PROPERTY — REPARATIONS VIA REMEDIAL INTERVENTIONS — SUPREME JUDICIAL COURT OF MASSACHUSETTS HOLDS DESCENDANT LACKS PROPERTY RIGHTS IN IMAGES OF ENSLAVED ANCESTORS. — *Lanier v. President & Fellows of Harvard College*, 191 N.E.3d 1063 (Mass. 2022) (images of enslaved people at issue).

Lawsuits seeking compensation for injuries stemming from the institution of American chattel slavery face an uphill battle.[1] From the absence of congressionally authorized remedies[2] to procedural bars on common law claims,[3] prospective plaintiffs must confront a system ill-suited to provide redress for the legacy of slavery. Recently, in *Lanier v. President & Fellows of Harvard College*,[4] the Supreme Judicial Court of Massachusetts held that a plaintiff seeking possession of daguerreotypes[5] of her enslaved ancestors was not entitled to possessory rights to the images, despite plausibly alleging tort claims for emotional distress. Though *Lanier* earnestly grappled with Harvard's perpetration of harms against enslaved people and their descendants, the court's refusal to grant descendants meaningful common law remedies represents the continuing failure of our judicial system to rectify historic abuses.

While Tamara Lanier was growing up, her mother, Mattye Thompson, repeatedly told Lanier to never forget that their family history "began with a man named Renty Taylor."[6] After her mother's death in 2010, Lanier scoured historical sources, including census data, to confirm that she was Renty Taylor's direct lineal descendant.[7] Further research led Lanier to discover daguerreotypes of Renty and his daughter, Delia, made during the mid-nineteenth century at the behest of Harvard professor Louis Agassiz.[8] To capture these images, "Delia was stripped naked to the waist,"[9] "Renty was ordered to disrobe,"[10] and both were forcibly "photographed . . . in various poses and from different

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[1] *See In re* Afr.-Am. Slave Descendants Litig., 471 F.3d 754, 758 (7th Cir. 2006).

[2] *See* H.R. 40, 118th Cong. (2023); *see also* Jesse Washington, *H.R. 40, The Federal Bill to Study Reparations, Appears Stalled Once Again*, ANDSCAPE (July 11, 2022), https://andscape.com/features/h-r-40-the-federal-bill-to-study-reparations-appears-stalled-once-again [https://perma.cc/7P9Z-ZA6U] (noting that H.R. 40, a "decades-old [federal] bill to study and make recommendations" on ways to remedy the legacy of slavery, continues to "stall[]" in Congress).

[3] *See Path to Restorative Justice: Hearing on H.R. 40 Before the Subcomm. on the Const., C.R. & C.L. of the H. Comm. on the Judiciary*, 116th Cong. 21 (2019) (statement of Eric J. Miller, Professor of Law, Loyola Marymount University) ("[I]n any reparations lawsuit . . . the statute of limitations remains a significant obstacle.").

[4] 191 N.E.3d 1063 (Mass. 2022) (image of enslaved person at issue).

[5] Daguerreotypes, "the precursor to modern photograph[s]," took "painstakingly long" to capture. Motion for Direct Appellate Review by Supreme Judicial Court at 2 n.1, *Lanier* (No. 2021-P-0350).

[6] *Lanier*, 191 N.E.3d at 1070.

[7] *Id.* at 1070–71.

[8] *Id.* at 1070.

[9] *Id.* at 1069.

[10] *Id.*

angles."[11] Agassiz used the daguerreotypes of Renty and Delia to give "scientific legitimacy to the myth of white racial superiority."[12]

In March 2011, Lanier notified then–Harvard University President Drew Faust of her findings.[13] She asked Harvard to verify her ancestral ties and to disclose how it had previously used and would continue to use the daguerreotypes in its possession at the Peabody Museum.[14] Faust failed to fulfill either request.[15] In October 2017 — after Harvard used Renty Taylor's image on a Harvard University Press publication and at a national conference — Lanier wrote Faust again to demand that the daguerreotypes of Renty and Delia be "immediately relinquished" to her.[16] This demand went unacknowledged.[17]

In March 2019, Lanier sued Harvard in the Superior Court of Massachusetts, alleging that the daguerreotypes "were taken without Renty's and Delia's consent and therefore unlawfully retained by Harvard."[18] She brought forward seven claims: (1) replevin; (2) conversion; (3) unauthorized use of a name, picture, and/or portrait; (4) violation of the Massachusetts Civil Rights Act[19]; (5) intentional interference with a property interest; (6) negligent infliction of emotional distress; and (7) equitable restitution.[20] For Lanier's property-related claims (claims 1, 2, and 5–7),[21] Harvard moved to dismiss on the grounds that they were "time-barred and that Lanier d[id] not have a property interest in the [daguerreotypes]."[22] Harvard argued that Lanier's third claim failed because the deaths of Renty and Delia precluded her right to sue.[23] And as for Lanier's fourth claim, Harvard argued that it too was time-barred and that Lanier lacked standing.[24]

The trial court granted Harvard's motion to dismiss in full.[25] Setting aside the issue of timeliness of filing, the court held that Lanier's property-related claims were fruitless as a matter of law — common law provides that the photographer, not the subject, retains the property

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11 *Id.* at 1070.

12 *See id.* Agassiz's work also legitimized the "perpetuation of American slavery." *Id.*

13 *Id.* at 1071.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 Lanier v. President & Fellows of Harvard Coll., No. 1981CV00784, slip op. at 4 (Mass Super. Ct. Mar. 1, 2021).

19 MASS. GEN. LAWS ch. 12, §§ 11H–11J (2020).

20 *Lanier*, slip op. at 4.

21 Although negligent infliction of emotional distress is typically a tort claim, in the trial court it was treated as a property-related claim because Lanier's distress resulted from the appropriation of her ancestors' likenesses. *Id.* slip op. at 10 n.12.

22 *Id.* slip op. at 4.

23 *Id.*

24 *Id.*

25 *Id.* slip op. at 15.

interest in a photograph.[26] Thus, because Renty and Delia, as the subjects, could not have had a property interest in the daguerreotypes, Lanier could not have inherited such an interest.[27] The court agreed with Harvard's reasoning on Lanier's unauthorized-use claim and dismissed it because Renty and Delia were deceased.[28] The court also held that Lanier's statutory civil rights claim was time-barred and that, in any event, Lanier's allegations were "[in]sufficient to state a plausible claim for relief."[29] Lanier appealed, and the Supreme Judicial Court of Massachusetts granted her application for direct appellate review.[30]

The Supreme Judicial Court affirmed in part, vacated in part, and remanded.[31] Writing for the court, Justice Kafker[32] concluded that Lanier's emotional distress tort claim — but not her property-related claims — survived the motion to dismiss.[33] He began by establishing that Harvard owed Lanier a duty of reasonable care, an element of negligence required to claim relief for negligent infliction of emotional distress.[34] This duty arose from the University's involvement in the "horrific conduct by which the daguerreotypes were created" coupled with its knowledge of Lanier's purported relation to Renty and Delia.[35] Justice Kafker held that a jury could reasonably conclude that Lanier's insomnia and nausea — manifestations of her emotional distress — were "actual and foreseeable consequence[s]" of Harvard's failure to satisfy its duty of care.[36] He also held that Lanier's emotional distress claim was not time-barred as Harvard's negligence towards Lanier had not ceased since starting over ten years ago.[37]

Further, Justice Kafker held that Lanier's allegations for negligent infliction of emotional distress, if proven, would satisfy three of the four elements of reckless infliction of emotional distress.[38] He also explained that Harvard's present actions and past misconduct rose to the level of extreme and outrageous conduct — the remaining element of reckless infliction of emotional distress.[39] Given these plausible tort allegations, Justice Kafker briefly considered First Amendment liability limitations. He concluded that while Harvard's usage of the daguerreotypes was

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[26] *Id.* slip op. at 11.

[27] *Id.* slip op. at 12.

[28] *Id.*

[29] *Id.* slip op. at 13–14.

[30] *Lanier*, 191 N.E.3d at 1072.

[31] *Id.* at 1083.

[32] Justice Kafker was joined by Chief Justice Budd and Justices Gaziano, Lowy, Cypher, Wendlandt, and Georges.

[33] *Lanier*, 191 N.E.3d at 1072.

[34] *Id.* at 1073.

[35] *Id.*

[36] *Id.* at 1074.

[37] *Id.*

[38] *Id.* at 1075. He concluded that (1) Harvard knew or should have known that its conduct would cause Lanier distress, (2) its conduct caused her distress, and (3) the distress was severe. *Id.*

[39] *Id.* at 1078.

insulated from tort liability as a matter of public concern, "personal interactions between Harvard and Lanier" were not.[40]

Next, Justice Kafker addressed Lanier's property-related claims. He agreed with the trial court that these claims were untimely brought and that Lanier lacked a cognizable property interest in the daguerreotypes.[41] He reiterated that under common law, "the photographer and not the subject owns 'the negative [and] the photographs printed from it.'"[42] Justice Kafker then asserted that, even in similarly "egregious circumstances," courts are not required by state law to confer ownership rights over offensive (or criminally acquired) photographs to "persons depicted in them or their descendants."[43] He noted that when statutes require forfeiture of property in such circumstances, the rights transfer not to private parties but to the Commonwealth.[44] Lastly, because the allegation that Agassiz used Renty's image to support pseudoscientific theories of white superiority implicated Renty's constitutional rights rather than Lanier's, Justice Kafker agreed with the dismissal of Lanier's claim that Harvard violated the Massachusetts Civil Rights Act.[45]

Chief Justice Budd concurred.[46] She argued that the viability of the claims Lanier could plausibly allege rested on the "ethical standards of our modern community."[47] These ethical standards, she stressed, were blatantly disregarded by Harvard, whose alleged conduct not only "inflicted . . . violence on Lanier"[48] but also violated universal codes of ethics for archival institutions.[49] Chief Justice Budd also claimed that Harvard's conduct transgressed its self-proclaimed values and commitments.[50] Such commitments, including meaningfully repairing harm and connecting descendants to their lineage, were undercut by Harvard's refusal to engage Lanier.[51] Through discussion of the viability of an unjust enrichment claim, she communicated an openness to considering "nuanced" legal theories from similarly situated plaintiffs.[52]

Justice Cypher also concurred,[53] but disagreed that Lanier had no cognizable property interest in the daguerreotypes.[54] She argued that the ills of the American legal system — such as the legal fiction "that

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[40] *Id.* at 1079.
[41] *Id.* at 1079–80.
[42] *Id.* at 1081 (alteration in original) (quoting Thayer v. Worcester Post Co., 187 N.E. 292, 293 (Mass. 1933)).
[43] *Id.*
[44] *Id.*
[45] *Id.* at 1083.
[46] *Id.* (Budd, C.J., concurring).
[47] *Id.* at 1084.
[48] *Id.* at 1087.
[49] *Id.* at 1084–85.
[50] *Id.* at 1087.
[51] *Id.*
[52] *Id.* at 1090–91.
[53] *Id.* at 1091 (Cypher, J., concurring).
[54] *Id.* at 1092.

turn[ed] humans to chattel property,"[55] as well as legislation that "systemically perpetuated the deprivation of rights of formerly enslaved individuals and their descendants" — had rendered it incapable of providing a sufficient remedy for injuries faced by descendants of enslaved Africans like Lanier.[56] Justice Cypher asserted that it was the duty of common law, designed to adapt to "new . . . conditions of society,"[57] to "provide a remedy where none currently exists."[58] She then proposed a new cause of action allowing (1) a direct lineal descendant of an enslaved person in the United States to (2) sue someone in possession of an artifact "created or obtained as a consequence of [such] enslavement," when (3) the defendant "participated . . . 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 defendant has refused the plaintiff's request to relinquish the artifact.[59]

The court rightfully disparaged Harvard's mistreatment of Lanier, Renty, and Delia. And yet, by imprudently restricting itself to common law standards arising from fundamentally incompatible precedent, the court inhibited its ability to access the range of existing remedial interventions that would have made possible reparations in the form of granting property relationships or equitable interests to Lanier.

The court's insistence that the photographer, and not the photographed, owns the right to a picture is anchored in inapposite precedent. In advancing this argument, the court cited three cases. First, in *Thayer v. Worcester Post Co.*,[60] the plaintiff alleged that the defendant newspaper infringed on her right to privacy when it captured and published a photograph of her at an airport; she contended that she had a property interest in "any picture of herself taken in a private capacity."[61] There, the court rejected the notion that the plaintiff's privacy had been violated — the photograph, for which the plaintiff voluntarily posed, was taken with her knowledge and consent in a public place.[62] Likewise, in *Ault v. Hustler Magazine, Inc.*[63] and *Continental Optical Co. v. Reed*,[64] the plaintiffs argued that their privacy had been invaded by the defendants, only for the courts to highlight the voluntariness with which they were photographed.[65] The *Lanier* court failed to acknowledge that these

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55 *Id.* (alteration in original) (quoting Deleso Alford 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)).

56 *Id.* at 1092–93.

57 *Id.* at 1093 (quoting Commonwealth v. Gallo, 175 N.E. 718, 724 (Mass. 1931)).

58 *Id.*

59 *Id.* at 1100–01.

60 187 N.E. 292 (Mass. 1933).

61 *Id.* at 292–93.

62 *Id.* at 293.

63 860 F.2d 877 (9th Cir. 1988).

64 86 N.E.2d 306 (Ind. App. 1949).

65 *Ault*, 860 F.2d at 882–83; *Cont'l Optical Co.*, 86 N.E.2d at 309.

cases featured non-enslaved plaintiffs, rendering their legal status and circumstances so different as to be noncontrolling. As "chattel property," Renty and Delia were denied a right to privacy,[66] including the right to refuse to take part in the making of the daguerreotypes — facts the court erroneously ignored. There is no indication from *Thayer*, *Ault*, or *Continental Optical Co.* that a photographer would retain a property right in images of people who could never consent to be photographed.

Moreover, the court undertakes an unnecessarily restrictive property-or-no-property approach as part of its questionable common law analysis. In determining that *Thayer* controlled, the court saw no way forward for Lanier's property-related claims. However, property can be construed as "loose and open-ended" when faced with a property-*like* situation, where the right to exclude need not be as all-encompassing as traditional property rights.[67] When faced with a category of such *quasi-property* interests, the law may simply "simulate the functioning of property's exclusionary apparatus through a relational liability regime."[68] The Supreme Court formalized this concept of quasi property in *International News Service v. Associated Press*.[69] There, the decision hinged on a universal notion of fairness, which the Court determined the defendant violated by taking, misappropriating, and selling news material that the complainant labored to acquire.[70] As a result, the Court barred the defendant from using the time-sensitive news that the complainant collected while they were in competition.[71] In making this move, it deemphasized the typical focus of traditional property rights — the *resource* itself (for example, the news) — and instead emphasized the *interest* "implicated in the parties' interactions" (for example, who gets to publish time-sensitive news).[72] These interests "d[id] not emanate exclusively from[] the resource," but rather "derive[d] . . . from the nature, context, and consequences of the parties' interactions."[73] Relatedly, American courts have also recognized quasi-property interests in corpses. For instance, one early opinion held that "[t]here is a duty imposed by the universal feelings of mankind . . . towards the dead; [as

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66 The bodies of enslaved individuals "were treated as 'items of public (indeed pornographic) display'" because Black men and women were deemed "unworthy" of privacy, and sexual privacy in particular. Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1905 (2019) (quoting Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 770 (1999)).

67 Shyamkrishna Balganesh, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1891–92 (2012).

68 *Id.* at 1891 (emphasis omitted).

69 248 U.S. 215 (1918).

70 *Id.* at 239–40.

71 *Id.* at 245–46.

72 Balganesh, *supra* note 67, at 1899.

73 *Id.* at 1900.

such, there is] a duty . . . to protect [corpses] from violation[.] . . . [I]t may therefore be considered as a sort of quasi property."[74]

Put plainly, our judicial system — by appealing to "universal feelings" such as fairness and care for the deceased — has justified quasi-property interests for plaintiffs when it has deemed fit. Accordingly, it has the institutional capacity to grant descendant plaintiffs quasi-property interests in photographs of their ancestors that were coercively taken to advance racial eugenics. Granting such interests to descendant plaintiffs will require courts to (1) "treat Black dead bodies" with the same respect as "white bodies," and "appreciate the unequal dishonor, destruction, and degradation" that the bodies of enslaved Black people "faced for centuries in life and in death";[75] (2) "avoid ratifying exploitation";[76] (3) prevent "identity-based subordination" from continuing to disrupt enslaved Africans' "relationships with their descendants";[77] and (4) view descendants of the enslaved as individuals "whose outrage is legally cognizable," whose "mental anguish is . . . foreseeable [and] compensable," and who are capable of being "trustees for dead persons."[78] While it is presently unlikely that courts will meet these conditions given the pervasiveness of racial discrimination in our judicial system,[79] one thing is certain: arguing for quasi-property interests is not a new undertaking under common law. Just as the Court in *International News Service* permitted an injunction against the defendant,[80] the court here could have prevented Harvard from using the daguerreotypes without Lanier's explicit permission.

Lastly, alongside quasi property, another existing remedy the court overlooked in its common law analysis is bailment. What likely made the court wary to recognize some sort of property interest in *Lanier* was its fear that privatization of the daguerreotypes will result in lack of public access to all sorts of historical images. Fortunately, bailment law — which is established "upon express or implied contract between . . . parties"[81] — provides a means to skirt around this privatization concern while also permitting Lanier some form of control over the daguerreotypes. This arrangement confers upon the bailee "the right to use and enjoy possession free from control by the bailor, subject . . . to do so with care, . . . and to return it in good order" at the end of the bailment.[82] The court could have structured a bailment or trust-like

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[74] Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 238 (1872); *see also* Balganesh, *supra* note 67, at 1897 (discussing this quote).

[75] Fred O. Smith, Jr., *On Time, (In)equality, and Death*, 120 MICH. L. REV. 195, 237 (2021).

[76] *Id.* at 226.

[77] *Id.* at 203.

[78] *Id.* at 207.

[79] *See Confronting and Eliminating Systemic Racism in Trial Courts*, NAT'L ASS'N FOR PRESIDING JUDGES & CT. EXEC. OFFICERS, https://napco4courtleaders.org/confronting-and-eliminating-systemic-racism-in-trial-courts [https://perma.cc/2DJW-5CN9].

[80] Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918).

[81] Nash v. Lang, 167 N.E. 762, 765 (Mass. 1929).

[82] *Id.*

relationship in which Harvard retained possession of the daguerreotypes but for the benefit of Lanier, or with a duty of care to her — thus positioning Lanier as the bailor. This would have allowed Harvard to maintain actual possession of the daguerreotypes, keeping them accessible to the public but with certain stipulations on their use as determined by the exact terms of the bailment arrangement. Alternatively, the court could have constructed a relationship with Harvard as the title holder, granting it ownership but ultimately giving Lanier the "right to use and enjoy" the daguerreotypes as she sees fit. Such a relationship would have also given Lanier greater bargaining power than what the court's property-or-no-property approach afforded. This final suggestion demonstrates the flexibility of the legal tools at the court's disposal.

In response to these articulations of what remedies courts can provide descendant plaintiffs moving forward, skeptics may express concern that such interventions may be judicial activism infringing on legislative powers. However, not only are these approaches cabined within existing common law, the judiciary has the power to "remedy discrete injustices on a case-by-case basis."[83] Waiting on the legislature to provide remedies to those who have been historically wronged is not a mandatory route to justice. In fact, the judicial branch's ability to spell out rights before the legislature arguably comes from judges' duty to oppose "rule[s] whose consequences offend concepts of equity or rationality."[84] It is inequitable to allow Harvard to retain full property rights in, and continue to profit from, Lanier's enslaved ancestors' images. It is irrational to prevent Lanier from claiming some possessory rights over daguerreotypes of her enslaved ancestors who, during their lifetimes, could not exercise consent or even bring suit themselves. Because of courts' responsibility to ensure justice, as well as judges' ability to save legislatures time by using the tools available to courts to make equitable outcomes possible, this judicial activism critique falls flat.

The *Lanier* court's inability to conceive of complete redress for injustices it deemed "extreme and outrageous"[85] raises the question — to whom is "the great principle[] . . . of natural justice extended?"[86] While the court made room for descendant plaintiffs in future litigation to plausibly allege emotional distress, its mishandling of the most crucial parts of the plaintiff's complaint — her property-related claims — emphasizes an uncomfortable reality: until courts are willing to champion nuanced remedial approaches on behalf of descendant plaintiffs, they will be incapable of correcting injustices stemming from American chattel slavery.

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[83] *Lanier*, 191 N.E.3d at 1089 n.7 (Budd, C.J., concurring).

[84] *See* Jack G. Day, *Why Judges Must Make Law*, 26 CASE W. RSRV. L. REV. 563, 567 (1976).

[85] *Lanier*, 191 N.E.3d at 1077.

[86] FREDERICK DOUGLASS, The Meaning of July Fourth for the Negro, Speech at Rochester, New York (July 5, 1852), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 188, 194 (Philip S. Foner ed., Lawrence Hill Books 1999) (1950).