COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.	SUPERIOR COURT DEPT. CIVIL ACTION NO: 1981CV00784
TAMARA LANIER, Plaintiff, v. PRESIDENT AND FELLOWS OF HARVARD COLLEGE AKA HARVARD CORPORATION, ET AL. Defendants,	REQUEST FOR ARGUMENT FEBRUARY 19, 2020

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NOW COMES the plaintiff, Tamara Lanier, who hereby submits her Opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint.

AS GROUNDS THEREFORE, as set forth more fully in the accompanying Opposition, the plaintiff asserts that her complaint states legally sufficient claims upon which relief may be granted.

WHEREFORE, the plaintiff respectfully requests that this Honorable Court:

1. Deny Defendants' Motion to Dismiss;
2. Allow the plaintiff an opportunity to amend, should the court find her pleadings insufficient;
3. Stay the proceeding and allow the plaintiff to join indispensable parties should the Court find that misjoinder is an issue.

RESPECTFULLY SUBMITTED,

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BY HER ATTORNEYS,

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CERTIFICATION OF SERVICE

I, Sean K. McElligott, counsel for the plaintiff hereby certify that on February 19, 2020, I served a copy of the plaintiff's opposition to defendants' motion to dismiss upon all counsel of interest and/or their parties as reflected below.

President & Fellows of Harvard College;
Harvard Board of Overseers,
Harvard University, and The Peabody
Museum of Archeology and Ethnology

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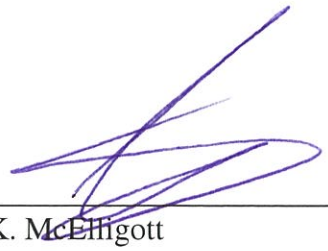

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"That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." - Harvard Law Review (1890)

OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION

In 1850, an enslaved man, Renty, and his enslaved daughter, Delia, were chosen as specimens for a "groundbreaking" study conceived of by Harvard's celebrated and prized professor Louis Agassiz. The purpose of the study was to prove "scientifically" that Blacks were a different and inferior species to Whites, a theory known as "polygenism." In furtherance of their compulsory participation in the racist study, Renty and Delia were dragged in chains from the plantation where they lived to a plush studio in Columbia, South Carolina. There, father and daughter were stripped naked and forced to stand before a camera as they were painstakingly studied and "photographed" from all angles as Agassiz had demanded. The process would not only have been abusive, dehumanizing and humiliating, but it would also have been torturously long. The way an image was captured in 1850 bore scant resemblance to modern-day photograph. It required the subject to stay perfectly still for an unnatural length of time, often requiring devices to hold a subject's pose. The images themselves were captured not on a negative

from which additional images could be easily replicated, but on a plate of silver and copper. This resulted in a tangible item that was one of a kind, more akin to a work of art on a canvas than a photograph. These plated images are known as daguerreotypes.[1] The daguerreotypes of Renty and Delia, and the tortious, inhumane, and undoubtedly criminal conduct visited upon them by Harvard – the very circumstances of their creation – are at the center of this case.

Harvard asks the court to completely disregard these circumstances as irrelevant and to dismiss the case as a matter of law. Harvard relies primarily on one argument: that "a photograph is the property of the photographer, not the [the subject]." MTD, 10-11. According to Harvard, this is a common law rule that holds true "however objectionable the circumstances of the photograph's origins" and in fact "regardless of the circumstances." MTD, 4,11-12. Harvard labels the import of the circumstances as merely raising "complex policy questions," and casually dismisses the significance of the facts of this case as bearing on matters of "ethics" and "morality," but having no relevance to the legal and equitable issues before the court. MTD, 2-3 This is the argument that Harvard *has* to make. Harvard knows that the only way it can prevail, at least as a matter of law, and hang on to its prized historical possessions– possessions so valuable to Harvard that it won't simply return them to Renty and Delia's family – is if the court ignores the circumstances of their derivation.

But Harvard's view of common law and equity is all wrong. In Harvard's view, rules are applied without regard to reason and circumstances; matters of policy, ethics, and morality are estranged from the law; and tortious conduct results in rewards to the perpetrator. In fact, the common law is shaped by fundamental principles of fairness and justice – principles inextricably linked with matters of "policy," "ethics" and "morality" – and dependent upon unique circumstances. The application of the common

[1] For a description of daguerreotype fabrication see khanacademy.org/humanities/becoming-modern/early-photography/v/early-photography-daguerreotypes

law does not brook subordination of reason, fairness, and justice to the blind application of general rules, especially where such an application rewards tortious and criminal conduct. The simple fact is that Harvard engaged in tortious activity in the kidnapping, invasion, assault, battery, and false imprisonment of Renty and Delia, and this conduct *resulted in* the fabrication of tangible property. That property was then used by Harvard for profit, for prestige, and for promotion of racism masquerading as "science." To this day Harvard continues to benefit from its unlawful dominion, control, and use of these images. Under the common law and equity, tortfeasors like Harvard are not rewarded by bestowing upon them the fruits of their torts. Reparations flow from the tortfeasor to the victim, not the other way around.

Harvard fails to admit the simple truth that there is no precedent for this case. To the plaintiff's knowledge, this case presents the first civil dispute in our country's history wherein a direct descendant of an African-born slave has asserted property rights to historical and cultural artifacts, created under brutal conditions, depicting her ancestors during their enslavement. Despite conceding that Ms. Lanier is both the direct descendent of Renty and Delia and inherits their property rights, Harvard has never articulated any basis for its right to possess the daguerreotypes. Ms. Lanier, on the other hand, has stated the factual and legal basis for her superior property rights to them.

II. STATEMENT OF FACTS:

A. History is Written by the Winner

Harvard's ongoing physical possession and control of the daguerreotypes is more than simple "stewardship" of tangible one-of-a-kind priceless historical and cultural artifacts. Dominion and control of the daguerreotypes has allowed Harvard to control the historical narrative in order to both bury the true story of Agassiz and enlarge its own prestige and profits. These claims are real. The story of Agassiz told by Harvard – even to this day – is that of a "great systematist, paleontologist, and renowned teacher of natural history." See https://mcz.harvard.edu/history, A.1. SAC, ¶ 6. Harvard made the daguerreotypes front and center at its March 2017 conference: "Universities and Slavery: Bound by

History" and then promptly buried the history it was professing to share. Indeed, Harvard saw fit to feature its prized possession – THE Renty daguerreotype – both on the cover of its program and projected above the conference stage. In the program, Harvard described the origin of the cover image of Renty as an image "taken for the Harvard professor Louis Agassiz as a part of Agassiz's scientific research." SAC, ¶¶ 188-89. The description went on to boast that "while Agassiz earned acclaim, Renty returned to invisibility." *Id.* No mention of the deplorable circumstances under which Renty was "photographed" or the nature of the "scientific study" that earned him acclaim was made – that part of the story was buried as if Renty simply posed of his own free will for Agassiz's legitimate and praiseworthy scientific endeavor. *Id.* The real story of the origin of Renty's image was unbeknownst at the time to the conference's keynote speaker, Ta-Nehisi Coates. Upon learning the truth two years later, Coates observed: "That photograph is like a hostage photograph. This is an enslaved black man with no choice being forced to participate in white supremist propaganda – that's what that photograph was taken for." "Who Should Own Photos of Slaves?" New York Times (March 20, 2019).

B. The History that Harvard Doesn't Tell

While Agassiz viewed Renty as a specimen from an inferior species, and Harvard recently referred to Renty as "invisible," the real "Pappa Renty" (as he has always been referred to in Ms. Lanier's family) was hardly invisible. In mid-18th century South Carolina, Renty actually risked imprisonment to teach himself to read using the "Blue Black Speller." He courageously led "secret Bible readings and study [groups] on the plantation where he was enslaved." SAC, ¶¶ 90, 92-94. In other words, Renty was a fiercely intelligent, motivated and fearless man.

Meanwhile, although Agassiz may once have been a credible scientist who rightly earned praise as a naturalist for his work with fish and glaciers, coming to America from Switzerland changed all that. From the moment Agassiz first laid eyes on a black person he was "repulsed," and disgusted by the very sight of them. He wrote that he could not "repress the feeling that they are not of the same blood as us."

Id., ¶¶ 44, 71. He described the "brain of a Negro [as] that of the imperfect brain of a 7-month-old infant in the womb of the White." *Id.*, ¶¶ 50-52. Agassiz took the fledgling theory of "polygenesis" and ran with it. The "scientific" classification of Blacks as an inferior species served mid-19th century Harvard's interests well. Harvard derived wealth off of the backs of slaves. Rich northern cotton tycoons feared the financial repercussions of the end of slavery. SAC, ¶¶ 41, 56-65.[2] Tycoon Abbott Lawrence made his fortune from "cotton that was planted, picked, ginned, baled and shipped by enslaved men, women and children." SAC, ¶ 59. In 1847, Lawrence donated $50,000[3] to Harvard to establish the first department of science at an American college, the Lawrence Scientific School, and to guarantee the salary of the scientist chosen to head this new department: Louis Agassiz. SAC, ¶¶ 55.

Agassiz's "objective" justification for slavery fit perfectly with Harvard's deep financial interest in perpetuating slavery and its ill-gotten gains.[4] In early 1850 Agassiz sought to solidify his increasingly influential "scientific theory" of polygenism. To do so, he needed "racially pure slaves born in Africa." SAC, ¶¶ 74-78. So, Agassiz "embarked on a tour of South Carolina plantations." *Id.* With the help of Dr. Robert Gibbes, Agassiz chose Renty, who was a native of the Republic of Congo, and his daughter, Delia, as "specimens" for his study.[5] *Id.* Agassiz's study called for Renty and Delia to be stripped naked, and forced against their will to pose for photographs taken from all angles. SAC, ¶¶ 1-3, 9, 22, 24, 49, 74-78, 107-112. Famously, Delia is seen crying in one image. To Agassiz, Renty and

[2] See historical context, A.30.
[3] At the time, the largest single gift ever by an individual to an American institution of learning. See SAC, ¶ 54.
[4] See at MTD, 4, ¶ 2; SAC, ¶¶ 121-122. In 2016, Harvard's then-President Drew Faust wrote: "Harvard was directly complicit in America's system of racial bondage from the College's earliest days in the 17th century until slavery in Massachusetts ended in 1783, and Harvard continued to be indirectly involved through excessive financial and other ties to the slave South up to the time of emancipation. This is our history and our legacy, one we must fully acknowledge and understand in order to truly move beyond the painful injustices at its core." "Recognizing Slavery at Harvard," Harvard Crimson, March 30, 2016, A.3.
[5] In addition to Renty and Delia, there were five other slaves photographed.

Delia were simply sub-human specimens, and through his own racist lens he believed that capturing their images would help him definitively "prove" his white supremacy theory of polygenesis.

Having received and studied the daguerreotypes of Renty and Delia, Agassiz published his "scientific" findings, which included the following loathsome statements: Blacks were "submissive, obsequious, [and] imitative;" that the white race had "the obligation to settle the relative rank among these races… in a scientific point of view;" that the view that the races were equal and "entitled to the same position in human society" was "mock-philanthropy and mock-philosophy;" "…that those higher attributes which characterize man in his highest development are...more harmoniously combined in the white race." Agassiz used these beliefs to promote policy arguing that the government "ought to put every possible obstacle to the crossing of the races, and the increase of half-breeds;" and warned that "[s]ocial equality...[is] at all times impracticable. It is a natural impossibility, flowing from the very character of the negro race…[T]hey are incapable of living on a footing of social equality with the whites, in one and the same community, without becoming an element of social disorder."[6] This became Agassiz's most consequential and enduring "achievement." SAC, ¶¶ 127-138.

C. Harvard's Marketing as Ethical Stewards of History

It is hard to ignore the detour Harvard takes in its motion to dismiss, in which it cobbles together a handful of examples apparently meant to convey the seriousness in which it has addressed its entanglement with slavery and the repercussions and enrichment of that entanglement. Aside from amorphous and non-committal statements like Harvard "acknowledg[ing] the importance of exploring its connection with slavery," Harvard refers to three "concrete" instances of something it seems to say is a kind of reckoning. First, Harvard takes credit for the work of one of its professors, Steven Jay Gould, for writing a book in 1981 (republished in 1996) that described Agassiz correctly as "the leading

[6] SAC, ¶¶ 107-116, 127-131; see also "The Diversity of Origin of the Human Races," Louis Agassiz, Christian Examiner (July 1850).

spokesman for polygeny in America. Second, Harvard asserts that they take good care of their artifacts. And third, that recently it committed $5 million to studying and reporting its connection to slavery.

It speaks to the paltriness of its efforts that Harvard takes credit for faculty member Gould's writing about Agassiz's racist beliefs in a 1981 book, and offers it as evidence of Harvard's own reckoning, MTD, 3. If this led to any reckoning by Harvard about Agassiz, why – 36 years after Gould's accurate observation - wasn't this true history of Agassiz shared with attendees at the 2017 conference on, of all things, the history of Harvard's ties to slavery? Why does Harvard's MCZ website continue to gush over his accomplishments? Harvard's failure to build off of Gould's observation is simply another example of its effort to control history. In terms of "ethical stewardship," taking care of property that has been compelled by your own wrongdoing can never be ethical. Nor can telling a false or incomplete story based on that stewardship or using that property for your prestige and profit. The argument that Harvard makes is beyond insulting given the seriousness of the claims in this case. In fact, it is "Exhibit A" of its failure to understand the gravity of its historical wrongdoing. Timing suggests that the true impetus for the new initiative is a bit of a public relations ploy in light of the pending case and its inclusion in a motion to dismiss is circumspect. Harvard could have been expected to invest in this area of study at least following 1981 with Gould's work. It appears that Harvard only acknowledges their connection and complicity with slavery when faced with external pressure, which calls into question the sincerity of Harvard's commitments to act on any ramifications of their research.

III. RENTY AND DELIA ACQUIRED PROPERTY RIGHTS IN THE DAGUERREOTYPES SUFFICIENT TO SUSTAIN MS. LANIER'S PROPERTY INTEREST CLAIMS

The single question before the court is whether Ms. Lanier's complaint has stated one or more claims upon which relief may be granted.[7] Ms. Lanier's operative complaint sets forth causes of action

[7] Harvard moved to dismiss under Mass. Civ. P. Rule 12 (b)(6). To survive a motion to dismiss, the plaintiff must set forth in the complaint factual allegations, either direct or inferential, regarding each

sounding in Replevin (Count One), Conversion (Count Two), Unauthorized Use (Count Three), Constitutional Violation (Count Four), Intentional Interference (Count Five), Negligent Infliction of Emotional Distress (Count Six), and Equitable Restitution (Count Seven). Harvard groups Ms. Lanier's claims in Counts 1, 2, 5, 6, and 7 together as "property interest" claims. Harvard's principal argument is that Ms. Lanier's property interest claims must be dismissed because, to assert such claims, Ms. Lanier must plead and prove ownership, and "there is no support for the proposition that a person, *in any circumstances*, derives a property interest in a physical photograph (or painting, or sculpture) *because* that photograph contains his or her image." MTD, 4, 8-12 (emphasis added). Harvard is wrong. As a preliminary matter, Ms. Lanier's property claims require only an assertion of a right to possession, not ownership, per se. To succeed, Ms. Lanier's right to possession must simply be superior to that of the defendant's. Further, Ms. Lanier does not base her right to possess the daguerreotypes only on the fact that Renty and Delia were the subjects of the same. The roots of the plaintiff's right to possession go much deeper than that. Harvard's generalization is a misstatement of the law, the facts and Massachusetts's principles of justice and equity.

A. Tangible Property Rights

Tangible property, in the law, is literally anything that can be touched and includes both real and personal property. "That the individual shall have full protection in person and in property is a principle as old as the common law." S. Warren and L. Brandeis, "The Right to Privacy," Harvard Law Review, Vol. IV, No. 5, p. 193 (December 15, 1890). The rights of personal property are divided into two general categories: general property rights and special property rights. A special property right is a

material element necessary to sustain recovery under some actionable legal theory. *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988); see also *Iannacchino v. Ford Motor Company*, 451 Mass. 623, 636 (2008); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). In deciding a motion to dismiss, the court must take plaintiff's allegations in the complaint as true. *Flagg v. AliMed, Inc.*, 466 Mass. 23, 26 (2013).

right or qualified interest in property (such as the interest of a bailee, pledgee, lawful possessor, a conditional vendee prior to full payment, or a lienholder) subordinate to the absolute, unconditional or general property or ownership. Merriam-Webster Dictionary. A general property right is absolute ownership usually of personal property with the right of complete dominion over it including the incidental rights of possession, of use and enjoyment, and of disposition or alienation. *Id.*

B. Ms. Lanier's Property Interest Claims Rests Upon her General or Special Property Rights in the Daguerreotypes

In Count One of her complaint, Ms. Lanier sets forth a cause of action for replevin. The common law right to replevin in Massachusetts was codified in statute in 1789. Harvard Law Review, Vol. IV, No. 5, p. 193; Statute of 1789, c. 25.[8] Replevin, founded on the wrongful taking of personal property, like a civil theft, "is a remedy, by which the person, from whom goods or chattels are taken, may be restored to possession of them until the question of title can be judicially tried and determined." *Maxham v. Day*, 82 Mass. 213, 214 (1860); *Lathrop v. Bowen*, 121 Mass. 107 (1876). "Remedies [like replevin] are always to be used and applied in subordination *to the great principles of right*, which it is the object of the law primarily to secure and protect." *Id.*, 215-16 (emphasis added).

At present, M.G.L. c. 247, § 7 states in relevant part: "If goods exceeding twenty dollars in value are unlawfully taken or detained from the owner or *person entitled to their possession*..., the owner or such other person may cause them to be replevied." (Emphasis added.) Thus, while a replevin action may be brought by an "owner," it may also be brought by a "person entitled to possession" who very clearly need not be the owner. See *Evergreen Marine v. Six Consignments of Frozen Scallops*, 806 F. Supp. 291, 294 (D. Mass 1992), vacated on other grounds 4 F.3d 90 (1st Cir. 1993); *Wilson v. Estate of Arcese*, 2007 Mass. Super LEXIS 330, 23 Mass. L. Rep. 11. To properly state a cause of action for

[8] Note that Harvard ignores the choice of law question entirely and moves to dismiss only under Massachusetts law. Ms. Lanier only responds to the arguments raised by the defense but notes that the choice of law question remains unresolved.

replevin, the plaintiff must assert that he has *either a general or special property interest* in the personal property that has been wrongfully taken or detained. See 66 Am Jur. 2d, Replevin, § 2.

> *Holding a title is not the sine qua non for bringing an action to recover chattel; instead, a plaintiff need only have a possessory right to the chattel superior to that of the defendant.* In other words, nothing more than a right of present possession founded upon a general or special [property right in the] goods or chattels is necessary to enable a plaintiff to maintain a replevin action. Thus, it is not essential that the title be absolute; a qualified title, accompanied by the right to possession is sufficient...*The critical issue in a replevin action is a right of possession, not ownership.* A*dditionally, the plaintiff is not required to set up a title good against the whole world but need only show a good title as against the defendant in possession.* This is true even though a third person may have some interest in the property….

66 Am. Jur. 2d Replevin §§ 11, 13 (emphasis added); see also *Iowa Truck Center, Inc. v. Davis,* 204 N.W.2d 630 (1973). *Ilsley v. Stubbs*, 5 Mass. 280, 283 (1809); *Commonwealth v. Fitzgerald*, 164 Mass. 587 (1895).

Ms. Lanier claims either a general or special property right to the daguerreotypes as the basis for her replevin action.[9] Thus, Harvard is categorically wrong in its assertion that Ms. Lanier must plead and prove absolute ownership to successfully assert a replevin claim. MTD, 3-4, 8-12. Harvard is equally wrong, having conceded that Ms. Lanier is the linear descendant of Renty and Delia, that she

[9] Similarly, in Count Two of her complaint, Ms. Lanier sets forth a claim for conversion, which is an intentional exercise of dominion or control over personal property seriously interfering with the right of another to control it. In this case, Ms. Lanier claims that the photographs themselves (not the countenances of Renty and Delia) were converted by Harvard. The elements of a conversion claim include that a plaintiff has an ownership *or possessory right or interest* in the property interfered with at the time of the defendant's wrongful act. *Evergreen Marine v. Six Consignments of Frozen Scallops*, 806 F. Supp. 291, 294 (D. Mass 1992), vacated on other grounds 4 F.3d 90 (1st Cir. 1993),. The plaintiff must show an immediate right to possession of the property at the time of the alleged conversion, even though title may be in another. *Guttentag v. Huntly*, 245 Mass. 212 (1923); *Beacon Motor Car. Co. v. Shadman*, 226 Mass. 570 (1917); *Harrington v. King*, 121 Mass. 269 (1876). Similar to Harvard's error regarding replevin, it also overlooks the fact that an action for conversion will lie for the disruption of possessory rights or interests shy of actual ownership. *Evergreen*, 4 F.3d 90 (1st Cir. 1993); *Tourles v. Hall*, 341 Mass. 299 (1960); *First National Bank v. Crocker*, 111 Mass. 163 (1872). See also *MacNeil v. Hazelton*, 306 Mass. 366 (1940); *Massachusetts Lubricant Corp. v. Socony-Vacuum Oil Co.*, 305 Mass 269, 271 (1940). Similar arguments hold true for Ms. Lanier's claims in Counts 5, 6, and 7.

must allege a property interest "superior to" other descendants of Renty. She "need only show a good title as against the defendant in possession."[10]

C. Origin of Ms. Lanier's Property Rights to the Daguerreotypes

1. Ms. Lanier's Property Rights to the Daguerreotypes Arise from Principles of Law, Equity and the Constitution

Determining which side has a superior property right is clearly a jury question. As stated above, Harvard never actually stated in its motion that it owns the daguerreotypes or articulated the basis for its claim of entitlement to them. Thus, on the record before the court, Harvard's only "claim" to the images is that it possesses them. Harvard does not even know (or won't tell) how it got them.[11] Instead, all Harvard argues in its motion is that Renty and Delia were not entitled to "own" the daguerreotypes, so neither is Ms. Lanier. Preposterously, Harvard argues that the circumstances under which the daguerreotypes came into existence are irrelevant to Ms. Lanier's property rights in them; even though Harvard admits that Agassiz committed "repugnant," "reprehensible" acts upon Renty and Delia in order to create the images. MTD, 3-4, 12. It is precisely because of the circumstances under which the daguerreotypes were created that Renty and Delia, and now Ms. Lanier, have property rights to the images themselves. But it is not just because Renty and Delia were the subjects of the images. The

[10] To the extent that Harvard argues that Ms. Lanier's replevin claim is inadequate as a matter of law because she must either demonstrate that she is "the sole owner" of the photographs or join the co-owners in this case, MTD, 14-15, Ms. Lanier responds thus. First, the defendant's argument is mistakenly directed toward "ownership" not "entitlement to possession." Harvard cites no authority to demonstrate that exclusive or outright ownership is a necessary element of a replevin claim based on entitlement to possession. Second, should the court believe that joinder of other parties is necessary, the court has the discretion to permit amendment of the complaint at any time to add real parties in interest and said amendment will likely relate back to the original pleading. See *Berman v. Linnane*, 434 Mass. 301, 304 (2001); M.G.L. c. 231, § 51; Mass. Civ. P. Rules 15 and 17a. Third, Harvard filed its motion to dismiss under Mass. R. Civ. P. Rule 12(b)(6) (i.e. failure to state a claim upon which relief can be granted). MTD, 1. The question of possible misjoinder of parties cannot be raised by motion filed under 12(b)(6). *Senay v. Meehan*, 5 Mass. App. Ct. 854, 855 (1977). See also Lanier Affidavit, ¶¶ 24, A. 7.

[11] Pat Kervick, Associate Archivist at the Peabody stated her belief that Agassiz's son, Alexander, transferred the photographs to Harvard in 1935; the other theories are that Louis Agassiz transferred them in 1858, or just left them there. 8 Harv. Unbound J. of Legal L. 1, 25, 51.

unvarnished truth is that Harvard's acts were criminal – kidnapping, torture and exploitation. Renty and Delia were intimidated, threatened and coerced into posing nude for the camera. Renty and Delia's constitutional rights were violated in the process of creating the daguerreotypes.[12] The general principle of law is that Harvard cannot profit from its wrongdoing by claiming it garnered a property interest superior to that of the plaintiff's under these circumstances. *Commonwealth v. Rosado*, 480 Mass. 540, 543 (2018). A wrongdoer should not be enabled by law to take advantage from his actions: *commodum ex injuria sua nemo habere debet*. Harvard's tortious conduct is not beside the point – *it is the point.* It cannot be swept under the rug or otherwise forgotten in the battle over who has a better claim to the daguerreotypes. "Otherwise illegal conduct is not made legal by being [photographed.]" *California v. Freeman*, 488 U.S. 1311, 1313 (O'Connor, J.) The law holds that "if there is tortious injury there should be recovery, and only strong arguments of public policy should justify a judicially created immunity for tortfeasors and bar to recovery for injured victims." *Lewis v. Lewis*, 370 Mass. 619 ,629 (1976).[13]

2. Harvard's Argument that Ms. Lanier Cannot State a Cognizable is Irrelevant, Incorrect and Unsupported

As stated above, Harvard's principal argument is that Renty and Delia cannot, as a matter of law, prove ownership in the daguerreotypes because "there is no support for the proposition that a person, *in any circumstances*, derives a property interest in a physical photograph (or painting, or sculpture)

[12] By 1784, the Massachusetts high court had outlawed slavery in the Commonwealth and slaves were constitutionally entitled to, among others, the rights to liberty and property. Massachusetts's constitution of 1780, Article I. In South Carolina, the Supreme Court in *Callahan v. Callahan*, 36 S.C. 454 (1892), retrospectively recognized similar rights in former slaves.

[13] Furthermore, the daguerreotypes are protected cultural relics/artifacts that were taken by Harvard though violent theft and, as such, Ms. Lanier has the right to their return. As cultural property, the photographs are protected under the spirit and policy reach of UNESCO (United Nations Educational, Scientific and Cultural Organization), NAGPRA (Native American Graves Protection and Repatriation Act, Pub. L. 101-601, 25 U.S.C. 3001 et seq., 104 Stat. 3048 – enacted on November 16, 1990, requiring institutions that receive federal funding to return Native American cultural items to lineal descendants) and the Hague Convention (Note, according to the latter, it is of no consequence that the offender may take better care of the property than the original owner).

because that photograph contains his or her image." MTD, 4 (emphasis added). This statement is irrelevant, incorrect, and unsupported. Therefore, it should be disregarded by the court. It is irrelevant because, as just stated, Ms. Lanier does not rest her property right claims simply upon the fact that Renty and Delia were the *subjects* of the daguerreotypes. It is incorrect as stated because it is a corruption (intentional or otherwise) of an unrelated principle of copyright law, which is inapplicable herein because legal rights of ownership of tangible property are distinct from rights of ownership of intangible rights under copyright. 1 Nimmer on Copyright §§ 2.08, 2.03 [c]. See discussion at A.27.

None of the cases cited by Harvard stand for the proposition it asserts that "in all circumstances" a subject of a photograph cannot acquire a property interest in the actual photograph. See *Thayer v. Worcester Post Co.*, 284 Mass. 160, 163-4 (1933) (plaintiff consented to have her photograph taken in a public place, with her knowledge); *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 882, 883 (9th Cir. 1988); cert. denied, 489 U.S. 1080 (1989) (means used by Hustler to obtain photograph was not actionable because plaintiff had agreed to be photographed by a newspaper and therefore not a privacy concern); *U.S. v. Jiles*, 658 F.2d 194, 200 (3d Cir. 1981) (state statute requiring court order to obtain photograph of juvenile taken while in juvenile detention, did not create a constitutionally protected property or liberty interest in the defendant); *Grandal v. New York - Grandal v. City of New York*, 966 F. Supp. 197, 203 (S.D.N.Y. 1997) (criminal appellee had no property interest in booking photo from previous arrest); *Berger v. Hanlon*, 1996 WL 376364, at *10 (D. Mont. Feb. 26, 1996), aff'd in part, rev'd in part, 129 F.3d 505 (9th Cir. 1997), vacated 526 U.S. 808, 119 S. Ct. 1706, 143 L. Ed. 2d 978 (1999) (plaintiffs did not have basis for *conversion* claim where CNN accompanied federal authorities lawfully executing search warrant of plaintiffs' home, plaintiff consented to entry[14]); *Zacchini v.*

[14] Harvard wrongfully asserts that the court "rejected conversion claims as to photographs taken without consent on private property." MTD, 11. To the contrary, the opinion refers to the fact that the plaintiffs were aware of being photographed and described at length that the entry on the property was not a trespass but secondary to a lawfully issued warrant.

Scripps-Howard Broad, Co., 47 Ohio St. 2d 224, 227 (1976), rev'd on other grounds, 433 U.S. 562 (1977) (fifteen second broadcast of plaintiff's "human cannonball" act at state fair was neither appropriation nor invasion of right to publicity; it was a newsworthy matter of public interest). Indeed, none of these cases even involved a claim of tortious conduct *in the creation* of the images at issue.

More importantly, none of the cases cited suggest in any way that a general rule would apply in circumstances where the photographer committed a tortious or criminal act in the process of compelling an unwilling subject to yield to the demands of the photographer including disrobing. It is true that in three of the cases cited, the courts commented on the property interests of the photographer vis-à-vis the subject, but these comments arise in the context of the specific factual circumstances of each case. In *Ault*, the court simply declared, without any support, that "while the photograph [of the plaintiff taken for a newspaper later used by Hustler] might be viewed as a chattel, it was the property of the photographer, not of Ault, so there was no conversion of Ault's chattels." *Ault* at 883. In *Thayer*, the court noted that "the plaintiff's allegations show that the picture was not taken surreptitiously or without her knowledge, *or consent*. On the contrary she *voluntarily* posed for it as one of a party of five. The picture was taken at an airport which is presumably a public place." The court went on to conclude that "[o]ne who *under the conditions disclosed in these counts* poses for a photograph has no right to prevent its publication" and that the "title to the photograph was not in the plaintiff but some other person." *Id.* at 163 (emphasis added). Finally, *Berger*, appears to simply overstate the fact specific conclusions of other courts by stating that it "agrees with those courts that have found that the use of photographed or videotaped images and sound recordings does not give rise to a cause of action for conversion." *Id.*, 10.

It is simply wrong for Harvard to declare that these cases support in any way its broad proclamation that no matter the circumstances (or for that matter, the claim or the time-period) the photographer always maintains a property right to the actual image superior to the subject's. This court should not be misled by Harvard's effort to brush off the facts and circumstances of this case as simply

"raising complex policy issues" of morality and ethics and decoupled from matters of law and equity. Policy, morality and ethics are not estranged from principles of law or equity, they are its driving force.

3. Even if Harvard Is Correct that the Subject of a Photograph Generally Does Not Acquire Property Rights in the Actual Image, the Rule Need Not be Applied to This Case

There is no doubt that Ms. Lanier's case is not the typical one. But the principle that guides the court to decide it is well established: *even if a rule has been generally accepted to date, a court need not continue to blindly follow it*:

> The mere longevity of [a] rule does not by itself provide cause for us to stay our hand if to perpetuate the rule would be to perpetuate inequity. When the rationales which gave meaning and coherence to a...rule are no longer vital, and the rule itself is not consonant with the needs of contemporary society, a court not only has the authority but also the duty to reexamine its precedents rather than to apply by rote an antiquated formula....One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court. There is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common law of centuries ago as different as day is from night. The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice....

Lewis, 628. As Justice Brandeis wrote "[t]hat the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." Harvard Law Review, Vol. 4, No. 5 (December 15, 1890), pp. 193-220. Whether considered a matter of common law, statutory law, constitutional law, humanitarian justice, or equity the circumstances alleged compel the court to "define anew" the nature and extent of the protection that Renty and Delia, and now Ms. Lanier, be accorded. To decide the motion before it, the court need not determine the exact nature of Renty and Delia's property rights in the daguerreotypes, only that the pleadings alleged by Ms. Lanier are sufficient to state legally cognizable causes of action. Ms. Lanier has done so, thus, Harvard's motion to dismiss must be denied.

IV. MS. LANIER HAS SET FORTH A LEGALLY COGNIZABLE CLAIM FOR PRIMA FACIE TORT IN COUNT FIVE

Regarding Ms. Lanier's claim set forth in Count Five (Intentional Harm to Property), Harvard adds another reason to its argument that it should be dismissed, i.e. "because Massachusetts courts have never recognized such a cause of action." MTD, 15. Harvard's statement is patently false. Ms. Lanier's Count Five sets forth a cause of action for, what was known at common law as, a "prima facie tort"[15] and is now set forth in Restatement (Second) of Torts § 871, which states: "One who intentionally deprives another of his legally protected property interest or causes injury to the interest is subject to liability to the other if his conduct is generally culpable and not justifiable under any circumstances." A prima facie tort recognizes the various tortious means by which harmful invasions of property interests are intentionally achieved and states a general rule that applies where the defendant has done an unprivileged act that caused harm to another's legally protected interest in property, deprived another of said interest, or created liability against the defendant. *Id.* It applies where a person has interfered with the possessory interests of another in land or chattels, either by causing harm to the subject matter or by depriving the other of possession, and also where there has been harm to or the deprivation of a non-possessory interest. *Id.* "The rule applies to situations in which the only remedy is by an action at law...and also when the only remedy is equitable in nature." *Id.* The Massachusetts Supreme Judicial Court was one of the first to recognize a prima facie tort.[16]

V. MS. LANIER HAS SET FORTH A LEGALLY COGNIZABLE CLAIM FOR EQUITABLE RESTITUTION IN COUNT SEVEN

Harvard largely ignores Ms. Lanier's claim set forth in Count Seven (Equitable Restitution), except to the extent its other arguments for dismissal may apply to it as well. This was a tactical error

[15] *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904), stated that ("It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape.")
[16] See *Carew v. Rutherford*, 106 Mass. 1 (1870); *Walker v Cronin*, 107 Mass 555, 562 (1871).

on Harvard's part because Ms. Lanier has stated a valid claim for equitable restitution, as a matter of law. Restitution is an equitable remedy by which a person who has been unjustly enriched at the expense of another is required to repay the injured party. *Santagate v. Tower*, 64 Mass. App. Ct. 324, 329-30 (2005). It is appropriate if the circumstances of the receipt or retention of property are such that, as between the two persons, it is unjust for one of them to retain it. *Id.* Restitution is "a restoration required to prevent unjust enrichment." 1 Dobbs, Law of Remedies § 4.1(1), at 557 (2d ed. 1993). "The fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff. Restitution rectifies unjust enrichment by forcing restoration to the plaintiff." *Id.* at § 4.1(2), at 557.[17] Further, as an equitable remedy, the statute of limitations defense does not apply to it.

VI. MS. LANIER HAS SET FORTH A LEGALLY COGNIZABLE CLAIM FOR UNAUTHORIZED USE IN IN COUNT THREE

In Count Three of her complaint, Ms. Lanier has stated a claim for Harvard's unauthorized use of Renty and Delia's names and images in violation of M.G.L. c. 214, § 3A.[18] Harvard argues that Ms. Lanier's § 3A claim should be dismissed because: (1) she failed to "plausibly" allege their names and images were used for advertising or trade, and (2) such claim does not survive Renty and Delia's deaths. MTD, 15-19. Massachusetts pleading rules require that pleadings be simple, concise and direct. No technical form of pleading is required. Mass. R. Civ. P. Rule 8. All that is necessary is the defendant be

[17] See also See also *Hitachi High Techs. Am., Inc. v. Bowler*, 455 Mass. 261, 268-71 (2009) (Equitable restitution, in contrast to restitution at law, is designed "to impose a constructive trust or equitable lien on particular funds or property in the defendant's possession.")

[18] M.G.L. c. 214, § 3A provides in relevant part: "Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used such person's name, portrait or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him...."

put on notice of the theory of the plaintiff's case. *Pederson v. Time, Inc.*, 404 Mass. 14,17 (1989); *Madsen v. Erwin*, 395 Mass. 715, 726 (1985). All pleadings shall be construed so as to do substantial justice and adjudication on the merits, rather than technicalities or procedure and for in the general policy of these rules. See Rule 8(f); *De Loach v. Crowley's, Inc.*, 128 F.2d 378 (5th Cir. 1942); Victory v. Manning, 128 F.2d 415 (3d Cir. 1942). As mentioned above, the cover of Harvard' 2017 conference program related to "Universities and Slavery: Bound by History," bore Renty's image, as did the jumbotron hanging over the stage. Dean Cohen began her remarks by directing the audience to "look[ ] at the cover of your conference program...The cover features a portrait of a man named Renty..." – the one she called "invisible."[19] See photo at A.29. If this was not an unauthorized use, nothing is...[20, 21]

VII. MS. LANIER HAS SET FORTH LEGALLY COGNIZABLE CLAIMS FOR CONSTITUTIONAL VIOLATIONS IN COUNT FOUR

Ms. Lanier has asserted two constitutional claims against Harvard: one on her own behalf and one for Renty and Delia. See the Mass. constitution of 1780, Article I. By 1784, Massachusetts outlawed slavery. Seventy years later, in 1850, Harvard unconstitutionally and illegally, by its conduct (not just its speech), perpetuated slavery by using Renty and Delia to "scientifically" justify it because slavery was good for Harvard's business. Thus, not only were Harvard's actions directly related to the continued enslavement of Renty and Delia - clearly an unconstitutional deprivation of their liberty; but its actions lead directly to their photographs being taken and wrongfully retained – clearly an

[19] https://www.radcliffe.harvard.edu/event/2017-universities-and-slavery-conference.
[20] Note that Harvard's Ilisa Barbash (Visual Anthropology Curator at the Peabody Museum) is set to profit from the June 2020 release of a book entitled "To Make Their Own Way in the World: The Enduring Legacy of the Zealy Daguerreotypes.".
[21] Further, Harvard's argument regarding § 3A's lack of post-mortem application is based on nothing more than a wishful inference drawn from other states' statutes. Section 3A itself is silent on the matter and Massachusetts law regarding survival of actions states, contrary to Harvard's claim, that a cause of action for unauthorized use survives. See M.G.L. c. 228, § 1; *Harrison v. Loyal Protective Life Ins. Co.*, 379 Mass. 212 (1979). *Hanna v. Ken's Foods, Inc.*, 69 Mass. App. Ct. 1107, 1107, n4 (2007), cited by Harvard at MTD, 17, is of no precedential value to its argument.

unconstitutional deprivation of their property. Also, Ms. Lanier has been unconstitutionally deprived of the daguerreotypes as set forth herein. M.G.L. c. 12, § 11I, enacted to combat the serious problem of racial harassment by private parties, authorizes Ms. Lanier to sue Harvard for the deprivation of her constitutional rights, as well as the deprivation of Renty and Delia's rights. Harvard's argument that Ms. Lanier lacks standing to assert such claims on behalf of Renty and Delia lacks support.[22] To the contrary, Massachusetts's law of survival of actions, suggests that Ms. Lanier can bring these claims.[23]

VIII. MS. LANIER HAS TIMELY FILED HER CASE

As for the statute of limitations, Harvard argues that Ms. Lanier's claims are time-barred, as a matter of law, because her cause of action accrued either (1) in 2011, when she "alleges that she came to believe she was a descendant of Renty and Delia," or (2) in 2014 when a Peabody spokesperson told a reporter that Harvard denied her claim of ancestry.[24] Not surprisingly, Harvard has incorrectly applied the law once more. In mid-March 2011, Ms. Lanier corresponded with Faust to request her assistance to learn more about the slave daguerreotypes and to review Ms. Lanier's documentation to affirm that Renty and Delia were her ancestors. See A. 5, ¶ 4. Faust responded by thanking Ms. Lanier and telling her to sit tight, that Peabody personnel would be in touch with her if they discover any new relevant information. A. 5, ¶ 6. Ms. Lanier did not question Faust's answer. Rather, she waited patiently to hear from Harvard. As of March 2011, neither had Harvard denied Ms. Lanier's ancestry, nor had Ms. Lanier demanded the photographs from Harvard. Thus, for statute of limitations purposes, Ms. Lanier had not suffered any "injury" at this time.

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[22] Cf. *Brum v. Town of Dartmouth*, 428 Mass. 684 (1999); *Lopes v. Commonwealth*, 442 Mass 170 (2004) (no issue raised regarding representative capacity of plaintiffs.)

[23] See also definition of "person" in M.G.L. c. 12, §5A to include "as natural person, corporation, partnership, association, trust or other business or legal entity."

[24] MTD, 4, n7, 6-7, 12-14; M.G.L. c. 260, § 2A provides: "Except as otherwise provides, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues."

In 2014, an article appeared in the Norwich Bulletin, in which the Peabody's Gerardi was quoted as saying that Ms. Lanier has "given us nothing that directly connects her" to Renty – an untruth that is directly at odds with Harvard's concession in its motion to dismiss. A. 53. After that article was published, Ms. Lanier continued to cordially correspond with Faust and Harvard. A. 5-6, ¶¶ 6-16. In these exchanges, Faust did not deny Ms. Lanier's ancestry, nor did Ms. Lanier ask for the photographs. It was not until October 27, 2017, that Tammy demanded Harvard turn the photographs over to her. A. 7, ¶ 18. Harvard's response, through Gerardi on November 13, 2017, was tantamount to a refusal. A. 7, ¶ 19. When this occurred, Ms. Lanier's causes of action for replevin, conversion, intentional harm to property, and negligent infliction of emotional distress - *which are premised on Harvard's unlawful retention of property to which Ms. Lanier holds a possessory interest* – accrued.[25, 26] As for her constitutional claims, Harvard's refusal to return the daguerreotypes amounts to an ongoing violation, which also accrued in November 2017. *Flynn v. Associated Press*, 401 Mass. 776, 776-77 (1988). The actual determination of the time of accrual, is a fact question for the jury's determination. Since Ms. Lanier's cause of action was commenced on March 20, 2019, it was timely filed within three years of the date of accrual. Stamped letter. A. 55.

IX. CONCLUSION

For the foregoing reasons, Harvard's motion to dismiss must be denied.

[25] Plaintiff's equitable claims are governed by laches. See *Santagate*, 333-35.

[26] Massachusetts applies the discovery rule. See *Wheatley v. American Tel & Tel. Co.*, 418 Mass. 394, 398 (1994); *Albrecht v. Clifford*, 436 Mass. 706, 714-15 (2002); *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215 (2009); *Riley v. Presnell*, 409 Mass. 239, 247-48 (1991); *Lindsay v. Romano*, 427 Mass. 771, 774 (1998) (question of fact for jury).

RESPECTFULLY SUBMITTED,

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CERTIFICATION OF SERVICE

I, Sean K. McElligott, counsel for the plaintiff hereby certify that on February 19, 2020, I served a copy of the plaintiff's opposition to defendants' motion to dismiss upon all counsel of interest and/or their parties as reflected below.

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