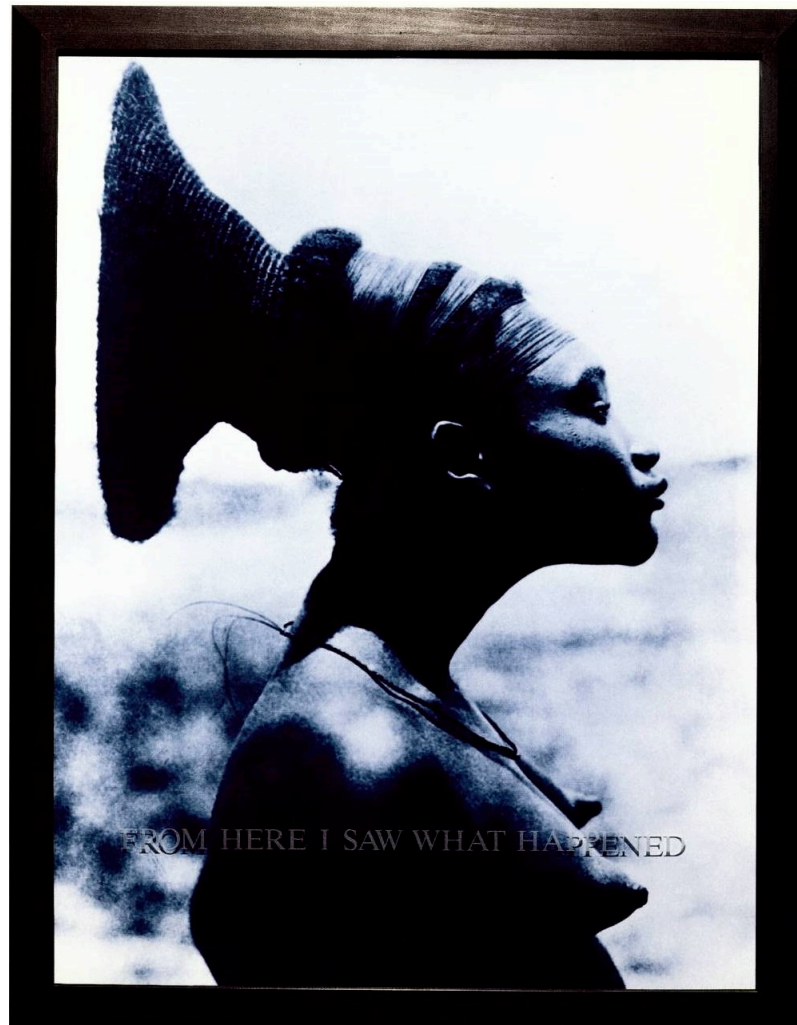


# From Here I Saw What Happened and I Cried: Carrie Mae Weems' Challenge to the Harvard Archive

Yxta Maya Murray\*



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\* Professor, Loyola Law School, Los Angeles. Thanks to Carrie Mae Weems, Christable Lee, Edward St. John, Jennifer Rothman, Kathleen Kim, Pat Kervick, Trish Capone, Jay Dougherty, and Rebecca Tushnet. Thanks also to Angela Harris, Carrie Menkel-Meadow, Tucker Culbertson, Allegra McLeod, Julie Mertus, Andrew Stecker and the amazing staff at *Unbound: Harvard Journal of the Legal Left* for supporting our symposium on October 12, 2012.

<sup>1</sup> CARRIE MAE WEEMS, *From Here I Saw What Happened*, in FROM HERE I SAW WHAT HAPPENED AND I CRIED (1995-96), available in EVERSON MUSEUM OF ART, CARRIE MAE

Who owns the violent past? In the early 1990s, New York artist Carrie Mae Weems traveled to Harvard University's Peabody Museum of Archaeology and Ethnology to see some mysterious photographs. Entering into the archives, she first signed a contract promising not to use any Peabody images without permission. She next found herself staring down at the daguerreotype of a miserable, dignified, and stripped-naked woman named "Delia" who had been enslaved by White masters in 1800s South Carolina. This picture of Delia, as well as images of fifteen other enslaved people, had been commissioned from photographer J.T. Zealy by Harvard ethnologist and Museum of Comparative Zoology founder Louis Agassiz in the 19th century.

As Weems already knew from previous study, Agassiz's suite of pictures had been undertaken to prove his very own "son of Ham" theory of "separate creation."<sup>2</sup> A proponent of "polygenesis,"<sup>3</sup> Agassiz imagined god had cooked up the races from entirely separate species, endowing some with masterful gifts and others with more servile talents. Agassiz illustrated his thesis with the aid of Dr. Robert W. Gibbes, a paleontologist who enjoyed close friendships with South Carolina slaveowners.<sup>4</sup> Together, they hired Zealy to document enslaved people handpicked by Agassiz.<sup>5</sup> One portion of the suite showed the subjects full length and nude, and the second portion focused on their heads and torsos.<sup>6</sup>

The images were not publicized during Agassiz's time. After Charles Darwin's *The Origin of Species* trounced Agassiz's fantasies in 1859,<sup>7</sup> Agassiz stored the pictures away. Years later, Agassiz or his son Alexander donated them and a trove of natural wonders to the museum.<sup>8</sup> The daguerreotypes remained in an attic of the Peabody until cataloguers rediscovered them in 1976.<sup>9</sup>

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WEEMS: RECENT WORK, 1992-1998 [hereinafter EVERSON MUSEUM OF ART, WEEMS: RECENT WORK], at plate 24 (1998).

<sup>2</sup> See Brian Wallis, *Black Bodies, White Science: Louis Agassiz's Slave Daguerreotypes*, AM. ART, Summer 1995, at 39, 42.

<sup>3</sup> *Id.* ("[P]olygenesis [is] the theory of multiple, separate creations for each race as distinct species.").

<sup>4</sup> *Id.* at 44-45.

<sup>5</sup> *Id.* at 45.

<sup>6</sup> *Id.*

<sup>7</sup> M. SUSAN BARGER & WILLIAM BLAINE WHITE, *THE DAGUERRETYPE: NINETEENTH-CENTURY TECHNOLOGY AND MODERN SCIENCE* 80-81 (1991).

<sup>8</sup> See *infra* text accompanying notes 149 and 296.

<sup>9</sup> *Faces of Slavery*, AM. HERITAGE MAG., June 1977, available at <http://www.americanheritage.com/content/faces-slavery> ("These pictures, part of a cache of fifteen, might have remained unknown had it not been for Elinor Reichlin, a former staff member of Harvard's Peabody Museum of Archaeology and Ethnology, who found them early last year in an unused storage cabinet in the museum's attic."); see also MOLLY ROGERS, *DELIA'S TEARS: RACE, SCIENCE, AND PHOTOGRAPHY IN NINETEENTH-CENTURY AMERICA* 5-7 (2010).

Weems realized that in Agassiz she had discovered the Ivy equivalent of Josef Mengele or Harry Laughlin. Though she had signed Harvard's restrictive contract, she unilaterally photographed the daguerreotypes and included these copies in her 1995-96 series *From Here I Saw What Happened and I Cried*. Weems here displayed the image of Delia, as well as other subjects that Agassiz's labels identified as "Jack," "Renty," and "Drana." She enlarged the images, shaped them in the "tondo" portrait circular shape, and tinted them red. She emblazoned Drana's profile image with the white boldface words *You Became a Scientific Profile*, Jack's with *An Anthropological Debate*, Renty's with *A Negroid Type*, and Delia's with *& A Photographic Subject*.



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<sup>10</sup> CARRIE MAE WEEMS, *You Became A Scientific Profile, A Negroid Type, An Anthropological Debate, and A Photographic Subject*, in *FROM HERE I SAW WHAT HAPPENED AND I CRIED* (1995-

Weems then combined this quartet with twenty-nine other appropriated pictures, such as a famous albumen silver *carte de visite* of a man's scourged back,<sup>11</sup> and a snapshot showing expatriate *chanteuse* Josephine Baker in a pensive mood.<sup>12</sup> Bracketing the series are two identical blue-toned images of a Nubian woman, who faces the series as a witness. In all, the text that marks the individual cells reads:

From Here I Saw What Happened/You Became a Scientific Profile/A Negroid Type/An Anthropological Debate/& A Photographic Subject/You Became Mammie/Mama, Mother & Then, Yes, Confidant – Ha/Descending the Throne You Became Footsoldier & Cook/House/Yard/Field/Kitchen/You Became Tom John & Clemens' Jim/Drivers/Riders & Men Of Letters/You Became a Whisper A Symbol of a Mighty Voyage & By The Sweat Of Your Brow You Laboured For Self Family & Others/For Your Names You Took Hope & Humble/Black and Tanned Your Whipped Wind of Change Howled Low Blowing Itself – Ha – Smack Into the Middle of Ellington's Orchestra Billie Heard It Too & Cried Strange Fruit Tears/Born With a Veil You Became Root Worker Juju Mama Voodoo Queen Hoodoo Doctor/Some Said You Were The Spitting Image of Evil/You Became A Playmate To The Patriarch/And Their Daughter/You Became An Accomplice/You Became The Joker's Joke &/Anything But What You Were Ha/Some Laughed Long & Hard & Loud/Others Said 'Only Thing A Niggah Could Do Was Shine My Shoes'/You Became Boots, Spades & Coons/Restless After The Longest Winter You Marched & Marched & Marched/In Your Sing Song Prayer You Asked Didn't My Lord Deliver Daniel?/And I Cried.<sup>13</sup>

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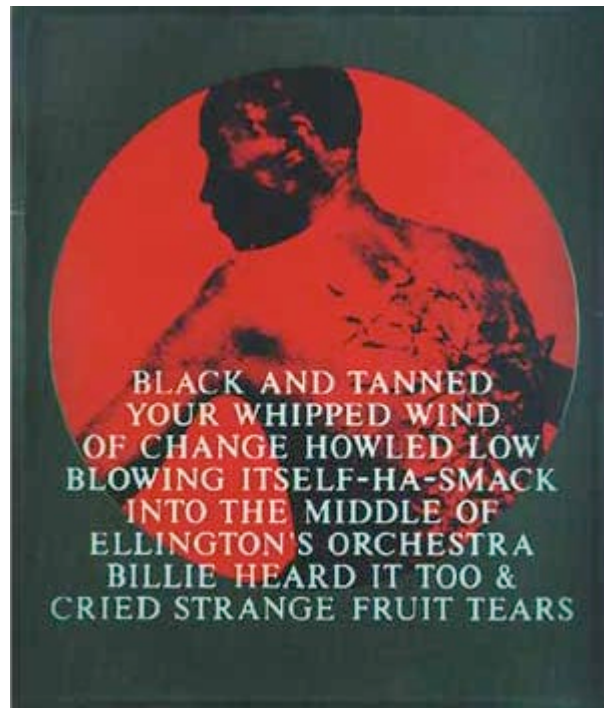
96), available in EVERSON MUSEUM OF ART, WEEMS: RECENT WORK, *supra*, note 1, plates 25-28.

<sup>11</sup> This image is of a man named Gordon, whose scars were documented by photographers William D. MacPherson and one Mr. Oliver in 1863. Gordon's photograph was widely reproduced in the United States, serving both prurient and abolitionist interests. See MARTIN A. BERGER, SEEING THROUGH RACE: A REINTERPRETATION OF CIVIL RIGHTS PHOTOGRAPHY 43 (2011) (identifying the image as a silver *carte de visite*). A *carte de visite* is a small daguerreotype portrait fixed onto cardboard. See ROBIN & CAROL WICHARD, VICTORIAN CARTES-DE-VISITE 12 (1999).

<sup>12</sup> See CARRIE MAE WEEMS, FROM HERE I SAW WHAT HAPPENED AND I CRIED (1995-96). The complete series is available at <http://carriemacweems.net/galleries/from-here.html>.

<sup>13</sup>*Id.*





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Perhaps predictably, Harvard threatened to sue Weems. Its administrators argued that Weems had freebooted their copyright to the Agassiz daguerreotypes and that she also violated her contractual promise not to use images taken in the Peabody without Harvard's permission.<sup>15</sup> Weems later spoke about the imbroglio in the 2009 documentary series *Art in the 21st Century*, confessing that she felt flabbergasted by Harvard's response: "I thought, Harvard's going to *sue* me for using these images of Black people in their collection. The richest university in the world."<sup>16</sup> Weems spent considerable time "worrying about it and thinking about it,"<sup>17</sup> and then issued a remarkable response. "I think that I don't have really a legal case, but maybe I have a moral case that [should] be . . . carr[ied] out in public," she told University representatives. "I think that your suing me would be a really good thing. You should. And we should have this conversation in court."<sup>18</sup> Weems won this fraught

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<sup>14</sup> CARRIE MAE WEEMS, *Black and Tanned*, in FROM HERE I SAW WHAT HAPPENED AND I CRIED (1995-96), available in EVERSON MUSEUM OF ART, WEEMS: RECENT WORK, *supra* note 1, plate 40.

<sup>15</sup> Telephone Interview with Dr. Pamela Gerardi, Director of External Relations, Peabody Museum of Archaeology and Ethnology, June 26, 2012. See also *Art in the 21st Century*, Season 5: *Compassion* (PBS 2009) (Weems segment available at <http://www.art21.org/videos/segment-carrie-mae-weems-in-compassion>).

<sup>16</sup> *Compassion*, *supra* note 15.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

staring contest when Harvard eventually blinked. It now demanded payment whenever Weems sold a cell, but then Harvard administrators also purchased the images for its art museum. Weems called this result “confus[ing].”<sup>19</sup>

Harvard’s oblique way of handling Weems seems half a concession, and half *droit de seigneur*. It certainly doesn’t answer the rights question in copyright or contract law. Did Harvard actually own the copyrights to a series of photographs made in 1850? And if it did, did the fair use doctrine of the 1976 Copyright Act allow any leeway for Weems’ superior “moral case?”

More fundamentally, did Harvard indeed own the daguerreotypes, which would clinch their copyright and contract claims? And if they did, *should* they own images of enslaved people that Agassiz won through violent coercion? Or should we regard these relics as cultural property belonging to African-Americans, which should be returned to the descendants of African-born enslaved people?

In this essay, I argue that images and objects that help us *bear witness* to the United States’ violent past deserve special treatment in copyright and property law. I pay special attention to the relics of enslavement, drawing inspiration from Weems’ observant Nubian woman. Her image prompts me to make the following case: Witnessing relics such as the Agassiz daguerreotypes give us rare opportunities to recall the history of slavery in the United States, and this exercise in memory can trigger peaceable transformations in our law and culture. In my continuing effort to energize a jurisprudence of nonviolence,<sup>20</sup> I maintain that remembering atrocities like slavery is a necessary practice for evolving a more peaceable legal and social discourse. This nonviolent objective will drive my analysis of Weems’ art, as well as of the copyright law and property issues that punctuate the Weems case.

With respect to copyright law, I argue that the fair use doctrine should give broad permissions to artists who appropriate witnessing images and relics, particularly when such borrowings illuminate how the violent past informs contemporary political practices. The fair use doctrine pivots on whether an artist “transformed” a work that they appropriated.<sup>21</sup> I show that artists who minimally alter relics of the violent past, but meaningfully showcase them, can transform our understanding of the works, as well as of our current society and laws. Their novel display of the work can prove as evolutionary as any physical intervention with existing art, and I maintain that it should qualify as transformation within the meaning of copyright law. For the purposes of this article, I reveal how Weems’ appropriation, when read in the context of her larger *oeuvre*, performs meaningful transformations in two related ways. First, Weems changes the daguerreotypes themselves through a kind of “observer effect,” wherein her very act of witnessing the daguerreotypes transforms their meanings.<sup>22</sup> Second, Weems’ re-seeing of the daguerreotypes alters our comprehension of the modern world. It challenges our perceptions of social practices like *de facto*

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<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Yxta Maya Murray, *The Pedagogy of Violence*, 20 S. CAL. INTERDISC. L.J. 537 (2011); Yxta Maya Murray, *A Jurisprudence of Nonviolence*, 9 CONN. PUB. INT. L.J. 65 (2009).

<sup>21</sup> See *infra* text accompanying notes 166-210.

<sup>22</sup> See *infra* text accompanying notes 231-32.

segregation and intelligence testing that now pass as legitimate, race-neutral, non-violent, and legal conventions. Weems' allusive artistic practices reveal that these customs trace back to past abuses that U.S. slaveholders once visited upon the bodies of African-born slaves. This brand of transformation—that is, the alteration of our comprehension of “race-neutral” conventions and legal practices—should be eligible for fair use protection.<sup>23</sup>

In the latter part of my essay I shift focus from copyright law to the underlying question of property ownership, which informs the contract issue. Harvard threatened to sue Weems based on her contractual promise not to appropriate their property without permission. Its officials only allowed Weems access to “their” daguerreotypes after she had so bound herself. It seems that the contract claim is a good one: even without a copyright, if they owned the pictures, they could show them to whom they liked, and on their own terms.<sup>24</sup>

But whose daguerreotypes are they? Should Agassiz have ever been able to claim a right to these pictures? And, by extension, should Harvard? Agassiz pirated these images through capture and exploitation. No legitimate law should recognize this violent taking of property rights.<sup>25</sup> Allowing the Agassiz daguerreotypes to remain in Harvard's custody sustains a brutal offense, and erases instead of bears witness to the violent past. In the interests of peace, the law should transfer the property to new hands: this would involve transforming the daguerreotypes' title from that of the University to those who bear the closest lineal relationship to the subjects of the daguerreotypes, being Drana, Renty, Jack, and Delia.<sup>26</sup>

Critiques of Harvard's flawed property rights in the daguerreotypes extend to other relics left by enslaved people. Harvard is not the only federally funded museum that owns objects, art, and images made by, created with, and left by slaves in the nineteenth century. Such relics should also be removed from federally funded museums and returned to descendants of those people, unless they were already donated by such descendants.<sup>27</sup> The Native American Graves Protection and Repatriation Act and U.S. and international treaties on cultural patrimony provide models for transforming these relics into protected cultural patrimony.<sup>28</sup> Just as my reading of the fair use doctrine urges an engagement with U.S. history, my reconsideration of property law also calls for a confrontation with the violent past—here, through a redistribution of precious keepsakes. The provocative public transfer of relics and goods, in turn, would transform contemporary ideas about who authored our national heritage, the violence that funded the creation of the United States, and how to honor that inheritance while looking toward a peaceable future.

In section I of this paper, I describe the strikingly tangled history of Louis Agassiz, the daguerreotypes, and their relation to Western racist science practices whose harms

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<sup>23</sup> See *infra* text accompanying notes 233-82.

<sup>24</sup> See *infra* text accompanying note 291-92.

<sup>25</sup> See *infra* Section IV.

<sup>26</sup> See *infra* text accompanying notes 419-46.

<sup>27</sup> See *infra* text accompanying notes 418-27.

<sup>28</sup> See *infra* text accompanying notes 326-51.

still resonate in contemporary customs such as de facto segregation and intelligence testing. In section II, I sketch Carrie Mae Weems' life and art, showing how her work traces these footprints in U.S. culture. In section III, I tackle the copyright fair use problem, noting how Weems transforms the daguerreotypes by the "observer effect," and by so doing also metamorphoses our perceptions of de facto segregation and intelligence testing. I argue that this alteration of our perception of these customs should be recognized in a copyright delineation of "transformation."

Following my copyright analysis, Section IV addresses the quandary underlying both the copyright as well as the contract issues: Does Harvard own these daguerreotypes at all? Should it? The first question appears answerable with an unqualified *yes*. The second inquiry's resolution, however, depends upon a witnessing of the violent past, one's dedication to peace, and a commitment to the transfiguration of property law as it relates to these objects.

### *I. Louis Agassiz, the Daguerreotypes, and the History of Racist Science in the U.S.*

Louis Agassiz wanted to be a man of progress and a good Christian in an age when such things still seemed possible. He combined these aspirations in his hobby of collecting objects from the natural world. At his death, the philosopher William James scripted a moving panegyric of his friend, whom he somewhat paradoxically vaunted as a Linnaeus, whose view of nature was "saturated with simple religious feeling."<sup>29</sup> Agassiz's embrace of the divine with the scientifically documented allowed him to devise a fiction of human creation that did not mangle the Bible stories he'd read as a youth.

Both god and nature announced themselves early to this child of the Alps. Agassiz was born at the dawn of the nineteenth century in Moutier, Switzerland to a clergyman father descended from Huguenots.<sup>30</sup> Agassiz cut a fine figure as a student at Heidelberg, distinguishing himself with his religious conviction and athleticism.<sup>31</sup> When illness forced him to take his ease in the countryside, he devoted his leisure hours to the fish that he found in the lakes of Neuchatel. He enjoyed studying them by killing them, mounting them, and preserving them in alcohol.<sup>32</sup> This initiation readied him for greater things in Munich, where he learned classification from Lorenz Oken, the famous natural philosopher and mystic.<sup>33</sup>

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<sup>29</sup> WILLIAM JAMES, LOUIS AGASSIZ 5, 11 (1896).

<sup>30</sup> CHARLES FREDERICK HOLDER, LOUIS AGASSIZ: HIS LIFE AND WORK xxi-xxii (1893).

<sup>31</sup> *Id.* at 20-21.

<sup>32</sup> *Id.* at 23.

<sup>33</sup> *Id.* at 27. *See also* ALBERT BOIME, ART IN AN AGE OF BONAPARTISM, 1800-1815 at 463-64 (1991) ("[Oken] declared that the action or the life of God consists in eternally manifesting, eternally contemplating itself in unity and duality, eternally dividing itself and still remaining one.")

Agassiz's appetite for collecting remained insatiable, and he gathered a *wunderkabinett* of insects, stuffed birds, fossils, rocks, and items from the woods.<sup>34</sup> This extraordinary acquisition of dead things gained him the favor of none other than Alexander von Humboldt, the superstar "discoverer" of South America,<sup>35</sup> and a professorship in Neuchatel.<sup>36</sup> Agassiz's work as a naturalist also earned him the favor of the famed glaciologist Jean de Charpentier,<sup>37</sup> who encouraged him to travel to the Alps to study ice masses. Once there, Agassiz chummed with the naturalist Arnold Guyot, a supporter of both Agassiz's scientific investigations as well as his burgeoning confidence in White supremacy.<sup>38</sup> Guyot's enthusiasms buoyed his own ascent to Princeton where he became a professor of geology and geography.<sup>39</sup> Guyot's major work of geography, *The Earth and Man*, portrays ecosystems as creating social, political, and moral "shaping influences" that create different human capacities according to a divine design.<sup>40</sup> Guyot's theory helped steer European colonization, and also harmonized with Agassiz's growing abhorrence of racial mixings, which both men believed would lead to the "fall" or degradation of the noble White race.<sup>41</sup>

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<sup>34</sup> HOLDER, *supra* note 30, at 30.

<sup>35</sup> *Id.* at 47-48. See also GERALD HELFERICH, HUMBOLDT'S COSMOS: ALEXANDER VON HUMBOLDT AND THE LATIN AMERICAN JOURNEY THAT CHANGED THE WAY WE SEE THE WORLD xvi (2004) ("From 1799 to 1804, Humboldt and his traveling companion Aime Bonpland accomplished what has been called the 'scientific discovery of the New World,' blazing a six-thousand-mile swath through what is now Venezuela, Colombia, Ecuador, Peru, Mexico, and Cuba.").

<sup>36</sup> HOLDER, *supra* note 30, at 49.

<sup>37</sup> *Id.* at 61.

<sup>38</sup> *Id.* at 69.

<sup>39</sup> See REXMOND CANNING COCHRANE, THE NATIONAL ACADEMY OF SCIENCES: THE FIRST HUNDRED YEARS, 1863-1963 at 64 (1978).

<sup>40</sup> See ARNOLD GUYOT, THE EARTH AND MAN: LECTURES ON COMPARATIVE PHYSICAL GEOGRAPHY IN ITS RELATION TO THE HISTORY OF MANKIND 248 (1906) ("[I]n all directions in proportion as we remove from the geographical seat of the most beautiful human type, the degeneration becomes greater, the debasement of the form more complete. Does not this surprising coincidence seem to designate those Caucasian regions as the cradle of man, the point of departure for the tribes of the earth? It results from this remarkable distribution of the races of man that the continents of the North, forming the central mass of the lands, are inhabited by the finest races, and present the most perfect types . . ."). See also *id.* at 253 ("Now if man came from the hands of the divine Author of his being pure and noble, it was in those privileged countries where God placed his cradle, in the focus of spiritual light, that he had the best chance to keep himself such. But how has he fallen elsewhere so low? It is because he was free, of a perfectible nature, and consequently capable also of falling.").

<sup>41</sup> For Guyot's influence on geography and European attitudes toward dominating African and South American continents, see Rich Heyman, *Research, Pedagogy, and Instrumental Geography*, in GEOGRAPHIC THOUGHT: A PRAXIS PERSPECTIVE 165 (2009) ("Guyot's geography bolstered a strictly instrumentalist approach in which man stood apart from nature: nature existed so that (European) man could conquer it, and science would prove to be a central tool in that project."). Regarding Guyot's attitudes about racial mixing, see *id.* For Agassiz's

By the mid-1800s, Agassiz's flourishing reputation garnered him, at thirty-nine years of age,<sup>42</sup> a prized invitation to give the Lowell Institute lectures in Boston.<sup>43</sup> He arrived in the Northeast in 1846 and immediately aroused local interest by stockpiling strange fish he found at open markets, insects he discovered in the fields, and other fauna that he amassed in his archives.<sup>44</sup> In Philadelphia, Agassiz made a fateful acquaintance with Samuel George Morton, an eminent American anthropologist so possessed by a curious passion for amassing human skulls that his collection numbered upwards of 600.<sup>45</sup> Morton made a special study of Native American crania and those filched from ancient Egyptian tombs, taking delight in measuring their capacities and deriving racial theories from their differences.<sup>46</sup> Eventually, Morton derived a ranking for the races based on cranial expansiveness: Caucasians topped the list, which then descended into Mongolian, Malay, Native American, and Negro types. Teutonics and their derivatives, being Germans and the English, proved superior in this metric. American-born Black people, Hottentots, and aboriginal Australians malingered at its bottom.<sup>47</sup> Morton's practices for deriving this data proved slightly less reliable than a haruspex's or an astrologer's,<sup>48</sup> but this did not prevent him from drawing fantastic conclusions about the corresponding moral worth of the races.<sup>49</sup>

Morton's theories soon featured in the intellectual war between monogenesists and polygenesists. Monogenesists believed that the human race descended from the perfection of Adam and Eve, and ascribed racial differences to degeneration.<sup>50</sup> Polygenesists like Morton believed in the separate species theory, which proves just as toxic in meaning, but alone authorized slavery since it posited that Whites and Blacks grew from entirely different origins: the supposedly bulbous-headed group was built by god for dominion while the reputedly tinier-brained set had been sprouted for serving.<sup>51</sup>

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thoughts on racial mingling, see LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 114 (2001). *See also infra* text accompanying notes 51-54.

<sup>42</sup> *Id.* at 88.

<sup>43</sup> *Id.* at 87.

<sup>44</sup> *Id.* at 88-90.

<sup>45</sup> Louis Menand, *Morton, Agassiz, and the Origins of Scientific Racism in the United States*, 34 J. BLACKS IN HIGHER EDUC. 110, 110 (2001-2002).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 110-11 (detailing Morton's failure to check the reliability of his racial attributions, factor in gender or body size, and his willy-nilly ejection of Hindus from the Caucasian index and the overloading of data on Native Americans by the inclusion of tiny Peruvian heads into their category).

<sup>49</sup> *Id.* at 110 (determining that Caucasians were intellectual, Native Americans vengeful, and "Ethiopians" are joyous and flexible).

<sup>50</sup> *Id.* at 111-12.

<sup>51</sup> *Id.* at 111.

Agassiz loved Morton's ideas, particularly after he encountered Black Americans for the first time at a Northeastern hotel.<sup>52</sup> He did not cherish this contact.<sup>53</sup> It would invigorate his ideas about different species, as well as his abhorrence for mixed-race relations, particularly romances that might lead to children.<sup>54</sup> His repugnance inspired him to champion Morton's theory at the Lowell lecture.<sup>55</sup> He then repeated these claims at a meeting of the Association for the Advancement of American Science at Charleston, South Carolina.<sup>56</sup> Agassiz's paralogisms provoked hostile responses from scientists and abolitionists, and he objected that he did not condone slavery.<sup>57</sup> His supposed commitment to manumission, however, did not stop him from pursuing this theory that so gladdened slaveowners.

In the same year as the enactment of the 1850 Fugitive Slave Act,<sup>58</sup> Agassiz toured South Carolina plantations and decided to defend his polygenist position by resuming his collecting habit. But this time he would collect live people, not animals, bones, or plants. For this purpose he enlisted Dr. Robert Gibbes, a Morton acolyte, who led Agassiz on a tour of the plantations.<sup>59</sup> On this expedition Agassiz selected

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<sup>52</sup> *Id.* at 112.

<sup>53</sup> *Id.* ("As much as I try to feel pity at the sight of this degraded and degenerate race . . . it is impossible for me to repress the feeling that they are not of the same blood as us. Seeing their black faces with their fat lips and their grimacing teeth, the wool on their heads, their bent knees, their elongated hands, their large curved fingernails, and above all the livid color of their palms . . . [I found them] hideous.") (citing a letter from Agassiz to his mother dated December of 1846).

<sup>54</sup> See *id.* at 114-15 ("It is immoral and destructive of social equality as it creates unnatural relations and multiplies the differences among the members of the same community in a wrong direction. . . . I am convinced also that no efforts should be spared to check that which is abhorrent to our better nature, and inconsistent with the progress of higher civilization and a purer morality.").

<sup>55</sup> *Id.*

<sup>56</sup> *Faces of Slavery*, *supra* note 9.

<sup>57</sup> See Wallis, *supra* note 2, at 44 ("Agassiz later claimed that his beliefs on racial typologies were without political motivation, and he remained a staunch abolitionist, a position that seems contradictory given the later pro slavery embrace of his views.").

<sup>58</sup> Louisa M. A. Heiny, *Radical Abolitionist Influence on Federalism and the Fourteenth Amendment*, 49 AM. J. LEGAL HIST. 180, n. 33 (2007) ("The Fugitive Slave Acts . . . requir[ed] non-slave states to assist in the capture and return of fugitive slaves to their owners in slave states.").

<sup>59</sup> *Id.* My research indicates that Gibbes identified as a scientist and a historian. In particular, he collected and edited documents relating to the history of the American Revolution, as it "relat[ed] to the Contest for Liberty Chiefly in South Carolina." See R. W. GIBBES, DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION, CONSISTING OF LETTERS AND PAPERS RELATING TO THE CONTEST FOR LIBERTY, CHIEFLY IN SOUTH CAROLINA, IN 1781 AND 1782, FROM ORIGINALS IN THE POSSESSION OF THE EDITOR AND FROM OTHER SOURCES (1857). In this tome, Gibbes identifies himself as a member of the American Association for the Advancement of Science and the New York Historical Society, among several other organizations. Brian Wallis describes Gibbes as "Columbia[, South Carolina's] foremost authority on science and culture. He was a nationally recognized expert

Delia, Jack, Renty, Drana, and others for their supposedly instructive appearances. He ordered Gibbes to “gather corroborative photographic evidence” of them, and then retreated to Harvard.<sup>60</sup> Gibbes hired one J.T. Zealy to take nude pictures of them at Zealy’s studio in the two attitudes that make up the series, being headshots and full body shots.<sup>61</sup> The record of what happened to the pictures here dwindles. Darwin’s 1859 treatise trounced Agassiz’s and Morton’s theory, and the daguerreotypes fade from history until their discovery in the Peabody attic in 1976.<sup>62</sup>

After Agassiz’s ill-received Lowell lecture, he lunged for signs of social validation so strenuously that he secured a professorship of zoology at Harvard in 1848.<sup>63</sup> Once there, he continued his practice of seizing specimens from the natural world. His store of skeletons, plants, corals, and stuffed beasts formed the foundation of the Museum of Comparative Zoology at Cambridge, which he established.<sup>64</sup> The museum was dedicated in 1860,<sup>65</sup> two years after Harvard purchased Agassiz’s collection of “accumulated specimens.”<sup>66</sup> During this period of his career, Agassiz prized the society of Oliver Wendell Holmes Sr., Ralph Waldo Emerson, and Henry Wadsworth Longfellow at the famous “Saturday club,” a Boston gathering of intellectuals.<sup>67</sup>

One of the most intriguing of these relationships was with Emerson. The author of *Self-Reliance* and ambivalent abolitionist<sup>68</sup> so approved of Agassiz’s museum work

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on American paleontology and, like Agassiz, an obsessive collector of scientific specimens.” Wallis, *supra* note 2, at 45.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See *Faces of Slavery*, *supra* note 9.

<sup>63</sup> HOLDER, *supra* note 30, at 97-98.

<sup>64</sup> *Id.* at 100, 103. Agassiz’s foundation of the Zoology museum did not end the University’s connections with slaveholding. Harvard Law School’s Royall Chair, now occupied by Professor Janet Halley, was established by Isaac Royall, a slaveholder, and the Royall Chair’s funding galvanized the establishment of the law school. For Professor Halley’s thoughtful comments on this painful legacy, see *My Isaac Royall Legacy*, 24 HARV. BLACKLETTER L.J. 117 (2008).

<sup>65</sup> HOLDER, *supra* note 30, at 109.

<sup>66</sup> See Julius H. Ward, *Louis Agassiz and his Friends*, 3 HARV. REG. 13, 13 (1881); see also *id.* (“The founder of the Museum of comparative Zoology at Harvard will always remain its first and greatest benefactor.”).

<sup>67</sup> EDWARD WALDO EMERSON, *THE EARLY YEARS OF THE SATURDAY CLUB, 1855-1870* at 450 (1918).

<sup>68</sup> See James H. Read, *The Limits of Self-Reliance: Emerson, Slavery, and Abolition* 4 (Sept. 3-6, 2009) (presented to the annual meeting of the American Political Science Association), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1451487](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451487) (“The Fugitive Slave Law of 1850 radicalized Emerson’s antislavery politics and at the same time conveniently harmonized his self-reliant philosophy with the fulfillment of his antislavery duties.”); *id.* at 5 (“Even as he engaged in it, Emerson saw antislavery activism draining time and energy away from his own proper work of freeing ‘imprisoned spirits, imprisoned thoughts, far back in the brain.’”) (citations omitted).



that in a letter dated December 13, 1864, he conveyed “blessings” to the Agassiz Museum project. “May you both increase and multiply for ages!” he wrote.<sup>69</sup> His respect for Agassiz’s teaching methods, moreover, also influenced the way he taught his own daughters.<sup>70</sup> So, even while Emerson deplored the Fugitive Slave Act,<sup>71</sup> one may still worry that Agassiz influenced this great American Bard in other matters as well. Indeed, it seems that Emerson may have borrowed from Agassiz’s faith that Caucasians ranked above other peoples when devising his own “scale of races” in his famous long essay series *The Conduct of Life*.<sup>72</sup>

Agassiz’s relationship with Oliver Wendell Holmes Sr. may also have proved influential for the poet, essayist, bigot, and physician who attacked abolitionists as “ultra melanophiles,”<sup>73</sup> believed that “moral idiocy” was inherited, and characterized children with learning disabilities as “the infant school of crime, for out of this class come the great majority of adult criminals.”<sup>74</sup>

A reader of Holmes Sr., of course, is made immediately to think of Holmes Jr., the Supreme Court Justice and author of *Buck v. Bell* who believed that “imbeciles” should be sterilized.<sup>75</sup> While some have attributed Justice Holmes’ enthusiasm for eugenics and poo-pooing of abolition to the “social Darwinism of the time,”<sup>76</sup> it still bears

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<sup>69</sup> See LOUIS AGASSIZ: HIS LIFE AND CORRESPONDENCE 620 (Elizabeth Cabot Cary Agassiz ed., 10th ed. 1893) (in this letter, Emerson also cautions against one university program having preponderance over all others, but assures Agassiz that he maintains the best, indeed, highest respect for Natural History).

<sup>70</sup> See *id.* at 525 (“Mr. Ralph Waldo Emerson revived [Agassiz’s relaxed educational] custom[s] for his own daughters. . . . He talked to them of poetry and literature and philosophy as Agassiz had talked to them of nature.”).

<sup>71</sup> Read, *supra* note 68, at 4.

<sup>72</sup> *Id.* at 23. See also RALPH WALDO EMERSON, THE CONDUCT OF LIFE, reprinted in 3 THE WORKS OF RALPH WALDO EMERSON 6 (1914) (“[L]aws . . . act on us daily . . . The menagerie, or forms and powers of the spine, is a book of fate: the bill of the bird, the skull of the snake, determines tyrannically its limits. So is the scale of races, of temperaments; so is sex; so is climate.”).

<sup>73</sup> JOHN T. CUMBLER, FROM ABOLITION TO RIGHTS FOR ALL: THE MAKING OF A REFORM COMMUNITY IN THE NINETEENTH CENTURY 57 (2008) (“Dr. Oliver Wendell Holmes . . . may have shared intellectual circles with abolitionists, but he had no time for their politics and persuasions. In a public talk he called them ‘ultra melanophiles’ and traitors to both the union and the white race.”).

<sup>74</sup> OLIVER WENDELL HOLMES, *Pages from an Old Volume of Life*, in 8 THE WORKS OF OLIVER WENDELL HOLMES 336-38 (1892).

<sup>75</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“Three generations of imbeciles is enough.”).

<sup>76</sup> See Peter Schuler, *Law Professor Reveals Another Side to Oliver Wendell Holmes Jr. in a New Book on Former Supreme Court Justice*, U. CHI. CHRON., Mar. 15, 2001 (interview with Albert Alschuler, author of LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2002)). See also LAW WITHOUT VALUES, *supra* at 46 (“The passion that Holmes had felt for the abolition of slavery before the Civil War faded during his ordeal and turned to disdain after the war ended.”); see also *id.* at 11 (“[A]lthough Holmes celebrated personal passion and claimed to have convictions, he ‘sneered’ at all political and moral causes except

noting that he was the son of a man whose convictions about moral, racial, and intellectual hierarchy fed on the same dazzling religious convictions<sup>77</sup> as his friend Agassiz, the abuser of Delia, Renty, Jack, and Drana. Indeed, Holmes Sr.'s and Agassiz's relationship proved so close that when Agassiz left Cambridge to venture to Brazil in search of yet more specimens to gather, Holmes wrote him a witty little ditty in fond farewell:

From the Indians of the Pampas  
 Who would dine upon their grampas,  
 From every beast and vermin  
 That to think of set us squirming . . .  
 Heaven keep the great Professor!  
 May he find, with his apostles,  
 That the land is full of fossils,  
 That the waters swarm with fishes  
 Shaped according to his wishes.<sup>78</sup>

In South America, Agassiz continued his habit of studying human exotica along with flora and animals.<sup>79</sup> He drew infamous parallels between primates and Black people he observed in the Amazon, and published his conclusions in his 1868 tome *Journey in Brazil*.<sup>80</sup> In the 1870s he repeated this practice of "scientific" observation in

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eugenics, which he supported in an especially chilling form by advocating the execution of 'everyone below standard.'").

<sup>77</sup> OLIVER WENDELL HOLMES, *MECHANISM IN THOUGHT AND MORALS: AN ADDRESS WITH NOTES AND AFTERTHOUGHTS* 103 (1871) ("[W]e may begin to speak of the moral character of inherited tendencies, which belong to the machinery for which the Sovereign Power alone is responsible. The misfortune of perverse instincts, which adhere to us as congenital inheritances, should go to our side of the account, if the books of heaven are kept, as the great Church of Christendom maintains they are, by double entry.").

<sup>78</sup> OLIVER WENDELL HOLMES, *A Farewell to Agassiz*, in *THE COMPLETE POETICAL WORKS OF OLIVER WENDELL HOLMES: WITH ILLUSTRATIONS* 294-95 (1887).

<sup>79</sup> HOLDER, *supra* note 30, at 128 (describing Agassiz's study of fish and Indians in the same paragraph).

<sup>80</sup> See CHRISTOPHER IMSCHER, *THE POETICS OF NATURAL HISTORY: FROM JOHN BARTRAM TO WILLIAM JAMES* 269 (1999) ("[Agassiz] emphasized that a country like Brazil, 'where the uncultivated part of the population go half naked, and are frequently seen entirely undressed,' provided an ideal testing ground for the efficiency of what he called 'the natural history method,' that is, 'the comparison of individuals of different kinds with one another, just as naturalists compare specimens of different species.'").

Tierra del Fuego.<sup>81</sup> Once he returned home, he built the Pekinese School of Natural History in Massachusetts' Elizabeth Islands,<sup>82</sup> and busied himself with ensuring that Darwin did not destroy his legacy. In the last weeks before his death, he gave a lecture on his theory of generation,<sup>83</sup> though apparently did not break out the daguerreotypes to support his argument. Delia, Renty, Jack, and Drana remained captured on film, evidently hidden in the nooks of Agassiz's own home until they were gifted by him to Harvard in 1858 or his son Alexander transferred the daguerreotypes to the University in 1935.<sup>84</sup> Meanwhile Agassiz continued his efforts to win over evolutionists to polygenesis, pressing his case that Darwin had not produced any evidence proving that species transformed through the eons.<sup>85</sup>

Agassiz himself paid a vast price for his inability to change with the times. In his last public presentation, he lectured before the Massachusetts Board of Agriculture on "the structural growth of domesticated animals."<sup>86</sup> He found himself unable to convert anyone to his faith in polygenesis. He died in a miasma of angst and disappointment on December 14, 1873.<sup>87</sup>

## II. *The Life and Art of Carrie Mae Weems*

Weems, unlike Agassiz, is unafraid of change. Her appetite for transmutation colors works such as *From Here I Saw What Happened and I Cried*, and also emerges as a strategy that helps her deal with the vagaries of existence. In short, transformation is the stuff out of which her life and art is made.

Weems is an Oregon baby,<sup>88</sup> but before her family landed on the West Coast they worked as sharecroppers in Mississippi.<sup>89</sup> She first studied modern dance in San Francisco,<sup>90</sup> a stage that all the biographies I've read gloss over.<sup>91</sup> Yet I find it

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<sup>81</sup> HOLDER, *supra* note 30, at 162 (Agassiz studying glaciers and the Fuegians).

<sup>82</sup> *Id.* at 168.

<sup>83</sup> BARRY WERTH, BANQUET AT DELMONICO'S: GREAT MINDS, THE GILDED AGE, AND THE TRIUMPH OF EVOLUTION IN AMERICA 83 (2009) ("The world has risen in some way or other," Agassiz concluded. "How it originated is the great question, and Darwin's theory, like all other attempts to explain the origin of life, is thus far merely conjectural. I believe he has not even made the best conjecture possible in the present state of our knowledge.").

<sup>84</sup> See Email from Pat Kervick to author, *infra* note 296.

<sup>85</sup> *Id.*

<sup>86</sup> HOLDER, *supra* note 30, at 177.

<sup>87</sup> *Id.* at 177 ("He often almost broke down in these last days.").

<sup>88</sup> Vivian Patterson, *The Hampton Project*, in CARRIE MAE WEEMS: THE HAMPTON PROJECT 22 (2000).

<sup>89</sup> *Id.*

<sup>90</sup> Andrea Kirsh, *Carrie Mae Weems: Issues in Black, White, and Color*, in NAT'L MUSEUM OF WOMEN IN THE ARTS, CARRIE MAE WEEMS 9 (1993).

<sup>91</sup> See, e.g., *id.* ("Weems came to her studies in photography as a mature student . . . [b]y that time she had professional experience in modern dance; a progression of unskilled and semi-skilled jobs . . . ; and extensive grass-roots political experiences."); Thomas Piche, Jr.,

prophetic that as a teenager she learned the body-morphing forms first styled by Merce Cunningham and Paul Taylor;<sup>92</sup> and set to the blundered cacophonies of John Cage.<sup>93</sup> Her dance practice showcases a stalwart work ethic that supported her financially as she took jobs in restaurants, offices, and factories while she studied choreography.<sup>94</sup> Her crucial experience working with socialist and feminist organizations also garlands her C.V. during these years.<sup>95</sup> Yet her attraction to the referential, disassembled movements of modern dance may have proved just as foundational for her adult work practices, which combine political consciousness with appropriations so transfigurative that they qualify as alchemy.

Weems' vision of her life changed at the age of eighteen. That year she first encountered the periodical *Black Photographers Annual* and work by photographers Anthony Barboza, Roy De Carava, and Adger Cowans.<sup>96</sup> At the age of 21 her first boyfriend gave her a camera,<sup>97</sup> and at 29 she entered the B.F.A. program at CalArts.<sup>98</sup> After spending the early '80s taking photographs, she seemed to switch gears again by studying folklore at the University of California, Berkeley in 1984.<sup>99</sup> She returned to the visual arts full time, however, and has continued taking photographs until the present day. Throughout her career, she has instituted two major habits into her work: taking and metamorphosis.

Weems' body of work is extensive and rich, and shows her taste for a variety of borrowings.<sup>100</sup> She is widely known for her allusive *Kitchen Tables Series*,<sup>101</sup> and in June

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*Reading Carrie Mae Weems, in* EVERSON MUSEUM OF ART, WEEMS: RECENT WORK, *supra* note 1, at 9-10 (setting forth biography but omitting this stage of her career).

<sup>92</sup> See, e.g., Rebekah J. Kowal, *Action is Finding Subjectivity: Merce Cunningham and Paul Taylor, in* HOW TO DO THINGS WITH DANCE: PERFORMING CHANGE IN POSTWAR AMERICA 151 (2010).

<sup>93</sup> With respect to John Cage's influence on modern dance, see GAYLE KASSING, HISTORY OF DANCE: AN INTERACTIVE ARTS APPROACH 250 (2007) (discussing Cage's work with Cunningham). With respect to Cage's musical style, see JAMES PRITCHETT, THE MUSIC OF JOHN CAGE 53 (1993) (describing the combination of a "single line," a "disjunct voice" and "fragmentation of the harmonic progression" as hallmarks of a Cagean musical style).

<sup>94</sup> See, e.g., Kirsh, *Carrie Mae Weems*, *supra* note 90.

<sup>95</sup> See, e.g., PETER HOWARD SELZ & SUSAN LANDAUER, ART OF ENGAGEMENT: VISUAL POLITICS IN CALIFORNIA AND BEYOND 154 (2006) ("She began taking documentary photographs in the San Francisco Bay Area while working at different jobs and participating in socialist and feminist actions.").

<sup>96</sup> Dawoud Bey & Carrie Mae Weems, *Carrie Mae Weems*, BOMB, Summer 2009, at 60, 63.

<sup>97</sup> Vivian Patterson, *supra* note 88, at 22. See also Kirsch, *Carrie Mae Weems*, *supra* note 90, at 9. See also Bey & Weems, *Carrie Mae Weems*, *supra* note 96, at 66 (identifying her first boyfriend as the giver of the camera).

<sup>98</sup> Kirsch, *supra* note 90, at 9.

<sup>99</sup> *Id.* at 13.

<sup>100</sup> For example, in Weems' *Family Pictures and Stories*, Weems documents her own family. See CARRIE MAE WEEMS, FAMILY PICTURES AND STORIES 1981-82, available at <http://carriemaeweems.net/galleries/family-pictures.html>. Part of her "borrowing" is in stealing power from the white gaze. Aaron Siskin in the 1930s had captured African

of 2012 the New York Times cited her multimedia show *Slow Fade To Black*, which she put on with composer Geri Allen.<sup>102</sup> However, for the sake of space I will focus on three works that will figure prominently in my legal analysis.

Some of Weems' most adaptive sampling may be found in her watershed 1989-90 series *Colored People*. This sequence consists of variously tinted portraits of African-American boys, girls, men, and women.<sup>103</sup> In its presentation of headshots of people of color, it riffs off of photography innovators such as Francis Galton, the nineteenth century eugenicist, Darwinist, fingerprint science pioneer, founder of biometry (that is, the use of statistical techniques and body measurements to determine intelligence), and mugshot inventor.<sup>104</sup> The connection between eugenics, photography, and

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American families on film in his series *Harlem Document*, which jars the observer with its panopticon's combination of intimate observation and hierarchical scrutiny. AARON SISKIND, *HARLEM DOCUMENT: PHOTOGRAPHS 1932-1940* (1981). Weems may have also drunk from the well of Addison Scurlock, who in the 1950s and 60s made a family business out of photographing African American go-getters in Washington, D.C. See, e.g., David Zax, *The Scurlock Studio: Picture of Prosperity*, SMITHSONIAN MAG., Feb. 2010, available at <http://www.smithsonianmag.com/people-places/The-Scurlock-Studio-Picture-of-Prosperity.html>. And while Weems has not tipped her hat to these photographers, she has acknowledged that Roy DeCarava's work in the 1955 monograph *Sweet Flypaper of Life* influenced this series. See Susan Fisher Sterling, *Signifying: Photographs and Texts in the Work of Carrie Mae Weems*, in NAT'L MUSEUM OF WOMEN IN THE ARTS, CARRIE MAE WEEMS, *supra* note 90, at 21; ROY DECARAVA & LANGSTON HUGHES, *SWEET FLYPAPER OF LIFE* (1955) (showing DeCarava's images of Harlem life accompanied with text by Langston Hughes).

Further, in her 1987-1988 series *Ain't Jokin'*, Weems sampled the ribaldry of comics in the tradition of Tin Pan Alley "coon song" composers, Freeman Gosden and Charles Correll's Amos and Andy strip, MGM cartoons, and the long history of anonymous Rabelaisians scrawling smut on bathroom walls. CARRIE MAE WEEMS, *AIN'T JOKIN'* (1987-88), available at <http://carriemaeweems.net/galleries/aint-jokin.html>.

Weems' plain-speaking *Black Woman With Chicken* forms one of the finest of these adaptations. CARRIE MAE WEEMS, *Black Woman with Chicken*, in *AIN'T JOKIN'* (1987-88), available in NAT'L MUSEUM OF WOMEN IN THE ARTS, CARRIE MAE WEEMS, *supra* note 90, at plate 9. *What Are the Three Things You Can't Give a Black Person?* matches *Black Woman* in brevity, allusive power, and style. See CARRIE MAE WEEMS, *What Are the Three Things You Can't Give a Black Person?*, in *AIN'T JOKIN'* (1987-88), available in NAT'L MUSEUM OF WOMEN IN THE ARTS, CARRIE MAE WEEMS, *supra* note 90, at 50 (The answer given is "A black eye, a fat lip and a job.").

<sup>101</sup> CARRIE MAE WEEMS, *UNTITLED (KITCHEN TABLE SERIES)* (1990), available in NAT'L MUSEUM OF WOMEN IN THE ARTS, CARRIE MAE WEEMS, *supra* note 90, at 64-89.

<sup>102</sup> Felicia R. Lee, *Two Artists Salute a Legacy*, N.Y. TIMES, June 14, 2012, at C21.

<sup>103</sup> CARRIE MAE WEEMS, *COLORED PEOPLE* (1989-90), available in NAT'L MUSEUM OF WOMEN IN THE ARTS, CARRIE MAE WEEMS, *supra* note 90, plates 17-23.

<sup>104</sup> JAMES FRANKLIN CROW, *PERSPECTIVES ON GENETICS: ANECDOTAL, HISTORICAL, AND CRITICAL COMMENTARIES* 359 (2000) (setting forth Galton's accomplishments). For the sake of completeness, I should also mention that Alphonse Bertillon, the white supremacist police officer and author of 1883's *Les Races Sauvages*, deserves co-credit for mug-shot pioneering. See ANNE MAXWELL, *PICTURE IMPERFECT: PHOTOGRAPHY AND EUGENICS*,

Weems' tinted headshots may initially seem hazy, but at this stage Weems had begun working on appropriations and critiques of racist science that would find their apotheosis in *From Here I Saw What Happened*. Galton's practices of capturing disenfranchised people in photography qualified him as a muse for her work in the late '80s, just as Agassiz would trigger the mid-1990s *From Here I Saw What Happened*.

Weems found much to comment on with photo-metrists like Galton. He joined the ranks of Britain's Royal Society of Geography in 1850 and soon thereafter explored South Africa.<sup>105</sup> Inspired by Georges Cuvier's 1815 dissection of Sarah Baartman, the original, doomed Hottentot Venus,<sup>106</sup> Galton conducted his own infamous study of yet another "Venus." He encountered this second goddess on his journeys, and measured her every square inch with a sextant.<sup>107</sup> In 1859, when his cousin, Charles Darwin, had published *The Origin of Species*, Galton's enthusiasm for measuring racial attributes merged with a conviction in White supremacy he felt was assured by Darwin's work. Back in Europe, Galton expanded on his practice of measuring people he believed resided on the lower reaches of the Great Chain of Being. He began working on fingerprinting technology, first by taking images of the fingertip whorls of "titled people," "idiots," and "farm laborers."<sup>108</sup> He then graduated to relentlessly photographing criminal "types" with the assistance of Paris's Surveyor-General of Prisons.<sup>109</sup> He shot convicts in close-up front view format, in the hopes of establishing certain physiognomic criminal traits,<sup>110</sup> but in fact setting the precedent for booking photos now taken of arrestees. Galton also took pictures of

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1870-1940 at 62-63 (2010) (setting forth Bertillon's fascination with racial anthropometry, or measurement, and how it flowered into his relentless photographic study of the human face).

<sup>105</sup> KARL PEARSON, *THE LIFE, LETTERS, AND LABOURS OF FRANCIS GALTON* 215 (1914).

<sup>106</sup> CLIFTON C. CRAIS & PAMELA SCULLY, *SARA BAARTMAN AND THE HOTTENTOT VENUS: A GHOST STORY AND A BIOGRAPHY* 140 (2009) (describing the procedure).

<sup>107</sup> FRANCIS GALTON, *THE NARRATIVE OF AN EXPLORER IN TROPICAL SOUTH AFRICA* 87-88 (1853), *available at* <http://books.google.com/books?id=8y0bAAAAYAAJ&pg=PP1#v=onepage&q&f=false> ("I was perfectly aghast at her development, and made inquiries upon that delicate point as far as I dared among my missionary friends. . . . Of a sudden my eye fell upon my sextant [and] the bright thought struck me.").

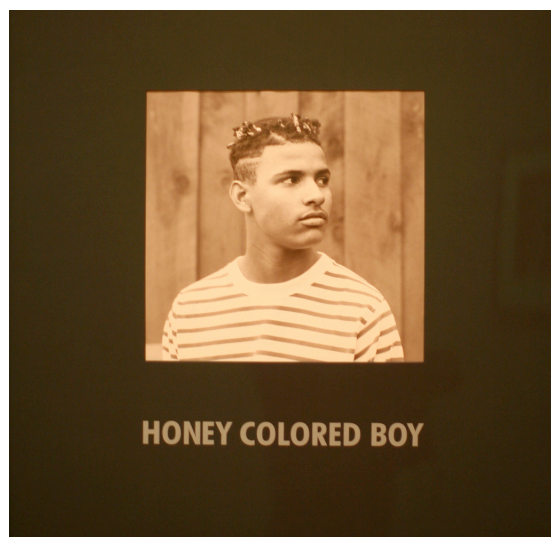
<sup>108</sup> John Berry & David A. Stoney, *History and Development of Fingerprinting*, in *ADVANCES IN FINGERPRINT TECHNOLOGY* 33 (2d ed. 2001).

<sup>109</sup> M.G. BULMER, *FRANCIS GALTON: PIONEER OF HEREDITY AND BIOMETRY* 34 (2003) ("Through the assistance of the Surveyor-General of Prisons, he had a large number of photographs of criminals classified into three groups . . . [by] visual inspection he thought that the photographs could be sorted into certain natural classes, and that the three groups of criminals contributed in very different proportions to the different physiognomic classes.").

<sup>110</sup> *Id.* See also JONATHAN MATTHEW FINN, *CAPTURING THE CRIMINAL IMAGE: FROM MUG SHOT TO SURVEILLANCE SOCIETY* 21 (2009) (reproducing Galton's mug-shot-like "composite" portraits, showing blended images of many men convicted of similar crimes; Galton's object was to come up with a stable of criminal "types.").

Jewish people with an eye toward figuring out their “type.”<sup>111</sup> Seen side-by-side, Galton and Agassiz seem like twins, but for their attitudes about Darwinism. Both men were lusty biometrists and took early mugshots of the powerless. They then used their findings to gauge the moral and intellectual worth of White privileged people versus people of color and the White poor.

Weems’ interest in race and Agassiz-Galtonian mugshots in history erupts in *From Here I Saw What Happened*, but she first announced this fixation in *Colored People*. *Colored People* borrows from Galton in its play with front and side profile close-up shots.<sup>112</sup> The series consists of monochrome triptychs of repeated headshots of her subjects, some of which she titled *Burnt Orange Girl*, *Magenta Colored Girl*, *Blue Black Boy*, *Golden Yella Girl*, and *Violet Colored Girl*.<sup>113</sup> The images are beautifully tinted repurposings of Galton’s grim forensic traditions. Their soft coloring and resolution quote daguerreotypes like Galton’s, but rebut his brutal schemes by showing boys, girls, men, and women in attitudes of contemplation, happiness, and melancholy.



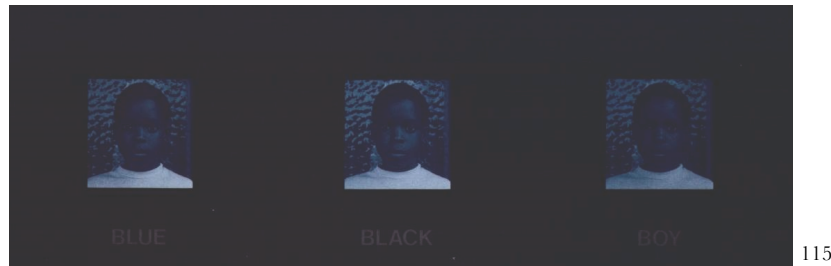
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<sup>111</sup>See, e.g., Francis Galton, *Illustrations of Composite Portraiture, The Jewish Type*, THE PHOTOGRAPHIC NEWS, Apr. 17, 1885, available at <http://www.eugenicsarchive.org/html/eugenics/static/images/2217.html>.

<sup>112</sup>CARRIE MAE WEEMS, *COLORED PEOPLE*, *supra* note 103.

<sup>113</sup>*Id.*

<sup>114</sup>CARRIE MAE WEEMS, *Honey Colored Boy*, in *COLORED PEOPLE* (1989-90), available in NAT'L MUSEUM OF WOMEN IN THE ARTS, CARRIE MAE WEEMS, *supra* note 90, plate 23.



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*Colored People*, as well as many other of Weems' series made around this period,<sup>116</sup> announce that journalistic borrowing as of 1990 had already formed a large part of her artistic practice. Yet, as far as I can tell, Weems made her first direct appropriations of existing images when she encountered Agassiz's daguerreotypes.

The Getty Museum commissioned *From Here I Saw What Happened and I Cried* from Weems, asking her to react to its 1995 show *Hidden Witness: African Americans in Early Photography*. *Hidden Witness* displayed photographs of African Americans from the 1840s through the 1860s owned by the Getty itself as well as a Detroit collector named Jackie Napoleon Wilson.<sup>117</sup> Weems assembled a presentation based on thirty prints, which she tinted red (signifying the outrages evidenced by the appropriated, violent images) and blue (signaling the confessional thoughts of the bookending Nubian observer) and emblazoned with her texts. *From Here I Saw What Happened and I Cried* issued from this show.

*From Here I Saw What Happened* marks Weems' most direct confrontation with photography's history, particularly portraiture. A 19th century subject either paid to sit for a portrait that would birth an admirable doppelganger—or would find herself trapped, snapped, and stuck like a specimen. "The real issue of photography of this period is that the sitter pays the photographer," Weems told a reporter at the time. "I began to imagine the people in a viable context, as real people living at a specific time whose lives had specific meaning."<sup>118</sup> Weems also invested the images with her longing, a state of mind that she has said drives her art.<sup>119</sup> As in her work with intimate portraiture and mug shot riffing, her act of sifting through history, emerging

<sup>115</sup> CARRIE MAE WEEMS, *Blue Black Boy*, in *COLORED PEOPLE* (1989-90), available in NAT'L MUSEUM OF WOMEN IN THE ARTS, CARRIE MAE WEEMS, *supra* note 90, at 59.

<sup>116</sup> See *supra* note 100 (describing Weems' larger body of work).

<sup>117</sup> Suzanne Muchnic, *Going for a Gut Reaction: Outspoken African American Artist Carrie Mae Weems Could Be Expected to Provide a Hot Response to Historical Images of Blacks*, L.A. TIMES, Feb. 26, 1995, available at [http://articles.latimes.com/1995-02-26/entertainment/ca-36188\\_1\\_artist-carrie-mae-weems](http://articles.latimes.com/1995-02-26/entertainment/ca-36188_1_artist-carrie-mae-weems).

<sup>118</sup> *Id.*

<sup>119</sup> See Bey & Weems, *supra* note 96 ("This invisibility—this erasure out of the complex history of our life and time—is the greatest source of my longing. As you know, I'm a woman who yearns, who longs for. This is the key to me and to the work, and something which is rarely discussed in reviews or essays, which I also find remarkably disappointing.").



with a document, and putting her fingerprints on it achieves the twin goals of the artist: to make it new, and to promote feeling.<sup>120</sup>

*From Here I Saw What Happened* begins with the archival, rectangular photo of the Nubian woman in profile. Tinted blue, she gazes on the lineage of thirty-one red-dyed pictures of African Americans from the 1850s through the 1950s or '60s. The series ends with a flipped image of the Nubian observer. As I've already stated, the Agassiz daguerreotypes inhabit the first four stations of the series,<sup>121</sup> which hosts additional appropriated pictures that portray other enslaved people,<sup>122</sup> as well as folks living under segregation.<sup>123</sup>

The etched text that sprays across the images provides a volcanic accompaniment to this record of endurance and infamy. *From Here I Saw What Happened* brings the reader visions of an unmolested Black womanhood observing red-tinted crime. Men are forced to wear huge prosthetic lips. Men are whipped. Handsome women and men pose in their fine clothes, incriminations slashed across their features. Here is proof that Josephine Baker wasn't always smiling. White people thought that it was funny to compare Black people to monkeys. People weathered life under segregation. In Weems' hands, these works bear witness to how these crimes actually happened. In so doing, they elicit an immense catharsis from the viewer. This emotional response encourages a view that the present moment remains haunted by those past

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<sup>120</sup> To "make it new" and the promotion of feeling are time-tested objectives of art. See, e.g., EZRA POUND, *MAKE IT NEW: ESSAYS* (1934). See also LEO TOLSTOY, *WHAT IS ART?* 180 (1960) (describing art as a vehicle to transmit perception (in his case, Christian perception) from the realm of reason and intellect into "that of feeling").

<sup>121</sup> Weems first deployed the Agassiz daguerreotypes in her 1991 *Sea Island Series*, where they were not featured so prominently. For the *Sea Island Series* Weems traveled to the group of barrier islands along the coasts of South Carolina and Georgia. Here live the Gullah, a citizenry descended largely from enslaved people who staked the land in the seventeenth century. Thomas Piché, Jr., *Reading Carrie Mae Weems*, in EVERSON MUSEUM OF ART, WEEMS: RECENT WORK, *supra* note 1, at 16-17. Weems took photographs of the landscape, and, as in *Ain't Jokin*, interspersed the images with African American folklore, such as the tales of flying Africans and ghosts at Ebo landing. CARRIE MAE WEEMS, *Untitled (Boone Plantation)*, *Untitled (Trailer)*, *Untitled (Hubcaps)*, and *Untitled (Ebo Landing)*, in SEA ISLAND SERIES (1991-92), available in EVERSON MUSEUM OF ART, WEEMS: RECENT WORK, *supra* note 1, plates 2-5. She also appropriated the Agassiz images, framed them as portraits, and included them in this alloy of words and pictures. The inclusion of the Agassiz images in the *Sea Island Series* is not mentioned in *Carrie Mae Weems: Recent Work 1992-1998*, the catalogue accompanying the 1998-99 exhibition of her work at the Everson Museum of Art. It is, however, described in the Brian Wallis article. See Wallis, *supra* note 2, at 59 ("By placing [the Agassiz daguerreotypes] beside pictures of remnants of the African culture the Gullah brought to America, Weems viewed their lives empathetically from a black point of view.").

<sup>122</sup> See *supra* note 11, discussing the image of the "whipped man."

<sup>123</sup> Regarding *From Here I Saw What Happened's* images detailing life under segregation, see cell 29 of the series, *OTHERS SAID/"ONLY THING A NEGGAH/ COULD DO WAS SHINE MY SHOES."*, depicting a woman holding a white infant. EVERSON MUSEUM OF ART, WEEMS: RECENT WORK, *supra* note 1, plate 52.

crimes. It is a visual version of William Faulkner's argument that "[t]he Past is never dead. It isn't even past."<sup>124</sup>



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Along with *Colored People* and *From Here I Saw*, Weems' 1997 *The Hottentot Venus* also figures in my analysis. This diptych shows black-framed images of the Parisian zoological garden where Cuvier displayed Sarah Baartman to inquisitive colleagues. The first picture shows a Victorian hothouse set amid leafy trees and manicured grasses. The second reveals a mansion with a pleasure garden ornamented by a beautifully oxidized bronze statue of a fawn. Beneath the images, elegant white script reads: "I passed Monsieur Cuvier; he fixed his gaze onto me; a sudden chill rose and the hairs on the nape of my neck stood on end, in defense, I touched myself, & fled."<sup>126</sup> Weems displays the existing site's evident civilization, and its elegant décor that harkens to "better times." Beneath it all, however, Baartman speaks to us, revealing the outrages committed there.

<sup>124</sup> WILLIAM FAULKNER, *REQUIEM FOR A NUN* 73 (Vintage Int'l 2011) (1950).

<sup>125</sup> CARRIE MAE WEEMS, *You Became an Accomplice*, in *FROM HERE I SAW WHAT HAPPENED AND I CRIED* (1995-96), available in EVERSON MUSEUM OF ART, WEEMS: RECENT WORK, *supra* note 1, plate 45 (picturing the chanteuse Josephine Baker).

<sup>126</sup> CARRIE MAE WEEMS, *THE HOTTENTOT VENUS* (DYPTICH) (1997), available in *BLACK VENUS 2010: THEY CALLED HER "HOTTENTOT"* at g16 (Deborah Willis ed., 2010). See also Debra S. Singer, *Reclaiming Venus*, in *BLACK VENUS 2010*, *supra*, at 92.

Though the diptych does not benefit from borrowings like that found in *From Here I Saw* or even the allusive *Colored People*, it does nod to heroizing nineteenth and early twentieth century landscape photography such as that of Eugene Atget and Edouard-Denis Baldur, who so romanticized Paris.<sup>127</sup> Further, it demonstrates Weems' awareness of the interwoven history of racist science that she exposes in those series. Read in combination with *Colored People* and *Hottentot Venus*, *From Here I Saw* reveals how Agassiz encouraged a belief in a "scale of races"<sup>128</sup> that sought to "shape" people according to White supremacy's "wishes."<sup>129</sup> This *idée fixe* bled into culture, world politics, and law. It also inspired outrages like Galton's,<sup>130</sup> and led to atrocities such as that suffered by Drana, Renty, Delia, Jack, and Baartman.

Moreover, the works expand our consciousness beyond even these connections: Weems' art encourages a deep study of this history of violence, which teaches us that Agassiz enjoyed an influential and amazingly interlinked life whose significance veers far beyond an isolated incident with Drana, Renty, Delia, and Jack. Agassiz was a Zelig of his day, and not only because of his dread-inspiring friendships with Emerson and Holmes. Cuvier—Sarah Baartman's dissectionist and Galton's role model<sup>131</sup>—was Agassiz's first professor of zoology and motivated his work on fish.<sup>132</sup> Morton, the headhunter who taught Agassiz polygenesis, learned the theory from observations made by Cuvier after his dismemberment of Baartman.<sup>133</sup> Agassiz further infiltrated European intellectual history through his relationship with Guyot. The Princeton geographer would leverage Agassiz's concepts of divine design, separate origins, and a horror of racial mixing into a theory of geography that influenced colonialism<sup>134</sup> and also segregation.<sup>135</sup>

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<sup>127</sup> See EUGENE ATGET, PHOTOGRAPHE DE PARIS (1930); MALCOLM DANIEL, THE PHOTOGRAPHS OF EDOUARD BALDUS (1994).

<sup>128</sup> See *supra* text accompanying note 72.

<sup>129</sup> See *supra* text accompanying note 78.

<sup>130</sup> To be clear, I can find no evidence that Galton, an Englishman, and Agassiz knew one another, but Weems shows us at least the eerie similarity of their urges and practices.

<sup>131</sup> See *supra* text accompanying note 106.

<sup>132</sup> Wallis, *supra* note 2, at 41.

<sup>133</sup> See SAMUEL GEORGE MORTON, CRANIA AMERICANA: OR A COMPARATIVE VIEW OF THE SKULLS OF VARIOUS ABORIGINAL NATIONS 31 (1899) (quoting Cuvier as follows: "It is now clearly proved that . . . [the] race of Negroes [did not] produce [] the celebrated people who gave birth to the civilization of ancient Egypt, and of whom we may say that the whole world has inherited the principles of its laws, sciences, and perhaps also religion . . . I have examined in Paris, and in the various collections of Europe, more than fifty heads of mummies, and not one amongst them presented the characters of the Negro or Hottentot.").

<sup>134</sup> See *supra* note 41.

<sup>135</sup> On Agassiz's horror of racial mixing and Guyot's belief in pure noble races, see *supra* text accompanying note 41. On Guyot's influence on anti-miscegenationist thought, see 2 DONALD WILLIAM MEINIG, THE SHAPING OF AMERICA: A GEOGRAPHICAL PERSPECTIVE ON 500 YEARS OF HISTORY 191 (1993) ("[A]n American school of ethnology emerged that produced scientific tomes defining the types of human kind and expounding on their fatefully divergent destinies in the modern world—anthropological corollaries to the geographical

Weems' appropriation of the Agassiz daguerreotypes is a hallmark of the liberatory, anti-racist, anti-sexist, and peaceable art and activism for which she is known.<sup>136</sup> Her unilateral taking of the daguerreotypes, moreover, adds to the works' meaning. Her "theft" takes back what Agassiz, Morton, Cuvier, Guyot, Galton, and their ilk stole from African-born people and their descendants in the United States. Weems' acknowledged as much when, responding to an interviewer's question about her use of the Agassiz images, she said:

I wanted to uplift them out of their original context and make them into something more than they have been. To give them a different kind of status first and foremost, and to heighten their beauty and their pain and sadness, too, from the ordeal of being photographed.<sup>137</sup>

However, Weems' artistic integrity and provocative consciousness raising do not necessarily resolve the question of whether her taking proved legal. In the following sections, I attend to the question of whether Harvard had good cause to threaten her, or whether Weems should have a fair use defense to this appropriation. I argue that her appropriation *may* find protection under cases that came after she made the series and faced down Harvard. Additionally, I contend that to the extent there remains an ambiguity, her witnessing of the violent past should be understood as transforming the daguerreotypes through the "observer effect." I also elaborate upon Weems' role in changing our understandings of modern customs, such as the segregation and intelligence testing that she reveals are rooted in racist science and Agassiz's brand of hysteria. This latter mode of transformation should further qualify her for protection under the fair use doctrine.

After that analysis, I turn to the underlying question of whether Harvard indeed owned the daguerreotypes such that it could lay claim to copyright and contract privileges. This will allow me to reconsider property law as it relates to the witnessing relics left by U.S. slaves in the nineteenth century.

### *III. Does Harvard Own the Copyright to the Agassiz Daguerreotypes? If it Does, Does Weems Enjoy a Fair Use Defense of Her Appropriation?*

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interpretations of Arnold Guyot." On segregation and its relationship to fears about racial romance and mixed-race children, see RENEE CHRISTINE ROMANO, RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA 148 (2003) ("White and Negro children in the same schools will lead to miscegenation. Miscegenation leads to mixed marriages and mixed marriages lead to mongrelization of the human race.") (quoting *Bloodstains on White Marble Steps*, JACKSON DAILY NEWS, May 18, 1954, at 1 (editorial written in response to *Brown v. Board*)).

<sup>136</sup> See *supra* note 100.

<sup>137</sup> Lisa Gail Collins, *Historic Retrievals: Confronting Visual Evidence and the Imaging of Truth*, in BLACK VENUS, *supra* note 126, at 81.

In the summer of 2012, I interviewed Dr. Pamela Gerardi, Director of External Relations for the Peabody.<sup>138</sup> I asked her for Harvard's version of the Weems story, and she quickly answered, with great forthrightness, that Harvard tried to block Weems' appropriation because the University "doe[sn't] want to be associated with exploitation . . . we would prefer not to be . . . I mean, would you?"<sup>139</sup>

Harvard, as noted above, threatened to sue Weems on both copyright and contract grounds. The contract question turns on Harvard's ownership of the daguerreotypes (that is, whether they had proper title of the daguerreotypes that they let Weems access), and I address property issues in Section IV of this paper. As to the question of whether Harvard owned a copyright in the Agassiz images, Dr. Gerardi acknowledged that Harvard's copyright claim was "murky,"<sup>140</sup> as indeed it appears to be.

Harvard's enjoyment of the copyright in the daguerreotypes encounters several obstacles, the first being whether Agassiz and therefore Harvard ever owned the copyright in the first place. Recall that Agassiz commissioned the images in 1850, and that Dr. Robert Gibbes arranged a selection of enslaved people for Agassiz to examine;<sup>141</sup> that Agassiz picked Drana, Delia, Renty, and Jack among others for the images, and then returned to Harvard;<sup>142</sup> and that Gibbes hired J.T. Zealy to take the pictures.<sup>143</sup> Did Agassiz own the copyright to the images? Certainly he did if the images were a "work for hire." This doctrine is codified in 201(b) of the Copyright Act, which provides that where a work is made for an employer, the employer is considered the author.<sup>144</sup> But I've encountered no hard evidence that Agassiz "hired" Gibbes. I have discovered no record of payment, though Gibbes *did* write Morton in 1850 that he had "just finished the daguerreotypes for Agassiz of native Africans of various tribes."<sup>145</sup> Still, the work for hire doctrine was not recognized until 1903,<sup>146</sup> and only codified in the Copyright Act of 1909.<sup>147</sup> Moreover, Congress did not extend copyright protection to photographs until 1865.<sup>148</sup>

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<sup>138</sup> Dr. Gerardi is so listed on Harvard University's Faculty of Arts and Sciences Administrative Directory. *Administrative Directory*, HARV. FACULTY OF ARTS & SCIENCES, <http://www.fas.harvard.edu/home/content/administrative-directory> (last visited Feb. 13, 2013).

<sup>139</sup> Telephone Interview with Dr. Pamela Gerardi, Director of External Relations, Peabody Museum of Archaeology and Ethnology, June 26, 2012.

<sup>140</sup> *Id.*

<sup>141</sup> See *supra* notes 59-60 and accompanying text.

<sup>142</sup> See *supra* note 60 and accompanying text.

<sup>143</sup> See *supra* note 61 and accompanying text.

<sup>144</sup> 17 U.S.C. § 201(b).

<sup>145</sup> Wallis, *supra* note 2, at 45.

<sup>146</sup> *Bleinstein v. Donaldson Lithographing*, 188 U.S. 239 (1903).

<sup>147</sup> Copyright Act of 1909, ch. 320, § 62, 35 Stat. 1075 (1909). See also Gregory Kent Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine's Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses*, 41 B.C. L. REV. 549, 565 (2000); Jennifer Sutherland Lubinski, *The Work for Hire Doctrine under Cmty.*

Assuming that the copyright did belong to Agassiz, and that Agassiz or his heir transferred it to Harvard when his collection of “accumulated specimens” was purchased for the University around 1858,<sup>149</sup> or when Alexander Agassiz gave Agassiz properties to the University in 1935,<sup>150</sup> the question next becomes whether the duration of the right extended until the 1990s. One problem is the lack of publication history. Moreover, Harvard counsel refuses to enlighten me about this record.<sup>151</sup> If the images were published around 1850, the copyright would certainly have run out by the 1990s.<sup>152</sup> However, if the daguerreotypes malingered in the obscurity of the Peabody’s attic until their discovery in 1976,<sup>153</sup> then Harvard could have claimed sole copyright in the images until well into the 2000s.<sup>154</sup>

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for Creative Non-Violence v. Reid: *An Artist’s Fair Weather Friend*, 46 CATH. U. L. REV. 119, n.6 (1996).

<sup>148</sup> Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 404 (2004) (citing the Copyright Act of 1865, ch. 126, 13 Stat. 540 (1865)). Even so, Rebecca Tushnet questions whether there should be ample copyright protection of photographs. See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 HARV. L. REV. 683, 739 (2012) (“For works whose expressive content is minimal and whose copyright is thus ‘thin,’ infringement can be found only if the works are virtually identical.”).

<sup>149</sup> See Julius H. Ward, *Louis Agassiz and his Friends*, 3 HARV. REG. 13, 13 (1881); see also *id.* (“The founder of the Museum of comparative Zoology at Harvard will always remain its first and greatest benefactor.”).

<sup>150</sup> See *infra* note 296.

<sup>151</sup> Email from Diane Lopez, Harvard Counsel, to Yxta Murray (July 3, 2012) (on file with author).

<sup>152</sup> If the rights were obtained under the Copyright Act of 1790, then a publication in 1850 would have run out by 1878. See J.A. Lorengo, *What’s Good for the Goose is Good for the Gander: An Argument for the Consistent Interpretation of the Patent and Copyright Clause*, 85 J. PAT. & TRADEMARK OFF. SOC’Y 51, 53 (2003) (“Under the aegis of the Patent and Copyright Clause, the Copyright Act of 1790 granted authors a monopoly with an initial term of 14 years that could be renewed, upon application, for another 14 years.”) (citing Act of May 31, 1790, 1 Stat. 124). If publication or registration occurred in or after 1909, then copyright could have expired as early as 1965. See DAVID NIMMER, COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA 62 (2003) (“[The 1909 Act’s] initial copyright term lasted for twenty-eight years from publication or other vesting of statutory copyright; upon compliance with the formality of registering the work and separately renewing it in the records of the United States Copyright Office, the second term lasted for an additional twenty eight years.”).

<sup>153</sup> See *supra* note 9. The Peabody was founded by George Peabody in 1866, and has a “comprehensive collection[] of North American archaeology and ethnology.” See *Museum History*, PEABODY MUSEUM OF ARCHAEOLOGY AND ETHNOLOGY AT HARVARD UNIVERSITY, <http://www.peabody.harvard.edu/about/history> (last visited Feb. 13, 2013). It also possesses “one of the ten largest photographic archives, documenting the cultures of indigenous peoples across the world.” *Id.* The Museum of Comparative Zoology was founded by Agassiz in 1859. See *History of the Oxford Street Museums*, HARVARD MUSEUM OF NATURAL HISTORY, [http://www.hmnh.harvard.edu/about\\_the\\_museum/history-2.html](http://www.hmnh.harvard.edu/about_the_museum/history-2.html) (last visited Feb. 13, 2013). It is a parent museum to the Museum of Natural History. I do not know why the Agassiz daguerreotypes were transferred from the Natural History Museum to the Peabody,

Even if we assume that the University owned the copyright, the baffling doctrine of fair use unsettles the question of its dominion over the Agassiz images. Harvard's claim here would have been that Weems violated its right to make derivative works.<sup>155</sup> Weems would defend that her appropriation in *From Here I Saw* constituted fair use. The fair use doctrine permits appropriation of the copyrighted work "for purposes such as criticism and comment,"<sup>156</sup> and the factors considered by courts in determining whether the use is fair include:<sup>157</sup>

- (1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit and educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use on the potential market for or value of the copyrighted work.<sup>158</sup>

In the years directly preceding Weems' creation of *From Here I Saw*, fair use's allowances looked miserly from the artist's perspective. In 1985, the Supreme Court decided *Harper & Row v. Nation Enterprises*,<sup>159</sup> the famous case involving *The Nation*'s scoop of *Time*'s paid-for, exclusive right to publish excerpts from Gerald Ford's hot-

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except perhaps to supplement the Peabody's large collection of photographs of indigenous people.

<sup>154</sup> Elizabeth Townsend Gard, *January 1, 2003: The Birth of the Unpublished Public Domain and Its International Implications*, 24 CARDOZO ARTS & ENT. L.J. 687, 689 (2006) (citing 17 U.S.C. 302 and 303(a) (2006)) ("[T]he 1976 Copyright Act created two mechanisms for change. First, section 303(a) guaranteed that no work would enter the public domain until December 31, 2002, regardless of how long the author had been deceased. Second, that section provided an incentive for publication of unpublished works created before 1978. If the unpublished work was published for the first time between January 1, 1978 and December 31, 2002, the new published work would be granted further protection until December 31, 2047. . . . [A]ny works that were published for the first time between January 1, 1978 and December 31, 2002 will remain under copyright under December 31, 2047."). This generous extension was made possible by the Sonny Bono Act, 17 USCA § 303.

<sup>155</sup> 17 U.S.C. § 106 (2006). Section 17 U.S.C. § 101 defines a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'"

<sup>156</sup> 17 U.S.C. 107 (2006).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* See also *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 538, 547 (1985).

<sup>159</sup> *Id.*

off-the-presses biography, *A Time To Heal*.<sup>160</sup> Sadly for Ford and *Time*, the author was two-fold loser: an “unidentified person” had stolen the manuscript and given it to *Nation* editor Victor Navasky, and the book was so boring that *The Nation*’s two-thousand word article, containing details about Ford’s Nixon pardon, destroyed *Time*’s interest in serialization.<sup>161</sup> The Supreme Court in *Harper & Row* observed that “factual” works should be treated with more liberality than those of “fantasy”<sup>162</sup> under the fair use doctrine, but nevertheless determined that it could not defend Navasky’s sackage of *A Time To Heal*. In the end, *The Nation* lost mainly for two reasons: the pillage was for profit,<sup>163</sup> and it stole the “heart of the book.”<sup>164</sup> As it happens, for-profit motives and lavish borrowing would also help to kill claims made in the early 1990s by the prolific Jeff Koons, whose screamy, extrovertedly po-mo takings of extreme if still copyrighted kitsch were deemed infringements in a rash of cases that came down during this period.<sup>165</sup>

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<sup>160</sup> *Id.* at 542.

<sup>161</sup> *Harper & Row, Publr. v. Nation Enters.*, 557 F. Supp. 1067, 1069 (1983).

<sup>162</sup> *Harper & Row*, 471 U.S. at 563 (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”).

<sup>163</sup> *Id.* at 562 (“The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. ‘[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.’”) (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

<sup>164</sup> *Id.* at 656.

<sup>165</sup> In *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), Koons hijacked a cute but excruciatingly Hallmarkian image of two White bourgeoisie holding a wad of puppies from photographer Art Rogers and turned it into a semi-hilarious, essentially sicko sculpture that repeated the image in 3-D down to the last detail. See James Traub, *Art Rogers vs. Jeff Koons*, OBSERVATORY (Jan. 21, 2008), <http://observatory.designobserver.com/entry.html?entry=6467>. The Second Circuit ignored Koons’ fair use speechifying defense, where he said his challenged sculpture, *String of Puppies*, constituted a parody that put him in the august company of Picasso and Marcel Duchamp, bringing the work into the “comment or criticism” class described by 17 U.S.C. § 107. The court was less interested in Duchamp’s urinal than in Koons’ profit motive and total borrowing. *Rogers v. Koons*, 960 F.2d at 309 (“Knowing exploitation of a copyrighted work for personal gain militates against a finding of fair use.”); see also *id.* at 311 (“Koons’ copying of Rogers’ work was the essence of the photograph.”). And in *United Features Syndicate v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993), the artist lifted U.F.S.’s popular cartoon character, Garfield. Garfield is a large tabby cat in the possession of eerily human cognitive gifts and a probably related dyspepsia. Garfield’s cynicism causes him to make deadpan observations about his owner, and his sidekick, Odie the Dog, who seems like a copy of the Disney character Goofy. Comics, GARFIELD.COM, <http://www.garfield.com/comics/vault.html?yr=2012&addr=120625> (last visited Feb. 14, 2013). Koons’ offense was to make a Frankenstein of a sculpture out of a simulacra of a troll doll, some kind of happy bumblebee sitting in a basket, and a basic copy of Odie (who I guess is distinguishable from Goofy because he is yellow) who seems to be simultaneously covering his mouth with one paw and yanking on his tongue with another. Like in the puppies case, the *United Features Syndicate* court found copyright violation because of Koons’ for-profit motive and the amount of borrowing. See *United Features Syndicate*, 817 F. Supp. at 379, 381.



Only in 1994 did this artist-unfriendly trend start to come to a close. This happened because the rap group 2 Live Crew recorded a funny send-up of Roy Orbison's *Pretty Woman* in 1989, wherein Crew characterized the eponymous lady as a prostitute who is hairy everywhere except on her head.<sup>166</sup> In *Campbell v. Acuff-Rose Music*, the Court refocused analysis on the first prong (nature of use) from the profit fixation of the earlier decisions to whether the work transformed the original source: "The central purpose of this investigation is to see . . . whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>167</sup> The Court took care to package 2 Live Crew's appropriation as an eminently protectable parody, which by definition must borrow directly from the work to comment on it.<sup>168</sup> The Court contrasted parodies with satires, which lift from other works while making general commentaries, a less-sheltered form of laziness that avoids making "something fresh."<sup>169</sup> In so reconstructing fair use, the Court limited the importance of profit motives, finding that many educational and critical uses of copyrighted works are conducted for pay,<sup>170</sup> and yet create a "social benefit" by making something new through that critique.<sup>171</sup>

Some post-*Campbell* circuit-level cases encourage an even more liberal view of the permissions of fair use. *Suntrust Bank v. Houghton Mifflin Co.*<sup>172</sup> and *Blanch v. Koons*<sup>173</sup> both allow extensive borrowing that serves the fair use aim of allowing commentary and critique. In the former case, Margaret Mitchell's estate sued Alice Randall, author of the *Gone With the Wind* parody *The Wind Done Gone*, for appropriating Mitchell's novel's characters, plot and major scenes. Randall's novel took aim at Mitchell's attitudes towards race, gender, sexuality, and slavery.<sup>174</sup> The Eleventh Circuit held that the borrowing constituted fair use, noting also that the doctrine preserves First Amendment privileges.<sup>175</sup> The court approved Randall's choice to parodically send up *Gone With the Wind* in particular, and not use Mitchell's book as a general satiric springboard for criticizing the American South and the United States'

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<sup>166</sup> 2 LIVE CREW, *Pretty Woman, on AS CLEAN AS THEY WANNA BE* (Skywalker Records 1989).

<sup>167</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578-79 (1994).

<sup>168</sup> *Id.* at 580 ("For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on the author's works.").

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 584.

<sup>171</sup> *Id.* at 516.

<sup>172</sup> 268 F.3d 1257 (11th Cir. 2001).

<sup>173</sup> 467 F.3d 244 (2d Cir. 2006).

<sup>174</sup> *Id.* at 1259, 1271.

<sup>175</sup> 268 F.3d. 1257, 1264.

history of enslaving African-born people.<sup>176</sup> Further, the court determined that *Gone With the Wind* is an “original, creative work” that ranks high in the “hierarchy of copyright protection.”<sup>177</sup> It also found that Randall appropriated a “substantial portion” of it.<sup>178</sup> Yet the court concluded that Randall’s anti-racist, anti-homophobic, and anti-sexist reconfigurations of Mitchell’s characters and perspectives rendered *The Wind Done Gone* “highly transformative,” and a bringer of “social benefit.”<sup>179</sup> In so writing, the Eleventh Circuit appears to have slyly invested the *Campbell* court’s concept of social benefit with potentially liberatory meaning.<sup>180</sup>

*Blanch v. Koons* also allows generous borrowing. There, a photographer who had taken an image of a woman’s legs for *Allure* magazine sued when Koons appropriated the picture in his work *Niagara*. *Niagara*, which formed part of a series called *Easyfun-Ethereal*, showed several pairs of women’s legs mashed up with images of edible sweets and the Falls.<sup>181</sup> In contrast to earlier cases in which Koons’ defenses failed,<sup>182</sup> *Blanch* established that Koons’ use was fair because it transformed “raw materials” by jacking them up into “new information, new aesthetics, new insights and understandings.”<sup>183</sup> Here, the “new insights” proved especially providential for fair use, as Koons’ contributions were “sharply different” than those of the *Allure* photographer.<sup>184</sup> Namely, the Duchampian critique of mass consumerism, or what he otherwise called “fact[s] in the world,”<sup>185</sup> with which Koons had previously—and unsuccessfully—justified his takings, had now won the day.<sup>186</sup> The court also took care to establish that *Campbell*’s liberal protections of parodies extended to non-parodic works.<sup>187</sup>

However, a clutch of post-*Campbell* cases warn that copious borrowing may violate the law. For example, in 2011, the Southern District of New York distinguished *Blanch v. Koons* in *Cariou v. Prince*.<sup>188</sup> There, appropriation artist Richard Prince was

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<sup>176</sup> *Id.* at 1269 (“TWDG is not a general commentary upon the Civil-War-era American South, but a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in GWTW.”).

<sup>177</sup> *Id.* at 1271. A “factual compilation[,]” on the other hand, would find less protection according to the court. *Id.*

<sup>178</sup> *Id.* at 1272.

<sup>179</sup> *Id.* at 1271 (citing *Campbell*, 510 U.S. at 579).

<sup>180</sup> *Id.* at 1270-71 (describing *The Wind Done Gone*’s subversion of *Gone With the Wind*’s racism and homophobia and relating it to *Campbell*-approved social benefit).

<sup>181</sup> 467 F.3d at 247.

<sup>182</sup> See *supra* note 165.

<sup>183</sup> *Id.* at 251-52 (quoting *Castle Rock Entm’t v. Carol Publ’g Grp.*, 150 F.3d 132, 142 (1998)).

<sup>184</sup> *Id.* at 252.

<sup>185</sup> *Id.* at 257.

<sup>186</sup> *Id.* at 253 (“Koons is, by his own undisputed description, using Blanch’s image as fodder for his commentary on the social and aesthetic consequences of mass media. His stated objective is thus not to repackage Blanch’s ‘Silk Sandals,’ but to employ it ‘in the creation of new information, new aesthetics, new insights and understandings.’”).

<sup>187</sup> *Id.* at 254.

<sup>188</sup> 784 F. Supp. 2d 337, 344 (S.D.N.Y. 2011).

held to have taken too much of Patrick Cariou's series of photographs of Jamaican Rastafarians in his 29-piece *Canal Zone* collage series shown at New York's Gagosian Gallery in 2007 to 2008.<sup>189</sup> Prince repurposed forty-one of Cariou's photographs by enlarging, cropping, tinting, and overpainting them.<sup>190</sup> He testified, much like Koons in *Blanch*, that he appropriated photographs to "get as much fact into [his] work,"<sup>191</sup> but the court held that this use of "raw ingredients"<sup>192</sup> did not sufficiently transform Cariou's art because it did not comment on, relate to the historical context of, or critically refer back to the original works.<sup>193</sup> Though Prince's degree of borrowing from and intervention with Cariou's images varied from cell to cell of the series, the court studied the suite as a whole to determine that transformation proved insufficiently consistent throughout, which weighed against him in the first prong of the analysis.<sup>194</sup>

*Henley v. DeVore*,<sup>195</sup> a 2010 case from the Central District of California, similarly restrains the permissions made possible by *Campbell*. Musician Don Henley brought this suit against California assemblyman Charles Devore, who used Henley's *Boys of Summer* in a Youtube campaign video. Devore's video featured a rewrite of Henley's hit number, retitled *The Hope of Summer*, which poked fun at Barack Obama and Nancy Pelosi.<sup>196</sup> In another video, Devore did the same with another Henley song, *All She Wants to Do Is Dance*, remaking it into a Barbara Boxer send-up called *All She Wants to Do is Tax*.<sup>197</sup> The court determined that fair use failed because Devore did not target Henley's music, but rather lampooned liberal views, which Henley's songs embodied.<sup>198</sup> The court then distinguished *Blanch* in its discussion of the much-belabored fair use tension between whether a work is a parody or a satire, limned by the court in *Campbell*.<sup>199</sup> The *Henley* court determined that, unlike Koons' presumably fresh art, Devore had only made minimal changes to Henley's lyrics, and failed to "intense[ly] transform[]" his songs.<sup>200</sup>

Authority that shrinks *Campbell*'s and *Suntrust*'s largess also exists in *Salinger v. Colting*, a 2009 case in the Southern District of New York that rejected the fair use

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 349 (alteration in original).

<sup>192</sup> *Id.* at 348.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 350.

<sup>195</sup> 733 F. Supp. 2d 1144 (C. D. Cal. 2010).

<sup>196</sup> 733 F. Supp. at 1148.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1155 ("[T]he Defendants' songs do not satisfy the fair use analysis. . . . ['Tax'] does not target Henley at all, and 'November,' which only implicitly targets Henley, appropriates too much from 'Summer' in relation to its slight jab at Henley.").

<sup>199</sup> *Id.* at 1152 (citing *Campbell*, 510 U.S. at 580).

<sup>200</sup> *Henley*, 733 F. Supp. 2d at 1158. The Court made some distinctions between *November* and *Tax*, deeming *Tax* a closer call. But the extent of Devore's taking persuaded it that it, too, violated copyright. *Id.* at 1163-64.

defense to *60 Years*, a sequel to J.D. Salinger's *Catcher in the Rye* written by Fredrik Colting.<sup>201</sup> Here, the court distinguished *Suntrust* because *60 Years* did not critique any character or theme of *Catcher*,<sup>202</sup> even though Colting argued that the novel critically examines its aging protagonist, Holden Caulfield.<sup>203</sup> The defendant's claim that he also mocked Salinger himself did not point to a sufficiently transformative critique.<sup>204</sup>

In addition, 1998's *Castle Rock Entertainment v. Carol Publishing Group*<sup>205</sup> saw the Second Circuit rejecting Seinfeld fan lit in the form of a trivia textbook because it "so minimally alter[ed] Seinfeld's original expression," despite the authors' creation of a question and answer form and the development of incorrect answers.<sup>206</sup> And, the same year, in *Columbia Pictures v. Miramax Films Corp.*,<sup>207</sup> the Central District of California held that Michael Moore's lampoon of a *Men in Black* movie poster, created to promote his anti-corporate documentary *The Big One*, did not rise to the fair use standard. In Moore's poster, he wore sunglasses and dressed in a tenebrous suit like *Men in Black* actors Will Smith and Tommy Lee Jones, but his hair flared scuzzily and he wore a baseball cap.<sup>208</sup> Whereas *Men in Black* posters read *Protecting the Earth from the Scum of the Universe*, Moore's poster read *Protecting the Earth from the Scum of Corporate America*.<sup>209</sup> Though the work could have been seen as using "raw material" to make a social critique about how we cherish ideal masculinity in our heroes, the court held that Moore's satiric poster didn't sufficiently target *Men in Black*, and just evidenced the auteur's effort to avoid making something new.<sup>210</sup>

### *A) Did Carrie Mae Weems' Transform the Agassiz Daguerreotypes in From Here I Saw What Happened and I Cried?*

I undertake this analysis in light of all of the important fair use cases that have come down to the present day, arguing that this authority suggests that Weems did

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<sup>201</sup> 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *rev'd on other grounds*, 607 F.3d 68, 70 (2d Cir. 2010).

<sup>202</sup> *Id.* at 258.

<sup>203</sup> *Id.* at 258-59.

<sup>204</sup> *Id.* at 262 ("At most, however, this device utilizes *Catcher* and the characters of Holden Caulfield and Salinger as tools with which to criticize and comment upon the author, J.D. Salinger, and his supposed idiosyncrasies, rather than on the work itself. Furthermore, the non-parodic, transformative aspect of Salinger the character is limited."). *See also* 607 F.3d at 73, 82-84 (decision on appeal) (noting but not explicitly rejecting or endorsing lower court's rejection of "parody-of-the-author" defense).

<sup>205</sup> 150 F.3d 132 (2d Cir. 1998).

<sup>206</sup> *Id.* at 143.

<sup>207</sup> 11 F. Supp. 2d 1179 (1998).

<sup>208</sup> *Id.* at 1182.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 1188.

transform the images within the meaning of up-to-the-minute copyright law.<sup>211</sup> To the extent that there remains an ambiguity, I will then make a case for an even broader interpretation of fair use, one which draws upon progressive theories currently enlivening copyright scholarship, as well as upon the values of nonviolence.

From the current point of view, Weems' taking appears sanctioned by *Campbell's* and *Suntrust's* permissions of extensive, for-profit borrowing,<sup>212</sup> and *Suntrust's* recognition of a "hierarchy" of copyright values that favors the dissemination of "factual" versus "creative" work.<sup>213</sup> *Blanch's* celebration of "new insights"<sup>214</sup> appended onto raw materials also adds to an assessment of the legality of her graffitied marauding of the Harvard archive, as does *Cariou's* sufferance of artistic pirating that comments on the "historical context"<sup>215</sup> of the original work.

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<sup>211</sup> Cases like *Campbell* obviously provide some of the strongest support for Weems' taking, but *Campbell* had just been decided when she began working on *From Here I Saw What Happened*. Moreover, *Campbell* certainly does not garner absolute protection for her appropriation, which deals in visual art rather than music, and may be seen as more minimally interventionist than 2 Live Crew's treatment of the Orbison song. Consequently, Weems was taking a chance in her work as well as in her response to the Harvard threat. This risk-taking means that when Weems told Harvard to sue her, she stood as a new model for civil disobedience in the copyright context.

Civil disobedience in matters of copyright law has become a popular concept as of late, mainly because members of the public domain movement resist what they see as a manifest destiny doctrine being furthered by exorbitant copyright durations. See, e.g., Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 680 (2005) ("[S]upporters of the public domain movement have accused the [Supreme] Court of selling out to private corporations. A radical few even advocated civil disobedience in the form of hacking and free distribution of copyrighted music and movies."); Mauricio Espana, *The Fallacy that Fair Use and Information Should be Provided for Free: An Analysis of the Responses to the DMCA's Section 2001*, 31 FORDHAM URB. L.J. 135, 197 (2003) (noting the argument that fair use will be safeguarded in part by civil disobedience by the public and mass media); Lawrence Lessig, *Copyright's First Amendment*, 48 U.C.L.A. L. REV. 1057, 1066 (2001) (describing the case of Eric Eldred, who wanted to commit civilly disobedient taking in the service of his publishing company but was persuaded to engage in a legal challenge to the Sonny Bono Act, which extended the copyright duration set forth by the 1976 Act). But Weems adds a fresh dimension to the debate over the public domain: she uses works purportedly owned by "the richest university in the world," *Compassion*, *supra* note 15, to reveal the raced and violent underpinnings of our contemporary culture. Weems thus combines elements of the "copyleft" with an anti-racist and non-violent politics, which makes her a new kind of hero in this struggle. Still, for the purposes of conserving space and time in this paper, I will leave this intriguing idea for another day.

<sup>212</sup> See *supra* text accompanying notes 167-80.

<sup>213</sup> See *supra* note 177.

<sup>214</sup> See *supra* note 181.

<sup>215</sup> *Cariou*, 784 F. Supp. 2d at 348 ("[T]he illustrative fair uses listed in the preamble to § 107—"criticism, comment, news reporting, teaching [. . .] scholarship, [and] research"—all have at their core a focus on the original works and their historical context.") (alteration in original) (quoting statute).

However, *From Here I Saw What Happens's* appropriation of the daguerreotypes remains vulnerable on several counts: *Campbell*, *Suntrust*, *Columbia Pictures v. Miramax*, and possibly *Salinger* frown on satiric takings that only would make general commentaries on politics or history (rather than the original work). Further, *Henley*, *Cariou*, and *Castle Rock* require extensive intervention with the original images. Finally, *Harper & Row v. Nation* disapproves of liftings of original works' "hearts."

*From Here I Saw What Happened and I Cried* certainly takes the "heart" of Agassiz's daguerreotypes, and it remains unclear whether her tinting of the images and addition of words is sufficiently transformative under *Henley*, *Cariou*, *Castle Rock*, and *Columbia Pictures v. Miramax*. Further, does she sufficiently comment on the originals? Over the images of Delia, Jack, Renty, and Drana, Weems writes, again, *You Became A Scientific Profile/A Negroid Type/An Anthropological Debate/ & A Photographic Subject*. This may be taken as a comment on Agassiz and his series, or a more general indictment of slavery, subordination, and racist science, as my analysis above shows. If so, generalized critiques of the past, or a concentrated attack on Agassiz the man, or an inclusion of "facts" may not come under the ambit of fair use in *Campbell*, *Henley*, *Miramax*, *Salinger*,<sup>216</sup> and possibly even *Suntrust*, though it would find some support in *Blanch* and *Cariou*. Furthermore, is the taking of the daguerreotypes additionally supported by the "factual" vs. "creative" dichotomy? Again, the above history demonstrates that these daguerreotypes, while intended as forensic examinations of pure biological facts, amounted to nothing more than exploitative fantasy: Agassiz and his like-minded brethren were possessed by a fever dream of racial superiority that proves just as creative as Margaret Mitchell's.

In all, I think the taking here somewhat supported by *Campbell* and *Suntrust* and more amply so by *Blanch*, but there is such a degree of ambiguity created by *Henley*, *Cariou*, *Castle Rock*, and *Miramax*, that if the case were to come to the courts today the outcome is not certain.

There is an urgent need for courts to set forth clear, liberal standards for appropriations, particularly as Weems forms part of a sisterhood of artists who study racism, sexism, and violence through takings that bear witness to a history of U.S. violence. Appropriations artists like Wangechi Mutu,<sup>217</sup> Kara Walker,<sup>218</sup> Nancy

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<sup>216</sup> In *Salinger*, the court did not find sufficient transformation where the author of *60 Years* lampooned J.D. Salinger in his derivative novel. See *supra* note 204.

<sup>217</sup> Wangechi Mutu studies the violence of racism and illness in her magazine and paper collages. See, e.g., Wangechi Mutu, SAATCHI GALLERY, [http://www.saatchi-gallery.co.uk/artists/wangechi\\_mutu.htm/](http://www.saatchi-gallery.co.uk/artists/wangechi_mutu.htm/) (last visited Feb. 14, 2013).

<sup>218</sup> Kara Walker makes black paper silhouettes that deal with the violence of slavery; these often incorporate collage elements from old magazines and books. See generally WALKER ART CTR., KARA WALKER: MY COMPLEMENT, MY ENEMY, MY OPPRESSOR, MY LOVE (2007). Sometimes Walker simply presents others' works in combination with her own as "a narrative of fluid symbols." See KARA WALKER, AFTER THE DELUGE: A VISUAL ESSAY 9-10 (2007) (incorporating images such as J.M.W. Turner's *Slave Ship* (1840) in a visual essay on Hurricane Katrina).

Spero,<sup>219</sup> Deborah Kass,<sup>220</sup> Joy Garnett,<sup>221</sup> and Barbara Kruger<sup>222</sup> have all critiqued White supremacy, militarism, and patriarchy, and their works express the violence of those regimes. Furthermore, we may be galled that Harvard used legal ambiguity to its own advantage when bullying an artist who sought to use the Agassiz daguerreotypes in ways that did not reflect the university in the best light. This misuse of power also calls for clear standards.

Current legal copyright scholarship that focuses on race, sexuality, poverty, and gender supports an argument that Weems fairly used the Agassiz daguerreotypes. Rebecca Tushnet, Laura A. Foster, Jennifer Rothman, Peter Yu, and Madhavi Sunder are just some of the theorists whose work combines intellectual property theory with politically progressive critiques. Tushnet, for one, illuminates the sexist underpinnings of the fair use doctrine.<sup>223</sup> She notices that sexy takings are more likely to be deemed fair use, for example, than takings that illustrate other themes, such as violence.<sup>224</sup> Laura A. Foster seeks greater patent protections for indigenous

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<sup>219</sup> Spero's work addresses feminism and war, among other themes. I analyzed her 1993 silkscreen, *We Are Pro Choice*, which appropriates pop culture images of women body builders and goddesses, in the 2012 essay Yxta Maya Murray, *Feminist Engagement and the Museum*, 1 BR. J. AM. LEG. STUDIES 32, 56-57 (2012).

<sup>220</sup> Deborah Kass has appropriated from a variety of artists but perhaps is best known for her stealing of Andy Warhol's style in her homage to Barbra Streisand in the 1993 *Double Red Barbara*, where she works to make lesbian desire and Jewish identity visible in a homophobic and anti-Semitic world. See Irving Sandler, *Deborah Kass*, BOMBSITE.COM (Sept. 2010), <http://bombsite.com/articles/3663>.

<sup>221</sup> Joy Garnett's 2003 oil on canvas, *Molotov*, is a painting of a photograph taken by Susan Meiselas of the Sandinista Revolution. Garnett's painting, which shows the violence of that revolution, caused a ruckus for its content as well as its questionably legal methods of production. See Joy Garnett & Susan Meiselas, *On the Rights of Molotov Man: Appropriation and the Art of Context*, HARPER'S MAG., Feb. 2007, at 53, 53.

<sup>222</sup> Barbara Kruger uses found images to illustrate violence against women. See, e.g., BARBARA KRUGER, UNTITLED (THINKING OF YOU) (1999-2000), available at <http://www.barbarakruger.com/art/thinking.jpg>; see also YOUR BODY IS A BATTLEGROUND (1989), available at <http://www.barbarakruger.com/art/yourbody.jpg>. Kruger has also been the subject of a copyright lawsuit. *Hoepker v. Kruger*, 200 F. Supp. 2d 340 (S.D.N.Y. 2002). See also Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U.J. GEN. SOC. POL'Y & L. 273, 290 (2007) ("The court in *Hoepker* did not decide the copyright question because it determined that the photograph's expired foreign copyright had not been properly restored, but it did state without analysis that Kruger's work was transformative for purposes of [the case's] right of publicity claim. If that conclusion also applied to the copyright claims, *Hoepker* would be a heartening instance of fair use based on a playful, feminist use that did not depend on ridiculing a woman's sexuality.") (footnotes omitted).

<sup>223</sup> Tushnet, *supra* note 222, at 290.

<sup>224</sup> See *id.* at 287-88 ("[A]dding violence to an existing work rarely allows a parodist to succeed in a fair use defense. . . . Recently, courts have split on whether showing clips of the violent beating of Reginald Denny was fair use given its newsworthiness, but reprinting the nude photo of Miss Universe Puerto Rico to illustrate her questionable morals was of enough public interests to justifying the copying."). But see *contra* Jennifer Rothman, *Sex Exceptionalism in*

peoples.<sup>225</sup> My colleague Jennifer Rothman calls for a liberty approach to intellectual property problems. She would create greater First Amendment scrutiny in copyright cases, particularly those involving identity-based uses of copyrighted works.<sup>226</sup> She also advocates permissions that promote intimacy and freedom of intimate association, as well as those that help sufferers of violent sexual attacks deal with their experiences.<sup>227</sup> Peter Yu advances a human rights framework for analyzing intellectual property rights, positing that lack of access to cultural and educational materials needs to be fixed into this joint analysis.<sup>228</sup> Madhavi Sunder theorizes a modern intellectual property law that recognizes profound inequalities in the world; she worries about people's unequal capacities to participate in intellectual production as well as the potential for their vulnerability and exploitation.<sup>229</sup>

Together these theorists invest the fair use doctrine with progressive possibilities, which could help the case that Weems' taking fulfills a liberatory objective, and also recognizes inequalities. It is true, however, that Tushnet's analysis of the fair use cases cautions that Weems' study of violence in *From Here I Saw What Happened* may not qualify it as a worthwhile taking in the copyright jurisprudence.<sup>230</sup> In response to this

*Intellectual Property*, 23 STAN. L. & POL. REV. 119, 146 (2012) (finding that courts actually frown upon sexy takings if "judged immoral or obscene").

<sup>225</sup> Laura A. Foster, *Situating Feminism, Patent Law, and the Public Domain*, 20 COLUM. J. GENDER & L. 262, 297 (2011).

<sup>226</sup> Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 513 (2010) ("Copyright law should be limited when it interferes with the sacred space constitutionally reserved for individuals to define and construct themselves.").

<sup>227</sup> *Id.* at 522 ("[T]he blogger using the Journey song could contend that the use was an intimacy-promoting one, as she sought to become close to other rape survivors and closer to her existing circle of friends and relations.").

<sup>228</sup> See Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GEORGIA ST. U. L. REV. 709, 719 (2007). See also Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007).

<sup>229</sup> Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 333 (2006) ("[P]rofound inequalities in the world render individuals with unequal capacity to participate in intellectual production more vulnerable to exploitation of their rights. A cultural approach to intellectual property recognizes existing disparities in cultural capabilities resulting from economic, social, and cultural inequalities, and seeks intellectual property laws that accommodate difference.").

<sup>230</sup> See Tushnet, *supra* note 222. On the other hand, since the Agassiz daguerreotypes reveal men and women in the nude, perhaps this would cohere with the poisonous fair use doctrine documented by Tushnet.

In my own correspondence with Professor Tushnet, she cautioned that a skeptical scholarly assessment of Weems' transformation of the Agassiz daguerreotypes under current doctrine could only exacerbate the problem of the fair use doctrine's opacity. She referred me to Patricia Aufderheide and Peter Jaszi's book *Reclaiming Fair Use: How to Put Balance Back in Copyright*, which issues a call for the development of expansive best practices that will allow people to "reclaim the constitutional and human rights they have as creators under copyright . . . and change both practice and policy." PATRICIA AUFDERHEIDE & PETER JASZI, *RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT* x (2011). I acknowledge that a firm assertion that Weems' work did transform the Agassiz daguerreotypes



gap in the law, I advocate that to the anti-subordination, anti-racist, anti-homophobic, anti-poverty, and pro-feminist values advanced by copyright scholars, one other ethic should specifically be promoted: that of nonviolence. Artists who appropriate existing works in order to witness and showcase the violent past should be recognized by law as levying constructive social critiques that come within the fair use ambit.

Furthermore, where an existing work is minimally altered, the “transformation” analysis should be expanded, particularly where a taking fulfills that nonviolent objective. We should boost our understandings of “transformation” in fair use beyond physical interventions in images or objects: Where an existing work is minimally altered, the “transformation” analysis should be recognized as encompassing transformations of social understandings, not just images or objects. And courts engaging with this enlarged conception of transformation should take care to give leeway to artists like Weems, whose transformations of our conceptions of race, history, law, and justice fulfill socially beneficial, peaceable objectives.

### *B) Nonviolence and Alteration: A New Take on Transformation*

*From Here I Saw*, when read in light of *Colored People* and *The Hottentot Venus*, reconfigures the Agassiz daguerreotypes. Weems does not so much copy the documents as re-place them on the family mantel, and in so doing she transfigures these documents via a right-brained version of physicist Werner Heisenberg’s “observer effect.”<sup>231</sup> In physics, observation changes atom measurements.<sup>232</sup> In Weems’ historically-alert art, her witnessings of Agassiz’s daguerreotypes re-shapes them. That is, she alters our understandings of the daguerreotypes by investing them with her point of view. Having seen them through her eyes, we cannot regard them the same way ever again. We discern them now as evidence of the violent past, as well as of antique beliefs in Black “separateness” that we would like to believe have faded with time – but alas, as her works suggest (and as most of us already know), these revenants and superstitions continue to exert their damage on current reality.

Weems performs even more revolutions than that. Her re-seeing of the Agassiz daguerreotypes transforms not only the images, but possibly even the violent, racist,

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would help nudge copyright law toward greater openness, but in the interests of seeing the pitfalls of the fair use doctrine and urging a new take on transformation, I here examine the possible legal claims of unfair use under current case law.

<sup>231</sup> See WERNER HEISENBERG, *THE PHYSICAL PRINCIPLES OF THE QUANTUM THEORY* 3 (1949).

<sup>232</sup> See *id.* (“[I]n classical physical theories it has always been assumed either that [the interaction between observer and object] is negligibly small, or else that its effect can be eliminated from the result . . . . This assumption is not permissible in atomic physics; the interaction between observer and object causes uncontrollable and large changes in the system being observed . . . .”).

and amnesiac<sup>233</sup> contemporary world in which they exist. In *Campbell*, the Supreme Court demanded that transformations elicit a “social benefit”<sup>234</sup> by “shedding new light on an earlier work, and, in the process, creating a new one.”<sup>235</sup> Then, in *Suntrust*, the Eleventh Circuit enriched the concept of social benefit with progressive values that agree with the theories crafted by the likes of Tushnet, Rothman, Yu, and Sunder.<sup>236</sup> I would like to elaborate upon the path begun by *Suntrust* and socially conscious copyright scholars by urging for a protection of Weems’ witnessing appropriation of Agassiz daguerreotypes, since her taking transforms our perceptions of supposedly benign contemporary social practices. I am specifically speaking here about de facto segregation and intelligence testing customs, which were violently founded and encouraged by the separate species philosophies of Agassiz and his colleagues. Though parts of *Suntrust*,<sup>237</sup> as well as *Columbia Pictures v. Miramax*<sup>238</sup> and possibly *Salinger*,<sup>239</sup> deter takings that levy general commentaries on politics, history, or

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<sup>233</sup> Legal scholars have oft noted an ahistoricism characteristic of both judicial and legislative endeavors. See, e.g., Tanya Washington, *Loving Grutter: Recognizing Race in TransRacial Adoptions*, 16 GEO. MASON U. CIV. RTS. L. J. 1, n.207 (2005) (“The recent reticence expressed by several members of the United States Senate when considering whether to issue a formal apology for the widespread practice of lynching in this nation is a profound illustration of the manner in which many experience historical amnesia when it comes to addressing race and racial realities.”); G. Kristian Miccio, *Male Violence – State Silence: These and Other Tragedies of the 20th Century*, 5 J. GENDER RACE & JUST. 339, 339 (2002) (noting that cultural amnesia as well as a lack of collective will permits the state to “condone” gendered violence); David Hall, *Reflections On Affirmative Action: Halcyon Winds and Minefields*, 31 NEW ENG. L. REV. 941, 963 (1997) (“In the area of race and gender politics in this society, there has existed, and still exists, a social policy of amnesia.”); Derrick Bell et al., *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037, 1081 (1990) (“We do not have to suffer the waste of an amnesia that robs us of the lessons of the past rather than permit us to read them with pride and understanding.”) (quoting Audre Lorde); William Bradford, *“With a Very Great Blame on Our Hearts:” Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 152 (2002/2003) (“‘Legal amnesia,’ ignorance, and malignance stand between Indian claims for redress and a legal and political system that has denied justice to the original inhabitants of the United States for centuries.”); Wendell L. Griffen, *Race, Law, and Culture: A Call to New Thinking, Leadership, and Action*, 21 U. ARK. LITTLE ROCK L. REV. 901, 901 (1999) (“It is not overstating the case to suggest that, when it comes to race, we are living in the United States of Amnesia.”).

<sup>234</sup> See *supra* note 171 and accompanying text.

<sup>235</sup> *Campbell* at 516.

<sup>236</sup> See *supra* text accompanying notes 223-29.

<sup>237</sup> *Suntrust*, 268 F.3d at 1269 (“TWDG is not a general commentary upon the Civil-War-era American South, but a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in GWTW.”).

<sup>238</sup> Moore’s political commentary did not persuade the *Columbia* court, though it should also be said that Moore did not appropriate images that related directly to corporate greed. See *supra* text accompanying notes 208-09.

<sup>239</sup> *60 Years’* commentary on middle-aged ennui did not move the *Salinger* court. See *supra* text accompanying note 203.

human psychology, Weems' work shows the stunningly "socially beneficial"<sup>240</sup> and "fresh"<sup>241</sup> meanings of these commentaries. In line with my nonviolent objectives, I contend that this kind of transformation should also qualify a work for a fair use defense in copyright law.

In the following section I will set forth in detail how Weems' appropriation of the Agassiz daguerreotypes transforms our readings of contemporary de facto segregation and intelligence testing by revealing their roots in hurt and harm.

*i) How Carrie Mae Weems' Work Transforms Our Understanding of Racial Segregation and Intelligence Testing*

Weems' appropriation of the Agassiz images allows us to bear witness to direct, violent harm committed by White slaveowners against enslaved people in the 19th century. Her disobedient adoption transforms our understanding of contemporary schemes such as de facto segregation and intelligence testing, which are now regarded as benign. After learning of the long tradition of raced violence that undergirds these current forms of discrimination, we may begin to perceive them, too, as violent or as rooted in violence.

First, what do I mean by violence? My definition of "violence" is broad, and encompasses more than the immediate imposition of physical suffering without consent. In this essay, I borrow from several scholars of nonviolence, including Cynthia Cockburn, who writes of a "continuum of violence," which links types or kinds of violence.<sup>242</sup> In addition, I draw from Johann Galtung, who describes "structural violence," wherein social structures distribute injury, sickness, and death to the disadvantaged.<sup>243</sup> Galtung also identifies "cultural violence," which exists when aspects of our culture, such as religion, ideology, language, art, or science justify or legitimate direct or structural violence.<sup>244</sup> Further, Newton Garver writes of "quiet violence," which occurs when institutions deprive people of choices in a systematic

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<sup>240</sup> See *supra* note 171.

<sup>241</sup> See *supra* text accompanying note 169.

<sup>242</sup> See CYNTHIA COCKBURN, *ANTIMILITARISM: POLITICAL AND GENDER DYNAMICS OF PEACE MOVEMENTS* 255 (2012) (describing the scale of force (from a fist to a bomb), and the metric of social units (from two people in a fist fight to wars between nations)).

<sup>243</sup> My paraphrase of Galtung here borrows from Cockburn, *supra* note 242. See also Johan Galtung, *Violence, Peace, and Peace Research*, 1 J. PEACE RES. 167, 175 (1969) (noting that "the general formula behind structural violence is inequality, above all in the distribution of power"). Nancy Scheper-Hughes and Philippe Bourgois also include "humiliation" in the list of harms performed by structural violence. See NANCY SCHEPER-HUGHES & PHILIPPE BOURGOIS, *VIOLENCE IN WAR AND PEACE* 1 (2004) ("Structural violence—the violence of poverty, hunger, social exclusion and humiliation—inevitably translates into intimate and domestic violence.") In 1990, Galtung also wrote of structural violence's effects on the "mind and spirit" as well as structural violence's relationship to environmental destruction. See Johan Galtung *Cultural Violence*, 27 J. OF PEACE RESEARCH 291, 294 (1990).

<sup>244</sup> *Id.* at 291.

way.<sup>245</sup> I also draw upon my own work on jurisprudences of nonviolence, which identifies violence where conduct demeans, degrades, threatens “survival,” or fractures community.<sup>246</sup>

### a) *De Facto Segregation*

Weems’ appropriation of the daguerreotypes transforms our comprehension of de facto housing and school segregation that many people do not currently regard as instruments of suffering.<sup>247</sup> Congress and the Supreme Court, moreover, have declared that de facto housing and school segregation are not illegal and may not be remedied by desegregationist efforts.<sup>248</sup>

But *From Here I Saw What Happened and I Cried* demonstrates that the bloody history of slavery resounds in contemporary de facto segregation. Our consideration of the Agassiz images and their entangled relationship to historical racist science (as also revealed in *Colored People* and *The Hottentot Venus*) shows how beliefs in theories like polygenesis, and the related horror of racial mingling, inspired “separate but equal” segregation and continue to be felt in de facto partition. With respect to historical segregation, Agassiz’s theories directly inspired Guyot’s fancies about geography,

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<sup>245</sup> See C.A.J. COADY, *MORALITY AND POLITICAL VIOLENCE* 23 (2007) (citing Newton Garver, *What Violence Is*, THE NATION, June 24, 1968, at 209, reprinted in PHILOSOPHICAL ISSUES: A CONTEMPORARY INTRODUCTION 228 (James Rachels & Frank A. Tillman eds., 1972)).

<sup>246</sup> Murray, *A Jurisprudence of Nonviolence*, *supra* note 20, at 115-19.

<sup>247</sup> See, for example, a survey in CNN Money listing “the best places to live.” Neighborhoods such as Cheshire, Connecticut, which is 87.2% White, 5.0% African-American, and 5.1% Asian-American, make the top of the lists. *Best Places to Live 2011*, CNN MONEY, <http://money.cnn.com/magazines/moneymag/bplive/2011/states/snapshots/CS0914160.html> (last visited Mar. 9, 2013). See also *Profile of General Population and Housing Characteristics: 2010, Cheshire Town, New Haven County, Connecticut*, U.S. CENSUS BUREAU, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC\\_10\\_DP\\_DPDP1&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&prodType=table) (last visited Mar. 9, 2013). If the demographic that reads Money Magazine understood all or mostly White communities as arbiters of harm, then presumably they would not be so celebrated.

<sup>248</sup> While the Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2000), prohibits discrimination on the basis of race, it does not outlaw practices like white flight. See Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. DE NOVO 967, 1004 (2012) (“The nondiscrimination provisions of the FHA can provide, to some extent, a right to a particular unit or house, but cannot guarantee opportunity because those holding opportunity [such as white, wealthy people seeking homes] can opt out [of integration] without violating the FHA.”). Further, the Supreme Court has struck down desegregationist efforts where there is no establishment of de jure segregation or its lingering effects—lingering effects that do not include present racial divides. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (striking down school desegregation efforts in Kentucky and Washington).

which harbored racist convictions that lent support to Jim Crow laws.<sup>249</sup> Further, in works such as John David Smith's book *When Did Southern Segregation Begin*, we learn how segregation commenced as a practice of racial control, wherein Whites maintained the desired relations (or lack thereof) between the races in townships where African-Americans were under less surveillance than on plantations.<sup>250</sup> This desire to regulate interracial contact shared by Agassiz, expanded upon by Guyot, and exercised in 19th century townships<sup>251</sup> appears to still exist today: in 2012, 29% of Republican respondees to a Mississippi poll said that they believed that intermarriage among the races should be illegal.<sup>252</sup>

However, beyond inspiring a feeling of general dread, how does Weems' evocation of this history change our comprehension of modern de facto segregation? It changes our perceptions of such segregation because it reveals its violent aspects.

Do I really mean that White suburban communities are sites of violence? I do. If "violence" includes cultural attitudes or social structures that deprive people of choice,<sup>253</sup> distribute injury, sickness or death to the disadvantaged,<sup>254</sup> or degrade, demean, and fracture community,<sup>255</sup> then de facto segregation and attendant pricing strategies create violence by depriving people of color of choice in where to live. This deprivation extends not just to housing, but also to law enforcement, medical facilities, nature areas, and other resources that inform public health and individual longevity.<sup>256</sup> White flight also demeans people of color, implicates survival, and obviously fragments our society.

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<sup>249</sup> See Heyman, *supra* note 41 at 297 ("The three northern continents . . . seem to be made of the leaders; the three southern, the aids. The people of the temperate continents will always be the men of intelligence, of activity, the brain of humanity, if I may venture to say so; the people of the tropical continents will always be the hands, the workmen, the sons of toil.") (quoting Guyot).

<sup>250</sup> See, e.g., JOHN DAVID SMITH, *WHEN DID SOUTHERN SEGREGATION BEGIN: READINGS* 11 (2001) (describing slavery and segregation as related forms of racial control) ("Slavery on the South's isolated farms and plantations was a multifaceted system of labor, social, and racial control that was regulated by federal law, state slave codes, local ordinances, and close supervision by whites. Segregation thus was unnecessary, if not unworkable there. Conditions differed, however, in the Old South's towns and cities, where African American laborers enjoyed degrees of anonymity, freedom from strict surveillance, and independence . . . . [P]ublic etiquette was needed to govern the relations of races when the blacks were beyond the supervision of their owners.") (internal quotation marks omitted).

<sup>251</sup> *Id.*

<sup>252</sup> *Interracial Marriage: Many Deep South Republican Voters Believe Interracial Marriage Should be Illegal*, HUFFINGTON POST (Mar. 12, 2012), [http://www.huffingtonpost.com/2012/03/12/interracial-marriage-deep-south\\_n\\_1339827.html](http://www.huffingtonpost.com/2012/03/12/interracial-marriage-deep-south_n_1339827.html).

<sup>253</sup> See *supra* text accompanying note 245.

<sup>254</sup> See *supra* text accompanying note 243.

<sup>255</sup> See *supra* text accompanying note 246.

<sup>256</sup> On white flight leading to inferior police responses, see Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and*

However, de facto segregation seems so matter-of-course and tribal that many people will remain blind to the violence that it creates.<sup>257</sup> Yet Weems' witnessing of the history of raced violence in this country does change our perception. Her revelations about historical White attitudes that led to Africans' enslavement, control, dissection, murder, and sexual abuse in the nineteenth century prompt us to see how violence remains a part of people of color's lives because of the *persistently same White racist beliefs in people of color's "separateness."* The conviction of Black inferiority that once led Agassiz to exploit Drana, Jack, Renty, and Delia today helps build White enclaves and authorizes the contemporary control of people of color by the police, who monitor them in "bad areas" outside of that pale.<sup>258</sup> This "scale of races"<sup>259</sup> also creates an intense concentration of White wealth that leaves communities of color at greater risk of physical assault and morbidity because of poor law enforcement response times, poor health care, or poor health education.<sup>260</sup> Further, the resulting

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*Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 105 (1998) ("Community safety is also a significant problem in racially segregated neighborhoods. In 1988, the Los Angeles Police Department conducted a study researching 911 response times. The study revealed that police procedures appeared biased against minorities as response times to emergency calls were substantially slower in predominantly minority neighborhoods."); Ellen Fortino, *Fate of policy deployment, 911 responsiveness lawsuit uncertain*, AUSTIN TALKS, (Aug. 7, 2012), <http://austintalks.org/> ("[M]inority communities [in Austin, Texas] have lower numbers of officers than white communities. . . . 911 calls are more likely to go without a response in minority neighborhoods compared to white neighborhoods."). With respect to white flight and medical care for people of color, see Sidney D. Watson, *Race, Ethnicity and Quality of Care: Inequalities and Incentives*, 27 AM. J. L. AND MED. 203, 217 (2001). ("Medicaid patients—who are disproportionately minority—still cluster in public hospitals and the few private hospitals—some formerly all Black—that welcome them. The financial situation was further exacerbated by white flight and urban decay. In the 1970s and 1980s, urban areas became increasingly poor and increasingly Black. Inner city hospitals that did not move to the suburbs risked losing their doctors and insured patients to hospitals that would. As hospitals moved to the suburbs, African-Americans in the inner city became increasingly dependent on the few, crowded public hospitals that remained."). On white flight and salubrious public spaces, see, e.g., KEVIN MICHAEL KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* 124 (2005) ("Unwilling to share public space with blacks, white Atlantans once again looked for a private alternative. In the case of the public parks, some whites hoped to move municipal lands into private hands.").

<sup>257</sup> For example, Cheshire, Connecticut is largely considered a "bucolic" community. Its status as a place of prestige, peace, and community values was brought into focus during the time of the notorious Petit family home invasion killings. See *Petit Family Killings*, N.Y. TIMES (Jan. 27, 2012), [http://topics.nytimes.com/top/reference/timestopics/people/p/petit\\_family/index.html](http://topics.nytimes.com/top/reference/timestopics/people/p/petit_family/index.html).

<sup>258</sup> See, e.g., Wendy Ruderman, *Rude or Polite, City's Officers Leave Raw Feelings in Stops*, N.Y. TIMES, Jun. 26, 2012, <http://www.nytimes.com/2012/06/27/nyregion/new-york-police-leave-raw-feelings-in-stops.html?pagewanted=all>.

<sup>259</sup> See *supra* text accompanying note 72.

<sup>260</sup> See *supra* note 256. See also, e.g., Arline T. Geronimus et al., *Poverty, Time, and Place: Variation in Excess Mortality Across Selected U.S. Populations, 1980-1990*, 53 J. EPIDEMIOLOG.

school segregation leads to a tremendous economic divide in public education as a result of property taxes,<sup>261</sup> and the ill-funded schools hazard a high drop-out rate that is associated with criminality, health problems, and exposure to other violent dangers.<sup>262</sup>

Weems' revelatory remembrance of slavery can aid us in efforts to transform the Fair Housing Act, which has not fulfilled its promise.<sup>263</sup> A study of her work also recommends a reconsideration of the 2007 Supreme Court decision *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>264</sup> which struck down school desegregationist efforts in Washington and Kentucky. *Parents Involved*, indeed, turned upon the question of how far back in history we may look for proof of continuing patterns of segregation.<sup>265</sup> Justice Roberts, writing for the majority, proffered a most

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COMMUNITY HEALTH 325, 325 (1999) ("African American residents of urban/northern communities suffer extremely high and growing rates of excess mortality."). *See also id.* at 328 (describing the risks of death by homicide and death by HIV/AIDS among African American poor); DEVELOPING GOV'T ACCOUNTABILITY TO THE PEOPLE, SHADOW REPORT ON INTERNATIONAL CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 20 (2007) (describing the "gross" lag in emergency response time in communities of colors versus privileged communities); Hossein Bahrami et al., *Difference in the Incidence of Congestive Heart Failure by Ethnicity*, 168 ARCH. INTERN. MED. 2138 (2008) (ascribing the higher incidence of cardiac disease and related death among African Americans to "socioeconomic factors," including the availability of good medical care).

<sup>261</sup> Roslyn Arlin Mickelson, *Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat from Race Sensitive Remedies: Lessons from North Carolina*, 52 AM. U. L. REV. 1477, 1483 (2003) ("Given the system of public school financing, which is largely dependent upon property taxes, and in view of the racial segregation in public and private housing markets, it is not surprising that there are striking race (and class) differences in school revenues and related opportunities to learn.").

<sup>262</sup> *See, e.g.*, Kimberly Jade Norwood, *Adult Complicity in the Dis-education of the Black Male High School Athlete & Societal Failures to Remedy His Plight*, 34 T. MARSHALL L. REV. 21, 27 (2008) ("[T]here is still a very serious problem with drop-out rates and proficiency levels for Black youth in general and the risk is particularly acute for Black males. In 2006 the national Black male student dropout rate from high school was 53% while similar rate[s] for Hispanic students was 43% and for White students was 25%."); JOHN M. BRIDGELAND ET AL., THE SILENT EPIDEMIC: PERSPECTIVES OF HIGH SCHOOL DROPOUTS 3 (2006), available at <http://www.ignitelearning.com/pdf/TheSilentEpidemic3-06FINAL.pdf> ("The decision to drop out is a dangerous one for the student. Dropouts are much more likely than their peers who graduate to be unemployed, living in poverty, receiving public assistance, in prison, on death row, unhealthy, divorced, and single parents with children who drop out from high school themselves.").

<sup>263</sup> *See supra* note 248.

<sup>264</sup> 551 U.S. 701 (2007).

<sup>265</sup> *Parents Involved* addressed public school districts in Seattle, Washington and Jefferson County, Kentucky, which had adopted race-conscious student assignment policies. *Id.* at 708. Each school sought to maintain "racial balance" between Whites and African-Americans and other minority races. *Id.* In each case challenges were brought based on Equal Protection principles. *Id.* In Seattle, around 41 percent of the students in the district were white, and 59 percent were nonwhite. For popular, oversubscribed schools, admissions was based in part on

truncated historical analysis,<sup>266</sup> while Justice Breyer, in a dissenting opinion joined by Justices Ginsberg, Souter, and Stevens, argued in strong terms that a longer view was called for.<sup>267</sup> Weems' work directly connects with Breyer's vision of jurisprudence and also counsels that we delve even deeper into history than he was willing to go.<sup>268</sup>

### *b) Intelligence Testing*

Just as Weems' transfigures our perceptions of de facto segregation, *From Here I Saw*'s emotive exposure of history transforms our comprehension of contemporary intelligence testing efforts, which found their beginnings in raced hurt and harm. Legal scholars have queried whether tests like the Standard Aptitude Test, Graduate Records Examination, Medical College Admissions Test, and Law School Admission Test are racially biased for their emphasis on "general based" or "g-based" theories of intelligence developed in part by British psychologist Charles Spearman in 1904.<sup>269</sup> Studies show that African-American SAT test takers achieve a score that is about one full standard deviation lower than the average score of White test takers, Latino test takers achieve a score slightly above African-Americans, Native Americans score at half a standard deviation less than White Americans, and Asian-Americans score slightly above White Americans.<sup>270</sup>

Some advocates of racial parity such as my colleague Kimberly West-Faulcon argue that alternative tests that use a multidimensional definition of intelligence will lead to better evaluations and smaller racial differences in scores.<sup>271</sup> Others suggest

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whether the school had achieved this racial balance. If not, then race was considered a "tiebreaker" for a student of color seeking entry. *Id.* at 711-12. In Jefferson County, 34 percent of the students were Black, and most of the remaining 66 percent were White. The County had adopted a plan mandating that all nonmagnet schools maintain a minimum Black enrollment of 15 percent, and a maximum Black enrollment of 50 percent.<sup>265</sup> If a school was out of balance, a student who belonged to the overrepresented group would not be assigned there. *Id.* at 715-16. Justice Roberts' majority opinion struck down both systems as invidious racial classification, using strict scrutiny. *Id.* at 720-21.

<sup>266</sup> Justice Roberts found that in Seattle the schools had never been "segregated by law, and were not subject to court-ordered desegregation decrees." *Id.* at 720. And while Jefferson County had been so subjected, it had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects." *Id.* Though eliminating the vestiges of intentional discrimination would be a compelling interest, this historical analysis proved for the majority that such vestiges no longer existed. *Id.* at 721.

<sup>267</sup> Justice Breyer wrote a lengthy dissent that traced the history of segregation in Seattle and Jefferson County from 1945 in Seattle and 1954 in Kentucky, arguing that these long patterns of partition negated any meaningful distinction between de jure and de facto segregation. *Id.* at 807, 813-14 (Breyer, J., dissenting).

<sup>268</sup> That is, all the way back to the nineteenth century.

<sup>269</sup> Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1239, 1256 (2011).

<sup>270</sup> *Id.* at 1270-71.

<sup>271</sup> *Id.* at 1241.



abandoning intelligence testing altogether.<sup>272</sup> These critics complain of intelligence tests' stigmatizing people of color and foreclosing their opportunity,<sup>273</sup> identifying these tests as violent within Garver's, my, and perhaps Galtung's meanings.<sup>274</sup>

Few, however, would identify intelligence testing with violence. Yearly mass participation in intelligence testing demonstrates its social legitimacy.<sup>275</sup> However, Weems' art and her evocation of history transform our understanding of these tests by revealing their woeful genesis in the racist science of the 19th century.<sup>276</sup>

How so, exactly? Weems' *From Here I Saw What Happened and I Cried*, when read with *Colored People* and *Hottentot Venus*, proffers a library of incriminatory facts about intelligence testing, and practices of separating people according to intellectual or moral worth. It turns out that Charles Spearman, the founder of the g-based theory of intelligence, was directly inspired by the work of François Galton, gatherer of "idiot" and "titled people's" fingerprints, aper of Agassiz-like mug shots, imitator of Cuvier, measurer of the second *Hottentot Venus*, and pioneer of the "biometric" science of intelligence testing.<sup>277</sup> Galton expressed his racial theories through a series of intelligence tests that focused on sensory and psychological abilities, and believed that these exams would unveil "some general ability—a general intelligence that contributed in some way to each of the different measured skills."<sup>278</sup> Galton, then, developed his concept of general intelligence in tandem with a belief system that presupposed general, essentialist characteristics shared by racial classes. In his biography, Spearman asserts that his first labors at developing a test for general intelligence drafted off of Galton's essentializing view of intelligence and human capacity.<sup>279</sup> Though scholars such as Kimberly West-Faulcon do make some mention

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<sup>272</sup> Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 121 (2003) ("[I]t is [the] overemphasis on test scores and school merit [that have] failed to allocate scarce educational opportunities in a manner that is consistent with democratic values."); Matthew L. M. Fletcher, *The Legal Fiction of Standardized Testing*, 21 L. & INEQ. 397 (2003) (telling stories of trauma and race and standardized testing); Alex M. Johnson, *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 312-313 (2006) (noting that law schools that take foreign students through L.L.M. programs will increase their diversity while admitting students who need not have taken the LSAT).

<sup>273</sup> See Fletcher, *supra* note 272.

<sup>274</sup> See *supra* notes 244-246.

<sup>275</sup> See Jacques Steinberg, *Record Number Take SAT, but the Scores of Blacks and Puerto Ricans Lag*, THE CHOICE (Sept. 13, 2010), <http://thechoice.blogs.nytimes.com/2010/09/13/sat-2010/> (stating that 1.55 million graduating high school students took the SAT in the spring of 2010).

<sup>276</sup> See *supra* Sections I and II.

<sup>277</sup> See *supra* text accompanying notes 104-111.

<sup>278</sup> JAMES S. NAIRNE, PSYCHOLOGY 313 (2008).

<sup>279</sup> See JOHN B. CARROLL, HUMAN COGNITIVE ABILITIES: A SURVEY OF FACTOR-ANALYTIC STUDIES 37 (1993) (citing Spearman's autobiographical essay) ("One day, inspired by Galton's *Human Faculty*, I started experimenting with a little village school nearby. The aim was to find out whether, as Galton has indicated, the abilities commonly taken to be 'intellectual' had any correlation with each other or with sensory discrimination.").

of Galton when attacking contemporary intelligence testing,<sup>280</sup> Weems' *From Here I Saw What Happened and I Cried*, *Colored People*, and *Hottentot Venus* encourage us to understand that the essentialist concept of general intelligence is not just the bequest of batty racists lingering in the shadows of history. Rather, it is the keeps-giving gift of a network of vivisectionists and head-hunters who egged each other on to snuff out "idiots"<sup>281</sup> while congratulating themselves on their own brilliance. This eureka moment only comes from a careful consideration of Weems' work and its historical context. But those willing to put in the hours of study (and all policymakers, lawyers, and judges should number themselves in this ambitious grouping), will find that Weems transforms their perceptions of intelligence testing by revealing Spearman's filiation with Morton, Cuvier, Agassiz, and Galton, a dangerous brotherhood that based its conceptions of merit on a "science" of blood and hurt. These revelations can animate proposals that G-rated theories of intelligence cannot be uncoupled from a totalizing, racist, and dangerous view of human beings.

Weems' appropriation of the Agassiz daguerreotypes, and her social critiques, are best understood within the context of her work as a whole. Reading Weems' oeuvre, we can see that her takings, while perhaps light on alterations of the kind sought by *Henley*, *Cariou*, *Castle Rock*, and *Miramax*, evolves our understandings of practices that are arguably benign. She shows us that they were birthed in a bed of brutal racist science that led to the deaths, enslavements, and exploitation of many people. Our resulting re-readings of de facto segregation and intelligence testing qualify as peaceable, "socially beneficent,"<sup>282</sup> and transformative effects of Weems' appropriation, a taking that should be recognized as fair use of Harvard's reputedly copyrighted property.

## ii) *Obstacles to an Enlarged Conception of Transformation*

Several obstacles snap at my heels as I offer these suggestions. The first quandary would be heard in the din of artist objections that "the observer effect" argument permits greedy thefts of copyrighted work so as long as freebooters offer persuasive interpretations of it. However, appropriations artists such as Sherrie Levine have already proved the accuracy of my argument that the observer effect alters existing work. Levine photographs other artists' products—most famously, in the 1980's she reproduced Walker Evans' photographs—and then submits them to the audience as her own, in so doing challenging notions of authorship, genius, and reality.<sup>283</sup> Her

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<sup>280</sup> See Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, n.107 (2011).

<sup>281</sup> See *supra* text accompanying note 108.

<sup>282</sup> I am paraphrasing *Suntrust's* approval of *The Wind Done Gone's* "socially beneficial" racial critique. See *supra* text accompanying note 179-80.

<sup>283</sup> See, e.g., Kenneth Baker, *Walker Evans' Documentary Style Spoke Forcefully to Generations*, SAN FRANCISCO CHRON., Feb. 4, 2012, at E1 ("When [Levine] first presented [her Evans reproductions] they came across as merely flippant. But time has brought out the canniness in their critique of the vintage print as art market fetish and the gold-diggers' dreams of authenticity that it can provoke. Levine's use of the camera to devalue photography, just as

scurrilous viewpoint so infuses the art she appropriates that she changes its meaning, and so her somewhat sloppy copies have proved for the last three decades how “intense”<sup>284</sup> physical intervention need not occur for significant transformations to take place.

Indeed, the examples set by Levine and other appropriations artists<sup>285</sup> show that courts’ requirements that appropriations artists materially intervene with borrowed objects or images in order to qualify for fair use betray a curiously passive approach to art. If art is not only the physical entity made by artists but also the exchange that the art triggers between the artist and her audience, then physical transformation can only be but one kind of mutation the artist performs on appropriated art. Other factors to examine are, as I have shown here, the re-setting of the work, the changes created by the work’s infusion with the appropriator’s perspective, and the resulting transformative responses these gestures elicit in the audience.

A related critique could complain that my reinterpretation of “transformation” derives from a reading not only of the work at stake, but also additional pieces in the artist’s oeuvre. Namely, in my analysis I argue that *From Here I Saw What Happened*, read in conjunction with *Colored People* and *Hottentot Venus*, transforms our perceptions of de facto segregation and intelligence testing, and that this brand of transformation should qualify for fair use. But no fair use cases that I have seen analyze whether an appropriation is transformative by considering its significance within the artist’s body of work as a whole. *Cariou* permits a consideration of other cells within a series,<sup>286</sup> but my method expands beyond that. Perhaps my approach is too difficult? Am I asking for heroic art criticism from an ill-equipped judiciary? No. Courts engaging in art law questions *should* rise to the challenge that the fair use doctrine issues. Isolated readings of artworks can yield impoverished interpretations. Museum practices of holding artist retrospectives show that thoughtful students—or judges—of art do not study art objects in isolation, but will best fathom them in the context of an artist’s body of work as a whole.<sup>287</sup> And if I—who have no art history training—can do the work, so can the bench.

A further problem confronts this recalibration of the fair use doctrine. As Tushnet counsels us, nonviolent values remain either muted or nonexistent in copyright

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the art economy began inflating it, now seems quietly to have solicited a whole sale reassessment of photography’s role in forming the world we inhabit.”).

<sup>284</sup> See *supra* text accompanying note 200.

<sup>285</sup> See *supra* text accompanying notes 217-22.

<sup>286</sup> See *supra* text accompanying note 194.

<sup>287</sup> See, e.g., John Elderfield, *Preface*, in WILLEM DE KOONING, JOHN ELDERFIELD ET AL., *DE KOONING: A RETROSPECTIVE* 7 (2011) (“The aim of this . . . exhibition . . . is to reveal the extent and depth of Willem de Kooning’s artistic achievement.”); David A. Ross, *Director’s Foreword*, in SOL LEWITT: A RETROSPECTIVE 15 (Gary Garrels, ed., 2000) (“The central purpose of this retrospective . . . is to provoke a thorough understanding of Sol LeWitt’s contribution both within and despite the constraints of contemporaneous art historical categorization.”); Erik A. Powell, *Foreword*, in MICHAEL GOVAN, DAN FLAVIN ET AL., *DAN FLAVIN: A RETROSPECTIVE* 9 (2004) (“The retrospective . . . allows us to serve the art by presenting it to our audience in its full breadth.”).

jurisprudence, though arguably *Suntrust's* permission of a critique of an author's racism, sexism, and homophobia has paved the way to that goal. I encourage us to introduce this value to fair use tests in the interest of furthering a peaceable legal discourse and society. Weems' rewitnessing of the Agassiz daguerreotypes changes the images through the observer effect, but it also alters something far greater. Her remodeling of the pictures also reforms our comprehensions of permitted social practices that historically and currently exercise violence upon the disenfranchised, a practice that is both transformative and socially beneficial and so within the meaning of the fair use tests already adopted.

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This brings me to my second argument, which concerns the conclusion I just made: throughout this paper I have announced that Weems did, in fact, "take," "borrow," and "appropriate" the daguerreotypes from Harvard, and that this seizure should be legal.

But *were* they Harvard's? The assessment that Weems snatched the images from the school's grasp assumes that the daguerreotypes indeed do qualify as University property. However, while engaging in my lengthy and bookish fair use analysis, I have been continually dogged by the sensation that that should *not* be right. I am beset by the conviction that the copyright issue amounts to a red herring, and that Agassiz should never have owned these works. The question of ownership, of course, underlies the issues of not only copyright claims. It also supports the contract breach that Weems hazarded when she copied the daguerreotypes.<sup>288</sup>

Harvard objected because she took their property without permission. But I think that there's an argument that Weems should have more right to the daguerreotypes than even this old, storied, and esteemed University that sheltered Agassiz so many years ago.

It is to this contention that I now turn.

#### *IV. Who Owns the Agassiz Daguerreotypes? Making a Case for the Protection and Return of Cultural Property Made with or by African-Born Enslaved People in the Nineteenth Century*

I visited the Peabody Museum of Archaeology and Ethnology on October 12, 2012 to examine the daguerreotypes. That morning, my cab dropped me off on a corner off Massachusetts Avenue, and I wandered somewhat lost through the leafy wilds of Harvard. I saw floppy-fringed students outfitted in gorgeously askew prep, and careened past crooked Victorian masonry buildings while breathing in the Coke-can cold of the autumnal east. I am a California girl: U.C.L.A., Stanford; I teach at Loyola Law School in Los Angeles. I had never set foot on Harvard's campus before,

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<sup>288</sup> See *supra* text accompanying notes 9-19.

and as I pounded up the foot-softened steps of the Peabody I found myself in the deep throes of Ivy lust.

The Peabody must have ghosts. If so, I think they're furious. But when I first entered the museum I felt awestruck and happy. The walnut staircase creaked; the wood floors shone like whiskey. The whitewashed walls bumped and furrowed like the face of an old wizard. The shabbiness was *perfect*. Shadow boxes in alcoves hosted glimmering masks and headdresses once worn by African clans. Wafts of money and elite tradition thinned out the oxygen so that every stolen bone and poached medicine bag glowed in its rare atmosphere, exquisite, like royal jewels.

Trish Capone, one of the curators who led me through the collection, met me in lobby and almost immediately had me sign a contract.<sup>289</sup> The agreement required me to promise that no photographs I took at the Peabody would be exhibited except in connection with university teaching, or in unpublished documents, unless I obtained prior written permission from the Peabody and Harvard University. The contract specifies that if I breach it, I will owe ten thousand dollars in liquidated damages. Trish is lovely, intelligent, gentle. She moved away to allow me to read the document in semi-privacy. I signed the contract.

Sometime later, I sat down in the office of Pat Kervick, Associate Archivist at the Peabody, and two lovely and spectrally-pale archivists-in-training younglings whom I will not name. Pat is a serious, sandy-haired woman whose delicate gestures betray her regular intimacy with incunabulum that is as fragile as frost. With spare movements, she pointed me toward a table draped with black cloth. Eight small, papyrus-colored boxes wrapped with ribbon neatly stacked on top of the cloth. The student archivists and I sat down and watched silently as Pat removed from the papyrus-colored cases exquisite red-velvet covered hinged boxes that once opened revealed the surprisingly tiny gilt-framed daguerreotypes.

One by one, Pat exposed Jack, Renty, Drana, Delia to me. A clock ticked from a dusty hallway; I began to sweat. Things started to seem *wrong*. Every scar, every wrinkle of these victims thrust themselves out of the frames. The daguerreotypes were both as bijoux as Cartier and at the same time the worst things I had ever seen. I couldn't tell if they were of a piece with the terrible glamour of Harvard or a worm-hole that transported me out of what I had thought was Eden and into hell.

I had to bring my face right up to theirs. Daguerreotypes are like holograms, in that the observer will not best see the image by facing it straight on, but rather by creeping up on the blurry, reflective likeness until the subject reveals itself in its fullness. This process gave me an intense sensation of being a peeping Tom. The instinct that I treaded on forbidden ground only increased when I saw that my own face reflected back to me in the bronze shadows of the daguerreotype, so that I appeared simultaneously to be looking over Jack or Drana's shoulder or blotting out their features with my own.

Small details alerted my attention, ones that had escaped me when examining Weems' copies. Drana, Jack, Renty, and Delia's white muslin clothing bunches

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<sup>289</sup> This is the Peabody Museum's Permission to Photograph Collections contract, signed by me on October 12, 2012 (on file with author).

around their waists, having been wrenched down and flattened against their hips to expose their chests and shoulders. You can see in the pulled and yanked fabric the evidence of their forced disrobing. The most grievous signature of the daguerreotypes, however, remains Jack, Renty, Delia, and Drana's facial expressions, gone slack or gnarled with grief and humiliation. The images' tiny size – 3 by 4 inches – requires the observer to peer down very closely, so that you become almost kissingly intimate with these persecuted ancestors.

"I love the boxes," one of the archive-studies trainees suddenly said in the hush. The girl admired the ingeniously crafted velvet and leather pyx that housed the daguerreotypes. She moved her hands together, pretending to handle the frames. "I love things that fit together."

*What? Lady, you are so damn crazy if that's the only thing that strikes your attention.* The rest of us remained mute. The sound of our caught breath and nervous coughs rattled the Peabody's serenity. The images slid over the black cloth, luminous, horrible. They now exist in nearly perfect condition, having been immaculately conserved this year by Harvard's own Weissman Preservation Center.<sup>290</sup>

"How many times do you show these to visitors?" I asked Pat.

"Three or four times a year, at the maximum," she said. And then we fell quiet again.

Everyone transforms everything. As the daguerreotypes passed through our hands, I thought how Harvard's possession and care for these images had irretrievably changed them. They were now shameful but priceless possessions, exhibited to privileged cognoscenti. I could not read them apart from their context, which was as well-tended wards of the "richest university in the world." The atrocity that led to their making almost submerged beneath the *joaillier's* unveiling ritual, a ceremony that spoke more to their rareness, their expensive perfection, than to pain and trespass. I fear they have become luxury items.

In other hands, the daguerreotypes would take on other meanings and readings. Weems' illegal transport of them foregrounds the agony, distrust, betrayal, and crime that birthed them. By making such huge copies, she also gives us an excellent opportunity to *see* them. But in Harvard's expensive halls, sighed over by connoisseurs, they become precious, peeped-at rarities instead of badges of murder, sexual assault, and shame that should inspire wails instead of decorous compliments about their fittings.

By owning these daguerreotypes, Harvard is changing them, as any owner changes any object. Their meaning grows obscured by inaccessibility and the fact that they remain owned by an institution that gave aid and comfort to the villain who commissioned them.

But *does* Harvard own them?

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<sup>290</sup> E-mail from Patricia Capone, Associate Curator & Repatriation Coordinator, Peabody Museum of Archaeology and Ethnology, to author (Aug. 31, 2012) (on file with author).

The contract that Carrie Mae Weems and I signed presumes that Harvard owns the daguerreotypes. And, certainly, if Harvard does have good title to the images—if not ownership of the copyright—then they could still contract with Weems for access to the pictures on their terms.<sup>291</sup> However, did Agassiz or his son pass on good title to Harvard such that it could threaten Weems in the early 1990's? If he did not, then the contract could be illusory.<sup>292</sup>

In an 1859 issue of the *Harvard Register*, one Julius H. Ward writes in homage to Agassiz, and describes the scientist as effectively thrusting a mountain of specimens and oddments at the University.<sup>293</sup> Were the daguerreotypes included in this hoard? It's possible that Agassiz just forgot the photos in one of Harvard's attics. If Agassiz wanted to keep his naked photos for himself, to gloat over in the shadowy nooks and crannies of the University, then that would not suffice for an *inter vivos* or gift *mortis causa* (a gift that takes effect after death).<sup>294</sup> So, there's a possibility here that the daguerreotypes actually belong to Agassiz's heirs.<sup>295</sup> Indeed, Pat Kervick explained that she believed that Agassiz's son, Alexander, transferred the documents to Harvard in 1935.<sup>296</sup>

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<sup>291</sup> See Robin J. Allan, *After Bridgeman: Copyright, Museums, and Public Domain Works of Art*, 155 U. PA. L. REV. 961, 980 (2007) ("When uncertainty looms over the copyright status of art reproductions, museums may resort to other methods of protecting the works in their collections – namely contracts, such as those that appear on the back of a ticket or on a museum website. These contracts may become more restrictive as copyright recedes as a viable doctrine for protecting art reproductions . . . . In addition, an important consideration passed over by public domain proponents . . . is that contract law lacks copyright's statutory exceptions: no fair use doctrine.").

<sup>292</sup> See BLACK'S LAW DICTIONARY 370 (9th ed. 2009) (a contract is illusory when "one party gives as consideration a promise that is so insubstantial as to impose no obligation").

<sup>293</sup> Julius H. Ward, *Louis Agassiz and His Friends*, 3 HARV. REG. 13, 14 (1881) ("Agassiz in October, 1859 . . . begged the Trustees of the Museum to accept from him specimens for which he had paid \$10,000 in cash . . . as a 'contribution to the Museum.'").

<sup>294</sup> For one, it's possible that he did not "deliver" the daguerreotypes to the museum, a requirement for both types of gifts. See *Duryea v. Harvey*, 183 Mass. 429, 433 (1903) ("[T]he lack of delivery to the donee or to someone for her, passing the title to her during the lifetime of the donor, is fatal. In the case of a gift *mortis causa*, as well as in that of a gift *inter vivos*, such a delivery is necessary to the validity of the gift."). See also *Fuss v. Fuss*, 373 Mass. 445, 450 (1977) ("[I]n determining the beneficiaries of a gift, we give substantial weight to the intent of the donor.").

<sup>295</sup> See Marilyn Bailey Ogilvie, *Agassiz, Elizabeth Cary (1922-1907)*, in 1 THE BIOGRAPHICAL DICTIONARY OF WOMEN IN SCIENCE: PIONEERING LIVES FROM ANCIENT TIMES TO THE MID-20TH CENTURY 12 (2000) (mentioning Agassiz's wife and three children).

<sup>296</sup> Conversation with Pat Kervick, Associate Archivist, Peabody Museum of Archaeology and Ethnology (Oct. 12, 2012). See also Email from Pat Kervick to author (Oct. 19, 2012) (on file with author) ("According to my notes, the daguerreotypes were transferred to the Peabody Museum in 1935 from the effects of Alexander Agassiz, son of Louis Agassiz. (Alexander Agassiz died in 1910.)"); DELIA'S TEARS, *supra* note 9, at 332 n.39 ("[T]he daguerreotypes were transferred in 1935.") (citing Elinor T. Reichlin, *Survivors of a Painful Epoch: Six Rare*

However, could Louis pass on title to Alexander? Depending on whether Agassiz paid Dr. Robert Gibbes for producing the daguerreotypes,<sup>297</sup> maybe they belonged to *him*. And, also, since “work for hire” was not recognized until 1909, long after Agassiz died,<sup>298</sup> then it’s possible that the images belonged to the photographer, J.T. Zealy.

Still, let’s assume Agassiz owned them under working legal principles, and that either independently or via his son, he gave them to Harvard, which also enjoys dominion over them. If so, then, as noted above, Weems probably breached the contract.<sup>299</sup> However, that conclusion allows us to ask this question: Why in the world should this White man who exploited Jack, Drana, Delia, and Renty be able to possess the fruits of that exploitation, and then gift them to Harvard?

It is worth noting that Harvard is not the only organization that owns 19th century images of slaves. The Maryland Historical Society possesses a daguerreotype of slave Martha Ann “Patty” Avis, taken circa 1860.<sup>300</sup> Yale University’s Beinecke Rare Book and Manuscript Library owns an 1850 ambrotype of “Uncle Marian,” a “slave of great notoriety.”<sup>301</sup> The National Humanities Center publication *African Americans in Slavery: Photographs: 1847-1863* catalogues images of African-American enslaved people owned by the Kentucky Gateway Museum Center, the Library of Congress, Louisiana State Museum, the University of Virginia Library, and the Ohio Historical Society.<sup>302</sup> Furthermore, artists made scores of paintings of enslaved people in the nineteenth century, and today these works reside in private and museum collections.<sup>303</sup>

Images in daguerreotypes and paintings, moreover, are not the only artifacts made under conditions of violence by enslaved people in this country. An active trade of

Pre-Civil War Daguerreotypes of Southern Slaves 3 (unpublished typescript) (on file with Peabody Museum of Archaeology & Ethnography, Harvard University)).

<sup>297</sup> See *supra* text accompanying note 145.

<sup>298</sup> See *supra* text accompanying note 87.

<sup>299</sup> See *supra* text accompanying note 291.

<sup>300</sup> See Maryland Hist. Soc’y, *Rare Daguerreotype Offers Insight into Urban Slavery*, COMMUNITY TIMES (Oct. 11, 2011), [http://www.carrollcountytimes.com/community\\_times/news/rare-daguerreotype-offers-insight-into-urban-slavery/article\\_7bcc9d6c-f43b-11e0-b66f-001cc4c002e0.html](http://www.carrollcountytimes.com/community_times/news/rare-daguerreotype-offers-insight-into-urban-slavery/article_7bcc9d6c-f43b-11e0-b66f-001cc4c002e0.html).

<sup>301</sup> *Half Length Formal Portrait of "Uncle Moreau" [Omar ibn Said]*, BEINECKE RARE BOOK & MANUSCRIPT LIBRARY, [http://beinecke.library.yale.edu/dl\\_crosscollex/brbdl/oneITEM.asp?pid=2002060&iid=1009308&srctype=ITEM](http://beinecke.library.yale.edu/dl_crosscollex/brbdl/oneITEM.asp?pid=2002060&iid=1009308&srctype=ITEM).

<sup>302</sup> NAT’L HUMANITIES CTR., *AFRICAN AMERICANS IN SLAVERY: PHOTOGRAPHS: 1847-1863*, at 2-12 (2007), available at <http://nationalhumanitiescenter.org/pds/maai/enslavement/text1/photosenslaved.pdf>. Other daguerreotypes and ambrotypes owned by the University of Virginia, Virginia’s Valentine Museum, and the University of Georgia can be found in Gladys-Marie Frye’s *STITCHED FROM THE SOUL: SLAVE QUILTS FROM THE ANTE-BELLUM SOUTH* 4-11 (1990).

<sup>303</sup> See Eve M. Kahn, *Books Analyzing Images of Slaves in History*, N.Y. TIMES, Aug. 2, 2012, at C24 (“Pictures of slaves did prove marketable among aristocrats and abolitionists in England and on the Continent.”).



crafts made by slaves also exists. Museums and private owners possess fine quilts,<sup>304</sup> as well as pottery that can fetch as much as \$40,000 per piece at auction.<sup>305</sup>

Once we begin to question the chain of title of relics made as a result of the violent oppression of enslaved people, of course, we can begin to reconsider the entire nature of property ownership in this country. For example, Thomas Jefferson's plantation at Monticello was built by slave labor.<sup>306</sup> It is a private non-profit<sup>307</sup> that charges admission<sup>308</sup> and has a shop selling wine, gifts, furniture, and home décor.<sup>309</sup> Perhaps

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<sup>304</sup> See generally *Real History: Firsthand Accounts of Slaves and Abolitionists Online*, HART COTTAGE QUILTS, <http://ugrrquilt.hartcottagequilts.com/rr10.htm> (last visited Feb. 20, 2013). This link opens into a page devoted to listing 19th century African American quilts that presently reside in American museums. According to this website, "slave-made quilts" will be found in the Atlanta History Center, Georgia's Chief Vann House Historic Site, the Louisiana State Museum, the Metropolitan Museum of Art, North Carolina's Historic Carson House, the Charleston Museum, Texas's Panhandle-Plains Historical Museum, San Antonio, Texas's Witte Museum, the Tennessee State Museum, and Virginia's Valentine Museum.

An even broader survey of these quilts is available in Gladys-Marie Fry's book *STITCHED FROM THE SOUL: SLAVE QUILTS FROM THE ANTE-BELLUM SOUTH* (1990). Professor Fry notes that a "significant" number of slave-made quilts are now preserved in fifteen states and England. *Id.* at 1. She also writes that along with quilts, "many woven coverlets, counterpanes, rag rugs, bed rugs, and crocheted artifacts attributed to the handiwork of slave women have been located." *Id.* She also believes that these finds are "the proverbial tip of the iceberg." *Id.* at 3. In addition, Professor Fry also gives a brief survey of clothing made by enslaved people that is now stored in the archives of The Ladies' Hermitage Association in Tennessee, The Charleston Museum in South Carolina, and The Museum of the Confederacy in Virginia.

With respect to quilts in private hands, see, e.g., Kyra, *1830s Slave Quilt—\$40k-\$60k*, BLACK THREADS (Jan. 25, 2007), <http://blackthreads.blogspot.com>, detailing a "slave quilt" purchased from a slave owner named Mr. Polk. Today in the possession of one "Danny from Walterboro, South Carolina," who appeared on television's Antiques Roadshow, the quilt was estimated at between \$40,000-\$60,000. See also Bud Phillips, *Very Rare Slave Quilt Still Survives in Bristol*, TRICITIES.COM (Feb. 15, 2009) (describing a "priceless" "slave quilt" in the care of Bristol, Tennessee historian Bud Phillips); *A Slave Quilt, U.S.A.: Alabama, Circa 1880*, CHRISTIES (Apr. 4-5 2007) (listing a "slave quilt" for auction).

<sup>305</sup> The most famous American enslaved potter was "Dave the Potter" or "David Drake," whose work resides in the Smithsonian and has garnered high prices at auction. See Elizabeth Billips, *Dave Pot Fetches \$41,250 at Burke County Auction*, TRUE CITIZEN, Sept. 1, 2010, [http://www.thetruecitizen.com/news/2010-09-01/Front\\_Page/Dave\\_pot\\_fetches\\_41250\\_at\\_Burke\\_County\\_auction.html](http://www.thetruecitizen.com/news/2010-09-01/Front_Page/Dave_pot_fetches_41250_at_Burke_County_auction.html); *Jar Made by David Drake, a Slave Artisan, 1862*, SMITHSONIAN LEGACIES (last visited Feb. 20, 2013), <http://www.smithsonianlegacies.si.edu/objectdescription.cfm?ID=234>.

<sup>306</sup> LEWIS P. SIMPSON, *MIND AND THE AMERICAN CIVIL WAR: A MEDITATION ON LOST CAUSES* 18 (1989) ("[Jefferson] built Monticello with slave labor.").

<sup>307</sup> Thomas Jefferson Foundation, MONTICELLO, <http://www.monticello.org/site/about/thomas-jefferson-foundation> (last visited Feb. 20, 2013).

<sup>308</sup> *Tickets & Tours*, MONTICELLO, <http://www.monticello.org/site/visit/tickets-tours> (last visited Feb. 20, 2013).

descendants of enslaved people should own or share in these profits, because Monticello was built as a result of the same kinds of violence that created the Agassiz daguerreotypes. Further, the Wachovia Corporation has acknowledged that companies it absorbed profited from U.S. slavery.<sup>310</sup> Enslaved people helped build Brown University.<sup>311</sup> Harvard Law School's first Chair was funded by a slaveowner.<sup>312</sup> Slaves laid the foundations of New York.<sup>313</sup> Expanding our focus yet more, we recall that Indian slaves built the California mission system,<sup>314</sup> and in the nineteenth century the Central Pacific Railroad (now Union Pacific) was built by Chinese immigrants who were spurred to work under the whip.<sup>315</sup>

Returning to the Agassiz daguerreotypes for the moment, we know from recorded history as well as Delia, Jack, Renty, and Drana's facial expressions that they "sat" for their portraits under a persistent threat of violence. If the subjects of the photographs did not consent to their portraits being taken, and race supremacists injured them and profited from the resulting images, then there is a problem with Agassiz's, and thus Harvard's, claim over them. Dr. Gerardi is correct: they are the fruits of exploitation. How should we analyze this issue? Today, photographs taken of unwilling subjects

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<sup>309</sup> MONTICELLO GIFT COLLECTION, <http://www.monticellocatalog.org/> (last visited Feb. 20, 2013).

<sup>310</sup> Katie Benner, *Wachovia Apologizes for Slavery Ties*, CNNMONEY (June 2, 2005), [http://money.cnn.com/2005/06/02/news/fortune500/wachovia\\_slavery/](http://money.cnn.com/2005/06/02/news/fortune500/wachovia_slavery/) ("Historians . . . found that the Georgia Railroad and Banking Company and the Bank of Charleston – institutions that ultimately became part of Wachovia through acquisitions – owned slaves, Wachovia said in a statement.").

<sup>311</sup> BROWN UNIV. STEERING COMM. ON SLAVERY & JUSTICE, SLAVERY AND JUSTICE 12 (2006), *available at* [http://brown.edu/Research/Slavery\\_Justice/documents/SlaveryAndJustice.pdf](http://brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf).

<sup>312</sup> See *supra* note 64. Many thanks to Andrew Stecker for alerting me to this history.

<sup>313</sup> ALAN J. SINGER, NEW YORK AND SLAVERY: TIME TO TEACH THE TRUTH 28 (2008) ("Enslaved Africans helped build Trinity Church, the streets of the early city, and a wooden fortification located where Wall Street is today.").

<sup>314</sup> GEORGE E. TINKER, MISSIONARY CONQUEST: THE GOSPEL AND NATIVE AMERICAN CULTURAL GENOCIDE 42 (1993) ("The California mission system[']s legacy includes] the imposition of slave labor conditions on Indian converts for the support of the missions and the accompanying military presidios."). Currently, the California mission system is not awash in cash but it does charge admissions. See, e.g., <http://www.missionsjc.com/visit/visit.php>.

<sup>315</sup> NAJIA AARIM-HERIOT, CHINESE IMMIGRANTS, AFRICAN AMERICANS, AND RACIAL ANXIETY IN THE UNITED STATES 82 (2006) ("For both Chinese railroad builders and black agricultural laborers, whippings and coerced labor were used as a form of social control and to degrade and impress upon them that they were powerless."). In 1870, Central Pacific Railroad merged with Southern Pacific Railroad. See BRIAN SOLOMON, SOUTHERN PACIFIC RAILROAD 24 (1999) ("From 1870 onward, Central Pacific and Southern Pacific were financially, personally, and operationally intertwined."). Union Pacific purchased Southern Pacific in 1996. See CLAUDE WIATROWSKI, RAILROADS ACROSS NORTH AMERICA: AN ILLUSTRATED HISTORY 72 (2007) ("In 1996, the Southern Pacific name disappeared when Union Pacific . . . purchased the Southern Pacific.").

may be barred from use in advertising or trade under a right of privacy<sup>316</sup> or a right of publicity.<sup>317</sup> North Carolina does not provide for rights of publicity, never mind post-mortem ones,<sup>318</sup> though it does have a right of privacy that prohibits exploitation of people's photographs.<sup>319</sup> Agassiz's and Harvard's use and occasional display of these research images would conceivably violate post-mortem tort rights of privacy (if they exist in North Carolina<sup>320</sup>) since the daguerreotypes were made without informed consent.<sup>321</sup>

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<sup>316</sup> The right of privacy was first recognized in *Pavesich v. New England Life*, 50 S.E. 68 (Ga. 1905), a case that condemned the use of a photograph of plaintiff in connection with a life insurance advertisement. See Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 79 (1988) (analyzing the case). See also, e.g., *Molony v. Boy Comics Publishers*, 277 A.D. 166, 169 (N.Y. App. Div., 1st Dep't 1950) (deeming §§ 50-51 of the New York Civil Rights law to forbid the "use of the name, portrait or picture of a living person, without his consent for advertising purposes, or for the purposes of trade") (internal quotations omitted); *Gill v. Curtis Publishing Co.*, 239 P.2d 630, 633 (Cal. 1952) ("A legally enforceable right of privacy is deemed to be a proper protection against [] encroachment upon the personality of an individual. While the early law gave redress only for physical interference with life and property, it is now recognized that man's spiritual nature also needs protection, and that his feelings as well as his limbs should be inviolate. . . . [B]efore the day of newspapers, radio, and photography, when life was simpler and human relations more direct, the individual could himself adequately protect his privacy. Today this would be impossible.").

<sup>317</sup> The right of publicity was first recognized in *Haelan Laboratories, Inc., v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), cert. denied, 346 U.S. 816 (1953). See Brandon Johansson, *Pause the Game: Are Video game Producers Punting Away the Publicity Rights of Retired Athletes?*, 10 NEV. L. J. 784, 786 (2010). The elements of a right of publicity claim are that there is an appropriation by the defendant that derives from the use of the plaintiff's name or likeness, that the appropriation must be for the defendant's use and benefit, and that there must be an appropriation of the plaintiff's name or likeness, though in California the appropriation may be of the plaintiff's "identity." See William A. Drennan, *Wills, Trusts, Schaudenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 ARK. L. REV. 43, 70 (2005).

<sup>318</sup> *North Carolina Right of Publicity Law*, CITIZEN MEDIA LAW PROJECT (last updated August 7, 2012), <http://www.citimedialaw.org/legal-guide/north-carolina-right-publicity-law> ("North Carolina does not provide a statutory basis for right to publicity claims. In 2009, the North Carolina legislature proposed, but did not enact, legislation that addressed the right of publicity. North Carolina appellate courts have only applied the misappropriation branch of the invasion of privacy tort in two cases.").

<sup>319</sup> Rights of privacy cases in connection with uses of photographs are few and far between in North Carolina. It is worth noting that they have applied to the living. See *Flake v. Greensobro News*, 195 S.E. 55 (N.C. 1938) (photograph published without consent in advertising a violation of right of privacy); *Barr v. Southern Bell Tel. & Tel. Co.*, 185 S.E.2d 328 (N.C. Ct. App. 1972) (photograph and name published in an advertisement without consent violated right of privacy).

<sup>320</sup> See *id.* See also 21 Okl. St. § 839.1 (2012) (providing for a right of privacy forbidding using names, portraits, or pictures of any person without consent of the living subject, or without the

However, more is at stake here than an invasion of privacy. People committed serious crimes in the course of taking these photographs. Perhaps the better framing of the problem occurs as follows: if Agassiz and his cohorts wrested enslaved people's property from them through violence or the threat of violence, then the daguerreotypes are the proceeds of robbery.<sup>322</sup> We now regard the protection of one's image as an outgrowth of property rights, and so this construction appears apt.<sup>323</sup> And, if the images cannot be separated from the pictures, as indeed they can't, then the daguerreotypes themselves are the fruits of taking through fear of force.<sup>324</sup>

Consequently, a commitment to nonviolence—or even common sense—mitigates that Harvard should not now own these objects. Further, once we start down this road, as I have shown, we may start to question and challenge the nature of all sorts of property claims, from those of museums' holdings of pretty quilts to the foundations of mighty Wall Street.

But under what legal doctrine could we transform legal title in properties made by enslaved people, driven by the concern that these properties are the fruits of illegal force? Should we employ the tort of assault and battery, which could feasibly garner the victims' heirs' damages? Or should we turn to restitution in crimes? These brands of jurisprudence do not hold much hope for answering offenses that took place in the nineteenth century. Foreclosure here seems particularly assured since Congress did not even acknowledge the wrong of slavery until 2009, and while phrasing their

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consent of the surviving spouse, personal representative, or of a majority of the deceased's adult heirs).

<sup>321</sup> See Jordan Paradise & Lori Andrews, *Tales from the Crypt: Scientific, Ethical, and Legal Considerations for Biohistorical Analysis of Deceased Historical Figures*, 26 TEMP. J. SCI. TECH. & ENVTL. L. 233, 283 (2007) ("ACMG's paper on Informed Consent for Medical Photographs addresses issues of informed consent, dissemination, promotion of research, confidentiality, public access, and conflicts of interest. The Medical Photographs paper stresses the importance of obtaining consent for all uses that will be made of medical images, including worldwide distribution via the internet. ACMG's paper on Informed Consent for Medical Photographs addresses issues of informed consent, dissemination, promotion of research, confidentiality, public access, and conflicts of interest. The Medical Photographs paper stresses the importance of obtaining consent for all uses that will be made of medical images, including worldwide distribution via the internet."). Paradise and Andrews stress that biohistorical research on deceased people, for example DNA research, also involves issues of descendants' informed consent. *Id.* at 262.

<sup>322</sup> See Model Penal Code § 222.1 (defining robbery as a theft that includes the infliction of serious bodily injury on the victim, or where the defendant threatens the victim with such harm). Theft requires the taking of property. See *id.* § 223.2.

<sup>323</sup> See, e.g., Paula B. Mayes, *Protection of a Persona, Image, and Likeness: The Emergence of the Right of Publicity*, 89 J. PAT. & TRADEMARK OFF. SOC'Y 819, 819 (2007) ("Property rights now protect not only one's personal property, good will, or interest in a business or product/service, but also protect one's name of 'persona,' and/or image.").

<sup>324</sup> *Id.*

self-reproach carefully so that they did not compromise it by the faintest promise of reparations.<sup>325</sup>

However, a body of law now exists that creates certain rights to reclaim cultural artifacts taken via violent theft. Categorizing the Agassiz daguerreotypes and other slave-made artifacts as forms of protected cultural property could pave a path for redistributing assets torn from enslaved ancestors through violence. That is, rebranding artifacts like the Agassiz daguerreotypes as forms of cultural patrimony could reconfigure who owns the violent past.

### *A) Cultural Property Law: Definitions of Cultural Property*

Many fine scholars write on the concepts of cultural property and heritage. These theorists raise important questions about the definitions of cultural property (otherwise known as “heritage” or “products”),<sup>326</sup> and note that firm protections of cultural property can help indigenous peoples while also ossifying culture and preventing important sharings and appropriations.<sup>327</sup>

Before we attend to these debates, and see how an awareness of historical violence shifts the conversation about cultural property, let’s first consider whether the daguerreotypes qualify as such. Cultural property first found recognition in the 1954 Hague Convention on the Protection of Cultural Property, which requires signing parties to prevent theft and destruction of such property during wartime.<sup>328</sup> The

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<sup>325</sup> Bernie Becker, *Senate Approves Slavery Apology, With Reparations Disclaimer*, THE CAUCUS (June 18, 2009), <http://thecaucus.blogs.nytimes.com>.

<sup>326</sup> Lyndel V. Prott & Patrick J. O’Keefe, ‘*Cultural Heritage*’ or ‘*Cultural Property*’?, 1 INT’L J. CULTURAL PROP. 307, 311-12 (1992) (arguing for a use of the term “cultural heritage” because it conveys a sense of care and dignity rather than commodification); Manilo Frigo, *Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International Law?*, 86 REVUE INT’L DE LA CROIS-ROUGE 367, 368-69 (2004) (comparing the concept of “cultural property” versus “cultural heritage,” and noting that “heritage” is broader in scope, covering non-material cultural elements that have received some international legal protections); SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW x (2005) (using the term “cultural products” because it “emphasizes the ongoing nature of the products’ creation and . . . the role of the market in their life cycles.”).

<sup>327</sup> See, e.g., SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW xi-xii (2005) (considering the problem presented by a lack of protection for cultural products, as well as the fact that protection itself can lead to disagreeable results, like the ossification of culture in the source community); John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831 (1986) (encouraging a culturally internationalist view of cultural property in lieu of one propounding cultural nationalism; cultural internationalism would encourage more sharing and circulation); Naomi Mezey, *The Paradox of Cultural Property*, 107 COLUM. L. REV. 2005, 2006 (2007) (noting that some appropriations transform the contested property into something belonging to more than one culture).

<sup>328</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, arts. 3-4, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]. The United States is not a signatory to the Convention.

Hague convention defines cultural property as “moveable or immovable property of great importance to the cultural heritage of every people.”<sup>329</sup> It includes edifices or sites that host cultural property.<sup>330</sup>

UNESCO’s 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property also forbids signing states from receiving stolen cultural property,<sup>331</sup> and requires them to take appropriate steps to return cultural property stolen after the convention entered into force.<sup>332</sup> It defines cultural property as property identified by a government as “being of importance for archeology, prehistory, history, literature, art or science.”<sup>333</sup> Cultural property here encompasses flora, fauna, and minerals, and historical, archeological, ethnological or artistic objects.<sup>334</sup> Manuscripts, statuary, stamps, photographs, films, antiquities and furniture also come within UNESCO’s “cultural property” ambit.<sup>335</sup>

In 2003, UNESCO updated cultural property concepts in its Convention for the Safeguarding of Intangible Cultural Heritage.<sup>336</sup> It advances a very broad definition of cultural heritage to cover everything from “practices” and “expressions” to “cultural spaces associated therewith.”<sup>337</sup> It requires ratifying parties to “safeguard” intangible cultural heritage,<sup>338</sup> which is defined as “ensuring . . . [its] viability” through “promotion” and “enhancement.”<sup>339</sup>

The United States did not sign The Hague<sup>340</sup> or the 2003 UNESCO<sup>341</sup> Conventions, though it did ratify the 1970 Convention with some declarations and

<sup>329</sup> *Id.* art. 1.

<sup>330</sup> *Id.*

<sup>331</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]. The United States has accepted the Convention, but with a list of “declarations and reservations.” See 1970 UNESCO Convention, Declarations and Reservations; see also 1970 UNESCO Convention, States Parties.

<sup>332</sup> *Id.* art. 7.

<sup>333</sup> 1970 UNESCO Convention, art. 1.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 3 [hereinafter 2003 UNESCO convention].

<sup>337</sup> *Id.* art. 2(1).

<sup>338</sup> *Id.* art. 1(a).

<sup>339</sup> *Id.* art. 2(3). See also art. 13(c), (d)(iii) (designating “[o]ther measures for safeguarding” such as “foster[ing] scientific, technical and artistic studies, and “ensuring access to the intangible cultural heritage while respecting customary practices”). Thanks goes to Naomi Mezey for her article *The Paradox of Cultural Property*, supra note 323, which lays out this survey of cultural property and heritage instruments.

<sup>340</sup> 1954 Hague Convention, supra note 328. See also Mezey, supra note 327, at 2009 n.9.

<sup>341</sup> Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT’L 66, 66 (2004) (“No one voted against [the convention]; only a handful of nations abstained [including] the United States . . .”).

reservations.<sup>342</sup> However, the United States recognizes its obligations concerning the cultural property of Mexico and that of Native Americans. In 1970, it signed the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties Treaty,<sup>343</sup> wherein it agreed to “recover and return . . . stolen archaeological, historical and cultural properties” removed from Mexico after March 24, 1971.<sup>344</sup> The treaty defines “cultural properties” as art objects and artifacts of the pre-Columbian and colonial periods of outstanding importance to the national patrimony, as well as important documents from official archives for the period up to 1920.<sup>345</sup> The U.S. also signed executive agreements with Peru,<sup>346</sup> Guatemala,<sup>347</sup> and Ecuador.<sup>348</sup> Further, Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA),<sup>349</sup> which requires the return of Native American funerary objects and other articles of “cultural patrimony” held by federally-funded museums on the condition that a “cultural affiliation” exists between those objects and an Indian tribe.<sup>350</sup> “Cultural patrimony” is defined as an “object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself.”<sup>351</sup>

### *B) Analyzing the Agassiz Daguerreotypes Under These Acts and Treaties*

#### *i) The Agassiz Daguerreotypes Qualify as Cultural Property According to the Letter of Existing Instruments Governing Such Property*

The Agassiz daguerreotypes qualify as cultural patrimony or property under both the most restrictive and the most expansive definitions of cultural property described above. Having sketched out what secrets they tell about science, culture, race, violence, history, time, and art in the above analysis, it seems beyond cavil that the pictures are of great importance to the cultural heritage of African-Americans and all

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<sup>342</sup> See 1970 UNESCO Convention, Declarations and Reservations.

<sup>343</sup> July 17, 1970, 22 U.S.T. 494, T.I.A.S. No. 7088.

<sup>344</sup> *Id.* art. III(1).

<sup>345</sup> *Id.* art. I(1).

<sup>346</sup> Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Peru, Sept. 15, 1981, 33 U.S.T. 1607.

<sup>347</sup> Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Guat., May 21, 1984, 2039 U.N.T.S. 241.

<sup>348</sup> Agreement Between the United States of America and the Republic of Ecuador for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Ecuador, Nov. 17, 1983, 2039 U.N.T.S. 253. For a review of these U.S. agreements see Merryman, *Two Ways*, *supra* note 322 at 850-51 and Kevin F. Jowlers, *International and National Legal Efforts to Protect Cultural Property*, 38 TEX. INT’L L.J. 145, n.122 (2003).

<sup>349</sup> 25 U.S.C. §§ 3001-3013 (2000).

<sup>350</sup> *Id.* § 3005(a).

<sup>351</sup> *Id.* § 3001(3)(D).

Americans, which would qualify them under the 1954 Hague Convention.<sup>352</sup> They are photographs that are important for history, art, and science, thus bringing them within the ambit of UNESCO's 1970 Convention.<sup>353</sup> They express cultural heritage, thus aligning them with the 2003 UNESCO Convention.<sup>354</sup> They are both archives and art objects of national importance, which would activate the Mexican treaty when addressing pre-Columbian and colonial artifacts.<sup>355</sup> And they are objects of ongoing cultural importance, which would trigger NAGPRA regarding Native artifacts.<sup>356</sup> Indeed, existing definitions of cultural property, heritage, and patrimony extend so broadly that it seems almost impossible to argue for the daguerreotypes' lack of such status.<sup>357</sup>

*ii) The Agassiz Daguerreotypes Also Qualify as Cultural Property According to the Nonviolent Spirit of the Instruments*

The nonviolence policies undergirding cultural property protection also reach to objects like the Agassiz daguerreotypes. The Hague, UNESCO, and U.S.-Mexico instruments, for example, seek to guard against violent takings of cultural property. And, in the case of NAGPRA, cultural property law seeks to bear witness to the violent past by requiring a return of cultural property violently commandeered by the United States hundreds of years ago.

*a) The Policy of the Hague, UNESCO, and U.S.-Mexico Instruments: to Prevent the Violent Taking of Cultural Property*

The Hague and UNESCO Conventions announce their nonviolent ethic in their administration of cultural property protection. Despite the stated intent of their drafters, they do not only protect cultural property because of its importance to "mankind."<sup>358</sup> That is, they do not simply seek to preserve the works for future generations. Rather, these instruments seek to "right past wrongs"<sup>359</sup> by preventing and redressing violent takings of cultural property from proper owners by belligerents:

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<sup>352</sup> Cultural importance defines cultural property under the 1954 Hague Convention. See *supra* text accompanying notes 328-29.

<sup>353</sup> See *supra* text accompanying note 335.

<sup>354</sup> See *supra* text accompanying note 337.

<sup>355</sup> See *supra* text accompanying note 345.

<sup>356</sup> See *supra* text accompanying note 351.

<sup>357</sup> See John Merryman, *Cultural Property Internationalism*, 12 INT'L J. OF CULTURAL PROP. 11, 12 (2005) (arguing that the "cultural property category is . . . amorphous and boundless.").

<sup>358</sup> The 1954 Hague Convention's preamble asserts that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind." 1954 Hague Convention, *supra* note 328, Preamble.

<sup>359</sup> Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN. ST. L. REV. 641, 683 (2011) (advocating a cultural "heritage" vs. property approach, noting that cultural heritage laws, which he identifies as those such as NAGPRA, seek to right past wrongs).



We can see this motivation in the fact that the instruments do not consider whether these rightful holders may best qualify as physical caretakers of that cultural property, “best” here meaning those most equipped to preserve the property for the longest amount of time.

The 1954 Hague Convention evinces this policy, as it obligates its signatories to safeguard cultural property based in part on the lessons learned from World War II.<sup>360</sup> The Hague was inspired in part by the depredations of Alfred Rosenberg, head of the Hitler’s Einsatzstab Rosenberg, who organized a titanic looting of artistic treasures from France, Germany, Belgium, the Netherlands, and Eastern Europe.<sup>361</sup> The Nazis bore a curious attitude toward cultural property: Sometimes they destroyed treasures, as in the cases of the famous book burnings<sup>362</sup> and the destruction of so-called degenerate art.<sup>363</sup> On the other hand, sometimes the Nazis carefully “safeguarded” this stolen art. Herman Göring, for example, plundered art collections to develop a treasury of 1,375 paintings, 250 sculptures, and 168 tapestries.<sup>364</sup> This hoard included five works by Rembrandt and 73 by Cranach the Elder as well as the Younger.<sup>365</sup> Yet Göring took care of these artworks, since he intended to donate them to a state museum of his own creation upon his sixty-fifth birthday.<sup>366</sup> His concern for his stolen collection waxed so great that in his last days in power, he evacuated his collection to Obersalzberg, storing them in trains kept in hidden, relatively bomb-proof tunnels.<sup>367</sup>

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<sup>360</sup> See *supra* text accompanying note 328.

<sup>361</sup> See Merryman, *Two Ways of Thinking About Cultural Property*, *supra* note 327, at 836 (describing the Einsatzstab Rosenberg); Jack R. Fischel, *Einsatzstab Rosenberg (Operational Staff Rosenberg)*, in HISTORICAL DICTIONARY OF THE HOLOCAUST 676-78 (2010) (describing the countries targeted for cultural plunder by the Nazis).

<sup>362</sup> See, e.g., ROBERT P. ERICKSEN, *COMPLICITY IN THE HOLOCAUST: CHURCHES AND UNIVERSITIES IN NAZI GERMANY* 88 (2012) (describing the famous book burning on May 10, 1933, in Berlin, where books by Jewish authors or those “out of favor with the regime” such as Erich Maria Remarque, Marx, Freud, Einstein, and Heinrich and Thomas Mann, were incinerated).

<sup>363</sup> In the 1930s, Joseph Goebbels amassed a stock of nearly 20,000 artworks of modern art from German museums. Art from this collection that was deemed out of keeping with Nazi ideology was first to be exhibited, as it was in the Degenerate Art exhibition, and then burned. See HERSCHEL BROWNING CHIPP AND PETER HOWARD SELZ, *THEORIES OF MODERN ART: A SOURCE BOOK BY ARTISTS AND CRITICS* 474 (1968) (setting forth the history of the Degenerate Art exhibition and the fate of the art displayed in that show).

<sup>364</sup> JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* 188, 190 (1996) (detailing the collection; discussing how part of the collection was “tainted by their having been obtained by force,” including a plundering of the Jeu de Paume).

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 187.

<sup>367</sup> *Id.* at 195.

The Hague Convention condemns this kind of thievery, even though the offender may take better care of the artwork than its original owners.<sup>368</sup> Theft by war criminals, and not just destruction or risking of cultural property, then, offends the Hague Convention.

While the drafters of the 1970 and 2003 UNESCO Conventions initially appear less concerned with hijackings like the Nazis',<sup>369</sup> those instruments did grow out of a response to hostile occupations and colonizations. Ana Filipa Vrdoljak observes that the 1970 Convention issued from an international, inter-war "push" "for the return of cultural materials removed during foreign occupation."<sup>370</sup> And Johannes Van Aggelen suggests that UNESCO 2003's protection of intangible culture might fill the gap left by the United Nations' 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which did not include cultural genocide in its prohibitions<sup>371</sup>: "Measures not aimed at the physical destruction of a group, but rather at the destruction of its cultural heritage and those leading to forced migration of a population, ethnic cleansing, consequently fall outside the protection of [the Genocide, but not necessarily the 2003 UNESCO] Convention."<sup>372</sup>

The United States also recognizes the wrong of violent appropriations, particularly its own citizens' taking of Mexican and South American properties, thefts much supported by White power vis-à-vis Latino vulnerability. Again, in the Recovery and Return of Stolen Archeological, Historical and Cultural Properties treaty,<sup>373</sup> both nations agree to "recover and return . . . stolen archeological, historical and cultural properties" that are removed from the respective nations after March 24, 1971.<sup>374</sup> While the reciprocity seems to indicate that both nations can claim guilt of violent or at least wrongful thefts, it is impossible to read this treaty without considering the history of colonialism, conquest, and murder that characterized the U.S. domination

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<sup>368</sup> The Hague Convention provides that contracting parties will "undertake. . . all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention." 1954 Hague Convention, *supra* note 328, art. 28.

<sup>369</sup> As John Merryman notes, the 1970 Convention is concerned with "illicit" exportations of cultural property, which may exist in the most mundane of situations, such as "clandestine excavation and export." *Two Ways of Thinking About Cultural Property*, *supra* note 327, at 844. Further, writers on UNESCO 2003 see it as a response to the "threats of global culture." MARILENA ALIVIZATOU, *INTANGIBLE HERITAGE AND THE MUSEUM: NEW PERSPECTIVES ON CULTURAL PRESERVATION* 36 (2012).

<sup>370</sup> Ana Filipa Vrdoljak, *Unraveling the cradle of civilization 'layer by layer': Iraq, its peoples, and cultural heritage* in *CULTURAL DIVERSITY, HERITAGE AND HUMAN RIGHTS: INTERSECTIONS IN THEORY AND PRACTICE* 72 (2010).

<sup>371</sup> *The Shift in the Perception of Multiculturalism at the UN since 1945*, in *MULTICULTURALISM AND INTERNATIONAL LAW: ESSAYS IN HONOUR OF EDWARD MCWHINNEY* 182 (2009).

<sup>372</sup> *Id.*

<sup>373</sup> July 17, 1970, 22 U.S.T. 494.

<sup>374</sup> *Id.* art. III(1).

of Mexico in the nineteenth and early twentieth century.<sup>375</sup> The looting and destruction of Mexican relics formed part of a multifaceted practice of U.S. violent exploitation of that country, which would find such horrific expression in U.S. soldiers' conduct during the Mexican-American war.<sup>376</sup> Violent practices also characterized destructive thefts of antiquities such as thirty thousand artifacts "collected" by the American archaeologist Edward Herbert Thompson from the Sacred Cenote at Chichen Itza in the early twentieth century—and which today reside in the collection of the Peabody.<sup>377</sup> This history of conquest, blood, and thievery colors our understanding of the *Recovery and Return* treaty, which seeks to make some concessions about the U.S. role in violent, wrongful taking of Mexicans' lives and property.

The Agassiz daguerreotypes, and possibly other relics made with or by enslaved people, qualify as cultural property under the spirit of the UNESCO and Hague Conventions and the U.S.-Mexico treaty. They are the products of violent theft by belligerents, in this case U.S. slaveholders, and deserve special treatment in accord with the nonviolent policy announced by these instruments. Moreover, should this special treatment include the return of the property to descendants of the enslaved people who participated in these relics' making, it would not matter if these inheritors could not preserve the relics at the same state-of-the-art standards of the Peabody Museum.

As I will next show, NAGPRA provides even more support for this conclusion.

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<sup>375</sup> See, e.g., Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved? and We Are Not Saved: The Elusive Quest for Racial Justice*, by Derrick Bell, 97 YALE L.J. 923, 940 (1988) ("The Treaty of Guadalupe Hidalgo . . . purported to guarantee to Mexicans caught on the U.S. side of the border full citizenship and civil rights, as well as protection of their culture and language. The treaty, modeled after ones drawn up between the U.S. and various Indian tribes, was given similar treatment: The Mexicans' properties were stolen, rights were denied, language and culture suppressed, opportunities for employment, education, and political representation were thwarted.").

<sup>376</sup> See BRONWYN MILLS, U.S. MEXICAN WAR 35 (2003) (Quoting an officer's diary: "We reached Burrita around 5 p.m., many of the Louisiana volunteers were there, a lawless drunken rabble. They had driven away the inhabitants, taken possession of their houses, and were emulating each other in making beasts of themselves." Mills also writes, "[other] [o]fficers' memoirs describe behavior much worse than that – scalping innocent civilians, killing women, children, and babies, burning homes, desecrating Catholic religious objects.").

<sup>377</sup> Spencer Burke, *Envoy: From Deep to Dark*, HARV. ADVOCATE, Commencement 2011, available at <http://www.theharvardadvocate.com/content/envoy-deep-dark>. Mexico has claimed that they were removed from the country illegally, and the artifacts have been "the subject of a lengthy legal battle and long-standing antipathy." *Id.* at 3. See also Pilar Luna Erreguerena, *Mexico: A Country with a Rich Underwater Legacy*, INTERNATIONAL HANDBOOK OF UNDERWATER ARCHAEOLOGY 271 (2002) (describing Thompson purchasing the "Chichen" hacienda, which contained the artifacts, and then razing it through a "dredging" system so that he could access relics that had been thrown by indigenous ancestors down holy wells.). While at the Peabody, I also visited this fantastic and depressing collection with the guidance of Trish Capone.

*b) The Policy of NAGPRA: To bear witness to the violent past by requiring the return of cultural property*

NAGPRA redresses wrongful takings of Native cultural property: where a museum did not obtain a relic through “voluntary consent” of a Native individual or group, the chain of title is deemed a bad one, and the object ripe for repatriation.<sup>378</sup> With respect to establishing a wrongful taking, NAGPRA looks backwards, far more than the U.S.-Mexico treaty, which only requires return after 1971,<sup>379</sup> or UNESCO 1970, which urges return after that year.<sup>380</sup> In so doing, NAGPRA bears witness to the history of violence by requiring a return of such property to Native Americans that has been stolen and sheltered in museums since the founding of this country.<sup>381</sup> This repatriation will unconditionally return the property to the tribal descendants of the original makers or owners of that property.<sup>382</sup> Many times, receiving tribes do not treat repatriated cultural property with an eye toward its material survival, but rather rebury, sell, or even destroy it.<sup>383</sup> NAGPRA also covers the ancestor graves of Native Alaskan and Hawaiian groups,<sup>384</sup> who cherish similar, nonpreservationist beliefs about the reburial of ancestors, though possibly not funerary objects.<sup>385</sup>

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<sup>378</sup> NAGPRA, 25 U.S.C. § 3001(13) (defining right of possession as that derived through voluntary alienation); 3005(c) (repatriation may be had where museum does not possess right of possession).

<sup>379</sup> See *supra* text accompanying notes 344-45.

<sup>380</sup> See *supra* text accompanying note 332.

<sup>381</sup> NAGPRA requires the repatriation of Native American cultural property held in federally funded museums, and of funerary remains discovered after 1970. 26 U.S.C. § 3002.

<sup>382</sup> See Kimberly L. Alderman, *Ethical Issues in Cultural Property*, 45 IDAHO L. REV. 531 (2009) (“Some archeologists, for instance, resent NAGRA [sic] because burial objects are returned to the Native American tribe without condition. To the rancor of archeologists, sometimes the objects are then sold on the open market or even reburied in the ground.”).

<sup>383</sup> See *id.*; *Kinney v. Weaver*, 367 F.3d 384 (9<sup>th</sup> Cir. 2004) (denying petition of the Yakama Indian Nation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes of the Colville Reservation, who sought to repatriate an ancient excavated body in order to rebury it; though the body was known as “the ancient one” amongst the tribes, tests determined that the corpse was not of Native American ancestry). See *id.* at fn. 8 (tribal claimants believed that “when a body goes into the ground, it is meant to stay there until the end of time.”) (quoting Joint Tribal Amici). See also Alderman, *supra* note 382, at n. 59 (quoting lawyer and collector Peter K. Tompa, who complains about artifacts being reburied and resold).

<sup>384</sup> See 25 U.S.C. § 3001-3013 (2000).

<sup>385</sup> See Christopher Pala, *Applying NAGPRA in Hawaii*, INDIAN COUNTRY TODAY, Sept. 26, 2008, <http://indiancountrytodaymedianetwork.com/ictarchives/2008/09/26/applying-nagpra-in-hawaii-80534> (detailing a conflict between Senator Daniel Inouye, chairman of the Indian Affairs Committee in the 1990’s, and Honolulu’s Bishop Museum, over the return and reburial of funerary objects accompanying a body that was stored at the museum); Andrew L. Slayman, *Reburial Dispute*, ARCHAEOLOGY, Oct. 10, 1996, <http://www.archaeology.org/online/news/kennewick.html> (discussing the remains of a skeleton found in Alaska. Tribes allowed scientists to test the skeleton, but “[a]t some point the

NAGPRA, then, shares the spirit of The Hague Convention and UNESCO instruments. It is not merely preservationist. It also seeks to tackle the wrong of violent takings of cultural property. More than that, in its requirement of repatriation, it redresses and bears witness to the long history of raced violence in the United States. As Jack F. Trope and Walter Echo-Hawk write about the United States' violent past and its relationship to the act, "[t]he problem that [NAGPRA] seeks to remedy is one that characterized Indian/White relations since the Pilgrims landed at Plymouth Rock in 1620."<sup>386</sup> In an almost eerie—but in hindsight, predictable—synchronicity, Trope and Echo-Hawk cite Samuel George Morton's head-hunting raids of Native American bodies as an impetus for the law. As noted above, Morton's policy of crania-collecting and measuring supposedly proved Indians' separate species genesis as well as their inferiority.<sup>387</sup> Agassiz drew much inspiration from Morton's collection of 600 Native American crania and used Morton's measurements as support for his separate, inferior species theory.<sup>388</sup> The resulting demotion of Native Americans led to their capture in reservations, and served as a justification for genocide.<sup>389</sup> Morton's collection of Native American crania also ushered in a vogue for obtaining Indian body parts for the Army Medical Museum in the 1860s, which led to outright murder and dismemberment of Native Americans.<sup>390</sup> NAGPRA, then, allows Native Americans to recover bodies and funerary objects for cultural reasons that include a redress and rewitnessing of this violent atrocity.

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remains will be repatriated for reburial."); *Alaska Natives to rebury remains*, INDIANZ.COM, Feb. 14, 2001, <http://64.38.12.138/News/archive.asp?ID=edu/2142001-2&day=2/14/01> (Alaskan natives to rebury remains returned under NAGPRA by the University of Alaska).

<sup>386</sup> Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act*, THE FUTURE OF THE PAST: ARCHAEOLOGISTS, NATIVE AMERICANS, AND REPATRIATION 11 (2001).

<sup>387</sup> *Id.* ("Dr. Samuel Morton, the father of American physical anthropology, collected large numbers of Indian crania in the 1840s. His goal was to scientifically prove, through skull measurements, that the American Indian was a racially inferior 'savage' who was naturally doomed to extinction. Morton's findings established the 'Vanishing Red Man' theory, which was embraced by government policy-makers as 'scientific justification' for relocating Indian tribes, taking tribal land, and conducting genocide – in certain instances – against American Indians.") (citations omitted). See also Wallis, *supra* note 2, at 44 (Agassiz, influenced by Morton's collection, theorized that Negroes, as well as Indians and Hindus, were other species).

<sup>388</sup> Trope and Echo-Hawk, *supra* note 386, at 11; see also Wallis, *supra* note 2, at 42.

<sup>389</sup> See Trope and Echo-Hawk, *supra* note 386, at 11.

<sup>390</sup> *Id.* at 11-12 ("Later, the search for Indian body parts became official federal policy with the Surgeon General's Order of 1868. The policy directed army medical personnel to procure Indian crania and other body parts for the Army Medical Museum. In ensuing decades, over 4,000 heads were taken from battlefields, burial grounds, POW camps, hospitals, fresh graves, and burial scaffolds across the country. Government headhunters [also] decapitated Natives who had never been buried . . . such as slain Pawnee warriors from a western Kansas battleground, Cheyenne and Arpaho victims of Colorado's Sand Creek Massacre, and defeated Modoc leaders who were hanged and then shipped to the Army Medical Museum.").

The Agassiz daguerreotypes, and possibly other relics of enslaved people, come within the policy reach of laws like NAGPRA. Indeed, the problems of cultural property in the Agassiz and NAGPRA contexts issue from the *same root*, being the nineteenth century collection habits and theories of Morton and Agassiz. NAGPRA, then, provides ample support for transforming our understanding of relics left by enslaved people as forms of cultural property that deserve special treatment. As in the case of cultural properties taken by hostiles after World War II and Native American relics stolen from the 17<sup>th</sup> century, White slaveholder claims over properties made by and with enslaved people prove obnoxious because slave-owners plundered them, and because their continued possession through this chain of title fails to acknowledge the history of racial atrocity in the United States.

*c) Does it matter if the relics are “hybrids” of African-American and White slaveholder culture?*

The one, possibly key difference between the Agassiz daguerreotypes (as well as other relics of enslavement) and traditionally recognized forms of cultural property is their unfree origins. Property typically qualifies as cultural patrimony under the Hague and UNESCO conventions where it issues from evidently autonomous cultural expression, or is art raided from the collections of people oppressed by tyrants. So, for example, arguments over the appropriate “ownership” of revered holy sites have triggered Hague claims;<sup>391</sup> Rembrandts stolen by the Nazis are also covered by the Hague Convention.<sup>392</sup>

The UNESCO Conventions, the Mexican Treaty, and NAGPRA also typically apply to such celebratory relics of culture. Turkey invokes UNESCO 1970 in its efforts to obtain the return of stolen objects such as tiles of its ancestral Sultan’s tombs and library, the stele of Samsat, and the Bogazkoy Sphinx.<sup>393</sup> Further, the United States has, under UNESCO 1970, returned to China marble wall images from the tomb of Wang Chuzhi, and to Egypt a Greco-Roman style Egyptian sarcophagus.<sup>394</sup>

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<sup>391</sup> See *Riots on West Bank Over Alleged Violation of Hague Convention*, CULTURAL PROP. & ARCHAEOLOGY L., Feb. 24, 2010, <http://culturalpropertylaw.wordpress.com/2010/02/24/riots-on-west-bank-over-alleged-violation-of-hague-convention/> (“The Palestinian Center for Human Rights (PCR) condemned a decision by Israel to name the Cave of Machpelah (also called the Cave of the Patriarchs, and known to Muslims as Ibrahimi Mosque) on the West Bank as an Israeli ‘National Heritage’ site.”).

<sup>392</sup> See *supra* text accompanying notes 328-29.

<sup>393</sup> See Catherine Schofield Sezgin, *UNESCO 1970 Convention Today: Turkey’s Statement to the 40<sup>th</sup> Anniversary Commemoration Meeting Last Week*, ASS’N FOR RESEARCH INTO CRIMES AGAINST ART, Mar. 22, 2011 (translating the speech made by Mr. Murat Suslu, Director General of Cultural Assets and Museums for the Turkish Ministry of Culture and Tourism, at a 2012 UNESCO meeting).

<sup>394</sup> See Lyndel V. Prott, *Protection of Archaeological Objects Under the 1970 UNESCO Convention* 2 (June 2012),

Free expressions of group identity also find protection in UNESCO 2003's sheltering of intangible cultural property.<sup>395</sup> Finally, the Mexico-U.S. treaties and NAGPRA,<sup>396</sup> as well, apply in cases involving archeological treasures, and objects sacred to Native Americans.<sup>397</sup>

The Agassiz daguerreotypes obviously differ in significant respects from ancient Chinese marbleworks and sacred Native American artifacts, in that they are the products of coercion and violence. Whites forced African Americans to participate in their making, and so these products do not qualify as cherished African-American ideals, stories, notions, histories, or legacies that give a positive "sense of identity and continuity."<sup>398</sup> Rather, they are evidence of crime, and, at first glance, nothing but compelled African-American participation in White supremacist mummeries. In this way, then, they qualify as the most noxious of what scholar Naomi Mezey describes as a cultural "hybrid" in her article *The Paradoxes of Cultural Property*.<sup>399</sup> There, Mezey analyzes Native American cultural property claims on Indian mascots, noting that such efforts to control depictions of Native people succumb to an etiolated conception of culture.<sup>400</sup> Mezey argues that mascots, like so many other culture insignias, are jointly made, and that their mash-up genesis "undoes the authoritative logic of cultural property," because "[p]reserving cultures brings us back to the trap of cultural purity and authenticity."<sup>401</sup> Indeed, Mezey believes that all cultural property arguments may fail after considering how every culture is a product of "contamination."<sup>402</sup>

Certainly, the Agassiz daguerreotypes are hybrids of African-American and White supremacist points of view. Because Drana, Renty, Jack, and Delia feature in the photographs – and express their dissent through their facial expressions and postures – they make a clashing contribution to what Agassiz hoped would be a seamless proof

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[http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Prot\\_arch\\_objects\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Prot_arch_objects_en.pdf).

<sup>395</sup> See UNESCO 2003, *supra* note 336, art. (2)(1) (defining intangible patrimony as "practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage . . . [and that] provide[] them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity").

<sup>396</sup> The treaty applies to "art objects and artifacts of the pre-Columbian cultures . . . of outstanding importance to the national patrimony, including stelae and architectural features such as relief and wall art." See U.S.-Mexico Treaty, *supra* note 343, art. I(1).

<sup>397</sup> 25 U.S.C. 3001 § (2)(3)(C) (identifying cultural objects that may be repatriated as sacred objects, that is, objects used in religious worship).

<sup>398</sup> See *What is Intangible Cultural Heritage?*, UNESCO, (identifying these features as characteristics of intangible cultural heritage), <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00003>.

<sup>399</sup> See Mezey, *The Paradox of Cultural Property*, *supra* note 327.

<sup>400</sup> *Id.* at 2031-45.

<sup>401</sup> *Id.* at 2044.

<sup>402</sup> *Id.* at 2043, 2046.

of his separate species theory. Yet the daguerreotypes' hybrid quality does not kill off their qualification as cultural property or heritage that can be returned to their descendants, particularly if bearing witness to violence remains an aim in this field of law and policy.

First, and again, wresting the daguerreotypes from Harvard and placing them back in the custody of descendants or appropriate institutions would not succumb to a myth of cultural purity and authenticity, but rather recognize a history of abuse and theft that Harvard currently would rather keep quiet. In this recognition, a return of the images to descendants or appropriate institutions would make visible the complicated, "contaminated," "impure," and "inauthentic" status of the daguerreotypes that Harvard currently doctors, obscures, and spins. Further, establishing the daguerreotypes as cultural property of African Americans would recognize that culture springs not only from euphoric, free expressions of cherished cultural ideals but also of these things' opposite: crime and disinheritance create culture as much as do celebratory or aspirational monuments to a people. Recognition of the destructive *and* constructive power of conquest would elaborate on culture's dynamism, rather than confine it to a pure, official story. And finally, this approach, which does not put "hybridism" and "cultural property" in either/or categories, directly relates to a peaceful objective: as Weems' art shows us, bearing witness to our violent history by returning these objects to descendants requires authorities to not only verbally admit how our mingled culture was birthed in force and death as well as triumphant creativity,<sup>403</sup> but to practice that recognition by giving back the last traces of ancestors who helped build this country but could never be a part of it.

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However, what are these traces of enslaved peoples' lives, deaths, and labor that should be returned? The daguerreotypes, certainly – but what else? I have already observed that the question of cultural property raised by the Agassiz daguerreotypes leads to a possible wholesale reconfiguration of property rights in the United States. But how far are we willing to go?

This inquiry involves two sub-questions:

If cultural property includes 1) artifacts important for cultural heritage, as well as history, art, and science and 2) artifacts wrongfully taken, what should qualify as protected cultural property for descendants of African-born enslaved people?

Second, who should get the property?

### *C) What Qualifies as African-Born Enslaved People's Cultural Property?*

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<sup>403</sup> See Becker, *supra* note 325.



This is a huge question, particularly since African-born enslaved people made and built so many important and valuable U.S. artifacts, as well as institutions.<sup>404</sup> Should we only qualify the daguerreotypes as cultural property? Or enlarge our definition to include Wall Street?<sup>405</sup> Weems, indeed, counsels an expansive approach to this analysis in her work. She does so via a canny quotation of Malcolm X, whom she cites in her 1991 series *And 22 Million Very Tired and Very Angry People*.<sup>406</sup> In this montage, she intersperses images of a globe, an African icon, a book, a rolling pin, an armed man, and a veiled woman with direct block quotes from speeches delivered by figures such as X:

It was our labor that built this house. You sat beneath the old cotton tree telling us how long to work or how hard to work, but it was our labor, our sweat, and our blood that made this country what it is, and we're the ones who haven't benefited from it. And all we're saying today is, it's payback – retroactive.<sup>407</sup>

Should X's property theory prevail in this analysis? Weems' encouragement of this view of property law brings us back to the early nineteenth century Supreme Court case of *Pierson v. Post*,<sup>408</sup> which confirms the role that capture and dominion play in property rights. In a terse opinion dealing with an anarchic fox hunting expedition, the Court found that these forces drive the designation of property rights.<sup>409</sup> Specifically, it determined that rights are achieved through physical occupancy, and that labor alone<sup>410</sup> does not entitle anyone to any right.<sup>411</sup> The labor

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<sup>404</sup> See *supra* text accompanying notes 306-15.

<sup>405</sup> See *supra* note 313.

<sup>406</sup> CARRIE MAE WEEMS, *A Hot Spot in a Corrupt World, A Little Black Magic, Some Theory, By Any Means Necessary, An Armed Man, A Veiled Woman in AND 22 MILLION VERY TIRED AND VERY ANGRY PEOPLE* (1991), available in NAT'L MUSEUM OF WOMEN IN THE ARTS, CARRIE MAE WEEMS, *supra* note 90, plates 38-43 (1992).

<sup>407</sup> *Id.* at 92.

<sup>408</sup> 3 Cai. R. 175 (N.Y. 1805).

<sup>409</sup> In *Pierson v. Post*, Post set up and pursued a fox. *Id.* at 177. Pierson used Post's corraling of the beast to his own advantage, and intercepted and killed it. *Id.* at 178. Who owned the fox? The majority in the case determined that property was achieved through physical occupancy, and that labor did not entitle Post to any right in the creature. *Id.* at 179-80 ("However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet this act was productive of no injury or damage for which a legal remedy can be applied."). The dissent, however, was in a Lockean mood. Josh Blackman, *Outfoxed Pierson v. Post and the Natural Law*, 51 AM. J. LEGAL HIST. 417, 419 (2011) ("The [dissent's] theory is known as the labor theory of property, as defined by John Locke and Jean Barbeyrac. The labor theory of property grants a property right to the hunter who invests labor in the pursuit of the beast.").

<sup>410</sup> The dissent argued that Post was entitled to the fox because he had put his labor into the chase. . . ("[W]e cannot greatly err in saying that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporeal possession . . . confers such a right to the object of it.")

<sup>411</sup> *Id.*

theory fell on hard times upon the decision in *Pierson* and has never recovered,<sup>412</sup> despite exhortations such as X's.

So, though slaves laid down the foundations of Wall Street, Brown University, California missions, and arguably Union Pacific,<sup>413</sup> there's little legal or even powerful social<sup>414</sup> support for deeming them cultural property that can be returned to the descendants of enslaved people. Slaveholders certainly "occupied" these institutions. The Supreme Court's famous vindication of the role of conquest in the acquisition of property<sup>415</sup> also restrains a wild-eyed vision of the vast kinds of cultural patrimony that might be claimed by descendants of African-born enslaved people. Further, Black reparations at the current time appear to extend beyond "the dominant legal imagination."<sup>416</sup>

So, political and legal realities do not pave the way for a Malcolm X-like redistribution. However, NAGPRA's transfers of graves and funerary and other cultural objects to Indian, Hawaiian, and Alaskan tribes does create a precedent for a cultural property law that requires a return of smaller objects to the descendants of slaves. This is for two reasons, the first being the related history of exploitation experienced by Native and enslaved people. The second is the emotional response lawmakers and constituents have to the relics that speak of that exploitation.

With respect to history, Congress enacted NAGPRA out of recognition of some of the identical historical depredations that helped support slavery, namely, the exploitation of live and dead bodies of American Natives and African slaves performed by Samuel Morton, Agassiz, and their intellectual circle and progeny.<sup>417</sup> Concerning the emotional response that supported NAGPRA, Anglo-Americans embrace a tradition of respecting the White dead that encouraged sympathy for Native American remains that led to the law's enactment.<sup>418</sup> A similarly cathartic

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<sup>412</sup> Blackman, *supra* note 409, at 417 ("The holding in *Pierson v. Post* has been accepted as gospel for law students and property students alike.").

<sup>413</sup> See *supra* text accompanying notes 306-15.

<sup>414</sup> See *supra* text accompanying note 325.

<sup>415</sup> See *Johnson v. M'Intosh*, 21 U.S. 543, 587 (1823) ("The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty."); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 n.3 (1985) (relying on *Johnson* to dash claims brought by Indian tribes under the Indian Trade and Intercourse Act); *Seneca Nation of Indians v. New York*, 382 F.3d 245, 248 n.4 (2004) (relying on *Johnson* to reject claims brought by the Tonawanda Band of Seneca Indians based on the Indian Trade and Intercourse Act).

<sup>416</sup> Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 433 (1998).

<sup>417</sup> See Trope and Echo-Hawk, *supra* note 386.

<sup>418</sup> See, e.g., Julia A. Cryne, *NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts*, 34 AM. INDIAN L. REV. 99, 100 (2009/2010) ("It is part of the universal human experience to

empathy or sympathy will certainly occur to any sane person who examines the Agassiz daguerreotypes, since the facial expressions, forced nudity, and physical postures of Jack, Renty, Drana, and Delia speak eloquently of trauma and sexual assault. It is possible that this emotional drive will not carry over when we consider including objects such as pottery, quilts, and other handicrafts, but storytelling about the lives of enslaved people and the exploitation of their gifts and lives could overcome that barrier.

*D) Proposal for the African-Born Enslaved People Heritage Protection and Return Act*

I thus advocate for the federal protection of cultural property that involves photographic or painted images taken of African-born enslaved people,<sup>419</sup> or are objects reasonably believed to have been made, or partially made, by enslaved people.<sup>420</sup> This proposal is original to this essay. Cultural property here encompasses moveable objects, including historical, archeological, ethnological, funerary, or artistic objects.<sup>421</sup> Manuscripts, statuary, photographs, pottery, textiles, and furniture also come within this proposal's ambit.<sup>422</sup>

Objects included in this proposed definition of cultural property should be returned to descendants of African-born enslaved people or affiliated institutions if those objects reside in the control of a Federal agency or federally funded museum, upon request of such descendants or institutions that have the closest cultural affiliation with such cultural property.<sup>423</sup> Lineage would be determined by a preponderance of the evidence.<sup>424</sup> Federal agencies and federally funded museums would be obligated to conduct a survey to determine if they possess cultural property within the meaning of this proposal; the survey would be completed in consultation with a review committee established under the proposal.<sup>425</sup> If such cultural possession

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acknowledge our dead and dispose of their bodies in some particular and reverent fashion, and it is human to seek treatment of our ancestors' remains with respect.").

<sup>419</sup> This borrows from the inspiration for the Hague Convention; *see supra* text accompanying notes 360-67. Looted art was important to the Hague drafters.

<sup>420</sup> This borrows from NAGPRA, which allows the repatriation of funerary objects that are "reasonably believed to have been placed with individual human remains either at the time of death or later." *See* 25 U.S.C. § 3001 3(a). I include the phrase "partially made," having learned from Gladys-Marie Frye that quilts were often made both by enslaved women and their owners. *See* *Stitched from the Soul*, *supra* note 304, at 33. Further, the daguerreotypes and other images of enslaved people can be seen as made in part by the sitters and in part by the photographers or painters.

<sup>421</sup> This borrows from the 1970 UNESCO Convention, *see supra* text accompanying note 334.

<sup>422</sup> This is also from the 1970 UNESCO Convention, *see supra* text accompanying note 335.

<sup>423</sup> This borrows from NAGPRA, 25 U.S.C. § 3005.

<sup>424</sup> This borrows from NAGPRA, 25 U.S.C. §§ 3001-3002.

<sup>425</sup> This borrows from NAGPRA, 25 U.S.C. §§ 3003-3005.

is established then the museums would notify the most closely affiliated persons or institutions.<sup>426</sup> An exception would be made in the rare cases that descendants had already donated or sold the cultural property. Cultural property found on federal lands after the date of the enactment of the act should also be returned to lineal descendants or affiliated institutions.<sup>427</sup>

This definition borrows heavily from the Hague and UNESCO Conventions, as well as NAGPRA. Since the Peabody receives federal funds, it is currently under NAGPRA obligations, and would also be obliged under my proposal.<sup>428</sup>

But as we can see, my proposal raises the question of who, precisely, should own these returned works?

### *E) Who Should Own the Works?*

NAGPRA offers a model for determining the ownership of redistributed cultural property of enslaved people in the United States. NAGPRA provides that human remains, funerary objects, and cultural property should be returned upon request to direct lineal descendants,<sup>429</sup> or, if they cannot be determined, to institutions with the closest affiliation.<sup>430</sup> As noted above, proof of descent is established by a preponderance of the evidence.<sup>431</sup>

We are currently seeing an explosion of genetics testing among Americans, and Michelle Obama's established genetic ties to a Clayton, Georgia slaveowner's son named Dolphus T. Shields and an enslaved woman named Melvina recently made news.<sup>432</sup> In 2012, President Barack Obama also featured in news reports that describe discovered genetic links between his mother and one of the first known slaves in the United States.<sup>433</sup> These and other stories of African-Americans discovering their lineage<sup>434</sup> show that in some cases lineal descendants affiliated with cultural property could be established by a preponderance of the evidence.

<sup>426</sup> This borrows from NAGPRA, 25 U.S.C. § 3003.

<sup>427</sup> This borrows from NAGPRA, 25 U.S.C. § 3002.

<sup>428</sup> See NAGPRA & Repatriation, Peabody Museum of Archaeology and Ethnology, <http://www.peabody.harvard.edu/node/310>.

<sup>429</sup> 25 U.S.C. § 3002.

<sup>430</sup> *Id.*

<sup>431</sup> See *supra* text accompanying note 423; see also 25 U.S.C. §§ 3001-3002.

<sup>432</sup> Rachel L. Swarns, *Meet Your Cousin, The First Lady: A Family Story, Long Hidden*, N.Y. TIMES, Jun. 16, 2012, <http://www.nytimes.com/2012/06/17/us/dna-gives-new-insights-into-michelle-obamas-roots.html?pagewanted=all>. See also Teresa Watanabe, *Called back to Africa by DNA*, L.A. TIMES, Feb. 18, 2009, <http://articles.latimes.com/2009/feb/18/local/me-africa18>.

<sup>433</sup> Sheryl Gay Stolberg, *Obama has Ties to Slavery Not by His Father but His Mother, Research Suggests*, N.Y. TIMES, Jul. 30, 2012, <http://www.nytimes.com/2012/07/30/us/obamas-mother-had-african-forebear-study-suggests.html?pagewanted=all>.

<sup>434</sup> See, e.g., Richard Willing, *DNA Rewrites History for African-Americans*, USA TODAY, Feb. 2, 2006, [http://www.usatoday.com/tech/science/genetics/2006-02-01-dna-african-americans\\_x.htm](http://www.usatoday.com/tech/science/genetics/2006-02-01-dna-african-americans_x.htm).

Where such a determination proves impossible, NAGPRA also provides guidance. While NAGPRA repatriates cultural property and remains to tribes where lineal descendants cannot be found, Hawaiian natives are not organized into such groupings. This has made repatriation difficult in some situations,<sup>435</sup> but NAGPRA names certain cultural institutions, such as Hui Malama I Na Kupuna O Hawaii Nei (“Group Caring for the Ancestors of Hawaii”) and the state Office of Hawaiian Affairs as qualified recipients of remains and cultural property.<sup>436</sup> Other institutions may also so qualify.<sup>437</sup>

Many currently operating African-American cultural institutions could qualify for the purposes of my proposal. Some include the National Association for the Advancement of Colored People,<sup>438</sup> the Underground Railroad Foundation,<sup>439</sup> the Association for the Study of African American Life and History (which founded Black History Month),<sup>440</sup> the Association of Black Women Historians,<sup>441</sup> Howard University,<sup>442</sup> and Morehouse College.<sup>443</sup> As in the case of NAGPRA, institutions that come into the possession of unclaimed cultural property should dispose of the objects in consultation with a review committee, which would be a seven person committee appointed by the Secretary of the Committee.<sup>444</sup> The Secretary would appoint members from lists developed by African-American cultural institutions, national museum organizations, and scientific organizations.<sup>445</sup> Finally, in the event that cultural property can be attributed to more than one descendant, there should be joint ownership.<sup>446</sup>

### *F) Dilemmas Raised by My Proposal*

Several questions arise almost immediately upon contemplation of my proposal. The risks of commodification provide the first quandary, as this problem exists whenever personal objects are promoted for sale. Margaret Jane Radin has shown

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<sup>435</sup> See Christopher Pala, *supra* note 385 (“Hawaii has no distinct tribes, so deciding ‘to whom you give the objects back’ has been a major problem, said Betty Kam, vice president for cultural resources of the Bishop Museum in Honolulu, the main repository of Hawaiian and Polynesian art and culture.”).

<sup>436</sup> 25 U.S.C. 3001-3002.

<sup>437</sup> *Id.* See also Pala, *supra* note 385.

<sup>438</sup> <http://www.naacp.org/>.

<sup>439</sup> <http://www.ugrrf.org/>.

<sup>440</sup> <http://www.asalh.org/>.

<sup>441</sup> <http://www.abwh.org/>.

<sup>442</sup> <http://www.howard.edu/>

<sup>443</sup> <http://www.morehouse.edu/>.

<sup>444</sup> 25 U.S.C. § 3006.

<sup>445</sup> *Id.*

<sup>446</sup> This is out of recognition that some objects were made by multiple people, such as in the case of quilts. See *STITCHED FROM THE SOUL*, *supra* note 304 at 69 (describing “quilting part[ies]”).

the dangers of commodifying the personal,<sup>447</sup> and Carrie Mae Weems' work showcases the Agassiz daguerreotypes' capacity to increase our understanding of the malleability of science, our culture, our history, and our personal identities. If we transform the daguerreotypes and other artifacts into cultural property, the resulting redistribution of objects made by enslaved people could simply degrade into a huge sale.<sup>448</sup>

However, Radin also acknowledges the "nonideal world,"<sup>449</sup> which the Agassiz daguerreotypes certainly evidence. While the hazards remain considerable, a recognition of the current injustices shaping United States culture also permits us to see how a redistribution of these relics of enslavement would alleviate to some very small degree a very old wrong, and refocus attention on the issue of slavery in this country so that the nation would have the opportunity to witness the violent past.

Further support for my proposal may be found in the work of property theorist Jeffrey Douglas Jones, who reveals how property law forged in the name of personhood could be used to "prop-up treasured socio-cultural meanings that might otherwise be lost or endangered to particular groups whenever the underlying resources were themselves endangered."<sup>450</sup> Harvard's move to censor Weems<sup>451</sup> demonstrates that our remembrance of slavery is so endangered. That is, Harvard's threat to muzzle Weems, if successful, would have crushed an important opportunity (the public viewing of *From Here I Saw*) for us to witness the raced violence that burst forth simultaneously with the supposedly victorious birth of the United States. In addition, the censorship of the Agassiz daguerreotypes would have waylaid the chance to discern racist science's legacy in contemporary practices such as de facto segregation and intelligence testing.<sup>452</sup>

Commodification, however, isn't the only issue. Scholars such as Naomi Mezey have demonstrated that cultural property laws and discourse threaten the flexibility of culture.<sup>453</sup> In the case of objects made by African-born enslaved people, the categorization of certain objects as cultural property could force a public determination of the meanings of those objects, which may result in an ossification of culture as well as a silencing of dissent by in-members of that culture. This has

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<sup>447</sup> According to Radin, self-commodification or sale "undermines personal identity by conceiving of personal attributes, relationships, and philosophical and moral commitments as monetizable and alienable from the self," which does "violence to our deepest understanding of what it is to be human." *Market-Inalienability*, 100 HARV. L. REV. 1849, 1905-06 (1987).

<sup>448</sup> *Id.*

<sup>449</sup> *Id.* at 1903 ("In the nonideal world we do live in, market-inalienability must be judged against a background of unequal power.").

<sup>450</sup> Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J. L. & POL'Y 93, 128 (2011).

<sup>451</sup> See *supra* text accompanying note 15.

<sup>452</sup> See *supra* text accompanying notes 247-82.

<sup>453</sup> Mezey, *The Paradox of Cultural Property*, *supra* note 327, at 2017 ("Cultural property logic . . . encourages conformity and suggests [authentic] ways to perform one's identity.").

already happened in the case of Native Hawaiian funerary objects.<sup>454</sup> It is possible that similar issues will also surface in the case of cultural objects used by African-born enslaved people.<sup>455</sup> Such objects could have contested meanings which should be debated with great rigor and not necessarily decided in a potential lawsuit.

In addition, the determination of lineal descendants under this law could enliven but also stiffen our current notions of African-American identity.<sup>456</sup> Racial identity cannot only be determined by biology, and the genetic testing that my proposal would encourage might also push a one-dimensional “official” definition of Blackness. Furthermore, many might object to the idea of African-American culture being composed at least in part of the disinheritance and crime that images like the Agassiz daguerreotypes evidence. As Michael Henry Dyson writes, “the very malleability of Blackness permits Black folk to shape it into weapons to fight on all sides of the debate about what Blackness is or isn’t.”<sup>457</sup> My proposal officially puts crime like Agassiz’s into the realm of African-American cultural property, and so arguably restrains this malleability.

Yet, while the law powerfully constructs culture and identity, lawyers and legal scholars may take too much upon themselves if they believe that their reforms will irretrievably direct individual acculturation. I think it would be the height of arrogance to believe that returning stolen images or artifacts made under coercion back to descendants will impede African-Americans’ abilities to independently factor that gesture into their own ways of knowing themselves and the world. After all, the law has recognized White property rights derived from slave labor, and this has not stopped African-Americans such as Malcolm X from developing an identity resistant to that social order. We may return these forms of cultural property to descendants or institutions, yet it is up to the new owners to determine this repatriation’s meaning.

This question raises another, potentially more serious dilemma. I provide for no guarantee that the new owners of these objects will dispose of them in ways that suit scholars, scientists, and future generations. New owners may not be able to store and care for the items in a manner that best conserves them. They also may not allow

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<sup>454</sup> There exists a debate over whether Hawaiians used funerary objects and about their significance generally. This question seemed to have been publically resolved in favor of usage and significance in a famous case involving objects and human remains owned by Honolulu’s Bishop Museum. See Pala, *supra* note 385.

<sup>455</sup> For example, in a case involving the discovery of fourteen bodies of enslaved people in Menands, New York, small brass pins and burial clothes were found in the excavated graves. Are these “important” cultural properties or just bits and pieces that had no real significance? My proposal would require a public satisfaction of that question. See Jordan Carleo-Evangelist, *Remains Must Not Be ‘On a Shelf Forever’*, TIMESUNION.COM, Feb. 7, 2012.

<sup>456</sup> See, e.g., Maroon King, Comment to *The Meaning of Afrolatino*, FORUMBIODIVERSITY.COM (Mar. 10, 2012), <http://www.forumbiodiversity.com/showthread.php/29799-The-meaning-of-Afrolatino/page7> (“[W]hy do you need to have a genetic test done to know you black? I know I black from creation because my culture is black.”).

<sup>457</sup> Michael Henry Dyson, *Tour[é]ing Blackness*, in TOURÉ, WHO’S AFRAID OF POST-BLACKNESS?: WHAT IT MEANS TO BE BLACK NOW xv (2011).

access to them by writers, scholars, scientists, and artists. In the case of Harvard, while it has not been a generous custodian of the Agassiz daguerreotypes, the University has allowed scholars to access them and reproduce them in the past.<sup>458</sup> Also, in my visit to the Peabody, I saw that it hosts them in state-of-the-art housing.<sup>459</sup>

We might, then, require new owners to act as stewards of this new property, rather than owners of bundles of sticks with respect to daguerreotypes, quilts, and other objects made by enslaved people. I derive this suggestion from the subtle and intriguing arguments made by Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, who justify laws like NAGPRA based on the idea that Native Americans are not traditional owners of property, but rather stewards of them.<sup>460</sup> Stewardship identifies obligations that possessors of cultural property owe to the present and the future, based on the conviction that the property is “sacred,”<sup>461</sup> or should be administered consistent with core Native beliefs.<sup>462</sup> It appears to weigh in favor of conservation in many cases.<sup>463</sup>

However, requiring descendants of enslaved people to act as stewards over this property *could* rigidify that property’s meaning for African-American inheritors. Stewardship could require new owners to care for relics in particular ways, when perhaps there remains significant disagreement about proper disposal or treatment of these objects. Stewardship would also require a certain amount of reverence for these images and remnants, which some people conceivably may not find appropriate, believing instead that the past is past. If we aim to return these images and objects out of recognition that they were violently wrested from African-born people, and prove culturally important records of the violent past, we can witness this history through cultural property law without requiring the new owners to parrot specific beliefs. In fact, if people did treat their newly inherited objects differently, that would help us understand the variety of meanings of the violent past for contemporary U.S. law and culture. The cultural property is important, but such a recognition only requires return. It does not dictate how people should respond to its significance, any

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<sup>458</sup> See, e.g., ROGERS, DELIA’S TEARS, *supra* note 9. This book is both a creative and nonfictional account of the subjects of the daguerreotypes. Rogers used the daguerreotypes with Harvard’s permission. Conversation with Pat Kervick, October 12, 2012.

<sup>459</sup> Indeed, the facilities were stunning, and Pat Kervick emphasized the cost and care with which Harvard conservators had attended to the pictures. *Id.*

<sup>460</sup> *In Defense of Property*, 118 YALE L.J. 1022 (2009).

<sup>461</sup> *Id.* at 1112 (“[F]or indigenous groups, land is sacred.”).

<sup>462</sup> *Id.* at 1092 (describing NAGPRA as “empowering tribes, as peoples, to regain access to and custody of Indian remains and artifacts in a manner consistent with their own lifeways and beliefs”).

<sup>463</sup> *Id.* at 1078 (“The stewardship concept . . . embodies a notion of mutual trusteeship – enriched by a view of the interdependence between present and future generations and between different peoples – that acknowledges the fact of global cohabitation and mandates a sense of shared responsibility. Stewardship requires contemplation of natural resources as deserving of respect independent of their utility to human interests, and posits that their survival should be facilitated.”).



more than descendants who inherit art stolen from the Nazis are legally obligated to dispose of it in ways that pay respect to their ancestors.<sup>464</sup>

In any case, if we assume that museums always take respectful, perfect care of these objects, we are wrong. The history of museum and private ownership of the objects made by enslaved people is a complicated tale. Sometimes institutions treat the objects and remains with as much honor as they can,<sup>465</sup> but on other occasions they seem denuded or indeed degraded by their setting.<sup>466</sup> My own observations of how the Agassiz daguerreotypes now morph into luxury objects under Harvard's care shows that conservation does not mean keeping things as they were. The risks of this property being treated as a fungible, non-"sacred" item run both ways.

All of this goes to perhaps one of the most important virtues of my proposal: a potentially powerful public lesson of remembrance would occur as a result of the return of these relics. Scholars credit NAGPRA with catalyzing memory and witnessing in the context of Native American history.<sup>467</sup> The discussion, controversy, and recollection that this transfer of properties would create would alert us to the significance of slavery to the present day.

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<sup>464</sup> David D'Arcy, *Nazi-Looted Klimt Brings \$40 Million at Sotheby's Auction*, ADOBE AIRSTREAM, Nov. 9, 2011, <http://adobeairstream.com/art/nazi-looted-klimt-brings-40-million-at-sothebys-auction/> ("A Klimt landscape that hadn't been [seen] since the late 1930's by the man whose family owned it before the Nazi Era sold for \$40 million last Wednesday night at Sotheby's in New York.").

<sup>465</sup> For example, Yale makes its image of "Uncle Marian" available to the public and provides some public education. See *supra* note 301.

<sup>466</sup> In Texas's Panhandle Plains Historical Museum, the museum's brochure advertises an "African American trunk" filled with "touchable objects such as an Underground Railroad Quilt Sampler" and "slave shackles," alongside a picture of a blond, blue-eyed child in a cowboy hat playing around with said shackles. See PPHM: PANHANDLE-PLAINS HISTORICAL MUSEUM MARKS THE SPOT 7 (2011/12).

For similar problems connected to quilts in private hands (which are not included in my proposal), see, e.g., Bud Phillips, *Very Rare Slave Quilt Still Survives in Bristol*, TRICITIES.COM, Feb. 15, 2009, [http://www2.tricities.com/news/2009/feb/15/very\\_rare\\_slave\\_quilt\\_still\\_survives\\_in\\_bristol-ar-247308/?referer=http://www.google.com/webhp?sourceid=toolbar-instant&hl=en&ion=1&qscrl=1&nord=1&rlz=1T4ADRA\\_enUS446US452&shorturl=http://bit.ly/g7EvML](http://www2.tricities.com/news/2009/feb/15/very_rare_slave_quilt_still_survives_in_bristol-ar-247308/?referer=http://www.google.com/webhp?sourceid=toolbar-instant&hl=en&ion=1&qscrl=1&nord=1&rlz=1T4ADRA_enUS446US452&shorturl=http://bit.ly/g7EvML) (describing "Martha," who made a valuable quilt that remains in historian Bud Phillips' hands. Martha was owned by a Mrs. Bushong, and Mr. Phillips told a reporter that Martha was not required to leave Bushong's house post-emancipation. Phillips, while posing with the quilt, said that Bushong was "kind and compassionate," and Martha "very grateful for the kindness that had been shown to her.").

<sup>467</sup> CAROLYN FLUEHR-LOBBAN, *ETHICS AND THE PROFESSION OF ANTHROPOLOGY: DIALOGUE FOR ETHICALLY CONSCIOUS PRACTICE* 126 (2003) ("Conversations are at the root of NAGPRA and one of the important results of NAGPRA . . . [It creates] a forum for speaking and listening."). See also Jordan Carleo-Evangelist, *Remains must not be 'on a shelf forever,'* TIMESUNION.COM, Feb. 7, 2012, <http://www.timesunion.com/local/article/Remains-must-not-be-on-a-shelf-forever-3112405.php>.

Moreover, my proposal would offer some small forms of Black reparations for slavery that are now being denied. Though it has been said, as I have already noted, that Black reparations are beyond the legal imagination,<sup>468</sup> NAGPRA paves the way for these forms of return and restitution and witnessing. Weems' tender, disastrous, brave, and painful work inspires us to create a similar opportunity in the law for descendants of enslaved people and U.S. culture at large.

### V) Conclusion

The cliché that those who refuse to heed the past are condemned to repeat it applies with great, fresh force to legal thought. Institutional and legal resistance to witnessing the history of raced violence in this country also defies the U.S.'s own ability to transform a future perilous with want, inequality, and suffering into one secured by parity and peace. In this way, Harvard University, with its contemporary policy of refusing "to be associated with exploitation," resembles none other than the founder of its Museum of Comparative Zoology, Agassiz himself. Agassiz declined to change with the times – that is, he rejected Darwin's revelation about how the past figures in the present and the future. Harvard also shrinks from the pain of changing one's mind. And so, like Agassiz, it now risks transforming its image from an innovative force of change to that of a jealous hoarder of treasures and outmoded ideals.

Carrie Mae Weems is to Harvard as Darwin was to Agassiz. She is a force of radical transformation. Her challenge to the Harvard archive changed not only Agassiz daguerreotypes that it protected, but in her broadcast of those images she also shifted our modern fathoming of race, intelligence, living arrangements, and property rights.

Her varieties of transformation – via the observer effect and this mutation of our modern comprehension of the world in which we live – should be recognized as activating a fair use defense in copyright law.

Perhaps more importantly, her acts of civil disobedience should spur a reorganization of property rights. There is no good reason why Agassiz should ever have been able to claim these daguerreotypes. And so there remains no good reason for Harvard's ownership of these images of Jack, Delia, Drana, and Renty. The violent past should be recognized in modern property law, at the very least providing that relics made and left by enslaved people should be returned to their descendants. The national conversation that would ensue from this redistribution would, I hope, elicit peaceable if discomfiting witnessings and conversations that could further transform our alienated, unequal nation.

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<sup>468</sup> See Westley, *supra* note 416.

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