# THE ANIMAL COMPANION PUZZLE: A WORTH UNKNOWN THOUGH HEIGHT TAKEN*

By
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*Once upon a time, long ago, there was a woman who had been given a box from the gods. She brought her box to a locksmith shoppe. The smiths gathered around in wonder at that famous box. Long in tooth and tenure, Eldesmith was the senior in charge. "Pandora, I see you have come to us with your box. When last you opened it, all trouble broke loose. What's the problem now?"*

*"Trouble is," said Pandora, "Hope is trapped in the box. It's locked, and the key is lost. Can you free her?"*

*Eldesmith shook his head. "Sorry, cannot. We don't look for lost keys, and we can't make a key to fit that old lock. A lock and box so beautiful must have been made in Elysian Fields."*

*From the back of the shoppe, Ecosmith called out, "Wait! Hold on! I have this key here that'll work. Very efficient. It opens anything." Ecosmith was a well-trained problem solver, but a newcomer to the trouble of locked boxes from gods.*

*Curosmith examined the key and observed, "Eco, your key does not fit this lock. How can it help?" Curosmith's questions invariably penetrated half way to rectifying but, alas, would always fall short of closure.*

*"Good question, Curo," said Ecosmith, "but easily answered. We simply replace inefficiency with efficiency."*

*Curosmith scratched his head. "Do you mean a new lock to fit your key?"*

*Ecosmith looked disturbed, but had to admit, "Yes, I suppose you could put it that way."*

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* Love . . . the star . . . [w]hose worth's unknown, although his height be taken." William Shakespeare, *Sonnet 116*, in *The Yale Shakespeare: Shakespeare's Sonnets* 58 (Edward Bliss Reed, ed., Yale U. Press 1923).

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Editor's note: The author intends this Essay to be enlightening fireside reading, to appeal as much to the heart as the head. This Essay aims to remind traditionally intellectual analysts that to be true to their purpose of justice, the law must not lose sight of important natural realities. The differences between this Essay and others published in law reviews are intentional and serve as a further reminder that the discourse should be motivated as much by conscience as by contemplation.

*"But it's a lovely lock," said Curosmith. "Is efficiency more important than beauty?"*

*Folsmith broke the silence that followed. "Let's assume the box has no bottom." No one was ever quite sure whether Folsmith was a simpleton or a merry andrew.*

*Eldesmith finally lost patience with his juniors. "We have no time for this nonsense. Look at all the trouble this box has caused, and is causing, and will likely cause again if it is opened again. Releasing Hope is hopeless. It can't be done. Let it be. Give it up."*

*"But you're locksmiths," begged Pandora. "You're supposed to open locks and not decide whether it is wise to do so."*

*That's when Ocamsmith stepped forth. He had been around the shoppe for years and was drawn to the candor, beauty, and simplicity of puzzles. He was not so much smart as he was honest. "Interesting predicament: how to solve without finding its former key, without changing its lock, without pretending it is something that it is not, and without surrender. Fascinating."*

*Joining with Ocamsmith, Curosmith asked, "Before we go after an answer, how do we know there really is a problem? How do we know Hope is in the box? Shouldn't we be sure about trouble before we try solving?"*

*Ocamsmith agreed. "Yes, Curo, we should think outside the box before we get into it. Let's dumb it down. Many puzzles are solved, not by finding their solution, but rather by simply finding there is no question. It is not a puzzle to ask, do lions roar? Do eagles soar? Perhaps, it is* resolve*, not* solve*, that we seek."*[1]

Folks come to law smithies with tort troubles. Those troubles follow this general scenario: Allegedly, someone has *breached* a duty owed that *damaged* another's *right*, thus calling for a *duty* of smithies to *fix it*.

In this nation's separation of government powers, that scenario initiates a job for the judicial branch, where courts are the shop smithies. Within their job description and among its many work orders lies the issue of *pet loss remedy*. That remedy will be the focus of this Essay; but first, all remedy of any kind must be put in context.

The foregoing scenario is a continuity of four allegations: (1) wrong (2) has caused (3) loss of a right (4) in need of remedy. In order to arrive at that final remedy issue for pet losses, the first three issues must be satisfied. Assume the truth of the first two issues: A defendant's faulty conduct or product has actually and proximately caused plaintiff harm. The third issue (was that harm the loss of a right?) is an essential step to remedy, because right, loss, and remedy are linked as one in order to be properly understood.

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[1] For early mythical origins of the Pandora Box, see Hesiod, *Works and Days*, in *Hesiod and Theognis* 59, 60–62 (Dorothea Wender trans., Penguin Bks. Ltd. 1981).

## RIGHTS, LOSSES, AND REMEDIES

It is axiomatic that if there was no right in the first place, there can be no legally recognized, tortious loss of it. If there were no loss, there would be no need for a remedy.

In our democracy, folks have many rights. Among the obvious are rights to physical body integrity, to mental peace, to bodily movement, to property, to reputation, to privacy, to commercial transaction, and more. Loss of such rights can be protected in law by torts called battery, assault, false imprisonment, inflictions of emotional distress, trespass, conversion, libel, slander, privacy invasion, contract interference, fraud, and more.

There are many other more encompassing rights conferred by law in certain situations, for example, the right to speak, to worship, to assemble, to vote, to have a lawyer, and, in some minds more controversial, the rights to choose, to marry, to die. All rights will have conditions; but within those conditions they are rights nonetheless.

The most principled and principal rights have been characterized in universal terms as "self-evident" and "unalienable."[2] They appear in our people's declaration of rights to "Life, Liberty, and the Pursuit of Happiness"[3] and are re-confirmed as rights to "life, liberty, and property" in their highest Law of the Land.[4]

So, the sequence is: If no right, then no loss; and if no loss, then no remedy. But can the reverse be true? If courts can find no remedy, does that mean there was no right or was no loss of it? When life, liberty, property, or happiness has been taken in fact, yet seemingly cannot be fixed, should it follow in the eyes of law that there was never a right to such value or that it was not taken? There are court opinions that can be read to mean as much when they say, "If we cannot fix it, then we must deny the claim to a right lost." That posturing does not make sense; it is a non sequitur and sophism. All would or should agree.

An irremediable right is oxymoronic. That is a premise on which this Essay and its proposal stand. Such horse sense is ensconced in constitutional pronouncements such as: "every man shall have a remedy by due course of law for injury done him in person, property, or reputation."[5] Such "injury" assumes harm inflicted by wrong. Therefore, a procedural right to remedy must follow a substantive right wrongfully taken. Indeed, those two rights go hand in hand.[6]

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[2] *Declaration of Independence* [¶ 2] (1776).

[3] *Id*.

[4] U.S. Const. amends. V, XIV, § 1.

[5] Or. Const. art. I, § 10.

[6] *See Marbury v. Madison*, 5 U.S. 137, 166 (1803) (stating generally that where the law assigns a duty and individual rights depend on the performance of that duty, an injured individual "has a right to re[s]ort to the laws of his country for a remedy"); *see also* Lon L. Fuller, *The Case of the Interrupted Whambler*, in *The Problems of Jurisprudence: A Selection of Readings Supplemented by Comments from the Author* 628–38 (Temp. ed., Found. Press, Inc. 1949) (exploring colorfully the jurisprudential debate between rights and remedies in the fictional Court of Newgarth).

## COMPENSATORY REMEDY

In tort cases, generally, monetary remedies have three categories: punitive, nominal, and compensatory. Punitive damages focus on dollars to penalize aggravated conduct beyond mere negligence. Nominal damages are paltry dollar awards in token of victory where rights have been invaded, but no ostensible loss ensues other than the indignity of violation itself. Punitive and nominal damages are not theoretically involved with the extent of loss to the victim and, therefore, are not the concern of this Essay.[7]

In the third type of damage, however, the victim's losses are center stage. Compensatory damages seek to replenish loss and are targeted in these pages. While all three damages are money awards, the compensatory dollars are the medicine supposing to replenish the harm.

The noun "damage" in law can refer to two different phases. "Damage" can mean the actual harm inflicted—for example, a broken leg, blindness, or pain and suffering. "Damages" can also refer to the dollar values given the victim for such loss. Thus, for example, it may be written: "Plaintiff's car fender *damage* was accorded dollar *damages*." Those two uses, while different, nevertheless emphasize law's plan that damage should be a joinder in equipoise between the lost valuable and its number values.

So, if compensation is to be the purpose, then to be accurate with that word, dollars must be the medium of exchange equalizing the right lost and the restoration of the status quo. Accordingly, loss and cash must balance so that a valuable is made whole again. Quid pro quo. Parity, not portion, is the theory. Granting that full restoration can be satisfied with some leeway for approximation, nevertheless, a cup that has been emptied is not replenished by filling it halfway. There is no such thing as fractional recompense. Hiding behind "it's-the-best-that-can-be-done" is an excuse, not an accomplishment. If courts set out to restore and fail to do so, yet continue to justify their remedy as "restoration," a fiction is made of the word "compensatory." Some judges confess the fallacy; yet most courts pretend. This is more than semantics or a game with words. The meaning of the word is critical here.

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[7] This Essay focuses on negligent tortfeasance, where punitive damages are not forthcoming. If the defendant's conduct was malicious, wanton, reckless, or intentional, punitive damages are available, thus providing a worthwhile incentive for plaintiff to pursue in court, even though the compensatory-type loss may be paltry. Whereas, in a negligence action without punitive or noneconomic or significant economic loss, the incentive is not worthwhile and the negligence inflicting horrendous consequence goes unheeded for want of money award.

## ECONOMIC DAMAGES

Law separates two categories of compensatory awards and labels them "economic" and "noneconomic." When the damage inflicted can be truly replenished with cash or nearly so, it is deemed an economic loss. This most often occurs when the victim's loss is standardized in that it is solely pecuniary, contractual, or liquid; in other words, it can be readily monetized. In those situations, commercial evidence is available to render the loss concrete through handy market data like catalogs, price listings, sales and salary records, repair costs, stock quotes, actuarial data, and an array of other statistical and liquidatable accounts from which reliable money calculations can be made. Harm to physical properties, costs of medical help, and loss of income and earning capacities are typical out-of-pocket harms where economic discipline and market theories prove workable in making matters whole again. Restoration of those kinds of losses is not so troublesome and is of no bother here.

## NONECONOMIC DAMAGES

But when a loss falls into the category labeled "noneconomic," the ability to price it is without the fixed commerce so helpful in valuing economic valuables. What then should courts do about damages that have no marketplace experience? That question has had mixed resolve in the courts. Some noneconomic losses have been allowed so-called "compensation," and others have not. Traditionally, even though no marketing exists for the general damages caused by a plaintiff's defamed reputation or invaded privacy, courts have assigned dollar value to such priceless valuables. More frequently, dollar recompense is given to certain noneconomic losses in personal injury cases, even though no commercial standards exist, and even though restoration in dollars is impracticable and barely imaginable. After all, what really is the price tag for excruciating pain, permanent mental suffering, disabling paralysis, inability to see, to run, to do favorite activities, to be disfigured?

Many of these kinds of damage have been called "hedonic" because they involve the loss of happiness, beauty, or pleasure. They amount to the absence of what was once the joy of normalcy. They are quite different than a dent in the fender, the "totaling" of a car, the loss of wages, or a bill for brain surgery.

So, if it is absurd to value a valuable that is valueless, and, if it is oxymoronic to imagine "compensatory pricelessness," then how come courts, for decades, have allowed dollar remedy for some types of unhappiness yet for others will reason: "If it can't be done, it won't be done" or "half full is the best we can do"? Inconsistency always begs an obvious question, why? The noneconomic value called "companionship" is an issue area prime for probing into that discrepancy.

## LOSS OF COMPANIONSHIP

When a plaintiff sues on account of the loss of a human companion, courts allow dollars for economic losses of the deceased's work services and medical and burial expenses. But classically, courts have been reluctant to grant any recompense for the mental distress from the companionship lost.[8]

Today, for wrongful death of a human, many, not most, states will allow some compensatory remedy for a limited form of companionship loss—a loss distinguished from the survivor's mental distress, which is not to be remedied. How the flow of grief is to be separated from the loss of the bond that caused it is a difference beyond this author's ability to contemplate—rather like allowing dollars for an amputation but not the anguish of having but one arm. Indeed, the lines drawn here are tangled in a sheepish attempt to salvage some modicum of compensation for a loss previously ignored. Straightening the snarls calls for some definition.

## COMPANIONSHIP DEFINED

Before vesting companionship with the status of a right, a close look must be given to exactly what that relationship is. Companions may be spouses, children, parents, kinfolk, colleagues, friends, and more. But examples do not define what constitutes that bond. In the cold, dispassionate business of changing real damage into dollar damages, law analysis tends to shy from past emotional scrutiny. Financial ways with fondness are bound to be awkward.

Arts and sciences fit comfortably with each other in the liberal education of college campuses. But in the necessary business of monetizing in courts of law, their company is uneasy. Some folks embrace emotion and are disturbed by materialism. Others champion commerce and recoil at sentiment. Wonder and wisdom becomes those who can keep them separate while balancing both. The word "love" will not be defined in a law dictionary, just as the word "fiscal" will not be found in a romantic ode. Like it or not, however, "fiscal love" is thrown together in courtroom justice when it comes to healing companion loss. Accordingly, some meaning of that bond is needed—not because the mind is void, but rather because it needs reminding.

Companionship is two emotions in motion on the same track but headed in opposite directions—love given and love received. That mutuality is not a clash; it is a joinder that is synergistic and symbiotic in

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[8] *See e.g.* Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 Yale J. Health Policy L. & Ethics 506, 519 (stating that "[d]amages under wrongful death legislation typically include lost financial support and lost services"), 520–21 (noting that in wrongful death suits some states allow limited recovery for mental anguish by close relatives, but that other states forbid recovery for mental anguish) (2005).

that it intensifies and supports. If it lacks that creation and interchange, it is not companionship.

Love is often bandied about: "We love our country;" "I love Paris in the morning;" "You love to dance;" "Elena loves her new job;" "Popeye loves spinach;" "Don't you just love Donald's haircut;" "Mabel loved chocolate;" "Bert loved fishing." But those loves do not give love back. It is the exchange of love that triggers the issue at hand. The feelings of love and of being loved are distinct passions. When they are shared, a third dynamic ensues: companionship. That Romeo loves Juliet is not yet a bonding.

All of that may seem overly sentimental and anathema to cerebral analysis—too much syrup and not enough serum for the sober-minded. The four-letter "love" word turns the amorous *on* and the scholarly *off*. Being fond of others, instead of "loving" them, invokes a tempered level of propriety. Nevertheless, love is just as universally true to our natures as are the sums of arithmetic and the counting of riches. If there is to be remedy in the courts for the loss of such a bond, then the ciphering of the numbers must deal with love unrequited—forlorn love bereft of love now gone—a broken bond of what was once sharing and shoring.

Monetizing love is an "arithmetic" that has frustrated the judiciary. What is lost is a union where one plus one does not equal two. Rather it is nature's computation where one and one makes "One" to the power of three or more. Such hopeless mathematical equalization leaves courts with no way to compute compensatory dollars. So, does that mean there is no right to companionship?

## RIGHT TO COMPANIONSHIP

As said before, without a right, there can be no remedy. The reverse, however, is not true. Just because a given remedy is troublesome or hopeless, that ought not mean there was no right. A right is justified by its intrinsic merit and not by whether its breach has recourse.

So, is there an inherent right to companionship as herein defined? In a democracy that extols "Perfect Union" and the "Blessings of Liberty,"[9] inter alia, the full grasp of what constitutes companionship is reason enough to give union its freedom. Seeking and keeping society with others is a cohesion embracing a busy cluster of human activities in communication, competition, contest, congregation, election, conjugation, negotiation, alliance, assembly, and other powers concerning civic and social joinder. Certainly those liberties demonstrate the strong imprint of respect by a gregarious society for all of its myriad societies. Any attempt to ban, impair, or infringe upon companionship

[9] U.S. Const. preamble.

would certainly be met by a challenge upholding the right to such happiness.[10]

## LOSS OF PETS

Having prefaced some general definitions of companionship, its right, its loss, and its insurmountable evaluation, the remaining remedy problem becomes even more acute in cases where the lost companion is a pet.[11] Courts have given the animal bond the same cold shoulder as the human bond except more so.

Human attachment to pets, however, has distinctions that warrant different scrutiny. In human loss cases, standing to sue lies with immediate family, if at all. The bond there arises out of blood and legal vows—a mutuality linked by nature or by human laws, not just by love and affection. In contrast, the link between creatures of different species is a dependency arrived at solely by choice, caretaking, and household sharing without ties of DNA or laws. Sheltering, feeding, grooming, and other humanities are eventually returned with the only stipend that pets have to give: loyalty, cheer, and non-judgmental devotion. Taking care breeds giving care, and that mutuality fosters a link in many ways more needy and thriving than genealogy or promises. Children will grow out of dependency; pets grow into it. The commitment of a pet's attachment never fades or severs.

But, for reasons well entrenched in judicial precedent, those distinctions have not been enough to convince courts to award dollar remedy for the loss of what it is that makes an animal a pet and a human not a pet. That becomes an awkward, if not dire, predicament for judges. In tort cases, they are confronted with the defendant's wrongful killing of a pet, where plaintiff's claim is not for the worthless value of the animal's body, but rather for the priceless loss of bodiless comradery. So, typically, fact scenarios fall into a pattern fitting this general hypothetical.

Grizabella is an old cat well past normal life expectancy. She has been with the Elliot family since kittenhood. She is slower now and of little use as a mouser. "In the lamp light the withered leaves collect at [her] feet."[12] One day she is negligently killed by a speeding car; or

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[10] *Declaration of Independence* [¶ 2] (an example of which would be laws against bans on miscegenation, fraternization, and same-sex marriage).

[11] An oft-used phrase is "pet animal companion," which is redundant because "pet" denotes a non-human animal that is a companion. The notion behind this phrase is to distinguish pets from wild and working animals. People are not pals with wild animals, and the latter's principal attachments are for transporting, plowing, showing, breeding, providing food, *et cetera*. As for pet "loss," that will usually mean death. Disabling loss is not likely, either because of euthanasia or a disability not severe enough to affect companionship. Pets in this nation are usually, but not exclusively, cats, dogs, or horses.

[12] Grizabella's story is adapted from the musical *Cats*. *See* Andrew Lloyd Webber, Play, *Memory*, in *Cats* (official website available at http://www.catsthemusical.com/ (accessed Nov. 19, 2011)) (play and lyrics adapted from T.S. Eliot, *Old Possum's Book of Practical Cats* (Harcourt Brace & Co. 1939)).

perhaps by a veterinarian's failure to diagnose, treat, or anaesthetize; or perhaps by an animal shelter's neglect at confinement, feeding, or care; or perhaps by a neighbor's failure to restrain a trespassing, aggressive, marauding dog. In consulting a lawyer, the Elliots are told that to sue the speeder, vet, kennel, or neighbor would be pointless. As a mere cat, Grizabella was virtually worthless. No one at market needs an old, useless cat at her tenth life. As for her purrs, such loss of companionship is not a legitimate claim in courts of law. She was, in effect, open game to negligence. No accountability is forthcoming in civil action—even though "if you touch[ed] [her] you'[d] understand what happiness [was]."[13]

Seldom is a judicial opinion written without judges noting or insinuating sheepish apology for their denial. Hands tied, their forced negation produces some equally forced explanations—reasons that are more like excuses.

## DUBIOUS REASONS FOR PET LOSS DENIAL

Sometimes courts offer *analogous precedent* as a reason to deny recovery. Inasmuch as prior cases have frowned upon remedy for the distress in losing *human* companionship, then, *a fortiori*, remedy should be denied for that loss in cases of an animal companion—a good-for-the-goose-good-for-the-gander rationale. Aside from ignoring the foregoing distinctions, that excuse is not satisfying because it begs the essential question: Why does the bond of *any* animate companionship deserve no recognition? In other words, what are the reasons underlying the analog compared? If there are good reasons to deny anything, it is not because of other wrongful denials.

Another excuse is an old one concerning *judicial administration*. It is brought out and dusted off whenever judges anticipate tasks that tax judicial business. Cases of pet loss are foreseen as an opening in the bar's gate through which might pour feigned claims and the proverbial flood of litigation that threaten to jam court dockets with cases and multiple new issues. Who shall have standing to sue? What animal species qualify as pets? What degree of bonding amounts to true companionship? How can that noneconomic loss be monetized? How can juries be kept from sentimental emotion and runaway assessments?

But those anticipations are alarmist and not insurmountable. They are used to procrastinate, begging more time for reflection and readiness. They do not address the merits of rights, losses, and remedies. They give administrative excuse, not substantive reason.

Another justification offered to defend a denial of remedy for pet loss has been to put pets in the category of *fungibles*—things that can be readily replaced in kind. Lassie, Tabby, or Dobbin are treated as no different than all other dogs, cats, or horses of the same breed, thus

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[13] *Id*.

providing a handy, economic, market trade-off. That rationale overlooks the loss claimed. What was lost was not a canine, feline, or equine; it was a companion. Courts must deal with the latter. Instead of singling out the animal as a special pet, the excuse fashions the animal as a general specimen. It does what all of the other excuses do; it changes the situation by concocting troubles, switching the lock, or pretending no bottom, so that the real predicament need not be faced.

Another excuse has been offered and sometimes accepted in order to *protect veterinarian negligence*. The courts argue that veterinarians should not be liable for companionship losses because that would increase costs and reduce the availability of their services.[14] Granted that vets are, by virtue of their business, in a position to be targeted in pet loss cases, is that reason to single them out from other alleged negligent actors or to grant them special immunity? Why should doctors, lawyers, dentists, veterinarians, or any other experts educated and licensed for selling their professional care be given pardons from careless performance of the special skills and knowledge that they represent having and for which they charge? That is a wonder and an astonishment bordering on shame. Only the rationalizations of certain financiers and liability insurers would stoop to bestow such privilege on those already privileged.

The most prominent rationalization for denying animal companionship loss rests upon this age-old deduction: A major premise commands that noneconomic dollars are not to be given for the *loss of property*; a minor premise is that pets are no more than items of property.[15] Ergo: Pet loss is not to be given noneconomic dollars. Thus, the remedy for lost property is solely economic, i.e., measured by monetary worth of the property at real or theorized markets. Any special attachments that the owner may have had for the item (e.g., heirlooms and other sentimental holdings) are noneconomic, and not recoverable. So, if a home is negligently set afire, the owner can recover the fair market value of the house, her favorite chair, her painted portrait of her grandfather, and her poodle. But she cannot recover for the loss of any

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[14] *See e.g. McMahon v. Craig*, 176 Cal. App. 4th 1502, 1514–15 (Cal. App. 4th Dist. 2009) (stating that "extending emotional distress damages to owners of companion pets based on veterinary malpractice would have unknown consequences on both the cost and availability of veterinary care"); *see also* Steve Barghusen, *Noneconomic Damage Awards in Veterinary Malpractice*, 17 Animal L. 13, 36–37 (2010) (discussing the cost of veterinary malpractice insurance and noting that these costs "will inevitably rise with any increase in the number of lawsuits or the amount of damages awarded").

[15] *See e.g. Kaufman v. Langhofer*, 222 P.3d 272, 275 (Ariz. App. Div. 1 2009) (denying emotional damages for the loss of a pet bird because "Arizona law is consistent with the majority position classifying animals as personal property and limiting damages for their negligent injury or death to their fair market value"); *see also* Barghusen, *supra* n. 15, at 16–17 (noting that animals are property under the law, and traditionally "the legal remedy for damage to property has been the payment of the fair market value of that property" or, in the case of a pet, "the amount required to purchase a similar pet at the time of the pet's death").

happiness. After all, they were, indeed, but items—items to which she chose to become attached.

What seems valid is often a veil. In order to be critical of that syllogistic way, one need not dispute the minor premise. A pet does fit into the category of property as schematically defined by law. Classifying a pet as property shores up the contention that pet entitlement is a right under the Fifth and Fourteenth Amendments to the United States. Constitution: the right "to life, liberty, and property."

But that proprietary scheme is abused here when it sometimes sweeps the massive coverage of property under the rug. The concept of "property" can be manipulated so as to become a means to reach goals instead of being a goal itself. To put breathing, sentient property born of nature into a group along with commodities born of craft defies understanding, unless, of course, it is a subterfuge to reach other policy. Dogs, cats, horses, and such simply do not fit with refrigerators, photographs, jewelry, and blankets. There was a time when human beings themselves were considered property and were listed as inventory as a means to reach odious ends.[16]

Folk wisdom is keen enough to see the absurdity in any legal avenues destined to conclude that a $10 cat is not as important as its bag of cat food costing $40. Common sense also tells us that a relevant distinction lies between the loves an owner has for a car or a family heirloom, on one hand, and a pet dog on the other. The ruin of an antique Model T Ford or Grandma's wedding ring is not the loss of a companion. Cars and rings do not reciprocate love. Lassie's love, however, is an indelible part of the attaching.

Other areas of law provide reasons to treat pet property differently from inanimate property. Ownership of animals brings unique duties imposed by law. Owners are allowed to rip the tail off their dress shirts, to deprive their refrigerators of food and drink, to let their cars rust away, to starve their lawns, to chop the muzzle on their shotguns. Moreover, citizens need not give humane treatment to their phones, nor avoid cruelty to their books, nor license for their rose bushes, nor control dandelion invasion into their neighbors' yards. Laws require that owners cannot so abuse their animals and must be caretakers, groomers, feeders, treaters, controllers, and providers. Out of all that responsibility for *giving care* there grows *caring for* the animal. From that comes a possession different than shirts, cars, lawns, guns, phones, and books. It is called a "pet."

As seen in the foregoing, whether through governance of laws or public charities, humane society has shown its own care for animals—domestic and wild. The human species's link with other animal species

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[16] The human property excuse has gone on for centuries and exists on this planet today where cultures presume that married women are bound, like property, to their husbands. Something close to that presumption prompted Charles Dickens to write, "If the law supposes that . . . the law is a ass . . . ." Charles Dickens, *Oliver Twist* 354 (Kathleen Tillotson ed., Oxford U. Press 1966) (describing a character's response to the assertion that "the law supposes that your wife acts under your direction").

is a union that ought to say something for special treatment. While pets are reasonably deemed property, they deserve *sui generis* attention. Their value is authentic and quite different from their value in commerce. The pricelessness to the owner, yet its worthlessness at markets, may or may not be enough distinction to warrant remedy, but that irony ought to trigger pets as a unique form of property. If remedy is going to be denied, it has to be for a far better reason than lumping pets into a class along with dishes and rugs. To do otherwise would be like treating marriage the same as merchandise. To the question "animal, vegetable, or mineral," does anyone really need to be told that a pet is not a vegetable or mineral?

Here is another way to look at pets as property: All property has its properties. Initially, the word "property" commonly suggests a material object. However, all such pieces have their uses and joys. Those properties are what make the object a subject for property. If a thing is totally bereft of, or reduced in known utility to, anyone, it would not be the same property object as it once was. It is trash or salvage. Its qualities are what help define it as property: refrigerators preserve food, clothing protects and adorns, books amuse and inform, and scopes magnify. If any of those cease to so function, they are discarded, unless, of course, their properties can be restored. Usefulness and serviceability are called "usufruct" in certain commerce. Folks borrow or rent property objects primarily for their incorporeal qualities and functions and only secondarily for their tangible embodiment. If a mower can no longer mow it has no property as, and ceases to be, a mower, albeit now, perhaps, some other kind of property to the possessor in the way of memento or valued salvage.

Pets are property because they have the capacity for bonding, just as glue is property because it sticks. People have been known to stuff and mount their dead pet. That taxidermy is no longer a pet. And so, have courts not painted themselves into a corner when they deny dollars to remedy on grounds that the animal was property? It was called property because of its main use for companionship, yet dollars are denied for loss of the very utility that made the pet a property in the first place.

All of the foregoing analogical, administrative, fungible, and property excuses for decreeing denial are feeble for the most part. Nevertheless, this critique does not prove the need for compensatory remedy. Rather, it serves to reveal that there must be a more candid impetus afoot for deigning to deny. In pet loss cases, excuses have become overpaint covering the original canvas. Once the pentimento is uncovered, the real cause appears. It is this: Compensation simply cannot be accomplished. The love that is companionship cannot be replenished with dollars. It is an impossibility. To attempt to justify dollars falling short of full restoration with "it's-the-best-we-can-do" is not a solution; it is a surrender. Partial recuperation does not give compensation; it denies it. Taking steps toward a destination does not make arrival.

Sometimes court opinions have been candid enough to admit that impossibility is the ground for their denial. That honest recognition puts the issue back where it belongs: finding an able remedy for pet loss. Until that is found, courts are justified in not doing what cannot be done. Some would call that an "impasse." I prefer the word "predicament," or "puzzle." An impasse is insurmountable. But a predicament is a predicate to an answer—a puzzle begging to be solved.

## THE PUZZLE

This is the situation: wrong exists, right exists, loss exists, cause exists; but where is the remedy? Where is the way into what is boxed? So far, the virtual solution of the courts has been to leave the box closed. That status has not resolved the quandary. Rather, it frustrates and compounds the puzzle. If a kind of loss is so huge that no amount of redress can fully compensate it, then is that not further testament of how horrendous and painful the loss must be and, therefore, how appalling it is for justice to stay blind to it?

Since prehistoric times, human animals have trapped, tamed, trained, and bred wild animals in order to get them to live with, share with, go with, work with, or bond with humans. Genetic manipulation has further divided wild species into sub-categories called "breeds." Out of all such creation, should it be any wonder to ask a civilized society to also create in its courts laws respecting the bond it cultivated by demanding accountability for any wrong inflicted on that creation? If society makes something and it gets broken, should it not fix it? But, if death has put fixing beyond redemption, how can it be fixed?

Courtrooms and commentaries continue to deal with the issue, thus evincing that the problem is still open and the box is not. Cries of hope within have perked the ears of certain smiths trained in the discipline of economics. With whetted appetites, they flock to the puzzle with their financial tools.

## THE ECONOMIC DISCIPLINE

In the distant past, economists had defined and abided by law's borders drawn between "economic" and "noneconomic" damages. The latter losses could not be liquidated; i.e., they could not be readily converted into cash, meaning that they had no transactional value in society—hence, they were not economic. The science of economics explores the making, marketing, managing, and measuring of the use of goods, services, and wealth. It takes for granted, and rests its theories on, the assumption that people desire wealth and seek their own welfare. Economists call that "rational selfishness."[17] Accordingly, their aims

[17] *See generally* Ayn Rand, *The Objectivist Ethics*, in *The Virtue of Selfishness: A New Concept of Egoism* 27 (Signet 1964) (defining "rational selfishness" as "the values required for . . . human survival—not the values produced by the desires, the emotions, the 'aspirations,' the feelings, the whims or the needs of irrational brutes . . . .").

are riddled with quantification and measuring sticks where monies are gauge markers.

Such finance puts matters squarely in line with dollars-for-damage problems. Use of the marketplace becomes a common tool for making that transition. The methodology investigates how much citizens will trade of this in order to get that. Using the medium of such exchange, the inquiries become: How many dollars for a given thing or service? How much cost for benefit or benefit for cost? Where does willful buying and selling arrive at an agreement on price? That method works well when valuables are concrete and fluid in trade, as in the case of a property object. Such pricing becomes a use of resources to produce an optimal utility service (recompense)—a goal economists call "efficiency."

When economic analysis is confronted in a tort case with animal companionship as a lost item, that pricing is hit by the same problem that has beleaguered courts of law: how to make whole again a damage that has no commerce in dollars. Any attempt to apply traditional economics to that noneconomic situation is bound to produce some curious outcomes. For example, negligently killing a non-working, commercially valueless pet will save the owner future food, shelter, veterinarian expenses, and other caretaking costs that exceed the pet's economic sales benefit. Thus, without consideration of the pet's noneconomic values, strict economics might say the wrongdoer has done the owner a favor—an absurdity that would justify payment from the owner, rather than to the owner.

No case brings the puzzle of valuing animal companionship to greater focus than the situation where the owner has paid far more to fix a wounded pet than the animal was worth in commerce. For example, suppose the animal's economic value (set by extrinsic marketing) is $40, but the veterinarian cost (indicative of the owner's intrinsic bond) is billed at $1,000. Market value and vet expenses are both economic losses, so that is not the problem. But the defendant will argue against paying for the latter repair cost because it was unreasonably incurred. The plaintiff will urge reasonableness, however, on account of the noneconomic value of companionship. So, would it be consistent for courts to not recognize the bond as a noneconomic, compensatory loss, while at the same time recognizing it as a reasonable ground for economic fixing? That would be an enormous contradiction between laws. How can *lost* companionship not deserve trial justice, while *live* companionship can serve as trial justification?

The same contradiction between the use of companionship as a legitimate justification for incurring expenses, but not for assessing its loss as damages, might be applied to burial expenses in a pet cemetery, where courts have customarily recognized the right to recover such economic costs even if, for example, the costs are $1,000 for a $10 pet.

Today, such confusion has led some economic analysts to converge upon the pet loss remedy issue armed with theories that expand their discipline's assumptions to include imagined markets for rational self-

interest—not what traders have actually done, but rather what they might supposedly do. Those assumptions might be evidenced, for example, by the extent to which humans finance the safety of their pets—as though, perhaps, the purchase of vaccines and food for the pet are indicia of the pet's total worth; or as though the cost of veterinary or life insurance on the pet is a declaration of market value.[18]

Thus does the discipline of economics enter into a noneconomic domain with economic tools. But whether by real or imagined commerce, pricing companionship remains a matter of quantifying quality—monetizing the synergy and symbiosis of mutual devotion—in short, valuing invaluables.

## CRITIQUE OF THE ECONOMIC APPROACH

Just as restoration of animal companionship has troubled law, so too ought it to trouble economics. Traditional economics had accepted the fact that some compensation had to be culled out of their analyses, thus granting that "noneconomics" was a label that meant exactly what it expressed. Modern economists, however, are not troubled, because they come to the problem with an all-purpose cure, which by definition is an answer that precedes the question. Whatever the problem, they will devise an economic recompense for it. They solve by changing humanity to fit their procrustean beds. Quality must connect to quantity. Love lost must conform to business lost. When all you have is a yardstick, everything looks like inches.

Economics is born of a materialistic society where talk is fiscal, finance is the quest, pursuit is mechanized, engines are arithmetic, ciphers are cash, and money talks. Economics is a social science that is not sociable and strives to be a physical science.

When it comes to the noneconomic value called "companionship," economists make the error of turning the bond into a reciprocity—a deal between two traders. To put an economic spin on companionship, economists must assume some "rational selfishness"[19] and welfare exchange. But, there is nothing selfish about ideal companionship—nothing rational or irrational about it. It is emotional. It is sentimental. Exchanging favors is not what drives companions. Comrades are not allies and business partners in pursuit of common wealth. The latter relations are governed by give and take. Pure companionship has no such motives. To be sure, trade may become a product of companionship, just as companionship may happen as an offshoot of association. But reciprocity is neither a pre-condition nor post-condition to companionship. There is no buy-sell, cost-benefit, fiscal, or contractual consideration involved. Romeo's love for Juliet may have yearned for her love in return but did not depend on it. When Juliet felt the same, those mutual carings became a gestation of which companionship was

[18] Is a $100,000 life insurance policy on a husband an inference or a clue of his fiscal and human worth?

[19] Rand, *supra* n. 17, at 27.

born. They coincided but were not cause and effect. Once the bond began, they may have shared and shored one another but did not initiate one another. Seed does not make soil (nor soil seed), yet their sprouting and feeding can form a tree.

This is not to say that pseudo-companionship will not have its moments. In the real world, the demand for favors and the wish for friends will mix. But the loss of the friendship, not the favors, is what needs fixing here. Affinity is not reciprocity. Yet some modern economists hitch their compensatory analyses to the wagons of alliance and selfish exchange in order to find economic wheeling.

In spite of all said, the service that economic study has given to many of life's problems deserves respect. Its tools have worked fine in areas of law focused on private and government business, for example, contracts, securities, commercial paper, sales, anti-trust, taxation, banking, and all aspects of budgeting, accounting, and finance. But when it seeks to patch all of the wear and tear in the fibers of law and life, it goes too far. Companionships are music where beauty is in the ear, not in cerebral tricks.

## "COMPANION ANIMAL CAPITAL"

As was said earlier, respect is owed the economic discipline. However, that admiration does not extend to all of its disciples.[20] So obsessed with their own bailiwick, some see no bounds, only vistas. One such plan appeared in a recent issue of this periodical. Author Sebastien Gay offered, in his own words, "an economic perspective to the debate," and titled the article and theory *Companion Animal Capital*.[21] Like any good economist, he transforms his scheme into jargons befitting commerce—vernacular that could be taken to the bank but not to the heart. In addition to "capital," he uses "shadow wage," and "investment," "coefficient of appreciation," "opportunity costs," "term of ownership," "interest rates," "risk-free bond choice," "wage-risk trade-off methodology," and, of course, "cost-benefit comparisons."[22]

All of that is compacted in one grand algorithm, or "model," as he calls it.[23] Typical of arithmetic formula, the model's components are cemented with multiples, divisions, and equalizers tempered by various times for the life of the pet and the relationship.

Gay lists "enjoyment" and "entertainment" as losses marked for configuration in animal labor performed.[24] That notion of joy is tucked away without explanation and obscured by other list items. It is as close as he comes to recognizing a companionship loss. But it misses the mark. There is a difference between the bond of companionship

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[20] The same may be said about my own discipline. Devotion to Law does not embrace all lawyers or all laws.

[21] Sebastien Gay, *Companion Animal Capital*, 17 Animal L. 77, 79 (2010).

[22] *Id*. at 79–81, 85–86, 88.

[23] *Id*. at 87.

[24] *Id*. at 88 n. 75; *id*. at 90.

and the fun of enjoyment. We can go to a zoo or circus and enjoy the animals, but that does not make them our pets. Joy is a one-way street; companionship is a two-way synergy. The death of a mother deer was a loss of a bond to Bambi but only sorrow to onlookers. Fun is not a relationship, and companions are not just fun. In terms that economists would employ, bonding includes the "cost" of giving; fun is the "benefit" of just taking.

It is not surprising that an economist will try to liken comradery to "entertainment." "Takings" are a very big dynamic in a discipline that marches to the beat of "rational self-interest." But receiving from another and sharing with another are two different rhythms. The loss of that synthesis is what *Companion Animal Capital* ignores.

Another component in Gay's formulations is labeled "coefficient of appreciation."[25] One might hope that the word "appreciation" could be a euphemism for love, as in "Romeo appreciates Juliet" or "Scarlet appreciates Tara" or "the Lone Ranger appreciates Silver." But, alas, that is not Gay's meaning. For him, "appreciation" refers to the rise as opposed to the depreciation in fiscal value.[26] It is the way economics sees things—not passion, but prosperity.

Thus, Gay considers a pet to be a capital asset—a valuable kept to create other values—wealth to make wealth. To the extent that the animal provides services to the owner, Gay likens it to an employee whose performance should be paid a "shadow wage."[27]

The "coefficient" in his formula model is represented by the letter "K," which is broken down by the letters "f, m, g, h, q, Z, O"—initials for the animal's food, medicines, gifts, health, quality, and then "Z" for the owner's income and "O" for the animal's species, breed, and color—all of which is meant to be the "function" and "parameter" of the "bond between the owner and her companion animal."[28] That so-called "bond" is what Gay labels "capital."[29]

Gay also uses "opportunity cost" as an element in valuing a pet.[30] Evaluation must include, he says, the money lost in interest income on a fiscal bond that owners might have earned had they opted to kill the pet and used that opportunity for investment instead of spending money to care for the animal.[31]

Gay's analysis and proposal is driven by what all rules seek: the need to standardize ad hoc judgments. Society desires uniform and predictable outcomes on which to rely in setting a future course. That kind of leveling and even-handedness is especially needed in the business world. It follows that quantification becomes a much-used tool in standardizing. When used to extremes, however, it endangers reality

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[25] *Id*. at 89.
[26] *Id*.
[27] Gay, *supra* n. 21, at 81.
[28] *Id*. at 89.
[29] *Id*. at 89–90.
[30] *Id*. at 92.
[31] *Id*. at 88, 92.

and rights. Quantifying quality is a process susceptible to oppression. Remedy for the fact-intensive issue of lost companionship is just such a target. Where rule machinery and mechanics encroach, nothing is left of *veredictum* for the case *sub judice* "truth saying" [verdict] about the facts at hand. Standards are good master keys, but sometimes the lock is a situational beauty that does not deserve mastering.

To justify his standardization, Gay claims it "improves predictability and consistency" and states that his "format of economic damages . . . reduces the uncertainty associated with noneconomic damages," in that it "increases expected economic damage and decreases noneconomic damage."[32] Indeed it does all of those things, but they are not justifications. An arbitrary and fixed $100 reward in all pet loss cases would do the same thing. Standards must rest upon merit, and merit is not so cut-and-dried in this arena. Rules for golf or poker are entirely based on standards for the sake of standardization and nothing more. But civilization is not a game. To tell grieving survivors that their pets were capital business investments is to make another of law's callous fictions. It misconstrues; but worse, it is a rude discourtesy to mourners. It satisfies predictability without satisfying the predicament. Although "capital" comparison may run an orderly business, when it comes to sociality, it clashes and insults.

In the courtroom, economic algorithmic thinking is doomed at the outset. In trials, jurors initiate the setting of dollar amounts. They take account of all relevant evidence, which naturally will and customarily has included many of the aspects in Gay's formula. But a jury is not in a computerized laboratory; their deliberations are in a jury room where folk wisdom is called upon to bring justice within a law system neither void of sensitivity nor ignorant of situational ethic.

Somewhere far beneath convolutions, Gay's model has buried a happiness devastated by wrongdoing. His is an impressive scheme; but then too, so are the many plans for making robotic intelligence, prosthetic limbs, clones, artificial life and organs, and other synthetics to substitute for nature's realities.

## COURT DUTY TO RECTIFY

Gay's proposal goes down the same dead-end road courts have taken for decades. Both operate on the assumption that the remedy for noneconomic damage, when allowed, must be compensatory. Restoration, however, is an impasse that stops courts from any remedy for animal companion loss and has led economists, like Gay, to redefine the loss in order to avoid the impasse.

No matter how many components and configurations economists can fancy in their analysis of pet loss, there is no honest way to value loving—no way to fill its loss with equivalent dollars. If economics cannot equalize, liquidate, and quantify, or otherwise make whole, then

[32] *Id*. at 95.

that should signal the damage is beyond its science. If its disciples seek nevertheless to pursue that predicament, that is a strain that belittles their tools and makes their central concept a tool by itself. When the carpenter envisions carpentry as the hammer, the nail will not get driven.

The judicial and economic disciplines should abandon efforts to restore. Then, economic followers can opt out of any further chase. But courts do not have that option. Schools of jurisprudence may differ over the role of judges in creating rights, wrongs, and losses.[33] But once those issues are settled affirmatively in a given case, there is general agreement that the role of judges mandates redress. When citizens' rights have been wrongfully taken, they do not go to the legislative or executive branches; they go to the courts for redress. That is a time-honored principle of common law—judge-made law. It is not judicial activism; it is judicial responsibility. But that does not release the logjam; the puzzle remains: Remedy appears infeasible, yet courts must remedy.

## LEGALISTIC OBLIQUITY

In order to remedy, courts should stop dealing with the many fancies, flights, fallacies, and fictions that bully the debate and misdirect the aim needed here. It is time

> to put aside the doomed effort at trying to find the monetary value of pet companionship;
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> to desist likening pets to inanimate properties, fungibles, capital assets, and wage earners;
>
> to shuck the notion that loss of a pet is no more than a market-value loss without loss of happiness;
>
> to cease lifeless, cranial analysis of what is in heart and soul;
>
> to quit parting the joy of companionship from the distress that inevitably follows its loss;
>
> to halt the shirking of duty to rectify a right wrongfully taken;
>
> to stay the surrender to "it's-all-that-can-be-done;"
>
> to abandon the penchant to so standardize that nothing remains for ad hoc verdict and situational judgment; and
>
> in sum, to stop branding what is priceless as "worthless."

## THE PROPOSAL

Law smithies are handed a puzzle: how to open the locked-in hope of remedy when the key is gone. The predicament has been laid to rest without satisfaction. It merely naps and awakens again and again in

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[33] Idealists, positivists, and realists debate these issues.

judicial, legislative, and academic halls—indicative of hope. But alas, where is the key?

To solve a puzzle, the first step is to make sure that the exact question is fully understood. Part of the puzzle here is one of its false enticements: compensation. It was never that. Rather, the question is: How can pet loss be *remedied*, not how *compensated*? Rectifying and restoring are subtly different. All compensation is a remedy, but not all remedies are compensations. To *rectify* means to make right, not necessarily to make whole.

When it is not feasible to replace pet loss with dollars, any money award disguised as recompense is a fiction. Partial compensation is an excuse that does not change the failure to make whole again. Not all remedy penalizes (punitive damage), nor tokenizes (nominal damage), nor restores (compensatory damage). Sometimes remedy simply pacifies and makes amends. When that is so, dollars do not cure what was lost, but they do ease repercussions from the loss—relieve, not restore. In the area of noneconomic loss, that fourth category of damages is needed.

Medical science is fully aware of such remedy. Medicine does not always heal harm. Sometimes it is symptomatic relief—an aspirin for a headache, a wrist support for arthritis, a cane for a limp.

If towers are destroyed, they can be remedied either by rebuilding or by memorializing. Much as a memorial service is for closure, so too can dollars be used to assuage, saying far more than dollars used for sales or salaries.

Likewise, wars are not ended by restoring life to the way it was. They are ended by armistice. Truce, not trade, is what makes peace. And mothers have always known to treat their child's skinned knee and tears with a kiss to make it better.

There is nothing unfamiliar about remedies that soothe and satisfy—money that gladdens the heart instead of replenishing the purse. Such dollars are not mercy; they are justice judicially levied to befit the wrong and the suffering of its victim. Peace wronged should have a pacifying remedy—a happiness legally imposed for an unhappiness illegally imposed. Instead of the insulting and misleading business of "compensatory damages," there should be a fourth category called "*solace damages*."[34]

Some will continue to see solace awards as a charity. Not so. Charity dollars are a voluntary gift for a cause deserving generosity, whereas solace dollars are an order invoked against an involuntary defendant for an infliction deserving remedy. The latter serves in part as a subtle deterrence. Even though punitive damages are not allowed in negligence cases, any time a money award of any kind is imposed or threatened, a dose of restraint is fixed upon an actual or potential

[34] The notion of solace damages introduced in this Essay should not be confused with the discussion of solace damages in Kathleen M. McCauley & William Demarest, *Medical Malpractice Law*, 43 U. Rich. L. Rev. 227, 237 (2008).

wrongdoer. We drive, treat, and act with care partly because it may cost us dearly if we do not. Sanctions against those who fail to act reasonably or in obedience to laws of safety or personal promise are enforcements that make a civilized society. Payment of our victim's losses, as well as payment of penalties to society, provides deterrence.

Unfortunately, under traditional tort law in negligence cases, the killing of a pet holds no such significant deterrence, because pets in general have little economic value and are given no consideration of noneconomic companionship. That failure renders negligent drivers, veterinarians, or other tortfeasors immune and undeterred from the consequences of their neglect. Law should open its doors to a significant dollar damage award, not just for the plaintiff's pain, but also for the wrongdoing. Tortfeasors should pay for their fault, not just for what was taken. A pet, not just an animal, has been wrongfully lost. Solace calls for assuaging and dissuading, not sympathizing.

## CANDOR

Some will say that this solace proposal is not profound and that it has always been the case. I agree. It is nothing new. But it has been subliminally at work and only occasionally acknowledged in judicial opinions. For example, Chief Judge Wachtler of the New York Court of Appeals wrote:

> [R]ecovery for noneconomic losses such as pain and suffering and loss of enjoyment of life rests on the legal fiction that money damages can compensate . . . . We accept this fiction, knowing that . . . money will neither ease . . . nor restore . . . . We have no hope of evaluating what has been lost, but a monetary award may provide a measure of solace . . . .[35]

The solace proposal does nothing more than catch up to that horse sense—to what has been done naturally whenever weighing the loss of cherished passions like hiking hills, watching ball games, painting pictures, hearing songs, smelling flowers, savoring flavors, or, as here, sharing comradery. The engine that drives the monetizing of priceless passions is compassion, not commerce, like it or not. It is naïve or pretense to say otherwise. Solace damages are needed, not just for fairness, but also for candor. This proposal is a plea to acknowledge the honest and irrepressible instinct of humanity to sometimes bestow loss with grace, instead of with pricing.

Some may say that if solace is what has always been done or hoped for, then what is the problem with a need for candor? Why not let law continue as it always has? The reason to lift the veil of compensation is to reveal the face of the original puzzle: pricelessness that nevertheless deserves monetary remedy. The problem is truly "noneconomic"—one that warrants non-restorative solutions and not

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[35] *McDougald v. Garber*, 536 N.E.2d 372, 374–75 (N.Y. 1989) (internal quotations omitted).

the tinkering of economic tools that change the puzzle's givens in order to make lost love and sorrow fit the fix of a panacea.

Some will censure solace as *pointless and amorphous sentiment*. They will urge getting back to business and no nonsense. What is needed, they will say, is concrete, predictable quantification and standardization that build "going concern." However, humans cannot deny their humanity, which is a pursuit of, not a retreat from, feelings. Happiness is much larger than owning a house; it is also making a home. Rights and property reach beyond material embodiments; they include anything valuable to which people seek to attach, including the music as well as the violin. Only those obsessed by rational self-worth, wealth, materialism, and a draconian view of order would criticize solace as *pointless*, *amorphous sentiment*.[36]

## MONETIZING THE SOLACE

Having made strides toward solace damages, steps still have to be taken to make their way to money. The plaintiff has not come to court against the wrongdoer to get a hug. Solace must be expressed in dollars. How should courts monetize consolation instead of compensation?

The first step is to fix firmly on what is to be consoled. Companionship has been lost, which is to say that happiness has been nullified, i.e., rendered empty of happiness. Here, an important distinction must be made between the states of happiness, no happiness, and unhappiness. No happiness is the neutral ground—neither happy nor unhappy. Thus, a sequence here, for example, might begin with having no toy, then getting a toy, then going back to having no toy, then feeling distress at having lost it. Compensatory theory tries to monetize the difference between the values of that former state of happiness and the current state of no happiness and is frustrated in such attempt. Solace theory, however, aims further down the causal chain and targets the residual pain, suffering, and loneliness—the unhappiness of grief that flows from that nothingness. Solace does not comfort the love that was lost; it seeks to console the love that still lingers unrequited.

Some may say that the distinction between loss of something and distress over it is too narrow to be of much help. I have no disagreement with that. Unfortunately, however, the separation has been etched in law by some lawmakers when they would allow money to compensate a loss of companionship but not for the ensuing mental distress.[37] If that forced distinction must be made, then solace would

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[36] Rand, *supra* n. 17.

[37] Dan B. Dobbs & Paul T. Hayden, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury*, 616 n.11 (5th ed., West 2005); *see e.g.* Gay, *supra* n. 21, at 95 (discussing loss of a companion animal); *see also* Andrew J. McClung, *Dead Sorrow: A Story about Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. Rev. 1, 26 (2005) (discussing general approaches to damages for wrongful death).

have to reverse that position by monetizing the distress, not the loss—for solace, just like compensation, cannot make a loss whole again.

There are minor losses that can be unpleasant or annoying but are not given to severe distress: for example, loss of directions, loss of respect, loss of a game, loss of memory or time. A loss becomes the issue here only when it is harsh enough to cause the agonies of grief. In those situations, the non-happiness (neutral) and unhappiness (sorrow) are not separate; rather, they are inextricably united. One cannot think of a deep loss without the sorrow that follows it—just as one cannot think of grief without a loss that prompted it.

The next step in monetizing solace is to realize that remedies deal with equations. But that word must be used carefully. An equation—expressed symbolically by an equal sign ("=")—suggests a fair exchange, that is, equilibrium to the left and right of that sign. But an equation can also have other meanings in the sciences.

Mathematical equations are purely quantitative and state true equality (e.g., 2 + 1 = 3). But in chemistry, an equation expresses something productive and creative, not just something arithmetic. Two atoms of hydrogen joined with one atom of oxygen make a new molecule (e.g., $2H + O \rightarrow H_2O$). Something new has emerged. Substances have reacted. Synergy results. Two plus one does not equal just three atoms; it equals one water molecule. Economists and compensatory theory maneuver arithmetically on dollar numbers as an equal exchange for the harm inflicted: loss + money damages = restoration.

Math and chemistry formulas work their way through much of life. In cooking, two spoons of this plus one of that does not just equal three spoonfuls; it makes a new flavor. Likewise, combinations of musical notes, artistic colors, sports players, and cause workers do not just add up; they create the power of chords, pictures, teamwork, and solidarity.

And so it is that sometimes quantities cause quality—not just a sum but a synergy. When ill-fated forces leave sadness in the wake of companionship's demise, the equation should be: sorrow + solace money = closure. Amends to make amen. Monetizing that equation is chemistry, not mathematics. To create closure, how much solace will sorrow need? And by what process shall that solace be ciphered?

## TRIAL PROCESS

The process for turning the solace equation into money numbers would be pretty much as it always has been in noneconomic reparation, except now with more honesty of purpose.

"Price" is no longer a key. The plaintiff survivor has already paid that price in an irreplaceable value lost. The price was paid for another's purchase. Now it is time to see what defendant's fault owes in amends for a lingering cost that cannot be undone, but can be relieved.

Much of what economist Gay proposed as ingredients in his scheme is consistent with what courts have usually allowed as evi-

dence in other noneconomic situations where suffering needed remedy. In pet loss cases, such proof might include ages and life expectancies of each companion; the term of the past relationship; costs for pet care; and a whole host of attentions, services, events, and joys shared within the bond. Economic work service provided by the animal (while having market value) might also be services of noneconomic love that in turn would allow the inference of sorrow from its loss. The degree of the defendant's fault in causing the loss might also be relevant in gauging the height of the plaintiff's angst, which is, after all, a grief aggravated by the depth of defendant's offense. In short, solace is needed for the vindication that spurs sadness. The more horrendous the wrongdoer's neglect (albeit short of punitive conduct), the more likely the survivor's distress widens the breach in need of closure. For the same reason, when plaintiff was also at fault, sorrow from self-guilt would be a relevant reduction in the cash award.

In general, relevant evidence to show solace dollars has much to do with the genuine vitality of the bond prior to its loss. While value of that lost companionship is not what is remedied, its strength or weakness is highly probative and persuasive of the measure of grief that flows from it.[38]

The foregoing are some of the factors considered by judges in fixing the admissibility and sufficiency of evidence and re-considered by juries in weighing the credibility of evidence. Those adjudications and deliberations are not tooled by mechanical algorithm in order to standardize. Those fact-intensive decisions are governed by common prudence as to what friendship and sadness mean in life.

The life experience that jurors bring to the courtroom does not need the analytical machinery of a scientific discipline. Citizens are well acquainted with the spectrum of happy to sad, company to loneliness, sharing to taking. They know the difference between a pet and a refrigerator and between a laugh and a sob. Juries have always been given umpire decisions about situational facts that might ask: How much time is too long or too short? How much distance is too far or too close? How much temperature is too hot? How much demeanor is real and how much airs? How much effort is enough? What is reasonable conduct, product, or doubt? What is true? Who is false? What is probable or unlikely? What are fair dollars for lung cancer? For blindness? For disfigurement? For loss of uses and joys? For relief? What makes sense? The time-honored laboratory of judge and jury—of judgment and verdict—is at work here.

When it comes to dollars for damage, some economists might argue that jury assessment ought to be left out of that monetizing. But

[38] If law were trying instead to remedy the value of the pre-existing bond, proof of the surviving plaintiff's grief would be less convincing. It seems more prudent to allow evidence of the depth of a gash to prove the level of pain than to allow evidence of the pain to prove the depth of the gash. All such strained inferences are further indicia of the feckless separation of the two goals (loss versus sorrow).

economics is also predicated on its "juries"—the experience of folk traders (customers and proprietors) in the business of marketing. For pain, suffering, and unhappiness, the trial jury is the marketplace.

Jury solace money, as with any amount of money remedy, is a verdict that must comport with the court's charge.[39] Then, the jury's verdict is subject to trial and appellate court scrutiny for excessiveness. Furthermore, amounts are also limited by plaintiffs' self-imposed ceilings as fixed by their own pleas to judge and jury. A plaintiff importuning for solace or closure would have to be cautious about the appearance of over-reaching. At the same time, however, caution should not deter plaintiffs from testimony and argument showing the pricelessness of the companionship and how far below recompense lie their pleas for amends.

Moreover, legislators may (or may not) choose to enact caps on the amount of solace dollars in pet loss cases. That potential debate will wait another day. But this much can be said: Caps have to be high enough to overcome the drawback of plaintiff's litigation costs. That obstacle could be overcome by allowing an additional recovery for reasonable attorney fees.[40]

As for the amount of money needed to arrive at peace, it could never measure up to the feckless attempts at reaching what was once priceless and irredeemable. Nevertheless, the award should be healthy and not the paltry sums and petty tokens of nominal damages which serve to be no more than a lonely mark of success. Pyrrhic victory is not the motive driving pursuit of pet loss remedy. Nor are true companions moved to seek personal wealth in exchange for the death of a pal. The amount should be meaningful and not an insult to or a trifling with a broken heart. Justice is the goal, relief is its measure, and money is the medicine.

Aside from just a debt owed from one to another, cash for any kind of companion loss also serves as societal respect paid. Animals commonly band together in villages, tribes, flocks, herds, prides, pods, schools, packs, coveys, and many more groupings. The human species is particularly pluralistic. Humans collect and connect in many kinds of internal societies. Within a national realm, bands bond around politics, religions, genders, races, cultures, causes, businesses, labors, sports, and alma maters—where muster, e.g., sects, fraternities, fans, denominations, ghettos, pacts, gangs, alumni, teams, parties, castes, professions, unions, classes, clans, clubs, cloisters, and cliques. And most of all, as individuals, our gregarious needs seek the strongest society of all: company as small as just one for another.

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[39] The judge's charge to the jury should include an instruction to the effect that they are not trying to make the plaintiff whole with dollars, but rather simply trying to comfort with dollars.

[40] *See e.g.* 510 Ill. Comp. Stat. Ann. 70/16.3 (West 2004) (allowing recovery of attorney fees in animal cruelty cases).

So, when the right to such small society, embraced as it is by larger societies, has been wrongfully taken and left with sadness in need of remedy, the mission of civilized mega-society and its law process should not be to ask: How much was that small society worth? Rather, like old friends who gather around, society should ask: How much will it take to show that we care? A societal passion turned to sorrow should be met by the compassion of the realm.

## THE CHORUS

This Essay has focused on a predicament that has puzzled some law smithies and driven others to surrender. But the quandary still stirs. It is a dilemma knotted within "a worth unknown though height taken."[41]

That standoff has enabled the puzzle to survive and to intrigue even though the solution was hidden there in the heart of justice at all times. Discovery is evident once remedy is seen not as return, but rather as relief compelled by a duty to rectify. Solace damages for noneconomic loss have always been at work to relieve severe pain, suffering, and unhappiness.

Indeed, the answers to some locked boxes are obvious yet veiled by obstinance, obstruction, obfuscation, and obliquity. Pandora and the locksmiths were not able to open her box with Hope inside. Yet, from the moment she sought help, trouble ceased. There was no longer any puzzle. Once the question was simplified, the answer was plain. Just as lions roar and eagles soar, so do folks dream.

Q: What was your trouble, Pandora? A: A locked box.

Q: So, what was your wish about the box? A: To open it.

Q: Why open a troubled box? A: To let Hope out.

Q: So to be precise, your question is: how to set Hope free? A: Yes.

Q: Then, why take the box to locksmiths? A: Because I needed help.

Q: How could they help? A: That's what locksmiths are for.

Q: Were you certain they could open the box? A: Not for certain, no.

Q: If you weren't certain, why seek help? A: I thought they would try.

Q: Trying is far from fixing, right? A: It's better than nothing.

Q: But is better than nothing going to work? A: It's worth a chance.

Q: A troubled box? Uncertainty? Trying? Chancing? What made you think all of that was good enough? A: I had hope.

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41 The phrase is the subtitle of this Essay. *See* Shakespeare, *supra* the footnote following this Essay's subtitle, at 58.

And so, they all lived happily ever after, secure in the knowledge that:

An open way does not free hope.

Hope is what frees the way.