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## Damages Under the Privacy Act: Is Emotional Harm “Actual”?

### INTRODUCTION

The Social Security Administration (“SSA”), the Federal Aviation Administration (“FAA”), and the United States Department of Transportation (“DOT”) illegally exchanged pilot Stanmore Cooper’s confidential medical records, disclosing his HIV positive status to one another.<sup>1</sup> As the investigation into Cooper’s fitness as a pilot became public knowledge, the press publicized Cooper’s stigmatizing illness.<sup>2</sup> A United States District Court in the Northern District of California found that this information sharing between agencies was illegal, violating the federal Privacy Act of 1974.<sup>3</sup> Despite this finding, the court held that Cooper was not entitled to any damages for his emotional suffering—which included anxiety, humiliation, fear of social ostracism, and severe emotional distress—caused by the government’s invasion of his privacy.<sup>4</sup> The court in *Cooper v. Federal Aviation Administration*<sup>5</sup> justified this paradox by reasoning that the Privacy Act compensates victims for “actual damages” and that the phrase “actual damages” is strictly limited to pecuniary harm, excluding nonpecuniary harm like the kind Cooper suffered.<sup>6</sup> As a result of the court’s reasoning, a question

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1. *Cooper v. Fed. Aviation Admin.*, No. C 07-1383, slip op. at 12 (N.D. Cal. Aug. 22, 2008).

2. *Id.* at 21.

3. *Id.* at 19. The government agencies violated the following provision of the Privacy Act:

No agency shall disclose any record which is contained in a system of records by any means of communication to any other person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section . . . .

5 U.S.C. § 552a(b) (2006). The court determined that the use of Cooper’s records was not “routine.” *Cooper*, No. C 07-1383, slip op. at 19.

4. *Cooper*, No. C 07-1383, slip op. at 19, 25. The emotional distress Cooper suffered is discussed in his complaint. *See* Complaint at 8, *Cooper*, No. C 07-1383.

5. No. C 07-1383 (N.D. Cal. Aug. 22, 2008).

6. *Id.* at 22–23.

emerges: did the *Cooper* court correctly interpret the Privacy Act when it denied Cooper compensation?

The *Cooper* court ultimately relied on the canon of sovereign immunity to reach its decision, which downplayed the importance of interpreting the phrase “actual damages.”<sup>7</sup> Instead of taking on the controversial and thorny enterprise of interpreting the statutory meaning of the phrase “actual damages,” the court limited its discussion to a review of the Fifth and Eleventh Circuits’ construction of the phrase.<sup>8</sup> Not persuaded by the reasoning of either circuit, however, the *Cooper* court found that because ambiguity existed in the phrase “actual damages,” the canon of sovereign immunity dictated the outcome of the case, and that the ambiguity would be resolved in favor of the government. Consequently, this prohibited Cooper from recovering for his emotional damages.<sup>9</sup>

This Recent Development challenges the holding of the *Cooper* court. Part I explains the *Cooper* court’s reasoning. Part II explores the language and the purpose of the Privacy Act. In Part III, this Recent Development criticizes the *Cooper* court’s reliance on the canon of sovereign immunity to form the backbone of its argument. In response to the *Cooper* court’s discussion of Fifth and Eleventh Circuit precedent, Part IV highlights the difficulty and inconsistency that result in relying on legislative history to interpret a statute. Part V considers the purpose, policy, plain meaning, and relevant precedent of the Privacy Act to conclude that the phrase “actual damages” should include nonpecuniary harm. Accordingly, the *Cooper* court should have interpreted the Privacy Act to allow waiver of the government’s immunity to suit for emotional harm, permitting Cooper to recover.

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7. *Id.* at 24. (“The court need not, however, conduct its own analysis of the legislative history to reach the conclusion that mental distress alone does not satisfy the Privacy Act’s actual damages requirement.”).

8. *Id.* at 25. This Recent Development agrees with the *Cooper* court that neither the reasoning of the *Johnson* court nor the reasoning of the *Fitzpatrick* court can decide this case. To be sure, *Johnson* shows that traditional canons of statutory interpretation *can* be used to hold that the phrase “actual damages” includes emotional harm. This Recent Development, however, advances the proposition that purposivism combined with traditional statutory interpretation, like that in *Johnson*, yields the most accurate result. See generally *Johnson v. Dep’t of Treasury*, 700 F.2d 971 (5th Cir. 1983) (relying on parts of the legislative history to find that the phrase “actual damages” does include emotional harm); *Fitzpatrick v. Internal Revenue Serv.*, 665 F.2d 327 (11th Cir. 1982) (using parts of the legislative history to hold that the phrase “actual damages” does not include emotional harm).

9. *Cooper*, No. C 07-1383, slip op. at 25.

I. THE COURT'S DECISION IN *COOPER V. FEDERAL AVIATION  
ADMINISTRATION*

Stanmore Cooper was a pilot, certified to fly with an airman license granted by the FAA.<sup>10</sup> Cooper was also HIV positive.<sup>11</sup> In 2002 the DOT began investigating certified pilots to find potential discrepancies between their medical exams needed for licensure and their medical records submitted to other government agencies, specifically those records used to seek government benefits.<sup>12</sup> During this investigation (known as "Operation Safe Pilot"), the DOT discovered that Cooper reported his HIV positive status to the SSA, which allowed him to receive disability benefits.<sup>13</sup> Cooper, however, had not reported his HIV positive status on his airman medical certification.<sup>14</sup> The DOT obtained this information from the SSA through a transfer of Cooper's records and relayed it to FAA personnel during a meeting in January 2005.<sup>15</sup> These government agencies completed this information transfer without Cooper's consent and without a valid exemption to the Privacy Act's prohibition on inter-agency sharing.<sup>16</sup>

As a result of this investigation, Cooper's airman license was revoked.<sup>17</sup> The federal government pressed charges against Cooper for making false statements to a government agency.<sup>18</sup> Cooper pled guilty to charges of making false statements to a government agency,<sup>19</sup> and the court fined him and sentenced him to probation for the offense.<sup>20</sup> The press covered Cooper's case, which revealed Cooper's previously private medical condition.<sup>21</sup> Because Cooper's condition

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10. *Id.* at 2.

11. *Id.*

12. *Id.* at 3.

13. *Id.* at 3–4.

14. *Id.* at 6.

15. *Id.* at 6–7.

16. *Id.* at 12, 19. The Privacy Act allows information sharing without consent if the disclosure is within the scope of an agency's routine use regulations as published in the Federal Register or if the disclosure is compatible with the purposes for which the agency collected the record. *See* 5 U.S.C. § 552a(1)(B) (2006).

17. *Cooper*, No. C 07-1383, slip op. at 7.

18. *Id.* at 7.

19. *Id.* at 7–8. Investigators confronted Cooper at a Starbucks about his HIV status, and he readily admitted that he purposefully omitted the information from his FAA medical information. *Id.* at 7. Cooper's Privacy Act claim does not dispute this charge or Cooper's own wrongdoing. *Id.* His claim is about whether the government agencies violated the Privacy Act in their investigation, which revealed this information. *Id.*

20. *Id.* at 7–8.

21. *Id.* at 21.

was widely publicized, he suffered “severe emotional distress.”<sup>22</sup> Hoping to recover for this violation of privacy and the distress he suffered, Cooper filed suit against the defendant government agencies on July 10, 2007, in a district court in the Northern District of California.<sup>23</sup>

In early 2008 Cooper and the defendant agencies both moved for summary judgment on the issue of liability.<sup>24</sup> In spite of the court’s finding that the government agencies had violated the Privacy Act,<sup>25</sup> the court ultimately granted the defendant agencies’ motion.<sup>26</sup> The court found that the damages Cooper suffered were not within the statutorily recoverable category of “actual damages” because, according to the court, the phrase “actual damages” is limited to pecuniary harm, excluding nonpecuniary harm, like the emotional harm Cooper suffered.<sup>27</sup>

The *Cooper* court’s decision is troubling for two reasons. First, it greatly limits the scope of recovery from the illegal sharing of information by government agencies.<sup>28</sup> Second, the decision was based upon an unnecessarily limited exploration of the statutory language. A review of the Privacy Act and other relevant statutory materials reveals that an alternative interpretation of the phrase “actual damages” exists for adoption as a national standard in all privacy-related cases. The *Cooper* court saw the canon of sovereign immunity as an insurmountable hurdle.<sup>29</sup> However, assessment of the purpose, policy, relevant precedent, and plain meaning of the Privacy Act shows that sovereign immunity should not decide the case so easily. Instead, a comprehensive analysis of these materials suggests that the phrase “actual damages” includes the nonpecuniary harm suffered by Cooper. Therefore, a proposed construction of the phrase

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22. *Id.*; see also *supra* note 4 and accompanying text (describing Cooper’s distress).

23. See *Cooper*, No. C 07-1383, slip op. at 1.

24. *Id.* at 1–2.

25. “[T]he court finds that the SSA-OIG’s transmission of Cooper’s records to another agency without his prior consent was unlawful under 5 U.S.C. § 552a(b).” *Id.* at 19.

26. *Id.* at 2.

27. *Id.* at 25.

28. The *Cooper* decision would affect the number of plaintiffs who would be able to recover under the Privacy Act in a significant way because, as discussed in further detail in Part V, Privacy Act violations are more likely to cause emotional, rather than pecuniary, harm. Under the *Cooper* decision, only plaintiffs who have suffered pecuniary harm will be able to recover. See *infra* notes 151, 154–56 and accompanying text.

29. “[T]he issue must be decided by the rule that when ‘analyzing whether Congress has waived the immunity of the United States, [courts] must construe waivers strictly in favor of the sovereign.’” *Cooper*, No. C 07-1383, slip op. at 24 (second alteration in original) (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986)).

“actual damages” that would include nonpecuniary harm necessarily begins with an examination of the Privacy Act itself.

## II. THE PRIVACY ACT

The multifaceted and oft-interpreted right to privacy has meant many things to many courts.<sup>30</sup> In one attempt to crystallize this area of law, Congress codified part of a right to privacy in the federal Privacy Act of 1974.<sup>31</sup> Senator Sam Ervin of North Carolina proposed the Privacy Act, largely in response to the Watergate scandal.<sup>32</sup> The exposure of personal information involved in the Watergate scandal as a result of intergovernmental sharing generated a fear, which, combined with advances in technology, prompted Ervin to propose a bill that codified citizens’ rights of privacy against the government.<sup>33</sup>

Among other things, the Privacy Act set out to provide protection for citizens against the federal government’s intrusions into, and disclosures of, personal records.<sup>34</sup> In *Cooper*, the court looked at a portion of the Privacy Act that guarantees that government officials who irresponsibly release, share, or handle the private information of citizens will be held accountable for doing so.<sup>35</sup> This provision comports with the larger purpose of the Privacy Act, which is to “balance the government’s need to maintain information about individuals with the rights of individuals to be protected against

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30. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing a right to privacy which rendered unconstitutional laws prohibiting private homosexual sodomy); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (finding a right of privacy existing in the “penumbras” of the Constitution, leading to a finding that laws that unreasonably prohibit abortion are unconstitutional); *Katz v. United States*, 389 U.S. 347, 353 (1967) (recognizing that the Fourth Amendment protection against unreasonable searches and seizures extends to an expectation of privacy against wiretaps in public phone booths); see also 2 *ENCYCLOPEDIA OF PRIVACY* 414–28 (William G. Staples ed., 2007) (listing major cases and developments in the many areas of privacy law).

31. Privacy Act of 1974, Pub. L. No. 93-579, § 2, 88 Stat. 1896, 501 (codified at 5 U.S.C. § 552a (2006)).

32. U.S. DEP’T. OF JUSTICE, OVERVIEW OF THE 1974 PRIVACY ACT, <http://www.justice.gov/opcl/1974privacyact-overview.htm> (last visited Nov. 8, 2009) (Legislative History of the Privacy Act of 1974) [hereinafter U.S. DEP’T OF JUSTICE WEB SITE].

33. *Id.* (Policy Objectives).

34. The Privacy Act provides a citizen with four civil causes of action against the federal government for the following violations by a government agency: (1) refusing to amend a citizen’s records as requested; (2) withholding agency records from a citizen after proper request; (3) failing to maintain a citizen’s records with completeness, fairness, accuracy and timeliness; and (4) for other violations within the Act which produces an adverse effect on the claimant. *Id.* (Civil Remedies).

35. See *Cooper v. Fed. Aviation Admin.*, No. C 07-1383, slip op. at 10–11 (N.D. Cal. Aug. 22, 2008).

unwarranted invasions of their privacy stemming from federal agencies' collection, maintenance, use, and disclosure of personal information about them."<sup>36</sup> To effectuate this purpose, the Act creates four policy objectives:

- (1) To restrict disclosure of personally identifiable records maintained by agencies.
- (2) To grant individuals increased rights of access to agency records maintained on themselves.
- (3) To grant individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely, or complete.
- (4) To establish a code of "fair information practices," which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records.<sup>37</sup>

Cooper's claim deals with the first policy of restricting information disclosure.

As part of its enforcement scheme, the Privacy Act provides for compensation for "actual damages" suffered by an individual that result from a violation of the Act.<sup>38</sup> The Act provides for four types of civil remedies for violations: two provide injunctive relief and two provide for monetary damages.<sup>39</sup> The Privacy Act itself does not

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36. U.S. DEP'T OF JUSTICE WEB SITE, *supra* note 32 (Policy Objectives).

37. *Id.* (underlining in original).

38. See 5 U.S.C. § 552a(g)(4) (2006). The relevant damages provision of the Privacy Act reads:

(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; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4)(A)–(B).

39. "Amendment lawsuits" under 5 U.S.C. § 552a(g)(1)(A) and "access lawsuits" under 5 U.S.C. § 552a(g)(1)(B) allow victims injunctive relief to require the state to amend citizen records or to allow access to their own records. "Accuracy lawsuits" under 5 U.S.C. § 552a(g)(1)(D) allow citizens to sue for damages where inaccurate records are kept. Suits like Cooper's are allowed under 5 U.S.C. § 552a(g)(1)(D) as "other damages" suits for mistakes such as unlawful disclosure or for violation of any "other" provisions of the Act where the adverse effect standing requirement, as well as the intentional or willful requirement, are met. See 5 U.S.C. § 552a(g)(1).

comment on whether the phrase “actual damages” is intended to limit recovery to pecuniary damages, nor does it address a distinction between pecuniary harm and emotional, nonpecuniary harm in its text.<sup>40</sup> Cooper sought monetary damages to compensate for the disclosure of his records: an injunction could not remedy the damage resulting from the agencies’ exchange. It is clear that the Privacy Act provided Cooper with a cause of action, but instead of using the relevant provisions of the Act to decide the case, the court relied on sovereign immunity.

### III. THE CANON OF SOVEREIGN IMMUNITY

The *Cooper* court ultimately based its decision solely on the canon of sovereign immunity.<sup>41</sup> Specifically, the *Cooper* court decided the case based on prior holdings that “‘ambiguity [concerning] whether [a particular statute] authorizes a punitive damages award . . . must be resolved in favor of the Government.’”<sup>42</sup> The court stated, “Defendants argue, and the court agrees, that the issue must be decided by the rule that when ‘analyzing whether Congress has waived the immunity of the United States, [courts] must construe waivers strictly in favor of the sovereign . . . and not enlarge the waiver beyond what the language requires.’”<sup>43</sup> The court found that the phrase “actual damages” was ambiguous, that Congress had not expressly waived sovereign immunity as to the type of damages for which the government would be amenable to suit, and that, as a result, the phrase “actual damages” must be narrowly construed only to include pecuniary harm.<sup>44</sup>

The canon of sovereign immunity is a doctrine deeply embedded in American law and creates a strong presumption in favor of the sovereign.<sup>45</sup> The canon posits that if a statute does not clearly abrogate the government’s immunity, the government cannot be

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40. See U.S. DEP’T OF JUSTICE WEB SITE, *supra* note 32 (Policy Objectives).

41. *Cooper v. Fed. Aviation Admin.*, C 07-1383, slip op. at 24–25 (N.D. Cal. Aug. 22, 2008).

42. *Id.* at 25 (quoting *Siddiqui v. United States*, 359 F.3d 1200, 1204 (9th Cir. 2004)).

43. *Id.* at 24 (alterations in original) (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986)).

44. *Id.* This Recent Development argues that this is neither the best nor the most appropriate use of the canon of sovereign immunity.

45. See generally *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 498 (2006) (noting that particularly in the context of waivers, sovereign immunity creates a presumption in favor of the government).



liable.<sup>46</sup> Sovereign immunity protects the government from suit, but it does so providing that Congress has not waived that immunity in a statute.<sup>47</sup> The government's immunity, therefore, can be waived when the statute requires the waiver.<sup>48</sup> The force behind the canon of sovereign immunity comes from the idea that governments are presumed to be immune from suit and that the legislature must intentionally and clearly allow a waiver to this longstanding and important immunity.<sup>49</sup> This argument carries great force because of the danger of allowing the government to be overly liable. However, a problem with this reasoning is that clarity is neither a specialty nor a goal of the legislature.<sup>50</sup> Statutes are purposefully vague in some cases in order to leave interpretation to the courts and to allow courts to resolve unforeseen difficulties with the law without requiring statutory amendment or repeal.<sup>51</sup> Legislatures are also often vague as a result of compromise between legislators and the houses of Congress.<sup>52</sup> Recognizing that the legislature must be vague, to a point, in order to make statutes practicable requires weighing that particular consideration against the demands of sovereign immunity.

Courts have long applied this canon,<sup>53</sup> but the *Cooper* court neglected to note that the canon has recently been questioned<sup>54</sup> and

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46. See, e.g., WILLIAM ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRET, LEGISLATION AND STATUTORY INTERPRETATION 336–39 (2000) (describing the canon of sovereign immunity in a more rigid form).

47. See *id.* An abrogation of the state's immunity is synonymous with a "waiver."

48. See *Cooper*, No. C 07-1383, slip op. at 24.

49. ESKRIDGE ET AL., *supra* note 46, at 336–37; see also 5 U.S.C. § 552 (2006) (providing that the Privacy Act is aimed at remedying federal government agency behavior). One example of where the Act provides for government liability is in § 552a(g)(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 . . . ." 5 U.S.C. § 552a(g)(4).

50. TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE 165 (2004) ("In the legislative practice, ambiguity can allow progress to continue on areas of disagreement, rather than making *complete* agreement the prerequisite to *any* agreement.").

51. The doctrine of unconstitutional vagueness applies to criminal statutes and provides that a statute which is unclear about the behavior that can be sanctioned criminally cannot withstand the constitutional requirement for notice. Civil laws, however, do not threaten to take life or liberty of transgressors and thus leave room for vagueness. See ESKRIDGE ET AL., *supra* note 46, at 344–45. The rule of lenity applies only to criminal law to "reflect a commonsense notion that potential criminal defendants are virtually impossible to organize for political action." *Id.*

52. See LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 12 (2008) ("Bills are the result of committee work and political compromise.").

53. See DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW 1 (2005) ("[S]overeignty as recognized today has existed in one form or another for thousands of years.").

that the canon of sovereign immunity should be used alongside other canons of statutory interpretation.<sup>55</sup> Simply put, courts should not use sovereign immunity as a solution to every statutory ambiguity involving government amenability to suit.<sup>56</sup>

One reason that sovereign immunity inappropriately barred recovery in Cooper's case is because the canon only applies where language is obviously ambiguous. It is not obvious that the phrase "actual damages" is ambiguous.<sup>57</sup> Some courts have defined ambiguity in statutory language as that which is "capable of being understood by reasonably well-informed persons in two or more senses."<sup>58</sup> This definition intends to consider the context of the statutory scheme and the terms of the statute when asking whether there is more than one reasonable interpretation of the statute's terms.<sup>59</sup> As articulated, however, this definition may be incorrect.<sup>60</sup> The question is not whether there can be multiple reasonable interpretations, but whether, in context, there is more than one equally plausible meaning to a term or phrase.<sup>61</sup> In Cooper's case, the court should have asked itself whether it is plausible that the phrase "actual damages" could include emotional harm *or* exclude emotional harm.

The dictionary definition of "actual,"<sup>62</sup> the reasoning of other courts,<sup>63</sup> and the purpose of the Privacy Act to compensate victims for

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54. ESKRIDGE ET AL., *supra* note 46, at 337 ("[S]trict construction must be justified on more finely tuned grounds. Some commentators have argued that sovereign immunity is obsolete—that in modern times, government should be as amenable as private parties to suit for harm it causes."). Eskridge and his coauthors also note that there exists "tension between the sovereign immunity canon and contemporary values supporting compensation for victims of wrongdoing." *Id.* at 338; *see also* DOERNBERG, *supra* note 53, at 210 (explaining that sovereign immunity shields the government from liability in a way that runs contrary to constitutional guarantees of protection from the government); John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1121–24 (1993) (questioning whether there is justice in sovereign immunity and finding that the canon lacks adequate justification).

55. ESKRIDGE ET AL., *supra* note 46, at 337.

56. *Id.* at 338.

57. *See, e.g., infra* Part V.C. (arguing that courts can use the plain meaning of the phrase "actual damages").

58. *State ex rel. Kalal v. Circuit Court of Dane County*, 2004 WI 158, ¶¶ 27–36, 681 N.W.2d 110, 122 (Wis. 2004) (seeking to define the word "refuses" in a Wisconsin statute).

59. *Id.*

60. *See* JELLUM, *supra* note 52, at 69 ("This definition cannot be correct for if it were then ambiguity would be found in every court case involving a statutory interpretation issue.").

61. *See id.* at 70.

62. *See infra* note 146 and accompanying text.

63. *See infra* Part V.B.

the harm they are most likely to incur<sup>64</sup> support the idea that including emotional harm in the phrase “actual damages” is *more* plausible than excluding emotional harm. These three supporting points give context both to the case and to the statutory terms, and they provide strong support for a conclusion that the phrase “actual damages” unambiguously refers to all types of damages that a claimant has suffered at the time of his or her complaint. Therefore, it was presumptive of the *Cooper* court to hold that the phrase “actual damages” was ambiguous.

Sovereign immunity was also an inappropriate basis on which to decide this case because there is serious doubt about whether the sovereign immunity canon should trump legislative history, purpose, and public policy.<sup>65</sup> Though the *Cooper* court examined the reasoning of other circuit courts<sup>66</sup> and also analyzed some of the legislative history of the Privacy Act,<sup>67</sup> the court explicitly based its decision exclusively on sovereign immunity grounds.<sup>68</sup> Courts have been known to rest entire decisions on one canon, like sovereign immunity, but it would be prudent to consider more than one source of insight in deciding a question which potentially limits recovery for so many plaintiffs.<sup>69</sup>

Because sovereign immunity takes away all redress for citizens against the government, it seems that courts should only take such a serious step when they consider other canons of statutory interpretation. As such, the canon of sovereign immunity should be dealt with like other canons of statutory interpretation, such as the canons of lenity and *ejusdem generis*,<sup>70</sup> and the canon of sovereign immunity should be one of many factors considered when interpreting a statute.<sup>71</sup> The canon of sovereign immunity, by itself

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64. See *infra* notes 123–28 and accompanying text.

65. See *supra* note 54 and accompanying text.

66. *Cooper v. Fed. Aviation Admin.*, No. C 07-1383, slip op. at 23–24 (N.D. Cal. Aug. 22, 2008).

67. *Id.* at 22–23.

68. *Id.* at 24.

69. See *ESKRIDGE ET AL.*, *supra* note 46, at 337 (“[Sovereign immunity] is no reason, standing alone, to construe such a statute narrowly; strict construction must be justified on more finely tuned grounds.”).

70. See *supra* note 51. The canon of lenity dictates that in the criminal law, where a statute is vague it shall be interpreted in favor of the defendant, so as to avoid unjust punishment. *ESKRIDGE ET AL.*, *supra* note 46, at 344–45. The canon of *ejusdem generis* is one of the grammar canons, which states that “when general words are near specific words, the general words should be limited to include only things similar in nature to the specific words.” *JELLUM*, *supra* note 52, at 107.

71. See *generally* *ESKRIDGE ET AL.*, *supra* note 46, at 339 (“As the sovereign immunity example indicates, hoary canons sit like loaded guns, to be picked up and even

and in its most robust form, does allow the *Cooper* court to exclude emotional, nonpecuniary damages because the statute did not explicitly include them.<sup>72</sup> However, a stronger ruling resting on the Privacy Act's policy, purpose, plain meaning, and legislative history could waive the government's immunity from suit for nonpecuniary harm.<sup>73</sup>

The remainder of this Recent Development will engage in statutory interpretation of the Privacy Act to demonstrate that the Act, even if construed strictly, allows for the recovery of emotional harm and that the *Cooper* court should have found that Congress intended to waive the government's immunity in this instance. To be sure, the *Cooper* court acted within the boundaries of its authority by using sovereign immunity to decide the case. However, a more judicially-sound and prudent interpretation of the phrase "actual damages" looks to the history and policy behind the Act. An examination of this background follows.

#### IV. THE TROUBLE WITH LEGISLATIVE HISTORY

The legislative history of a statute is the record of debates, deliberations, and discussions that were considered in creating the statutory language that becomes law.<sup>74</sup> Legislative history can include speeches made by any number of legislators on the debate floor; committee reports from the committees and subcommittees through which legislation passes in both houses; proposed, rejected, and accepted amendments; public understanding of issues and terms at the time of the legislation's passage; the President's signing statements; and many other opinions of players in the process.<sup>75</sup> By sheer mathematics, the variety of materials coming from legislators from both sides of an issue will necessarily include evidence judges can use to support a broad range of potentially inconsistent outcomes.

A 1,455-page document comprises the Legislative History of the Privacy Act.<sup>76</sup> The volume contains contradictory materials, such as

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modified to produce more firepower by skillful advocates and opportunistic judges. Regrettably, because the canons are rule-like in form, judges may rely upon them without acknowledging that the canons are rooted in controversial values, may have been phrased in different ways in prior cases, and can evolve over time on a case-by-case basis.").

72. *Id.*

73. The *Johnson* court's holding exemplifies this approach. *Johnson v. Dep't of Treasury*, 700 F.2d 971, 977 (5th Cir. 1983).

74. ESKRIDGE ET AL., *supra* note 46, at 295.

75. *Id.*

76. See JOINT COMM. ON GOV'T OPERATIONS, LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974, at 1458 (1976) [hereinafter SOURCEBOOK].

the refusal to adopt a bill with broader recovery provisions<sup>77</sup> and a statement by the sponsor of the eventually-passed bill that stresses the importance of protecting against embarrassment,<sup>78</sup> which suggests the intent to include broad recovery provisions. The specific problem with the legislative history of the Privacy Act, as it relates to the *Cooper* case, is that the drafters of the bill never directly discussed the issue of emotional distress. This makes the exercise of divining what was meant from a number of related, but not exact, statements just as difficult as interpreting the language of the statute itself.<sup>79</sup> This explains why the courts in *Johnson v. Department of Treasury*<sup>80</sup> and *Fitzpatrick v. Internal Revenue Service*<sup>81</sup> examined portions of the legislative history relevant to the phrase “actual damages” and reached two diametrically opposed conclusions.

In *Johnson*, the Fifth Circuit granted recovery for emotional distress suffered by an Internal Revenue Service (“IRS”) attorney whose conduct—unbeknownst to him—had been the subject of an internal government investigation for several months.<sup>82</sup> In awarding damages to the plaintiff, the *Johnson* court found the phrase “actual damages” to encompass emotional harm, loss of reputation, embarrassment, and similar nonpecuniary harms.<sup>83</sup> In contrast, the Eleventh Circuit in *Fitzpatrick* found that the phrase “actual damages” was strictly limited to pecuniary loss.<sup>84</sup> The plaintiff in *Fitzpatrick*, another IRS employee, ostensibly suffered emotional distress when the agency publicly disclosed his mental illness after he took a leave of absence from work.<sup>85</sup> While neither of these cases binds the *Cooper* court in the Ninth Circuit, they are probative because they detail each court’s interpretation of the phrase “actual damages.”

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77. S. 3418, 93d Cong. § 303, reprinted in SOURCEBOOK, *supra* note 76, at 334, 371.

78. 120 CONG. REC. at 36,904, reprinted in SOURCEBOOK, *supra* note 76, at 803.

79. This is precisely the reason why Justice Scalia and the New Textualists refuse to look at legislative history to interpret statutory language. See, e.g., JOSEPH L. GERKEN, WHAT GOOD IS LEGISLATIVE HISTORY? JUSTICE SCALIA IN THE FEDERAL COURTS OF APPEALS 91–97 (2007). Justice Scalia does not believe there is “such a thing as a unified ‘intent of Congress’ with regard to a piece of legislation . . . . Even if there were an identifiable ‘intent of Congress,’ one should not look to legislative history to discern what that intent is.” *Id.* at 91.

80. 700 F.2d 971 (5th Cir. 1983).

81. 665 F.2d 327 (11th Cir. 1982).

82. *Johnson*, 700 F.2d at 972–93.

83. *Id.* at 972.

84. *Fitzpatrick*, 665 F.2d at 331.

85. *Id.* at 328.

The Fifth Circuit in *Johnson* looked to legislative history to determine Congress's purpose behind the Privacy Act.<sup>86</sup> The court concluded that the legislative history showed that the law intended to provide the highest level of protection to citizens against government interference with personal privacy.<sup>87</sup> In combination with its legislative history analysis, the *Johnson* court took a functional approach to reach its ultimate conclusion about the phrase "actual damages."<sup>88</sup> Borrowing from Supreme Court precedent, the Fifth Circuit observed that the kinds of damages involved in violation of privacy cases are typically mental or emotional, rather than pecuniary.<sup>89</sup> Consistent with this logic, the *Johnson* court concluded that statutes protecting constitutional rights should be tailored to provide a remedy for violations of those rights.<sup>90</sup> Thus, both the legislative history of the Privacy Act and a functional assessment of privacy violations led the Fifth Circuit to hold that the phrase "actual damages" included nonpecuniary harm.<sup>91</sup>

The weakness of the *Johnson* court's interpretation is the traditional problem involved with looking at legislative history to find answers: it is a virtual grab bag of opinions from different legislators and committees.<sup>92</sup> For example, the *Johnson* court did not address the opinion of the Privacy Protection Study Commission, which the *Fitzpatrick* court found to be probative.<sup>93</sup>

While *Johnson* cited a wide array of authority for its position, its Eleventh Circuit counterpart, *Fitzpatrick v. IRS*, also found persuasive authority for its opposing viewpoint. The court in *Fitzpatrick* ultimately found that the phrase "actual damages" does not encompass nonpecuniary harm.<sup>94</sup> The court relied on the Privacy Protection Study Commission's interpretation of the phrase.<sup>95</sup> The Commission, formed by the Act itself in order to report to Congress,

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86. *Johnson*, 700 F.2d at 974-83.

87. *See id.* at 975-76.

88. *Id.* at 977-78.

89. *Id.* at 977 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 385 n.9 (1967)). "Obviously, mental distress is the normal and typical damage resulting from an invasion of privacy." *Id.*

90. *Id.* at 977 (quoting *Carey v. Phiphus*, 435 U.S. 247, 258 (1978)).

91. *Id.* at 972.

92. *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Leventhal, who said using legislative history is like "looking over a crowd and picking out your friends").

93. *See infra* notes 95-99 and accompanying text.

94. *Fitzpatrick v. Internal Revenue Serv.*, 665 F.2d 327, 331 (11th Cir. 1982).

95. *Id.*

does not bind a court to its interpretation of the Privacy Act's language.<sup>96</sup> The Commission believed that the phrase "actual damages" only encompassed pecuniary harm.<sup>97</sup> The Commission clearly opined that the legislature intended the phrase "actual damages" to be synonymous with "special damages," which do not include emotional harm.<sup>98</sup> However, there are two problems with using the Commission's opinion. First, a non-binding advisory commission issued the opinion. Second, the Commission's opinion is logically weak because it argues that the legislature intended to say "special damages," even though it chose not to use this specific term.<sup>99</sup>

The reasoning of the *Fitzpatrick* court made the problem of the legislative history "grab bag" even more apparent.<sup>100</sup> As far as the problem of disparate legislative history goes, the *Fitzpatrick* court took a narrower look at the legislative history in its analysis than the *Johnson* court did, making its reasoning even less persuasive. The *Fitzpatrick* court's view is narrow because it relied on the "evolution" of the language of the statute, statements made by the bill's sponsor in the Senate, and the remarks made by a commission formed to analyze the Privacy Act after its passage.<sup>101</sup> The court neither looked to the stated purpose of the Act in its preamble<sup>102</sup> nor to the statements of any of the other 545 legislators who may have spoken as to which types of damages the bill would compensate.<sup>103</sup> The *Fitzpatrick* court also did not address the strength of the right to privacy, which *Johnson* suggested is prevalent in much of the legislative history of the Act.<sup>104</sup>

The *Johnson* court reiterated that the preamble of the Privacy Act itself states that "the right to privacy is a personal and

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96. *Id.* at 330 n.5. The Senate bill had aimed to give this group authority to oversee and enforce the Act, but the compromise bill allowed the group to exist only as a "non-permanent study commission." *Id.*

97. *Id.* at 330-31.

98. *Id.*

99. The reason that the Commission thought that the phrase "actual damages" only included pecuniary harm was because it thought the legislature *intended* this. *Id.* at 331. The Commission's opinion is simply another opinion attempting to identify what the Legislature meant. Some legal scholars and judges have attacked the idea of legislative intent as a concept which is impossible to discern. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 90 (1991).

100. See *supra* note 92 and accompanying text.

101. *Fitzpatrick*, 665 F.2d at 330-31.

102. See generally *Fitzpatrick*, 665 F.2d 327 (omitting any discussion of the preamble of the Privacy Act).

103. See *id.* at 330 (discussing only the view of the congressional committees, including, but not limited to, the Privacy Protection Study Commission).

104. *Johnson v. Dep't of Treasury*, 700 F.2d 971, 976 (5th Cir. 1983).

fundamental right protected by the Constitution of the United States.”<sup>105</sup> Senator Ervin, a co-sponsor of the Privacy Act, further said that privacy and “fair, honest” government were foundational principles of our Constitution and that “[t]heir restatement as legislative guarantees are vital.”<sup>106</sup> This language within the Act itself, supported by Senator Ervin’s remarks, speaks to the idea that a right to privacy is constitutionally based and, thus, may be afforded a higher level of protection—like compensation from a large pool of potential damages.<sup>107</sup> While it was valid for the *Fitzpatrick* court to examine the opinion of the Privacy Protection Study Commission, the *Johnson* court’s emphasis on the Privacy Act’s preamble and bill sponsor statements shows that the legislative history is not dispositive.

The *Fitzpatrick* and *Johnson* courts both went down the slippery and murky path of searching for meaning in piles of legislative history,<sup>108</sup> and neither court presented the history in a persuasive manner adequate to determine a clear victor. The *Cooper* court avoided much of the legislative history guessing game and relied on the canon of sovereign immunity for its decision.<sup>109</sup> However, the phrase “actual damages” deserves a more careful examination and interpretation, like that given by the *Johnson* and *Fitzpatrick* courts, in order to avoid relying exclusively on the canon of sovereign immunity and frustrating legislative history.<sup>110</sup> *Johnson* and *Fitzpatrick* illustrate the ease with which an examination of legislative history can convincingly lead to opposite outcomes. Because the legislative history fails to adequately guide the interpretation of the phrase “actual damages,” the purpose for which the statute was written and the policy driving the statutory language can—and should—provide the meaning of the statute.<sup>111</sup>

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105. *Johnson*, 700 F.2d at 976 (quoting Privacy Act § 2(a)(4), 5 U.S.C. § 552a (2006)).

106. *Id.* (citing 120 CONG. REC. at 36,891, reprinted in SOURCEBOOK, *supra* note 76, at 769).

107. *Id.* at 977.

108. See generally SOURCEBOOK, *supra* note 76 (containing 1,455 pages of legislative history of the Privacy Act).

109. *Cooper v. Fed. Aviation Admin.*, No. C 07-1383, slip op. at 24 (N.D. Cal. Aug. 22, 2008).

110. See, e.g., *Library of Cong. v. Shaw*, 478 U.S. 310, 320 (1986) (using sovereign immunity to hold that an attorney was not entitled to interest on his attorney’s fees because the statute did not contain an express waiver for the state); *Siddiqui v. United States*, 359 F.3d 1200, 1204 (9th Cir. 2004) (construing sovereign immunity in favor of the government and not allowing damages without proof of actual damages).

111. Especially in *Cooper*’s case, where the court establishes on the record that the government did act illegally, sovereign immunity becomes a difficult argument to accept. Sovereign immunity carries the important function of allowing the government to perform its functions without constant fear of lawsuit, but in the case of the Privacy Act, Congress



## V. THE PHRASE “ACTUAL DAMAGES” INCLUDES EMOTIONAL HARM

### A. Purpose

Where rule-like canons of statutory interpretation conflict with one another or fail to provide a satisfactory construction of the statute, jurists turn to theories of statutory interpretation. Jurists and scholars use these theories as guides in weighing the value of plain meaning, the canons of statutory interpretation, and the legislative history<sup>112</sup>:

Jurists need a way to approach statutes to determine, among other things, whether to rely more heavily on the text and linguistic canons or on other, extra-textual evidence of meaning; whether to consider legislative history and if so, which history; whether to consider the purpose of the bill; and how to determine the weight to give a source the judge will consider.<sup>113</sup>

Theories of statutory interpretation provide a unified view for a judge to keep in mind when weighing all of the above-referenced evidence.<sup>114</sup> Theories differ from canons of statutory interpretation in that theories provide more general guidelines of addressing the *goals* of statutory interpretation and how to reach them, rather than rule-like dictations that explain how to read specific pieces of evidence.<sup>115</sup> One such theory—purposivism—is a philosophy that scholars such as Henry Hart, Jr., Albert Sacks, and William Eskridge employ.<sup>116</sup> A

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created a statute with the express purpose of constraining government action. The Senate Committee on Government Operations, which recommended passage of the Privacy Act, stated that “[t]he premise underlying this legislation is that good government and efficient management require that basic principles of privacy, confidentiality and due process must apply to all personal information programs and practices of the Federal Government.” S. Rep. No. 93-1183, at 14 (1974), *reprinted in* SOURCEBOOK, *supra* note 76, at 167.

112. See ESKRIDGE ET AL., *supra* note 46, at 211 (distinguishing between *sources* of legislative interpretation, like legislative history and text, and *goals* of interpretation as described in theories of legislative interpretation); *see also* JELLUM, *supra* note 52, at 16 (“Adherents of the different [theories] differ in what they believe best shows the intent of the enacting legislature and, thus, the meaning of the statute.”).

113. JELLUM, *supra* note 52, at 15.

114. *Id.*

115. *Id.* at 11–16.

116. See ESKRIDGE ET AL., *supra* note 46, at 221 (“Purposive interpretation of statutes was a conceptual hallmark of the New Deal, classically articulated in the Hart and Sacks legal process materials.” (citing HENRY HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374–80 (1994))).

purposivist approach to statutory interpretation means that a jurist will look to the broader goals of a statute rather than looking for drafter intent as to a specific provision within a statute.<sup>117</sup> By setting up the inquiry in this way, “purposivism asks questions about which there may have been greater consensus in the legislative deliberations and deploys a tool that more nimbly addresses new or unforeseen circumstances.”<sup>118</sup>

When applied to the Privacy Act, the purposivist theory supports the conclusion that the phrase “actual damages” encompasses nonpecuniary harm. As evidenced by the failure of both the terms of the Privacy Act itself and the legislative history to spell out the meaning of the phrase “actual damages,” Congress did not make explicit whether nonpecuniary harm would be recoverable.<sup>119</sup> The lack of consensus on the meaning of the phrase necessitates some method of resolution. Applying the canon of sovereign immunity, as the *Cooper* court did, does not provide any sort of resolution; it merely avoids the issue while also frustrating Congress’s stated purpose in enacting the Privacy Act. The damages provision of the Privacy Act is particularly suited to a purposivist reading both because the purpose is clearly stated in the legislative history of the Act and because the statutory language is unclear.

While there is no consensus on the specific meaning of the phrase “actual damages” within the history of the Privacy Act, there is agreement that the purpose of the Act is to protect the privacy of citizens and to restrain the government from interfering with this right.<sup>120</sup> As the Supreme Court noted in *Carey v. Phiphus*,<sup>121</sup> statutes should be tailored to provide a remedy for the right they protect.<sup>122</sup>

As part of its “Congressional Findings and Statement of Purpose” for the Privacy Act, Congress stated that:

(b) The purpose of this Act [enacting this section and provisions set out as notes under this section] is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to—. . . (6) be subject to civil suit for

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117. *Id.*

118. *Id.*

119. See *infra* Part V.C.

120. See 120 CONG. REC. at 36,904, reprinted in SOURCEBOOK, *supra* note 76, at 803 (“[By privacy,] I mean the right ‘to be let alone’—from intrusions by Big Brother in all his guises”) (statement of Sen. Barry Goldwater, Member, J. Comm. Government Surveillance & Individual Rights).

121. 435 U.S. 247 (1978).

122. *Id.* at 259.

any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.<sup>123</sup>

This statement of the Act's purpose, most notably the use of the term "any" as a term to modify "damages," suggests that the legislature did not intend to exclude emotional harm from the phrase "actual damages." The purpose of the Privacy Act is to protect the privacy of citizens,<sup>124</sup> and compensating victims for the behavior that the Privacy Act prohibits is the best way to carry out that purpose.

The issue in *Cooper* was Cooper's right, under the Privacy Act, to have his medical records kept private.<sup>125</sup> Under the court's reasoning, Cooper was given no remedy despite the denial of his right, and this decision frustrates the purpose of the Privacy Act. The appellate court hearing Cooper's appeal has the opportunity to vindicate the purpose of the Privacy Act, while reading the phrase "actual damages" in a manner consistent with precedent,<sup>126</sup> using an acceptable definition of the plain meaning of the term,<sup>127</sup> and considering the policy behind the Privacy Act.<sup>128</sup>

*B. Prior Ninth Circuit Decisions Interpreting the Phrase "Actual Damages" in Various Legal Contexts*

In looking at Ninth Circuit precedential interpretations of the phrase "actual damages" in contexts other than the Privacy Act, the *Cooper* court stated that the Ninth Circuit had interpreted the phrase "actual damages" to mean economic harm in the case of the Securities Exchange Act ("SEA")<sup>129</sup> and to mean "objectively measureable financial loss" in the context of copyright infringement.<sup>130</sup> However, the interpretations of the phrase in these contexts are distinguishable and, moreover, could support a finding to include emotional distress in the phrase "actual damages" under the

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123. Privacy Act of 1974, Pub. L. No. 93-579, § 2, 88 Stat. 1896, 501 (codified at 5 U.S.C. § 552a (2006)).

124. See *id.* § 2(a)(4)–(5), 88 Stat. at 501 (“(4) [T]he right to privacy is a personal and fundamental right protected by the Constitution of the United States; and (5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.”).

125. See *Cooper v. Fed. Aviation Admin.*, No. C 07-1383, slip op. at 12–13 (N.D. Cal. Aug. 22, 2008).

126. See *infra* Part V.B.

127. See *infra* Part V.C.

128. See *infra* Part V.D.

129. *Cooper*, No. C 07-1383, slip op. at 23 (citing 15 U.S.C. § 78bb(a) (2006)).

130. *Id.* (citing *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002)).

Privacy Act. On the other hand, *Cooper* recognized that the Ninth Circuit found that the phrase “actual damages” included emotional distress and humiliation in a case addressing violations of the Fair Credit Reporting Act (“FCRA”).<sup>131</sup> The *Cooper* court discussed this use of the FCRA to support a limited interpretation of the phrase “actual damages,” though, ultimately, sovereign immunity carried its decision.<sup>132</sup>

The SEA and copyright law are intended to protect the financial interests of citizens.<sup>133</sup> While the FCRA likewise protects the financial interests of citizens,<sup>134</sup> it also seeks to protect private information, similar to the Privacy Act. In its statement of purpose, the FCRA lists “a respect for the consumer’s right to privacy” as one of its protected interests.<sup>135</sup> Because of the similarities between the Privacy Act and the FCRA, the *Cooper* court should have emphasized Ninth Circuit precedent addressing the FCRA over the decisions addressing various other financial interest statutes. These similarities between the Privacy Act and the FCRA also support an argument about the purpose of the law. For the FCRA to protect the privacy of creditors, the Ninth Circuit thought that losses of privacy—a purely emotional harm—had to be compensable.<sup>136</sup> Similarly, the confidentiality of government records in the Privacy Act protects against humiliation and invasion of privacy, and the meaning of the phrase “actual damages” should reflect this purpose.<sup>137</sup>

Perhaps because of the unclear nature of precedent and legislative history, the *Cooper* court did not decide the case on these bases. Rather, the court made its decision based entirely on the canon

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131. *Id.* (citing 15 U.S.C. § 1681 (2006)).

132. *Id.* at 23–25.

133. The Securities Exchange Act lists its purpose as making the regulation of securities transactions “reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions.” 15 U.S.C. § 77(b) (2006); see also *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) (noting the financial harm endured by copyright holders as a result of the music-sharing Web site Napster).

134. See, e.g., 15 U.S.C. § 1681(a)(1) (2006) (stating that one of the Fair Credit Reporting Act’s purposes is “the continued functioning of the banking system”).

135. *Id.* § 1681(a)(4).

136. See *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995) (looking at precedent as well as the history and congressional concern behind the FCRA to hold that the phrase “actual damages” includes emotional harm).

137. For a discussion of the Act’s intention to protect against invasions of privacy, see *supra* notes 120–24 and accompanying text.

of sovereign immunity.<sup>138</sup> In deciding *Cooper* based solely on sovereign immunity grounds, the court essentially ignored the way in which the Ninth Circuit dealt with the phrase “actual damages” in related contexts. In addition to considering precedent, it may be helpful to consider the “plain meaning” of the Privacy Act to determine how the court should have applied the statute to Cooper’s facts.

### C. Plain Meaning

Statutory interpretation also requires an attempt to define the “plain meaning” of a statute or, as in this case, a term within a statute.<sup>139</sup> The plain meaning rule or canon simply assumes that words have a “plain” or “ordinary” meaning that judges can discern using tools like dictionaries, other statutes, and the generally “accepted” definition of the term.<sup>140</sup> The courts in both *Johnson* and *Fitzpatrick* concluded that there was no widely accepted, *legal* plain meaning for the phrase “actual damages.”<sup>141</sup> This conclusion is based on the varied uses of the phrase; in short, courts have defined the term “damages” differently in different legal contexts.<sup>142</sup>

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138. See *supra* note 29 and accompanying text.

139. For many courts, the plain meaning analysis is the first step to statutory interpretation. See *ESKRIDGE ET AL.*, *supra* note 46, at 223; see also *United States v. Yeatts*, 639 F.2d 1186, 1189 (5th Cir. 1981) (stating that the first step of a court in construing any statute must be to interpret the statute in accordance with its “plain meaning”); UNIF. STATUTE & RULE CONSTR. ACT § 19 (1995) (“The text of a statute or rule is the primary, essential source of its meaning.”).

140. *JELLUM*, *supra* note 52, at 62–67.

141. *Johnson v. Dep’t of Treasury*, 700 F.2d 971, 976 (5th Cir. 1983) (concluding that the phrase “actual damages” has no plain meaning); *Fitzpatrick v. Internal Revenue Serv.*, 665 F.2d 327, 329 (11th Cir. 1982) (holding that no legal plain meaning exists because the phrase had not been used consistently either to include or exclude emotional damages in other federal statutes).

142. See, e.g., 22 AM. JUR. 2D *Damages* §§ 24–25 (2003) (defining “compensatory damages” in the contexts of employment law, civil rights violations, property damage, and breach of contract and explaining that “compensatory damages” are sometimes synonymous with “actual damages”). Both parties in *Johnson* also provided controlling case law to the court which supported their respective views on the “plain meaning” of the phrase “actual damages.” *Johnson*, 700 F.2d at 974. In employment law, the phrase “actual damages” was found to be lost wages plus mental anguish in wrongful termination cases. See Kurtis Kemper, Annotation, *Excessiveness or Adequacy of Damages for Wrongful Termination of At-Will Employee Under State Law*, 86 A.L.R. 5TH 397, 397 (2001). For violations of the Civil Rights Act, compensatory damages are available for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” 42 U.S.C. § 1981a(b)(3) (2006). For breach of contract and property damage claims, the court has construed the phrase “actual damages” to mean all losses which are recoverable as a matter of right “other than punitive or exemplary damages.” 22 AM. JUR. 2D *Damages* § 24 (2003).

It should be pointed out, however, that jurists of the increasingly popular New Textualist theory may look to find plain meaning beyond the legal uses of the term.<sup>143</sup> New Textualists seek to give statutory language uniform, universal meaning, which provides meaning for the average citizen reading the law.<sup>144</sup> A New Textualist argues that interpreting terms as the average citizen understands them provides consistency and notice to those bound by the laws.<sup>145</sup> Under this view, it can be helpful to turn to a dictionary definition. *Merriam-Webster* defines “actual” as: “(a) existing in act and not merely potentially; (b) existing in fact or reality; or (c) existing or occurring at the time.”<sup>146</sup> This dictionary definition, a representation of a common understanding of the term, supports a finding that the phrase “actual damages” includes any damages that have already occurred, limited only by the temporal requirement.<sup>147</sup> Therefore, for the New Textualist, “actual” may simply mean existing in the present, as opposed to being possible or in the future. The dictionary definition and a common understanding of the term “actual” corroborate the argument that “actual” damages are not restricted by a pecuniary–nonpecuniary distinction, but instead, are restricted by whether the damages are in existence at the time of the injury.

#### D. Policy

Though a New Textualist would shudder at the thought,<sup>148</sup> courts should also consider the policy implications of a statute when interpreting it, especially to determine whether the holding will help effectuate the purpose of the law.<sup>149</sup> The policy implications loom

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143. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 660 (1990) (“Traditionally, plain meaning signified that under ordinary principles of grammar and dictionary definitions of its words, the statutory provision has only one meaning.”).

144. See *id.* at 653 n.128 (“[I]nterpretive doubts are to be resolved by assessing the meaning that would reasonably have been conveyed to a citizen at the time the law enacted.”) (statement of Justice Antonin Scalia).

145. See *id.* at 667.

146. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 22 (3d ed. 1993).

147. See JELLUM, *supra* note 52, at 65 (stating that dictionaries are a common source of plain meaning, but noting that dictionaries vary and that not all dictionary definitions are persuasive).

148. New Textualists believe in looking exclusively at the text in statutory interpretation. BLACKWELL COMPANIONS TO PHILOSOPHY: A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 204 (Dennis Patterson ed., 1999). Part of embracing the text as the beginning and end of statutory interpretation means excluding considerations, like public policy, from statutory analysis. *Id.*

149. See ESKRIDGE ET AL., *supra* note 46, at 9–15 (discussing the “pragmatic” approach to statutory interpretation which considers the practical repercussions of a particular interpretation of a statute). This is a controversial statement with which legal

large in the context of the *Cooper* decision.<sup>150</sup> If the type of harm most likely suffered by Privacy Act violations becomes non-compensable, the efficacy of the Privacy Act as a deterrent on government officials is dramatically reduced.<sup>151</sup> Samuel Warren and Louis Brandeis initially defined the right to privacy as “the right to enjoy life—the right to be let alone.”<sup>152</sup> The resulting damages from a Privacy Act violation, then, should compensate citizens who have been deprived of the ability to enjoy life fully and who feel the harm of government intrusion.<sup>153</sup> Enjoyment of life and the right to be let alone are not rights which carry monetary value, yet they are the rights that the Privacy Act should protect. Protecting these rights, then, requires compensating harm that is not necessarily limited to pecuniary harm.

Allowing victims to recover only pecuniary harm severely limits the way in which the Privacy Act can compensate citizens for the harm against which the Act is intended to protect.<sup>154</sup> This limitation also carries a more severe policy implication: under-compensating victims. If the phrase “actual damages” includes only monetary harm, the government, in effect, is deterred only from causing monetary harm against its citizens.<sup>155</sup> As the *Cooper* court determined, the government violated the terms of the Privacy Act by sharing Cooper’s

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scholars will disagree. As part of recommending a purposivist approach to statutory interpretation, this Recent Development argues that policy is a crucial consideration in determining the intended purpose of a piece of legislation.

150. The *Cooper* court began its opinion by noting that “[a] good many laudable public policies collide in the facts at bar. These include policies to ensure the safety of the nation’s airways, to root out waste, fraud and abuse in the Social Security system and to secure personal privacy of citizens with a leitmotif of policies against discrimination.” *Cooper v. Fed. Aviation Admin.*, No. C 07-1383, slip op. at 1 (N.D. Cal. Aug. 22, 2008).

151. See *Time, Inc. v. Hill*, 385 U.S. 374, 385 n.9 (1967) (“In the ‘right of privacy’ cases the primary damage is the mental distress from having been exposed to public view . . .”).

152. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

153. *Johnson v. Dep’t of Treasury*, 700 F.2d 971, 977 (5th Cir. 1983) (arguing that courts should “tailor . . . the compensation to the nature of the privacy interest protected”); see also *supra* note 120 and accompanying text (evidencing how the language of the Warren & Brandeis article influenced the Privacy Act).

154. *Johnson*, 700 F.2d at 977 (“Interpreting ‘actual damages’ to include only out-of-pocket losses would not only preclude recovery in large numbers of cases but also run counter to Congress’ intent to ‘promote governmental respect for the privacy of citizens by requiring . . . agencies and their employees to observe . . . constitutional rules.’ ” (citing S. Rep. No. 93-1183, at 1 (1974), reprinted in SOURCEBOOK, *supra* note 76, at 154))).

155. *Id.* at 971 (“In addition, confining ‘actual damages’ to out-of-pocket losses would lessen government motivation to comply with the Act and thereby run counter to Congress’ intent.”).

records between agencies, yet the government has not suffered any consequences.<sup>156</sup>

### CONCLUSION

There are no straightforward answers to the problems involved in discerning clear meaning from the cryptic code of our law. Perfect consistency by judges seems to be a hopeless goal given the wide array of beliefs, philosophies, and whims of those comprising the judiciary. As evidenced by the *Fitzpatrick* and *Johnson* decisions, legislative history is not dispositive in determining the meaning of a statute. Instead, courts should primarily consider the purpose of the statute in reaching a decision. Purposivism provides a balance between honoring the goals of the legislature, while allowing for practical solutions to the problems created by legislative ambiguity. Purposivism also restrains courts because it gives the courts a goal to effect, forcing courts to advance specific policies. It becomes simpler to make a broad inquiry into the purpose of a statute, rather than to try to discern the very specific meaning of a single term or phrase in a statute. If the *Cooper* court had used a purposivist approach, the holding would show that the judiciary can vindicate the purpose of the statute when the legislature leaves necessary flexibility in the text.

The drafters of the Privacy Act intended to protect plaintiffs like Stanmore Cooper from violations of his privacy, from embarrassment, and from emotional suffering. The drafters of the Privacy Act specifically sought to deter government officials from the exact conduct exhibited by the agencies in *Cooper*, and without the remedy proposed here, there is no deterrent against this conduct. Because the legislative language and the purpose of the Privacy Act seek to protect citizens from embarrassment and from invasion into their private papers and records, and because not compensating for that emotional harm would lead to a minimal deterrence against such conduct, the phrase “actual damages” within the Privacy Act should include emotional and mental harms as compensable injuries. The *Cooper* court, therefore, should have waived the government’s immunity in order to allow Stanmore Cooper to recover for his emotional harm.

NICOLE M. QUALLEN

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156. See *Cooper v. Fed. Aviation Admin.*, No. C 07-1383, slip. op. at 19 (N.D. Cal. Aug. 22, 2008).