SJC-13138

TAMARA LANIER vs. PRESIDENT AND FELLOWS OF HARVARD COLLEGE & others.[1]

Middlesex. November 1, 2021. - June 23, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Emotional Distress. Negligence, Emotional distress, Duty to prevent harm. Wanton or Reckless Conduct. Constitutional Law, Freedom of speech and press. Conversion. Intentional Conduct. Restitution. Personal Property, Ownership. Limitations, Statute of. Common Law. Massachusetts Civil Rights Act. Practice, Civil, Motion to dismiss.

Civil action commenced in the Superior Court Department on March 20, 2019.

A motion to dismiss was heard by Camille F. Sarrouf, Jr., J.

The Supreme Judicial Court granted an application for direct appellate review.

Joshua D. Koskoff, of Connecticut, & Ben Crump, of Florida (Carey B. Reilly & Preston Tisdale, of Connecticut, & Talley L. Kaleko & Jennifer L.W. Seymore, of Florida, also present) for the plaintiff.

[1] Harvard Board of Overseers, Harvard University, and Peabody Museum of Archaeology and Ethnology.

Anton Metlitsky, of New York (Victoria L. Steinberg also present) for the defendants.

The following submitted briefs for amici curiae:

John Roddy & Elizabeth Ryan for Eamon Moore Whalen & others, Jarrett Martin Drake, Ariella Aïsha Azoulay, Cornelia Bewersdorf, Dan Hicks & another, and Meredith McKinney & another.

Robert J. Ambrogi & Peter J. Caruso for Massachusetts Newspaper Publishers Association & another.

KAFKER, J. In 1850, the Harvard professor Louis Agassiz arranged to have daguerreotypes made of Renty Taylor and Delia Taylor, who were enslaved on a plantation in South Carolina.[2] Renty was ordered to disrobe. His daughter, Delia, was stripped naked to the waist. Their images were then captured in four daguerreotypes. These daguerreotypes were later used by Agassiz in an academic publication to support polygenism, a pseudoscientific racist theory for which Agassiz, a prominent scientist, was a vocal proponent.

Identifying herself as a descendant of Renty and Delia Taylor, the plaintiff, Tamara Lanier, contacted Harvard University seeking recognition of her ancestral connection to Renty and Delia and requesting information regarding Harvard's past and intended use of the daguerreotypes. When the university dismissed Lanier's claim of descent from Renty and Delia and ignored her requests, continuing to use and display

[2] Daguerreotypes were an early precursor to the modern photograph.

images of Renty without informing her, she brought this action against the defendants, the President and Fellows of Harvard College, the Harvard Board of Overseers, Harvard University, and the Peabody Museum of Archaeology and Ethnology (collectively, Harvard),[3] seeking relief for emotional distress and other injuries, as well as restitution of the daguerreotypes to her. A judge of the Superior Court granted Harvard's motion to dismiss, determining that each of the claims Lanier raised failed as a matter of law and that the facts as alleged in her second amended complaint did not plausibly suggest an entitlement to relief.

Because we conclude that the alleged facts, taken as true, plausibly support claims for negligent and indeed reckless infliction of emotional distress, we vacate the dismissal of the plaintiff's claim for negligent infliction of emotional distress and remand the case to the Superior Court to allow the plaintiff to amend her complaint to incorporate allegations of reckless infliction of emotional distress. The dismissal of Lanier's other claims, however, we affirm.[4]

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[3] The President and Fellows of Harvard College and the Harvard Board of Overseers govern Harvard University. The Peabody Museum of Archaeology and Ethnology is owned and controlled by Harvard University.

[4] We acknowledge the amicus briefs submitted by the descendants of Louis Agassiz; Jarrett Martin Drake; Ariella

Background. We summarize the factual allegations in the plaintiff's complaint, supplemented by information drawn from the undisputed documents referenced in that complaint. For the purposes of reviewing a motion to dismiss, we accept all factual allegations as true and draw all reasonable inferences in the plaintiff's favor. Shaw's Supermkts., Inc. v. Melendez, 488 Mass. 338, 339 (2021).

1. Louis Agassiz, polygenism, and the daguerreotypes of Renty and Delia Taylor. Harvard is a private educational institution founded in Cambridge in 1636. Louis Agassiz was a Swiss natural scientist whose primary area of study was comparative zoology. Employed by Harvard from 1847 until his death in 1873, Agassiz was also a proponent of polygenism, the pseudoscientific theory that racial groups lack a common biological origin and thus are fundamentally and categorically distinct. Consistent with his belief in polygenism, Agassiz delivered lectures in Boston and South Carolina asserting that Black and white people have separate origins. As a leader in the scientific community, with a reputation buttressed by his affiliation with Harvard, Aggasiz's views purported to give

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Aïsha Azoulay; Cornelia Bewersdorf; Dan Hicks and Nicholas David Mirzoeff; Meredith McKinney and the Harvard Student Coalition to Free Renty; and the Massachusetts Newspaper Publishers Association and New England First Amendment Coalition.

scientific legitimacy to the myth of white racial superiority and the perpetuation of American slavery.

In 1850, three years after joining the Harvard faculty, Agassiz embarked on a tour of South Carolina plantations in search of people he believed were racially "pure" Africans whom he could study as evidence to support polygenism. At the B.F. Taylor plantation in Columbia, Agassiz selected several individuals from among the enslaved population, including Renty and Delia Taylor, to be photographed using the daguerreotype process. Renty and Delia were taken to the studio of photographer J.T. Zealy, where Renty was ordered to disrobe and Delia was stripped naked to the waist, following which Zealy photographed them in various poses and from different angles, according to Agassiz's instructions.

The daguerreotypes were sent to Agassiz, who used them to support the polygenist conclusions he proposed in an academic article entitled "The Diversity of Origin of the Human Races." It appears that in 1936, the daguerreotypes were transferred to the holdings of the Peabody Museum of Archaeology and Ethnology (Peabody Museum), where they remained in obscurity. In 1976, the daguerreotypes were discovered in a wooden cabinet in a corner of the Peabody Museum's attic by a museum researcher. Although the researcher who made the discovery expressed concern for the families of the men and women depicted in the

daguerreotypes, Harvard did not act on the researcher's concerns. Rather, it simply claimed the daguerreotypes as its property. The discovery itself attracted national media attention, as the daguerreotypes were believed to be the "earliest known photographs of American slaves."[5]

2. The plaintiff's family history, her contacts with Harvard, and Harvard's use of the daguerreotypes. The plaintiff's mother, Mattye Thompson, often told the story of their family, which began with a man named Renty Taylor, also known as Papa Renty or "the Black African." Papa Renty was an indomitable man who defied slavery's tyranny by teaching himself and others to read and by conducting secret Bible readings and study on the plantation where he was enslaved. As a reminder to never forget the family history that began with Renty Taylor, Mattye Thompson repeatedly told her children and grandchildren, "Always remember we're Taylors, not Thompsons."

In 2010, as Thompson was nearing the end of her life, she implored her children to document their family history. After Thompson's death, the plaintiff set out to fulfill her wish, searching online resources and libraries and archives in South Carolina and speaking to anyone who might have information about

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[5] Rensberger, Earliest Pictures of Slaves Found in Harvard Attic, N.Y. Times, May 31, 1977, https://www.nytimes.com/1977/05/31/archives/earliest-pictures-of-slaves-found-in-harvard-attic.html [https://perma.cc/RU6V-JLAZ].

their ancestors. Based on this research, Lanier concluded that she is the direct lineal descendant of Renty Taylor.

During her research, Lanier learned about the daguerreotypes of Renty and Delia Taylor at Harvard. In March 2011,[6] she wrote to Drew Gilpin Faust, the president of Harvard University at the time,[7] and stated that she had "historical and [United States] Census information" that "confirm[ed]" that two of the individuals depicted in the daguerreotypes were her ancestors. Lanier asked "to learn more about the slave daguerreotypes and how they have [been] or will be used," and for "a formal review of [her] documentation" to verify that Renty and Delia Taylor were indeed her ancestors.

In her response, Faust thanked the plaintiff for sharing her story. She noted that the plaintiff had been in touch with staff members at the Peabody Museum and had been given the opportunity to view the daguerreotypes. Faust also stated that the museum was "involved in an ongoing project regarding those daguerreotypes" and that the same staff members had "agreed to be in touch with you directly if they discover any new relevant

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[6] The plaintiff's complaint identifies the date of her initial correspondence with Faust as May 2011, but her subsequent affidavit filed with the Superior Court, and the attached correspondence to Faust, both list the date of that communication as March 17, 2011.

[7] Faust, we note, is a distinguished historian of the antebellum South and the Confederacy.

information." But Harvard never contacted Lanier about any ongoing or future projects involving the daguerreotypes, nor did it contact her regarding the verification of her lineage and connection to the daguerreotypes.

In March 2014, Lanier's hometown newspaper, the Norwich Bulletin, published an article about the daguerreotypes and the plaintiff's research into her family connection with Renty and Delia. Both Lanier and a Peabody Museum staff member were interviewed about the plaintiff's connection to the daguerreotypes. In the Norwich Bulletin article, the director of external relations for the Peabody Museum was quoted as saying of Lanier: "She's given us nothing that directly connects her ancestor to the person in our photograph."

In 2017, Renty Taylor's image from one of the daguerreotypes at issue was used on the cover of the thirtieth anniversary edition of "From Site to Sight," a volume on anthropology and photography published and marketed by Harvard University Press. Harvard also used the image at a national academic conference it hosted on universities' historical connections with slavery in March of that year. At the conference, which the plaintiff attended with her own daughters, Renty's image was projected on a large screen onstage and was also featured on the front cover of the conference program, where it was accompanied by the following caption:

> "The man you see on the program's front cover, Renty, lived and worked as a slave in South Carolina in 1850, when his photograph was taken for the Harvard professor Louis Agassiz as a part of Agassiz's scientific research. While Agassiz earned acclaim, Renty returned to invisibility."

According to the plaintiff's complaint, this description "took [her] breath away," not only because it omitted the "racist and dehumanizing" nature of Agassiz's work, but also because it "relegate[d] Renty to 'invisibility,'" in "flagrant disregard for [her] repeated attempts to share Renty's story and restore a measure of the humanity that Agassiz [had] stripped from him."

Prompted by these events, Lanier sent another letter to Faust on October 27, 2017, in which she demanded that the daguerreotypes of Renty and Delia be "immediately relinquished" to her. Harvard responded to her letter on November 13, 2017, without acknowledging her demand.

The plaintiff then commenced this action in the Superior Court on March 20, 2019. She ultimately alleged seven counts against Harvard: replevin, conversion, unauthorized use of a portrait or picture, violation of the Massachusetts Civil Rights Act, intentional harm to a property interest, negligent infliction of emotional distress, and equitable restitution.[8]

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[8] With respect to the count for unauthorized use of a portrait or picture, Lanier asserted a claim against Harvard for using the daguerreotypes of Renty and Delia Taylor for advertising and commercial purposes without consent, in violation of G. L. c. 214, § 3A. The motion judge dismissed

When the motion judge granted Harvard's motion to dismiss the plaintiff's second amended complaint pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), this appeal followed. We subsequently granted the plaintiff's application for direct appellate review.

Discussion. 1. Standard of review. We review the grant of a motion to dismiss de novo, accepting as true all well-pleaded facts alleged in the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor, and determining whether the allegations plausibly suggest that the plaintiff is entitled to relief. See Sacks v. Dissinger, 488 Mass. 780, 783 (2021); Shaw's Supermkts., Inc., 488 Mass. at 339.

In undertaking this review, we also may consider uncontested documents that the plaintiff has referenced in her complaint, especially given that Lanier has attached such documents to her affidavit in opposition to Harvard's motion to dismiss and both parties have discussed them in their briefing. See Ryan v. Mary Ann Morse Healthcare Corp., 483 Mass. 612, 614

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this claim on the ground that the statute does not provide that the right to sue survives the death of the person whose picture or portrait has been used. We need not discuss this claim further because the plaintiff's briefs fail to present any argument challenging the motion judge's ruling. See, e.g., Campatelli v. Chief Justice of the Trial Court, 468 Mass. 455, 477 (2014); Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019) ("The appellate court need not pass upon questions or issues not argued in the brief").

n.5 (2019); Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 224 (2011), S.C., 466 Mass. 156 (2013); Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n.4 (2004).

In addressing Lanier's various claims here, we separate claims for emotional distress from the property-related claims, namely replevin, conversion, intentional harm to a property interest, and equitable restitution, as we conclude that the former survive the motion to dismiss but that the latter do not.

2. Negligent infliction of emotional distress. To recover for negligently inflicted emotional distress, a plaintiff must prove "(1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case." Payton v. Abbott Labs., 386 Mass. 540, 557 (1982). The requirement of physical harm is interpreted to include a broad range of symptoms; what is required is only enough "objective evidence" to "corroborate [plaintiffs'] mental distress claims." Sullivan v. Boston Gas Co., 414 Mass. 129, 137-138 (1993). Qualifying symptoms include those that "could be classified as more 'mental' than 'physical,'" provided that they go beyond "mere upset, dismay, humiliation, grief and anger." Gutierrez v. Massachusetts Bay Transp. Auth., 437 Mass. 396, 412 (2002), S.C., 442 Mass. 1041 (2004), quoting Sullivan, supra at 135-139.

To establish the first element of negligence, the plaintiff must show that the defendant owed a duty to the plaintiff and that the defendant's failure to exercise reasonable care resulted in a breach of that duty. See Helfman v. Northeastern Univ., 485 Mass. 308, 315, 327 (2020); Conley v. Romeri, 60 Mass. App. Ct. 799, 801 (2004) ("It is fundamental that there must be a showing of a duty of care owed to the plaintiff, because [t]here can be no negligence where there is no duty" [quotation and citation omitted]). Unless Harvard owed a duty of care to Lanier, then, she has no claim to relief for negligent infliction of emotional distress.

"Whether a defendant has a duty of care to the plaintiff in the circumstances is a question of law . . . , to be determined by reference to existing social values and customs and appropriate social policy." O'Sullivan v. Shaw, 431 Mass. 201, 203 (2000), citing Davis v. Westwood Group, 420 Mass. 739, 743 (1995). We conclude that Harvard's present obligations cannot be divorced from its past abuses. In light of Harvard's complicity in the horrific actions surrounding the creation of the daguerreotypes, once Lanier communicated her understanding that the daguerreotypes depicted her ancestors and provided supporting documentation, we discern in both existing social values and customs and appropriate social policy a duty on Harvard's part to take reasonable care in responding to her.

Indeed, Harvard itself voluntarily undertook to apprise Lanier of any new information regarding the daguerreotypes, which would include information about her lineage from the individuals depicted in the daguerreotypes, and about how, going forward, the daguerreotypes would be used and displayed. We emphasize, however, that Harvard's duty did not arise simply out of its voluntary representation to Lanier that it would keep her informed. Cf. Cottam v. CVS Pharmacy, 436 Mass. 316, 323 (2002) ("A . . . person or entity . . . may voluntarily assume a duty that would not otherwise be imposed on it . . ."). Its duty of care arose rather from what Lanier communicated to the university and from its involvement in the horrific conduct by which the daguerreotypes were created. To reiterate: given the university's horrific, historic role in the coerced creation of the degrading daguerreotypes, once Lanier approached Harvard as a descendant of the individuals depicted in these daguerreotypes, provided documentation to that effect, and requested further information, a duty to respond to her requests with due care was triggered.

Based on this duty, we conclude that the facts as alleged regarding Harvard's ongoing treatment of Lanier since her 2011 letter do not preclude a finding that Harvard has committed a breach of its duty of care to her. Without any prior notice to Lanier, Harvard publicly dismissed her claim of an ancestral

connection to Renty and Delia in her local newspaper. The university also failed to contact her when it subsequently used Renty's image on the cover of a book it published, and prominently featured that same image in materials connected with a conference that it hosted. Harvard also rebuffed her attempts to tell "Renty's story," in the words of the complaint. In sum, despite its duty of care to her, Harvard cavalierly dismissed her ancestral claims and disregarded her requests, despite its own representations that it would keep her informed of further developments.

Moreover, Lanier has alleged that as a result of Harvard's mistreatment of her, she suffered emotional distress that produced physical symptoms of insomnia and nausea. A fact finder could determine both that this distress was the actual and foreseeable consequence of Harvard's conduct toward the plaintiff and that her distress was a reasonable reaction to that conduct.

Taken together, then, Lanier's various factual allegations are sufficient to "raise a right to relief" on her claim of negligent infliction of emotional distress "above the speculative level." Dunn v. Genzyme Corp., 486 Mass. 713, 721 (2021), quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

Moreover, a cause of action for negligent infliction of emotional distress is not, on the alleged facts, untimely. As a tort action, a claim for negligent infliction of emotional distress must be brought "within three years next after the cause of action accrues." G. L. c. 260, § 2A. "Under our discovery rule, a cause of action for negligence accrues when 'a plaintiff knows or reasonably should know that [he or she] has sustained appreciable harm as a result of a defendant's negligence.'" Khatchatourian v. Encompass Ins. Co. of Mass., 78 Mass. App. Ct. 53, 57 (2010), quoting Massachusetts Elec. Co. v. Fletcher, Tilton & Whipple, P.C., 394 Mass. 265, 268 (1985). Although Lanier's complaint alleges that she suffered emotional distress because of Harvard's treatment of her, she does not indicate when she sustained this harm.

Nevertheless, even if she began to suffer emotional distress from Harvard's conduct more than three years before she commenced this action in March 2019, Lanier's claim is not time barred given the continuing nature of Harvard's negligent response to her requests. We have explained that where the tort complained of "has perdured for a period longer than the allowable period for bringing an action," then although "the plaintiff is barred from recovering damages for the time antedating the allowable period," nonetheless the "action is not barred" because the "continuing nature of the wrong keeps alive

the right to bring the action." Crocker v. Townsend Oil Co., 464 Mass. 1, 10 (2012), quoting J.R. Nolan & B. Henry, Civil Practice § 15.6, at 358 (3d ed. 2004).

3. Reckless infliction of emotional distress. Although a closer question, we also conclude that the plaintiff has adequately alleged facts to plausibly support a claim of reckless infliction of emotional distress. In the course of setting out allegations in support of her claim of negligent infliction of emotional distress, Lanier alleged that Harvard's conduct toward her was "undertaken in . . . reckless disregard for how it would affect [her]." Although she expressly sought relief only for negligent infliction of emotional distress specifically, we discern plausible support for a claim of reckless infliction of emotional distress in this and other allegations that Lanier has made.

In reaching this conclusion, we are guided by the understanding that this court's task in reviewing the allowance of a motion to dismiss is to determine "whether the factual allegations in the complaint are sufficient, as a matter of law, to state a recognized cause of action or claim, and whether such allegations plausibly suggest an entitlement to relief." Dunn, 486 Mass. at 717. For a claim to survive a motion to dismiss, the complaint need not recite that specific cause of action so long as the factual allegations are sufficient to support such a

claim. See Rafferty v. Merck & Co., 479 Mass. 141, 161 (2018) (vacating dismissal of suit by generic drug consumer against brand-name drug manufacturer and directing Superior Court to grant leave to plaintiff to amend his complaint to allege claim of reckless rather than negligent failure to warn); Cheney v. Automatic Sprinkler Corp. of Am., 377 Mass. 141, 150 (1979) (giving plaintiff opportunity to amend complaint where court "indicat[ed] for the first time . . . the relevant considerations concerning" his claim). Allowing a claim to go forward for further factual development is particularly appropriate when the claim for relief rests on a "fact-intensive and novel theory of recovery." Baker v. Wilmer Cutler Pickering Hale & Dorr LLP, 91 Mass. App. Ct. 835, 850 (2017), citing Ritchie v. Department of State Police, 60 Mass. App. Ct. 655, 663 n.14 (2004).

a. Elements of a reckless infliction of emotional distress claim. To recover on a claim of reckless infliction of emotional distress, a plaintiff must establish four elements. First, the plaintiff must show that the defendant "knew or should have known that emotional distress was the likely result of his conduct." Agis v. Howard Johnson Co., 371 Mass. 140, 144-145 (1976), citing Restatement (Second) of Torts § 46 comment i (1965). See Roman v. Trustees of Tufts College, 461 Mass. 707, 717 (2012), quoting Sena v. Commonwealth, 417 Mass.

250, 264 (1994) ("a plaintiff must show . . . that the defendant . . . should have known that his conduct would cause . . . emotional distress"). Second, the plaintiff must establish that the defendant's conduct was "extreme and outrageous." Agis, supra at 145, quoting Restatement (Second) of Torts § 46. Third, the defendant's conduct must have caused the plaintiff's distress. Agis, supra. Finally, the plaintiff must have suffered "severe" emotional distress, "of a nature 'that no reasonable man could be expected to endure it.'" Id., quoting Restatement (Second) of Torts § 46 comment j.

We conclude that Lanier has alleged sufficient facts relating to each of these elements to "raise a right to relief above the speculative level." Dunn, 486 Mass. at 721, quoting Iannacchino, 451 Mass. at 636. As explained above in connection with Lanier's negligent infliction of emotional distress claim, her allegations, if proved, are sufficient to establish that Harvard should have known that its conduct toward the plaintiff would likely result in emotional distress and that its conduct was the factual and legal cause of her distress. The fact that this distress has, as alleged, been manifested in symptoms such as nausea and insomnia is enough to plausibly suggest that Lanier has suffered severe distress.

The remaining issue, requiring further analysis, is whether Harvard's treatment of Lanier may qualify as extreme and outrageous conduct.

b. Extreme and outrageous conduct. The bar is high for a defendant's conduct to count as "extreme and outrageous" for purposes of an intentional or reckless infliction of emotional distress claim. "Conduct qualifies as extreme and outrageous only if it 'go[es] beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community.'" Polay v. McMahon, 468 Mass. 379, 386 (2014), quoting Roman, 461 Mass. at 718. To qualify as extreme and outrageous, then, a defendant's actions must flout the most basic community standards of decency and propriety.

We have no doubt that Agassiz's actions in 1850 -- having Renty and Delia taken, stripped, and forced to pose for the daguerreotypes -- would have met these requirements. What is directly at issue here is, however, the separate question whether Harvard's conduct toward a descendant of Renty and Delia nearly 170 years later satisfies these stringent requirements. Nevertheless, as emphasized in connection with Lanier's negligent infliction of emotional distress claim, Harvard's present actions cannot be divorced from its past misconduct. Because Harvard's historic complicity in the objectionable

origins of the daguerreotypes informs the legal significance of its contemporary treatment of Lanier, we analyze them together.

In 1850, slavery had long been abolished in Massachusetts. See Commonwealth v. Aves, 18 Pick. 193, 209 (1836) (holding that slavery had been abolished in Massachusetts no later than 1780, when Massachusetts Declaration of Rights became effective). If Agassiz had arranged for two persons to be taken against their will to a photography studio in Massachusetts, where they were then forced to disrobe and pose for daguerreotypes to be made of them, he should have faced criminal liability for an illegal conspiracy, whether to batter or to kidnap.[9]

In South Carolina, where the daguerreotypes were created, slavery was still recognized as a lawful institution. Under this institution, "founded in force, not in right," Aves, 18 Pick. at 215, persons who were enslaved had no legal right to control their own bodies and labor, being instead reduced to

[9] "[A] combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose" was recognized as itself "an offence punishable by the laws of this Commonwealth." Commonwealth v. Hunt, 4 Met. 111, 122, 123 (1842). Physically taking another and confining him or her without consent was just such a criminal or unlawful purpose. See Commonwealth v. Blodgett, 12 Met. 56, 79 (1846) (by statute, it was punishable criminal offense to, "without lawful authority," "forcibly seize and confine, or . . . inveigle or kidnap any other person"); Commonwealth v. Clark, 2 Met. 23, 24 (1840) ("touching of another's person, wilfully or in anger, without his consent," was, "unless justifiable," unlawful "battery").

"mere chattel[s] personal" with no legal protections against battery or kidnap. State v. Maner, 20 S.C.L. (2 Hill) 453, 454 (1834). Taking advantage of the continued existence of slavery in South Carolina, Agassiz therefore apparently faced no legal impediments in procuring Black people who were enslaved there to be stripped and photographed to further his pseudoscientific theories that Black and white people do not share a common origin and that the former are biologically inferior to the latter.

Seized and made to pose for the camera under conditions in which no valid consent could have been given, Renty and his daughter suffered not only a gross interference with their bodily autonomy but also an invasion of their personal privacy and an affront to their dignity. Any subsequent display and dissemination by Agassiz and his associates of the daguerreotypes resulting from this sordid episode, by exposing to public gaze degrading and dehumanizing images of Renty and Delia, would have compounded these harms.

In sum, Agassiz's actions in 1850 were extreme and outrageous. Harvard has not suggested otherwise. Indeed, there are few acts more extreme and outrageous than forcing another held in a condition that precludes giving valid consent to pose half-naked for a photograph, and subsequently displaying and exploiting the resulting images for one's own ends. Moreover,

Agassiz's extreme and outrageous conduct was undertaken while he served as a Harvard professor and in his role as an academic researcher.

Even long after the deaths of Renty and Delia Taylor, the degrading and dehumanizing daguerreotypes that Agassiz arranged to have made of them retained their capacity to wound. The Peabody Museum researcher who discovered the daguerreotypes in 1976 seemed to recognize this, expressing concern for the descendants of the individuals depicted in the daguerreotypes, apparently aware that such descendants would be intensely interested in and concerned about the past mistreatment, and the ongoing degrading display, of their half-naked ancestors. But despite being notified of Lanier's belief in her lineage from Renty and Delia, as well as receiving documentation supporting this belief, at no point did Harvard engage meaningfully with her to verify her potential family connection to the individuals portrayed in the daguerreotypes. Instead of engaging personally with Lanier, Harvard ignored her and -- without informing her -- expressed its skepticism about her assertion of descent through a public statement given by the director of external relations for the Peabody Museum to Lanier's local newspaper that, from Harvard's perspective, she had given the museum "nothing that directly connect[ed] her ancestor to the person in [the museum's] photograph." Harvard also went on to repeatedly use

the degrading daguerreotype of Renty in ways that exposed his image to public gaze, without at any time consulting with or even informing Lanier before doing so, or allowing her an opportunity to tell Renty's story.[10]

As we have already observed, Harvard's past complicity in the repugnant actions by which the daguerreotypes were produced informs its present responsibilities to the descendants of the individuals coerced into having their half-naked images captured in the daguerreotypes. Whether Harvard's response to Lanier's inquiries about the daguerreotypes resulted in a breach of basic community standards of decency cannot be evaluated without taking into account its historic responsibility for Agassiz's role in the horrific circumstances by which those very daguerreotypes were created.

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[10] As thoughtfully explained in the concurrence by the Chief Justice and in the amicus brief submitted by Jarret Martin Drake, Harvard's actions in this regard starkly depart from standards of archival practice widely recognized today. In its Code of Ethics for Archivists, the Society of American Archivists (SAA), which is North America's largest organization of archivists, affirms the importance of respecting privacy in archival practice. The SAA's Code of Ethics recognizes the importance of "ensur[ing] that privacy and confidentiality are maintained, particularly for individuals and groups who have had no voice or role in collections' creation, retention, or public use." The Code also insists on "the respectful use of culturally sensitive materials" in archival collections, including by appropriate "consult[ation]" with stakeholders. Society of American Archivists, Core Values Statement and Code of Ethics, https://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics#code_of_ethics [https://perma.cc/KY75-LLJ2].

When the plaintiff informed Harvard that the daguerreotypes of Renty and Delia Taylor that it had in its possession, and that it used according to its own purposes, were in fact photographic images of her ancestors, Harvard was put on notice that she would reasonably be greatly concerned about how the images -- created through coercion and depicting her ancestors in a degrading, dehumanizing light -- would be used, displayed, and disseminated. What was at stake for her was the continued exposure and exploitation of images of her ancestors, by the very institution complicit in the coerced and invasive creation of those images. In these circumstances, basic community standards of decency dictate that the institution complicit in the extreme and outrageous actions by which the degrading daguerreotypes of Lanier's ancestors were produced should, in the words of her complaint, "willingly make amends" for its past actions or at least "stop perpetuating the wrenching pain of its past" by engaging in good faith with her, both about her ancestral connection to the individuals depicted in the daguerreotypes, and about how these degrading and dehumanizing images would be used going forward, particularly in public displays. Because, as alleged, Harvard did just the opposite,

its actions plausibly rose to the level of extreme and outrageous conduct.[11]

4. First Amendment limitations on tort liability. Although we are persuaded that the plaintiff's allegations have plausibly suggested an entitlement to relief for infliction of emotional distress, any right, as well as any remedy that might ultimately be awarded, must be carefully delineated to respect the protections for freedom of speech under the First Amendment to the United States Constitution. This may limit what activity by Harvard may be taken into account in determining the university's liability for negligently or recklessly inflicting emotional distress on Lanier. In particular, even if shameful, Harvard's commentary on the daguerreotypes and Agassiz's role in their creation, presented in the context of an academic conference, would appear to be protected speech under the First Amendment; this includes Harvard's own characterization in the conference program of Agassiz's work as scientific research and of Renty as being rendered invisible.

We emphasize that the First Amendment "looks beyond written or spoken words as mediums of expression." Hurley v. Irish-

[11] For the reasons discussed in connection with the plaintiff's claim of negligent infliction of emotional distress, a claim of reckless infliction of emotional distress would also not be barred by the three-year statute of limitations for tort actions.

American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995).[12] Imposing tort liability for how photographs -- including daguerreotypes -- are used to express and communicate ideas therefore raises First Amendment concerns. See ETW Corp. v. Jireh Publ., Inc., 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment . . . includes . . . photographs . . .").

Whether and to what extent Harvard's expressive use of or commentary on the daguerreotypes can form the basis of liability for infliction of emotional distress depends on whether the speech activities at issue deal with matters of public concern or with private matters. A matter of public concern is a "matter of political, social, or other concern to the community" or "a subject of general interest and of value and concern to the public." Snyder v. Phelps, 562 U.S. 443, 453 (2011), first quoting Connick v. Myers, 461 U.S. 138, 146 (1983), then quoting San Diego v. Roe, 543 U.S. 77, 84 (2004). By contrast, "purely private" matters are those that "concern[] no public issue." Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc., 472 U.S. 749, 759, 762 (1985).

[12] Photography is a medium that attracts First Amendment protection because it is a "significant medium for the communication of ideas" and an "organ of public opinion." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

Speech on a public matter "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Snyder, 562 U.S. at 452. Specifically, such speech may not be the basis of liability for infliction of emotional distress, even if that speech is extreme and outrageous, as "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' . . . views." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988). Where, however, "matters of purely private significance are at issue, First Amendment protections are often less rigorous." Snyder, supra. With respect to speech of only private concern, then, there is no First Amendment impediment to holding defendants liable in tort for causing emotional distress.

Distinguishing which aspects of Harvard's interactions with the plaintiff qualify as speech of public rather than private concern is a fact-intensive question that cannot be fully resolved at this early stage of proceedings. See Snyder, 562 U.S. at 453, quoting Dun & Bradstreet, Inc., 472 U.S. at 761 ("Deciding whether speech is of public or private concern requires us to examine the 'content, form, and context' of that speech, 'as revealed by the whole record'").

Nevertheless, the broad strokes of the distinction between the public and private aspects of Harvard's expressive activities are already apparent at this early stage. We note, first, that the daguerreotypes at issue here are significant in understanding the history of American slavery. At the time of their discovery in 1976, the daguerreotypes attracted public attention as the earliest known photographic images of individuals enslaved in the United States. Today, they continue to serve as damning proof of the evils of American slavery itself, and of Harvard's own complicity in this evil history, especially when the daguerreotypes are contextualized with the full facts surrounding their creation. The history and legacy of slavery in this country is, without doubt, a matter of public concern. Indeed, confronting the history of slavery and its ongoing impacts and lingering harms is a matter of utmost importance in the public life of our nation. For this reason, Harvard's expressive use of the daguerreotypes to characterize the history of American slavery and comment on its past and present significance is speech on a matter of public concern that is insulated from tort liability by stringent First Amendment protections. This is true even if Harvard was complicit in this evil history, and not describing and accepting responsibility for its own misconduct.

On the other hand, Harvard's dismissive and disrespectful response to Lanier's inquiries about her ancestral connection to Renty and Delia, and about how the images of her ancestors would be used, touches on matters solely of interest to the specific litigants in this case, not to the public at large. These personal interactions between Harvard and Lanier "did not address a public concern" and hence may constitutionally incur tort liability. Snyder, 562 U.S. at 453, quoting Roe, 543 U.S. at 84.

5. Property claims. Although we discern claims for infliction of emotional distress that survive dismissal, we conclude that Lanier's property claims were properly dismissed. She has argued that because the daguerreotypes at issue were created in the context of "multiple tortious and criminal violations" of Renty and Delia's rights, it was Renty and Delia, not Agassiz or Harvard, who held possessory rights over the daguerreotypes from the time they were made. She further argues that as a descendant of Renty and Delia, she is entitled to possession of the daguerreotypes. We determine that Lanier's property claims do not survive dismissal for two reasons. To begin with, the claims were not timely brought. On the more complicated question whether, on the merits, Lanier has alleged sufficient facts to plausibly make out her property claims, we

determine that she has no cognizable property interest in the daguerreotypes.

Lanier's claims of replevin, conversion, and intentional harm to a property interest are subject to the three-year statute of limitations for tort and replevin actions. See G. L. c. 260, § 2A ("actions of tort . . . and actions of replevin, shall be commenced only within three years next after the cause of action accrues").[13] Lanier's equitable restitution claim is likewise subject to the three-year limitations period in G. L. c. 260, § 2A. Where an equitable claim such as restitution is not explicitly covered in the statutes of limitations, we look to the analogous claim at law to determine the applicable statute of limitations. See Sacks, 488 Mass. at 791 n.14 (claim for unjust enrichment predicated on tortious conduct presumed to be governed by statute of limitations for torts). Here, Lanier's equitable restitution claim is premised on the allegation that although she is the "rightful owner" of the daguerreotypes of Renty and Delia, Harvard has unlawfully

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[13] The text of G. L. c. 260, § 2A, explicitly includes "actions of replevin." The statute also applies to claims for conversion, which is a tort action. See Patsos v. First Albany Corp., 433 Mass. 323, 327 n.6 (2001). The plaintiff's claim for intentional harm to a property interest, which has not to date been recognized as a cause of action in Massachusetts, is premised on Restatement (Second) of Torts § 871 (1979). Assuming but not deciding that such a cause of action is available in Massachusetts, it would be a tort action subject to G. L. c. 260, § 2A.

retained possession of them. Her equitable restitution claim is thus analogous to her replevin claim, for which the limitations period is three years.

Under the discovery rule, a plaintiff's cause of action accrues, and the limitations period begins to run, "when the plaintiff discovers or with reasonable diligence should have discovered that (1) he has suffered harm; (2) his harm was caused by the conduct of another; and (3) the defendant is the person who caused that harm." Harrington v. Costello, 467 Mass. 720, 727 (2014).

With respect to her property claims, the alleged harm suffered by Lanier is Harvard's wrongful possession of and control over the daguerreotypes. Her March 2011 letter to Faust indicated her awareness by that time of the circumstances surrounding the creation of the daguerreotypes and that Harvard was in possession of them; it also demonstrated that she already believed then that she descends from Renty and Delia. The March 2014 article in the Norwich Bulletin again revealed Lanier's knowledge at the time that Harvard was in possession of daguerreotypes depicting individuals she believed to be her ancestors. In addition, the statement by the Peabody Museum's director of external relations reported in the article reasonably put her on notice that Harvard rejected her assertion

of descent and hence any property rights she might have in the daguerreotypes.

Consequently, the plaintiff's factual allegations and exhibits indicate that, at the latest by March 2014, she had discovered or reasonably should have discovered that Harvard wrongfully took and retained possession of the daguerreotypes of Renty and Delia, which, she believed, were rightfully hers. As such, under the discovery rule, her property-based causes of action accrued no later than March 2014. Her property claims filed in March 2019 were therefore barred by the relevant statutes of limitations.

As for the merits of her property claims, absent the extraordinary circumstances surrounding the creation of the daguerreotypes, Lanier would have no property rights in them. In general, the photographer and not the subject owns "the negative [and] the photographs printed from it." Thayer v. Worcester Post Co., 284 Mass. 160, 163-164 (1933). Accord Ault v. Hustler Magazine, Inc., 860 F.2d 877, 883 (9th Cir. 1988), overruled on other grounds by Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990) (photograph is "the property of the photographer"). Likewise, those whose likenesses are reproduced in a photograph do not, simply for that reason, have a property interest in it. See Continental Optical Co. v. Reed, 119 Ind. App. 643, 652 (1949) ("the subject of a photograph does not own

the negative or have any property rights therein"). In the ordinary course then, the daguerreotypes would be the property of the person who made them or who contracted for them to be made, who could then freely transfer ownership over them to others. A descendant of someone whose likeness is reproduced in a daguerreotype would not therefore inherit any property right to that daguerreotype.

Even in egregious circumstances like those described here, property transfers to private parties have not been ordered. Consider G. L. c. 272, § 105 (b), which provides that whoever "willfully photographs, videotapes or electronically surveils another person who is nude or partially nude" when that person is in a "place and circumstance" where he or she "would have a reasonable expectation of privacy in not being so photographed," and "without that person's knowledge and consent," is criminally liable. General Laws c. 272, § 105 (c), further prohibits willfully and knowingly "disseminat[ing]" a "visual image" of another person taken in violation of § 105 (b), when done "without consent" of the person depicted. This statute recognizes, and seeks to protect by the imposition of criminal penalties, individuals' privacy interests in avoiding the nonconsensual photographic reproduction by another of their nude or partially nude likeness and the subsequent public distribution of any such invasive images. See Commonwealth v.

Wassilie, 482 Mass. 562, 570 (2019) (purpose of § 105 [b] is to "protect the victim's privacy and to penalize the invasion of that privacy"). Nevertheless, it notably does not provide for the conferral of ownership rights in the offending photographs or video footage on the persons depicted in them or their descendants.

Although there are also statutory provisions for forfeiture of property because of that property's connection to criminal activity, these provisions are mostly offense-specific and likewise do not order property transfers to private parties. They instead require forfeiture of the property implicated in the criminal activity to the Commonwealth. See, e.g., G. L. c. 90, § 24W (providing for forfeiture to Commonwealth of motor vehicles owned by persons convicted of drunk driving offenses); G. L. c. 269, § 10 (e) (providing for confiscation of firearm by Commonwealth upon conviction of illegal possession of firearm); G. L. c. 94C, § 47 (providing for forfeiture to Commonwealth of property used or intended for use in illegal manufacture, delivery, and distribution of controlled substances); G. L. c. 265, § 56 (providing for forfeiture to Commonwealth of property used or intended for use in human trafficking).[14]

[14] We note that G. L. c. 276, §§ 1 and 3, provide for property seized as evidence during a search to be returned to the rightful owners if the property was stolen, embezzled,

Here, we have neither a criminal conviction nor a specific statute providing for forfeiture or transfer of property under the factual circumstances alleged. The most closely analogous statutes, as explained above, would require forfeiture of the property associated with the criminal activity to the Commonwealth, not the transfer of such property to a private party. Lanier has also not identified any judicial decisions providing for compelled forfeiture or transfer to a private party in these circumstances,[15] nor are we aware of any such decisions.

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obtained by false pretenses, or "otherwise obtained in the commission of a crime," and for the seized property to be forfeited "as the public interest requires." However, these provisions only apply to property seized in the course of a search conducted "in the execution of a search warrant." There was no criminal investigation of Agassiz, and no search warrant that issued targeting him or his property. General Laws c. 276, §§ 1 and 3, therefore do not provide any authority for transferring the daguerreotypes to Lanier.

[15] In Commonwealth v. Wiseman, 356 Mass. 251, 258-259 (1969), cert. denied, 398 U.S. 960 (1970), S.C., 360 Mass. 857 (1971), this court acted in very exceptional circumstances to limit the full possessory rights of a filmmaker to use and distribute film footage he had made, for the sake of the privacy interests of those depicted in the film. The Wiseman court determined that because the film displayed mentally ill inmates of a correctional facility "in situations which would be degrading to a person of normal mentality and sensitivity," such as being portrayed nude or while undergoing distressing symptoms of mental illness, distribution of the film to the general public would work an "indecent intrusion into the most private aspects of the lives of [the inmates depicted]." Id. at 258. For that reason, the court enjoined showing the film to the general public, while allowing viewings by specialized

6. The creation of a new common-law right. We can also identify no support in the common law of this Commonwealth or any other State for the new cause of action that Justice Cypher's concurrence would create to allow descendants of persons who were enslaved to obtain possession of artifacts that resulted from the enslavement of their ancestors.

As more thoroughly explained in the concurrence by the Chief Justice, the new right proposed in Justice Cypher's concurrence does not derive from common-law reasoning, which is a precedent-based, evolutionary decision-making process providing both for continuity and change.[16] Rather, a right and remedy, without precedent, would be created anew.[17]

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audiences. It did not, however, require the filmmaker to transfer possession of the film to those portrayed in it or confer ownership rights on them. Indeed, it allowed the filmmaker to charge for viewings of the film by specialized audiences as permitted under the injunction. Id. at 262-263.

[16] See B.N. Cardozo, The Nature of the Judicial Process 67 (1921) (common law develops through judges "extend[ing] or restrict[ing]" "existing rules," giving due weight to "certainty and uniformity and order and coherence" of system of legal rules); F. Schauer, Thinking Like a Lawyer 119 (2009) ("common-law rules" are "developed incrementally and by accretion over time"); D.A. Strauss, The Living Constitution 37, 38 (2010) (common law develops "over time, not at a single moment" by "emerg[ing] from [an] evolutionary process through the development of a body of precedents").

[17] Cf. Strauss, supra at 38 ("Present-day interpreters" of common law may contribute to its evolution, "but only by continuing the evolution, not by ignoring what exists and starting anew").

Although arising out of a case, the proposed new cause of action is in certain ways more comparable to remedial schemes providing for the repatriation of cultural items or for reparations that have hitherto been accomplished only by legislative action. See, e.g., Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 (legislation providing for repatriation of Native American human remains and cultural items held by Federal agencies and institutions receiving Federal funds to lineal descendants and culturally affiliated tribes). Notably, perhaps the most serious attempt to date to achieve a program of reparations with the force of law for the historic enslavement of Black Americans has taken the form of a bill introduced in the United States Congress. See Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. Rep. 40, 117th Cong., 1st Sess. (2021).[18] Such open-ended power to create and assign new legal rights and duties properly belongs to the Legislature, not the judiciary. See 1 L.H. Tribe, American Constitutional Law 982 (3d ed. 2000) ("The open-ended discretion to choose ends is the essence of legislative power"). For this reason, and for

[18] For an overview of the history of the struggle for reparations for Black Americans, including the contrast between the strategy of achieving reparations through litigation and strategies seeking legislative solutions, see J.C. Torpey, Making Whole What Has Been Smashed: On Reparations Politics 107-132 (2006).

the reasons explained in our earlier discussion of Harvard's liability for causing Lanier emotional distress, we look to existing tort law to provide the appropriate remedy here.

7. Massachusetts Civil Rights Act claim. In her complaint, Lanier alleged that Harvard, acting through administrators appointed pursuant to the State Constitution, buttressed the racist ideology underlying slavery and otherwise advocated for a slave-based economy in the period "between approximately 1846 and 1861." Because by then this court had held that slavery was unlawful under the Massachusetts Constitution, Lanier contends that Harvard's advocacy for slavery, particularly those of its efforts that relied on the use of Renty Taylor's image, amounted to a violation of his State constitutional rights, which entitles her to relief under the Massachusetts Civil Rights Act, G. L. c. 12, § 11I.

The motion judge properly granted Harvard's motion to dismiss this claim. The Massachusetts Civil Rights Act creates a private right of action for "[a]ny person whose exercise or enjoyment . . . of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with." G. L. c. 12, § 11I. However, a plaintiff may only bring such an action "in his own name and on his own behalf." Id. The allegations in Lanier's complaint that Agassiz used Renty's image to support pseudoscientific theories

of racial hierarchy pertain to an alleged interference with Renty's constitutional rights, not to any interference with her own rights. Because there is no provision in the Massachusetts Civil Rights Act that allows Lanier to bring a claim for a violation of the State constitutional rights of her ancestor that took place more than one and one-half centuries ago, her State civil rights claim cannot succeed on the alleged facts.

Conclusion. We vacate the motion judge's allowance of Harvard's motion to dismiss Lanier's claim for negligent infliction of emotional distress, and remand the case to the Superior Court with directions to allow the plaintiff to amend her complaint to incorporate a claim of reckless infliction of emotional distress. We affirm, however, the motion judge's dismissal of the property claims and the Massachusetts Civil Rights Act claim.

So ordered.

BUDD, C.J. (concurring). I agree with the court that Tamara Lanier has stated a claim for negligent infliction of emotional distress (NIED), and that she should be permitted to amend her complaint to add a claim for reckless infliction of emotional distress (RIED). I further agree that her remaining claims properly were dismissed. I write separately to emphasize that the alleged conduct of the defendants (collectively, Harvard) here clearly transgressed moral standards broadly adopted by archival institutions. It thus ran afoul of Harvard's duty of care to Lanier and could be found to be extreme and outrageous. Finally, although I am not persuaded that Justice Cypher's proposed cause of action is the proper course, I remain open to the possibility that a legal theory could be developed by which plaintiffs similarly situated to Lanier could be afforded fuller relief than that which the court affords Lanier today.

1. I agree with the court's holding that Harvard's exploitation of the enslavement of Lanier's ancestors forges a special relationship between Harvard and Lanier that obligates Harvard to exercise reasonable care in responding to Lanier's claim that the daguerreotypes in its possession depict her ancestors. Ante at . As the court explains, because Lanier plausibly alleges facts that would support a finding that Harvard woefully failed to satisfy this duty of care, thereby

causing Lanier emotional distress -- an undoubtedly reasonable reaction in these circumstances, with physical manifestations -- Lanier has stated a claim for NIED against Harvard. Id. at . See Payton v. Abbott Labs., 386 Mass. 540, 557 (1982).

I further agree that Lanier has stated a claim for RIED against Harvard because the facts that she alleges additionally would support a finding that Harvard "knew or should have known that emotional distress was the likely result of [its] conduct," this conduct was "extreme and outrageous," and the distress that it caused Lanier was "severe." Agis v. Howard Johnson Co., 371 Mass. 140, 144-145 (1976), quoting Restatement (Second) of Torts § 46 & comment j (1965).[1] Ante at .

The court's conclusion that each of these claims legally is viable rests on its evaluation of the ethical standards of our modern community. These standards are the guidepost for determining that Harvard owes a special duty of care to Lanier, see Correa v. Schoeck, 479 Mass. 686, 693 (2018), quoting Jupin v. Kask, 447 Mass. 141, 143 (2006) ("duty of care is derived from 'existing social values and customs and appropriate social policy'"), as well as for determining that its conduct could be found "extreme and outrageous," see Polay v. McMahon, 468 Mass.

[1] I also agree with the court that neither an NIED nor an RIED claim is time barred because of the continuing nature of Harvard's tortious response to Lanier's outreach. Ante at note 11.

379, 386 (2014), quoting Roman v. Trustees of Tufts College, 461 Mass. 707, 718 (2012) ("Conduct qualifies as extreme and outrageous" if "regarded as atrocious, and utterly intolerable in a civilized community"). I write separately to emphasize that Harvard's alleged conduct here indeed transgresses contemporary standards and values adopted by museums and research institutions nationally and internationally, including by Harvard itself.

As the court notes, ante at note 10, the Society of American Archivists (SAA), North America's largest organization of archivists, has published a code of ethics that urges archivists to "establish procedures and policies to protect the interests of the . . . individuals . . . whose public and private lives and activities are documented in archival holdings." Society of American Archivists, Core Values Statement and Code of Ethics, "Privacy" (rev. Aug. 2020), https://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics#code_of_ethics [https://perma.cc/KY75-LLJ2]. The SAA code of ethics additionally encourages archivists to "consult with those represented by records" in order to "promote the respectful use of culturally sensitive materials in their care." Id.

The American Alliance of Museums (AAM), of which Harvard's Peabody Museum of Archaeology and Ethnology is a member,[2] similarly has published an ethical code that provides that "competing claims of ownership that may be asserted in connection with objects in [a museum's] custody should be handled openly, seriously, responsively and with respect for the dignity of all parties involved." See American Alliance of Museums, AAM Code of Ethics for Museums, "Collections" (amended 2000), https://www.aam-us.org/programs/ ethics-standards-and-professional-practices/code-of-ethics-for-museums [https://perma.cc/BK9D-QUAD].

The International Council of Museums (ICOM) likewise has a code of ethics, which "reflects principles generally accepted by the international museum community" and is presented as a "minimum standard for museums." See International Council of Museums, ICOM Code of Ethics for Museums (2017) (preamble), https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf [https://perma.cc/4TLR-J3Y3]. The code observes:

> "Museum collections reflect the cultural and natural heritage of the communities from which they have been derived. As such, they have a character beyond that of ordinary property, which may include strong affinities with national, regional, local, ethnic, religious or political identity. It is important therefore that museum policy is responsive to this situation."

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[2] See American Alliance of Museums, Find a Member Museum, https://ww2.aam-us.org/about-museums/find-a-museum [https://perma.cc/HJV8-Y7WC].

Id. at 33. In line with this guiding principle, the ICOM ethical code directs that "[w]here museum activities involve a contemporary community or its heritage, . . . [r]espect for the wishes of the community involved should be paramount." Id. at 34.

These various ethical codes show that museums and research institutions across the United States and the world realize their special ethical obligations to the communities from whom their collections have too frequently been wrongfully extracted. They demonstrate a uniform commitment to proactive examination of the provenance of held artifacts and to respectful and transparent consideration of competing ownership claims to these artifacts.

This is so even where these institutions hold valid legal title to the artifacts at issue. For example, the Smithsonian Institution (Smithsonian) has created an ethical returns working group that is in the process of developing an institution-wide policy for scrutinizing its collection practices and addressing any wrongs. See McGlone, Why the Smithsonian Is Changing Its Approach to Collecting, Starting with the Removal of Looted Benin Treasures, Wash. Post, Jan. 6, 2022 (McGlone); Stevens, Smithsonian to Return Most of Its Benin Bronze Collection to Nigeria, N.Y. Times, Mar. 8, 2022 (Stevens). The working

group's focus is not on technical questions of legal title, but "on ethics." McGlone, supra. According to Kevin Gover, the undersecretary for museums and culture at the Smithsonian, the institution is "going beyond legal title and asking, should we own this, knowing the circumstances under which it came into our ownership?" Stevens, supra. Similarly, Christine Mullen Kreamer, the deputy director of the African Art Museum and a member of the Smithsonian's ethical returns working group, stated that the institution is scrutinizing "past collecting practices in light of current ethical concerns," prioritizing "[e]ngagement with communities," and "giving voice to individuals, communities and institutions that have not always had a voice." McGlone, supra. In connection with this effort, the Smithsonian recently removed eighteen Benin Kingdom Court Style works from its cases -- which had been looted by British soldiers during a raid of Benin City (in modern Nigeria) -- and is working to repatriate the pieces to Nigeria, although it is not legally obligated to do so. See id.; Stevens, supra.

As another example, in 2010 the Museum of Fine Arts, Boston (MFA), realized that four Seventeenth Century tapestries in its possession once had been owned by an art dealership in Berlin, Germany, managed by Jakob and Rosa Oppenheimer, who were Jewish. See Museum of Fine Arts Boston, Ownership Resolutions, https://www.mfa.org/collections/provenance/ownership-resolutions

[https://perma.cc/4699-VMD4]. The Oppenheimers had fled Germany to escape Nazi persecution, and the art from their dealership subsequently had been sold at an auction. Id. On learning this history, the MFA contacted the Oppenheimers' heirs, who allowed the MFA to retain the tapestries as part of a settlement agreement. Id.

Particularly illuminating here, a case study published by the SAA describes how an archival institution dealt with the discovery that it possessed photographs of a Sun Dance, "a sacred, week-long ceremony that was distinctive of the Great Plains tribes during the [E]ighteenth and [N]ineteenth centuries." E.M. Ryan, Society of American Archivists, Case Studies in Archival Ethics, Case #3: Identifying Culturally Sensitive American Indian Material in a Non-tribal Institution, at 3 (Sept. 2014), https://www2.archivists.org/sites/all/files/AmericanIndianMaterial_CEPC-CaseStudy3.pdf [https://perma.cc/2QWX-M4PR]. The institution surmised that "the images were most likely taken without the knowledge or consent of the tribal members," and therefore contacted the director of the Shoshone-Bannock Tribes' language and cultural preservation department to arrange a meeting to discuss "proper handling of the images given their sensitive content." Id. at 4. In the meantime, the institution removed the sensitive photographs from its online digital collection. Id. After discussion with tribal leaders,

the institution agreed to restrict public access to the sensitive photographs, which remained in the institution's files only to be viewed by "[f]amilies of those depicted in the images." Id. at 5.

These three examples show how archival institutions deal respectfully with individuals who are connected to pieces in their collections and prioritize those individuals' wishes for how the pieces should be used or displayed, particularly where the pieces were created or acquired under conditions of duress, violence, or nonconsent. Such practices reflect a shared recognition on the part of these institutions that to disregard such individuals' concerns would be to signal that the inequitable power structures that enabled the archival institution to possess the contested pieces live on. To send this signal is itself a form of violence.[3]

Harvard's alleged conduct here inflicted just this sort of violence on Lanier. It brushed her off, publicly dismissed her ancestral claim, and continued to display and profit from the daguerreotypes without Lanier's input or involvement. This departs from every ethical code quoted supra. By failing to

[3] Indeed, when the Smithsonian removed the looted Benin pieces from its shelves, it replaced them with photographs and a sign that states in part: "We recognize the trauma, violence and loss such displays of stolen artistic and cultural heritage can inflict on the victims of those crimes, their descendants, and broader communities." McGlone, supra. See Stevens, supra.

engage respectfully and transparently with Lanier when she approached the university to explain her connection to the daguerreotypes, Harvard transgressed archival institutions' values, selfishly putting itself and its agenda before any effort to reckon with its past or make amends in the present.

Indeed, Harvard transgressed what it now upholds as its own values. Harvard recently released a report detailing the university's historic ties to slavery and recommending reparative action. See Presidential Committee on Harvard & the Legacy of Slavery, Harvard & the Legacy of Slavery (Apr. 25, 2022), https://radcliffe-harvard-edu-prod.s3.amazonaws.com/b2c5a41d-8bfd-4d04-933c-858670839e50/HLS-whole-report_FINAL_2022-04-25FINAL-ua.pdf [https://perma.cc/52W5-X8YA]. The report proclaims: "Today, Harvard University . . . embraces reckoning with its past," and is "seeking to make amends for these wrongs." Id. at 5, 56. It specifically describes Louis Agassiz's racist work, id. at 33-38, including his procurement of the Zealy daguerreotypes, id. at 35-36, and acknowledges that Agassiz's research "produce[d] devastating consequences in the [Nineteenth] and [Twentieth] [C]enturies," id. at 11, among them, "intellectual justification for continued subjugation" of Black people in the United States. Id. at 29. The report declares that "[t]he damage caused by Harvard's entanglements with slavery and its legacies warrant

action," even in "the absence of a legal requirement" to act. Id. at 57. The report presents recommendations "that seek to remedy harms to descendants," id. at 58, in ways that are "visible, lasting, grounded in a sustained process of engagement, and linked to the nature of the damage done," id. at 57. One such recommendation is to "support direct descendants" of enslaved individuals who labored on Harvard's campus or were enslaved by Harvard staff through "dialogue" and "relationship building," with an aim of enabling these descendants to "recover their histories" and "tell their stories." Id. at 60.

Lanier's ancestors did not labor on Harvard's campus or suffer from enslavement directly by Harvard staff, but it is without question -- as detailed in the Harvard report, id. at 29, 33-38, and described by the court, ante at -- that Harvard, through its agent Agassiz, exploited Renty and Delia's (and others') enslaved condition to extract from them value then used in furtherance of a white supremacist agenda. Thus, the spirit of the report would appear to encompass dialogue and relationship building with the descendants of those pictured in the Zealy daguerreotypes, as well as pursuit of a visible and lasting remedy to the harm worked by Agassiz and Harvard against them. Lanier suggests such a remedy. Harvard's refusal even to discuss respectfully with Lanier her request to possess the daguerreotypes of Renty and Delia flies in the face of its

aspirational report. Harvard's conduct thus belies its purported commitment to enable descendants to "recover their histories," to "tell their stories," or to repair meaningfully the harm it has done to them.

For the reasons stated by the court, Harvard's alleged treatment of Lanier is inconsistent with its special duty of care to her -- a duty derived from values espoused by museums and other archival institutions across the country and world, and to which Harvard itself pays lip service -- and a jury soundly could find that it was "extreme and outrageous."

2. Lanier alleges that the Zealy daguerreotypes depict her enslaved ancestors and are possessed by Harvard -- the very institution whose exploitation of her ancestors enabled the daguerreotypes' creation. Harvard's continued retention of the daguerreotypes despite Lanier's competing claim to them is patently unjust. However, this court cannot remedy a perceived wrong based solely on a strongly held moral belief. Cf. Holland v. Florida, 560 U.S. 631, 649 (2010), quoting Lonchar v. Thomas, 517 U.S. 314, 323 (1996) ("courts of equity 'must be governed by rules and precedents no less than the courts of law'"); State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 436 (R.I. 2008), quoting B.N. Cardozo, The Nature of the Judicial Process, at 141 (1921) (judges "exercise a discretion informed by tradition, methodized

by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'").

Courts are constrained to evaluate the matters that are brought before them, and the arguments raised by either side must be grounded in our constitutional, statutory, or common law. Although we do not abandon our moral instincts and sense of justice when we attempt to resolve them, we are obligated to work within the bounds of precedent together with principles that are adapted incrementally to new circumstances that come before us. See, e.g., Mohr v. Commonwealth, 421 Mass. 147, 159 (1995), quoting Roe v. Catholic Charities of the Diocese of Springfield, 225 Ill. App. 3d 519, 524 (1992) ("common law traditionally grows" by extending established common-law doctrines, not through "dramatic, radical departure[s] from the well-established common law"); PM Group Life Ins. Co. v. Western Growers Assur. Trust, 953 F.2d 543, 547 (9th Cir. 1992) ("the common law decisionmaking process is inherently incremental in nature;" it "calls for devising a rule that does not stray too far from the existing regime"); Rafaeli, LLC v. Oakland County, 505 Mich. 429, 472–473 (2020) ("The common law is . . . incremental in adapting to society's changing circumstances, developing gradually to reflect our policies, customs, norms, and values"); R.J. Aldisert, Logic for Lawyers 8 (3d ed. 1997) (Aldisert) ("The genius of the common law is that it proceeds

empirically and gradually, testing the ground at every step . . .").

As explained by the court, none of the arguments that Lanier sets forth for possession of the daguerreotypes fits within our common-law precedent or any incremental adaptation thereto, nor do they have a statutory or constitutional basis. These arguments, therefore, provide no ground for the specific relief that the plaintiff seeks by way of claims under property law.

Further, although I fully support Justice Cypher's effort to create a new common-law cause of action, I am not persuaded that the one she proposes is anchored sufficiently in legal precedent -- either our own or that of other jurisdictions.[4] I agree that courts are charged with, among other things, remedying injustices. And to be sure, Justice Cypher's

[4] Contrast, e.g., Mohr, 421 Mass. at 156-161 (recognizing cause of action for wrongful adoption after analyzing cases from other jurisdictions that had done same and analogizing to existing cause of action under our common law); Viccaro v. Milunsky, 406 Mass. 777, 780-782 (1990) (recognizing cause of action for wrongful birth after surveying cases demonstrating that "almost all courts have allowed" such claims); Alberts v. Devine, 395 Mass. 59, 66-69, cert. denied sub nom. Carroll v. Alberts, 474 U.S. 1013 (1985) (recognizing cause of action for violation of physician-patient duty of confidentiality after determining that most courts to have considered question had provided for similar cause of action); Agis, 371 Mass. at 142-144 (recognizing cause of action for intentional or reckless infliction of severe emotional distress after analyzing "history of actions for emotional distress").

suggested course of action comports with an intuitive sense of what is just and fair. However, an appeal to the abstract notion of justice by itself cannot justify the judicial creation of new rights and remedies. Courts are required to reason from analogy to existing, concrete applications of the law. See Aldisert, supra at 8. This is not to say that the common law is stagnant or change unwelcome. Indeed, "[t]he genius of the common law . . . is its capacity for orderly growth," see Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. 374, 376 (1968), quoting Lum v. Fullaway, 42 Haw. 500, 502 (1958), and "[n]o litigant is automatically denied relief solely because [s]he presents a question on which there is no Massachusetts judicial precedent." Alberts v. Devine, 395 Mass. 59, 68 (1985), cert. denied sub nom. Carroll v. Alberts, 474 U.S. 1013 (1985). See Lewis v. Lewis, 370 Mass. 619, 628 (1976). But common-law growth must have some order to it if we are to avoid rule by bare judicial instinct.[5]

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[5] The development of the common-law right to privacy exemplifies how the common law properly evolves in an orderly fashion, expanding upon recognized legal rights after discerning an underlying principle that they reflect. See Pavesich v. New England Life Ins. Co., 122 Ga. 190, 193 (1905) (leading case by State court of last resort recognizing common-law right of privacy; "[t]he entire absence . . . of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, . . . but such absence . . . is not conclusive of the question as to the existence of the right"); Lawrence v. A.S. Abell Co., 299 Md. 697, 699-702 (1984) (overview of this historical development).

My concern with Justice Cypher's cause of action is not that it is unprecedented per se, but that she does not explain how she gets from the very abstract legal principles that she invokes to the very specific cause of action that she proposes, other than by looking to the facts of the instant case. Although this case indeed presents novel facts, the legal issues presented lie at the intersection of bedrock areas of common law: tort, property, and equity. Our existing case law has much to say on these issues. Comparisons to recognized legal claims could be made, and deviations justified.[6] Although this is how common-law development normally works, Justice Cypher's concurrence is not reasoned this way. Contrast Agis, 371 Mass. at 142-144; Pavesich, 122 Ga. at 193. Because I am not persuaded that Justice Cypher's proposed cause of action has a proper foundation in our common law, I cannot join her concurrence.[7]

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[6] I sketch out a rough outline, infra, of one potential approach, using an unjust enrichment claim as a comparator. As Justice Cypher's cause of action is unlike any recognized common-law claim, it eludes such comparison altogether.

[7] However, I disagree with the court that Justice Cypher's proposed cause of action violates separation of powers principles. Ante at . The adjudication of common-law claims for equitable transfers of property to remedy discrete injustices on a case-by-case basis falls squarely within the ambit of the judicial branch. Although Justice Cypher's proposed cause of action is analogous to certain provisions of the Native American Graves Protection and Repatriation Act of

By declining to join Justice Cypher's opinion today, I do not mean to discourage future litigants similarly situated to Lanier from advancing novel theories for recovery. To the contrary, I am open to the possibility that a viable legal theory could be advanced that would permit this court to provide a plaintiff similarly situated to Lanier with an adequate remedy for a harm such as that which Lanier here alleges. Cf., e.g., Alberts, 395 Mass. at 68-69 (newly recognizing cause of action for violation of physician-patient duty of confidentiality).

Essentially, Lanier seeks an equitable transfer of property from Harvard to her, based on Harvard's having obtained the property through wrongdoing to her ancestors. This sounds in unjust enrichment. See Salamon v. Terra, 394 Mass. 857, 859 (1985), quoting Restatement (First) of Restitution § 1 (1937)

1990, see 25 U.S.C. § 3005(c), this does not imply that it is beyond the reach of our common-law powers. Compare Alberts, 395 Mass. at 67–68 ("G. L. c. 233, § 20B, creates an evidentiary privilege as to confidential communications between a psychotherapist and a patient. The fact that no such statutory privilege obtains with respect to physicians generally and their patients does not dissuade us from declaring that in this Commonwealth all physicians owe their patients a duty [of confidentiality], for violation of which the law provides a remedy . . ." [citation omitted]). Cf. J.A. Pojanowski, Private Law in the Gaps, 82 Fordham L. Rev. 1689, 1743 (2014) ("When, as in most federal cases today, courts are understood to lack general common law powers, the inapplicability of any statute entails that a plaintiff fails to state a claim. In state courts . . . that conclusion does not follow. Rather, the court could treat the question as one governed by private law norms operating within the court's common law residuary").

("A person who has been unjustly enriched at the expense of another is required to make restitution to the other"); Restatement (Third) of Restitution and Unjust Enrichment § 44 (2011) ("A person who obtains a benefit by conscious interference with a claimant's legally protected interests [or in consequence of such interference by another] is liable in restitution as necessary to prevent unjust enrichment . . ."). In the Commonwealth, we have typically used unjust enrichment for quasi contractual matters or to undo property transfers tainted by fraud, bad faith, or violation of a duty, see, e.g., Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 644 (2013); Maffei v. Roman Catholic Archbishop of Boston, 449 Mass. 235, 246 (2007), cert. denied, 552 U.S. 1099 (2008), neither of which fits the circumstances before us. However, there may also be "cases in which the remedy for unjust enrichment gives the plaintiff something -- typically, the defendant's wrongful gain -- that the plaintiff did not previously possess." Restatement (Third) of Restitution and Unjust Enrichment § 1 comment a. Here, although Renty and Delia never possessed the daguerreotypes, Harvard acquired them through wrongdoing against Renty and Delia, and unjust enrichment principles dictate that this wrongful gain be disgorged.

The problem is, to whom? Unjust enrichment supports transferring to the wronged party the defendant's wrongfully

acquired gain. But here we have before us not Renty and Delia, but their descendant, Lanier. Under traditional conceptions, Lanier would appear to lack standing to bring an unjust enrichment claim against Harvard based on harms inflicted by Harvard against her ancestors. See In re African-American Slave Descendants Litig., 471 F.3d 754, 759-761 (7th Cir. 2006), cert. denied, 552 U.S. 941 (2007). Cf. Schumann v. Loew's Inc., 144 N.Y.S.2d 27, 29 (1955) ("the few cases which have permitted recovery for the publication of the name or picture of a deceased person . . . contain no suggestion that . . . descendants of a person whose name or portrait is published without authorization . . . would possess a good cause of action for violation of a right of privacy" [quotation omitted]).

Our Commonwealth courts are not limited by the justiciability restrictions of art. III of the Federal Constitution. Contrast In re African-American Slave Descendants Litig., 471 F.3d at 759-761. Still, we generally adhere to traditional standing principles, and there are sound reasons undergirding that adherence. See Slama v. Attorney Gen., 384 Mass. 620, 624 (1981) ("To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury"). For an unjust enrichment claim to be viable in these circumstances, we would need reasoned argumentation for why an ancestor of an enslaved person should be permitted to sue

on behalf of and recover in the place of her enslaved ancestor. Compare Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 447, S.C., 484 Mass. 1029 (2020) (discussing representative standing); Planned Parenthood League of Mass., Inc. v. Bell, 424 Mass. 573, 578, cert. denied, 522 U.S. 819 (1997) (same). There may be further challenges to the type of unjust enrichment claim I have gestured at here, or other arguments undergirding a different remedy altogether. I note simply that we have yet to be presented with such a nuanced theory,[8] and that, if we were, it would receive careful and rigorous consideration, as we consider all arguments that come before us.

[8] Ideally, such a theory would be advanced by a litigant; courts properly are wary of developing the law without "a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflict and demanding interests." Flast v. Cohen, 392 U.S. 83, 97 (1968), quoting United States v. Fruehauf, 365 U.S. 146, 157 (1961).

CYPHER, J. (concurring). 1. Introduction. The plaintiff, Tamara Lanier, brought this action against the defendants, President and Fellows of Harvard College, the Harvard Board of Overseers, Harvard University, and the Peabody Museum of Archaeology and Ethnology (collectively, Harvard), seeking possession of daguerreotypes[1] of her ancestors, Renty and Delia,[2] who were enslaved in South Carolina in the 1800s. The plaintiff also sought monetary damages, but the primary form of relief requested in her complaint and in the case before this court was Harvard's surrender of the daguerreotypes to her. Although I agree with the court that Harvard may be liable for negligent or reckless infliction of emotional distress, I disagree that the plaintiff has no interest in the daguerreotypes that this court may recognize. Thus, I write separately to discuss the legal

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[1] A daguerreotype was a precursor to the modern photograph. The daguerreotype process was the first publicly available and commercially successful photographic-like process. The daguerreotype process created "a highly detailed image on a sheet of copper plated with a thin coat of silver without the use of a negative." Library of Congress, The Daguerreotype Medium, https://www.loc.gov/collections/daguerreotypes/articles-and-essays/the-daguerreotype-medium [https://perma.cc/DB76-SQLN]. Exposure times initially ranged from three to fifteen minutes, but improvements in the process "soon reduced the exposure time to less than a minute." Id. Due to the lack of negative, each daguerreotype contains a unique image. Id.

[2] Renty and Delia were enslaved on the plantation of B.F. Taylor and thus share the last name "Taylor." I therefore refer to them by their first names.

avenue by which I believe the plaintiff could be permitted to pursue possession of the daguerreotypes.

To survive a motion to dismiss pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), the factual allegations in the complaint must "'plausibly suggest[]' . . . an entitlement to relief." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 554, 557 (2007). The "factual allegations 'must be enough to raise a right to relief above the speculative level.'" Dunn v. Genzyme Corp., 486 Mass. 713, 721 (2021), quoting Iannacchino, supra. Massachusetts is a notice pleading jurisdiction. Dunn, supra at 719. "Under the Massachusetts practice of notice pleading, 'there is no requirement that a complaint state the correct substantive theory of the case.'" Berish v. Bornstein, 437 Mass. 252, 269 (2002), quoting Gallant v. Worcester, 383 Mass. 707, 709 (1981). All that is required under Mass. R. Civ. P. 8 (a) (1), 365 Mass. 749 (1974), is "a short and plain statement of the claim . . . which affords fair notice to the defendant of the basis and nature of the action against him" (quotation and citation omitted). Berish, supra. Taking the plaintiff's allegations as true and drawing "every reasonable inference in favor of the plaintiff" for the purposes of deciding a motion to dismiss, Heath-Latson v. Styller, 487 Mass. 581, 582 n.3, 584 n.8 (2021), I think that the factual allegations in the

plaintiff's complaint plausibly suggest that she is entitled to possession of the daguerreotypes under a common-law cause of action that I understand to be within the authority of this court to recognize.

2. The need for a remedy. The making of the daguerreotypes was a horrific harm to Renty and Delia, inflicted by their enslavers and by Louis Agassiz, a Harvard professor who ordered that the daguerreotypes be created. I agree with the court that the judge properly dismissed the specific property causes of action pleaded in the plaintiff's complaint based on our existing jurisprudence. However, if the plaintiff ultimately prevails on the surviving tort causes of action articulated by the court, the trial court will not be able to award the plaintiff with possession of the daguerreotypes, which was the plaintiff's primary reason for bringing suit.

Further, the plaintiff's claim is no ordinary claim that can be rooted in our traditional jurisprudence. As the court concludes, our current law does not provide the plaintiff with an identifiable cause of action whereby she may seek possession of the daguerreotypes. However, this court should not ignore that this fact derives from the legal fiction, inflicted on Renty and Delia, "that turn[ed] humans to chattel property." Washington, Critical Race Feminist Bioethics: Telling Stories

in Law School and Medical School in Pursuit of "Cultural Competency," 72 Alb. L. Rev. 961, 962 (2009).

Although it is easy to point to American chattel slavery as the direct instrument of Renty's and Delia's disenfranchisement, repressive legislation such as Black Codes and Jim Crow laws, and the indifference of many white Americans to the plight of Black Americans, systemically perpetuated the deprivation of rights of formerly enslaved individuals and their descendants, and led to their continued exclusion from many legal protections, even after slavery was legally abolished. See D.A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II 111 (2008) ("In the eyes of the vast majority of white Americans, the refusal of the southern states [after the Civil War] to fully free or enfranchise former slaves and their descendants was not an issue worthy of any further disruption to the civil stability of the United States"); C. Galland, Love Cemetery: Unburying the Secret History of Slaves 81 (2007) ("the 'store system' [and] debt peonage" were "very much a part of the Jim Crow era" and were "often as restrictive and cruel as the institution of slavery itself"); N.I. Painter, Creating Black Americans: African-American History and Its Meanings, 1619 to the Present 154 (2007) (Painter) ("In three court cases decided between 1895 and 1903, the [United States] Supreme Court ruled against

[B]lack men who had sued their states for racist disenfranchisement . . . . Taken together, these decisions of the . . . Supreme Court signaled the end of the larger reconstruction by supplying the legal basis for the segregation, disenfranchisement, and racial degradation that characterized the South -- and much of the North -- during the first half of the [T]wentieth [C]entury"). As a result, the plaintiff now faces a legal system several generations later devoid of a sufficient remedy for the injuries and injustices she has faced as a descendant of enslaved Africans and African-Americans.

3. The common law. "The courts of this Commonwealth enjoy common law powers." Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 545-546 (1998). Where the common law is "founded . . . upon 'justice, fitness and expediency,'" and is "designed to meet and be susceptible of being adapted 'to new institutions and conditions of society'" and "new usages and practices, as the progress of society in the advancement of civilization may require,'" Commonwealth v. Gallo, 275 Mass. 320, 333 (1931), quoting Commonwealth v. Temple, 14 Gray 69, 74 (1859), it can and should provide a remedy where none currently exists.

According to former Supreme Judicial Court Chief Justice Oliver Wendell Holmes,

> "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course,

> considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis."

Gregory v. Ashcroft, 501 U.S. 452, 466 (1991), quoting O. Holmes, The Common Law 35-36 (1881).

More recently, former Chief Justice Ralph D. Gants remarked:

> "We are responsible [for] and the sole arbiter of the common law of Massachusetts. The common law of Massachusetts is ours. We are responsible for it. If it turns out that it does not work, it is our fault. That is part of our obligations. And ultimately within the rubric of all those three things that we do [interpreting the Massachusetts Constitution, interpreting Massachusetts statutes and regulations, and developing the common law], probably the single most important thing . . . is that it is our obligation to correct miscarriages of justice. Our job here is ultimately to do justice. If [we] are writing a decision and [we] are finding it to be unjust, that should cause [us] to think harder as to whether or not that decision is compelled, perhaps by controlling authority by the United States Supreme Court. Not by controlling authority from us, because if we did something which turns out now in retrospect to be unjust, it is our obligation to change it. So we don't walk away from miscarriages of justice. We don't generally say, 'well, we rely upon the importance of continuity, so if it was an injustice that occurred a while ago, we're just going to leave it be.' Our obligation is to correct a miscarriage of justice whenever it happens, and that is part of what is bred in our bone."

R.D. Gants, C.J., Welcome Remarks (Aug. 31, 2020).

As the Supreme Court has stated, "the common law is susceptible of growth and adaptation to new circumstances and

situations, and . . . the courts have power to declare and effectuate what is the present rule in respect of a given subject . . . . The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions." Dimick v. Schiedt, 293 U.S. 474, 487 (1935), citing Funk v. United States, 290 U.S. 371 (1933). "The common law, unlike a constitution or statute, provides no definitive text; it is to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community." Gregory, 501 U.S. at 466. The common law "draw[s] 'its inspiration from every fountain of justice'" and has "a 'flexibility and capacity for growth and adaptation' which [is] 'the peculiar boast and excellence' of the system" (citation omitted). Funk, supra at 383.

This court also finds its authority to prevent and correct injustices through its equitable powers. This court "has full equity jurisdiction," Gargano v. Pope, 184 Mass. 571, 574 (1904), "of all cases and matters cognizable under the general principles of equity jurisprudence," Parkway, Inc. v. United States Fire Ins. Co., 314 Mass. 647, 651 (1943), and has "broad and flexible powers to fashion remedies,"[3] Recinos v. Escobar,

[3] "Equitable remedies are flexible tools to be applied with the focus on fairness and justice." Demoulas v. Demoulas, 428 Mass. 555, 580 (1998).

473 Mass. 734, 740 (2016), quoting Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1), 424 Mass. 430, 463 (1997). See G. L. c. 214, § 1. "These powers . . . extend to actions necessary to afford any relief in the best interests of a person under their jurisdiction." Recinos, supra at 741, quoting Matter of Moe, 385 Mass. 555, 561 (1982). "A fundamental maxim of general equity jurisprudence is that equity will not suffer a wrong to be without a remedy." Recinos, supra.

Although once separate, today, common law and equity have merged throughout the history of American law such that the common law now is in many ways based on equitable principles. See Bone, Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules, 89 Colum. L. Rev. 1, 10 (1989) (discussing merger of law and equity); Chapter One: The Intellectual History of Unjust Enrichment, 133 Harv. L. Rev. 2077, 2090 (2020), quoting C.L. Roberts, The Restitution Revival and the Ghosts of Equity, 68 Wash. & Lee. L. Rev. 1027, 1032 (2011) ("The law is . . . littered with 'remnants of equitable tests that continue to operate as prerequisites for access to certain remedies'"). Compare Recinos, 473 Mass. at 741 ("equity will not suffer a wrong to be without a remedy"), with Shields v. Gerhart, 163 Vt. 219, 223 (1995) ("the common law . . . provides a remedy for

every wrong"). Therefore, we may develop the common law by recognizing new causes of action when warranted.[4] Compare Labonte v. Giordano, 426 Mass. 319, 322 (1997) (new cause of action may be warranted where insufficient remedies available under current law and plaintiff presents sufficient reasons for expanding those remedies by creating new cause of action), with Fletcher v. Dorchester Mut. Ins. Co., 437 Mass. 544, 547, 550

[4] Other courts have similarly expanded the common law in their jurisdictions to appropriately include new causes of action where existing remedies were lacking. For a thorough overview of decisions in other jurisdictions that have recognized the inherent authority of courts to recognize new causes of action, whether constitutionally rooted or arising at common law, see Binette v. Sabo, 244 Conn. 23, 33, 39-41 (1998). See also, e.g., Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. 374, 375-376 (1968) (recognizing cause of action for invasion of privacy, despite lack of recognition at "ancient common law," and noting that "[t]he common law system would have withered centuries ago had it lacked the ability to expand and adapt to the social, economic, and political changes inherent in a vibrant human society"); Walinski v. Morrison & Morrison, 60 Ill. App. 3d 616, 617-620 (1978) (recognizing cause of action for "money damages . . . based on a violation of the rights provided for by Article I, Section 17," of the Illinois Constitution, which states that "[a]ll persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property," where factual allegations pleaded in complaint and reasonable inferences therefrom were sufficient to state such claim); Mouret v. Godeaux, 886 So. 2d 1217, 1221 (La. Ct. App. 2004) (discussing judicial creation of "avowal action" by which biological father may "establish [his] paternity to children born during the mother's marriage to another man despite the statutory presumption of the husband's paternity," creating "'dual paternity,' where the mother's husband is the child's legal father, but the biological father may also assert some parental rights").

(2002) (declining to recognize cause of action for spoliation of evidence where remedy already exists "within the context of the underlying civil action"). See also, e.g., Mohr v. Commonwealth, 421 Mass. 147, 159 (1995) (recognizing cause of action for wrongful adoption); Viccaro v. Milunsky, 406 Mass. 777, 779-782 (1990) (recognizing cause of action for wrongful birth); Alberts v. Devine, 395 Mass. 59, 60-61, 70-71, cert. denied, 474 U.S. 1013 (1985) (recognizing cause of action for inducing violation of physician's duty of confidentiality); Agis v. Howard Johnson Co., 371 Mass. 140, 144-145 (1976) (recognizing cause of action for intentional or reckless infliction of severe emotional distress without resulting bodily injury).

This flexibility permits development of the law to follow evolving societal norms surrounding what is reasonable and tolerable, and conversely what is unreasonable and intolerable. "The maxim nullus commodum capere potest de injuria sua propria [no advantage may be gained from one's own wrong] has long been applied by courts of law and equity." Shrader v. Equitable Life Assur. Soc'y of the U.S., 20 Ohio St. 3d 41, 44 (1985). However, where the plaintiff alleges that Harvard employed Agassiz and facilitated -- and is thus culpable for -- the harms caused to Renty and Delia in the creation of the daguerreotypes, the Commonwealth's existing causes of action, which appear to

allow Harvard's continued retention of the daguerreotypes and leave the plaintiff without redress, lead to a violation of this well-established maxim. Thus, as the plaintiff has observed, current law impermissibly "rewards wrongdoers -- even criminals -- and their sponsors with the spoils of their wrongdoing." Rather than perpetuate the common law in a manner violative of one of the common law's most established maxims, I would permit it to evolve to ensure that the maxim that one should not be allowed to profit from one's own wrongful conduct is not rendered meaningless.[5]

Here, the plaintiff has asserted among other things that (1) the daguerreotypes, currently in Harvard's possession, "are all that is left to connect [her] to her ancestors," Renty and Delia;[6] and (2) Harvard's continued possession of the

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[5] "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." Lembke v. Unke, 171 N.W.2d 837, 844 (N.D. 1969), quoting State v. Culver, 23 N.J. 495, 505, cert. denied, 354 U.S. 925 (1957). Contrary to the court's assertion, ante at , I do not understand our authority to recognize new common-law rights to be unlimited. The cause of action I would recognize today is -- as the evolution of the common law must be -- based on the adaptation of existing legal maxims and principles to conform to modern society's understanding of what constitutes intolerable conduct.

[6] The plaintiff asserts that, "[g]iven that these four [daguerreotypes] are all that is left to connect Lanier to her ancestors, it cannot be gainsaid there is anything more dear to this family."

daguerreotypes amounts to rewarding wrongdoers with the spoils of their wrongdoing, and concepts of fairness and justice demand the recognition of a cause of action to remedy that harm. If the plaintiff's allegations are proved, Harvard's continued retention of the daguerreotypes allows it to profit from its own wrongful conduct -- including the participation in the enslavement of Renty and Delia decades after slavery was abolished in the Commonwealth -- in a manner violative of a well-established common-law maxim. Where it is within our power to develop the common law to ensure that there is no miscarriage of justice in this case, I think we should not allow the law to continue to leave the plaintiff without any avenue for redress for the harms she has suffered and continues to suffer as a result of Harvard's wrongful conduct. Accordingly, in light of the unique facts and circumstances of this case, I would

recognize a cause of action that would provide a limited remedy for the harm the plaintiff alleges.[7,8]

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[7] The situation presented to us is rare in that (1) the daguerreotypes, artifacts from the 1800s, are likely still in existence today due to being in archival protection for most of their existence; (2) given Agassiz's historical notoriety and Harvard's prominence in the Commonwealth, there was meticulous documentation surrounding the creation and use of the daguerreotypes; and (3) Harvard as a purportedly wrongdoing entity today existed in largely the same form as a wrongdoing entity in 1850. Thus, contrary to the court's concern that legislation is the only way to repatriate such an artifact, this case presents a very specific claim that this court is well equipped to resolve.

[8] The court and the Chief Justice's concurrence conclude that the cause of action I propose has no foundation in our common law where it does not resemble an established cause of action and cannot be analogized to the facts of another case. See ante at , . The Chief Justice's concurrence further asserts that I could have made comparisons to "recognized legal claims" and then justified any deviations therefrom. Id. at . However, no examples are provided of any such legal claims that I might have used, nor has my research revealed any, suggesting that there are as yet no recognized legal claims that could serve as a useful comparator here.

Given that Black Americans have long been deprived of the rights and the access to the legal system that others have enjoyed, see supra, and thus to my knowledge no court in this country has yet seen a descendant of enslaved persons prevail on a claim remotely resembling the plaintiff's, it is hardly surprising that other cases have not been resolved as I propose this case could be. To rely on the premise that because we have no precedent there can be no new claims or rights does not acknowledge that the people who now assert such a claim or right previously were not recognized by the legal system. And although the facts are unique, as discussed supra and infra, the legal principles underlying the cause of action I would apply them to are well established under the common law and this court's equitable powers. As discussed infra, we have in the past rendered decisions with significant implications for issues of slavery and race, most notably when, in response to a series

The wrong the plaintiff alleges, and that I would address, is Harvard's continued wrongful retention of the daguerreotypes, which were created specifically as a consequence of the enslavement of the plaintiff's ancestors and concomitant wrongdoing by Agassiz and Harvard, are a vital component of the plaintiff's family lineage, and are a source of a meaningful familial connection, physically and emotionally, between the plaintiff and her ancestors.[9] So long as the daguerreotypes

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of freedom suits brought by enslaved African-Americans, this court judicially abolished slavery in Commonwealth vs. Jennison (1783) (unreported). See A. Zilversmit, The First Emancipation: The Abolition of Slavery in the North 113 (1967) ("In a new series of freedom cases, the abolitionists succeeded in persuading the courts to interpret the constitution in a way that was probably never intended by its framers"). Thus, I understand this court's historical decisions in this area to provide precedent for the cause of action I propose today.

[9] It is significant to me, as it is to the court and the Chief Justice's concurrence, that Harvard's posture in this case is questionable. Harvard is not an ignorant third party who happens to possess the daguerreotypes. Agassiz, and by extension Harvard, directly benefited from the enslavement of Renty and Delia by using them to create the daguerreotypes, by Agassiz using the daguerreotypes in turn to promote racist, pseudoscientific theories, and by Harvard continuing to control and benefit from them in the manner it has. Since the rediscovery of the daguerreotypes in 1976, Harvard has continued to profit from this exploitation by allowing use of the images only with Harvard's permission and upon the payment of a substantial licensing fee. Harvard also has used the daguerreotypes to publish works it has sold for profit. See, e.g., To Make Their Own Way in the World: The Enduring Legacy of the Zealy Daguerreotypes (I. Barbash, M. Rogers, & D. Willis, eds., 2020).

remain under the defendants' control, Renty and Delia remain cherished members of the plaintiff's family who are relegated to an existence as "enslaved subjects trapped inside the frame -- subjects who, from the very first exposure, were intended to exist more as objects and symbols of American slavery than as fully realized human beings with the ability either to represent themselves through -- or withhold themselves from -- the camera." H.L. Gates, Jr., Foreword, To Make Their Own Way in the World: The Enduring Legacy of the Zealy Daguerreotypes 9 (I. Barbash, M. Rogers, & D. Willis, eds., 2020) (Barbash). See D.R. Berry, The Price for Their Pound of Flesh: The Value of

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The defendants seem alone in failing to acknowledge the legacy of their own complicity in this case. Agassiz's descendants expressed in their amicus brief that creating a remedy by which the plaintiff legally can pursue possession of the daguerreotypes is a necessary step to "acknowledge and move towards repair" of the incalculable harm to the plaintiff's lineage, wrought by Agassiz and Harvard in the pursuit of false arguments of scientific racism. As the Chief Justice's concurrence notes, Harvard recently released a report discussing the university's "entanglements with slavery and its legacies" and making seven specific recommendations for reparative action. Presidential Committee on Harvard & the Legacy of Slavery, Harvard & the Legacy of Slavery 10, 57-60 (Apr. 25, 2022), https://radcliffe-harvard-edu-prod.s3.amazonaws.com/b2c5a41d-8bfd-4d04-933c-858670839e50/HLS-whole-report_FINAL_2022-04-25FINAL-ua.pdf [https://perma.cc/52W5-X8YA]. I wholly agree with her analysis that Harvard's conduct in this case -- including its refusal to acknowledge that its past and current conduct related to the daguerreotypes harms Lanier as a descendant of Renty and Delia -- undermines its professed commitment to reckon with its ties to slavery and make amends to descendants of enslaved individuals who were exploited by Harvard.

the Enslaved, from Womb to Grave, in the Building of a Nation 195 (2017) ("death did not end the[] commodification [of the enslaved]"). Agassiz, and by extension Harvard, exercised control over Renty and Delia and their images during their lives. Concepts of fairness and equity demand that Harvard be prohibited from continuing to control Renty's and Delia's legacy in perpetuity.[10]

4. The abolition of slavery in Massachusetts. To understand why I think that we have the ability to remedy this

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[10] The plaintiff asserts that "[t]he daguerreotypes are all that remain of her ancestors[,] Renty and Delia," and that "Harvard's refusal to return Renty['s] and Delia's images to [the plaintiff] is a continuation of Renty['s] and Delia's enslavement and a perpetuation of Harvard's legacy of white supremacy." Moreover, Harvard University and Harvard's Peabody Museum of Archaeology and Ethnology have adopted policies to research the provenance of artifacts in the institution's possession to determine rightful ownership where such artifacts were obtained after theft or other illegal transactions and to then return such artifacts to their rightful owners. See Harvard University, Steering Committee on Human Remains in Harvard Museum Collections, https://www.harvard.edu/president/news/2021/steering-committee-on-human-remains-in-harvard-museum-collections [https://perma.cc/LK4T-ZUMR]; Harvard University, Message from the Peabody Museum Director, https://peabody.harvard.edu/news/message-peabody-museum-director [https://perma.cc/6PZZ-WT7E]. I think the daguerreotypes constitute such artifacts. It is widely recognized that human remains and related objects have inherent cultural and communal significance to the kin of the individuals those remains and objects represent. See, e.g., 25 U.S.C. § 3001(3) (Native American Graves Protection and Repatriation Act); Steering Committee on Human Remains in Harvard Museum Collections, supra. Where, as the plaintiff asserts, the daguerreotypes are Renty's and Delia's final tangible impression on this Earth, they likewise have inherent cultural and communal significance to the plaintiff as their lineal descendant.

particular wrong, it is necessary to examine the history of slavery and its abolition in Massachusetts, as our ability to right this wrong derives from this history. Throughout much of the Eighteenth Century, individuals -- including enslaved individuals -- repeatedly lobbied the General Court to abolish slavery legislatively. A. Zilversmit, The First Emancipation: The Abolition of Slavery in the North 100-103 (1967). In 1703 the General Court enacted a statute to make manumission, the release of an individual from slavery, more onerous by imposing a fee on enslavers who freed those they had enslaved. Id. at 18. In later years, the General Court changed course and "made several attempts to end slavery and the slave trade." Id. at 100.

At the same time that enslaved Africans and African-Americans were lobbying the General Court to abolish slavery, they were also seeking the judicial abolition of slavery through a series of cases that have become known as "freedom suits" -- cases in which enslaved persons sued for their freedom. Id. at 101-103. "John Adams recalled that the arguments in the freedom cases . . . '[arose] from the rights of mankind.'"[11] Id. at 104. After ratification of the Massachusetts Constitution in 1780,

[11] We acknowledge that, earlier, John Adams had argued on behalf of an enslaver in one such freedom suit. Zilversmit, supra at 103.

which declared that "[a]ll men are born free and equal,"[12] these freedom suits ultimately succeeded in bringing about the abolition of slavery through judicial interpretation of that provision of the Constitution. Id. at 112-113. See Massachusetts Constitution and the Abolition of Slavery, https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery [https://perma.cc/74QQ-FB2X].

Thus, for the abolition of slavery in Massachusetts, we owe a great debt to the brave men and women who, while enslaved, went to courts that had so far permitted their enslavement to challenge the existence of slavery in Massachusetts and to argue for their freedom, among them, Adam, Priscilla, Juno, Timon,[13]

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[12] Article 1 of the Massachusetts Declaration of Rights has since been amended to provide that "[a]ll people are born free and equal" (emphasis added). Art. 106 of the Amendments to the Massachusetts Constitution.

[13] As the Senate recognized in 2009, one of the indignities suffered by those enslaved was the stripping of their given names. Sen. Con. Res. 26, 111th Cong., 1st Sess. (2009). Although some, like Renty and Delia, were made to use the surname of their enslaver, others were allowed no surname at all. Thus, the case names created when these individuals sued for their freedom often listed only a first name for the plaintiff. See Blanck, Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts, 75 New Eng. Q. 24, 27 n.8 (2002).

Elizabeth Freeman,[14] and Quock Walker.[15] They led this court to recognize, in 1783, that under the Massachusetts Constitution, slavery was "as effectively abolished as it [could] be by the granting of rights and privileges wholly incompatible and repugnant to [slavery's] existence," and that "perpetual servitude [could] no longer be tolerated."[16] J.D. Cushing, The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case," 5 Am. J. Legal Hist. 118,

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[14] When enslaved, Elizabeth Freeman was known as "Mum Bett," the name she used in her freedom suit. Massachusetts Constitution and the Abolition of Slavery, https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery [https://perma.cc/74QQ-FB2X]. After winning her freedom, she changed her name to Elizabeth Freeman. National Women's History Museum, Elizabeth Freeman, https://www.womenshistory.org/education-resources/biographies/Elizabeth-freeman [https://perma.cc/Q7GC-F2C9]. I therefore use the name she chose for herself as a free woman.

[15] Blanck, 75 New Eng. Q. at 27 n.8. Massachusetts Constitution and the Abolition of Slavery, https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery [https://perma.cc/74QQ-FB2X].

[16] Chief Justice William Cushing included these remarks in his instructions to the jury in the case of Commonwealth vs. Jennison (1783) (unreported), in which Nathaniel Jennison was charged with assault and battery related to his enslavement of Quock Walker. J.D. Cushing, The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case," 5 Am. J. Legal Hist. 118, 130-132 (1961). Similar instructions were adopted in a unanimous opinion of the court in Inhabitants of Littleton vs. Tuttle (1796) (unreported). Later cases recognized these two rulings as having abolished slavery judicially. See, e.g., Inhabitants of Winchendon v. Inhabitants of Hatfield, 4 Mass. 123, 128-129 (1808) (recounting jury instructions in Jennison and Tuttle cases).

133 (1961). See Massachusetts Constitution and the Abolition of Slavery, https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery [https://perma.cc/74QQ-FB2X].

This court played a critical role in the abolition of slavery in Massachusetts, but we should not ignore that the court's history with slavery and some of the important race-related issues since then has not always been a paradigm of freedom and equality. For example, although this court held in Commonwealth v. Aves, 18 Pick. 193, 217 (1836), superseded by the Thirteenth Amendment to the United States Constitution, that an enslaved person who was brought into the Commonwealth by her enslaver became free on entering Massachusetts and thus could not be removed forcibly from the Commonwealth by her enslaver, the court declined to extend that holding to "fugitives," meaning those enslaved individuals who had fled their captivity to assert their right to be free.

This court also has the unfortunate distinction of being one of the first courts to develop the "separate but equal" doctrine,[17] later relied on and endorsed by the Supreme Court in the infamous decision in Plessy v. Ferguson, 163 U.S. 537, 540-

[17] See Roberts v. Boston, 5 Cush. 198, 206, 209 (1849), superseded by St. 1855, c. 256, §§ 1-5 (separate schools for Black and white children did not violate their right to be "equal before the law").

541, 548-550 (1896), overruled by Brown v. Board of Educ. of Topeka, 347 U.S. 483, 494-495 (1954).

In light of this checkered history, I understand this court to have a continuing responsibility to ensure, to the fullest extent that our role as Justices may permit, that the common law provides a remedy for every substantial wrong. See, e.g., Recinos, 473 Mass. at 741; Shields, 163 Vt. at 223. To fulfill that responsibility, I think we may do what common-law courts always have been empowered to do and recognize a judicial remedy to ensure that where, as here, an aggrieved litigant has pleaded a violation of her rights, she has access to an appropriate judicial remedy tailored to the facts of her case.

5. An appropriate remedy.[18] I conclude that the factual allegations in the plaintiff's second amended complaint

[18] I do not attempt, nor purport to possess the authority to recognize, a sweeping remedy akin to reparations. See art. 30 of the Massachusetts Declaration of Rights. All that I do today, and all that it is within our authority to do, is provide a potential remedy to a plaintiff who is properly before us, and who has pleaded a specific harm suffered due to allegedly wrongful conduct of the defendants. Contrary to the court's assertion, see ante at , this narrow cause of action is entirely dissimilar to a comprehensive statutory and regulatory scheme such as that created by the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. §§ 3001-3013, and is entirely dissimilar to the type of sweeping reparations to which the court compares it. Although the differences between my proposed cause of action and legislation such as NAGPRA are vast, a primary one is that, with a cause of action such as the one I propose, a plaintiff may only recover if she affirmatively brings suit in the first instance, and it

plausibly raise an entitlement to relief under a cause of action I would recognize as follows: a plaintiff must show that (1) she is a direct lineal descendant of a specific individual or individuals enslaved in the United States or in a colony that later became a part of the United States;[19] (2) the defendant has possession of an artifact,[20] which was created or obtained as a consequence of the enslavement of the plaintiff's ancestors; (3) the defendant participated, either directly or indirectly, in the wrongful creation or attainment of such artifact; (4) the artifact provides a meaningful connection between the plaintiff and her ancestors; and (5) the plaintiff has made a request or

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would be the plaintiff's burden to prove that she, as a specific individual, has fulfilled all the elements of the cause of action such that she is entitled to possession of the specific artifact to which she claims such entitlement. Conversely, pursuant to the framework created by NAGPRA, Federal agencies and museums have affirmative duties, in consultation with tribal governments, to inventory their holdings to identify any artifacts subject to NAGPRA. 25 U.S.C. § 3003. The cause of action I propose would place no similar affirmative duty on any potential defendants.

[19] I define "enslaved individual" in this case to encompass only those who were subjected to the institution of American chattel slavery. Although other people came to this land in positions that were less than free, such as those who indentured themselves to another in payment for their voyage, such forms of servitude are beyond the scope of this particular remedy.

[20] I use the term "artifact" to mean "an object[, such as a tool or instrument,] remaining from a particular period," namely, the period of American chattel slavery. See Merriam-Webster Online Dictionary, Artifact, https://www.merriam-webster.com/dictionary/artifact [https://perma.cc/E588-A7QK].

demand to the defendant to relinquish the artifact to the plaintiff, which the defendant has refused or ignored. On establishment of the foregoing elements, as the sole remedy for this cause of action, the plaintiff would be entitled to the specific performance of transfer of possession of the artifact from the defendant to the plaintiff.[21]

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[21] The court asserts, ante at , that the transfer of the daguerreotypes to the plaintiff would be inappropriate where Harvard has not been convicted of any crime in relation to the daguerreotypes and there is no statute "providing for forfeiture or transfer of property under the factual circumstances alleged." First, this ignores that, as noted supra, the plaintiff's circumstances are rare, if not unique, in several respects. A claimant pleading the cause of action I would recognize would need to identify an artifact from the era of chattel slavery that exists today and show that his or her ancestor had a connection to it, both of which become more difficult with the passage of time. The daguerreotypes have survived this long because they have been in archival protection for most of their existence. Many other artifacts of that time period have likely been degraded or destroyed altogether by this point. Further, Agassiz's status as a historical celebrity is also unique, meaning the level of meticulous documentation surrounding his creation and use of the artifacts may also well be unique or rare. As a result, this plaintiff's ability to establish a connection to the daguerreotypes is extremely rare in how strong it is and suggests that the potential class of litigants who may seek such a remedy is quite small. It is therefore unsurprising that no judicial decisions addressing a similar factual scenario have been identified. It does not necessarily follow, however, that this plaintiff must be resigned to go without a full remedy for the harm she has suffered.

Second, the successful prosecution of nearly every civil case results in the judicially ordered forfeiture of property by the defendant to the plaintiff, either via an award of monetary damages or the imposition of injunctive relief. Courts of the Commonwealth have long been empowered to impose injunctive

I now turn to the question whether, considering the factual allegations in the complaint, the plaintiff has plausibly suggested an entitlement to relief under this cause of action. I think she did. The plaintiff has alleged that (1) she is a

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relief that requires the transfer of property from one party to another. See, e.g., Tucker v. Connors, 342 Mass. 376, 378, 381-382 (1961) (affirming order requiring transfer of property to option holder as "a usual equity power"); Limpus v. Armstrong, 3 Mass. App. Ct. 19, 20-22, 24 (1975) (ordering specific performance of agreement to sell property to plaintiff despite plaintiff's failure to perform on date specified for closing where time was not of the essence). Additionally, money is property. See Ryan v. Mary Ann Morse Healthcare Corp., 483 Mass. 612, 628 n.17 (2019), citing G. L. c. 93, § 76 (a); Commonwealth v. Alleged Gaming Apparatus & Implements & Money, 335 Mass. 223, 224 (1957); Commonwealth v. Hays, 14 Gray 62, 64 (1859); Sheldon v. Root, 16 Pick. 567, 569 (1835). As such, an award of monetary damages for a plaintiff also requires the forfeiture of property by the unsuccessful party and transfer of the same to the prevailing party. This also means that, every time this -- or any -- court has recognized a new cause of action, it has allowed for the transfer of property between parties in novel circumstances.

Thus, if the plaintiff prevails on remand on her claims of negligent and reckless infliction of emotional distress claims, it will result in the transfer of property from Harvard to the plaintiff in the form of monetary damages. However, although the court considers a claim for reckless infliction of emotional distress to be part of established tort law, I note that this court did not recognize such a claim until 1976, and it is thus relatively new in the context of the long history of the common law. Compare Agis v. Howard Johnson Co., 371 Mass. 140, 144 (1976) (recognizing for first time cause of action for intentional or reckless infliction of severe emotional distress in absence of resulting bodily injury), with George v. Jordan Marsh Co., 359 Mass. 244, 255 (1971) (recognizing cause of action for intentional infliction of severe emotional distress with resulting bodily injury and declining to rule on availability of claim for reckless infliction of severe emotional distress).

direct lineal descendant of Renty and Delia, who were enslaved in the United States in the 1850s; (2) Harvard possesses the daguerreotypes, which were both created according to Agassiz's orders and obtained by Harvard as a consequence of Renty's and Delia's enslavement; (3) the daguerreotypes were created by Agassiz's exploitation of enslaved labor at a time when slavery was unlawful in the Commonwealth, with Agassiz acting as an agent and employee of Harvard; (4) the daguerreotypes represent the plaintiff's only remnant of any tangible connection to Renty and Delia; and (5) the plaintiff has demanded that Harvard relinquish the daguerreotypes to her, and Harvard has refused to do so. Thus, taking the factual allegations in the plaintiff's complaint as true, the plaintiff has stated a claim under the cause of action I would recognize today, and thus, she should be entitled to the opportunity to prove that claim at trial. See Alberts, 395 Mass. at 75 (recognizing new cause of action and reversing grant of summary judgment for defendants).[22] See also Labonte, 426 Mass. at 322-323 (declining to recognize new cause of action for tortious interference with expectancy under will

[22] Other examples of cases where a court has simultaneously recognized a new cause of action and reversed dismissal of the case or judgment for the defendant in order to allow for trial on the merits include Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C., 327 Conn. 540, 572 (2018); Theama v. Kenosha, 117 Wis. 2d 508, 528 (1984); Shockley v. Prier, 66 Wis. 2d 394, 404-405 (1975).

while donor is alive, but remanding case to allow plaintiff to amend complaint where donor died during pendency of appeal).

6. Statute of limitations. A statute of limitations generally applies equally at equity as in law. Baldassari v. Public Fin. Trust, 369 Mass. 33, 43 (1975), superseded on other grounds by G. L. c. 93A, § 9 (1), as appearing in St. 1979, c. 406, § 1. International Paper Co. v. Commonwealth, 232 Mass. 7, 13 (1919). Because the cause of action I would recognize is not based on breach of contract, I think it is most analogous to a tort,[23] and thus the three-year statute of limitations set forth in G. L. c. 260, § 2A, would apply. A statute of limitations period generally begins to run when "the cause of action accrues." See, e.g., G. L. c. 260, § 2A.

Pursuant to the discovery rule, "a cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that (1) he has suffered harm; (2) his harm was caused by the conduct of another; and (3) the defendant is the person who caused that harm." Harrington v. Costello, 467 Mass. 720, 727 (2014). The "harm" referred to in the discovery doctrine is limited to legally cognizable harm. See Sudbury v. Massachusetts Bay Transp. Auth., 485 Mass. 774, 781 (2020)

[23] Black's Law Dictionary defines "tort" as "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usu[ally] in the form of damages." Black's Law Dictionary 1792 (11th ed. 2019).

(asserted harm not legally cognizable). The cause of action I would recognize has, as one of its elements, that a defendant in possession of an artifact has rejected the plaintiff's demand to relinquish the artifact. Because a cause of action cannot accrue until, at a minimum, all of the elements of the claim have occurred, the cause of action I would recognize would accrue no earlier than when the plaintiff knows or should know that the defendant has refused the plaintiff's demand to relinquish such artifact.[24]

Here, the plaintiff alleges that she completed sufficient research to reasonably know that she is a descendant of Renty and Delia in 2017. She demanded Harvard relinquish the daguerreotypes to her on October 27, 2017, less than one year later. Harvard's response to the letter ignored the demand. Thus, the date of such reply, November 13, 2017, would be the

[24] Of course, as a predicate to such a demand, the plaintiff should know or reasonably be able to know that she is a direct lineal descendant of a person enslaved during the period of American chattel slavery described supra, and that the defendant possesses an object created or obtained through the specific enslavement of that ancestor. Where a demand is a required element of a claim, the demand must be made within a reasonable time, which generally means "the time limited for bringing an action at law" as set forth in the relevant statute of limitations. Kelley v. Thomas G. Plant Corp., 274 Mass. 102, 106 (1931). However, under the cause of action I would recognize, the time to make such a demand would depend on when the plaintiff knows or reasonably should know that she is a descendant of an enslaved person and that the defendant possesses an object created or obtained through the enslavement of that ancestor.

earliest point at which the plaintiff's cause of action accrued. The plaintiff commenced this action on March 20, 2019. Taking the plaintiff's factual allegations as true, as we must, if the court were to recognize the cause of action I have articulated, it would appear that the plaintiff's case was timely brought.

7. First Amendment considerations. It has been suggested by Harvard and certain amici that where the plaintiff's claim to the daguerreotypes derives from Renty's and Delia's status as subjects depicted therein, concerns under the First Amendment to the United States Constitution are implicated, specifically as related to freedom of the press and freedom of (the defendants') speech. I defer to the court's reasoning on freedom of speech as it relates to the negligent and reckless infliction of emotional distress claims, to the extent that those concerns, should they arise on remand, must be factually developed and litigated by the parties in the trial court.

I doubt, however, that the freedom of the press or freedom of speech are implicated by the remedy I propose, which would potentially transfer ownership and control of the daguerreotypes from one private entity to another. It is well established that the First Amendment rights to both freedom of expression and freedom of the press are limited by a private individual's rights related to his or her private property, and thus the

First Amendment would not be implicated by the cause of action I would recognize.

Here, we have daguerreotypes that are and would continue to be privately possessed -- by either Harvard or the plaintiff. Thus, I fail to see how this dispute between purely private parties, none of whom has an obligation to provide access to the daguerreotypes to the press or the public, implicates the rights of freedom of the press or freedom of expression secured by the First Amendment. As to the right to freedom of expression, although the case law addressing the interaction between the First Amendment and tangible property has dealt only with the interaction between a speaker's First Amendment rights and an individual's right to exclude others from their real property,[25] I conclude that the analysis is applicable to personal property as well, where the range of a person's rights in either type of property includes the right to exclude others. "[A] speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S.

[25] See, e.g., Hudgens v. National Labor Relations Bd., 424 U.S. 507, 509, 513, 521 (1976) (shopping center did not violate picketers' First Amendment rights by prohibiting picketing on its property because "the constitutional guarantee of free expression is a guarantee only against abridgment by government, [F]ederal or [S]tate").

788, 801 (1985). See Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987).

As a practical matter, where Harvard's current exercise of control over the daguerreotypes involves a prohibition on viewing the daguerreotypes or using the related images without Harvard's consent and a substantial licensing fee, the press would be no more legally restricted in its access to the daguerreotypes -- and thus its First Amendment rights would be no more burdened -- if the daguerreotypes were owned and controlled by the plaintiff than if they remained in Harvard's possession and control. Thus, the First Amendment does not prevent recognition of a cause of action whereby ownership of the daguerreotypes may be transferred from one private party to another.

Additionally, the photography-related cases relied on by Harvard and the motion judge in dismissing the plaintiff's property-related claims are inapplicable where, as here, the cause of action does not concern a photograph, but a unique artifact. A daguerreotype fundamentally is distinct from a photograph: photography results in an image designed to be easily reproduced ad infinitum. Where an individual takes a photograph, such photograph is generally the property of the photographer, and the use of such photograph is generally

protected under Federal copyright law.[26] Even a photographer hired by a private party may expect to retain ownership over the photographic negative, depending on the terms of any contract between the parties. But because the daguerreotype process results in a unique image on a single sheet of copper, dageurreotypists in 1850 would not have had a similar expectation of retention of the product of their work. Instead, a resulting daguerreotype is simultaneously the original,

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[26] I note that the question of property rights in a tangible photograph is distinct from the question of copyright in a photograph. I also observe that "[p]hotographs did not receive federal copyright protection until the Act of March 3, 1865, 38th Cong., 2d Sess., 16 Stat. 198." SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 306 (S.D.N.Y. 2000). Thus, the daguerreotypes, created in 1850, would not have been subject to Federal copyright protections.

It is also worth noting that the rule that a photographer owns the photograph taken is not absolute; exceptions exist. For example, where a person commits sexual abuse of a child or adult and photographs such abuse, the resulting imagery is forfeited to the State as the fruit of the crime and may, in the case of child sexual abuse, itself constitute a crime. See G. L. c. 276, §§ 1, 3 (evidence not "stolen, embezzled or obtained by false pretenses" and seized pursuant to search warrant "may be forfeited and either sold or destroyed, as the public interest requires"; stolen property to be returned to rightful owner); G. L. c. 272, § 29C (criminalizing possession of child sexual abuse material); Beldotti v. Commonwealth, 41 Mass. App. Ct. 185, 188-190 (1996), cert. denied, 520 U.S. 1173 (1997) (declining to return to defendant photographs depicting rape of victim where there was "connection between the property that [the defendant sought] to have returned to him and the crime he committed"). It rightly never has been suggested, however, that a journalist's First Amendment rights are threatened by this exception to the general rule that photographers own their photographs.

negative, and final viewable product, and is more akin to a painted portrait or a sculpture than to a photograph. Once created and delivered to a customer, there would be no alternative source of the image in which the daguerreotypist could have a property right. Thus, a daguerreotype is a unique item of personal property in which the creating daguerreotypist would generally retain no ownership rights after a sale. See Barbash, supra at 171.

Further, the photography cases relied on by Harvard and the judge largely concern photographs taken by, or provided to, journalists for the purpose of publishing the news, or with photographs taken by law enforcement in the course of a criminal investigation of the plaintiff; they do not address a situation analogous to that here, where the dispute is between two private parties, neither of whom is a member of the press or law enforcement and neither of whom appears to have freely offered images of the daguerreotypes to the press.[27,28] See, e.g., Thayer

[27] As discussed supra, the plaintiff's complaint alleges that Harvard prohibits use of images of the daguerreotypes unless such use is with Harvard's permission and upon payment to Harvard of a substantial licensing fee.

[28] I also note that neither Harvard nor Agassiz was the daguerreotypist, so to the extent that a photographer owns the photographs he or she takes and, by extension, a daguerreotypist owns the daguerreotypes he or she makes, on its face such rule does not appear to support Harvard's possession of the daguerreotypes.

v. Worcester Post Co., 284 Mass. 160, 163-164 (1933) (photograph provided to newspaper taken of group in public place with plaintiff's consent); United States v. Jiles, 658 F.2d 194, 195 (3d Cir. 1981), cert. denied, 455 U.S. 923 (1982) (photograph from plaintiff's juvenile record used during subsequent criminal investigation). Thus, because the cause of action I would recognize does not implicate the right of the press to publish photographs taken by or provided to members of the press, and because such right is protected by the First Amendment, nothing I would decide would alter the right of the press to publish photographs consistent with the case law relied on by the motion judge.

8. Conclusion. The result reached by the court underscores the need for the cause of action I have articulated in order to provide a full remedy for the harms alleged by the plaintiff. Failing to recognize that the plaintiff, as a descendant of Renty and Delia, may have a claim to the daguerreotypes superior to Harvard's is precisely the sort of miscarriage of justice that the late Chief Justice Gants warned us against perpetuating. We are faced with an aggrieved plaintiff who has pleaded facts that, if proved, demand a full remedy and nothing less. It is within this court's authority to provide such remedy by recognizing the cause of action I have articulated today.