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Controlling Identity: Plessy, Privacy, and Racial Defamation

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Abstract
This Article explores the origins of privacy law in early twentieth century America in relation to the legal solidification of Jim Crow in the aftermath of Plessy v. Ferguson. It considers some distinctively southern aspects of the origins of the right to privacy and argues that by viewing privacy, racial defamation, and Jim Crow in relation to each other, we can gain new insights into each-coming to understand that Plessy was not just about controlling space, or property, or even equality but also about controlling identity itself, and coming to see that in its origins, the right to privacy had a deeply racial component. Part II of this Article considers how Plessy implicated legal interests in the control over and construction of racial identity. Part III examines how our understanding of Plessy's treatment of identity interests can be deepened and broadened by reading Plessy in relation to Pavesich, the first American case to recognize a free standing legal interest in a right to privacy. Here, I argue that central to both cases were issues relating to an individual's access to legal means to control his identity. Part IV then elaborates on the relationship between Jim Crow laws and privacy by examining a series of racial defamation cases brought during this same period.

Keywords
Race, Privacy, Defamation, Discrimination, Identity, Equal protection, Dignity, Torts, Constitutional law, Critical race theory

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CONTROLLING IDENTITY: *PLESSY*, PRIVACY, AND RACIAL DEFAMATION

*Jonathan Kahn**

INTRODUCTION

In 1905, Paolo Pavesich, an artist living in Georgia, brought an action against the New England Mutual Life Insurance Company (New England Mutual) of Boston, Massachusetts for, among other things, invasion of his right to privacy.[1] New England Mutual published an advertisement in the *Atlanta Constitution* that included a photograph of Pavesich juxtaposed against a photograph of an "ill-dressed and sickly looking person."[2] Pavesich's picture was accompanied by a caption reading, "Do it now. The man who did,"[3] together with an alleged testimonial: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day [sic] my family is protected and I am drawing an annual dividend on my paid-up policies."[4] Under the other person's picture was a caption conveying that the other person had not bought insurance and now realized the error of his ways.[5] "These two pictures," declared the advertisement, "tell their own story."[6]

Paolo Pavesich, however, had never had any contact with New England Mutual, nor did he ever consent to the use of his image for such a purpose.[7] Moreover, he asserted that, as an artist, such a misappropriation of his image was "peculiarly offensive to him."[8] In finding for Pavesich, the Georgia Supreme Court became the first court in the nation to recognize a distinct right to privacy.

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1. Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).
2. *Id.*
3. *Id.*
4. *Id.* at 69.
5. *Id.*
6. *Id.*
7. That his name did not appear in the advertisement was inconsequential to Pavesich because he was plainly identifiable through his picture. *Pavesich*, 50 S.E. at 69.
8. *Id.*

II. THE SOUTHERN ORIGINS OF PRIVACY

In his opinion for the court, presiding Justice Andrew Jackson Cobb commented on the novelty of Pavesich's privacy claim and was careful to distinguish it from any claim grounded in a property right:

> The question therefore to be determined is whether an individual has a right of privacy which he can enforce, and which the courts will protect against invasion. It is to be conceded that prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and that therefore a claim to a right of privacy, independent of a property or contractual right, or some right of a similar nature, had, up to that time, never been recognized in terms in any decision.[9]

The right to privacy, then, was something different from a property right. It inhered in the person and its infringement caused a distinctive type of harm that could not be measured solely in terms of material or pecuniary harm. It was a "dignitary" tort that involved harm to the individual's identity.[10]

Where did the court locate this new right of privacy? Cobb asserted it had "its foundation in the instincts of nature," and further held:

> It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. . . . A right of privacy in matters purely private is therefore derived from natural law.[11]

More immediately, however, Cobb derived his conception of this new right from Samuel Warren and Justice Louis Brandeis, who published their famous article, *The Right to Privacy*, fifteen years earlier in the *Harvard Law Review*.[12] Soon after the decision was announced, Cobb wrote a flattering letter to Justice Brandeis, calling his attention to

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9. *Id.*

10. *See generally, e.g.*, Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213 (1999) [hereinafter Kahn, *Bringing Dignity Back to Light*]; Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371 (2003) [hereinafter Kahn, *Privacy as a Legal Principle*].

11. *Pavesich*, 50 S.E. at 69–70.

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

this, the first opinion to recognize the right to privacy, and expressing Cobb's confidence that it would, before long, become the norm.[13]

In their article, Warren and Justice Brandeis reviewed the diverse strands of legal, political, and social commentary relating to issues of privacy and wove them together into a coherent argument for a legally distinct right to privacy grounded in a concern for "man's spiritual nature."[14] To Warren and Justice Brandeis, privacy did not involve property so much as the "more general right to the immunity of the person,—the right to one's personality."[15] As scholar Robert Post notes, their project, in part, was "to disentangle privacy from property,"[16] and it was in this spirit that Cobb drew from their work in writing his opinion.

Pavesich's case, however, might seem a rather peculiar choice to inaugurate this new right. It did not involve any sort of prying into the private precinct of his home or the publication of intimate facts about his personal life. Rather, Pavesich alleged a harm based on the nonconsensual use of his image in a commercial advertisement. The defendant did not reveal anything about Pavesich that we might today regard as "private information." Rather, the tort involved was what has since come to be known as "appropriation of identity."[17] In elaborating on the nature of the interest and harm at stake, Cobb asserted,

> The form and features of the plaintiff are his own. The defendant insurance company and its agent had no more authority to display them in public for the purpose of advertising the business in which they were engaged than they would have had to compel the plaintiff to place himself upon exhibition for this purpose.[18]

There was a sense here that Pavesich's "spiritual nature" (as Warren and Justice Brandeis would put it) was somehow being degraded through its forced public exhibition and association with a commercial venture. Cobb did not understand Pavesich's image simply as his property—it was more. Pavesich's image was an extension and manifestation of his identity, of his very self. Allowing its public display in a newspaper advertisement could lead to it being used "to ornament

13. Cobb's letter is referred to by Brandeis in two letters. Letter from Louis Brandeis to Andrew Jackson Cobb (Apr. 17, 1905), and Letter from Louis Brandeis to James Bettner Ludlow (Apr. 20, 1905), *in* 1 THE LETTERS OF LOUIS D. BRANDEIS 303, 303–04, 306 (Melvin Urofsky & David Levy eds., 1971).

14. Warren & Brandeis, *supra* note 12, at 193.

15. *Id.* at 207.

16. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 648 (1991).

17. *See* Kahn, *Bringing Dignity Back to Light*, *supra* note 10, at 215–26; William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

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

the bar of a saloon keeper or decorate the walls of a brothel."[19] Thus, Cobb concludes,

> 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; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.[20]

It is with this remarkable reference to slavery that I would like to situate the emergence of the right to privacy in this Georgia court in relation to *Plessy v. Ferguson*,[21] and the more or less contemporaneous emergence of the legalized regime of Jim Crow laws throughout the South.[22]

In 1896, the Supreme Court upheld an 1890 Louisiana statute "providing for separate railway carriages for the white and colored races."[23] The first Justice John Harlan's eloquent dissent asserted that such separation constituted a "badge[ ] of slavery."[24] Justice Henry Brown's opinion for the majority, however, perfunctorily dismissed such concerns, stating,

> That it [the law] does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or, at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services.[25]

For Justice Brown, depriving Plessy of control over his own racial self-definition and subjecting him to forced separation based on that definition did not implicate any significant issues of control over the self. And yet, a mere nine years later, as legalized segregation was solidi-

19. *Id.* at 80.

20. *Id.* (emphasis added).

21. 163 U.S. 537 (1896).

22. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974) (1955).

23. *Plessy*, 163 U.S. at 540.

24. *Id.* at 554, 562 (Harlan, J., dissenting).

25. *Id.* at 542.

fying its hold on the South, Georgia's Justice Cobb forcefully invoked the specter of slavery to protect the image of a white man.[26]

If nothing else, the irony of juxtaposing Cobb's opinion against Justice Brown's blithe dismissal of Justice Harlan's concerns that Louisiana's "separate but equal" railroad accommodations stamped blacks with a "badge of slavery"[27] demands further consideration. I believe, however, that more is at work here than irony. Rather, in this Article I argue that by viewing these two cases and the doctrines they represent in relation to each other, we can gain new insights into both—coming to understand that *Plessy* was not just about controlling space, or property, or even equality, but also about controlling identity itself, and coming to see that in its origins, the right to privacy had a deeply racial component. Part III of this Article explores how *Plessy* implicated legal interests in the control over and construction of racial identity. Part IV then considers how our understanding of *Plessy*'s treatment of identity interests can be deepened and broadened by reading *Plessy* in relation to *Pavesich*, the first American case to recognize a free standing legal interest in a right to privacy. Here, I argue that central to both cases were issues relating to an individual's access to the legal means to control his identity. Part V then elaborates on the relationship between Jim Crow laws and privacy by examining a series of racial defamation cases brought during this same period.

Racial defamation involved the unidirectional grant of rights to white people to contest their characterization as black. Typically, these cases involved a person claiming to be white contesting his characterization as non-white.[28] In the early twentieth century, the majority rule was that erroneously stating that a "white person" was a "negro" was libelous per se.[29] A reciprocal concept of libel for mistaking the racial identity of a non-white person generally did not exist.[30] While dating back to the origins of the Republic,[31] such cases emerged in greater number and with greater urgency in the aftermath

26. There is actually no mention made of Pavesich's race in the opinion. This is an assumption based on a number of factors, including the fact that it would be more common for such courts to mention race only when the plaintiff was not white (white being the unmarked norm) and because given the general racism endemic in the majority white society, it would be unlikely that a corporation would hold out a non-white-looking person as a model customer in an advertisement in a newspaper such as the *Atlanta Constitution*.

27. *Plessy*, 163 U.S. at 542.

28. *See generally* J.H. Crabb, Annotation, *Libel and Slander: Statements Respecting Race, Color, or Nationality as Actionable*, 46 A.L.R.2d 1287 (1956).

29. *Id.* pt. I.

30. *See* BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW AND THE RAILROAD REVOLUTION, 1865–1920, at 367 (2001).

31. *See, e.g.*, Eden v. Legare, 1 S.C.L. (1 Bay) 171 (1791).

of *Plessy*, as an increasing number of states passed Jim Crow laws, which were premised upon some authority making an external determination of a person's racial identity.[32]

In the context of the law of racial defamation, we see more clearly the connection between the legacy of *Plessy* and the emergence of identity-based interests contained in the new right to privacy. *Plessy* was decided in the gap between Warren and Justice Brandeis's article, elaborating upon the identity interests implicated by a free-standing right of privacy, and *Pavesich*, which first wrote these interests into law. *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.

III. *PLESSY*, PROPERTY, AND CONTROL OF IDENTITY

Historian Barbara Welke notes that common carriers in post-bellum America frequently enforced informal regimes of passenger segregation based both on sex and race.[33] Founded in custom and in private regulation, such regimes increasingly came under strain, especially with the rise of a black middle class in the 1880s, whose members demanded reasonable access to such quality accommodations as they could afford.[34] Mandatory Jim Crow laws, requiring railroads (and some other common carriers) to segregate their passengers by race, came in two waves. The first, preceding *Plessy*, began in 1887 in Florida; the second, coming in the decade following *Plessy*, was concentrated around 1900.[35]

Scholar Charles Lofgren argues that "increasing black unwillingness to defer to whites," was the most direct trigger for these waves of Jim Crow legislation.[36] "Negro newspapers," notes Lofgren, "perceived growing black assertiveness in the face of indignities inflicted by whites; and among the white population stories of 'uppity' Negroes increased during the 1880s."[37] The spatial management of public accommodations was meant both literally and figuratively to put blacks back in their "place"—that is, a subordinate position—and to reassert

32. *See* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 22 (1988); J. Allen Douglas, *The "Most Valuable Form of Property": Constructing White Identity in American Law, 1880–1940*, 40 SAN DIEGO L. REV. 881, 892–902 (2003).

33. WELKE, *supra* note 30, at 323–48.

34. *Id.* at 336.

35. LOFGREN, *supra* note 32, at 22.

36. *Id.* at 25.

37. *Id.*

white supremacy. More than mere physical separation and subordination were at issue here (although these, of course, were substantial and significant). As Lofgren emphasizes, the emergence of Jim Crow laws was embedded in struggles over dignity—not in the formal subordination of bodies, as in literal slavery, but in the social and cultural denigration of identity. It was in this context that Louisiana passed the Separate Accommodations Act,[38] No. 111, in 1890, which stated it was

> [a]n act to promote the comfort of passengers on railway trains; requiring all railway companies carrying passengers on their trains, in this state, to provide equal, but separate, accommodations for the white and colored races, . . . directing [the officers of such railways] to assign passengers to the coaches or compartments set aside for the use of the race to which such passenger belong.[39]

Resistance to the Separate Accommodations Act began to form as soon as it was introduced as a bill before the state legislature.[40] One memorial filed by seventeen black members of the American Citizens' Equal Rights Association denounced the bill as violating the basic American ideal "that all men are created equal," and asserted forcefully that "[c]itizenship is national and has no color."[41] Failing to stop the passage of the bill, members of Louisiana's elite Creole community organized the Citizens' Committee to Test the Constitutionality of the Separate Accommodations Act.[42] The Committee hired prominent attorney Albion Tourgee, a leading white publicist for Negro rights, to head the challenge. After trying one inconclusive case, Homer Plessy stepped forward to act as a test case, which Tourgee and the Committee hoped would lead all the way to the U.S. Supreme Court.[43]

Homer Plessy, a resident of New Orleans, was seven-eighths black and one-eighth white—an "octoroon."[44] On June 7, 1892, he bought a first class ticket on the East Louisiana Railway for passage from New Orleans to Covington, Louisiana and took a seat reserved for white passengers.[45] He was arrested for violating the Separate Accommodations Act.[46] As Lofgren notes, the arrest "was surely arranged" be-

38. *See generally id.*

39. *Ex parte* Plessy, 11 So. 948, 948–49 (La. 1892) (citing 1890 La. Acts 111, at 152–54).

40. LOFGREN, *supra* note 32, at 28.

41. *Id.*

42. *Id.* at 28–43.

43. *Id.*

44. *Id.* at 41.

45. *Id.*

46. LOFGREN, *supra* note 32, at 41.

cause as his counsel later asserted "the mixture of colored blood [was] not discernible" in him.[47] Essentially, he "appeared" to be white.

Scholar Cheryl Harris persuasively argues that a central component of *Plessy* involved a dispute over the plaintiff's claim to a property interest in his reputation for being white.[48] Tourgee's brief asserted that "[r]eputation is a species of property and is valuable in proportion as it entails rights and privileges, whether social or political."[49] Indeed, Plessy had been chosen as a plaintiff for this test case quite deliberately because, as Albion Tourgee argued, among other things, the railroad conductor, acting as an agent of the state, had deprived Plessy of his valuable reputation for being white without due process of law.[50]

Justice Brown rejected this argument, largely on procedural grounds, asserting that such a claim could be asserted as a matter of civil tort law, independent of a challenge to the constitutionality of the law. Hence, Plessy's reputational claim was not the concern of the Supreme Court.[51] Specifically, Justice Brown asserted:

> If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called "property." Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.[52]

This rhetorical gesture, argues Harris, implicitly recognized and protected a property value in "whiteness."[53]

Building on Harris's work, scholar J. Allen Douglas notes that "while the courts, following *Plessy* [and its reference to civil remedies for racial misrepresentation], treated whiteness as an object possessed, they determined the meaning of that object through its representation in the community, the very same means by which courts recognized and constructed reputation."[54] The courts' very need to appeal to the representation in the community implied a sort of racial instability and mutability which threatened the social order built on white supremacy. In this context, argues Douglas, *Plessy* and its progeny can be understood as attempts "to locate racial identity in the body in

47. *Id.*

48. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1747 (1993).

49. LOFGREN, *supra* note 32, at 55.

50. Harris, *supra* note 48, at 1746–48; *see also* Douglas, *supra* note 32, at 882–83.

51. *Plessy*, 163 U.S. at 549.

52. *Id.*

53. Harris, *supra* note 48, at 1750.

54. Douglas, *supra* note 32, at 896.

the form of an object or property—an immutable, natural 'thing' possessed—to ensure a means for 'quieting title' in whiteness."[55]

Justice Brown's opinion effectively denied Plessy's claim to property in a reputation for being "white." If Plessy was to be considered "a colored man," he could not claim injury to reputation because such a claim would not accord with the Court's implicit understanding of the "reality" of race as something fixed and determinable. Nonetheless, the same "if-then" structure of Justice Brown's qualification of Plessy's claim also raised the specter of racial indeterminacy—that Plessy's racial identity might not be immediately obvious. Thus, in the very act of trying to "quiet title" to whiteness, the majority opinion in *Plessy* underlined the problematic nature of the state's project of forced racial identification.

Scholar Thomas Davis argues that questions of racial identification lay at the core of *Plessy*.[56] Beyond the more obvious and immediate subordination imposed by segregation lies the deeper and more subtle question of "[w]ho has the authority to decide a person's identity, the person or government?"[57] Davis pursues this issue by exploring the complex and layered understandings of race in Louisiana's Creole community. Plessy himself, and many of his supporters, belonged to New Orleans's elite Creole community. "Creoles of color," notes Davis, "vigorously resisted" collapsing multifarious distinctions of race into unified binaries of black and white.[58] He presents the striking example of post-bellum Creole leader Blanc F. Joubert, who asserted that he was of "both races," and that "I cannot tell you whether I am a white man or a colored man."[59] For those challenging the Separate Accommodations Act, racial identity was anything but "black and white."

The American legal system had a complex and sustained engagement with questions of racial indeterminacy throughout the nineteenth century leading up to *Plessy*. Exploring issues of racial identity formation in the ante-bellum period, scholar Ariela Gross argues that beyond blood, ancestry, or reputation, the actual "'performance' of whiteness" played a central role in the legal determination of what it meant to be white.[60] Looking at a series of cases that turned on ques-

55. *Id.* at 989.

56. *See generally* Thomas J. Davis, *More Than Segregation, Racial Identity: The Neglected Question in* Plessy v. Ferguson, 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 1 (2004).

57. *Id.* at 1.

58. *Id.* at 6.

59. *Id.*

60. *See generally* Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

tions of determining racial identity, Gross identifies five primary ways in which race was talked about in such trials: (1) physical description; (2) documented ancestry; (3) ascriptive identity or reputation, i.e., other people's beliefs about one's identity; (4) performance, i.e., actions that were socially identified with one race or another; and (5) race as a scientific category as interpreted by experts.[61]

Gross's work points to the difficulty of clearly identifying and assigning race in the context of legal proceedings. No single attribute was always definitive. "Blood" may have been understood as the "essence" of white identity, but blood was not visible. Hence, the Court needed to invoke one or more of the five methods elaborated by Gross to try to ascribe racial identity.[62] Gross describes popular stories both of blacks "passing" as whites and of whites being mistakenly taken into slavery as blacks.[63] Such narratives of racial indeterminacy "threatened white men's sense of themselves and their families, lending urgency to the question of racial knowability."[64]

Gross focuses, in particular, on the idea of "performing whiteness" as a critical means through which racial identity became fixed in society and at law.[65] Thus, testimony about how a person acted, socially and civically, became a central means to ascribe racial identity in a legal context. Such performance might include social actions, such as graceful dancing or association with other whites, or it might include civic performances, such as voting or serving on a jury. Outward performances of race were understood to reveal something about the inner racial essence of the person.[66]

In taking a white seat on the East Louisiana Railway, Homer Plessy was "performing whiteness." His ability to "act" white was implicitly central to his claim that he had a reputational interest in his whiteness. In this regard, Plessy was engaged in a process of racial self-identification—asserting, through his actions, his right within certain contextual constraints to construct and present his own racial identity. Thus, a central argument in Tourgee's brief asserted the impropriety of allowing a railroad officer to classify an "octoroon" as black.[67] As Davis put it, "the argument for Plessy was clearly that . . . law must privilege self-identification."[68] This was perhaps the most threatening

61. *Id.* at 133, 147–49.
62. *Id.* at 156.
63. *Id.* at 142–47.
64. *Id.* at 123.
65. *Id.* at 156–58.
66. Gross, *supra* note 60, at 156–57, 162–63.
67. LOFGREN, *supra* note 32, at 54–55; *see also* Davis, *supra* note 56, at 32.
68. Davis, *supra* note 56, at 32.

aspect of Plessy's claim because it both asserted the indeterminacy of race and challenged the authority of the state to supersede a person's control over his or her racial self-definition.

In upholding the Separate Accommodations Act, the Supreme Court not only endorsed the degrading legal principle of "separate but equal," but also implicitly validated the state's power to delegate to railroad officers the authority to make definitive determinations of racial identity. Thus, *Plessy* was not just about segregating people based upon their racial identity, it was also about establishing a legal framework for allocating power to determine racial identity. Justice Harlan, of course, rightly and powerfully identified the stigmatic harm of separation under such circumstances as amounting to a "badge[ ] of slavery."[69] But returning to Justice Brown's majority opinion we can see that he dismissed Justice Harlan's concerns by characterizing slavery in terms of control over one's body:

> That it [the law] does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or, at least the *control* of the labor and services of one man for the benefit of another, and the absence of *a legal right to the disposal of his own person, property and services*.[70]

Mere separation, argued Justice Brown, did not deprive Plessy of such control over his body.[71] Any stigma he might experience, therefore, was not of the state's making, but merely his own perception of events, and hence his own responsibility.[72] Justice Brown's argument, however, loses its force if we focus on Tourgee's concerns about the state's power to determine racial identity. Looking at *Plessy* in relation to the right of privacy, it is possible to discern a new understanding of the nature of Jim Crow's "badge of slavery" as based upon control over one's identity, rather than control over one's body.

IV. READING *PLESSY* THROUGH *PAVESICH*

A. Privacy, Identity, and Anxiety

Let us return, then, to *Pavesich* and its striking notion that appropriating a person's image is tantamount to enslaving their identity.[73] Both *Plessy* and *Pavesich* involved the legal status of a person's right

69. *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting).
70. *Id.* at 542 (emphasis added).
71. *Id.* at 549.
72. *Id.*
73. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 80 (Ga. 1905).

to control the presentation of one's identity in society. Compared with the harsh and increasingly pervasive restrictions of Jim Crow laws, the appropriation of Pavesich's picture to sell insurance may seem relatively trivial and Cobb's reference to slavery mere hyperbole. But in the context of the times, both cases articulated legal protections to address some of the central identity-based anxieties consuming white middle class society as America entered the twentieth century. *Plessy*, of course, addressed anxieties about racial identity and concerns about the "mongrelization" of the white race through interracial mixing.[74] Plessy, himself being of visibly indeterminate race, presented the additional threat of "passing," which, as scholar Elaine Ginsberg notes, "is also about the boundaries established between identity categories and about the individual and cultural anxieties induced by boundary crossing."[75] The informal customary regimes of separating the races were coming under increasing strain, particularly in the face of growing black self-assertiveness. In response, anxious whites turned to state legislatures to invoke legal authority to resolidify boundaries and hierarchy between the races.[76]

The right to privacy, as articulated by Warren and Justice Brandeis and as written into law by Cobb, was grounded in an essentially conservative impulse to preserve a somewhat romantic conception of genteel bourgeois individual identity against what was perceived to be the crasser aspects of modernization.[77] Not least among these aspects was the voracious expansion of the market into a national phenomenon, which threatened to turn everything into a commodity.[78] With their focus on the "spiritual nature of man,"[79] Warren and Justice Brandeis were concerned with distinguishing between the fungible and non-fungible aspects of identity. In the face of the emergence of a modern, urban, industrial market society, they were anxious to protect the intangible cultural values of previously hegemonic white genteel bourgeois society.[80] During the late nineteenth and early twentieth centuries, "identity" itself increasingly became subject to commodification as advertisers developed the use of "brand name" recognition to sell products in a national market where consumers otherwise had

74. *See generally* LOFGREN, *supra* note 32, at 93–115; Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 49 (1996).

75. Elaine K. Ginsberg, *The Politics of Passing*, *in* PASSING AND THE FICTIONS OF IDENTITY 1, 2 (Elaine K. Ginsberg ed., 1996).

76. *See supra* notes 31–36 and accompanying text.

77. Kahn, *Bring Dignity Back to Light*, *supra* note 10, at 218–23.

78. *Id.*

79. Warren & Brandeis, *supra* note 12, at 193.

80. Kahn, *Bringing Dignity Back to Light*, *supra* note 10, at 215–23.

no means of verifying the source or quality of a product.[81] In a world where everything was transformed into a commodity, champions of privacy felt a pressing need to protect the integrity of a person's identity.

It is, perhaps, no coincidence that Pavesich's case involved just such a phenomenon. This Georgia artist had his image appropriated by a Massachusetts corporation to advertise its product throughout the country. When Cobb spoke of enslavement, he understood that a special relationship existed between a person and his image, such that the image contained aspects of his identity. To misuse the image was to inflict harm upon the subject's identity. As Professor Edward Bloustein notes in his analysis of *Pavesich*,

> No man wants to be 'used' by another person against his will, and it is for this reason that commercial use of a personal photograph is obnoxious. Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interests of others. In a community at all sensitive to the commercialization of human values, it is degrading thus to make a man part of commerce against his will.[82]

The defendant, in effect, had coerced Pavesich himself by forcing his identity into service. Moreover, the court identified the commercial context of an advertisement as a distinctive threat to the integrity of his persona.[83] Forcing Pavesich's identity into the market rendered his unique individuality a fungible commodity, which was capable of being bought and sold. In this context, privacy rights have their roots in a regard not simply for dignity in general, but more specifically for dignity as manifest in the integrity of one's individual identity or persona. *Pavesich*, then, involved a dignitary harm—an infringement of a personal interest—not a property right.

B. Disentangling Privacy and Property

By reading Cobb's opinion in *Pavesich* in relation to *Plessy*, we can begin to engage in the enterprise of "disentangling"[84] the privacy from property interests implicit in Plessy's claim. Tourgee, of course, might have been aware of Warren and Justice Brandeis's article on the right to privacy, but Plessy's claim arose before the right had been recognized by any court.[85] Moreover, Warren and Justice Brandeis did not

81. JAMES D. NORRIS, ADVERTISING AND THE TRANSFORMATION OF AMERICAN SOCIETY, 1865–1920, at 97–98 (1990).

82. Bloustein, *supra* note 10, at 988.

83. *Pavesich*, 50 S.E. at 80–81.

84. *See* Post, *supra* note 16, at 648.

85. *See supra* text accompanying notes 1–13.

make the sort of explicit connections between privacy interests and slavery that Cobb would make in 1906.[86] Nonetheless, if, as Davis argues, a central component of Plessy's claim involved the "privilege of self-identification," then Cobb's opinion can be used to shed light on contemporary legal understandings of the nature of this privilege. Further, Cobb's opinion can be used to consider how this privilege implicated not only property interests in reputation, but also less tangible, more subtle, and perhaps deeper privacy interests in maintaining the integrity of the self in the face of racist state power.

Returning to Justice Brown's majority opinion in *Plessy*, we can see that his dismissal of Justice Harlan's Thirteenth Amendment concerns was facilitated by a physical, property-based perception of slavery as involving control over the *body* of a person. Hence, he is not wholly unreasonable in observing that "slavery implies involuntary servitude . . . the ownership of mankind as chattel."[87] Separate but equal accommodations did not place a different physical burden on black bodies than it did on white bodies.[88] Moving on to the question of the stigma resulting from state imposed racial segregation, Justice Brown asserted that "[l]aws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other."[89] Rather, if blacks perceived such separation as stamping them with a "badge of inferiority," it was "solely because the colored race chooses to put that construction upon it."[90] Justice Brown focused here on the legal management of space,[91] which he distinguished from control over meaning or identity. In so doing, he constructed the burdens imposed on each race as equal and relegated concerns over stigma to the private sphere, beyond the control or responsibility of the state. Justice Brown thus marginalized the stigma to the inconsequential status of "mere" social perception without legal import.

To today's reader, Justice Harlan's dissent clearly makes sense and should have carried the day. Our too ready acceptance of the obvious merit of Justice Harlan's dissent, however, may blind us to its limitations and to the possibilities for broadening our understanding about

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86. Brandeis later heartily would approve of Cobb's opinion as a whole, and one can only assume, of his use of the analogy to slavery. *See supra* note 13.

87. *Plessy*, 163 U.S. at 542.

88. *Id.* at 542–43.

89. *Id.* at 544.

90. *Id.* at 551.

91. On law and the racial marking of space generally, see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994). *See generally* DAVID DELANEY, RACE, PLACE, AND THE LAW, 1836–1948 (1998).

the nature of the interests at stake in contests both over Jim Crow laws and privacy. I believe one reason Justice Harlan failed to overcome the logic of Justice Brown's argument was that at the time he, too, focused primarily on control over space and bodies, and overlooked the ramifications of considering how the case implicated the legal status of control over identity—not as a reputational property interest, but as a personal dignitary privacy interest.

Thus, for example, Justice Harlan characterized the Separate Accommodations Act as having "the purpose . . . to exclude colored people from coaches occupied by . . . white persons."[92] Such forced segregation "compel[led] [blacks] to keep to themselves" and encroached on their "personal freedom" by restricting their choice of where to move and sit.[93] Justice Harlan's language of exclusion and locomotion speaks of bodies traveling through space. The infringement on personal liberty comes not literally from putting blacks in chains, but from restricting their choice over where they can go, solely on the basis of their race. Justice Harlan's emphasis on choice and self-control resonates with scholar Lawrence Friedman's characterization of twentieth century America as a "Republic of Choice."[94] Friedman contrasts the self-disciplined individualism of the nineteenth century with the self-expressive individualism of the twentieth century.[95] Standing at the cusp between these two worlds, Justice Harlan's opinion, in some respects, looks backward to the nineteenth century's belief in "massive self control."[96] Freedom and choice were understood to depend on such self-control. In the South, Friedman notes, concern for self-control manifested itself in a sense of "honor," which focused on one's standing in the eyes of others.[97] Justice Harlan, being a border-state southerner, was apparently sensitive to the southern emphasis on honor; it is, perhaps, manifest in his discussions of "pride of race."[98] He was concerned that the Separate Accommodations Act was "enacted for the purpose of humiliating"[99] blacks, and of course that "[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of

92. *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

93. *Id.* (Harlan, J., dissenting).

94. LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE (1990).

95. *Id.* at 35–41.

96. *Id.* at 31.

97. *Id.* at 27–31, 35–41.

98. *Plessy*, 163 U.S. at 554 (Harlan, J., dissenting).

99. *Id.* at 563 (Harlan, J., dissenting).

servitude."[100] Blacks, therefore, were stigmatized through the deprivation of personal control over physical movement through space. This assault on the self-control of the body constituted the core of Justice Harlan's conception of the liberty interest at stake in *Plessy*.

Looking forward into the twentieth century, Friedman notes that the valorization of choice changed from the self-disciplined individualism of the previous century into a more self-expressive individualism in which "the right to 'be oneself,' to *choose* oneself, is placed in a special and privileged position."[101] Friedman characterizes an ideal of individualism that is grounded in the control of one's constitution and presentation of one's identity. It is an ideal that informed Cobb's (another southerner) conception of Pavesich's right not simply to physical "self-control," but also to control over the self—as manifested in an image that became invested with his distinctive identity.

C. *Controlling Identity as a Distinct Dignitary Interest*

As Davis notes, control over identity was also a central but unresolved issue in *Plessy*.[102] For Davis, though, the central injury, as articulated by Tourgee and his supporters, involved allowing railroad officials, as agents of the state, to make definitive assignments of racial identity, which erased both the empirical complexity of racial identity as understood in Louisiana's Creole community and the related ability of its members to assert their membership in "the dominant race" and make claims to the "pecuniary value" associated therewith.[103] While insightfully analyzing the Creole community's own concerns with the reputational value of control over identity, Davis does not fully consider non-property, dignitary legal interests implicit in such claims.

Bringing the reasoning of *Pavesich* to the fore, we can consider the possibility that Louisiana's deprivation of control over self-identification constituted a direct infringement on a personal, dignitary interest to control one's identity. In other words, Justice Harlan's "badge of servitude" was imposed not only by the physical segregation of blacks into separate cars, but also by the deprivation of control over their identity—precisely the sort of "enslavement" discussed by Cobb in

100. *Id.* at 562 (Harlan, J., dissenting).

101. FRIEDMAN, *supra* note 94, at 3. Friedman's contrast echoes the categories elaborated by Robert Bellah, Richard Madsen, and William Sullivan. *See generally* ROBERT BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985). In particular, *Habits of the Heart* notes the rise of expressive individualism in the twentieth century. *See id.* at 27–54, 142–66. Expressive individualism is marked by a therapeutic ideal of individual self-realization. *See id.*

102. Davis, *supra* note 56, at 29–36.

103. *Id.*

Pavesich.[104] Let us return now to Cobb's evocative language and consider how it might apply to Homer Plessy:

> 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; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.[105]

Justice Harlan identified Jim Crow's badge of slavery as inhering in the message that segregation implied that one race was superior to another.[106] Justice Brown dismissed this concern by asserting that any stigmatizing message attributed to the law was merely of the "colored race['s]" own devising.[107] But Cobb's opinion in *Pavesich* is only secondarily concerned with any particular message conveyed by the use of the image. Rather, it was the forced exhibition itself that degraded the subject's identity. It was the medium of appropriation, not any particular message, that enslaved Pavesich and caused the dignitary harm.

Similarly, one might argue that a component of the harm caused by Jim Crow laws involved the delegation of state authority to railroad officers to assign racial identity. Justice Brown took due note of the fact that the Separate Accommodations Act empowered railroad officers "to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed white, and who a colored, person."[108] He dismissed this concern, however, as "not properly aris[ing] upon the record of this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race."[109]

In dismissing this concern, Justice Brown effectively ratified the power of the state to delegate authority to "brand" passengers with a

104. *Pavesich*, 50 S.E. at 80.
105. *Id.* (emphasis added).
106. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).
107. *Id.* at 551.
108. *Id.* at 549.
109. *Id.*

racial identity against their will. It empowered agents of the state to control central aspects of self-identification. Bringing Cobb's language to bear on such a situation, one might argue that such an appropriation of control over his own identity would bring Plessy "to a realization that his liberty has been taken away from him . . . that he is in reality a slave, without hope of freedom, held to service by a merciless master."[110] In this context, the "badge of slavery" imposed by Jim Crow laws can be understood not only in terms of forced spatial segregation, but also in terms of deprivation of control over one's self-characterization. Such a deprivation of liberty need not necessarily carry an offensive message to infringe on one's liberty. The harm is not the stigmatization of black identity as inferior, rather it is the loss of control over identity itself that marks the individual as subjugated. Under the theory of appropriation of identity, it was state control over the power to mark one's identity rather than over any particular message conveyed by the state that infringed on a privacy-based liberty interest. Under this theory, Justice Brown's dismissal of stigma as merely social becomes irrelevant. In forcibly marking Plessy's racial identity, Louisiana stole that identity and enslaved it in a manner even more immediate and invasive than did New England Mutual's use of Pavesich's photograph.

Under a privacy-based theory of appropriation of identity, stigma (though obviously present) need not be shown to establish harm. Such an analysis allows one to supplement Justice Harlan's application of the historical conception of physical enslavement, embodied in the prohibitions of the Thirteenth Amendment, with the common law's historical concern with protecting the integrity of the individual's identity as articulated in *Pavesich*.[111] In a constitutional context, a privacy-based claim would not implicate the liberty interest of the Thirteenth Amendment, but rather that of the Fourteenth Amendment's Due Process Clause.[112]

Invoking substantive due process was, of course, a tricky enterprise when dealing with the Supreme Court at the turn of the twentieth century. It is revealing, in this regard, that the Court's infamous decision in *Lochner v. New York*, finding a due process liberty interest in

110. *Pavesich*, 50 S.E. at 80.

111. For a fuller consideration of the historical concern of privacy law with protecting the integrity of individual identity, see Kahn, *Privacy as a Legal Principle*, *supra* note 10, at 371–78.

112. American constitutional jurisprudence of privacy is grounded in the Supreme Court's interpretations of the Due Process Clause of the Fourteenth Amendment. The foundational case in this regard is *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1302–1435 (2d ed. 1988).

freedom of contract,[113] came the same year as the *Pavesich* case. Cobb's opinion asserted a fundamental personal interest in controlling the intangible meaning and presentation of one's identity even as the Supreme Court was declaring a similar interest in the right to control one's far more tangible economic engagement in the market. *Lochner* looked backward toward America's agrarian past and its understanding of liberty as grounded in the possession of tangible property. *Pavesich* looked forward to a modern, urban, industrial world. Commenting on this transition, Justice William Brennan noted,

> Until the end of the nineteenth century, freedom and dignity in our country found meaningful protection in the institution of real property. In a society still largely agricultural, a piece of land provided men not just with sustenance but with the means of economic independence, a necessary precondition of political independence and expression.[114]

But, he observed, we are no longer such a nation and now "hundreds of thousands of Americans live entire lives without any real prospect of the dignity and autonomy that ownership of real property could confer."[115] Justice Brennan, therefore, concluded that "[p]rotection of the human dignity of such citizens requires a much modified view of the proper relationship of individual and state."[116]

Cobb's (and Warren and Justice Brandeis's) concern with protecting a liberty interest in maintaining the integrity of individual identity parallels what scholar Kenneth Vandevelde has identified as a development of a new "dephysicalized" concept of property that identified property as an interest, rather than a thing.[117] Making the connection between physical and non-physical interests in personality explicit, scholar Roscoe Pound, writing in 1915, asserted that "[a] man's feelings are as much a part of his personality as his limbs."[118] He went on to ground privacy interests specifically in the changing conditions of modern life, "growing out of the conditions of life in the crowded communities of today."[119]

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113. Lochner v. New York, 198 U.S. 45 (1905).

114. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *in* INTERPRETING THE CONSTITUTION 23, 29 (Jack N. Rakove ed., 1990).

115. *Id.*

116. *Id.* at 29.

117. Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 328–29 (1980).

118. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 363–64 (1915).

119. *Id.* at 363.

D. *Identity, Race, and Property*

It is revealing to note that the *Plessy* Court was not wholly deaf to issues of identity and property. Four months before handing down its decision in *Plessy*, the Supreme Court handed down a seemingly unremarkable opinion in *United States v. Gettysburg Railway Co.*[120] The case involved the power of Congress to seize land through its power of eminent domain in order to preserve land at the site of the Civil War Battle of Gettysburg.[121] The Court held, among other things, that the power of eminent domain was an incident of federal sovereignty,[122] and that the specific purpose of preserving and marking the site of the Battle of Gettysburg was public, and hence supported the exercise of that power.[123] In reaching this conclusion, the Court emphasized the centrality of the battle to the construction of the modern American nation:

> By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defence [sic] in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection.[124]

Noble sentiments indeed. In preserving the battlefield at Gettysburg, the Court recognized that Congress was engaging in a central aspect of nation-building—the promotion of citizens' *identification* with the institutions of the state. But the national identity being preserved at the new Gettysburg Memorial in the 1890s was very different than the one asserted so resoundingly by President Abraham Lincoln in his fa-

120. 160 U.S. 668 (1896).
121. *Id.* at 679.
122. *Id.* at 681.
123. *Id.* at 680–81.
124. *Id.* at 682.

mous address. President Lincoln's Gettysburg Address called forth the nation toward a "new birth of freedom"[125] and identified the battle with a cause meant to realize the promise of equality embodied in the Declaration of Independence.[126] Historian Amy Kinsel notes, however, that for many white Americans the site being preserved in 1896 primarily commemorated the common experiences and valor of the *white* soldiers on both sides of the battle while ignoring or effacing the issue of slavery.[127] The meaning of Gettysburg was contested during this time. During the late nineteenth century, black intellectuals such as Frederick Douglass worked hard "to force the country to face up to the Civil War's legacy of black emancipation."[128] Despite these efforts, Gettysburg, once a symbol of promise for equality and freedom, was transformed into a means to reconcile white northerners and southerners at the expense of African-Americans.

In exercising its power of eminent domain to preserve this site, Congress excluded African-Americans from this newly configured national identity. The lesson in citizenship so ardently celebrated by the Supreme Court was a lesson in white citizenship. It was, in some respects, the final repudiation of Reconstruction on the eve of the constitutional legitimation of Jim Crow laws. Gettysburg marks the symbolic reconstitution of the post-bellum American nation as white. Just as *Plessy* deprived individual blacks of control over their racial identity, *Gettysburg* ratified the exclusion of blacks from a central claim to being part of the nation's identity. Neither case, however, recognized a free standing interest in identity. Rather, they considered identity in relation to physical space and real property. In focusing on property rather than the intangible dignitary interests, as it also did in *Lochner*, the Court upheld existing hierarchies and denied African-Americans access to control over both individual and national identity.

V. RACING PRIVACY/PRIVATIZING RACE: RACIAL DEFAMATION AND WHITE CONTROL OVER RACIAL IDENTITY

Returning to the identity-based harms of the Jim Crow era, there is still the issue of whether the deprivation of control over identity

125. Abraham Lincoln, Gettysburg Address (1863), *available at* http://www.ourdocuments.gov/doc.php?doc=36&page=transcript (last visited Feb. 22, 2004).

126. *See generally* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992).

127. Amy Kinsel, *From Turning Point to Peace Memorial*, *in* THE GETTYSBURG NOBODY KNOWS 203, 221–22 (Gabor S. Boritt ed., 1997).

128. *Id.* at 321.

would affect blacks and whites equally, and hence not offend equal protection. The first response could be that identity based claims would not be brought under the Equal Protection Clause, but rather the Due Process Clause of the Fourteenth Amendment. Thus, it is conceivable that a white person could bring a similar claim. Disparate treatment would not be required to establish a constitutional harm. Nonetheless, it is important to consider that even in this regard there is an imbalance of power: A legally enforced hierarchy of white over black in relation to the power of members of each race to contest state assertions of control over their racial identity. This becomes most evident if we examine Justice Brown's dismissal of Plessy's property-based reputation claim in relation to the spate of racial defamation cases that followed the constitutional ratification of Jim Crow laws.

Laws like Louisiana's, which required racial segregation on common passenger carriers, also required officers of the carriers to identify and assign racial identity to passengers as a precondition of directing them to the appropriate car. As Justice Brown noted, "The power [of a conductor] to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as . . . who, under the laws of the particular state, is to be deemed a white, and who a colored person."[129] It is a great irony of Jim Crow laws that in obliging agents of the state to classify on the basis of race, they forced the indeterminacy of race into high relief. Lawsuits of this era against common carriers for racial defamations emerged not out of conductors' intent to "insult" a white person, but out of confusion concerning a person's "true" racial identity.[130] Plessy was not the only passenger whose racial identity "was not readily discernible" to the eyes of railroad officials. In the coming years, other passengers claiming to be "white" would bring racial defamation suits against common carriers for the misattribution of their identity.[131] As Welke notes, "[t]he racialized space of Jim Crow . . . created new perils of identity for whites. Under Jim Crow, conductors had the power, in fact, the legal obligation, to determine the race of every passenger . . . . In the minds of most whites, to be called black . . . was an actionable insult."[132] Jim Crow laws thus created the preconditions for a series of racial defamation suits by whites, which directly challenged the authority of agents of the state to control their racial identity.

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129. *Plessy*, 163 U.S. at 549.

130. *See, e.g.*, Wolfe v. Georgia Ry. & Elec. Co., 53 S.E. 239 (Ga. 1906); S. Ry. Co. in Ky. v. Thurman, 90 S.W. 240 (Ky. 1906); May v. Shreveport Traction Co., 53 So. 671 (La. 1910).

131. WELKE, *supra* note 30, at 357.

132. *Id.* at 356.

Significantly, only whites brought suits for being wrongfully compelled to ride in coaches assigned to non-whites. There were no racial defamation suits brought by blacks misidentified as white.[133] At first, this might seem simply attributable to the "social" reality, so tellingly referred to by both Justices Brown and Harlan, of black subordination.[134] Indeed, from the point of view of the dominant white society, what harm would there be in being assigned to a more powerful, more highly valued social group? This comports with the idea that the great harm of segregation is stigma. Thus, for example, in one 1905 racial defamation case, a South Carolina court noted,

> When we think of the radical distinction subsisting between the white man and the black man, it must be apparent that to impute the condition of the negro to a white man would affect his (the white man's) social status, and, in case any one publish a white man to be a negro, it would not only be galling to his pride, but would tend to interfere seriously with the social relation of the white man with his fellow white men.[135]

The clear implication here is that this social distinction would not support a reciprocal claim by a black person. But, if this is so, then the absence of black claims for racial defamation can be understood not simply as a function of social status, but also as a function of the legal institutionalization of the dominant white society's perception of that social status.

The logic of racial defamation cases therefore depended upon a racially specific imbalance in power to control one's racial identity—a racial identity that was made legally salient by the institutionalization of Jim Crow laws. The majority rule was that it was libelous per se to call a white man black.[136] There was no reciprocal rule for calling a black man white, and there certainly was no recognized rule that would have allowed Plessy's Creole supporters to challenge the reduction of multiple and complex "colored" identities to a monolithic category. Under this legal regime, people of color, therefore, had differential access to the legal means to challenge state control of their racial self-identification. Moreover, the officers and conductors whom the state deputized with the power of racial identification and assignment were white.[137] Thus, not only did blacks have less access to legal means to contest the control of their racial identity by agents of the

133. *Id.* at 367.

134. *Plessy*, 163 U.S. at 542–45, 557–59.

135. Flood v. News & Courier Co., 50 S.E. 637, 639 (S.C. 1905).

136. Crabb, *supra* note 28, § 1.

137. WELKE, *supra* note 30, at 268.

state, but also they were effectively denied access to the positions through which the state exercised this power in the first place.

In 1906, one year after Cobb wrote his opinion in *Pavesich*, the Georgia Supreme Court first heard the racial defamation case of *Wolfe v. Georgia Railway & Electric Co.*[138] In this case, Nathan Wolfe alleged that it was libel per se for a conductor on an Atlanta street car to negligently assign him and his sister to a car designated for "negro passengers."[139] Wolfe alleged that his "feelings were outraged by the conductor's conduct, not only on his own account, but by reason of the humiliation and mortification which resulted to his sister under the circumstances."[140] Though brought as a libel action, Wolfe did not characterize his injuries primarily in terms of a property interest in his reputation. Rather, his reference to outrage and humiliation clearly referenced a concern to maintain what was essentially a personal interest in the integrity of his (and his sister's) racial identity.

Wolfe's case worked its way through the Georgia court system up to the State's Supreme Court three times.[141] Ultimately, he lost the case because he failed to allege in his initial petition that he was white.[142] The court's seizure on Wolfe's failure affirmatively to allege his race is itself revealing. Wolfe alleged that the effect of his exchange with the conductor "create[d] in the minds of strangers that [he] had colored blood in his veins, and that he was attempting to pass as a white passenger," and that in the minds of people who knew him, it created the impression that he had been "associating with negroes."[143] Finding such an assertion to fall short of an actual declaration that he was "a white man; that is a member of the Caucasian race,"[144] the court noted that, "such an effect might have been produced, though the plaintiff be not a white man."[145] Indeed, the court continued, "the plaintiff might be a mulatto and still the effect of the conversation upon the minds of persons to whom he was a stranger might be that he had colored blood in his veins, and that he was attempting to pass

138. 53 S.E. 239 (Ga. 1906).

139. *Id.* at 240.

140. *Id.*

141. *See* Wolfe v. Ga. Ry. & Elec. Co., 65 S.E. 62, 63 (Ga. Ct. App. 1909).

142. *Id.* (finding the lower court's judgment regarding Wolfe's failure to allege he was white to be res judicata). Cobb dissented on this point, urging a more liberal construction of the common sense understanding of the petition. *Wolfe*, 53 S.E. at 241 (Cobb, J., dissenting).

143. *Wolfe*, 53 S.E. at 241.

144. *Id.*

145. *Id.*

as a white person."[146] Under such circumstances, Wolfe's complaint failed adequately to allege a cause of action.[147]

The court's finding is striking because of its explicit acknowledgment of the social reality of racial ambiguity in the Jim Crow South. It is almost as if the specter of Plessy, the light skinned "octoroon" whose race was not "discernible in him,"[148] was haunting the Georgia court. Like Plessy, Wolfe could only maintain a claim if he was "a white man."[149] The court perceived no harm if Wolfe was merely a "mulatto" attempting to pass as a white man. Such a person had no basis in law to contest a state agent's exercise of legal authority over his racial identity.

The second of the court's three opinions on Wolfe's case considered more directly the nature of the legal interests at stake in racial defamation. In a striking passage that resonates powerfully with Cobb's reference to enslavement in *Pavesich*, the court declared,

> Under our benign institutions "*every man is the architect of his own fortune.*" Every citizen, white and black, may gain, in every field of endeavor, the recognition his associates may award. That is his right, and his own concern. But the courts can take notice of the architecture without intermeddling with the building of the structure. It is a matter of common knowledge that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian.[150]

The court went on to take judicial notice of this "intrinsic difference between the two races."[151] On the one hand, the court's metaphors of construction manifest the classic American ideal of the "self-made man" and valorized the importance of control over one's self as a core legal value. On the other hand, in taking judicial notice of a distinction between the "architecture" of the self and the actual "building of the structure," the court accords legal power to the racist attitudes of a white supremacist society to condition the terms of control over one's racial identity. As a practical matter, under the terms of the court's analysis, whites could have access to the legal system to contest the characterization of the racial identity by state agents, but blacks could not. Thus, blacks might be able to "design" their persons in the abstract, but states could enact Jim Crow laws authorizing their agents to brand those individuals with a racial identity, while articulating doc-

146. *Id.*
147. *Id.*
148. LOFGREN, *supra* note 32, at 28.
149. *Plessy*, 163 U.S. at 549.
150. Wolfe v. Ga. Ry. & Elec. Co., 58 S.E. 899, 901 (Ga. 1907) (emphasis added).
151. *Id.*

trines of racial defamation that valorized the construction of those identities as inferior. Thus, marked as inferior, blacks could have no basis for challenging the state's control over the assignment of their racial identity.

Other cases made the connection between *Plessy* and racial defamation quite explicit. In 1903, a South Carolina newspaper printed a story about Augustus Flood who brought a lawsuit after being struck by a trolley car.[152] The article referred to the plaintiff, Augustus Flood, as "colored."[153] Flood then sued the newspaper for libel, asserting he was "a white man of pure Caucasian blood."[154] The newspaper argued that since the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution established legal equality between the races, Flood could not maintain that its mistake amounted to libel.[155] The court rejected this argument, asserting that "when we think of the radical distinction subsisting between the white man and the black man, it must be apparent that to impute the condition of the negro to a white man would affect his, the white man's social status."[156] The court then explicitly invoked *Plessy* to argue that the Civil War amendments did not have any impact upon the social status of the races.[157] *Plessy* legitimized a legal regime that allowed the stigma of segregation to reinforce the social disabilities of race. The court in *Flood* then took judicial notice of these very same disabilities to grant legal relief to a white man for racial defamation.

Together, these two cases reveal how powerfully the logic of privacy-based interests in identity and dignity might combine with property-based interests in spatial management to deny blacks access to legal means to contest state control over their racial identity. The Court in *Plessy* first privatized the issue of racial stigma, basing its decision on the idea that social stigma was not the concern of the Constitution. The decision in *Flood*, and other similar racial defamation cases, then drew on the logic of *Plessy* to racialize the privacy interests implicit in these defamation suits. *Flood* asserted that social stigma based on the racial hierarchy that *Plessy* ratified provided a basis for whites to contest outside control over their racial identity in a manner that blacks could not.

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152. *See generally Flood*, 50 S.E. 637.

153. *Id.* at 638.

154. *Id.*

155. *Id.*

156. *Id.* at 639.

157. *Id.* at 640.

Such judicial recognition of the social "reality" of racial hierarchy as a legitimate basis for structuring legal rights brings us back to *Pavesich* and its concern for protecting the integrity of the individual's identity from outside control. Perhaps we can now see that its reference to slavery takes on a different meaning in the context of a Jim Crow South, where only whites could contest racial misidentification. Re-reading *Pavesich* through the lens of *Plessy* and the racial defamation cases, we see Cobb's reference to slavery takes on racial overtones more explicitly. To deny Pavesich control over his image did not simply enslave his identity in some abstract sense, rather it relegated him to the status of a black person in society—someone who had no access to legal control over his identity. In making a claim to control his identity, Pavesich was implicitly, in the words of Ariela Gross, "performing whiteness,"—asserting a privacy-based claim that resisted the enslavement of his identity and thereby distinguished him from his black contemporaries.

VI. Conclusion

In drawing connections between Jim Crow laws, privacy, and racial defamation, I have tried to bring to the foreground a fuller understanding of the status of identity in the American legal tradition. Privacy and Jim Crow laws share an obvious common concern for the legal management of space and community relations. Historically, they emerged together in an era beset by anxieties about the rapid social changes being wrought by modernity. These anxieties manifested themselves in deep concerns about control over individual identity and the relationship of that control to the conservative impulse to maintain the structures of an old social and economic order. As they played themselves out at the turn of the twentieth century, these concerns produced legal structures that allocated power over identity on the basis of race. Jim Crow laws and privacy informed each other to reinforce racial hierarchy and subordination. Nonetheless, in rereading *Plessy*, *Pavesich*, and the racial defamation cases in relation to each other, I also have tried to lay out some of the unexplored potentials for using legal interests in identity to subvert racial hierarchy. By articulating control over identity as an explicit legal interest, I believe it is possible to supplement our traditional understandings of the equal protection doctrine to encompass new grounds for challenging legal regimes of hierarchy and subordination.