2011

The Market Value Rule of Damages and the Death of Irreparable Injury

Patrick Luff

THE MARKET VALUE RULE OF DAMAGES AND THE DEATH OF IRREPARABLE INJURY

PATRICK LUFF*

A fundamental principle of remedies is that the remedy should be sufficient to place the injured party in the position he would have occupied but for the wrong suffered. But law and equity come to very different conclusions about what remedy is sufficient to restore a plaintiff to his status quo ante *when real property, rare property, and property with high sentimental but low market value are involved. Equity treats the loss of these items as irreparable injury, meaning that damages are not adequate to compensate the victim for their loss. But if the real property is seized in eminent domain proceedings, or rare or sentimental personal property is destroyed, the market value of these items is generally deemed at law to provide an adequate measure of the value of the loss, so that giving the plaintiff market value damages constitutes an adequate remedy at law. This demonstrates a fundamental tension between law and equity: Law presumes that the market value is the measure of the damages suffered from the loss, but equity presumes that the damages from this same loss are immeasurable; were it otherwise, damages would be adequate, and equity jurisdiction would not be invoked. This article examines this tension and concludes that the market value rule of damages fails to provide an adequate remedy when real property is seized in eminent domain or when irreplaceable personal property is destroyed through some wrongful act.*

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INTRODUCTION

A basic rule in remedies is that the remedy should return the injured party, as nearly as possible, to the position he occupied prior to his injury. Law and equity consider what is sufficient to return the plaintiff to his *status quo ante* from different angles, but their conclusions are really two sides of the same coin. Equity will come into play only when the normal remedy at law—damages—is insufficient to restore the plaintiff to his rightful position.[1] In this situation, the plaintiff is said to have an inadequate remedy at law, with the result that forcing him to pursue a damage remedy will constitute irreparable injury. Equity presumes that damages are never adequate in the case of real property, so that whenever an individual is deprived of real property, he has suffered irreparable injury, and damages are never adequate to restore his *status quo ante*. But in the case of eminent domain, courts take a very different view; they presume that the market value of the property seized is sufficient to satisfy the constitutional requirement that a condemnee receive just compensation when his property is taken for public use.

On the other hand, both law and equity presume that the normal remedy for personal property wrongfully taken by another is return of the property.[2] When the property has been destroyed, of course, damages are the only remedy available; destroyed property cannot be returned. But when the property has been destroyed, law only grants the injured party the market value of his loss. The problem with personal property remedies is thus a recognition that personal property is somehow unique—hence the need for its return, rather than its mere replacement—coupled with a disinclination to take account of this uniqueness when the only available remedy is damages. With respect to both real and personal property, then, law and equity come to very different conclusions about what remedy is sufficient to restore the plaintiff to the position he occupied prior to his loss.

Part I of this article discusses the main cases establishing the rules of compensatory damages and law, their rejection at equity, and the tension inherent in the way law and equity view the sufficiency of compensation for loss. Equity presumes that for lost property, only return of the property is adequate to restore the injured party to his *status quo ante*, where law presumes that the injured party is entitled only to the market value of the property seized or destroyed.

Part II of this article then examines attempts by the courts to resolve this tension. Courts in eminent domain proceedings adhere to the general principle that market value damages are adequate to provide plaintiffs with just compensation for their losses. Similarly, courts hearing claims for losses of personal property grant market

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[1] The rightful position may be the *status quo ante*, as when my property is wrongfully taken by another, but it may also be something else. A defendant might interfere with the plaintiff's ongoing efforts to improve his position, in which case lost profits (or lost wages) are elements of damage that plaintiff would have earned, but for the wrong, but which he never had before. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 16 (3d ed. 2002); *see also* DAN DOBBS, LAW OF REMEDIES § 6.6 (2d ed. 1993) (discussing interference with contracts and other opportunities). My thanks to Douglas Laycock for pointing this out to me.

[2] *E.g.*, Pardee v. Camden Lumber Co., 73 S.E. 82, 84 (W. Va. 1911) ("If personal property possesses a value peculiar to its owner . . . equity will vindicate and uphold the right to the possession thereof and immunity from injury, by the exercise of its extraordinary powers. . . . [H]owever trivial its value or character may be."). At law, a plaintiff would have sought a writ of replevin for personal property that was taken but was recoverable. DOBBS, *supra* note 1, §§ 4.2(2), 5.17(2).

value damages, although the case law does show some attempt to grant the injured parties some compensation for the subjective value of their losses, either by recognizing the use value of the items lost—a value that is not reflected in the market value of the items—or by granting some additional damages based on the conclusion that certain items are universally recognized to have some intrinsic sentimental value.

Finally, Part III discusses some proposed solutions to the tension between law and equity in cases involving real property and personal property for which there is not a vigorous market. This article concludes that, in eminent domain cases, courts should provide compensatory damages, and place the risk of overcompensation on the condemnor. Likewise, with respect to property with high subjective but low market value, courts should award damages that take account of the loss of subjective value that individuals lose when their property is wrongfully lost or destroyed.

I. LAW AND EQUITY IN TENSION

This Part examines two conceptions of the rightful position. Law presumes that damages equivalent to the market value of the thing lost through some act of a defendant—either the act of the government seizing property for public use, or the wrongful act of an individual in losing or destroying property—are sufficient to restore a plaintiff to his rightful position. On the other hand, equity treats such injuries as irreparable, with the result that market value damages would be inadequate to restore the plaintiff to his rightful position.[3]

A. Irreparable Injury in Damages

A damage award should be sufficient to place the injured party in the position he would have occupied but for the wrong—his rightful position.[4] Based on this principle, the justness of the compensation can be measured in turn by whether or not the remedy returns the plaintiff to his rightful position.

In *United States v. Fifty Acres of Land*,[5] the Supreme Court expounded on this concept of just compensation.[6] The central issue in *Fifty Acres of Land* was "whether a public condemnee is entitled to compensation measured by the cost of

[3] As we will see, the situation becomes more difficult when the property is destroyed, so that the plaintiff could not simply seek specific performance in equity.

[4] Wicker v. Hoppock, 73 U.S. 94, 99 (1867) ("The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. . . . The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed."); United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958) ("The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party.") (citing Hill v. Varner, 290 P.2d 448, 449 (Utah 1955)); Park v. Moorman Mfg. Co., 241 P.2d 914, 920 (Utah 1952)); *see also* DOBBS, *supra* note 1, § 1.1, at 3 ("The damages remedy is a money remedy aimed at making good the plaintiff's loss."); LAYCOCK, *supra* note 1, at 15 ("*Hatahley*'s rule . . . is the essence of compensatory damages.").

[5] United States v. Fifty Acres of Land, 469 U.S. 24 (1984).

[6] Just compensation is guaranteed by the Constitution when the government takes private property for public use. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also Fifty Acres of Land*, 469 U.S. at 25-26.

acquiring a substitute facility if [the condemnor] has a duty to replace the condemned facility."[7] In other words, the court had a choice between two separate measures of damages. The court could have chosen to grant damages equal to the market value of the property seized, or it could have granted damages equal to the amount the plaintiff would have had to pay to purchase a facility that would allow it to do the same things for which it had used the condemned property—the replacement cost.

The Court held that condemnees are not entitled to the replacement value of their lost property when the market value of the property can be ascertained.[8] Citing *Olson v. United States*,[9] the Court noted that "the market value of the property at the time of the taking" is the normal measure of just compensation. Although the Court recognized that "[d]eviation from this measure of just compensation has been required . . . 'when market value has been too difficult to find,'"[10] that was not the case in *Fifty Acres of Land* because testimony indicated that there was a healthy market for the type of property at issue in the case.[11] Most important to the Court's decision was its reliance on *Lutheran Synod*,[12] where the Court had refused to take account of the use value of the property to the injured plaintiff—the value that a particular plaintiff realizes from enjoying the property, which would not be reflected in the market value of the property.[13]

Also important to the Court's decision in *Fifty Acres of Land* was its refusal to allow the plaintiff consequential damages for its loss.[14] This means that if the plaintiff proceeds to buy another property because he still has a need for the type of property that has been seized, he will be forced to shoulder any costs that normally inhere in the finding and acquisition of property—taxes, insurance and closing costs, and the man-hours lost in searching for a suitable replacement property. Moreover, there may not be any property in the area that is suitable for the plaintiff's use, or at least not any at a similar price. If the plaintiff receives $200,000, but the only property that will serve the function of the previous property costs $700,000, the

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[7] *Fifty Acres of Land*, 469 U.S. at 26.

[8] *Id*.

[9] Olson v. United States, 292 U.S. 246 (1934).

[10] *Fifty Acres of Land*, 469 U.S. at 29; *see also* United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950) ("[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. . . . Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"). The Court explained that this exception applies when the property in question was of a type that is rarely sold on the open market. *Fifty Acres of Land*, 469 U.S. at 30.

[11] *Fifty Acres of Land*, 469 U.S. at 30.

[12] United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (citing *Lutheran Synod*).

[13] *Id.* at 516.

[14] *Fifty Acres of Land*, 469 U.S. at 33 (citing United States v. General Motors Corp., 323 U.S. 373, 382 (1945); JACQUES B . GELIN & DAVID W. MILLER, FEDERAL LAW OF EMINENT DOMAIN § 2.4(B) (1982)).

plaintiff will have to suffer the additional cost of buying the property ($500,000 in this case) if he wishes to recapture the use of the previous property.

For the significance of *Fifty Acres of Land*, consider a flat piece of land that lacks improvements, which could be put to many purposes. Additionally, imagine that the area where the land is situated is always windy and sits atop a mineral seam. This property could be use for agriculture, as a wind farm, or left unimproved and mined for the mineral deposits it contains. The owner would achieve different use values based on how the property was used. Consider further that the property has actually been used for wheat farming for the last eighty years and has been passed down through successive generations of one family. A company interested in using the property as a wind farm or a mine may arrive on the doorstep one day and offer a certain sum—the market value for a particular use—which the owner might reject based on his sentimental attachment to the property. If that is the case, then the market value clearly would not to reflect the true value of the property, at least through the eyes of the current owner; if it did, the owner would sell. But if the property were seized in eminent domain proceedings, the owner would only be entitled to the market value of the property.

As a result, our hypothetical property can be described as having several types of value. Naturally, there is the monetary value that is reflected in the market value for the property, which presumably would be based on its most valuable use. But to the farmer, the value is different. The property has value based on the use to which the farmer can put it; if he has always been a farmer, and holds no other skills, he may value the property more than what the market would offer because he is not interested in moving his family and his equipment, or because he believes that he would be unable to find a similar piece of property for the price being offered. Moreover, he may also attach sentimental value to the fact that several generations of his family have farmed the property, the fact that he likes his neighbors, or the way that the sunset looks as he gazes over his fields. These varying types of value will be considered in greater detail in Part III.

B. Irreparable Injury in Equity

In contrast to the law's presumption that market value constitutes sufficient damages to place the injured party in their rightful position when real property is taken, equity presumes the opposite: damages are inadequate to make the injured party whole, so that forcing a plaintiff to seek damages at law would constitute irreparable injury. As a result, equity will generally grant plaintiffs whose property rights are interfered with either an injunction if the property is threatened, or specific performance if the property has already been taken.

Pardee v. Camden Lumber Co.[15] involved an injunction to prevent the defendant from cutting timber on a piece of land.[16] Title to the land was in dispute, and the defendant in the action was planning to cut the timber before the title dispute had been resolved.[17] Ultimately, the court ruled that the defendant was properly enjoined, because if the timber was cut, and the plaintiff ultimately prevailed in the

[15] Pardee v. Camden Lumber Co., 73 S.E. 82 (W. Va. 1911).

[16] *Id.* at 83.

[17] *Id.*

title dispute, the plaintiff would be irreparably injured if the timber were no longer on the land.[18]

First, essential to understanding *Pardee* is an understanding of the irreparable injury rule and the law of injunctions. A court will award an injunction (either preliminary or permanent) only in order to prevent irreparable injury.[19] And irreparable injury will occur only if the plaintiff seeking the injunction lacks an adequate remedy at law.[20] Thus, in order for a plaintiff to obtain an injunction, he must show that the injunction will prevent some loss that cannot be later remedied with a damage award in a court of law. Therefore, for the court in *Pardee* to conclude that an injunction was proper, it first had to decide that damages would not be sufficient to remedy the cutting of the timber on the property. While the court recognized that damages are adequate "in all those instances in which the property [that] is injured or destroyed may be substantially replaced with the money recovered as its value,"[21] the court concluded that because no two pieces of land are alike, equity should always grant injunctions to prevent irreparable injury to real property, because damages will never restore land to the position it was in before the damage.[22] Likewise, because all land is unique, damages will never suffice to purchase a substitute property. In other words, loss of real property through the wrongful act of another can *never* be remedied through damages.[23]

From this recognition that all land is unique, the court concluded that "[b]eing a part of the land itself, [timber] has no legal equivalent in nature or value, for no two pieces of land are alike in all respects, nor is a piece of land, stripped of its timber, with a right of action for the felled timber or for damages, the equivalent of the same land with the timber on it."[24] As a result, the court concluded that cutting the timber would constitute irreparable injury, and the injunction was therefore appropriate.[25]

Cases involving personal property have likewise held that market value damages are an inadequate remedy. In a case involving, of all things, a very special type of carrot, the court granted specific performance on a delivery of carrots.[26] Campbell Soup had purchased a type of carrot with an orange core. Using this type of carrot ensures that the carrots in Campbell's soups were always little orange cubes.[27] The contract price at the time of delivery was $30 per ton, but the market price at the time of delivery had risen to $90 per ton, so the seller repudiated the contract and

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[18] *Id.* at 85.

[19] *E.g.*, Humble Oil & Ref. Co. v. Harang, 262 F. Supp. 39, 42 (E.D. La. 1966).

[20] *See id.*

[21] *Pardee*, 73 S.E. at 84.

[22] *Id.*

[23] *But see* Van Wagner Adver. Corp. v. S & M Enters., 492 N.E.2d 756, 757 (N.Y. 1986) (holding that "[s]pecific performance of a contract to lease 'unique' billboard space is properly denied when damages are an adequate remedy to compensate the tenant and equitable relief would impose a disproportionate burden on the defaulting landlord").

[24] *Pardee*, 73 S.E. at 84.

[25] *Id.* at 86.

[26] Campbell Soup v. Wentz, 172 F.2d 80 (3d Cir. 1948).

[27] *Id.* at 82.

sold the carrots at the higher price to a third party.[28] At the time, it was "virtually impossible to obtain [the rare carrots] in the open market,"[29] and therefore the court held that this situation was appropriate for equitable relief.[30]

There were several possible outcomes to this case. The court could have allowed Campbell to cover—purchase the carrots for whatever price whoever currently owned the carrots wanted for them—and allowed them to recover damages equal to the amount it had to expend to get the carrots.[31] Had Campbell done so, however, it would then have faced the task of justifying the expenses it incurred in covering in court when it sought damages for the breach, as well as the risk that the court hearing the case would have found its costs excessive. Or the court could have taken on the more onerous task of attempting to calculate the amount of damages Campbell would suffer in lost sales from using a different type of carrot, presumably based on the amount of sales that using two-tone carrots would cost. Both of these possibilities suggest a remedy that would be incredibly onerous either on Campbell or the courts. In these cases, finding a correct amount of damages would be practically impossible, if not actually so. Thus, damages may be inadequate not just in cases involving real property. Where damages are very difficult to determine, equity courts will likewise issue injunctions to prevent what amounts in practice to an irreparable injury.[32]

C. The Conflict

By framing the issue in *Fifty Acres of Land* as whether just compensation requires the government to provide condemnees with the replacement value of their property,[33] the Court highlighted the problem that is central to this article. The Court could have awarded the plaintiff monetary damages equal to the cost the city would have incurred in finding and acquiring an equivalent piece of property. Such an award would have included not just the market value of the property, but also compensatory damages that would include the cost of searching for and purchasing an equivalent piece of land. Instead, it chose to award simply the market value of the property itself.[34] But by doing so, it cannot be said to have restored the plaintiff, *as nearly as possible*, to the position it occupied before the condemnation of the

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[28] *Id.* at 81.

[29] *Id.* at 81, 82.

[30] In the actual case, the court ultimately denied relief on other grounds. *Id.* at 83.

[31] This conclusion comes from economic theory, which would argue that cover is never really impossible. LAYCOCK, *supra* note 1, at 387.

[32] *See also* Continental Airlines, Inc. v. Intra Brokers, Inc., 24 F.3d 1099, 1105 (9th Cir. 1994) (concluding that "difficulty of establishing economic harm . . . and possible immeasurability or unascertainability or harm" did not prevent the need for equitable relief); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 362 (1978) ("In asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee.").

[33] United States v. Fifty Acres of Land, 469 U.S. 24, 25-26 (1984).

[34] *See supra* notes 5–14 and accompanying text.

land. If the city were inclined to replace the condemned property, it would have to incur the costs associated with finding and buying property—costs it would not have had if it were allowed to keep the original property. Thus, if we take the concept of rightful position seriously, the market value rule of damages alone never provides just compensation, because it does not restore the injured party, as nearly as possible (or even as nearly as practically possible), to the position it occupied before the loss.

If we take the equity view of the loss of real property, of course, no amount of damages will be adequate compensation, hence equity's conclusion that a loss of real property constitutes irreparable injury. If damages were adequate to restore the plaintiff's *status quo ante*, then the plaintiff would have an adequate remedy at law, and thus no irreparable injury. Of course, the government has constitutional authority to take property for private use,[35] so the normal rule of equity cannot apply. But the question this article poses is whether the market value rule of damages in fact provides condemnees with just compensation for their losses.

Just compensation in law also comes into conflict with equity in two situations involving loss of personal property: (1) those where the item is one of a kind—a rare piece of art or jewelry, for example; and (2) those where the item has low or zero market value, but has high value to the owner of the property—such as photographs and family heirlooms. In both situations, the problem is that there is not an active market for the thing lost,[36] but the court cannot avoid the difficult task of measuring damages by simply ordering the items to be returned. In the former case, a court faced with this difficulty could set damages based on the appraised value of the item, or failing that, the testimony of experts as to the price such an item might receive at auction if it were to be sold. In the latter case, however, such evidence will be unavailing, and courts find themselves deciding between market value (the cost of printing the photographs that were later lost or destroyed) and some measure of value that takes into account the sentimental value the owners attached to their lost items.

At this point, it is clear that there are several types of value: the value that a piece of property can obtain on an open and active market—the objective value; the value that a particular holder of property realizes by using the property—the use value; and the sentimental value that the owner attaches to the property. The remainder of this article will discuss courts' and scholars' attempts to resolve the tension between these concepts of value in achieving just compensation for injured plaintiffs.

II. COURTS' ATTEMPTS TO SOLVE THE PROBLEM

With respect to real property, courts have ignored the equity view and granted only the market value of the property lost. The exception has come when the property is special for some reason, either because the property has been put to some special use, or because the property is unique in a way different from equity's normal presumption that *all* land is unique. With respect to personal property,

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[35] *See* U.S. CONST. amend. V.

[36] I say "the thing lost" because, as we will see in Part II, courts sometimes award the market value of property lost or destroyed, but without taking account of special circumstances that increase the value of the property for the owner. Thus, we see courts awarding the cost of developing photographs based on its normal market value, but ignore the fact that the value of the photographs comes not from the paper on which it is printed, but the scenes they depict.

however, courts have been more willing to consider measures of damages other than the market value of the things lost.

A. Real Property

The normal rule that market value damages are sufficient compensation for loss of real property has been held not to apply in cases where market value is too difficult to find, or when the application of the general rule would result in manifest injustice to the owner or the public.[37]

First, for special purpose property—a church, for example—there generally is not an active market from which the market value, or its diminution, can be determined. In these cases, courts have struggled with the proper measure of damages when the property is damaged or destroyed. In *Trinity Church v. John Hancock Mutual Life Insurance Co.*,[38] for example, the court concluded that the diminution of value of a church that had been damaged during the construction of another building in the area could not be ascertained using the normal, market value rule of damages.[39] The court noted two instances in which replacement or restoration costs had been granted: (1) cases involving special use property, in which the cost of restoration, minus the depreciation that was necessarily fixed as a result of the restoration;[40] and (2) "contexts where diminution in market value is unavailable or unsatisfactory as a measure of damages," where the cost of restoration is likewise used as the measure of damages.[41] The court in *Trinity Church* made clear, however, that when courts deviate from the market value rule of damages, the cost of replacement or reconstruction must be reasonable in light of the damages inflicted.[42]

Similarly, courts have recognized that a person conducting business in a unique location suffers a unique loss that cannot be remedied with mere market value damages.[43] What follows from a finding of uniqueness in these circumstances is the conclusion that the plaintiff is entitled to compensatory damages for the lost business

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[37] The "manifest injustice" exception seems to be a safety valve for equity courts to do equity when the need arises. *Fifty-Acres of Land*, 469 U.S. at 29 (citing United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).

[38] Trinity Church v. John Hancock Mut. Life Ins. Co., 502 N.E.2d 532 (Mass. 1987).

[39] *Id.* at 533.

[40] *Id.* at 536 (citing Foxboro Assocs. v. Assessors of Foxborough, 433 N.E.2d 890 (1982) (using reproduction cost less depreciation to assess the value of a raceway); Roman Catholic Archbishop of Boston v. Commonwealth, 306 N.E.2d 254 (1974) (analyzing the eminent domain taking of a church); Commonwealth v. Mass. Tpk. Auth., 224 N.E.2d 186 (1967) (analyzing the eminent domain taking of armory); Newton Girl Scout Council, Inc. v. Mass. Tpk. Auth., 138 N.E.2d 769 (1956) (analyzing the eminent domain taking of Girl Scout camp)).

[41] *Id.* (citing cases where the damages were to real property).

[42] *Id.* ("In some cases, 'to make such a restoration would be an uneconomical and improper way of using the property' and 'might involve a very large and disproportionate expense to relieve from the consequences of a slight injury.'") (citing Hopkins v. Am. Pneumatic Serv. Co., 80 N.E. 624, 624 (Mass. 1907)).

[43] *See, e.g.*, Taylor v. Jones Cnty., 422 S.E.2d 890, 892 (Ga. Ct. App. 1992); Heilman v. Dep't of Transp., 290 S.E.2d 189 (Ga. Ct. App. 1982).

separate from the market value of the property.[44] Still, these cases make clear that the unique value of the property flows from the nature of the land and the owner's use of it, rather than the sentimental value that the owner attaches to the land.[45]

B. Personal Property

Currently, the courts have three ways of compensating for the loss or destruction of personal property. They may award the fair market value, a situation we have already seen in the real property context; they may award the value of the property to the owner—"the actual loss in money [the property owner] has sustained by being deprived of articles which are especially adapted to the use of the individual";[46] or they may award damages that take some account of the sentimental value of the property, but which are limited by the rule of reasonableness.

An example of the award of market value damages comes from *Richardson v. Fairbanks North Star Borough*,[47] where the plaintiffs sought damages for a pet that was wrongfully euthanized by a city animal shelter. The court in *Richardson* noted that "[s]ince dogs have legal status as items of personal property, courts generally limit the damage award in cases in which a dog has been wrongfully killed to the animal's market value at the time of death."[48] Therefore, the court denied the plaintiff's claim for damages based on the sentimental value of the animal.

But when one's pet is euthanized, the market value of the pet is not always the exclusive damages remedy. In another case, a neighborhood dog injured the plaintiff's pet.[49] The market value of the animal was $500, but the cost of treating the animal's injuries was $2500.[50] In this case, the court granted the latter of the two; because most animals are kept for companionship, the value of the animal comes from its use, not its ability to be traded on an active market.[51] The court decided to award the repair value of the property, even though it was five times the market value, because doing so was necessary to return the plaintiff to her *status quo ante*.[52]

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[44] *Taylor*, 422 S.E.2d at 892.

[45] *Id.* at 892-93.

[46] Crisp v. Sec. Nat'l Ins. Co., 369 S.W.2d 326, 329 (Tex. 1963); *see also* Garcia v. Color Tile Distrib. Co., 408 P.2d 145, 149 (N.M. 1965); Winters v. Charles Anthony, Inc., 586 P.2d 453, 454 (Utah 1978); McCurdy v. Union Pac. R.R. Co., 413 P.2d 617, 623 (Wash. 1966); Broyles v. Broyles, 711 P.2d 1119, 1124 (Wyo. 1985).

[47] Richardson v. Fairbanks N. Star Borough, 705 P.2d 454 (Alaska 1985); *see also* State v. Stanley, 506 P.2d 1284 (Alaska 1973) (awarding only market value damages for the loss of personal items on a crab vessel that sank while in the state's custody).

[48] *Richardson*, 705 P.2d at 456 (citing Green v. Leckington, 236 P.2d 335, 337 (Or. 1951)).

[49] Hyland v. Borras, 719 A.2d 662 (N.J. Super. Ct. App. Div. 1998).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 663. *But see supra* note 47 and accompanying text.

McAnarney v. Newark Fire Ins. Co.[53] states the general rule for the second type of case:

> The law of damages distinguishes between marketable chattels possessed for purposes of sale and chattels possessed for the comfort and well-being of their owner. In the instance of the former it judges their value by the market price. In the instance of the latter it measures their loss, not by their value in a second-hand market, but by the value of their use to the owner who suffers from their deprivation.[54]

Cases using the second measure of damages generally deal with clothing and home furnishings.[55] There is a large second-hand market for clothing and furnishings, but the problem is that individuals will not view their own used clothing as equivalent to second-hand clothes that they might buy on the open market. Courts usually agree that plaintiffs in such suits are entitled to the actual economic value of the lost property—an amount more than the market value of the items—because rather than buying second-hand replacements, the plaintiffs are essentially forced to buy new clothes as replacements. Nevertheless, the courts reject claims for extra damages arising out of sentimental attachments to the property.

A case demonstrating the third measure of damages is *Campins v. Capels*,[56] where the court held that sentimental value was a consideration in determining the value of property that was not bought or sold on an open market because the property was coveted awards for personal achievement.[57] At issue were three national racing championship rings, which had been stolen and melted down at a jeweler's. First, the court made clear that the injured party was entitled to his actual monetary loss, but not " '*any fanciful or sentimental values which he might place on them*,' "[58] which in normal circumstances would be measured by the market value of the item.[59] But because the rings were not ordinary jewelry that was available on an open market, the court concluded that the rings had no market value.[60] Thus, the question the court faced was how to "find jewelry's actual value to its owner when it has a high value for its intrinsic content but also has a primary function and a consequently raised value based on pure sentimentality."[61]

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[53] McAnarney v. Newark Fire Ins. Co., 159 N.E. 902 (N.Y. 1928).

[54] *Id.* at 905.

[55] *See, e.g.*, White Consol. Indus., Inc. v. Swiney, 376 S.E.2d 283 (Va. 1989); Cannon v. Northside Transfer Co., 427 N.E.2d 712 (Ind. Ct. App. 1981); Shaffer v. Honeywell, Inc., 249 N.W.2d 251 (S.D. 1976); Spackman v. Ralph M. Parsons Co., 414 P.2d 918 (Mont. 1966); Cecil v. Headley, 373 S.W.2d 136 (Ark. 1963); Clift v. Fulton Fire Ins. Co., 315 S.W.2d 9 (Tenn. Ct. App. 1958).

[56] Campins v. Capels, 461 N.E.2d 712 (Ill. App. Ct. 1984).

[57] *Id.* at 720–22.

[58] *Id.* at 720 (quoting Anchor Stove & Furniture Co. v. Blackwood, 35 N.E.2d 117, 119 (Ill. App. Ct. 1941)) (emphasis original).

[59] *Id.* at 719.

[60] *Id.* at 720

[61] *Id.*

First, the court recognized that market value would be an inadequate measure of damages if the property lost had qualities that could be appreciated only by the owner.[62] But the court made clear that this sentimental value was not a "mawkishly emotional or unreasonable attachment to personal property," but rather "the feelings generated by items of almost purely sentimental value, such as heirlooms, family papers and photographs, handicrafts, and trophies,"[63] with the proviso that these sorts of items are those which would engender sentimental feelings in *any* owner.[64] As a result, rather than granting the plaintiff the wholesale value of the gold, the retail value of the gold, or the replacement cost of the rings, the court upheld a grant of an award substantially larger than any of these figures.[65] Still, the court made clear that any such sentimental value awarded must be reasonable.[66]

Another case, *Bond v. A.H. Belo Corp.*,[67] concerned a collection of photographs and newspaper clippings that the plaintiff had accumulated over her lifetime and were subsequently lost by a newspaper reporter.[68] Claiming that it was "a matter of common knowledge that items such as these generally have no market value which would adequately compensate their owner for their loss or destruction,"[69] the court concluded that the plaintiff had been injured at an amount larger than the actual value of the items that she lost.[70]

Thus, courts seem to have developed three approaches to personal property cases. Courts will sometimes simply use the market value of the lost items. In cases where the use value of the items exceeds the market value, courts will often compensate individuals based on the use value. Finally, in cases where items are generally accepted to have some sentimental value, courts may award extra damages in recognition of the loss. But in all situations, courts are restrained by a rule of reasonableness, so that even where items are recognized to have special, sentimental value to the owner, courts will not award special damages akin to those granted in emotional distress tort cases. Nevertheless, the courts seem to have accepted that there is something unique about certain types of personal property, and they have attempted to quantify that uniqueness through a measure of damages that goes beyond mere market value.

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[62] *Id.* (quoting United States v. Maryland, 322 F.2d 1009 (D.C. Cir. 1963), *rev'd on other grounds* 382 U.S. 158) (1965).

[63] *Id.* at 721 (internal citations omitted).

[64] *Id.*

[65] *Id.* at 722.

[66] *Id.* ("[E]ven for significant awards or mementos we do not intend to permit fanciful speculation as to their worth.").

[67] Bond v. A.H. Belo Corp., 602 S.W.2d 105 (Tex. Civ. App. 1980).

[68] *Id.* at 106.

[69] *Id.* at 109.

[70] *Id.* at 110. Curiously, the court cited the general rule against damages based on sentimental value in discussing a case dealing with heirlooms, arguing that heirlooms do not have their primary value in sentiment. *Id.* at 109.

III. PROPOSED SOLUTIONS

This Part considers solutions to the problem of valuing property seized in eminent domain, or wrongfully destroyed by the act of some party. One proposal is that the proper measure of damages is one that will allow the injured party to purchase substitute property that will serve a function substantially similar to that of the property lost. Another possibility is to increase the compensatory damages that inhere in the seizure of property taken in eminent domain proceedings. This article concludes that the proper measure of damages depends on the nature of the property. For real property, plaintiffs should be given damages that will allow them to purchase a property with a function equivalent to the property lost, even if the new property is more expensive. Additionally, courts should award compensatory damages for the costs of acquiring the new property. And with respect to both real and personal property, courts should take account of the sentimental value of the property lost and include that value in the final damages award.

A. Restore the Function of the Res

It has been suggested that the appropriate way to compensate parties who lose their property should be to grant damages sufficient to restore the function of the thing lost.[71] Imagine someone who owns an old car. It may look terrible, but it runs perfectly. But suppose that owner wanted to sell his car. We would expect him to achieve less than the car's full value, because the prospective purchaser would force the seller to decrease the cost of the car as a sort of insurance against the seller's protestations that the car is in perfect shape, even if it's not much to look at.[72] Therefore, we would conclude that the market in used, but functioning, cars is depressed—their market value fails to reflect their actual value. But what if instead of selling his old car, the owner gets in an accident, and the car is no longer drivable? The insurance adjustor would come and give the owner an estimate based on the market value of the car. Since the market in used cars is depressed, the owner would receive something less than the true value of the car. The result, assuming the owner still needed a car, would be that he would then go on the used-car market and look for replacement.

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[71] James E. Beard, Comment, *A Tale of Boats, Bridges, Barges, and Automobiles: Restoring the Injured Party's Rightful Position in Cases Involving Loss of Used Property*, 76 OR. L. REV. 1049, 1058–71 (1997). Beard characterizes the problem as a collision of two fundamental principles of remedies: the rightful position rule and the rule that the wrongdoer is entitled to make the plaintiff whole in the least expensive way. *Id.* at 1050. But in stating the problem in this way, Beard has missed something important. The latter rule should only come into play when the remedy is the same from the perspective of the injured party. Thus, if the defendant repudiates his contract with me, and the choice is between him ultimately fulfilling his contract (which costs less), or having me cover (which costs more) and then seeking damages for the difference between the contract and the cover price, the defendant can choose the less expensive remedy if he so chooses. But Beard's characterization of the rightful position rule with respect to unique property as being in conflict with the cheapest remedy rule presumes that the market value rule and, say, rules that grant the injured party sentimental or use value place the injured party equally close to his *status quo ante*. For why this is untrue, *see supra* Part I.C.

[72] *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

At this point, one might object: "Well, if he's going on the used-car market, he'll get an equivalent car. Even though the market value of his car didn't reflect the true value of the car, the same will be true of other cars on the market." But this argument would be misguided. The used-car market is depressed because individuals who are buying fear that they will buy a lemon, so the market price is decreased as insurance against that possibility. But the seller will know better than the buyer whether the car is a lemon or not. Thus, when the owner in our example goes to purchase another car, he will be replacing a car that he knows runs well with one he is uncertain about, even though the market price of the two cars is identical.

As a result, a market value damage award places the risk of buying a nonequivalent product on the innocent party. A damages award designed to restore the function of the thing lost would take account of this problem and give the injured party the true value of his car. Taken a step further, this remedy would award compensatory damages for the cost of finding and purchasing the car. Of course, if we were merely interested in restoring the function of the *res* in the sense of a device that allows one to travel from point A to point B, any car that runs would restore the function of a totaled car. But clearly that formulation of the use of a car is incorrect; we would reject the suggestion that a straight-off-the-lot Mercedes is the same as my old junker. So if we embrace a rule of damages that restores to the plaintiff the function of his lost property in the car context, what we really mean is that we want an award that will allow the owner to achieve a similar function in terms of reliability, features, and so forth.

A similar analysis would obtain in the case of real property. If my property is seized in eminent domain proceedings, and I am merely provided with the market value of the property, I may lose significant functionality by having to select a different home. People select homes for a myriad of factors—proximity to schools, proximity to places of business, character and reputation of the neighborhood, crime statistics, and the like. Moreover, I may attach sentimental value to my home because it was the home my grandfather built with his bare hands and in which I grew up.[73] A correct damage award would provide me with the funds to secure a home with similar attributes as the one I left, both in terms of size, acreage of the lot, proximity to schools and work, et cetera. Certainly, this will involve difficult fact-finding by the courts, but no more so than many other calculations courts often have to make.

B. Increase Compensatory Damages

The situation becomes more difficult in the case of personal property that has low or nonexistent market value, but high personal value. In these situations, courts should attempt to measure the subjective value of the loss, even though such a calculus would be difficult. Tort law, for example, allows individuals to recover damages for pain and suffering, despite the difficulty of placing a monetary amount on such a concept.[74] Surely, courts should not go so far as to award staggering amounts just because no amount of money could return a photograph of one's deceased relative, or because the owner would not have sold the property for any amount. But courts should nevertheless take some account of the subjective loss

[73] Both literature and law are naturally replete with exhortations to the special quality of one's home.

[74] *See* DOBBS, *supra* note 1, § 8.1(4).

individuals feel when they are deprived of sentimental items through no fault of their own.

Of course, in appraising the subjective value of the lost property, courts would run the risk of overcompensating plaintiffs. The court could do one of two things: either attempt to do no more than achieve the plaintiff's rightful position, with the risk that he will go undercompensated, or attempt to do no less, which creates a risk of overcompensation. If courts choose the former, the result is troubling because it places the risk on the innocent party. Viewed another way, the court's decision is whether to place the risk of overcompensation on the wrongful party, or the risk of windfall on the injured party. I suggest that, because the party creating the injury is in the best position to protect against the loss, he should bear the risk of granting the injured party a windfall.[75]

C. The Proper Measure of Damages

Ultimately, this article's proposal is very modest. I merely recommend that, when awarding damages, courts should follow the fundamental rule that damages should return the injured party, *as nearly as possible*, to his *status quo ante*. The mistake the market value rule of damages makes is that it considers the party's status before and after the injury in purely monetary terms. As we have seen, the value I achieve from the use I derive from a piece of property, a family heirloom, or an old car is different from the value that I can get for that thing on an active market. The law should view the plaintiff's rightful position as the use and enjoyment he gets out of a particular thing, rather than on the monetary value of that thing.

Even if we measure the plaintiff's positions before and after the injury purely in terms of monetary value, the market value rule of damages still fails to restore the plaintiff to his *status quo ante* because it denies him consequential damages for his loss. Assuming that the individual decides to buy another home after his previous one is seized in eminent domain proceedings, he will incur the cost of finding, negotiating, and closing on the property. But the market value rule of damages refuses to award these costs as consequential damages. So even if the plaintiff's position is viewed purely in monetary terms, he will receive the market value of his home, minus whatever costs he expends in finding a new home. Instead of being placed in his monetary *status quo ante*, he will be in his monetary *status quo ante* minus whatever costs he sustains in finding his new property. Clearly, the market value rule of damages fails to restore the plaintiff as nearly as possible to the position he occupied prior to his loss, because adding consequential damages to his award would place him closer to his *status quo ante* than an award that fails to include them.

CONCLUSION

Where real property is taken in eminent domain proceedings, or where invaluable property is lost or destroyed through the wrongful act of another, plaintiffs cannot avail themselves of the equity rule, which entitles them to the return of their property. Courts should therefore go further in granting damages so that plaintiffs will be returned as much as possible to the position they occupied before their losses.

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[75] *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.").

In eminent domain proceedings, courts should award damages sufficient to allow the plaintiff to purchase a piece of land that will approximate the use to which they had put their seized property, and grant consequential damages for the costs of purchasing that property, even if it creates the risk of a windfall for the plaintiff. In cases of personal property, courts should follow tort law's example and grant damages that attempt to reflect, albeit imperfectly, the sentimental damages that plaintiffs suffer when they lose their ability to enjoy their property through the wrongful act of another.

To do otherwise is to fall short of the basic rule's demand that a remedy should restore the injured party, as closely as possible, to his *status quo ante*.