

1984

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Recommended Citation

Frederick Z. Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 Fordham L. Rev. 611 (1984).

Available at: <https://ir.lawnet.fordham.edu/flr/vol52/iss4/7>

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DAMAGES UNDER THE PRIVACY ACT OF 1974: COMPENSATION AND DETERRENCE

INTRODUCTION

The right to privacy is crucial to the existence of any free society.¹ The Privacy Act of 1974 (Privacy Act or Act)² was enacted to preserve this right³ and to protect citizens from the growing number of invasions of privacy perpetrated by government agencies through the use of increasingly sophisticated information-gathering technology.⁴ The major goals of the Act are to compensate the victims of these invasions⁵ and to deter such illegal conduct in the future.⁶ The Act is

1. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting), *overruled*, *Katz v. United States*, 389 U.S. 347, 352-53 (1967); *Boyd v. United States*, 116 U.S. 616, 630 (1886). When debating the Privacy Act, Congress emphasized that "uncontrolled Government snooping is a dangerous assault on our constitutional liberties [, which] are the cornerstone of our democratic system. . . . A society cannot remain free and tolerate a Government which can invade an individual's privacy at will." 120 Cong. Rec. 36,901 (1974) (remarks of Sen. Nelson); see *id.* at 36,896 (remarks of Sen. Muskie) ("The privacy of our citizens has been a fundamental concern since the founding of our Republic."); *id.* at 36,648 (remarks of Rep. Alexander) ("[Privacy] is not only the bedrock of freedom[, it] is the very essence of democracy."); *id.* at 12,646 (Introductory Remarks of Senator Sam J. Ervin, Jr. on S. 3418) ("It seems that now, as never before, the appetite of government and private organizations for information about individuals threatens to usurp the right to privacy which I have long felt to be among the most basic of our civil liberties as a free people.").

2. Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified at 5 U.S.C. § 552a (1982)).

3. *Id.* §§ 2(a), (b) (Congressional findings and statement of purpose), *reprinted in* 5 U.S.C. § 552a note at 416-17 (1982).

4. See 120 Cong. Rec. 36,912 (1974) (Government Operations Committee Oversight); *id.* at 36,902-03 (remarks of Sen. Jackson); *id.* at 36,893 (remarks of Sen. Percy); *id.* at 36,652 (remarks of Rep. Broyhill); *id.* at 36,648 (remarks of Rep. Goldwater); *id.* at 36,652 (remarks of Rep. Regula).

5. See Privacy Act of 1974, Pub. L. No. 93-579, § 2(b)(6), 88 Stat. 1896, 1896 (1974) (One stated purpose of the Act is to subject the United States to "any damages" caused by actionable violations.), *reprinted in* 5 U.S.C. § 552a note at 416-17 (1982); 120 Cong. Rec. 36,897 (1974) (remarks of Sen. Muskie) (plaintiffs entitled to "damages for injuries resulting from the misuse of personal information"); *id.* at 36,645 (remarks of Rep. Abzug) (purpose of actual damages is compensation); *id.* at 36,644 (presentation of H.R. 16,373 to the House by Rep. Moorehead on behalf of the Committee on Government Operations) (civil damages available to compensate for injuries). Even if Congress had been silent on this subject, damages are presumed to serve a compensatory purpose in addition to any other purposes intended by Congress. See *Carey v. Piphus*, 435 U.S. 247, 255-57 (1978) (42 U.S.C. § 1983); *Nahmod*, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5, 9-10 (1974) (same).

6. See Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896, 1896 (1974), *reprinted in* 5 U.S.C. § 552a note at 416-17 (1982); *Protecting Individual*

intended to be self-enforcing⁷ through its remedial provisions, which permit successful plaintiffs to recover "actual damages" from the government.⁸

The term "actual damages," however, has no generally accepted legal definition,⁹ and is not clearly defined in the Privacy Act.¹⁰ This ambiguity has led to the development of two judicial approaches to the interpretation of the term "actual damages." The Eleventh Circuit has adopted a restrictive view of "actual damages" and strictly limits the measure of damages recoverable to proven out-of-pocket loss.¹¹ Recently, the Fifth Circuit formulated a liberal view of the measure of "actual damages," allowing successful plaintiffs to recover damages for proven mental and physical injury as well as economic loss.¹² This

Privacy in Federal Gathering, Use and Disclosure of Information, S. Rep. No. 1183, 93d Cong., 2d Sess. 1, 1-2 (1974) [hereinafter cited as S. Rep. No. 1183], *reprinted in* 1974 U.S. Code Cong. & Ad. News 6916, 6916-17; H.R. Rep. No. 1416, 93d Cong., 2d Sess. 38 (1974) [hereinafter cited as H.R. Rep. No. 1416], *reprinted in* Joint Comm. on Gov't Operations, Legislative History of the Privacy Act of 1974, 294, 330-31 (1976) [hereinafter cited as Sourcebook]; 120 Cong. Rec. 40,409-10 (1974) (remarks of Sen. Muskie); *id.* at 36,891-92 (remarks of Sen. Ervin); *id.* at 36,651-52 (remarks of Rep. Biaggi); *id.* at 36,646-47 (remarks of Rep. Horton); *id.* at 36,644 (Rep. Moorhead presenting H.R. 16,373 to the House).

7. S. Rep. No. 1183, *supra* note 6, at 83, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6916, 6996-67; H.R. Rep. No. 1416, *supra* note 6, at 38 (Additional Views), *reprinted in* Sourcebook, *supra* note 6, at 330; 120 Cong. Rec. 36,897 (remarks of Sen. Muskie); *see id.* at 36,652 (remarks of Rep. Regula).

8. 5 U.S.C. § 552a(g)(4)(A) (1982).

9. *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 974 (5th Cir. 1983); *Fitzpatrick v. IRS*, 665 F.2d 327, 329 (11th Cir. 1982); Privacy Protection Study Commission, *Personal Privacy in an Information Society* 530 (1977) (report) [hereinafter cited as PPSC Report]. Depending on the jurisdiction, actual damages may be limited to out-of-pocket loss or alternatively may compensate mental distress, humiliation and embarrassment in addition to pecuniary loss. *Compare Skipper v. South Central Bell Tel. Co.*, 334 So. 2d 863, 866 (Ala. 1976) (actual damages are compensatory and include humiliation and embarrassment) and *Firestone v. Time, Inc.*, 305 So. 2d 172, 176-77 (Fla. 1974) (actual damages include shame, mortification, mental anguish or hurt feelings if proven), *vacated and remanded on other grounds*, 424 U.S. 448, 459-61 (1976) and *Alber v. Nolle*, 98 N.M. 100, 106-07, 645 P.2d 456, 462-63 (Ct. App. 1982) (actual damages include recovery for pain and suffering) *with Morvant v. Lumbermens Mutual Casualty Co.*, 429 F.2d 495, 496 (5th Cir. 1970) (actual damages are pecuniary damages) and *Public Fin. Co. v. Van Blaricom*, 324 N.W.2d 716, 725 (Iowa 1982) (same).

10. *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 974 (5th Cir. 1983); *Fitzpatrick v. IRS*, 665 F.2d 327, 329 (11th Cir. 1982); *Houston v. United States Dep't of Treasury*, 494 F. Supp. 24, 30 (D.D.C. 1979); *see Fiorella v. United States*, 2 Gov't Disclosure Serv. (P-H) ¶ 81,363, at 81,942, 81,947 (W.D. Wash. 1981); PPSC Report, *supra* note 9, at 530.

11. *Fitzpatrick v. IRS*, 665 F.2d 327, 331 (11th Cir. 1982); *accord Houston v. United States Dep't of Treasury*, 494 F. Supp. 24, 30 (D.D.C. 1979).

12. *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 986 (5th Cir. 1983). The liberal view has been approved in dictum by the Tenth

difference in interpretation is significant because it will determine the effectiveness of the remedial provisions of the Act.¹³ Too restrictive an interpretation would reduce the incentives for citizen enforcement, thereby frustrating the compensatory and deterrent purposes of the Act. An overly liberal interpretation, however, would have a negative impact on efficiency in government, and might expose the government to excessive damage liability. Consequently, a determination of the proper scope of the term "actual damages" requires finding the optimum balance between these competing considerations.

This Note contends that Congress intended the term "actual damages" in the Privacy Act to include proven mental and physical injury in addition to economic loss. Part I of this Note traces the historical development of legal protections of privacy in American law up to the passage of the Privacy Act. Based on analysis of the language and legislative history of the Act and analogous areas of the law, Part II concludes that a liberal interpretation of "actual damages" most effectively furthers the goals of the Privacy Act. Finally, Part III explores the economic implications of the remedial provisions of the Act and recommends legislative changes to better balance the privacy rights of individuals and the interests of the government.

I. THE HISTORICAL DEVELOPMENT OF LEGAL PROTECTIONS OF PRIVACY

A. *The Common-Law Tort: Invasion of Privacy*

Protections for privacy interests have been recognized in American law since the early 1900's.¹⁴ The first legal protection for privacy interests developed by American courts was the common-law tort of invasion of privacy.¹⁵ Since the early 1900's this tort has been adopted

Circuit. *See Parks v. United States Internal Revenue Serv.*, 618 F.2d 677, 682-83 (10th Cir. 1980).

13. One of the enumerated purposes of the Privacy Act is to subject the Government to civil liability for "any damages" caused by actionable violations of the Act. Privacy Act of 1974, Pub. L. No. 93-579, § 2(b)(6), 88 Stat. 1896, 1896 (1974), reprinted in 5 U.S.C. § 552a note at 417 (1982). Congress viewed this aspect of the remedial provisions as a vital element of the Act. *See* 120 Cong. Rec. 36,897 (remarks of Sen. Muskie) (Act allows citizen to enforce his "fundamental rights" through the remedial provisions); *id.* at 36,644 (remarks of Rep. Moorehead) (civil remedies are the "legal teeth" of the Act).

14. *See* Restatement (Second) of Torts § 652A comment a (1976); G. White, *Tort Law in America* 173-76 (1980); Prosser, *Privacy*, 48 Calif. L. Rev. 383, 383-85 (1960).

15. Beane, *The Right to Privacy and American Law*, 31 Law & Contemp. Probs. 253, 257-59 (1966); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Probs. 326, 327 (1966). Following a seminal article in the *Harvard Law Review*, Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), the tort appeared in a 1903 New York statute, 1903 N.Y. Laws ch. 132, §§ 1-2 (codified at N.Y. Civ. Rights Law §§ 50-51 (McKinney 1976 & Supp. 1983-1984)); *see* W. Prosser, *Handbook of the Law of Torts* § 117, at 803 (4th

by statute or common law in nearly every state.¹⁶ Although the scope of the tort varies among the states,¹⁷ it is generally aimed at protecting four types of privacy interests: appropriation of another's name or likeness; unreasonable publicity of another's private life; publicity that presents an individual in a false light; and intrusion into an individual's private affairs, seclusion or solitude.¹⁸ Because privacy is a dignitary interest,¹⁹ the injuries caused by actionable invasions are difficult to measure and cannot be fully compensated by money damages.²⁰ Consequently, at common law successful plaintiffs in invasion of privacy actions may recover general damages for the injury to their

ed. 1971), Kalven, *supra*, at 331. A common-law tort of invasion of privacy was subsequently established by the Supreme Court of Georgia in 1905. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); see Restatement (Second) of Torts § 652A comment a (1976); Larremore, *The Law of Privacy*, 12 Colum. L. Rev. 693, 693-94 (1912).

16. Restatement (Second) of Torts § 652A app., at 268 (Reporter's Note) (1981). The tort of invasion of privacy is explicitly recognized in forty states and the District of Columbia. Four states have decided privacy cases on other grounds, three states have not addressed the issue and three other states have rejected the tort. *Id.* at 268-69.

17. See *id.* at 268 ("The tort action for invasion of the right of privacy, in one form or another, is presently recognized in [most states.]"); W. Prosser, *supra* note 15, § 117, at 804 ("In one form [or] another, the right of privacy is by this time recognized and accepted in all but a very few jurisdictions."); see, e.g., *Galella v. Onassis*, 487 F.2d 986, 995 n.12 (2d Cir. 1973) (tort plaintiff limited to statutory remedy for appropriation of name or likeness; no common law tort of invasion of privacy recognized in New York); *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d 1006, 1009, 345 N.E.2d 37, 40 (1976) (tort of invasion of privacy limited to appropriation of name or likeness); *Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 77, , 391 N.E.2d 935, 939 (1979) (statutory tort cause of action for unreasonable, substantial or serious interference with privacy); see also *Ward v. Connor*, 495 F. Supp. 434, 439-40 (E.D. Va. 1980) (common-law tort of invasion of privacy not recognized in Virginia), *rev'd on other grounds*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); cf. *Deaton v. Delta Democrat Publ. Co.*, 326 So. 2d 471, 473 (Miss. 1976) (common-law tort of invasion of privacy has developed "amid a welter of confusing judicial pronouncements").

18. Restatement (Second) of Torts § 652A (1977); W. Prosser, *supra* note 15, § 117, at 804-14. The Privacy Act is concerned with improper governmental collection, use and dissemination of personal information. Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896, 1896 (1974). Consequently, the interests protected by three of the branches of the tort: public disclosure, false light and intrusion are relevant to the interests protected by the Act.

19. D. Dobbs, *Handbook on the Law of Remedies* § 7.1, at 509 (1973); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 1002-03 (1964); see *Phillips v. Smalley Maint. Servs., Inc.*, 435 So. 2d 705, 710-11 (Ala. 1983); *Morrow v. Kings Dep't Stores, Inc.*, 57 N.C. App. 13, 18, 290 S.E. 732, 735 (1982) (quoting Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. Rev. 435, 443 (1980)); Restatement (Second) of Torts § 652A comment a (1977).

20. See Restatement (Second) of Torts § 903 comment a, at 453-54 (1979); D. Dobbs, *supra* note 19, § 7.1, at 509; see, e.g., *Birnbaum v. United States*, 436 F. Supp. 967, 986-89 (E.D.N.Y. 1977), *modified*, 588 F.2d 319 (2d Cir. 1978); *Phillips*

privacy interest and for proven mental injury.²¹ In addition, plaintiffs may recover their special damages.²² Although this tort action may adequately protect individuals from invasions by their fellow citizens²³ and possibly by their state government,²⁴ Congress realized that it was ineffective against agencies of the federal government.²⁵ The Privacy Act was intended, in part, to fill this gap in the legal protection of privacy.²⁶

v. Smalley Maint. Servs., Inc., 435 So. 2d 705, 711-12 (Ala. 1983); *Southwestern Bell Tel. Co. v. Ashley*, 563 S.W.2d 637, 639 (Tex. 1978) (quoting *Billings v. Atkinson*, 489 S.W.2d 858, 860-61 (Tex. 1973)). Injuries such as mental distress, humiliation and loss of reputation cannot be accurately measured in monetary terms. Because true compensation is usually impossible, money damages are awarded to approximate the harm done. See Restatement (Second) of Torts § 903 comment a (1977); D. Dobbs, *supra* note 19, § 7.1, at 509.

21. *Birnbaum v. United States*, 436 F. Supp. 967, 986-89 (E.D.N.Y. 1977), *modified*, 588 F.2d 319 (2d Cir. 1978); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 888 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); Restatement (Second) of Torts § 652H (1976); see D. Dobbs, *supra* note 19, § 7.3, at 528; 3 L. Frumer, R. Benoit & M. Friedman, *Personal Injury—Actions—Damages—Defenses* § 8.03 (1965).

22. *Birnbaum v. United States*, 436 F. Supp. 967, 987 (E.D.N.Y. 1977), *modified*, 588 F.2d 319 (2d Cir. 1978); Restatement (Second) of Torts § 652H (1976). Special damages are limited to economic damages to the plaintiff flowing from the tortious conduct and must be specifically alleged and proven. Restatement (Second) of Torts § 904 comment b (1977); D. Dobbs, *supra* note 19, § 7.3, at 531; 3 L. Frumer, R. Benoit & M. Friedman, *supra* note 21, § 8.04.

23. See W. Prosser, *supra* note 15, § 117; *Kalven*, *supra* note 15, at 333-39.

24. See W. Prosser, *supra* note 15, § 131, at 975-77.

25. See 120 Cong. Rec. 40,882 (1974) (remarks of Rep. Moorhead); *id.* at 36,914-15 (remarks of Sen. Huddleston). Although individuals can sue the federal government for invasion of privacy under the Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 26 U.S.C.), see *Birnbaum v. United States*, 436 F. Supp. 967, 976 (E.D.N.Y. 1977) (invasion of privacy is actionable under the Federal Tort Claims Act), *modified on other grounds*, 588 F.2d 319 (2d Cir. 1978); Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C.L. Rev. 497, 518-19 (1976) (same), plaintiffs must make out their cause of action under the applicable state law, *Birnbaum*, 588 F.2d at 327-28; W. Prosser, *supra* note 15, § 131, at 972. Congress did not believe that the protection offered by this and other existing legal protections was sufficient. 120 Cong. Rec. 40,880-81 (1974) (remarks of Rep. Moorehead).

26. See 120 Cong. Rec. 40,409-10 (1974) (remarks of Sen. Muskie). When it drafted the Privacy Act Congress had concluded that both the judicial and legislative branches of government had failed to adequately protect privacy and that it must take the initiative to provide legislative protections. *Id.* at 40,410. ("While the courts have begun to recognize the capacity and the practices of the government to invade the privacy of its citizens, it is the responsibility of the Congress to develop legislative protection against those invasions."); *id.* at 36,914 (remarks of Sen. Huddleston) ("[D]ue to the nature of the courts, this response has often been slow and incomplete Thus, what is needed now is a coordinated and comprehensive approach to the problems that can be provided only by the Congress."); *id.* at 36,649 (remarks of

B. *The Constitutional Right and the Privacy Act*

The Supreme Court has only recently recognized a general constitutional right to privacy.²⁷ The Court has applied this right on a case-by-case basis,²⁸ but has never defined the scope of the protected privacy interest.²⁹ As a result, when Congress enacted the Privacy Act there was uncertainty whether areas of privacy not previously addressed by the Court, such as government agency information practices, would be entitled to constitutional protection.³⁰ Cognizant of

Rep. Goldwater) ("[The Privacy Act] is an important . . . first step in the restoration of the individual's right to privacy . . . We must reestablish . . . the right to be left alone for the people of this country."). The common-law tort of invasion of privacy did, however, offer guidance with regard to the appropriate measure of damages for invasions of privacy, and influenced Congress in the drafting of the Act. *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 976-77 (5th Cir. 1983); *Parks v. United States Internal Revenue Serv.*, 618 F.2d 677, 683 (10th Cir. 1980); see H.R. Rep. No. 1416, *supra* note 6, at 9-10, *reprinted in Sourcebook, supra* note 6, at 302-03; 120 Cong. Rec. 36,904 (remarks of Sen. Goldwater).

27. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); see J. Nowak, R. Rotunda & J. Young, *Handbook on Constitutional Law* 738 (2d ed. 1983); H. Oleck, *Oleck's Tort Law Practice Manual* § 224, at 296 (1982); L. Tribe, *American Constitutional Law* § 11-3, at 570-71 (1978); Posner, *The Uncertainty of Privacy Protection by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 197.

Although the Constitution does not specifically establish a right to privacy, the Court has found such a right by inference in many areas. *Paul v. Davis*, 424 U.S. 693, 712 (1976); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *J.P. v. DeSanti*, 653 F.2d 1080, 1087 (6th Cir. 1981); H. Oleck, *supra*, § 224, at 296; see *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); J. Nowak, R. Rotunda, & J. Young, *supra*, at 734-35; L. Tribe, *supra*, § 15-3.

28. See *Whalen v. Roe*, 429 U.S. 589, 598-600 & n.26 (1977); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *J.P. v. DeSanti*, 653 F.2d 1080, 1087-88 (6th Cir. 1981); *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981); Clark, *Constitutional Sources of the Penumbra Right to Privacy*, 19 Vill. L. Rev. 833, 881-84 (1974); Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 Calif. L. Rev. 1447, 1448 (1976).

29. See *Paul v. Davis*, 424 U.S. 693, 712-13 (1976); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Barry v. City of New York*, 712 F.2d 1554, 1558-59 (2d Cir.), *cert. denied*, 104 S. Ct. 548 (1983); Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 Harv. C.R.-C.L. L. Rev. 361, 361 (1979). The confusion resulting from the lack of a clear definition of the extent of the right to privacy is evident in the area of the right to non-disclosure of private information by government. *Compare United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577-78 (3d Cir. 1980) (general constitutional right to non-disclosure of private information) with *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) (no general constitutional right to non-disclosure of private information).

30. See 120 Cong. Rec. 36,914 (1974) (remarks of Sen. Huddleston); *id.* at 36,896-97 (remarks of Sen. Muskie); *id.* at 36,648 (remarks of Rep. Goldwater). The Supreme Court did not address the issue of informational privacy and government agency practices until 1977, in *Whalen v. Roe*, 429 U.S. 589 (1977). See J. Nowak, R. Rotunda & J. Young, *supra* note 27, at 760. In *Whalen* the Court suggested that a

the lack of judicial guidance in this area, one Congressional goal in drafting the Privacy Act was to dispel any confusion as to whether specified disclosures by government agencies constituted violations of the right to privacy and to provide necessary safeguards.³¹

In 1976, after the passage of the Privacy Act, the Supreme Court intimated in *Whalen v. Roe*³² that the right to privacy may, to some undefined extent, apply to government agency information activities.³³ In *Whalen* the Court divided the privacy interests protected by the constitution into two basic types: "[T]he individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions."³⁴ The interest in independent decision-making encompasses the freedom to make personal decisions regarding matters such as abortion, contraception, education, marriage and divorce.³⁵ The Privacy Act, however, addresses itself to the branch of constitutionally protected privacy relating to the prevention of disclosure of personal matters in the context of the interaction of government agencies with individuals.³⁶ Courts facing this constitutional issue generally employ a balancing test, weighing the degree of intrusion on the individual against the governmental interest that ostensibly justifies the intrusion.³⁷ This

constitutional right to informational privacy might exist, but did not define the contours of this right. *Whalen*, 429 U.S. at 605-06.

31. See Privacy Act of 1974, Pub. L. No. 93-579, § 2, 88 Stat. 1896, 1896 (1974), reprinted in 5 U.S.C. § 552a note, at 416-17 (1982). Congress found that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States." *Id.* Congress also determined that it must "regulate the collection, maintenance, use, and dissemination of information by . . . agencies" to preserve and protect the right to privacy. *Id.*

32. 429 U.S. 589 (1977).

33. *Id.* at 605.

34. *Id.* at 599-600.

35. *Id.* at 599-600 & n.26; *Paul v. Davis*, 424 U.S. 693, 713 (1976); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

36. See Privacy Act of 1974, Pub. L. No. 93-579, § 2, 88 Stat. 1896, 1896 (1974), reprinted in 5 U.S.C. § 552a note, at 416-17 (1982). Congress found that government agency information practices posed a serious threat to individuals' privacy rights, and concluded that the gathering, use and dissemination of personal information must be regulated. *Id.*

37. See *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir.) (The existence of a right of non-disclosure of personal information in a given case is determined by balancing privacy intrusion against the governmental interest.), *cert. denied*, 104 S. Ct. 548 (1983); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980) (same); *Duplantier v. United States*, 606 F.2d 654, 670 (5th Cir. 1979) (same), *cert. denied*, 449 U.S. 1076 (1981); *Schachter v. Whalen*, 581 F.2d 35, 37 (2d Cir. 1978) (same); *Plante v. Gonzalez*, 575 F.2d 1119, 1136-37 (5th Cir. 1978) (same), *cert. denied*, 439 U.S. 1129 (1979). But see *J.P. v. DeSanti*, 653 F.2d 1080, 1089-91 (6th Cir. 1981) (no general constitutional right of non-disclosure of private information: balancing test is not appropriate).

test, however, is utilized on a case-by-case basis.³⁸ Consequently, uncertainty as to the scope of the constitutional right to privacy still exists³⁹ and the Privacy Act remains an individual's only comprehensive source of protection from privacy invasions by federal government agencies.⁴⁰

At the time of the debate over the Privacy Act there was widespread public opinion that the federal government was invading individuals' privacy as a matter of course without serious opposition from the judicial or legislative branches of government.⁴¹ The debate on the Act reflects Congress' conviction that it was acting with a strong mandate from the American public to restrain government.⁴² It was in this atmosphere that the Privacy Act was passed, and the strength of this conviction is reflected in the scope, structure and legislative history of the Act.

38. See *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir.), *cert. denied*, 104 S. Ct. 548 (1983); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980); *Duplantier v. United States*, 606 F.2d 654, 670 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981).

39. Posner, *supra* note 27, at 213-14. See *supra* notes 30-33 and accompanying text.

40. See 120 Cong. Rec. 40,880 (1974) (remarks of Rep. Moorhead). During the debate on the Privacy Act it was noted that the Act is the first meaningful privacy legislation passed by Congress since the fourth amendment. *Id.* The concerns which prompted Congress to enact the Privacy Act have not abated since 1974, and have, in fact, been aggravated by the rapid advances in information technology. *Id.* at 36,652 (remarks of Rep. Regula); see *N.Y. Times*, Sept. 12, 1983, at A23, col. 2; *id.* Sept. 8, 1983, at A1, col. 3. See generally D. Burnham, *The Rise of the Computer State 185-225* (1983) (discussion of the shortcomings of legislative attempts to protect privacy).

41. See 120 Cong. Rec. 36,897 (1974) (remarks of Sen. Muskie) (The Privacy Act should "help begin to restore public faith in our Government's information practices."); *id.* at 36,900 (remarks of Sen. Nelson) ("[I]ndividual liberty has been eroded by an expanding web of snooping conducted at all levels of government . . . which make[s] a mockery of the individual freedoms guaranteed by our Constitution."); *id.* at 36,647-48 (remarks of Rep. Alexander) ("Government has been overcome by a snooping mania. . . . Every American must insist that Government is the servant of the people—not our master."); *id.* at 36,643-44 (remarks of Rep. Moorehead) ("Americans want to see more credibility in Government . . ."). This opinion was reinforced by the increasingly sophisticated information-gathering technology available to government agencies. For example, at the time of the debate on the Act, it was technologically feasible for the government to install an information system that could maintain a record containing twenty typed pages of information on every individual in the United States, which could be recalled in less than a minute. *Id.* at 36,916 (remarks of Sen. Ribicoff) (quoting Report of the National Academy of Sciences (1972)).

42. See 120 Cong. Rec. 36,900-03 (1974) (remarks of Sen. Nelson); *id.* at 36,643 (remarks of Rep. Moorhead).

II. DAMAGES UNDER THE PRIVACY ACT

A. *Scope and Structure of the Privacy Act*

The Privacy Act protects personal privacy from unwarranted invasions by imposing restrictions on federal agencies with regard to the gathering, use and dissemination of information.⁴³ The Act prohibits the disclosure of a record contained in a system of records maintained by a federal agency unless the disclosure is made pursuant to the written request or with the consent of the individual to whom the record pertains.⁴⁴ This general prohibition, however, is subject to twelve exceptions, which permit disclosure when specified governmental or societal interests are shown.⁴⁵ The Act thus embodies an attempt to balance the societal interest in efficient government with the individuals' interest in personal privacy.⁴⁶

The Privacy Act requires that all agencies maintaining a system of records keep a detailed accounting of disclosures.⁴⁷ In addition, the agency must notify all persons or agencies to whom a record has been disclosed of any corrections or amendments made to the record and of any subsequent disputes regarding the record.⁴⁸ The Act gives any individual who is the subject of a record maintained in a system of records by an agency a right of access to that record.⁴⁹ This right is complemented by the right to request an amendment of the record to correct any items that are not "accurate, relevant, timely, or complete."⁵⁰

The Act further sets forth specific requirements governing agency information policies and practices. These requirements are indicative of the high degree of regulatory control Congress intended to build into the Act. Agencies may only collect information that is relevant to and necessary for the accomplishment of their purpose or mission.⁵¹ If information being collected may affect determinations regarding an individual's rights, benefits and privileges under any federal program, the agency must, to the greatest extent possible, collect the informa-

43. Privacy Act of 1974, Pub. L. No. 93-579, § 2, 88 Stat. 1896, 1896 (1974), reprinted in 5 U.S.C. § 552a note at 416-17 (1982); see Note, *Narrowing the "Routine Use" Exemption to the Privacy Act of 1974*, 14 U. Mich. J.L. Ref. 126, 128-29 (1980).

44. 5 U.S.C. § 552a(b) (1982).

45. *Id.* § 552a(b)(1)-(12).

46. H.R. Rep. No. 1416, *supra* note 6, at 4, reprinted in Sourcebook, *supra* note 6, at 297; 120 Cong. Rec. 36,647-48 (1974) (remarks of Rep. Alexander); *id.* at 36,647 (remarks of Rep. Gude); see *id.* at 36,891 (remarks of Sen. Ervin).

47. 5 U.S.C. § 552a(c) (1982).

48. *Id.* § 552a(c)(4).

49. *Id.* § 552a(d).

50. *Id.* § 552a(d)(2)(B)(i).

51. *Id.* § 552a(e)(1).

tion directly from the individual who is the subject of the record.⁵² Agencies are also responsible for establishing and maintaining technical, physical, organizational and operational safeguards in all systems of records to prevent any threat or harm to the security of such systems that could result in substantial harm, embarrassment, inconvenience or unfairness to any individual with respect to whom a record is maintained.⁵³

The remedial provisions of the Privacy Act allow plaintiffs to recover damages from the government in two situations.⁵⁴ The first is when the defendant agency's failure to maintain properly a plaintiff's record has resulted in an adverse decision in any determination relating to the qualifications, character, rights or opportunities of, or benefits to the individual that may be made on the basis of such record.⁵⁵ The second situation subjects the government to liability for any agency noncompliance with the Privacy Act that has had an adverse effect on the plaintiff.⁵⁶ If either of these events occur, and the court hearing the case determines that the agency action was "intentional or willful,"⁵⁷ the plaintiff may recover his "actual damages" but in no event less than \$1,000.⁵⁸ To determine the scope of the privacy protections established by the remedial provisions of the Act, it is

52. *Id.* § 552a(e)(2).

53. *Id.* § 552a(e)(10).

54. *Id.* §§ 552a(g)(1)(C), (D), (4). The damages section of the remedial provisions of the Privacy Act provide that:

Whenever an agency . . .

. . . .
(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, . . .

. . . .
(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000"

Id.

55. *Id.* § 552a(g)(1)(C).

56. *Id.* § 552a(g)(1)(D).

57. *Id.* § 552a(g)(4).

58. *Id.* § 552a(g)(4)(A). A plaintiff is also entitled to recover his reasonable costs and attorney fees if he has "substantially prevailed." *Id.* § 552a(g)(4)(B).

necessary to examine the meaning Congress intended to confer on the term "actual damages."

B. Analysis of "Actual Damages"

1. Statutory Language

The primary indication of Congressional intent is the language of the Privacy Act itself.⁵⁹ Although the meaning of the term "actual damages" is unclear on the face of the statute,⁶⁰ the broad range of potential bases of civil liability⁶¹ created by Congress indicate that it intended a liberal interpretation of "actual damages." The Privacy Act requires agencies to take precautions to avoid causing "substantial harm, embarrassment, inconvenience, or unfairness to any individual" who is the subject of a record.⁶² Additionally, any failure on the part of an agency to maintain properly a record that results in an adverse determination relating to an individual's qualifications, character, rights, or opportunities exposes the agency to liability.⁶³ The interests protected by these provisions are, in large part, dignitary interests that can only be measured in terms of mental or physical injury.⁶⁴ Indeed, in most instances, the economic loss caused by the injury is likely to be a small component of the total loss.⁶⁵ Consequently, a restrictive view

59. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980); *Perrin v. United States*, 444 U.S. 37, 42 (1979). Unless a clear and contrary legislative intent is demonstrated, the plain language of a statute is controlling. 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 46.01 (4th ed. 1973); see *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). In the face of ambiguous language, it is appropriate to look at the statute as a whole in light of the purposes Congress sought to serve. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979); 2A C. Sands, *supra*, § 46.05.

60. See *supra* note 10.

61. 5 U.S.C. § 552a(g)(1)(C), (D) (1982).

62. *Id.* § 552a(e)(10).

63. *Id.* § 552a(g)(1)(C).

64. See *supra* note 20. Although the law generally compensates such injuries to dignity and personality with money damages, such damages are an inexact compensatory substitute. Because injuries to non-economic interests typically cannot be measured in terms of out-of-pocket loss, plaintiffs who have suffered such injuries may recover damages for their mental and physical injuries. See *Restatement (Second) of Torts* §§ 903-904 (1977); D. Dobbs, *supra* note 19, § 7.3; W. Prosser, *supra* note 15, § 117, at 815.

65. See D. Dobbs, *supra* note 19, § 7.1, at 509 ("[T]hough economic or physical loss may be associated with the [dignitary] injury, the primary or usual concern is not economic at all, but vindication of an intangible right."). In structuring remedies for invasion of privacy the law has recognized that mental distress, humiliation, embarrassment and loss of reputation are usually the primary injuries, not out-of-pocket losses. *Id.* at 509-10; see W. Prosser, *supra* note 15, § 117, at 815; cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (defamation); *Time, Inc. v. Hill*, 385 U.S.

of actual damages, limiting such damages to pecuniary loss, would render the remedial provisions of the Act ineffective by excluding the type of damages most likely to occur from the recovery available under the Act. Moreover, a restrictive interpretation of "actual damages" would frustrate the intended purpose of the civil remedy because an inadequate recovery would reduce both the deterrent impact on the government and the incentives for citizen enforcement.⁶⁶

2. Legislative History

The legislative history of the Privacy Act reveals that there was bipartisan agreement in both the House⁶⁷ and Senate⁶⁸ that effective privacy legislation was urgently needed. Congress, aware that federal agencies were regularly gathering and using information for purposes which overstepped those that the respective agencies were created to serve,⁶⁹ concluded that Congressional intervention was required to protect personal privacy rights.⁷⁰ The civil-damages remedy was perceived by Congress as a vital element of the Privacy Act's enforcement scheme.⁷¹ There was, however, substantial disagreement between the

374, 384-85 n.9 (1967) (defamation and invasion of privacy). In the context of the Privacy Act, both courts following the liberal and those following the restrictive view have acknowledged that mental injury is a likely consequence of actionable invasions of privacy. *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 977 (5th Cir. 1983) (liberal view); see *Fitzpatrick v. IRS*, 665 F.2d 327, 331 & n.7 (11th Cir. 1982) (restrictive view). Although the *Fitzpatrick* court denied recovery for non-pecuniary harm, it recognized that the plaintiff had suffered "a general mental injury from the disclosure." *Id.* at 331.

66. See *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 977 (5th Cir. 1983). See *infra* note 122.

67. The House version of the Privacy Act, H.R. 16,373, 93d Cong., 2d Sess. (1974) (as amended October 2, 1974), reprinted in *Sourcebook*, *supra* note 6, at 258, was passed by a vote of 353 to 1 on November 21, 1974. 120 Cong. Rec. 36,976 (1974).

68. The Senate version of the Privacy Act, S. 3418, 93d Cong., 2d Sess. (1974), reprinted in *Sourcebook*, *supra* note 6, at 334, was adopted by a vote of 74 to 9 on November 21, 1974. 120 Cong. Rec. 36,917 (1974).

69. See 120 Cong. Rec. 36,912 (1974) (Government Operations Committee Oversight); *id.* at 36,901-02 (remarks of Sen. Nelson); *id.* at 36,893-94 (remarks of Sen. Percy); *id.* at 36,647 (remarks of Rep. Alexander); *id.* at 36,648 (remarks of Rep. Goldwater); *id.* at 36,652 (remarks of Rep. Regula). Congressional recognition of the tendency of government agencies to overstep their authority is reflected in the duty imposed on agencies to "maintain in [their] records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1) (1982). The term "maintain" in the context of the Privacy Act "includes maintain, collect, use, or disseminate." *Id.* § 552a(a)(3).

70. Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896, 1896 (1974), reprinted in 5 U.S.C. § 552a note at 416-17 (1982).

71. See H.R. Rep. No. 1416, *supra* note 6, at 3-4, reprinted in *Sourcebook*, *supra* note 6, at 296-97; S. Rep. No. 1183, *supra* note 6, at 82, reprinted in 1974 U.S. Code

House and Senate on the issue of the appropriate level of culpability that would subject the government to civil damage liability.⁷²

a. *The House Version of the Privacy Act*

The House version of the Privacy Act, as originally introduced by the Subcommittee on Government Operations, subjected the government to actual and punitive damages for an agency's willful refusal or failure to comply with the Act.⁷³ The House Committee on Government Operations later voted to amend the bill and allow plaintiffs to recover actual damages caused by an agency's "willful, arbitrary or capricious" violation of the Act.⁷⁴ The House subsequently adopted this version, but only after vigorous debate over a proposed amendment that provided for actual damages for any violations of the Act and both actual and punitive damages for "willful, arbitrary or capricious" violations.⁷⁵ The existence of such strong sentiment in favor of punitive damages makes it highly unlikely that the House intended to severely restrict plaintiffs' potential recoveries by limiting actual damages to out-of-pocket loss. Moreover, it was recognized in debate that mental harm was a probable consequence of governmental invasions of privacy.⁷⁶ The only place in the legislative history that "actual

Cong. & Ad. News at 6,996; 120 Cong. Rec. 36,647-48 (1974) (remarks of Rep. Alexander & Rep. Gude).

72. See 120 Cong. Rec. at 40,882 (1974) (Analysis of House and Senate Compromise Amendments to the Federal Privacy Act); *id.* at 40,406 (Analysis of House and Senate Compromise Amendments to the Federal Privacy Act).

73. H.R. 16,373, 93d Cong., 2d Sess. § 3(f)(3)(A) (1974), *reprinted in* Sourcebook, *supra* note 6, at 250.

74. H.R. Rep. No. 1416, *supra* note 6, at 31-32 (1974), *reprinted in* Sourcebook, *supra* note 6, at 324-25. In this form H.R. 16,373 was unanimously adopted by the House Committee on Government Operations and submitted to the full House for consideration. *Id.* at 10-11, *reprinted in* Sourcebook at 303-04. The punitive damages provision in the original bill was deleted by the Committee on Government Operations over strong opposition. See 120 Cong. Rec. 36,660 (1974) (remarks of Rep. Moorhead) (punitive damages provision deleted by a vote of 18 to 14).

75. See 120 Cong. Rec. 36,658-60 (1974) (debate on proposal to make the government liable for punitive damages); *see also id.* at 36,970 (remarks of Rep. Koch) (omission of punitive damages liability regrettable); *id.* at 36,645 (remarks of Rep. Abzug) (omission of punitive damages a major weakness).

76. See 120 Cong. Rec. 36,904 (1974) (remarks of Sen. Goldwater). While discussing the need for the Privacy Act and its goals Senator Goldwater commented that "privacy . . . mean[s] the great common law tradition that a person has a right not to be defamed[, which includes] the right to be protected against disclosure of . . . irrelevant embarrassing facts relating to one's own private life." *Id.* Representative Ashbrook noted that "[a]s the Federal Government has grown in power, it has increasingly intruded into the personal lives of its citizens." *Id.* at 36,971 (remarks of Sen. Ashbrook). Such intrusions and disclosures are the types of injuries which cannot be adequately measured in terms of out-of-pocket loss. See *supra* note 20. The most graphic indication of Congressional awareness of the injuries most likely to be

damages" is mentioned in connection with out-of-pocket loss is in a short passage referring to a subsequently rejected amendment which would have made the government liable for innocent violations of the Act.⁷⁷ Consequently, limiting actual damages to out-of-pocket loss is not supported by the legislative history of the House version of the Act.

b. *The Senate Version of the Privacy Act*

The original Senate version of the Privacy Act would have allowed an individual to recover both actual and punitive damages, if appropriate, for any violation of the Act by any person.⁷⁸ After consideration by the full Senate, this provision was modified to allow plaintiffs to recover actual and general damages, but in no event less than \$1,000, for any violation of the Act by any government officer or employee.⁷⁹ In the case of many dignitary interests, general damages are presumed by law without proof of the extent of the plaintiff's injury because "the wrong is said to be damage in and of itself."⁸⁰ Both courts following the restrictive⁸¹ and those following the liberal

spawned by illegal invasions of privacy are the examples given by Representatives and Senators of government agency abuse of their constituent's privacy. 120 Cong. Rec. 36,971 (1974) (remarks of Rep. Broomfield) (16 year old school girl the subject of an F.B.I. record as a result of a misaddressed letter); *id.* at 36,896 (remarks of Sen. Curtis) (unjustified IRS methods of investigation threatened to ruin Nebraska lawyer's reputation and practice); *see id.* at 36,901-03 (remarks of Sen. Jackson & Sen. Nelson) (review of recent examples of government agency spying on American citizens).

77. *See* 120 Cong. Rec. 36,955-56 (1974). In the debate over this amendment, Representative Eckhardt stated: "There is nothing in this that would provide for any damages beyond his actual out-of-pocket expenses . . ." *Id.* at 36,956 (remarks of Rep. Eckhardt). This statement apparently supports the restrictive view, and has been relied on by one of the courts following the restrictive view. *Houston v. United States Dep't of Treasury*, 494 F. Supp. 24, 30 n.13 (D.D.C. 1979). This comment must, however, be analyzed in context to properly gauge its import. Representative Eckhardt made the statement as part of a hypothetical example of an innocent violation of the Act involving only economic injury, not as a general comment on the meaning of the term "actual damages." *See* 120 Cong. Rec. at 36,955-56 (1974) (remarks of Rep. Eckhardt). This conclusion is reinforced by comments of both Representative Moorehead and Representative Eckhardt to the effect that actual damages are proven compensatory damages. *Id.*; *see Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 980 & n.24 (5th Cir. 1983).

78. S. 3418, 93d Cong., 2d Sess. § 304(b) (1974) (as introduced by Sen. Ervin), *reprinted in Sourcebook, supra* note 6, at 27.

79. *Id.* § 303(c), *reprinted in Sourcebook, supra* note 6, at 371.

80. D. Dobbs, *supra* note 19, § 7.3, at 528; *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974); Restatement (Second) of Torts § 904 comment a (1977); C. McCormick, Handbook on the Law of Damages § 14, at 53-54 (1935).

81. *See Fitzpatrick v. IRS*, 665 F.2d 327, 331 (11th Cir. 1982); *Albright v. United States*, 558 F. Supp. 260, 264 (D.D.C. 1982); *Houston v. United States Dep't of Treasury*, 494 F. Supp. 24, 30 (D.D.C. 1979).

view,⁸² however, concur that recovery of actual damages requires that the extent of the injury stemming from the Privacy Act violation must be proven.⁸³ These courts differ solely on the question of the types of injuries the plaintiff may prove and thus recover as actual damages.

c. The Compromise Version of the Privacy Act

The remedial provisions of the House and Senate compromise bill, subsequently enacted as the Privacy Act,⁸⁴ allow successful plaintiffs to recover their actual damages, but in no event less than \$1,000, caused by any agency's intentional or willful violation of the Act.⁸⁵ Two major compromises are reflected in the final version of the remedial provisions. These compromises pertain to both the standard of culpability and the measure of damages. The Act's requirement of "intentional or willful" agency conduct is lower than the House standard of "willful, arbitrary or capricious" and significantly higher than the Senate standard of "any violation." The original House measure of damages was limited to "actual damages." The final version of the Act incorporates the Senate's minimum recovery of \$1,000 but omits the Senate's "general damages" provision.

The change in the original House standard of conduct from "willful, arbitrary or capricious" to "intentional or willful" in the compromise version of the Act has been held by one court following the restrictive view to represent an "obvious quid pro quo" for the change in the Senate version from "actual and general damages" to simply "actual damages."⁸⁶ This compromise was construed to mean that "actual damages" as used in the Act is intended to be synonymous with special damages, which are limited to pecuniary loss.⁸⁷ There is no reference, however, in the legislative history to such a compromise.⁸⁸ In fact, both the House and Senate concurred that the final version of the standard of conduct in the Act represents an independent compromise between the House and Senate versions.⁸⁹ Thus, the

82. See *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 983-84 (5th Cir. 1983); *Parks v. United States Internal Revenue Serv.*, 618 F.2d 677, 683 (10th Cir. 1980) (dictum).

83. See *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 983 (5th Cir. 1983) (proven mental and physical injury); *Fitzpatrick v. IRS*, 665 F.2d 327, 331 (11th Cir. 1982) (proven out-of-pocket loss).

84. 5 U.S.C. § 552a (1982).

85. *Id.* § 552a(g)(4)(A) (1982).

86. *Fitzpatrick v. IRS*, 665 F.2d 327, 330 (11th Cir. 1982).

87. *Id.*

88. See *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 981 n.27 (5th Cir. 1983).

89. See 120 Cong. Rec. 40,406-07 (1974) (Senate analysis of the Compromise Amendments); *id.* at 40,882 (House analysis of the Compromise Amendments).

argument that Congress intended actual damages to be limited to special damages is tenuous. In light of the goals of the Privacy Act and the independent compromises made with respect to its remedial provisions, it is far more likely that the Senate had intended "general damages" to mean presumed compensatory damages and "actual damages" to mean compensatory damages for proven injury.⁹⁰

When drafting the Privacy Act, Congress was concerned with exposing the government to excessive damages liability.⁹¹ Courts following the restrictive view have relied on the extensive legislative discussion of the potential for excessive government damages liability as an indication of Congressional intent to limit actual damages to out-of-pocket loss.⁹² Debate on potentially excessive liability, however, focused on establishing the proper level of conduct to trigger such liability⁹³ and whether punitive damages against the government should be available.⁹⁴ There is no indication in the legislative history of congressional intent to limit compensation to proven economic loss.⁹⁵

It is highly probable that Congress was cognizant⁹⁶ of the Supreme Court's landmark decision in *Gertz v. Robert Welch, Inc.*,⁹⁷ which was decided a few months before the Privacy Act was debated.⁹⁸ The *Gertz* Court held that awards of presumed damages to plaintiffs suing the media for defamation would be unconstitutional in the absence of "actual malice," but compensatory damages may be awarded for "actual injury."⁹⁹ The Court stated that actual injury includes mental

90. See *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 983 (5th Cir. 1983).

91. See 120 Cong. Rec. 36,955-57 (1974); *id.* at 36,659-60.

92. See *Fitzpatrick v. IRS*, 665 F.2d 327, 330 (11th Cir. 1982); *Houston v. United States Dep't of Treasury*, 494 F. Supp. 24, 30 (D.D.C. 1979).

93. See *supra* note 89.

94. See *supra* notes 75-89.

95. See *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 977-83 (5th Cir. 1983).

96. See *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979); 2A C. Sands, *supra* note 59, § 50.01. Both the Eleventh Circuit and the PPSC concluded, without reference to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that it was highly likely that Congress was using "defamation language" in drafting the remedial provisions of the Act. *Fitzpatrick v. IRS*, 665 F.2d 327, 330-31 (11th Cir. 1982) (quoting PPSC Report, *supra* note 9, at 530). The Fifth Circuit also decided that Congress was probably using the terms "general" and "actual damages" in the context of defamation and the Court's decision in *Gertz*. *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 982-83 (5th Cir. 1983).

97. 418 U.S. 323 (1974).

98. *Gertz* was decided on June 25, 1974, and Congress considered the Privacy Act in November of 1974. *Id.*; see 120 Cong. Rec. 36,885 (1974) (Senate); *id.* at 36,643 (House).

99. 418 U.S. at 349.

distress, humiliation and embarrassment if proved by "competent evidence" on the theory that such damages are a natural and probable consequence of the wrongful conduct.¹⁰⁰ The torts of defamation and invasion of privacy are closely related because they both protect dignitary interests and cause similar types of injuries.¹⁰¹ Congress most likely was aware of both *Gertz* and the strong analogy between defamation and invasion of privacy, and it is therefore improbable that Congress intended actual damages to be synonymous with special damages. More probably, Congress was utilizing the term "actual damages" in the Privacy Act in the same sense the Supreme Court used "actual injury" in *Gertz*, and thus, the liberal view of actual damages, allowing recovery for proven mental and physical injury, is the only appropriate interpretation.

The Privacy Protection Study Commission (PPSC) was established by the Privacy Act¹⁰² to study specified privacy issues and make legislative recommendations to Congress.¹⁰³ The PPSC initially concluded "that Congress meant to restrict recovery to specific pecuniary losses until the [PPSC] could weigh the propriety of extending the standard of recovery."¹⁰⁴ Ultimately, however, the PPSC opined that "[i]f the rights and interests established by the Privacy Act are worthy of protection, then recovery for intangible injuries such as pain and suffering, loss of reputation, or the chilling effect on constitutional rights, is a part of that protection."¹⁰⁵ Consequently, the PPSC con-

100. *Id.* at 350. The Court concluded that allowing general damages in a defamation case involving the media, in the absence of actual malice, would be unconstitutional because it would aggravate the inhibiting effect of civil liability on the exercise of first amendment rights. The Court went on to say, however, that there is no constitutional bar to proven compensatory damages, and plaintiffs are entitled to recover for their actual injury. *Id.*

101. See D. Dobbs, *supra* note 19, § 7.1, at 509; W. Prosser, *supra* note 15, § 117, at 813; Bloustein, *supra* note 19, at 993; Wade, *Defamation and the Right of Privacy*, 15 Vand. L. Rev. 1093, 1094-95, 1120-21 (1962). The close connection between the torts of invasion of privacy and defamation was also referred to in the debate over the Privacy Act. 120 Cong. Rec. 36,904 (1974) (remarks of Sen. Goldwater).

102. Privacy Act of 1974, Pub. L. No. 93-579, § 5, 88 Stat. 1896, 1905 (1974).

103. *Id.* at 1905-10.

104. PPSC Report, *supra* note 9, at 530. The PPSC recognized that "actual damages" is an ambiguous term, and concluded that Congress intended to equate actual damages with special damages in the context of defamation with no further analysis. *Id.* at 530-31; see *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 983 n.33 (5th Cir. 1983). Congress is charged with knowledge of the common-law definitions of legal terms, 2A C. Sands, *supra* note 59, § 50.01, at 268, and therefore must have been cognizant of the traditional terms "general" and "special damages." If Congress had intended "actual damages" to be equivalent to "special damages," it is likely they would have used the term "special damages."

105. PPSC Report, *supra* note 9, at 531. The Eleventh Circuit concluded that actual damages in the Privacy Act were intended to be synonymous with special

cluded that the arguments in favor of a broad measure of damages outweigh the arguments for limiting damages to out-of-pocket loss.¹⁰⁶

Congressional debate on the Act indicated a strong Congressional intent that the remedial provisions effectively further the compensatory and deterrent goals of the Act. In light of the Act's legislative history and the Supreme Court's decision in *Gertz*, a liberal interpretation of the term "actual damages" best reflects this legislative intent. An analysis of analogous areas of the law reinforces a liberal interpretation.

3. Analogous Areas of the Law

An effective damages remedy is a vital element of any statutory scheme designed to protect constitutionally guaranteed rights.¹⁰⁷ When a constitutionally protected interest is violated, the Supreme Court has held that the courts should be flexible and use the remedy or combination of remedies that best vindicates the right implicated.¹⁰⁸ This rule has been applied to cases involving the invasion of a constitutional right that is also protected by federal statute.¹⁰⁹ Because the damages remedy furnished by the Privacy Act is ambiguous, courts

damages in defamation on the basis of the initial finding of the PPSC. *Fitzpatrick v. IRS*, 665 F.2d 327, 330-31 (11th Cir. 1982). The Eleventh Circuit, however, failed to consider the subsequent finding and ultimate conclusion of the PPSC that only a liberal approach to damages can give meaningful protection and compensation to the interests safeguarded by the Privacy Act. See PPSC Report, *supra* note 9, at 531.

106. PPSC Report, *supra* note 9, at 530-31. The PPSC recommended that the Privacy Act be amended to:

permit the recovery of special and general damages sustained by an individual as a result of a violation of the Act, but in no case should a person entitled to recovery receive less than the sum of \$1,000 or more than the sum of \$10,000 for general damages in excess of the dollar amount of any special damages.

Id. at 531.

107. *Cf. Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (Municipalities have no immunity under 42 U.S.C. § 1983 for violations of constitutionally protected interests and the good faith of their officers is not a shield against liability.). The Court interpreted 42 U.S.C. § 1983 broadly to better effectuate the compensatory and deterrent purposes of the statute. *Id.* at 651-52.

108. See *Davis v. Passman*, 442 U.S. 228, 245-48 (1979); *Carey v. Piphus*, 435 U.S. 247, 258-59 (1978); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971); *Halperin v. Kissinger*, 606 F.2d 1192, 1208 (D.C. Cir. 1979), *aff'd in part by an equally divided Court and cert. dismissed in part*, 452 U.S. 713 (1981) (per curiam).

109. See *Owen v. City of Independence*, 445 U.S. 622, 650-52 (1980) (42 U.S.C. § 1983); *Carey v. Piphus*, 435 U.S. 247, 258-59 (1978) (same); *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1272-73 (8th Cir. 1981) (title VII of the Civil Rights Act); *Halperin v. Kissinger*, 606 F.2d 1192, 1207-08 (D.C. Cir. 1979) (title III of the Omnibus Crime Control and Safe Streets Act), *aff'd in part by an equally divided Court and cert. dismissed in part*, 452 U.S. 713 (1981) (per curiam).

should be free to look to this flexible rule for guidance.¹¹⁰ Mental and physical injuries are the most probable types of harm resulting from violations of the Act.¹¹¹ Consequently, a damages remedy that specifically excludes recovery for such injuries not only fails to best protect the right implicated, but also prevents the effectuation of the goals of the Privacy Act.

If a constitutionally-protected interest is similar to an interest protected by the common law of torts, courts generally look to the common-law measure of damages for guidance as to the proper measure of damages.¹¹² The damages measure for the tort of invasion of privacy that was relied upon by Congress when drafting the Act¹¹³ is relevant to interpreting the term "actual damages." Tort law recognizes that mental distress is both a natural and probable consequence of actionable invasions of privacy and a major component of the total injury.¹¹⁴ The tort of invasion of privacy is intended to protect dignitary interests and allows plaintiffs to recover damages for both harm to the protected privacy interest and for proven mental distress.¹¹⁵ The types of injuries for which damages are recoverable under the tort of invasion of privacy, therefore, are compatible with the liberal interpretation of "actual damages."

The use of the term "actual damages" as it is employed in federal statutes enacted before the Privacy Act confirms a liberal construction.¹¹⁶ In these federal statutes the term "actual damages" has been interpreted in accordance with both the liberal¹¹⁷ and restrictive

110. See 2A C. Sands, *supra* note 59, § 50.01, at 268.

111. See *supra* note 65 and accompanying text.

112. See *Smith v. Wade*, 103 S. Ct. 1625, 1628 (1983); *Carey v. Piphus*, 435 U.S. 247, 257-59 (1978); 2A C. Sands, *supra* note 59, § 50.04, at 279-80.

113. See *supra* note 26.

114. See *supra* notes 20, 65 and accompanying text.

115. See *supra* notes 19-21 and accompanying text.

116. See *infra* note 117. When interpreting ambiguous language in a federal statute it is appropriate to look to the use of such language in other federal statutes. See *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979); 2A C. Sands, *supra* note 59, § 45.09, at 30.

117. See *Williams v. Matthews Co.*, 499 F.2d 819, 829 (8th Cir.) (award of actual damages under the Fair Housing Act of 1968 for discriminatory practices), *cert. denied*, 419 U.S. 1021 (1974); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636-37 (7th Cir. 1974) (same).

Congress specifically referred to the Fair Credit Reporting Act (FCRA) in the debate on the Privacy Act, 120 Cong. Rec. 36,646 (1974) (remarks of Rep. Erlenborn), and in both the House and Senate committee reports on the Privacy Act. See H.R. Rep. No. 1416, *supra* note 6, at 5, *reprinted in* Sourcebook, *supra* note 6, at 298; S. Rep. No. 1183, *supra* note 6, at 85, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 6998. There are strong parallels between the Privacy Act and the FCRA, which prescribes "actual damages" in its remedial provisions, 15 U.S.C. §§ 1681n, 1681o (1982), and is aimed at protecting consumers from reporting agency invasions

views.¹¹⁸ The restrictive view, however, has been followed only with respect to statutes designed to protect purely economic interests.¹¹⁹ Under federal statutes aimed at protecting personal or dignitary interests courts have consistently interpreted "actual damages" to include proven mental distress, humiliation and embarrassment in addition to pecuniary loss.¹²⁰ Because the Privacy Act is directed at protecting a dignitary interest, this analogy militates strongly in favor of a liberal interpretation of "actual damages." Moreover, a restrictive interpretation of "actual damages" is inconsistent with the pronounced tendency of courts to interpret statutes liberally to best vindicate the protected interest.¹²¹

of privacy. *Id.* § 1681(a)(4). Judicial interpretation of the term "actual damages" in the FCRA, before and after the passage of the Privacy Act, follows the liberal view allowing recovery for mental and physical injury in addition to pecuniary loss. *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1239-40 & n.7 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982); *Collins v. Retail Credit Co.*, 410 F. Supp. 924, 928, 932 (E.D. Mich. 1976); *Millstone v. O'Hanlon Reports, Inc.*, 383 F. Supp. 269, 276 (E.D. Mo. 1974), *aff'd*, 528 F.2d 829 (8th Cir. 1976).

118. See *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (1972) (Securities Exchange Act of 1934); *Wolf v. Frank*, 477 F.2d 467, 478-79 (5th Cir. 1973) (same), *cert. denied*, 414 U.S. 975 (1973); *Richardson v. MacArthur*, 451 F.2d 35, 43 (10th Cir. 1971) (same). Even in this area, however, there is authority for a broader interpretation of "actual damages" which would allow recovery of possible profits and benefits if they are not completely speculative. *Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 761, 781 (3d Cir. 1976); see *Mullaney, Theories of Measuring Damages in Security Cases and the Effects of Damages on Liability*, 46 *Fordham L. Rev.* 277, 280-81, 283-87 (1977).

119. See, e.g., 15 U.S.C. § 78bb(a) (1982) (Securities Exchange Act of 1934); 15 U.S.C. § 1989 (1982) (Motor Vehicle Information and Cost Savings Act); 17 U.S.C. § 101 (1976) (Copyright Revision Act of 1976) (codified as amended at 17 U.S.C. § 504 (1982)).

120. See *supra* note 117.

121. *Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3228 (1983). In *Guardians* the Court noted the well-established rule "that where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief." *Id.*; see *Davis v. Passman*, 442 U.S. 228, 245 (1979); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Halperin v. Kissinger*, 606 F.2d 1192, 1208 (D.C. Cir. 1979), *aff'd in part by an equally divided Court and cert. dismissed in part*, 452 U.S. 713 (1981) (per curiam). The Court has been particularly alert to provide adequate relief in the case of statutes aimed at protecting important societal interests and constitutional rights. See, e.g., *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492, 3502-03 (1983) (title VII of the Civil Rights Act of 1964); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472-73 (1982) (Clayton Act); *American Soc. of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 572-73 (1982) (same); *Maine v. Thiboutot*, 448 U.S. 1, 4-5 (1980) (42 U.S.C. § 1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342-44 (1979) (Clayton Act); *Carey v. Phipps*, 435 U.S. 247, 258-59 (1978) (42 U.S.C. § 1983); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-64 (1976) (title VII of the Civil Rights Act of 1964).

III. POLICY ANALYSIS AND LEGISLATIVE RECOMMENDATIONS

A. *Economic Considerations*

The more restrictive the measure of damages under the Privacy Act, the less effectively the civil remedy will fulfill its deterrent and compensatory purposes.¹²² Any remedy that excludes a major element of plaintiffs' probable injuries necessarily represents a lower level of compensation than one allowing plaintiffs to recover for all proven injuries. Because the restrictive view precludes recovery of the major element of injuries, a restrictive measure of damages may result in a substantially lower recovery than a liberal measure. The diminished recoveries obtainable under a restrictive view of "actual damages" reduce the incentives for the "widest possible citizen enforcement" envisioned by Congress.¹²³ As a result, the deterrent effect of civil damages on defendant agencies is proportionately reduced, and the disincentive for governmental agency violations of the Act is lowered.¹²⁴ Too liberal a measure of damages, however, may reduce government efficiency and result in unreasonably large government damages liability.¹²⁵ The ideal measure of damages, therefore, would balance these competing considerations to achieve the maximum level of compensation and deterrence without exceeding the maximum acceptable cost in loss of government efficiency and increased damages liability.

The effectiveness of the Act is similarly influenced by the degree of difficulty of establishing liability. Requiring plaintiffs to meet strin-

122. See C. Veljanovski, *The Economic Theory of Tort Liability—Toward a Corrective Justice Approach*, in *The Economic Approach to Law* 133-39 (1981). Theories of economic efficiency assume that the defendant (violation) is a rational decision-maker who will not invade a protected interest of the plaintiff if the cost of doing so exceeds the benefit he derives from the invasion. *Id.* at 128, 132. Consequently, the efficiency of deterrence is directly related to the availability and magnitude of civil damages. *Id.* at 137-38. The deterrent effect of potential liability will be weaker at a low level of damages than at a high level because there will be more instances in which the benefits of invading the protected interest will outweigh the consequences. *Id.* at 136-39. Although the rational decision-maker assumption may be dubious in cases such as automobile accidents, it is appropriate in the context of the Privacy Act which requires a deliberate—"intentional or willful"—violation before liability is imposed. See *id.* at 130-31; E. Mackaay, *Economics of Information and Law* 66-68, 70-71 (1982); R. Posner, *Economic Analysis of Law* § 6.2, at 122-23, § 6.12, at 142-43 (2d ed. 1977).

123. S. Rep. No. 1183, *supra* note 6, at 83, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 6997.

124. See *supra* note 122.

125. See C. Veljanovski, *supra* note 122, at 136-39. The objective of damages as a deterrent is to induce the most economically efficient behavior. Too great a level of

gent tests to establish government damages liability has the same detrimental impact on the compensatory and deterrent goals of the Act as a restrictive view of the measure of damages has. Alternatively, liberal criteria for imposing liability on the government may have as negative an effect on the goals of minimizing loss of governmental efficiency and damages liability as would a liberal measure of damages.

Courts following the restrictive interpretation of "actual damages" cite the protection of the government from excessive liability as a crucial policy consideration in reaching their decision.¹²⁶ This justification is spurious in view of the many hurdles the plaintiff must overcome in all actions brought under the Privacy Act before he is entitled to any damages.

A plaintiff can recover only if the agency did not take "reasonable" precautions to ensure the accuracy of records in its record system.¹²⁷ This "use of 'reasonableness' language creates loose and open-ended standards" that can defeat many claims under the Act.¹²⁸ Furthermore, plaintiffs must prove that an improper disclosure occurred¹²⁹ and that the disclosure was the result of an "intentional or willful"

deterrence imposes an inordinately large cost on the injurer relative to the increase in protection of the interest involved. *Id.*

126. See, e.g., *Fitzpatrick v. IRS*, 665 F.2d 327, 330 (11th Cir. 1982); *Houston v. United States Dep't of Treasury*, 494 F. Supp. 24, 30 (D.D.C. 1979).

127. *Edison v. Department of the Army*, 672 F.2d 840, 843 (11th Cir. 1982) (plaintiff bears the burden of proving that the agency was unreasonable); *Savarese v. United States Dep't of Health, Educ. & Welfare*, 479 F. Supp. 304, 306 (N.D. Ga. 1979) (same), *aff'd mem. sub nom. Savarese v. Harris*, 620 F.2d 298 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). Reasonableness is determined by balancing agency resources with the probability of a harmful disclosure. *Thompson v. Department of Transp., United States Coast Guard*, 547 F. Supp. 274, 283 (S.D. Fla. 1982); *Smierka v. United States Dep't of Treasury, Internal Revenue Serv.*, 447 F. Supp. 221, 226 n.35 (D.D.C. 1978), *remanded on other grounds*, 604 F.2d 698 (D.C. Cir. 1979).

128. *Smierka v. United States Dep't of Treasury, Internal Revenue Serv.*, 447 F. Supp. 221, 226 n.35 (D.D.C. 1978), *remanded on other grounds*, 604 F.2d 698 (D.C. Cir. 1979).

129. *Thomas v. United States Dep't of Energy*, 719 F.2d 342, 345 (10th Cir. 1983). Courts have strictly construed 5 U.S.C. § 552a(b) (1982) and require that the disclosure be the direct and initial result of retrieval from a record in a system of records. *Id.*; *Doyle v. Behan*, 670 F.2d 535, 538-39 (5th Cir. 1982); *Olberding v. United States*, 564 F. Supp. 907, 913 (S.D. Iowa 1982), *aff'd*, 709 F.2d 621 (8th Cir. 1983). Furthermore, dissemination of information to persons already aware of the information has been held not to be an actionable disclosure under the Privacy Act. *Federal Deposit Ins. Corp. v. Dye*, 642 F.2d 833, 836 (5th Cir. 1981); *King v. Califano*, 471 F. Supp. 180, 181 (D.D.C. 1979).

violation of the Act.¹³⁰ The plaintiff must also show an adverse effect¹³¹ before any liability may be found. In practice this standard has been a formidable barrier for plaintiffs to surmount.¹³² The plaintiff bears the burden of proving the violation of the Act and the causal relationship between that violation and the adverse effect.¹³³ Although Congress intended the Act to be an effective weapon which citizens could use to vindicate their rights,¹³⁴ courts have made this goal extremely difficult to attain. This problem is compounded in restrictive jurisdictions because not only are the prerequisites to liability applied so strictly as to defeat many claims, but also actual damages are construed so narrowly as to deny the successful plaintiff a reasonable compensatory recovery. This result is inconsistent with the goals and objectives of the Act. A liberal view, on the other hand, allowing a successful plaintiff to receive full compensation for proven injury, represents a far better balance between government and individual interests.

130. 5 U.S.C. § 552a(g)(4) (1982). Congress defined the standard of "intentional or willful" conduct as being "only somewhat greater than gross negligence." 120 Cong. Rec. 40,406 (1974). There is some confusion as to what this standard means, and it has been applied to require varying degrees of scienter. *Compare Parks v. United States Internal Revenue Serv.*, 618 F.2d 677, 683 (10th Cir. 1980) (willful and intentional conduct does not require "premeditated malice") *with Doe v. General Servs. Admin.*, 544 F. Supp. 530, 541 (D. Md. 1982) (willful and intentional means an extreme departure from the ordinary standard of conduct) *and Houston v. United States Dep't of Treasury*, 494 F. Supp. 24, 29 n.11 (D.D.C. 1979) (plaintiff must show intentional agency conduct).

131. *See Perry v. Block*, 684 F.2d 121, 129 (D.C. Cir. 1982); *Parks v. United States Internal Revenue Serv.*, 618 F.2d 677, 683 (10th Cir. 1980); *Thompson v. Department of Transp., United States Coast Guard*, 547 F. Supp. 274, 284-85 (S.D. Fla. 1982).

132. *See Office of Information and Privacy, U.S. Department of Justice, Freedom of Information 133-50* (1983). As of August 1983, the Department of Justice had identified 60 reported cases brought under the Privacy Act which included damage claims. Only four of these 60 cases have addressed the issue of the proper measure of actual damages under the Act. *Johnson v. Department of Treasury, Internal Revenue Serv.*, 700 F.2d 971 (5th Cir. 1983); *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982); *Albright v. United States*, 558 F. Supp. 260 (D.D.C. 1982); *Houston v. United States Dep't of Treasury*, 494 F. Supp. 24 (D.D.C. 1979). The other 56 claims were dismissed under the exceptions and exemptions to the Act or for failure to meet the prerequisites to liability. Only two of the four remaining cases found that the plaintiff was entitled to recover his actual damages, and they differ as to the proper measure of those damages. *See Johnson*, 700 F.2d at 986 (actual damages include proven mental and physical injuries); *Fitzpatrick*, 665 F.2d at 331 (actual damages are limited to out-of-pocket loss).

133. *See Edison v. Department of the Army*, 672 F.2d 840, 845 (11th Cir. 1982); *Mervin v. FTC*, 591 F.2d 821, 827 (D.C. Cir. 1978).

134. 120 Cong. Rec. 36,915 (1974) (remarks of Sen. Huddleston); *id.* at 36,652 (remarks of Rep. Biaggi).

B. Legislative Recommendations

The threat of violations of individuals' privacy rights posed by the information policies of government agencies mandate that privacy be tenaciously safeguarded as a matter of policy. Since its inception, the Privacy Act's civil remedies have been too difficult to obtain¹³⁵ to encourage widespread citizen enforcement or to have a substantial deterrent effect on government agencies. By amending the Act to define "actual damages" as proven mental, physical and economic injury,¹³⁶ Congress could eliminate the confusion surrounding the scope of the term and achieve a more effective balance. The adoption of a liberal view of the measure of damages would give plaintiffs a reasonable prospect of meaningful recovery and also provide the necessary incentive to make the Act self-policing. Such a revision would also enhance the deterrent effect of the Act by confronting agency violators with a real prospect of substantial liability.

To further enhance the deterrent effect of the Act, individual officers and employees of the federal government should be personally subject to punitive damages liability, up to a fixed statutory maximum, for knowing and willful violations of the Act.¹³⁷ Both Congress¹³⁸ and the Supreme Court¹³⁹ have recognized that it is appropri-

135. See *supra* note 132.

136. See D. Dobbs, *supra* note 19, § 7.3, at 528; Restatement (Second) of Torts § 652H (1976). See *supra* notes 20-21 and accompanying text. Permitting recovery for this combination of injuries will allow plaintiffs to obtain meaningful and comprehensive compensation for injuries caused by violations of the Act. This definition of "actual damages" is consistent with the traditional measures of general and special damages. By clarifying the damages provision of the Act in this way Congress can achieve an optimum balance between the compensatory and deterrent goals of the Act and the concern over unrestricted government damage liability.

137. Currently, the only individual liability under the Privacy Act is criminal liability. 5 U.S.C. § 552a(i) (1982). The Privacy Act imposes criminal liability on government officers and employees for certain "willful" violations of the Act, *id.* § 552a(i)(1), (2), and on any person who "knowingly and willfully" obtains information fraudulently from an agency in violation of the Act, *id.* § 552a(i)(3). Because criminal sanctions can be prosecuted only by the government, see *Windsor v. The Tennessean*, 719 F.2d 155, 160 (6th Cir. 1983), and the Privacy Act was intended to encourage widespread citizen enforcement, imposing punitive damages liability on individuals for knowing and willful violations of the Act would more effectively further the self-enforcement and deterrent purposes of the Act.

138. I.R.C. § 7217 (1976 & Supp. V 1981). Congress has exposed all persons, including government agency officers and employees, to liability for punitive damages for unauthorized disclosures of tax return information resulting from willful or grossly negligent conduct. *Id.* § 7217(c); *Rodgers v. Hyatt*, 697 F.2d 899, 905-06 (10th Cir. 1983). Thus Congress has, since the passage of the Privacy Act, determined that individual punitive damages liability is an effective mechanism to deter improper disclosures of information by agency personnel. It is noteworthy that the original Senate version of the Privacy Act would have made any person liable for any

ate to impose punitive damages liability on individual government officers and employees to deter conduct that is outside the scope of their legitimate authority. Individual defendants, however, should be liable only when there is a high degree of scienter, such as knowing and willful conduct, because too broad a scope of personal liability would have an inordinately negative effect on the efficient operation of government. Such a revision of the Act would make it a truly effective weapon with which citizens could protect their rights.

CONCLUSION

Congress repeatedly emphasized the overwhelming importance of privacy as a fundamental element of freedom and democracy during debate on the Privacy Act. The Act is currently the only comprehensive legislation protecting citizens' privacy rights from unwarranted invasions by federal government agencies. Through its civil remedy, the Act is aimed at deterring future intrusions on this critical right and at compensating the victims of illegal invasions of privacy. The language and legislative history of the Act indicate that Congress intended the term "actual damages" to be interpreted broadly to best effectuate the Act's provisions. Economic analysis of the Act demonstrates that a liberal view maximizes the deterrent and compensatory impact of the Act without exposing the government to undue liability or loss in efficiency. If Congress is truly concerned about the Orwellian prophecy¹⁴⁰ of an omnipresent, omnipotent bureaucracy, it should

violation of the Act and allowed plaintiffs to recover punitive damages where appropriate. S. 3418, 93d Cong., 2d Sess. § 304(b) (1974) (as introduced by Sen. Ervin), reprinted in Sourcebook, *supra* note 6, at 27. With the exception of the standard of conduct triggering liability, the punitive damages provision of the original version of the Privacy Act, *id.*, was very similar to the punitive damages provision of I.R.C. § 7217(c). Furthermore, both the original version of the Privacy Act and I.R.C. § 7217(c) are, in part, aimed at deterring unauthorized disclosure of personal information by government agencies. The Sixth Circuit recently commented, in the context of the Privacy Act, that Congress has the ability to subject government officials to individual liability for violations of the Act. *Windsor v. The Tennessean*, 719 F.2d 155, 160 & n.5 (6th Cir. 1983).

139. See, e.g., *Smith v. Wade*, 103 S. Ct. 1625, 1628-29 (1983) (42 U.S.C. § 1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981) (same); *Carlson v. Green*, 446 U.S. 14, 21-22 (1980) (constitutional tort action for violation of the eighth amendment); *Carey v. Piphus*, 435 U.S. 247, 257 & n.11 (1978) (42 U.S.C. § 1983). Furthermore, the Court has expressed scepticism concerning the effect that governmental liability will have on deterring illegal acts by officers and employees of government agencies. Moreover, the Court has stated that individual liability will have the most effective deterrent impact. *City of Newport*, 453 U.S. at 269-70; *Carlson*, 446 U.S. at 21-27.

140. E.g., 120 Cong. Rec. 36,912 (Government Operations Committee Oversight) (quoting testimony of Dr. Alan F. Westin); *id.* at 36,904 (remarks of Sen. Goldwater); *id.* at 36,647 (remarks of Rep. Alexander); *id.* at 36,652 (remarks of Rep. Regula).

amend the Act to clarify and expand its damages provisions. Until this occurs the judiciary has a duty to interpret “actual damages” as it was intended by Congress—in accordance with a liberal view.

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