petitioner was an Atlanta artist—not a famous one—named Paolo Pavesich.⁴⁰ Little is known about Mr. Pavesich, who appears to have been "lost to history," apart from his privacy suit.⁴¹ We learn from his lawsuit that defendant portrait photographer J. Quinton Adams had taken a formal photograph of the stout, robust-looking Pavesich.⁴² Adams then gave or sold a negative of Pavesich's photograph to defendant Thomas B. Lumpkin, an Atlanta general agent for defendant New England Life Insurance Co.⁴³ Without Pavesich's prior knowledge or consent, Lumpkin, or someone who worked with him, had a photograph of Pavesich developed from the Adams negative incorporated into an advertisement for a life insurance product.⁴⁴ On November 15, 1903, the advertisement was published in the regionally distinguished *Atlanta Constitution* newspaper.⁴⁵ For competitive newspapers of the day,

39. See ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE xi, 13, 21, 171 (2011).

40. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 68 (Ga. 1905).

41. Jefferson James Davis, *An Enforceable Right of Privacy: Enduring Legacy of the Georgia Supreme Court*, 3 J. S. LEGAL HIST., 97, 98 (1994).

42. *Id.* at 99 (naming the photographer as a man called "J. Quinton Adams" whose place of business was a short walk from the offices of the New England Life insurance Co.). Curiously, a photograph posted on a family genealogy website of a "Paul Pavesich" described as a fresco painter (1850–1920) looks remarkably like the man in the newspaper advertisement at issue in *Pavesich*. It is difficult to gauge the accuracy of amateur genealogy. See *Pavesich*, ANCESTRY.COM, http://search.ancestry.com/cgi-bin/sse.dll?gl=43&MS_AdvCB=1&rank=1&new=1&MSAV=2&msT=1&gss=angs-g&gsfn_x=1&gsln=Pavesich&gsln_x=1&msydy_x=1&msypn_x=XO&msypn_ftp_x=1&gskw_x=1&83004002_x=1&cpxt=0&catBucket=rstp&uidh=000&cp=0&so=2 (last visited Nov. 16, 2012).

43. *Pavesich*, 50 S.E. at 68.

44. *See id.*

45. *Id.*

advertising was an especially important source of revenue; it was an accomplishment for the *Atlanta Constitution* to win a major advertising client like the New England Life Insurance Co.⁴⁶ There is no way to ascertain whether, what today is a hokey-sounding ad, was then considered unusual or if it raised eyebrows in the pressroom.

Having fallen victim to the commercial imperatives of the insurance and newspaper businesses, Pavesich sued Adams, Lumpkin, and the New England Life Insurance Co. in an action for libel and invasion of privacy.⁴⁷ Pavesich's case was assigned to Judge Harry M. Reid of the City Court of Atlanta.⁴⁸ The defendants sought to have Pavesich's case thrown out. Perhaps because of Pavesich's novel privacy claim, Judge Reid entered an order sustaining the defendants' general demurrer.⁴⁹ Undeterred, claiming legal error, Pavesich appealed to the state supreme court (there being no intermediate court at the time).⁵⁰ He prevailed in the appeal.⁵¹ Records of what happened when the case was presumably remitted back to the lower court for disposition on the merits have been lost.⁵² But the supreme court opinion was so clearly in favor of a victory for Pavesich on both the libel and privacy claims that the parties may have settled to avoid the bother of a trial.⁵³

As framed by Judge Cobb, who wrote for a unanimous court, the *Pavesich* case presented the novel question "whether an individual has a right of privacy which he can enforce, and which the courts will protect against invasion."⁵⁴ The Georgia court was well aware that the New York high court had recently considered the same question in a similar case of unauthorized use of a photograph and denied the privacy claim as lacking a basis in precedent or statute.⁵⁵ In the well-known 1902 case, *Roberson v. Rochester Folding Box Co.*, the New York Court of Appeals declined to recognize a cause of action for invasion of privacy on behalf of a young woman whose photograph was used without her prior knowledge or consent on advertisements and packaging for baking flour.⁵⁶ Judge Parker argued that there was no right to privacy founded upon the claim that a man has a right to pass through this world without having his picture published, his

46. Davis, *supra* note 41, at 101-02.

47. *Pavesich*, 50 S.E. at 68-69.

48. See Davis, *supra* note 41, at 106.

49. *Id.*

50. See *id.*

51. See *Pavesich*, 50 S.E. at 81.

52. See Davis, *supra* note 41, at 118.

53. *Id.*

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

55. *Id.* at 77 (citing *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902)).

56. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 448 (N.Y. 1902). I have argued elsewhere that the outrage with the decision at the time was related to the fact that the plaintiff was a virtuous young female for whom commercial use of her visage despoiled her character and reputation. See Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441 (1990). But even today, when we no longer expect women to be hothouse flowers, one finds the court's refusal to recognize the privacy right disquieting. Can people just exploit our images at will for their own commercial purposes?

business enterprises discussed, or his eccentricities commented upon, "whether the comment be favorable or otherwise."⁵⁷ Unconstrained by the limitations of positive law, however, Georgia found a basis for a legally enforceable right to privacy not only in the deep recesses of positive law but importantly also in the "instincts of nature"⁵⁸ and the requirements of natural law.⁵⁹

II. AN OLD-FASHIONED OPINION

Judge Cobb's démodé opinion divides into several distinguishable (but unnumbered) sections. He did not have to lay out the facts of the case because they appear in the official case syllabus.⁶⁰ In the first section he immediately elaborates the right to privacy as a right grounded in human instincts and natural law. He finds the right to privacy implicit in the "true meaning and intent"⁶¹ of incontrovertible liberty and security. In his next section he makes what I would characterize as a "soft positivist" argument. He identifies some of the "many side lights in the law"⁶² from which the right of privacy can be inferred, including Roman and English common law principles. Here he asserts that the "liberty of privacy" can be forfeited by consent or can be waived expressly or impliedly, and that its violation is actionable in court like any other tortious injury.⁶³ Recognizing that privacy is not always superior to other goods, he notes that legitimate public welfare purposes sometimes require publicity.⁶⁴ He also recognized that privacy may at times be required by legitimate public purposes and imposed on the unwilling.⁶⁵ In a third major section, he acknowledges that freedom

57. *Roberson*, 64 N.E. at 443.

58. *Pavesich*, 50 S.E. at 69 ("The right of privacy has its foundation in the instincts of nature.").

59. *Id.* at 70 ("A right of privacy in matters purely private is therefore derived from natural law.").

60. *Id.* at 68.

61. *Id.* at 70.

62. *Id.* at 71.

63. *Id.* at 72 ("The right of privacy, however, like every other right that rests in the individual, may be waived by him, or by any one authorized by him, or by any one whom the law empowers to act in his behalf, provided the effect of his waiver will not be such as to bring before the public those matters of a purely private nature which express law or public policy demands shall be kept private. . . . It may be waived for one purpose, and still asserted for another; it may be waived in behalf of one class, and retained as against another class; it may be waived as to one individual, and retained as against all other persons.").

64. *Id.* at 73 ("Publicity in many cases is absolutely essential to the welfare of the public.").

65. *Id.* ("The law stamping the unbreakable seal of privacy upon communications between husband and wife, attorney and client, and similar provisions of the law, is a recognition not only of the right of privacy, but that, for the public good, some matters of private concern are not to be made public, even with the consent of those interested.").

This important point jibes with—and helped to inspire—the thesis of my book, *UNPOPULAR PRIVACY*, which is that there are duties as well as rights of privacy, and a place in liberal societies for government coerced privacy. See ALLEN, *supra* note 39 at 9–13, 23. I devote a chapter to professional and employee confidentiality as an example of privacy duties often imposed, without regard to consent. *Id.* at 99–122.

of speech and press must constrain privacy, for to speak and publish truth are natural and constitutional liberties.⁶⁶ In a fourth section Cobb makes, what I term, his “hard positivist” case for privacy, relying on roughly one dozen cases that lend support to the existence of a right of privacy distinct from rights of contract, property trust, or confidence.⁶⁷ In this section he addresses the elephant in his room—New York’s *Roberson* decision—rejecting the persuasive precedent established by its holding, and siding with dissenting Judge John Clinton Gray, whose opinion he quotes virtually in full.⁶⁸ Against the Parker majority in *Roberson*, with its deference to the power of legislative innovation, Judge Cobb warned of the dangers of excessive interpretative “conservatism.”⁶⁹

In a fifth section, Cobb explains the nature of the injury that privacy invasions constitute and why constitutional concerns about free speech and press do not apply to an unauthorized publication of a photo.⁷⁰ He emphasizes that the Georgia Constitution protects speech and publications of a person’s sentiments, not others’ images.⁷¹ In this section, he makes the notable analogy between privacy invasion and slavery.⁷² The opinion finishes off with a workmanlike analysis of Pavesich’s compelling libel charge.⁷³

III. THE NATURAL LAW ARGUMENT FOR THE RIGHT TO PRIVACY

The right to privacy is derived from natural law, since the desire for privacy is “recognized intuitively” as demanded by human instinct.⁷⁴ According to Judge Cobb:

Any person whose intellect is in a normal condition recognizes at once that . . . there are matters private, and there are matters public so far as the individual is concerned. Each individual . . . instinctively resents any encroachment by the public upon his rights which are of a private nature

66. *Pavesich*, 50 S.E. at 73 (“The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press.”).

67. *Id.* at 74–76.

68. *Id.* at 78–79 (extensively quoting Judge Gray).

69. *Id.* at 78 (“With all due respect to Chief Judge Parker and his associates who concurred with him, we think the conclusion reached by them was the result of an unconscious yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel. The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer, whether at the bar or upon the bench, can not be overestimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right.”).

70. *Id.* at 80–81.

71. *Id.* at 80.

72. *Id.*

73. *Id.* at 81.

74. *Id.* at 69.

.... A right of privacy in matters purely private is therefore derived from natural law.⁷⁵

Cobb went on to argue that the rights derived from natural law are “immutable,” “absolute,” and belong to every man, whether in the state of nature or in society.⁷⁶ Introducing the language of social contract theory, Cobb depicts the right to privacy as a right that a just civil society would be expected by its members to protect.

It was not extraordinary in Judge Cobb’s era to presume rights not embraced or incorporated. In the decades before *Pavesich* and for a time thereafter, Georgia judges commonly referenced “natural law” to support their conclusions of law. They referred to the “natural instincts” of men and animals.⁷⁷ They referred in passing to natural laws, such as the physical law that water flows and fruit decays.⁷⁸ But of greater relevance here, they sometimes referred to “natural law” as meaning the fixed norms governing human conduct and relationships, such as the “natural law” that the marital promise is binding and the “natural law” that property is alienable.⁷⁹ *Pavesich* was not the first and only case in which Judge Cobb himself referenced natural law. He invoked the concept of natural law in other,

75. *Id.* at 69–70.

76. *Id.* at 70.

77. *See, e.g.,* *Rollestone v. T. Cassirer & Co.*, 59 S.E. 442, 446 (Ga. App. 1907) (holding that a dog’s natural instinct attracted him to a trap baited with “stinking meat”); *see also* *Lowe v. Brooks*, 23 Ga. 325 (1857) (stating that it was the natural instinct of a man that his wife and children should enjoy the property—in this instance “two negroes”—he leaves behind).

78. *See, e.g.,* *Forrester v. Ga. R.R. & Banking Co.*, 19 S.E. 811, 813 (Ga. 1893) (noting the natural law of fruit decay); *Haywood v. Mayor of Savannah*, 12 Ga. 404, 411 (1853) (stating it is the “natural law[] that water runs and *will run*”); *see also* *Patton v. State*, 43 S.E. 533, 534 (Ga. 1903) (“But while it cannot consider the credibility of a witness, it must consider the nature and character of his testimony—whether it is in accord with natural laws, or is improbable, incredible, or seeks to establish facts which are impossible, or which, if not impossible, must, in their very nature, be uncertain, vague, indefinite, and insufficient to remove reasonable doubts.”); *S. Ry. Co. v. Covenia*, 29 S.E. 219, 219 (Ga. 1896) (“The question is, therefore, squarely made whether the court, on demurrer, can take judicial cognizance of the fact that a child of this tender age is incapable of rendering such service as would authorize the parent to recover, or whether, in such a case, the court is bound to submit the matter to the jury.”); *Rome Ry. & Light Co. v. Keel*, 60 S.E. 468, 470 (Ga. Ct. App. 1908) (“[F]or gravity, though a well-known law, produces a uniform acceleration. Under these laws of nature of which the court must take judicial notice, a sudden jump or jerk of the car cannot be produced by merely throwing off the brakes. Something else must concur to produce these effects.”); *Wright v. Floyd Cnty.*, 58 S.E. 72, 74 (Ga. Ct. App. 1907) (“[T]he use and easement would, by operation of universally known natural laws, inevitably and constantly tend to injure and destroy the bridge and to impair its usefulness for public travel, and thereby to create a public nuisance.”).

79. *Askew v. Dupree*, 30 Ga. 173, 176 (1860) (marriage is a contract of natural law with civil consequences); *Gresham v. Webb*, 29 Ga. 320, 324 (1859) (“By natural law the alienability of property is without restriction; alienability makes a part, and a great part, of the value of property. On those, then, who assert a restriction on the alienability of property, is the burden of showing, clearly, that there is some municipal laws which makes the restriction.”); *cf. Gillis v. Gillis*, 23 S.E. 107 (Ga. 1895) (natural law of mental competence).

uncelebrated cases.⁸⁰ In at least one case before him, Judge Cobb found a natural law invocation unimpressive.⁸¹

As to the natural right of privacy, however, Cobb was impressed by how well it applied to Pavesich's case. He was certain that future generations would "marvel" that the existence of the right by common law courts could ever have been doubted.⁸² Cobb straightforwardly linked the right to privacy to liberty and personal security:

The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law.⁸³

In the United States, we understand the constitutional right to privacy first recognized in *Griswold* as boiling down to the *liberty* to choose and decide a range of intimate matters relating to marriage, child-rearing, reproduction, health, intellect, and affiliation. In its earliest beginnings with the *Pavesich* case, the common law right to privacy, too, was understood and portrayed as a matter of *liberty*: "liberty of choice as to his manner of life."⁸⁴ Cobb elaborated:

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; still another may wish to live a life of privacy as to certain matters, and of publicity as to others. One may wish to live a life of toil, where his work is of a nature that keeps him constantly before the public gaze, while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. 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.⁸⁵

Following this line of reasoning, if Paolo Pavesich chose to live in seclusion and others forced him into "the public gaze" by causing his photograph to

80. See, e.g., *Bd. of Educ. v. Purse*, 28 S.E. 896, 898 (Ga. 1897) (holding that a school may suspend a child whose mother has disrupted a classroom); *id.* ("This parental duty [to educate children] is strongly and persuasively inculcated by the writers on natural law." (internal quotation marks omitted)).

81. Cobb was not always impressed by claims of natural law. See *Prey v. Oemler*, 47 S.E. 546 (Ga. 1904). Here, Cobb upheld an order denying a new trial where plaintiffs had complained that a statute was "too vague and indefinite to be enforced, and also is contrary to natural law, and violative of natural rights to fish in the sea, and arms thereof." *Id.* at 546. Cobb sardonically adjudged that "[t]his assignment of error is too vague and indefinite to raise any question for decision." *Id.*

82. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 81 (Ga. 1905) ("[W]e venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . .").

83. *Id.* at 71.

84. *Id.* at 70.

85. *Id.*

be published in a mass circulated newspaper in a libelous advertisement—to use Cobb’s original phrase—his “liberty of privacy” has been impaired.⁸⁶

Today, we lawyers would classify Pavesich’s case as an example of the invasion of the right to publicity, or as an appropriation of likeness or identity and a false light publication.⁸⁷ We would not call it an intrusion upon seclusion, because there was no physical violation, and we would not say it was a publication of private fact because of the libel. Such mid-century classifications are standard today, and yet our reliance upon them cloaks Cobb’s early twentieth century insight. An unauthorized publication of a photograph may hurt, whatever wrongs the lawyers’ and philosophers’ taxonomies name it, because it rips us from our own lives.⁸⁸ It is an act of subjugation. Normatively speaking, individuals possess a “liberty of privacy” simply by virtue of being human, a liberty that unwanted intrusions, publications, and identity appropriations can offend.

Cobb’s opinion recognizing a legal interest in “the name and non libelous misrepresentation” was apparently received in elite legal circles as innovative, but not wild. For example, it was noted with approval in the *Harvard Law Review* in 1907 as “an important advance.”⁸⁹ Cobb’s holding was promptly put to use to support all manner of claims by litigants and commentators, including a law review commentator suggesting that *Pavesich* might apply in a case where a photographer took more photographs than authorized of the plaintiff’s conjoined twins and even copyrighted some.⁹⁰ Several states, including Rhode Island, declined immediately to embrace the natural law argument for privacy rights and chose to wait for a more developed jurisprudence or statute.⁹¹ Within a

86. *Id.* at 72.

87. RESTATEMENT (SECOND) OF TORTS § 652A (1977). Section 652A states:

(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

(2) The right of privacy is invaded by

(a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or

(b) appropriation of the other’s name or likeness, as stated in § 652C; or

(c) unreasonable publicity given to the other’s private life, as stated in § 652D; or

(d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

88. Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1715 (2010) (arguing that plaintiffs’ experiences of the invasion and the lawyers’ taxonomies are dissonant); *id.* (“[T]he frequent practice of characterizing a single privacy invasion as an instance of multiple privacy torts calls into question the integrity of Prosser’s framework of formal categories.”).

89. *Right of Privacy—Infringement—Unauthorized Use of Name and Picture for Purposes of Trade*, 21 HARV. L. REV. 63, 63 (1907).

90. *Right of Privacy—Nature and Extent of Right*, 26 HARV. L. REV. 275, 275–276 (1913) (citing *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912)).

91. See *Henry v. Cherry & Webb*, 73 A. 97, 104–09 (R.I. 1909) (“It is evident, therefore, that the court considered the right of privacy as a natural right, and that natural rights are something reserved from all governments when society was formed; in other words, that there are rights reserved to the people, other and above those guaranteed by the Constitutions

decade, courts were more open to the right.⁹² By 1960 there would be, according to William Prosser's count, some 300 state law cases recognizing a right to privacy protecting interests in seclusion, good reputation, and freedom from unwanted publicity and commercial appropriation.⁹³

IV. THE POSITIVE LAW ARGUMENT FOR THE RIGHT TO PRIVACY

Judge Cobb defended a natural law foundation for the right to privacy, while also utilizing Roman law, state case law precedent, and constitutional law—multiple sources of positive law offering protection for liberty and due process. Thus, although the right to privacy is “derived from natural law,” it is, Cobb argued, recognized by the principles of municipal law and the constitutions of the United States and of the state of Georgia in provisions declaring that no person shall be deprived of liberty except by due process of law.⁹⁴ Cobb's opinion took on the task of laying out the positive law case to support his positive law claim.

Cobb also appealed to case law precedent. He displayed a capacity for reading authoritative precedent broadly in his treatment of *Wallace v. Railway Co.*⁹⁵:

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, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, are each guarantied [sic]. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law. In *Wallace v. Railway Co.*, it was said: “Liberty of speech and of writing is secured by

of the United States and states, and that these rights are enforceable in a court of justice. It is also obvious that, the right being reserved from all government when society was formed, its binding force on the Legislature, a branch of the government, is as transcendent as it is on the judiciary, a branch of the same government. . . . The foregoing consideration, together with an examination of the authorities, lead us to the same conclusion as that reached by a majority of the court in *Roberson v. Rochester Folding Box Co.*, ‘that the so-called right of privacy has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.’” (internal quotation marks and citation omitted)).

92. In 1911, an editor of the *Harvard Law Review* concluded that the “weight of authority in the United States now recognizes the right to privacy without the aid of statute.” See *Right of Privacy—Nature and Extent of Right*, 24 HARV. L. REV. 680, 681 (1911). Note the trend toward embracing Cobb's natural law based right in *Barber v. Time, Inc.*, 159 S.W.2d 291, 294 (Mo. 1942) (stating that a right to privacy exists based on natural law and was guaranteed by the U.S. Constitution where the plaintiff alleged that the defendant magazine violated her privacy by publishing her picture with an article about a physical ailment for which she was being treated).

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

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

95. 22 S.E. 579 (Ga. 1894). Although *Pavesich* refers to this case as *Wallace v. Railway Co.*, the South Eastern Reporter identifies it as *Wallace v. Georgia, C. & N. Ry. Co.*

the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred.”⁹⁶

Cobb’s effort to support the right to privacy with positive precedent read generously owes a debt to Samuel Warren and Louis Brandeis. Warren and Brandeis in their landmark *Harvard Law Review* article urged the creation of an invasion of privacy tort to protect “inviolate personality.”⁹⁷ At the same time, they urged that such a right could be easily extrapolated from existing common law. In *The Right to Privacy*, Warren and Brandeis explored a handful of English and American cases which they felt could be better rationalized on principles of privacy than other available legal principles.⁹⁸ They cited the New York case of Marion Manola—Judge Cobb cited the case, too—in which a court expressly applied privacy concepts on behalf of a theatrical performer whose photograph had been taken and would have been published without her consent but for a timely injunction.⁹⁹ Quoting Judge Gray, Cobb cited the idea of a “right of the individual to be let alone” popularized by Warren and Brandeis,¹⁰⁰ whose article Cobb admired,¹⁰¹ but gave a much more diverse set of examples of how the right could be impaired—stalking women and children, creating a nuisance, trespassing, gossiping, eavesdropping, and arbitrarily searching and seizing houses and papers.¹⁰² No mere mimic, Cobb linked his examples back to the ideas of choice, freedom, and liberty.

Because he wrote later, Cobb could cite cases that arose after 1890 when Warren and Brandeis seeded the field for judicial recognition of the right to privacy. One such significant case is *Schuyler v. Curtis*.¹⁰³ There, a family complained about the anticipated public display at a fair of a bust honoring a deceased female family member, citing the deceased’s right to privacy. The lower court in *Schuyler* extolled the importance of the privacy of someone who had lived in decorous seclusion, observing that “[s]he was undoubtedly a woman of rare gifts and of a broad and philanthropic nature;

96. *Pavesich*, 50 S.E. at 70 (citation omitted).

97. Warren & Brandeis, *supra* note 35.

98. See generally *id.*

99. *Id.* at 195–96 & 195 n.7; see also *Pavesich*, 50 S.E. at 74; *Manola Gets an Injunction*, N.Y. TIMES, June 18, 1890, at 3; *Miss Manola Seeks an Injunction*, N.Y. TIMES, June 21, 1890, at 2; *Photographed in Tights: Marion Manola Caught on Stage by a Camera*, N.Y. TIMES, June 15, 1890, at 2.

100. *Pavesich*, 50 S.E. at 78.

101. Jonathan Kahn, *Controlling Identity: Plessy, Privacy, and Racial Defamation*, 54 DEPAUL L. REV. 755, 756–57 (2005) (“Soon after the decision was announced, Cobb wrote a flattering letter to Justice Brandeis, calling his attention to this, the first opinion to recognize the right to privacy, and expressing Cobb’s confidence that it would, before long, become the norm.”).

102. See, e.g., *Pavesich*, 50 S.E. at 71 (“An outrage was committed not only by striking with the fists or with the club or lash, but also by shouting until a crowd gathered around one, and it was an outrage or legal wrong to merely follow an honest woman or young boy or girl; and it was declared in unequivocal terms that these illustrations were not exhaustive.”).

103. *Schuyler v. Curtis*, 15 N.Y.S. 787 (Sup. Ct. 1891), *aff’d*, 19 N.Y.S. 264 (Gen. Term 1892), *rev’d*, 42 N.E. 22 (N.Y. 1895).

but these she exercised as a private citizen, in an unobtrusive way.”¹⁰⁴ Without questioning the legitimacy of privacy rights asserted by an individual during the individual’s own lifetime, a later state court on appeal denied that families can assert privacy on behalf of deceased relatives who may or may not have wished others to honor them with a public statute after their deaths.¹⁰⁵

Cobb addressed the positive law elephant in the Georgia supreme courtroom—*Roberson*, the decision of a majority of the New York high court rejecting the right to privacy as lacking sufficient basis in existing law.¹⁰⁶ Cobb and his brethren rejected the *Roberson* majority. Cobb wrote an opinion embracing the logic of the lengthy dissenting opinion of Judge Gray, whose opinion he quoted in full.¹⁰⁷ Against the majority in *Roberson*, he observed the dangers of excessive interpretative “conservatism.”¹⁰⁸ Cobb explained the nature of the injury that privacy invasions constitute and why constitutional concerns about free speech and press do not apply to an unauthorized publication of a photo.¹⁰⁹ He emphasized that the Georgia Constitution protects speech and publications of a person’s sentiments, not others’ images.¹¹⁰

Cobb wrote of “a liberty of privacy”—the phrase is awkward to our ears—emphasizing that it belongs to free peoples and can be freely chosen or waived by them: “The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition.”¹¹¹ To be denied privacy is to be denied a critical component of liberty. We are talking about a tort, and invasions of privacy give rise to a private cause of action for tort damages suitable for wounded feelings.¹¹² Judge Cobb considered at length the constitutional objections to the right of privacy in general and as applied to the instant case. He concluded, however, that the Georgia Constitution grants one the right to publish one’s “sentiments” and denied that a

104. *Id.* at 788.

105. *See Schuyler v. Curtis*, 42 N.E. 22, 26 (N.Y. 1895) (“The fact that Mrs. Schuyler is dead alters the case, and the plaintiff and other relatives must show some right of their own violated, and that proof is not made by evidence that the proposed action of the defendants would have caused Mrs. Schuyler pain if she were living. A shy, sensitive, retiring woman might naturally be extremely reluctant to have her praises sounded, or even appropriate honors accorded her while living; and the same woman might, upon good grounds, believe, with entire complacency and satisfaction, that after her death a proposition would be made and carried out by her admirers to do honor to her memory by the erection of a statue or some other memorial.”).

106. *See generally* *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

107. *See Pavesich* 50 S.E. at 72, 78–79.

108. *Id.* at 78.

109. *See id.* at 80.

110. *See id.*

111. *Id.* at 72.

112. *Id.* at 73 (“It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover. In an action for an invasion of such right the damages to be recovered are those for which the law authorizes a recovery in torts of that character, and, if the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right.” (citation omitted)).

photograph accompanied by libelous text qualifies as publishers' or advertisers' "sentiments."¹¹³ There is a positive right to privacy, and it can be violated by unauthorized libelous publication. And when this sort of thing happens, the perpetrator has assumed the role of master over a slave.

V. "IN REALITY A SLAVE"—INVASIONS OF PRIVACY AS ENSLAVEMENT

After making his natural law and positivistic case for the right to privacy, Judge Cobb elaborated on the sort of injury that an invasion of the liberty of privacy amounts to. It amounts to the coercive institution recently abolished in his homeland, slavery:

The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot 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 . . .¹¹⁴

The equation of privacy invasion to slavery is more than casual rhetoric here. Moreover, it is anything but predictable. In the notorious *State v. Mann*,¹¹⁵ the concept of privacy was used, not on behalf of the slave, but on behalf of the master. The ideal of privacy was employed to help rationalize the court's unwillingness to punish a white man for whipping and shooting a slave: "The power of the master must be absolute, to render the submission of the slave perfect."¹¹⁶ Bloody vengeance is heaped upon defiant slaves "with impunity, by reason of its privacy."¹¹⁷ Cobb's slavery analogy could be understood as hyperbole and literary flourish. But consider the author and his context. This is Georgia, less than a generation after the end of lawful enslavement of African Americans, and Judge Cobb is from a prominent slave-holding Confederate family. Cobb's unique slavery analogy impels consideration of the context of law and society in which Cobb designed and executed the *Pavesich* opinion.

Andrew Jackson Cobb was a long-time Associate Justice on the Georgia Supreme Court when he issued the opinion on behalf of a unanimous court recognizing a right of privacy grounded in the natural instincts of man. Judge Cobb's seeming boldness in pushing the boundaries of the law did not come from being the oldest judge on the panel or its chief—he was neither of these. But he was the closest thing to a scholar on the court, which otherwise consisted of white male Democrats who had learned the

113. *Id.* at 80.

114. *Id.*

115. 13 N.C. 263 (1829).

116. *Mann*, 13 N.C. at 266. I am indebted to David Fryer for pointing this out to me.

117. *Id.* at 267.

law at the feet of practicing attorneys rather than in law school.¹¹⁸ Like his famous father Howell Cobb¹¹⁹ and his even more famous uncle Thomas Reade Rootes (R.R.) Cobb,¹²⁰ Judge Cobb displayed an intellectual interest in the law and its moral and political limits.

Born in Athens, Georgia, in 1857, Judge Cobb descended from one of the most prominent, politically engaged families of the antebellum and Civil War era South.¹²¹ His paternal ancestry may have been Welsh.¹²² Judge Cobb's grandfather, John A. Cobb, had been a successful slave-owning planter, an émigré from North Carolina to Georgia. Two of John A. Cobb's three sons, Howell Cobb and Thomas R.R. Cobb, would become heroes of the Confederacy.

Howell Cobb,¹²³ Judge Cobb's father, was a lawyer who served as a member of Congress, Governor of Georgia, and Treasury Secretary under President James Buchanan.¹²⁴ Howell Cobb acted as President of the Provisional Confederate Congress and administered the oath of office to Jefferson Davis as the first Confederate President.¹²⁵ During the Civil War, Howell Cobb served as a major general in the army.¹²⁶ He survived the war, but died of a heart attack in 1868, when Andrew was still a boy.¹²⁷ Judge Cobb's uncle, Thomas R.R. Cobb, also began as a lawyer.¹²⁸ Thomas was principal author of the Constitution of the Confederacy and a confederate general who died on the battlefield.¹²⁹

Both Thomas and Howell Cobb were passionate, if initially reluctant, defenders of Georgia succession. They were not, however, reluctant or

118. Davis, *supra* note 41, at 106 (describing the court as a collection of white male Democrats without law degrees, most considerably younger than their chief justice, who was in his sixties).

119. See *Howell Cobb (1815–1868)*, NEW GA. ENCYCLOPEDIA, <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-615&hl=y> (last visited Nov. 16, 2012).

120. See *Thomas R. R. Cobb (1823–1862)*, NEW GA. ENCYCLOPEDIA, <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-2487&hl=y> (last visited Nov. 16, 2012).

121. See *American Bar Association Politician Members in Georgia*, POLITICALGRAVEYARD.COM, <http://politicalgraveyard.com/geo/GA/aba.html> (last visited Nov. 16, 2012) (“Andrew Jackson Cobb (b. 1857)—also known as Andrew J. Cobb—of Athens, Clarke County, Ga. Born in Athens, Clarke County, Ga., April 12, 1857. Son of Howell Cobb and Mary Ann (Lamar) Cobb. Democrat. Lawyer; law professor; justice of Georgia state supreme court, 1897–1907; Presidential Elector for Georgia, 1912. Baptist. Member, American Bar Association; Phi Beta Kappa; Kappa Alpha Order. Burial location unknown. . . . Married, March 3, 1880, to Starkie Campbell (died 1901).”).

122. A MEMORIAL VOLUME OF THE HON. HOWELL COBB OF GEORGIA 14 (Samuel Boykin ed., 1870).

123. See *Howell Cobb*, *supra* note 119.

124. Jean H. Baker, *Learning from Buchanan*, N.Y. TIMES: OPINIONATOR (Feb. 26, 2011, 6:30 PM), <http://opinionator.blogs.nytimes.com/2011/02/26/learning-from-buchanan/>.

125. Cobb served as president of the Provisional Confederate Congress. See *Howell Cobb*, *supra* note 119. Cobb administered the oath of office to Davis. See *American President: A Reference Resource*, MILLER CTR., <http://millercenter.org/president/buchanan/essays/cabinet/279> (last visited Nov. 16, 2012).

126. See *Howell Cobb*, *supra* note 119.

127. See *id.*

128. See *Thomas R. R. Cobb*, *supra* note 120.

129. See *id.*

ambivalent defenders of slavery. To the contrary, they were thought-leaders in the defense of slavery, extolling the institution as both legal and moral. Thomas R.R. Cobb, who “bought, sold, and hired out slaves to suit his needs,”¹³⁰ authored the influential treatise, *An Inquiry into the Law of Negro Slavery in the United States of America*.¹³¹ Howell Cobb, who owned as many as a thousand slaves, authored a pro-slavery essay, *A Scriptural Examination of the Institution of Slavery*.¹³² Judge Andrew Cobb was doubtless cared for by slaves as a child. He was early exposed to his family’s beliefs (set out in his father Howell Cobb’s essay) that slavery was a just legal institution and that African blacks were an inferior, sinful race God placed under the protection of Christian white men for their care and betterment.

Judge Cobb was his father’s and uncle’s intellectual equal. He was arguably their moral superior, in so far as he came to turn his back on many forms of legal injustice to ethno-racial minority groups. A law school-educated lawyer, Cobb was a moderate social conservative, a Jacksonian Democrat (like his father), and a Baptist, who actively supported an initiative to ban the sale of alcohol in his native Athens.¹³³ He was regarded as a gifted practicing attorney and was a part-time law professor.¹³⁴ Cobb was no mere intellectual or academic. Cobb took an active interest in the nitty-gritty of judicial administration and procedure. He was instrumental in supporting a 1906 amendment to the Georgia Constitution creating a three judge court of appeals, to relieve the work load of the state supreme court.¹³⁵ It was noted in the *Georgia Law Review* that, as a jurist, Cobb was the most cited judge in the state and that he had written more opinions than any other judge systematizing and clarifying matters of pleading and practice.¹³⁶

130. WILLIAM B. MCCASH, THOMAS R.R. COBB (1823–1862): THE MAKING OF A SOUTHERN NATIONALIST 94 (2004).

131. THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (1858).

132. HOWELL COBB, A SCRIPTURAL EXAMINATION OF THE INSTITUTION OF SLAVERY: WITH ITS OBJECTS AND PURPOSES 3 (1856) (“African slavery is a punishment, inflicted upon the enslaved, for their wickedness. . . . Slavery, as it exists in the United States, is the Providentially-arranged means whereby Africa is to be lifted from her deep degradation, to a state of civil and religious liberty.” (emphasis omitted)).

133. See E. Merton Coulter, *The Athens Dispensary*, 50 GA. HIST. Q. 1, 14–36 (1966).

134. POLITICALGRAVEYARD.COM, *supra* note 121.

135. *History of the Court of Appeals*, CT. APPEALS GA., www.gaappeals.us/history/index.php (last visited Nov. 16, 2012) (citing a discussion at the 1902 Warm Springs meeting of the state Bar Association and stating that “[t]he discussion was based on a paper delivered by Justice Andrew J. Cobb captioned: ‘The Judicial System of Georgia: Its Defects; What Changes Are Necessary to Bring About a More Harmonious and Orderly System and to Relieve the Supreme Court?’ This paper recites statistics demonstrating that it was not humanly possible for the Supreme Court Justices to manage the workload. Justice Cobb noted, ‘The working hours of the Court for hearing argument and consultation have been, since October 1897, from 9 a.m. to 1 p.m. and from 3 p.m. to 5 p.m. in the Fall and Winter and 6 p.m. in the Spring and Summer. These hours, however, do not represent all of the working hours of the justices.’” (citations omitted)).

136. A.W. Cozart, *Andrew J. Cobb, The Supreme Court Judge*, 1 GA. L. REV. 38 (1927).

After Cobb left the bench he returned to law practice, carrying with him a keen interest in matters of legal justice. He joined the many secular and clerical individuals who supported clemency for Leo Frank. Frank was the tragic Jewish factory manager convicted on slim evidence of murdering a teenage factory worker, Mary Phagan.¹³⁷ On May, 20, 1915, while practicing law in Athens as partner in the four-lawyer firm of Cobb, Erwin & Rucker, Judge Cobb forwarded a letter addressed to the Chairman of the Prison Commission in reference to the Leo Frank case.¹³⁸ Judge Cobb knew the man who represented Leo Frank before the Commission,¹³⁹ former Georgia congressman William Marcellus (W.M.) Howard. Thanks to the efforts of Judge Cobb and thousands of others like him in and outside of Georgia, Frank's sentence was commuted to life in prison.¹⁴⁰ Sadly, a mob enraged by the commutation kidnapped Frank from jail and lynched him in the Georgia county bearing the name of Judge Cobb's confederate ancestors, Cobb County.¹⁴¹

Judge Cobb must have been greatly affected by the Frank lynching. For many years Cobb would serve as President of the Georgia Historical Society, to which he delivered a memorable lecture praising the procedural and structural innovations of the constitution of the Confederacy.¹⁴² In 1927, Cobb presented a surprising lecture to the Society, lambasting Georgia for turning a blind eye to lynching.¹⁴³ By failing to hold anyone accountable by prosecuting lawless murderers, the state thereby failed to recognize a "right to live" on the part of victims.¹⁴⁴ (Although the Georgia State Board of Pardons and Paroles pardoned Leo Frank on May 11, 1986,

137. See generally STEVE ONEY, AND THE DEAD SHALL RISE: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK (2003).

138. Letter from Andrew J. Cobb, Partner, Cobb, Erwin & Rucker, to G. H. Yancey, Ga. Prison Comm'n Sec'y (May 20, 1915), available at <http://cdm.sos.state.ga.us:2011/cdm/singleitem/collection/frankclem/id/73>. It is likely that such a letter would have enclosed support for Frank's clemency petition, as a large number of prominent Georgians weighed in support of commutation to life of Frank's death sentence.

139. See *Leo Frank Clemency File*, GA. SECRETARY ST., http://sos.georgia.gov/archives/what_do_we_have/online_records/leo_frank/default.htm (last visited Nov. 16, 2012); see also *Emory University Leo Frank Collection*, EMORY LIB., <http://findingaids.library.emory.edu/documents/frank674/> (last visited Nov. 16, 2012) ("Representing Leo Frank were William M. Howard of Augusta, [and others].").

140. See *Hope for Frank in Final Fight*, N.Y. TIMES, May 30, 1915, at 14.

141. See ONEY, *supra* note 137, at 561–65.

142. See generally Andrew J. Cobb, *The Constitution of the Confederate States: Its Influence on the Union It Sought To Dissolve*, 5 GA. HIST. Q. 7 (1921).

143. Andrew J. Cobb, *The Right To Live: Will the State Protect It or Must We Rely Upon Federal Authority?*, 6 GA. HIST. Q. 189, 192–93 (1922).

144. *Id.* at 194–95. This article does not provide evidence, though, that Cobb opposed race-based segregation. Some southerners of his day believed blacks were decidedly inferior and required the care and protection of whites, noblesse oblige. See John K. Larkins, Jr., *Judge Fite's Contempt: Race and the Rule of Law in Early Twentieth Century Georgia*, 90 GA. HIST. Q. 62, 63 (2006).

his killers—prominent men who acted in broad daylight without disguises—were never prosecuted.)¹⁴⁵

Positivism and realism were coexisting jurisprudential philosophies in Cobb's day, and it was not unusual to presume rights not embraced or incorporated. Cobb clearly believed in higher moral rights transcending law and social practice.¹⁴⁶ He wrote of a "right to live" and a "right to privacy" belonging to all men, whether recognized and respected or not. Indeed, Cobb's defense of Leo Frank was consistent with the view he expressed in *Pavesich* that

[t]he valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer . . . [should] not be overestimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right.¹⁴⁷

Judge Cobb was born before the Civil War and lived through it. As a learned jurist, he was surely aware that natural law arguments might be adduced as readily in a twisted defense of slavery¹⁴⁸ as in a noble defense of a "right to live" and "right to privacy".¹⁴⁹ In 1851, a Georgia court argued in *Neal v. Farmer*,¹⁵⁰ that slavery, though "contrary to the laws of nature," according to which each man owns himself and the fruits of his labor, is not prohibited, but sanctioned by the Law of Nations and ordained by Christianity, which requires that masters treat slaves with kindness, noblesse oblige.¹⁵¹ Cobb's claiming a "right to live" on behalf of Jewish

145. Donald Bertrand, *Group Marks Date Ga. Mob Lynched Jew*, N.Y. DAILY NEWS, Aug. 25, 2002, http://articles.nydailynews.com/2002-08-25/local/18201568_1_semitism-anti-semitism-leo-frank ("In 1986, the Georgia Board of Pardons and Paroles pardoned Frank, but only based on the state's failure to protect him while in custody. It did not officially absolve him of the crime.").

146. See Donald E. Wilkes, Jr., *The Western Judicial Circuit Today and in Bygone Times: A Short History of Local Superior Court Judges—Part Two*, 25 POPULAR MEDIA 6 (2011), available at http://digitalcommons.law.uga.edu/fac_pm/92 ("It has been accurately said that Andrew J. Cobb 'was conservative, but nevertheless he was unwilling to refuse to recognize a right or principle merely because it was novel.' Unsurprisingly, therefore, Cobb was the author of the opinion for the Georgia Supreme Court in the 1905 landmark case of *Pavesich v. New England Life Insurance Co.*, the first American appellate court decision to recognize a constitutional right to privacy. Andrew J. Cobb was also one of the most prominent of the courageous and enlightened Georgians who in the early-20th century publicly condemned lynchings, then the South's scourge.").

147. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 78 (Ga. 1905).

148. Christopher L.M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 301 n.83, 319 (1988).

149. Anita L. Allen & Thaddeus Pope, *Social Contract Theory, Slavery, and the Antebellum Courts*, in A COMPANION TO AFRICAN-AMERICAN PHILOSOPHY 125 (Tommy L. Lott & John P. Pittmann eds., 2002).

150. 9 Ga. 555 (1851).

151. *Id.* at 568 (holding that plaintiff slave owner may recover the value of a slave killed by defendant white man, where no criminal proceeding had been brought or won, since slave killing is not established in Georgia as a crime); see also *id.* at 568–69 ("Whilst it seems to be conceded by Jurists of all civilized countries, that the slave trade is contrary to the laws of

and black victims of lynching appropriated natural law for humane and just purposes.

Cobb's idea that deprivations of privacy are like slavery is at once both offensive and appealing. From one point of view the analogy to slavery is hyperbolic¹⁵² and highly offensive: enslaved Georgia blacks suffered complete bondage and degradation. The white man whose life of comfortable abundance is hampered only by an unauthorized advertisement in a mainstream city newspaper is hardly like the man, woman, or child whose cruel lot is to be property bought and sold, maimed and raped at will under the harsh terms of social and legal inferiority that characterized Georgia's version of chattel slavery.¹⁵³ Moreover, Cobb does not insist that slavery is per se unethical or immoral, merely that invasions of privacy wrongly enslave.

From the opposite point of view, the slavery analogy is appealing: Privacy is such an important thing—a foundational good—that the analogy is appropriately powerful rhetoric. It forces one to sit up and pay attention. Privacy invasions are not petty assaults on inessential aspects of honor or dignity.¹⁵⁴ They are serious, potentially ruinous interferences with the foundational goods that are cornerstones of freedom.

The normative case for the right to privacy is that privacy is something persons want and need, and it is something that a just society would not deny them. One does not have to be a proponent of natural law to embrace

nature, upon the principle, that every man has a natural right to the fruits of his own labor, and therefore, no other person can rightfully deprive him of them, and appropriate them against his will; yet, it is also well settled, that it is not prohibited by the Laws of Nations. This principle of the Law of Nations originated in the rights which war was originally held to confer. One of these rights was, that the victor might enslave the vanquished.”); *id.* at 582 (“The negro and his master are but fulfilling a divine appointment. Christ came not to remove the curse; but recognizing the relation of master and servant, he prescribed the rules which govern, and the obligations which grow out of it, and thus ordained it an *institution of christianity*. . . . The laws of Georgia, at this moment, recognize the negro as a man, whilst they hold him property—whilst they enforce obedience in the slave, they require justice and moderation in the master. . . . [T]he relation of master and slave in Georgia, is an institution subject to the law of kindness to as great an extent as any institution springing out of the relation of employer and employed, any where existing amongst men.”).

152. Cf. Raymond Shih Ray Ku, *Is Nominal Use an Answer to the Free Speech and Right of Publicity Quandary?: Lessons From America's National Pastime*, 11 CHAP. L. REV. 435, 440 (2008) (“Even if one agrees with *Pavesich* that unauthorized uses of one's likeness in advertising is akin to slavery, that does not mean that the use of the players' photographs on baseball cards is the same.” (footnote omitted)).

153. Kahn, *supra* note 101, at 760 (“*Plessy* and *Pavesich*, then, can be viewed as unlikely twins, each dealing with new conceptions of slavery and subordination as the United States entered the modern age. The former denied control over personal identity to blacks, while the latter established it for whites.”).

154. Concerns about honor and dignity are not inherently petty, far from it. Care must be taken not to overemphasize the distinction between liberty-based and dignity-based philosophical rationales for privacy, since dignitarian concerns often undergird deontological arguments for social and political liberty, as they do in Kantian ethical theory. Cf. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (arguing that liberty is a more distinct strand in U.S. than in European privacy law, where concerns about honor and dignity pervade).

the proposition that privacy protection is an imperative, and something that a just society would not neglect. Interferences with privacy, such as putting a man's photo into commercial service, are deprivations of the freedom to enjoy a life of reserve outside the public gaze.¹⁵⁵ One could object to nonconsensual photograph use as a violation of a property interest in controlling assets. But what Judge Cobb sought to push is a quite different idea that use of a man or woman's photo interferes with their freedom to limit the public gaze—a liberty so basic that without it one is, to that extent, a slave.

VI. FOUNDATIONAL GOODS AND THE CASE FOR PRIVACY RIGHTS

Judge Cobb's defense of the right to privacy commences with the social contractarian natural law and ends with an analogy of invasions of privacy to slavery. There is sufficient positive law argument in Cobb's opinion to quiet worries of pure, excessive judicial invention. But why apologize for the natural law argument? Even assuming that the epistemology of natural law, whereby humans have access to binding rules of human conduct, must be set aside, Cobb's characterization of the right to privacy as demanded by natural law meshes well with the extant normative perspectives according to which many forms of informational and physical privacies are, what I call in a recent book, "foundational goods"¹⁵⁶—just demands of government and social order, the world over. We often want and need our privacy; and it is often inhumane and unjust to deny us our "liberty of privacy." Cobb's strong language of natural right and the analogy to slavery mesh well, too, with the role that the right to privacy came to play in post-World War II foundational human rights documents, multinational European charters, and European Union law.¹⁵⁷ Article 12 of the United Nations Universal Declaration on Human Rights, provides that: "No one shall be subjected to arbitrary interference with his privacy"¹⁵⁸ The United Nations has subsequently issued its Guidelines for the Regulation of Computerized Personal Data Files, which reflects high regard for the kinds of privacy at risk in the digital age.¹⁵⁹ Article 17 of the International Covenant on Civil and Political Rights states that: "No one shall be subjected to arbitrary or

155. Cf. JEFFREY ROSEN, *THE UNWANTED GAZE* (2000) (discussing a twenty-first century perspective on an early twentieth century idea).

156. ALLEN, *supra* note 39, at xii, 171.

157. *Privacy and Human Rights: An International Survey of Privacy Laws & Practice*, GLOBAL INTERNET LIBERTY CAMPAIGN, <http://gilc.org/privacy/survey/intro.html> (last visited Nov. 16, 2012) ("Privacy is a fundamental human right recognized in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and in many other international and regional treaties. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age. The publication of this report reflects the growing importance, diversity and complexity of this fundamental right.").

158. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>.

159. Guidelines for the Regulation of Computerized Personal Data Files, G.A. Res. 45/95, U.N. Doc. A/RES/45/95 (Dec. 14, 1990).

unlawful interference with his privacy [and] [e]veryone has the right to the protection of the law against such interference.”¹⁶⁰

Scholars in the English-speaking world first began to analyze privacy as a normative concept in earnest in the 1960s and 1970s.¹⁶¹ Philosophers and other theorists rightly linked the experience of personal privacy with dignity, autonomy, civility, and intimacy; they also linked it to repose, self-expression, creativity, and reflection; they have tied privacy to the preservation of unique preferences and distinct traditions.¹⁶² Major ethical traditions—utilitarian, Kantian, and Aristotelian—provide grounds for taking privacy very seriously. From a utilitarian perspective, privacy has value as a tool for enhancing long-term freedom and opportunity by, for example, giving us information advantages over others. But privacy has dignitarian and aretaic ethical value as well. Respect for privacy, our own and others’, is a requirement of respecting persons as ends in themselves. Reserve and modesty are ethical virtues and positive character traits. Major religious traditions, including Christianity, Islam, and Judaism, argue for certain informational and physical privacies.¹⁶³

I am aligned with moral, legal, and political theorists who have argued that privacy is a right, and with the smaller group of theorists who have made a point of arguing that privacy is often a duty to oneself and to others, as well as a right.¹⁶⁴ Our duty of privacy to ourselves asks that we take into account the way in which our own characters, personalities, and life enterprises could be adversely affected by decisions to flaunt, expose, and share rather than to reserve, conceal, and keep.

I urge that we think of privacy as a “foundational” good like freedom and equality. Indeed, as Judge Cobb argued we require a “liberty of privacy” to have lives of our own, rich with other goods. Many forms of physical and informational privacy are the kinds of goods that are presupposed by a great many other goods. For example, if one wants to enjoy the good referred to as “reputation,” then anonymity, confidentiality, secrecy, and data protection are prerequisites. If one wants to be a scholar or an artist, then opportunities for solitude may be a prerequisite. Seclusion is a prerequisite of forms of intimate relationships (sexual, familial) that thrive on unembarrassed self-revelation and free expression. Characterizing privacy as a foundational good, I further maintain that a just and good society

160. International Covenant on Civil and Political Rights, *adopted and open for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

161. See generally Anita L. Allen, *Privacy*, in THE OXFORD HANDBOOK OF PRACTICAL ETHICS 485–513 (Hugh LaFollette ed., 2003) (summarizing philosophical and jurisprudential scholarship about the meaning and value of privacy since 1960 and providing detailed bibliography).

162. See ALLEN, *supra* note 39, at 171.

163. *Id.* at 13–18, 62–65, 195–97 (noting that privacy can be defended as a good from a number of different secular and religious perspectives).

164. *Id.* at 18–20 (noting that there can be duties as well as rights of privacy); cf. Anita L. Allen, *Is There a Moral Obligation To Protect One’s Own Privacy?* 64 ALA. L. REV. (forthcoming 2013) (addressing philosophical debates over the existence of duties to oneself).

governed by the rule of law would include legal protections for foundational privacies. The positive rights to privacy we enjoy are compelling rights because they link to vitally important ends and means. This perspective is consistent with both the notion that privacy rights are not absolute and commonly must give way to the demands of security, law enforcement, or public health, and with the perspective that individuals often prefer association and disclosure to privacy.

Judge Cobb exalted the right to privacy as a natural right, and influenced others to do it, during his lifetime and beyond it.¹⁶⁵ Again, one does not have to be a proponent of natural law to embrace the proposition that the right to privacy is something persons want and need, and something that a just society would not deny them. Interferences with privacy, such as putting a man's photograph into commercial service, are deprivations both of control over reputation and of the freedom to enjoy a life of reserve outside the public gaze.

A part of the genius of Judge Cobb's opinion is that through the strong language of natural law and slavery, he reiterated the important role implicitly given to privacy and private life conferred by the U.S. Constitution and state constitutions with similar provisions.¹⁶⁶ As I have argued elsewhere, the word privacy does not appear in the U.S. Constitution, of course, but "rich *conceptions* of privacy are implicit in any plausible renderings of the [Bill of Rights]."¹⁶⁷ Protections of religion,

165. See, e.g., *State v. Mosch*, 519 A.2d 937, 942 (N.J. Super. Ct. App. Div. 1986) ("The scales of justice remind us that the public as well as this victim have a right to feel safe when alone in their own homes. Since the incident here occurred, D.D. has been afraid to leave her apartment, afraid to be left alone and, even worse, afraid to walk around her own apartment. Each and every one of us has the fundamental right to be left alone. Our right to privacy is one of the most protected of our natural rights, having its origin in natural law, and protected by both state and federal constitutions." (citing U.S. CONST. pmbl. and N.J. CONST. art. I, ¶ 1 (1947))); cf. *Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042, 1049–50 (Ind. Ct. App. 2004) (acknowledging that privacy is a natural right and a core value animating state constitutional law); *Doe v. Doe*, 314 N.E.2d 128, 137 (Mass. 1974) (Reardon, J., dissenting) ("The 'right of privacy' cases discussed above have as an implicit assumption that as matter of practical universal agreement and natural right there exists a critical interest in individual control of certain aspects of human lives. The explicitly defined prohibition of State interference with these rights evinces an implicit recognition that to some degree these interests are protectible against private persons as well. Thus there is a cognizable private interest in begetting and raising children and, indeed, in the termination of a pregnancy. It is, I submit, equally true that such an interest exists in the father with respect to the completion in birth of an existing pregnancy."); *State v. Howe*, 308 N.W.2d 743, 749 (N.D. 1981) (Pederson, J., specially concurring) ("Free men and women can be injured by unwarranted invasion of privacy—whether we should call it a natural right or constitutional in scope has not been settled in the minds of judicial scholars." (citing *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572 (N.D. 1981))).

166. James Saylor, Note, *Computers As Castles: Preventing the Plain View Doctrine from Becoming a Vehicle for Overbroad Digital Searches*, 79 FORDHAM L. REV. 2809, 2815 (2011) ("The notion of a natural right to privacy and freedom against arbitrary governmental intrusion predated the strong reactions against general warrants and writs of assistance that immediately precipitated the American Revolution.").

167. Anita L. Allen, *First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885, 887 (2012).

thought and intellect, homes, and papers, combined with the reservation of unremunerated rights comprise strong constitutional privacy protections. About ten U.S. states' constitutions today protect privacy explicitly as a consequence of legislative action¹⁶⁸ and several other states' courts have established constitutional privacy.¹⁶⁹ Privacy protection is core to the European Union's constitutional self-understanding as well. Article 7 of the E.U. Charter of Fundamental Rights calls for respect for "private and family life, home and communications," and Article 8 calls for the Protection of Personal Data.¹⁷⁰

About a dozen major U.S. statutes protect government, medical, genetic, educational, financial, telephonic, and children's privacy for a reason.¹⁷¹ We arguably need additional and revised statutory protection in the United States. Indeed, in March 2012, the Federal Trade Commission issued a report calling upon Congress to enact additional "baseline privacy legislation" to protect internet users from unwanted browser tracking and other privacy problems.¹⁷² Recent legislation proposed by members of Congress seeks to address the demands of privacy protection in the world dominated by extensive use of the internet for commerce and communication, cellular telephone communications, and social networking.¹⁷³

168. For a convenient list, see *Privacy Protections in State Constitutions*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/telecom/privacy-protections-in-state-constitutions.aspx> (last visited Nov. 16, 2012).

169. See Jeffrey Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 974 (2006) (describing the mechanism through which states contemplate privacy as a constitutional principle).

170. Charter of Fundamental Rights of the European Union Art. 7, Dec. 7, 2000, 2000 O.J. (C 364) 10.

171. See Privacy Act of 1974, 5 U.S.C. § 552a (2006) (federal record privacy law); Gramm-Leach-Bliley Financial Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (codified in scattered sections of 12 and 15 U.S.C.) (financial privacy law); Fair Credit Reporting Act, 15 U.S.C. § 1681 (2006) (credit and financial information privacy law); Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6501 (children's online privacy law); Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 (2006) (telephone, computer, and other device communication privacy law); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2006) (video rental record privacy law); Family Education and Right to Privacy Act of 1974, 20 U.S.C. § 1232g (2006) (education record privacy law); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 701(1)–(3), 110 Stat. 1936, 1939–40 (codified as amended in scattered sections of 29 and 42 U.S.C.) (health information privacy and data security law); Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified in scattered sections of 29 and 42 U.S.C.) (genetic privacy law).

172. FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

173. See, e.g., Mobile Device Privacy Act, H.R. 6377, 112th Cong. (2012); *Issues & Legislation*, CONGRESSMAN ED MARKIE, <http://markey.house.gov/issues>, (last visited Nov. 16, 2012) ("Rep. Markey is the co-chair of the Congressional Privacy Caucus (CPC), which aims to educate members of Congress and staff on matters of privacy."); see also Editorial, *The End of Privacy?*, N.Y. TIMES, July 15, 2012, at SR10.

Like the United States, the European Union has seen growth and expansion of privacy law in the past few decades and is currently debating directions for appropriate reforms to catch up with new technologies and the cultural changes technologies have effectuated. The European Union's historic privacy directives¹⁷⁴ governing member states' legal requirements are expected to undergo major change to defragment E.U. law and keep apace of changes in technology and social practice.¹⁷⁵ An anticipated new "General Data Protection Regulation" will be directly applicable in all member states of the European Union replacing the individual conforming national data protection laws currently in force in the different member states.¹⁷⁶ It is commonly understood that the current E.U. privacy

174. I am referring principally to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 O.J. (L 201) 37; Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58/EC, 2006 O.J. (L 105) 54; Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 Amending Directive 2002/22/EC, 2009 O.J. (L 337) 11.

175. See *Protection of Personal Data*, EUR. COMMISSION, http://ec.europa.eu/justice/data-protection/index_en.htm (last visited Nov. 16, 2012).

176. One commentator suggested that the revisions to the new law "break[] [the] link with 'privacy' and [h]uman [r]ights." See *EU Data Protection Regulation Breaks Explicit Link with "Privacy" and Human Rights*, AMBERHAWK (Feb. 2, 2012), <http://amberhawk.typepad.com/amberhawk/2012/02/eu-data-protection-regulation-breaks-explicit-link-with-privacy-and-human-rights.html>. But the *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012), tells a different story:

In its Communication on "A comprehensive approach on personal data protection in the European Union", the Commission concluded that the EU needs a more comprehensive and coherent policy on the fundamental right to personal data protection.

The current framework remains sound as far as its objectives and principles are concerned, but it has not prevented fragmentation This is why it is time to build a stronger and more coherent data protection framework in the EU

. . . . The right to protection of personal data is established by Article 8 of the Charter and Article 16 TFEU and in Article 8 of the ECHR. As underlined by the Court of Justice of the EU, the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society. Data protection is closely linked to respect for private and family life protected by Article 7 of the Charter. This is reflected by Article 1(1) of Directive 95/46/EC which provides that Member States shall protect fundamental rights and freedoms of natural persons and in particular their right to privacy with respect of the processing of personal data.

Other potentially affected fundamental rights enshrined in the Charter are the following: freedom of expression (Article 11 of the Charter); freedom to conduct a business (Article 16); the right to property and in particular the protection of intellectual property (Article 17(2)); the prohibition of any discrimination amongst

directives represent an understanding of the requirements of human rights.¹⁷⁷ There have been some rumblings that the proposed new general privacy rules for the European Union abandon the word “privacy” and the deep human rights commitments. It is true that proposed regulations speak of “data protection.”¹⁷⁸ But I see no evidence that the European Union has forgotten that privacy is among the key rationales for data protection: the preface to the proposed rule states plainly that the “objectives and principles” of the current framework remain sound.¹⁷⁹

CONCLUSION

My conclusion is simple. The natural law discourse of *Pavesich* does not render the opinion archaic. Far from it, the spirit of natural law reasoning and a robust regard for liberty promoted by the case resonate even in the technology-saturated age of social networking and revelation.¹⁸⁰ The slavery discourse of *Pavesich* enhances the opinion’s natural law discourse by underscoring the vital, foundational role that privacy protection plays in our lives. It may have taken a son, nephew, and grandson of slaveholders like Judge Cobb to so starkly and persuasively frame the significance of having lives of our own, featuring realms beyond the gaze and control of others.

others on grounds such as race, ethnic origin, genetic features, religion or belief, political opinion or any other opinion, disability or sexual orientation (Article 21); the rights of the child (Article 24); the right to a high level of human health care (Article 35); the right of access to documents (Article 42); the right to an effective remedy and a fair trial (Article 47).

Id. at 2, 6–7.

177. See Directive 95/46/EC, *supra* note 174, ¶ 10.

178. See *Proposal for a Regulation*, *supra* note 176.

179. *Id.* at 18, ¶ 7.

180. Cf. Barbara J. Evans, *Much Ado About Data Ownership*, 25 HARV. J.L. & TECH. 69, 127 (2011) (“Claeys has argued rather persuasively that the old natural rights analysis did a better job of drawing sensible lines than modern utilitarian balancing can do.”).

APPENDIX

THE CONSTITUTION: ATLANTA, GA., SUNDAY, NOVEMBER 15, 1903

**DO IT NOW.
THE MAN WHO DID.**



**DO IT WHILE YOU CAN.
THE MAN WHO DIDN'T.**



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