Statutory Damages: Drafting and Interpreting

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I. INTRODUCTION

You have had a really bad day. Your neighbor killed your dog, a mixed-breed dog you rescued from the pound, which your two-year-old daughter adored. Someone copied one of your songs to her iPhone without paying the required ninety-nine cents.[1] At the end of your dinner out, your restaurant printed a receipt showing the last six digits of your credit card number in violation of a rule that required redaction of all but the last five. You were then denied entrance to a night club because of your race.

Perhaps you should sue. (This is, after all, a law review article.) But what are your damages? Economically, the death of your dog may have been a gain, not a loss at all; your much-loved dog had a negligible fair market value and promised to cost you large amounts for food and health care over its lifetime. Your loss from the illegal download is easily measured—you are out the ninety-nine cents (or, more accurately, your share of it)—but a lawsuit to recover that amount would be impractical. It is unlikely that printing six digits of your credit card number will cause you any harm whatever, notwithstanding the clear violation of the relevant regulatory regime. And even if your exclusion from the nightclub denied your equal dignity as a human being and offended core American values, it may have caused you no economic or other concrete damage and annoyed you only slightly. What is a legal system to do?

Either federal law or the law of one or more states addresses these problems by awarding statutory damages—damages to which you may be entitled without having to prove the amount, or more commonly even the existence, of actual damages under ordinary common law principles. In Tennessee, a pet owner may obtain non-economic damages up to $5000 for the death of his or her pet against the person who is liable for causing

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1. Middle tier pricing of songs on iTunes as of January 23, 2018. *See* https://www.apple.com/itunes/music/ (last visited Jan. 23, 2018) (advertising the "more than 43 million high-quality, DRM-free songs on iTunes for just 69¢, 99¢, or $1.29 each").

the death or injuries that led to the animal's death.[2] The person causing the pet's death must have done so intentionally or, if negligently, the incident must have occurred either on the owner or pet caretaker's property or while in the control and supervision of the caretaker.[3] Under section 504(c) of the Copyright Act, a plaintiff may recover statutory damages, in lieu of actual damages, of between $750 and $30,000 per infringed work, as the finder of fact deems "just."[4] No actual damages need be shown. If the finder of fact finds that the infringement was "willful," it can award up to $150,000 per infringed work.[5] Section 1681n(a) of the federal Fair and Accurate Credit Transactions Act ("FACTA") awards statutory damages of between $100 and $1000 for willful failure to comply with the act's disclosure requirements,[6] including its requirement that retailers redact all but the last five digits of the customer's credit card from any printed receipt.[7] Finally, in California, anyone discriminated against on the basis of race, national origin, religion, or disability in access to public accommodations can recover $4000 in statutory damages.[8]

On its face, authorization of statutory damages might seem to constitute a simple, reasonable, and straightforward solution to what might otherwise be difficult and expensive litigation problems. But consider some recent difficulties.

In *Arista Records LLC v. Lime Group LLC*,[9] plaintiff record company sought an award of approximately $1.5 billion in statutory damages for infringement of its songs by defendant.[10] Observing that plaintiffs also sought damages from individual users, which could amount to trillions of

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2. Known as the "T-Bo Act," TENN. CODE ANN. § 44-17-403(a)(1) (West 2010); *see also* Lauren M. Sirois, Comment, *Recovering for the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages*, 163 U. PENN. L. REV. 1199, 1203 (2015) (referring to the "T-Bo Act").

3. *Id.*

4. 17 U.S.C. § 504(c)(1) (2012).

5. 17 U.S.C. § 504(c)(2) (2012).

6. 15 U.S.C. § 1681n(a)(1)(A) (2012).

7. 15 U.S.C. § 1681c(g)(1) (2012).

8. CAL. CIV. CODE §§ 51, 52 (West 2007, Supp. 2014 & Westlaw through 2016 Legis. Sess.). Proof of actual damages is not a prerequisite to recovery of statutory minimum damages under California's Unruh Civil Rights Act; "plaintiff need only show that he was denied full and equal access, not that he was wholly excluded from enjoying defendant's services," and plaintiff in an action alleging denial of equal access to public accommodation can recover statutory damages "even if he did not enter the facility." Vogel v. Rite Aid Corp., 992 F. Supp. 2d 998, 1014 (C.D. Cal. 2014) (citations omitted).

9. 784 F. Supp. 2d 313 (S.D.N.Y. 2011).

10. *Id.* at 317 (explaining that multiplying the maximum statutory damage award of $150,000 per work for willful infringement by approximately 10,000 infringements results in "a potential award of over a billion dollars in statutory damages alone").

dollars, the court noted, "Plaintiffs are suggesting an award that is 'more money than the entire music recording industry has made since Edison's invention of the phonograph in 1877.'"[11]

Similarly, in *Blanco v. CEC Entertainment Concepts L.P.*,[12] plaintiff alleged that Chuck E. Cheese, a chain restaurant catering to children, had printed prohibited credit card information in violation of FACTA—specifically by printing more than the last five digits of the card number or expiration dates on its receipts.[13] Because the case was brought as a class action, statutory damages were expected to range from a minimum of $198,025,000 to a maximum of $1,980,250,000, notwithstanding the fact that plaintiff admitted she had incurred no actual harm and could not allege any harm to the class.[14] The court noted that the "end result would be grossly disproportionate to the harm, especially when Defendant immediately rectified this technical problem after the lawsuit was filed."[15] Although the court denied class certification, the case achieved notoriety because of the size of the requested award.[16] The case raised an obvious question: Is a two-billion dollar penalty really necessary to induce restaurants to print the right number of digits on their receipts? We will refer to the compounding of statutory damages in class actions as the "Chuck E. Cheese problem" below.

Or compare the following two cases. In *Capitol Records Inc. v. Thomas*, defendant, a single mother, illegally downloaded and shared twenty-four songs over the Internet.[17] A jury originally awarded statutory damages of $9250 per song,[18] for a total of $220,000, a verdict which the trial judge vacated as "wholly disproportionate" to the damages suffered by plaintiff record company.[19] On remand, the jury increased the award to $80,000 per song, for a total award of $1.92 million.[20] The facts in *BMG*

11. *Id.* (quoting Def. Mem. at 2–3).

12. No. CV 07-0559 GPS JWJx, 2008 WL 239658 (C.D. Cal. Jan. 10, 2008).

13. *Id.* at *1.

14. *Id.* at *2.

15. *Id.*

16. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 104–06 (2009) (discussing large awarded amounts in FACTA class action cases).

17. 579 F. Supp. 2d 1210, 1212–13 (D. Minn. 2008).

18. *See id.* at 1213.

19. *Id.* at 1227.

20. Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1048–50 (D. Minn. 2010) (remitting award from $80,000 to $2,250 per song); *see also* Capitol Records, Inc. v. Thomas-Rasset, 799 F. Supp. 2d 999 (D. Minn. 2011) (reducing third trial's total award of $1.5 million to $54,000 ($2250 per song), which the court believed was the maximum permitted under the Due Process Clause), *vacated*, 692 F.3d 899 (8th Cir. 2012) (rejecting constitutional argument and reinstating

Music v. Gonzalez were similar: an individual consumer downloaded thirty songs without paying for them.[21] She, however, was only required to pay $750 per song, the statutory minimum, for a total award of $22,500.[22] An award of just over $20,000 in one case and of just under $2,000,000 in a very similar one—almost a hundred-fold difference for no apparent reason. If law is to be based on neutral principles, not on whether the judge or jury likes or dislikes a particular party, this kind of unexplained disparity is troubling. It seems fundamentally inconsistent with the rule of law.

Another pair of cases, this time under the Cable Piracy Act, which similarly provides no guidance as to how courts are to determine what is "just":[23] In *Time Warner Cable of New York City v. Taco Rapido Restaurant*, the court based statutory damages on the number of people who viewed the infringed television show.[24] In *Joe Hand Promotions, Inc. v. McBroom*, defendant was ordered to pay instead an amount equal to the licensing fee it would have paid if it had purchased the programming legally.[25] Same violations, different outcomes, no explanation.

Perhaps a less serious problem, but a problem nonetheless, followed in the wake of the Supreme Court's decision in *Doe v. Chao*.[26] Focusing on the plain language of the statute and without referencing the purposes of statutory damages generally, the Court there held that under the Privacy Act of 1974,[27] statutory damages were only available if plaintiff could prove at least some actual damages other than emotional distress.[28] Lower courts have since split on whether to apply *Doe* to statutory damage provisions in other federal statutes, although most have ultimately declined to do so. The Fourth and Eleventh Circuits have applied *Doe* to the Stored Communications Act;[29] all other lower courts that have

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original award of $9,250 per song for total $220,000 damages).

21. No. 03 C 6276, 2005 WL 106592, at *1 (N.D. Ill. Jan. 7, 2005) *aff'd*, 430 F.3d 888 (7th Cir. 2005).

22. *Id.* In Atlantic Recording Corp. v. Howell, No. CV-06-02076-PHX-NVW, 2008 WL 4080008, at *3 (D. Ariz. Aug. 29, 2008), defendant was similarly assessed the minimum permitted statutory damages ($40,500.00) for using a file-sharing program on his home computer to illegally download fifty-four songs and distribute them to other users of the network.

23. 47 U.S.C. § 605(e)(3)(C)(i)(II) (2012).

24. 988 F. Supp. 107, 111 (E.D.N.Y. 1997).

25. No. 5:09–cv–276(CAR), 2009 WL 5031580, at *4 (M.D. Ga. Dec. 15, 2009).

26. 540 U.S. 614 (2004).

27. 5 U.S.C. § 552a(g)(4) (2012 & Supp. 2014).

28. *See Chao*, 540 U.S. at 617–18, 626.

29. Vista Mktg., LLC v. Burkett, 812 F.3d 954 (11th Cir. 2016); Van Alstyne v. Elec. Scriptorium, Ltd., 560 F.3d 199, 204–06 (4th Cir. 2009).

considered the question as applied to the SCA have gone the other way.[30] The Third and Eleventh Circuits have declined to apply it to the Driver's Privacy Protection Act;[31] district courts in the Eleventh Circuit, however, initially viewed themselves as bound by *Doe*.[32] Lower courts have also declined to apply *Doe*'s logic to the Video Privacy Protection Act,[33] the Fair Credit Reporting Act,[34] and the Fair and Accurate Credit Transactions Act.[35] Confusion seems to be the order of the day.

Several articles have explored problems created by the Copyright Act's statutory damage provisions, where some of the most widely publicized cases have arisen.[36] This article, however, is the first to explore the field of statutory damages generally. Part II offers a survey of some of the many contexts in which statutory damages are available in state and federal law. Part III explores the purposes of such provisions. As will be

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30. *See, e.g.*, Shefts v. Petrakis, 931 F. Supp. 2d 916, 919 (C.D. Ill. 2013); Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 759 F. Supp. 2d 417, 427–28 (S.D.N.Y. 2010); Freedman v. Town of Fairfield, No. 3:03CV01048 (PCD), 2006 WL 2684347, at *3 (D. Conn. Sept. 19, 2006); *In re* Hawaiian Airlines, Inc., 355 B.R. 225, 230–31 (D. Haw. 2006).

31. Pichler v. UNITE, 542 F.3d 380, 397–400 (3d Cir. 2008) (no actual damages required); Kehoe v. Fid. Fed. Bank & Tr., 421 F.3d 1209, 1212 (11th Cir. 2005) (same). *But see* Potocnik v. Carlson, No. 13–CV–2093 (PJS/HB), 2016 WL 3919950, at *10–12 (D. Minn. July 15, 2016) (actual damages required to recover liquidated damages under DPPA).

32. *See* Kehoe v. Fid. Fed. Bank & Tr., No. 03–80593-CIV-HURLEY/LYNCH, 2004 WL 1659617, at *6–8 (S.D. Fla. June 14, 2004) (actual damages required), *rev'd*, 421 F.3d 1209 (11th Cir. 2005); Schmidt v. Multimedia Holdings Corp., 361 F. Supp. 2d 1346, 1356 (M.D. Fla. 2004) (same).

33. *See, e.g.*, *In re* Hulu Privacy Litig., No. C 11–03764 LB, 2013 WL 6773794, at *4 (N.D. Cal. Dec. 20, 2013). One district court has refused to extend *Doe*'s logic to Michigan's Video Rental Privacy Act, the state's version of the Video Privacy Protection Act. Halaburda v. Bauer Publ'g Co., No. 12-CV-12831, 2013 WL 4012827, at *4–5 (E.D. Mich. Aug. 6, 2013).

34. *See, e.g.*, Arcilla v. Adidas Promotional Retail Operations, Inc., 488 F. Supp. 2d 965, 973–74 (C.D. Cal. 2007); Blanco v. El Pollo Loco, Inc., No. SACV 07–54 JVSRNBX, 2007 WL 1113997, at *3 (C.D. Cal. Apr. 3, 2007).

35. *See, e.g.*, Follman v. Vill. Squire, Inc., 542 F. Supp. 2d 816, 822–23 (N.D. Ill. 2007).

36. *See, e.g.*, Andrew Berger, *Statutory Damages in Copyright Litigation*, N.Y. ST. B. ASS'N J., Nov.–Dec. 2009, at 30; James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79 (2012); R. Buck McKinney, *Guardrail to Guardrail: Statutory Damage Awards in Copyright Infringement Litigation*, LANDSLIDE, May–June 2010, at 8; Christopher Pooser, *Statutory Damages Under the Copyright Act*, ADVOC. (IDAHO), Aug.–Sept. 2007, at 23; Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004); Kate Cross, Comment, *David v. Goliath: How the Record Industry Is Winning Substantial Judgments Against Individuals for Illegally Downloading Music*, 42 TEX. TECH L. REV. 1031 (2010); Damias A. Wilson, Note, *Copyright's Compilation Conundrum: Modernizing Statutory Damage Awards for the Digital Music Marketplace*, 85 SAINT JOHN'S L. REV. 1189 (2011); Sarah A. Zawada, Comment, *"Infringed" Versus "Infringing": Different Interpretations of the Word "Work" and the Effect on the Deterrence Goal of Copyright Law*, 10 MARQ. INTELL. PROP. L. REV. 129 (2006); Betselot A. Zeleke, Comment, *Federal Judges Gone Wild: The Copyright Act of 1976 and Technology, Rejecting the Independent Economic Value Test*, 55 HOW. L.J. 247 (2011).

seen, statutory damages are typically authorized in contexts in which actual damages are hard to prove or are believed to be inadequate either to encourage private enforcement or deter prohibited behavior. Part IV turns to some of the problems statutory damage rules have triggered, together with possible solutions. Part V, finally, concludes.

II. A SAMPLING OF STATUTORY DAMAGE PROVISIONS

To better understand both the problems statutory damages are designed to address and the problems they sometimes create, it may be useful to begin by reviewing a sample of existing statutory damage rules, both state and federal. It is not possible exhaustively to catalogue all such rules, since statutory damage provisions are not identified as such in codes or compilations and no simple database search exists to identify them. The rules explored in this Part II should therefore be viewed as illustrative. Nevertheless, for the most part, statutory damage rules appear to fall into four general categories: (1) rules for the protection of intellectual property, (2) business regulatory rules, now more commonly known as consumer or labor protection rules, (3) rules governing the protection or dissemination of information, and (4) civil rights rules. A few provisions outside these four categories will be sampled as well.

A. Rules for the Protection of Intellectual Property

Statutory damages for violations of copyright have been part of Anglo-American law for at least three centuries. The Statute of Anne, enacted in 1710, provided for damages of "one penny for every sheet which shall be found in [the infringer's] custody."[37] Relative to the earnings of an average worker, this would constitute the equivalent of about £8.38, or $10.29, per sheet today.[38] Early American copyright statutes followed this model but made damages more severe, providing in 1790 for damages of $0.50 per sheet[39] (equivalent to $251 in 2015 relative to the earnings of the average unskilled worker or $694 relative to the earning of the average

37. 8 Ann. c. 19 (1710).

38. Five Ways to Compute the Relative Value of a UK Pound Amount, 1270 to Present, MEASURINGWORTH, https://www.measuringworth.com/ukcompare/ (enter "1710" in "Initial Year" field, "1" in pence "Initial Amount" field, and "2015" in "Desired Year" field); GOOGLE, https://www.google.co.uk/search?sourceid=chrome-psyapi2&ion=1&espv=2&ie=UTF-8&q=pounds%20to%20dollars&oq=pounds%20to% 20dollars& aqs=chrome..69i57j0l5.3174j0j7 (enter "8.38" in "British Pound" field for current equivalent in American dollars) (conversion calculated on March 2, 2017).

39. Copyright Act of 1790, ch. 15, § 2, 1 Stat. 124, 124–25.

manufacturing worker[40]) and in 1802 for damages of $1.00 per print[41] (equivalent to $248 in 2015 relative to the earnings of the average unskilled worker or $694 relative to the earning of the average manufacturing worker[42]).

In 1856, Congress permitted plaintiffs to prove actual damages in excess of the statutory minimum,[43] providing for damages for the infringement of dramatic compositions "to be . . . assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court having cognizance thereof shall appear to be just."[44] ($100 in 1856 was equivalent to $19,700 in 2015 relative to the earnings of the average unskilled worker or $45,600 relative to the earning of the average manufacturing worker[45]). The Supreme Court, in *Brady v. Daly*,[46] explained that the then-new statute "provide[d] a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made."

Discretionary statutory damages for copyright violations without proof of actual damages in excess of the statutory minimum were introduced in 1909.[47] Opponents of the change asserted that discretionary damages of this kind were unprecedented.[48] As will be seen, this assertion

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40. Seven Ways to Compute the Relative Value of a U.S. Dollar Amount - 1774 to Present, MEASURINGWORTH, https://www.measuringworth.com/uscompare/ (to obtain the "labor earnings" measure under "income or wealth," enter "1790" in the "Initial Year" field, "0.50" in the "Initial Amount" field, and "2015" in the "Desired Year" field). The difference between equivalents computed by reference to earnings of unskilled workers and equivalents computed by reference to earnings of manufacturing workers is presumably due to the increase, over time, of the latter relative to the former.

41. Act of April 29, 1802, ch. 36, § 3, 2 Stat. 171, 171–72.

42. Seven Ways to Compute the Relative Value of a U.S. Dollar Amount - 1774 to Present, MEASURINGWORTH, https://www.measuringworth.com/uscompare/ (to obtain the "labor earnings" measure under "income or wealth," enter "1802" in the "Initial Year" field, "1.00" in the "Initial Amount" field, and "2015" in the "Desired Year" field).

43. Copyright Act Amendment 1856, ch. 169, 11 Stat. 138.

44. *Id.* at 139.

45. Seven Ways to Compute the Relative Value of a U.S. Dollar Amount - 1774 to Present, MEASURINGWORTH, https://www.measuringworth.com/uscompare/ (to obtain the "labor earnings" measure under "income or wealth," enter "1856" in the "Initial Year" field, "100" in the "Initial Amount" field, and "2015" in the "Desired Year" field).

46. 175 U.S. 148, 154 (1899).

47. Copyright Act of 1909, Pub. L. No. 60-349, § 25(b), 35 Stat. 1075, 1081.

48. "[Y]ou have gone away beyond . . . any common-law right or remedy that has ever been given in a statute before. . . . You have made provision by which the recovery of costs shall be such as never have appeared in any federal court before." Arguments Before the House Copyright Subcommittee of the Committee on Patents, Jan. 20, 1909 (statement of Mr. Parkinson), reprinted in 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT L31 (E. Fulton Brylawski & Abe Goldman eds., 1976).

was not completely true, but such damages were certainly new to the American copyright regime. Of the new law, the Second Circuit stated in *S.E. Hendricks Co. v. Thomas Publishing Co.*[49] that: "it was the intention of Congress . . . to give the new right of application to the court for such damages as shall 'appear to be just,' in lieu of actual damages."[50]

Plaintiffs could now receive damages greater than the statutory minimum without proving anything other than bare infringement, and without any guidance to the decision-maker other than to award such damages as shall "appear to be just."[51] Finally, in 1998, in *Feltner v. Columbia Pictures Television, Inc.*, the Supreme Court held that as a matter of constitutional law, in a copyright or any other case tried before a jury "'in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized,'" the amount of any statutory damage award had to be set by the jury.[52]

Under section 504(c) of the Copyright Act today, plaintiff, at its election, may recover statutory damages ranging from a minimum of $750 per work infringed up to $30,000 per work infringed, all as the jury considers "just," without any showing of actual damage.[53] If the jury finds that the infringement was "willful," it can award up to $150,000 per work.[54] In awarding plaintiff only $1.92 million as damages for defendant's unauthorized downloading of twenty-four songs, therefore, the jury in *Capitol Records, Inc. v. Thomas-Rasset* was being kind to defendant. It could have awarded up to $3.6 million.

Congress has used the same model to protect trademarks. The Lanham Act of 1946, also known as the Trademark Registration Act,[55] protects trademarked goods from being copied and sold fraudulently. It provides that in a case involving use of a counterfeit mark[56] in the selling of any goods, plaintiff may choose to recover, in lieu of actual damages and without proving any such damages, an award of statutory damages in an amount not less than $1000 nor more than $200,000 per item if the

49. 242 F. 37 (2d Cir. 1917).

50. *Id.* at 41–42.

51. *See id.*; *see also* Gross v. Van Dyk Gravure Co., 230 F. 412, 413 (2d Cir. 1916) (1909 Act giving courts the power to award damages "without the limitations of usual legal proof"); Woodman v. Lydiard-Peterson Co., 192 F. 67, 71 (D. Minn. 1912) (expressing confusion about existence and purpose of statutory damages in the 1909 Act).

52. 523 U.S. 340, 348, 353 (1998) (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830)).

53. 17 U.S.C. § 504(c)(1) (2012).

54. *Id.* § 504(c)(2).

55. Pub. L. No. 79-489, 60 Stat. 427 (codified as amended in scattered sections of 15 U.S.C.).

56. *See* 15 U.S.C. § 1116(d) (2012) (defining "counterfeit mark").

violation is not willful, or up to $2,000,000 per item if the use is willful.[57] The finder of fact has discretion to make an award within those limits.[58]

By contrast, statutory damages are not available in the U.S. for patent violations, willful or otherwise.[59] Internationally, it appears that only China and Russia authorize statutory damages in such circumstances.[60] Why is unclear.

B. Business Regulation (now Consumer or Labor Protection)

Another context in which statutory damages have long been used is that of business regulation—for the most part what today we would call consumer or labor protection. The first Supreme Court case to consider whether and in what circumstances statutory damages might violate due process arose in this context. In *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*,[61] an 1887 Arkansas law awarded damages of "not less than fifty dollars nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee" to any passenger charged more for passage by a railroad company than the amount prescribed by law.[62] ($50 and $300 in 1887 were equivalent, respectively, to $7,040 and $42,200 in 2015 relative to the earnings of the average unskilled worker or to $12,100 and $72,700 relative to the earnings of the average manufacturing worker[63]). In the event, the railroad had overcharged plaintiffs by sixty-six cents.[64] The Court upheld the jury's $75 statutory damage award nonetheless, quoting *Missouri Pacific Railway Co. v. Humes*[65] to the effect that

> the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at

57. 15 U.S.C. § 1117(c) (2012).

58. *See id.* § 1117(c)(1)–(2).

59. *See* Thomas F. Cotter, *Statutory Damages*, COMPARATIVE PATENT REMEDIES (Apr. 13, 2016, 8:13 AM), http://comparativepatentremedies.blogspot.com/2016/04/statutory-damages.html.

60. *Id.*

61. 251 U.S. 63 (1919).

62. *Id.* at 64 (quoting the relevant Arkansas statutes).

63. Seven Ways to Compute the Relative Value of a U.S. Dollar Amount - 1774 to Present, MEASURINGWORTH, https://www.measuringworth.com/uscompare/ (to obtain the "labor earnings" measure under "income or wealth," enter "1887" in the "Initial Year" field, "50" in the "Initial Amount" field, and "2015" in the "Desired Year" field; subsequently, using the same dates, enter "300" in the "Initial Amount" field).

64. *Williams*, 251 U.S. at 64.

65. 115 U.S. 512, 523 (1885).

> the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion,[66]

and adding further,

> [n]or does giving the penalty to the aggrieved passenger require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state.[67]

Modern consumer protection statutes that use statutory damages as part of their enforcement mechanisms include the federal Fair Debt Collection Practices Act ("FDCPA").[68] For violations of the FDCPA's regulation of debt collectors, plaintiffs are entitled to as much as $1,000 for a violation.[69] To avoid the Chuck E. Cheese problem, FDCPA provides that in class actions plaintiffs may only recover the lesser of $500,000 or one percent of defendant's net worth.[70] Statutory damages may be recovered whether or not actual damages exist.[71] Punitive damages, however, are not recoverable.[72] The amount of statutory damages is discretionary with the court, based upon factors listed in the statute: (1) the frequency and persistence of noncompliance by the debt collector, (2) the nature of the noncompliance, and (3) the extent to which the noncompliance was intentional.[73] This last factor, the extent to which noncompliance was intentional, makes it clear that statutory damages can be awarded even for unintentional violations. Courts have limited the effectiveness of the statute in the individual action context, however, by construing it to authorize a maximum of $1000 damages per action, regardless of the number of violations proved,[74] making it less likely that plaintiffs will bring individual lawsuits under the act. In the case of class action lawsuits, the statute directs the court to consider the same three factors, in addition to the resources of the debt collector and the number

66. *Williams*, 251 U.S. at 66.

67. *Id.*

68. Pub. L. 95-109; 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692p (2012)).

69. 15 U.S.C. § 1692k(a)(2)(A).

70. *Id.* § 1692k(a)(2)(B).

71. *See* Baker v. G.C. Services Corp., 677 F.2d 775, 781 (9th Cir. 1982).

72. *See* Randolph v. IMBS, Inc., 368 F.3d 726, 728 (7th Cir. 2004).

73. 15 U.S.C. § 1692k(b)(1) (2012).

74. *See, e.g.*, Wright v. Fin. Serv. of Norwalk, Inc., 22 F.3d 647, 651 (6th Cir. 1994); Harper v. Better Bus. Servs., Inc., 961 F.2d 1561, 1563 (11th Cir. 1992).

of persons adversely affected by the debt collector's conduct.[75] In either type of case, the court has the discretion to award no statutory damages, again regardless of the number of violations proved.[76]

A similar enforcement regime is established by the federal Electronic Fund Transfer Act of 1978 ("EFTA"),[77] which defines the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. One of its stated objectives is the protection of consumer rights.[78] Pursuant to this goal, the statute authorizes statutory damages in individual actions in "an amount not less than $100 nor greater than $1,000."[79] In the case of a class action, however, awards are to be made in the court's discretion:

> except that (i) as to each member of the class no minimum recovery shall be applicable, and (ii) the total recovery . . . in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant.[80]

Like the FDCPA, therefore, the EFTA avoids the Chuck E. Cheese problem.

In both individual and class actions, the EFTA provides an unusual degree of guidance to the court making the award, instructing it to consider:

> (1) in any individual action under subsection (a)(2)(A) [of this section], the frequency and persistence of noncompliance, the nature of such noncompliance, and the extent to which the noncompliance was intentional; or (2) in any class action under subsection (a)(2)(B) [of this section], the frequency and persistence of noncompliance, the nature of such noncompliance, the resources of the defendant, the number of persons adversely affected, and the extent to which the noncompliance was intentional.[81]

Under § 1640(a) of the federal Truth in Lending Act ("TILA"),[82] plaintiff is entitled to recover

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75. 15 U.S.C. § 1692k(b)(2).
76. *See* Emanuel v. Am. Credit Exch., 870 F.2d 805, 809 (2nd Cir. 1989).
77. Pub. L. No. 95-630, 92 Stat. 3641 (codified as amended in scattered sections of 15 U.S.C.).
78. 15 U.S.C. § 1693(b) (2012).
79. *Id.* § 1693m(a)(2)(A).
80. *Id.* § 1693m(a)(2)(B).
81. *Id.* § 1693m(b).
82. 15 U.S.C. § 1640(a) (2012).

> the sum of (1) any actual damage sustained by such person as a result of the failure; (2) [statutory damages ranging from twice the amount of any finance charge in connection with the transaction to $5,000, depending on circumstances]; (3) . . . the costs of the action, together with a reasonable attorney's fee as determined by the court; and (4) in [a limited subset of cases], an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.[83]

Like the FDCPA and the EFTA, the TILA alters these rules for class actions, providing

> except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $1,000,000 or 1 per centum of the net worth of the creditor.[84]

Congress has also used statutory damages to enforce the odometer provisions of the federal Motor Vehicle Information and Cost Savings Act.[85] The Act prohibits tampering with odometers on motor vehicles and establishes safeguards for the protection of persons who purchase vehicles with altered or reset odometers.[86] It provides further that a person who violates its provisions with the intention to defraud is liable for three times actual damages or $10,000, whichever is greater.[87]

The corresponding Ohio statute, the Ohio Odometer Rollback and Disclosure Act,[88] similarly prohibits tampering with motor vehicle odometers and adds state law safeguards to protect purchasers of motor vehicles with altered or reset odometers.[89] Damages available under the Ohio law equal "three times the amount of actual damages sustained or fifteen hundred dollars, whichever is greater."[90] Why Ohio needs state rules to this effect, given the federal statute, is unclear. The state rules might more conveniently allow enforcement in small claims court but for

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83. *Id.*

84. *Id.* § 1640(a)(2)(B).

85. Pub. L. No. 92-513, 86 Stat. 947 (odometer requirements now codified as amended in 49 U.S.C. §§ 32701–32711 (2012)).

86. 49 U.S.C. § 32701(b) (2012).

87. *Id.* § 32710(a).

88. OHIO REV. CODE ANN. § 4549.41–52 (West 2008). *See also* George L. Blum, Annotation, *Validity, Construction and Application of State Laws Concerning, Relating to, or Encompassing Disclosure of and Tampering with Motor Vehicle Odometer—Validity of Statutory Provisions, Construction of Statute and Particular Terms, and Remedies*, 66 A.L.R. 6th 351 (2011).

89. *See* OHIO REV. CODE ANN. § 4549.42 (West 2008).

90. *Id.* § 4549.49(A)(1).

the fact that Ohio's small claims division lacks jurisdiction to award "punitive or exemplary damages."[91] Whether statutory damages fall within either category is unclear.

In the real estate context, the Real Estate Settlement Procedures Act of 1974[92] protects consumers from unreasonably high settlement charges in real estate transactions.[93] In the case of a pattern or practice of noncompliance with the Act's requirements with respect to servicing of mortgage loans and administration of escrow accounts, violators are liable for actual damages plus any additional damages, as the court may allow, in an amount not to exceed $2,000.[94] In this context, statutory damages are only authorized in the case of a pattern or practice of violations;[95] in effect, this act, unlike most others, requires persistent bad behavior before statutory damages can be awarded.

Statutory damages provisions also commonly appear in state rules governing the return of security deposits to tenants. In California, for example, if a landlord fails in bad faith to return a deposit, the tenant may recover up to $200 in addition to actual damages.[96] In Georgia, any landlord who wrongfully retains a security deposit in violation of statutorily required procedures designed to prevent landlords from doing so is liable for up to three times the amount improperly withheld plus attorney's fees.[97]

Hawaii's Uniform Health-Care Decisions Act provides that any health-care provider or institution that intentionally violates the Act's health-care decision-making rules will be liable for "damages of $500 or actual damages resulting from the violation, whichever is greater, plus reasonable attorney's fees."[98] In addition, any person who intentionally and fraudulently changes an individual's advance health-care directive is liable "for damages of $2,500 or [any] actual damages resulting from the action, [again] whichever is greater, plus reasonable attorney's fees."[99]

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91. *Id.* § 1925.02(A)(2)(a)(iii) (West 2005 & Westlaw through 2016 Legis. Sess.).

92. Pub. L. No. 93-533, 88 Stat. 1724 (codified at 12 U.S.C. §§ 2601–2617).

93. 12 U.S.C. § 2601 (2012).

94. *Id.* § 2605(f)(1). Note, however, that a single violation of RESPA is not a "pattern or practice" of violations, as basis for statutory damages under RESPA. In re Tomasevic, 273 B.R. 682, 686–87 (Bankr. M.D. Fla. 2002). In class actions, additional damages are limited to the lesser of one million dollars or one percent of the net worth of the defendant. *Id.* § 2605(f)(2).

95. *Id.* § 2605(f).

96. CAL. CIV. CODE § 1950.7(f) (West 2010).

97. GA. CODE ANN. § 44-7-35(c) (West 2003).

98. HAW. REV. STAT. ANN. § 327E-10(a) (West 2008).

99. *Id.* § 327E-10(b) (West 2008).

The federal Migrant and Seasonal Agricultural Worker Protection Act of 1983 ("MSAWPA")[100] was enacted to improve the working conditions of migrant workers.[101] Congress evidently believed that providing for statutory damages would help to promote enforcement, deter violations, and more likely compensate farm workers for their injuries.[102] The Act therefore provides for statutory damages of up to $500 per plaintiff per violation.[103] Multiple infractions of the same provision, however, only constitute a single violation.[104] If a class action is certified then the maximum permitted award is the lesser of $500 per plaintiff per violation and $500,000 total.[105] The court is specifically "authorized to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation."[106] In setting the amount of such awards, courts have looked at, among other things, the total award requested, the nature of the violation, and amounts other courts have awarded in similar cases.[107] As a result, in enforcing the MSAWPA, courts have attempted to maintain consistency across cases, to treat awards made in other cases as having, in effect, precedential value with respect to amount. Consistency is facilitated by the fact that many cases under the MSAWPA are not tried before a jury.[108]

C. Rules for the Protection and Dissemination of Information

Statutory damages have also been invoked to enforce rules for the protection and dissemination of information. In the Omnibus Crime Control and Safe Streets Act of 1968,[109] for example, Congress authorized statutory damages for any person whose wire, oral or electronic

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100. 29 U.S.C. §§ 1801–1872 (2012 & Supp. 2016); Claudia G. Catalano, Annotation, *Construction and Application of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA)—General Provisions Subchapter (29 U.S.C.A. §§ 1851 to 1872),* 65 A.L.R. Fed. 2d 339 (2012).

101. *See* 29 U.S.C. § 1801 (2012). The state of Washington has a similar statute. *See* Farm Labor Contractors Act, WASH. REV. CODE ANN. §§ 19.30.010–902 (West 2005 & Supp. 2014).

102. Catalano, *supra* note 100.

103. 29 U.S.C. § 1854(c)(1) (2012).

104. *Id.* § 1854(c)(1)(A).

105. *Id.* § 1854(c)(1)(B).

106. *Id.* § 1854(c)(2).

107. Catalano, *supra* note 100.

108. *See id.* (describing most claims under the MSAWPA as equitable).

109. Pub. L. No. 90-351, 82 Stat. 197; *see also* Kristine Cordier Karnezis, Annotation, *Construction and Application of Provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) Authorizing Civil Cause of Action by Person Whose Wire, Oral, or Electronic Communication Is Intercepted, Disclosed, or Used in Violation of Act*, 164 A.L.R. Fed. 139 (2000).

communications are unlawfully intercepted, disclosed, or used.[110] Damages under the Act are scaled to the severity of the offense. A first offense of privately viewing a non-encrypted video or radio communication not for an illegal purpose and not for commercial advantage only triggers statutory damages of between $50 and $500.[111] For a repeat offender, still not for an illegal purpose and not for commercial advantage, damages rise to between $100 and $1,000.[112] If the offender has an illegal purpose or obtains a commercial advantage, however, damages become more severe; the court may award either (1) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation or (2) statutory damages equal to the greater of $100 per day of violation or $10,000 total.[113]

The Tennessee Wiretapping and Electronic Surveillance Act[114] similarly provides that any person whose wire, oral or electronic communication is intentionally intercepted, disclosed, or used in violation of the Act may recover the greater of (1) actual damages or (2) statutory damages of $100 per day of violation or $10,000, whichever is greater.[115]

The federal Electronic Communications Privacy Act of 1986 ("ECPA") extended the Omnibus Crime Control and Safe Streets Act's anti-wiretapping rules to computer and other digital and electronic communications.[116] If a violator had not been previously enjoined or found liable in a prior civil action under the ECPA, a plaintiff may recover "the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500."[117] If a defendant had previously been enjoined or found liable, a plaintiff may recovery "the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000."[118] The legislative history of the act suggests that this language was intended to authorize statutory damages even in the absence of actual damages.[119]

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110. *See* 18 U.S.C. § 2520 (2012).

111. *Id.* § 2520(c)(1)(A).

112. *See id.* § 2520(c)(1)(B).

113. *See id.* § 2520(c)(2).

114. TENN. CODE ANN. § 39-13-601 (West 2011).

115. *Id.* § 39-13-603.

116. *See* Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510–2522 (2012 & Supp. 2016); *see also* Electronic Communications Privacy Act of 1986 (ECPA), JUSTICE INFORMATION SHARING (July 30, 2013), https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1285.

117. 18 U.S.C. § 2520(c)(1)(A).

118. *Id.* § 2520(c)(1)(B).

119. S. Rep. No. 99-541, at 7 (1986).

The federal Privacy Act of 1974 prescribes a code of fair information practices for federal agencies in the collection, storage, and dissemination of personal information.[120] An individual harmed by an agency's violation of the Act's requirements may bring a civil action for damages against the agency. If an agency intentionally or willfully fails to maintain accurate records or fails to protect personal information in a way that has adverse effects on an individual, it is liable for actual damages "but in no case shall a person entitled to recovery receive less than the sum of $1,000,"[121] language nearly identical to that in the Stored Communications Act. As has been noted, however, in *Doe v. Chao*,[122] the Supreme Court construed this language to limit statutory damages to plaintiffs who could prove at least some actual damages, holding that the legislative history of the Electronic Communications Privacy Act was irrelevant to construction of the Privacy Act.[123] *Doe* has led to widespread confusion in the lower courts.[124]

With respect to records improperly maintained by state agencies, the California Information Practices Act[125] provides that a successful plaintiff shall recover, in addition to any special or general damages, a minimum of $2500 in what it terms "exemplary damages as well as attorney's fees and other litigation costs reasonably incurred in the suit."[126] California law thus provides for more than double the amount of statutory damages as federal law does and is explicit about the noncompensatory purpose of those damages.

On the flip side, Ohio, like many jurisdictions, requires public offices to provide public records upon request.[127] In Ohio, however, if a request is made and not complied with, the statutory damages are set at $100 per day from the date of filing a mandamus action, up to a maximum of $1000.[128] The law recites that the "award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed."[129]

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120. *See* 5 U.S.C. § 552a (2012 & Supp. 2016).

121. *Id.* § 552a(g)(4)(A).

122. 540 U.S. 614 (2004).

123. *Id.* at 626–27.

124. *See supra* notes 26–35 and accompanying text.

125. CAL. CIV. CODE § 1798 (West 2009 & Supp. 2014).

126. *Id.* § 1798.53 (West 2009).

127. Availability of Public Records, OHIO REV. CODE ANN. § 149.43(B)(1) (West 2013, Westlaw through 2016 Legis. Sess.).

128. *Id.* § 149.43(C)(2).

129. *Id.*

D. Civil Rights Rules

Damages for violation of a plaintiff's civil rights present a further problem in the measurement of damages. Someone whose civil rights are violated may suffer economic or emotional harm. But even if she does not, she and all those with the same protected characteristics suffer dignitary injury. One excluded from a nightclub because of her race has been injured—and core American values have been offended—even if an A-list nightclub then admits her and she is not distressed by her initial exclusion at all.

Unlike federal civil rights law, California's Unruh Civil Rights Act ("Unruh Act")[130] therefore authorizes damages as a remedy for discrimination by businesses "up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees."[131] Thus, in California, a victim of discrimination is entitled to $4000 in statutory damages even if she suffers no actual economic or emotional harm.

A comparison of the Unruh Act with the federal Americans with Disabilities Act of 1990 ("ADA")[132] illustrates how statutory damages can enhance civil rights enforcement. The ADA declares that disabled individuals are entitled to the full benefit and access to the goods, services, and privileges of public accommodations.[133] Title III of the ADA requires places of public accommodation (including most private businesses that are open to the public) to remove physical barriers to access—steps, heavy doors, and narrow aisles—or to provide alternate means of access.[134] It does not, however, provide for statutory damages. Since it is not always the case that persons discriminated against in violation of the ADA suffer demonstrable actual damages, the ADA does not always protect their dignitary interests; nor does it give persons who have been discriminated against any economic incentive to assist in the enforcement of the act. By contrast, the Unruh Act, which is construed to incorporate the ADA's substantive requirements, authorizes an award of up to three times the amount of actual damages, but in no case less than $4000, against businesses who do not meet those requirements.[135] Thus, in California, a

130. Unruh Civil Rights Act, CAL. CIV. CODE §§ 51, 52 (West 2007, Supp. 2014, & Westlaw through Ch. 859 of 2017 Regulatory Sess.) (enacted 1959).

131. *Id.* at § 52(a) (West, Westlaw through Ch. 859 of 2017 Regulatory Sess.).

132. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

133. *See* 42 U.S.C. § 12101 (2012).

134. *See* 42 U.S.C. § 12183 (2012).

135. CAL. CIV. CODE §§ 51(f), 52(a). California does impose limitations on recoveries in access

plaintiff who has been subjected to discrimination on the basis of disability has greater recourse, and greater incentive to ensure that businesses comply with the law, than similarly situated plaintiffs in other states.[136]

Another statute sometimes thought to fall within the civil rights category is the federal Freedom of Access to Clinic Entrances Act (FACE).[137] FACE authorizes criminal and civil remedies for violent, threatening, obstructive, and destructive conduct intended to injure, intimidate, or interfere with persons seeking to obtain or provide reproductive health services.[138] The damages provision states that a court may award any appropriate relief including compensatory and punitive damages.[139] "With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation."[140]

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discrimination cases. A defendant's liability for statutory damages in a construction-related accessibility claim against a place of public accommodation is reduced to a minimum of one thousand dollars ($1000) for each offense if the defendant demonstrates that it has corrected all construction-related violations that form the basis of the claim within sixty days of being served with the complaint. CAL. CIV. CODE § 55.56(g)(1) (West Supp. 2014 & Westlaw through Ch. 859 of 2017 Regulatory Sess.). Also, a defendant's liability for statutory damages in a construction-related accessibility claim against a place of public accommodation is reduced to a minimum of two thousand dollars ($2000) for each offense. *Id.* § 55.56(g)(2).

Recent changes to California procedure further limit the availability of statutory damages in construction-related accessibility claims. Attorneys who serve a demand or complaint on a violator must also serve a separate advisory notice. *Id.* § 55.54(a)(1). If the defendant qualifies for a stay and early evaluation conference, the court may stay the proceedings for ninety days unless the plaintiff has already obtained temporary injunctive relief. *Id.* § 55.54(d)(1). The court must also schedule a mandatory early evaluation conference for a date no later than seventy days after it issues the order. *Id.* § 55.54(d)(2). The defendant must file a copy of the Certified Access Specialist (CAS) inspection at least fifteen days before the conference. *Id.* § 55.54(d)(4)(A). In that same time-frame, the plaintiff must file and serve a list of the specific violations on the defendant's property, the amount of damages that the plaintiff is requesting, and the current amount of attorney's fees and costs. *Id.* § 55.54(d)(7)(A)–(C). The court may lift or extend the stay upon a showing of good cause by either party, and the CAS report is not binding on the court. *Id.* § 55.54(e), (j). When determining how much to award in attorney's fees, a court may consider any settlement offers a party made or rejected. CAL. CIV. CODE § 55.55 (West Supp. 2014). Otherwise, settlement offers are generally inadmissible under the Evidence Code. *Id.* The plaintiff can only recover attorney's fees if she personally encountered the violation on the defendant's property or if the defendant's violation deterred the plaintiff from using the defendant's property. CAL. CIV. CODE § 55.56(b) (West Supp. 2014).

136. Part of California's Disabled Persons Act, which antedated enforcement of the ADA through the Unruh Act, provided (and continues to provide) for $1,000 statutory damages or up to three times actual damages. CAL. CIV. CODE § 54.3(a) (West 2007).

137. 18 U.S.C. § 248 (2012) (enacted 1994); *see also* Heather J. Blum-Redlich, Annotation, *Validity, Construction, and Application of Freedom of Access to Clinic Entrances Act (FACE) (18 U.S.C.A. § 248)*, 134 A.L.R. Fed. 507 (1996).

138. 18 U.S.C. § 248.

139. *Id.* § 248(c)(1)(B).

140. *Id.*

E. Other Statutory Damage Provisions

The use of statutory damages is not limited to the four categories explored above.

We have already noted the Tennessee statute that authorizes up to $5,000 in statutory damages for the death of a pet from the person who caused that death or the injuries that led to that death.[141] A pet owner's subjective damages from the killing of her pet may be large even if her objective damages are minimal or negative. The Tennessee statute, in effect, deviates from classic common law damage principles[142] to compensate the owner for what may be a devastating subjective loss. Illinois law includes a similar provision, but for ostensibly noncompensatory reasons, authorizing an award of between $500 and $25,000 in punitive or exemplary damages for each act of abuse or neglect in addition to compensation for the owner's actual economic and emotional damages, plus attorneys' fees.[143]

Unlawfully destroying a tree may similarly not reduce the fair market value of the property in question, the standard common law measure of damages for wrongful destruction of ornamental trees.[144] Indeed, one could imagine circumstances in which doing so would increase the property's value. A tort recovery limited to economic loss might therefore afford the owner no or little recompense. New York solves this problem by authorizing statutory damages for the cutting, removing, injuring or destroying trees.[145] Even if defendant incorrectly believed she had the right to take such actions, she is still liable for the fair market value of the trees, $250 per tree, or both.[146] Plaintiff's damages may also include costs of litigation and reparation of the land.[147] Reparation, especially if the destroyed tree was mature, can be expensive.[148]

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141. *See* TENN. CODE ANN. § 44-17-403(a)(1) (West 2010).

142. *See* 4 AM. JUR. 2D *Animals* § 117 (2017) ("Dogs are classified as personal property for damage purposes, not as persons, extensions of their owners, or any other legal entity whose loss would ordinarily give rise to personal injury damages. Thus, the general rules [sic] is that the measure of damages for the destruction of personal property is the fair market value thereof at the time of the destruction.") (footnote omitted).

143. 510 ILL. COMP. STAT. ANN. 70 / 16.3 (West 2014).

144. *See* Kristine Cordier Karnezis, Annotation, *Measure of Damages for Injury to or Destruction of Shade or Ornamental Tree or Shrub*, 95 A.L.R.3d 508 (1979) (noting that "ordinarily the measure of damages is the resulting depreciation in the value of the land on which the trees or shrubs stood").

145. N.Y. REAL PROP. ACTS. LAW § 861 (McKinney 2009), *Vanderwerken v. Bellinger*, 900 N.Y.S.2d 170, 172–73 (N.Y. App. Div. 2010).

146. N.Y. REAL PROP. ACTS. LAW § 861(2).

147. *Id.*

148. *Tree Planting Costs*, HOWMUCH, https://howmuch.net/costs/tree-install (last visited Jan. 20,

Finally, in Oregon, a person who receives a dishonored check may recover from the maker statutory damages in an amount equal to $100 or triple the amount for which the check is drawn, whichever is greater.[149] Such damages are to be awarded in addition to the amount for which the check was drawn, but may not be more than $500 over the amount for which the check was drawn.[150] Here, statutory damages are presumably used both to deter wrongful conduct and to compensate the victim for the difficult-to-prove inconveniences, neither economic nor in the nature of classic emotional distress, inherent in having to deal with a bounced check.

The statutory provisions described in this Part II constitute but a few illustrative examples of the use and structure of statutory damage provisions in state and federal law. They should, however, be sufficient to permit an informed exploration, to which we now turn, of the kinds of problems that lead legislatures to enact such provisions and the kinds of problems they can in turn create.

III. PURPOSES

The justifications legislatures, courts, and commentators have offered for statutory damages fall into three broad categories.

The first is remedial. Quintessentially, it is asserted that damages in the area in question, although real, are unusually hard to prove; statutory damages are set so as to approximate likely actual damages without requiring proof of such damages. It is also sometimes asserted that, for whatever reasons, ordinary common law damage rules are inadequate in particular contexts. In some situations, for example, a subjective loss rule may better accord with justice; since subjective losses are hard to establish with certainty, statutory damages may do a better job in the circumstances. It may also turn out that failure to provide for damages in excess of plaintiff's actual damages can unjustly enrich the wrongdoer; statutory damages can solve this problem as well.

A second set of justifications derives from criminal law theory. Statutory damages may deter behaviors that we seek to reduce. They may punish, regardless of whether they have any deterrent effect. In any event, they may serve an expressive function, declaring to the wrongdoer and the world society's disapproval of his actions.

Thirdly, statutory damages may alter the procedures and incentives to litigate that might otherwise pertain. Provision of statutory damages in

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149. OR. REV. STAT. ANN. § 30.701(1) (West 2013).

150. *Id.*

lieu of actual damages may reduce or eliminate the cost of proving actual damages. Together with the increased litigation yields that statutory damages also authorize, this encourages litigation. In effect, statutory damages reflect a legislative intuition that *more litigation* of the type involved is better—that leaving the ordinary rules of civil litigation in place would result in too few lawsuits. Thus, statutory damage rules are commonly designed to make it possible for individual plaintiffs to bring cases they might otherwise not bring. They explicitly encourage private attorneys general to sue to vindicate the public interest. They may even substitute for criminal prosecution (without, of course, affording defendants the procedural protections to which they would otherwise be entitled in criminal court); many violations that trigger statutory damages are also crimes.

A. Remedial Purposes

The first and perhaps most important set of justifications for statutory damages is remedial—to better place each party in the position she would have been in in the absence of the violation. Statutory damages are, after all, part of the civil, not criminal, law; and the civil law's core purpose is remedial.

1. Compensation

a. Difficulties of proof

It is often claimed that statutory damages are authorized to allow recovery where it might otherwise be difficult or impossible to prove the existence or amount of plaintiff's actual damages, notwithstanding the fact that we intuit that plaintiff has suffered some amount of such damages. Senator Orrin Hatch, for example, has testified before Congress that "Section 504(c) of the Copyright Act provides for the award of statutory damages at the plaintiff's election in order to provide greater security for copyright owners, who often find it difficult to prove actual damages in infringement cases—particularly in the electronic environment."[151] In particular, it is asserted that in copyright cases it is often difficult to prove

151. 145 CONG. REC. S7453 (daily ed. June 22, 1999) (statement of Sen. Hatch) (The Senator went on to introduce a bill that increased the Copyright Act's statutory damage amounts, explaining that the then-current amounts were inadequate to achieve their aims given the "combination of more than a decade of inflation and revolutionary changes in technology." *Id.*).

the amount of profits plaintiff would have made had the infringement not occurred.[152]

Copyright was originally about preventing business competitors from taking business away from the copyright owner by publishing a work to which plaintiff had exclusive rights. Senator Hatch's difficulty-of-proof rationale is plausible in such a context, although it may not warrant "an award that is 'more money than the entire music recording industry has made since Edison's invention of the phonograph in 1877,'" as the Copyright Act apparently authorized in *Arista Records LLC v. Lime Group LLC*.[153] Today, however, many of the most salient copyright cases are brought instead against individuals making copies for personal use.[154] Unless defendant retransmits to others (a separate copyright violation), actual damages in such cases are easy to calculate: defendant has been deprived of the price defendant should have paid—for a song or movie often less than $1 and rarely more than $20. The argument that plaintiff's damages from personal use downloading are more difficult to prove than if defendant had shoplifted the corresponding CD or DVD from a store is not credible. By failing to distinguish between business competitor cases and personal downloading cases, Congress has authorized a series of stunningly large awards in the latter category that sometimes seem to call the legitimacy of copyright law itself into question—at least within the demographic most likely to engage in the behavior sought to be deterred.

By contrast, the difficulty-of-proof rationale is more plausible in trademark cases under the Lanham Act.[155] In *Louis Vuitton Malletier, S.A. v. LY USA*, high-end fashion designer Louis Vuitton asserted that the defendants' "willful, extensive, repeated and systematic counterfeiting of Louis Vuitton's valuable trademarks" warranted the maximum authorized statutory damage award.[156] The court awarded Louis Vuitton over three million dollars, observing that "[i]n enacting the statutory damages provision of the Lanham Act, Congress found, generally, that 'counterfeiters' records are nonexistent, inadequate or deceptively kept in order to willfully deflate the level of counterfeiting activity actually

152. Jonathan Bailey, *The Difference Between Fines and Damages*, PLAGIARISMTODAY (Aug. 28, 2009), https://www.plagiarismtoday.com/2009/08/28/the-difference-between-fines-and-damages/.

153. 784 F. Supp. 2d 313 (S.D.N.Y. 2011) (quoting Def. Mem. at 2–3) (criticizing requested statutory damage award of over $1.5 billion).

154. *See, e.g.*, Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010), *vacated*, 692 F.3d 899 (8th Cir. 2012).

155. *See* 15 U.S.C. § 1117(c) (2012).

156. No. 06 CIV. 13463(AKH), 2008 WL 5637161, at *1 (S.D.N.Y. Oct. 3, 2008).

engaged in, making proving actual damages in these cases extremely difficult if not impossible.'"[157]

In business regulation cases, whether the difficulty-of-proof rationale is plausible varies from wrong to wrong. In railroad overcharge cases, for example, computation of plaintiff's actual loss is trivial—except in very unusual cases, it is simply the amount of the overcharge. By contrast, the inconvenience and distress consumers suffer when debt collectors violate the fair debt collection practice rules[158] or the economic losses borrowers suffer when lenders violate the Truth in Lending Act[159] by failing to disclose credit terms may be extremely difficult to prove or quantify.

Privacy, information disclosure, and civil rights cases often present similarly forbidding difficulty-of-proof problems. In many cases, the only conventional damages may arguably be for emotional distress—and even there it is generally unlikely that plaintiffs will suffer the kind of serious emotional harm for which compensation is normally awarded. Experience suggests, moreover, that in the absence of physical harm finders of fact are often reluctant to award emotional distress damages at all. A typical response to such claims in actions for discrimination is that of the Illinois Human Rights Commission: "awards for emotional distress are very much the exception, not the rule."[160] The same is true in privacy cases:

> It is difficult . . . to calculate the damage suffered from the portrayal of someone in a false light or the intrusion into a person's seclusion. This is because the damages do not flow from a tangible loss. This is to be contrasted, for example, from the losses suffered in a car accident such as medical expenses and loss of income, which are tangible.[161]

Statutory damage awards that reasonably approximate plaintiffs' likely actual, albeit unconventional, injuries solve these problems.

b. Adjustments to common law damage principles

Statutory damages are also sometimes used when common law damage principles fail to capture what the legislature believes to be plaintiff's true loss. The classic common law, for example, did not generally protect the kinds of dignitary interests implicated in civil rights

157. *Id*. (quoting Polo Ralph Lauren, L.P. v. 3M Trading Co., No. 97 Civ. 4824(JSM)(MH), 1999 WL 33740332, at *4 (S.D.N.Y. Apr. 19, 1999)).

158. 15 U.S.C. § 1692k(a) (2012).

159. 15 U.S.C. § 1640(a)(2)(A) (2012).

160. *In re* Donna Davenport, No. 1987SF0429, 1998 WL 937869, at *5 (Ill. Hum. Rts. Com. Nov. 20, 1998).

161. Mac Cabal, Note, *California to the Rescue: A Contrasting View of Minimum Statutory Damages in Privacy Torts*, 29 WHITTIER L. REV. 273, 276–77 (2007).

cases. The statutory damages authorized by California's Unruh Civil Rights Act solve this problem, at least in California.

2. Unjust Enrichment

Finally, statutory damages rules make available an alternative to the equitable remedy of disgorgement in cases involving unjust enrichment of the wrongdoer. Where a copyright violator earns more profits than the owner would have earned, for example, merely giving the owner damages in the amount of his lost profits will still leave the wrongdoer in a better position than if he had never committed the wrong. The flexibility to award statutory damages under the Copyright Act allows courts to prevent such results. The same is true in trademark cases. Whether it is true in other contexts will depend on the facts.

Although unjust enrichment is sometimes cited as a justification for statutory damages, such provisions are not required to remedy that particular wrong. Recoveries to remedy unjust enrichment are generally available even in the absence of statutory damage rules. What statutory damages do allow, however, is for a court to order recoupment of the wrongdoer's hypothetical profits without proof of the amount of such profits, presumably because of the difficulties of tendering such proof. Whether this is appropriate will depend on the circumstances.

B. Substitutes for Criminal Enforcement

To the extent statutory damages cannot be justified as approximating likely actual damages or preventing unjust enrichment, they are often justified as substitutes for criminal penalties. Recall the Supreme Court's defense in *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*,[162] of the statutory damages awarded by Arkansas for railroad overcharges:

> [T]he power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.[163]

Modern criminal theory harbors an unresolved tension between punishment as retribution and punishment as deterrence. Punishment as

162. 251 U.S. 63 (1919).

163. *Id.* at 66 (quoting Mo. Pac. Ry. v. Humes, 115 U.S. 512, 523 (1885)).

retribution requires proportionality—that the punishment fit the crime. If statutory damages under the Copyright Act cannot be justified as remedial and must instead be justified as quasi-criminal penalties, they become difficult to defend under retributive theory. It is hard to characterize a $1.92 million penalty as proportionate to the wrong of downloading twenty-four songs without paying for them.[164]

Our current system of statutory damages for copyright violations is therefore more easily defended on a utilitarian basis, by reference to its ostensible deterrent effects. As Senator Orrin Hatch testified, today's sometime extreme statutory damages for copyright violations "provide greater deterrence for would-be infringers."[165] The Supreme Court in *W. F. Woolworth Co. v. Contemporary Arts, Inc*.[166] similarly held that statutory damages for copyright infringement are not only "restitution of profit and reparation for injury," but also are in the nature of a penalty "designed to discourage wrongful conduct."[167] Extreme penalties for deterrence purposes are harder to justify, however, if they have no demonstrable deterrent effect or if one believes that all punishment must have at least some retributive justification.

C. Procedural Purposes

As remedial provisions, statutory damages attempt to place each party in the position she would have been in in the absence of the violation. As substitutes for criminal enforcement, they focus on the behavior of potential or actual wrongdoers, punishing, deterring, or both. A third general category of justifications focuses on statutory damages' procedural effects—their effects on the behavior of potential or actual litigants, and on the course of the litigation itself.

1. Encouraging litigation

Statutory damages almost always result in higher litigation returns at lower cost to plaintiffs. They typically reduce or eliminate the cost of proving actual damages and almost always increase plaintiff's recovery. Thus, statutory damages commonly reflect a legislative determination, explicit or implicit, that more litigation of the type involved would be

164. Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010), *vacated*, 692 F.3d 899 (8th Cir. 2012).

165. 145 CONG. REC. S7453 (daily ed. June 22, 1999) (statement of Sen. Hatch).

166. 344 U.S. 228 (1952).

167. *Id.* at 233.

better—that leaving the ordinary rules of civil litigation in place would result in too few lawsuits.

Statutory damage rules are therefore generally structured so as to enable individual plaintiffs to bring cases they might otherwise not bring. In the realm of consumer protection, for example, "[s]tatutory damages were meant to provide an individual plaintiff with the ability to bring a lawsuit when the anticipated damages are otherwise too low to provide an attorney with adequate incentive to take a case."[168] In this regard, statutory damages are not unique; other techniques used to encourage lawsuits that might otherwise not be worth bringing include treble damages, punitive damages, attorneys' fees, and class actions.[169] As the sampling of statutory damage provisions in Part II illustrates, many legislative regimes that authorize statutory damages also authorize treble or punitive damages and the recovery of attorneys' fees, all to enable individual plaintiffs to bring cases they might otherwise not bring. Such remedies are commonly provided even in the absence of any actual harm.

For example, disclosure violations under the Truth in Lending Act usually do not involve actual damages.[170] To make lawsuits economically worthwhile and encourage private enforcement of the Act, therefore, Congress authorizes the award of statutory damages in addition to any actual damages for violations of that Act.[171] In *Edwards v. Your Credit Inc.*,[172] the Fifth Circuit held that statutory damages *must* be imposed for violations of the Act, regardless of the district court's finding that no actual damages had resulted from defendant's violations.[173] In *Perrone v. General Motors Acceptance Corp.*,[174] the same court opined that "statutory damages [under TILA] are reserved for cases in which the damages caused by a violation are small or difficult to ascertain."[175] Similarly, in the Chuck E. Cheese litigation, plaintiff herself admitted that

168. Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 61 (2005).

169. *See id.* (describing "the incentive-creating effect of statutory damages" as duplicative in class actions).

170. S. REP. NO. 93-278, at 14–15 (1973); 119 CONG. REC. 25,418 (1973) (statement of Sen. Proxmire) ("[T]here are almost never any actual damages" under the Truth in Lending Act); *see also* Scheuerman, *supra* note 16, at 110.

171. *See supra* note 83 and accompanying text.

172. 148 F.3d 427 (5th Cir.1998).

173. *Id.* at 441.

174. 232 F.3d 433 (5th Cir. 2000).

175. *Id.* at 436. This aspect of the court's decision seems inconsistent with the plain language of the statute. *See supra* note 83 and accompanying text.

neither she nor the class she represented had suffered any economic harm.[176]

Another way legislatures and courts sometimes articulate the same justification is to note that statutory damages are intended to encourage policing of the act in question by private attorneys general. Federal, state, and local enforcement agencies, civil or criminal, are often not equipped to identify and prosecute all potential violations of statutes within their jurisdiction. Statutory damages recruit private parties to fill this gap. Nearly every state, for example, has now extended to injured consumers the power to sue merchants who engage in deceptive practices.[177] In *Parker v. Time Warner Entertainment Co.*,[178] the Second Circuit acknowledged that the statutory damage provision of the Cable Privacy Act sought to "encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws."[179]

2. Providing notice

Some commentators have suggested that statutory damages perform the further procedural service of giving potential violators prior notice of the nature and severity of any damage awards they might face.[180] Unlike other types of damages, "furnishing a defendant with 'fair notice' of the potential damages recoverable is . . . addressed by explicitly delineated statutory damage amounts."[181]

This asserted advantage seems largely illusory. Most of us already have some intuitive sense of the magnitude of the liabilities or penalties we likely face if we break a lease, shoplift, or are found responsible for a car accident. A defendant hit with a $1.92 million judgment for downloading twenty-four songs,[182] by contrast, is almost certain to be surprised. One suspects that the management of Chuck E. Cheese was stunned to learn that printing one extra digit on a receipt threatened corporate bankruptcy.[183] How many clients ever instruct their lawyers to

176. Blanco v. CEC Entm't Concepts L.P., No. CV 07-0559GPSJWJX, 2008 WL 239658, at *2 (C.D. Cal. Jan. 10, 2008).

177. Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 ANTITRUST L.J. 125, 130 (1987) ("All of those states that have private rights of action now have provisions for attorneys' fees. . . . The attorneys' fees provisions are, of course, intended to encourage private attorney general enforcement of the consumer protection laws . . . .").

178. 331 F.3d 13 (2d Cir. 2003).

179. *Id.* at 22.

180. *See, e.g.*, Cross, *supra* note 36, at 1055–56; Jeffrey A. Holmstrand, *No Harm, but Still a Foul? Constitutional Defenses in Statutory Damages Claims*, FOR THE DEF., Nov. 2011, at 28.

181. Holmstrand, *supra* note 180.

182. *See supra* note 20 and accompanying text.

183. *See supra* notes 12–16 and accompanying text.

compile lists of the statutory damage provisions to which they might be subject? Without hiring a lawyer to compile such a list, how would any ordinary human being ever become aware of the obscure and sometimes counter-intuitive rules we have explored here?

It is all very well to deem criminal defendants to have known the law. It is another matter entirely to pretend that the real world actually knows or cares about statutory damage rules until they are asserted in litigation.

IV. PROBLEMS AND POSSIBLE SOLUTIONS

Our review of a sample of statutory damage provisions in Part II and of their purposes in Part III suggest at least three common problems. First, unless special care is taken in drafting the statute, statutory damage awards are inherently ambiguous: it is almost always impossible to determine what part of a lump-sum award should be treated as an approximation of actual damages and what part as a substitute for the criminal law. In writing statutory damage provisions, legislatures often invoke formulary language—for example, "an award of statutory damages . . . in a sum of not less than $750 or more than $30,000 as the court considers just"—that fails to do anything to remedy this inherent ambiguity. An irrational decision-making process known as "anchoring" may even cause such formulary language to make things worse. Second, when combined with class certification, statutory damage awards often threaten results that cannot possibly have been within Congress's contemplation. Third, because they are not anchored to actual damages, even statutory damages awarded in individual cases can seem ridiculously large, given the underlying wrong they are supposed to remedy; it is unclear whether such awards are subject to constitutional limitations and, if so, which.

A. Ambiguity and the Rule of Law

Many of the problems courts encounter in interpreting and applying statutory damages provisions are consequences of the fact that statutory damages are inherently ambiguous, serving multiple, often poorly defined, functions. Legislatures commonly invoke statutory damages by enacting simple formulary language that fails to distinguish among those functions and specify how each such function might best be served. When awards are set by general jury verdict, judicial review of that verdict for compliance with applicable legal standards becomes near-impossible; it is often unclear what standards, if any, should apply and how, mechanically, courts can even begin to administer them. In consequence, statutory damage rules can produce wildly inconsistent awards in factually similar

cases, inconsistent interpretations of similar statutory provisions, and penalties completely out of proportion to the wrongs they are supposed to punish or deter. This hardly seems consistent with the rule of law.

The Copyright Act's statutory damage provisions, among the most open-ended of any, illustrate these difficulties vividly. Section 504(c)(1) and (2) provides, in pertinent part, that:

> [T]he copyright owner may elect . . . to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, . . . in a sum of not less than $750 or more than $30,000 *as the court considers just*. . . . In a case where . . . infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000.[184]

The italicized language is the sum total of Congress's guidance to judges and juries: "*as the court considers just.*" We should not be surprised to see verdicts for indistinguishable wrongs that differ by an order of magnitude and a requested award for "more money than the entire music recording industry has made since Edison's invention of the phonograph in 1877."[185]

Part of the problem is the lack of a theory of statutory damages. We will not presume to offer any such theory. Based on our examination of a reasonably large sampling of statutory damages provisions in Part II and of their purposes in Part III, however, we can offer two general, and possibly useful, observations and a number of specific implementing suggestions. Our goal in this Part IV.A is simply to help courts and legislatures disentangle the multiple functions of statutory damages, interpret or write statutory damage rules in a manner consistent with their intended functions, and implement such rules in a manner consistent with the rule of law.

1. Interpreting Statutory Damage Rules to Effectuate Their Purposes

Premise 1: When legislatures enact statutory damage provisions, they have almost certainly concluded that the ordinary common law of damages is inadequate to their purposes. To constrain statutory damage rules to common law principles without clear evidence that the legislature intended to do so, therefore, risks frustrating the legislature's likely purposes. The *Doe v. Chao* interpretation of the Privacy Act, for example, which limited statutory damages to plaintiffs able to prove actual damages,

184. 17 U.S.C. § 504(c)(1), (2) (2012) (emphasis added).

185. *See supra* note 11 and accompanying text.

applied a basic common law principle in a way that frustrated private enforcement of the Act in all but the most unusual circumstances. Given the limited resources of government attorneys and the many competing demands on those resources, this means that the Privacy Act is unlikely to be enforced at all—except, again, in the most egregious circumstances. This was almost certainly not Congress's intention.

If courts accept this first premise, their first step in construing any statutory damage provision should be to ask why the legislature concluded that the common law of damages was likely to be inadequate in the circumstances. Construing the statute in a manner consistent with plausible answers to this question is much more likely to effectuate the legislature's purposes than either a common law interpretation (by hypothesis rejected by the legislature as inadequate) or a blind "plain language" approach.

In so inquiring, courts may usefully ask why the legislature authorized statutory damages in the context in question but did not do so in roughly analogous circumstances. Why, for example, did Tennessee authorize statutory damages for the killing of a dog, but not for the killing of a child? Why did Congress authorize statutory damages in copyright, but not in patent?

The answer to the first question is both straightforward and useful: emotional distress damages for the killing of a child were already available at common law, while the common law treated the killing of a dog as a mere destruction of property.[186] The Tennessee legislature seems to have intended to permit recovery for a type of harm not classically compensable at common law. The statute should be so construed.

The answer to the second is less clear but potentially equally useful. In the paradigm patent infringement case, as in the standard common law case, validity and infringement (and hence liability) are typically contested and fault is a priori unclear. Congress may therefore have viewed it appropriate that patent law adhere, for the most part,[187] to the tried-and-true principles of the common law of damages. In the paradigm case of copyright infringement, by contrast, validity and infringement are often obvious; damages, much less so. Congress may therefore have thought it fair in the standard case to treat copyright infringers as having accepted the risks of getting caught, deprive them of any windfall by reason of difficulties in proof of damages by the copyright owner, and include a

186. *See* 4 AM. JUR. 2D *Animals* § 117 (2017) (describing dogs as personal property).

187. Note, however, that disgorgement of the infringer's profits is not normally available in patent law. *See, e.g.*, Rachel L. Emsley, Note, *Copying Copyright's Willful Infringement Standard: A Comparison of Enhanced Damages in Patent Law and Copyright Law*, 42 SUFFOLK U. L. REV. 157, 166 (2008).

significant punitive or deterrent component in the damages available. If so, again, the statute should be so construed.

2. Structuring Statutory Damage Litigation to Permit Effective Judicial Review

Premise 2: In enacting statutory damage rules, legislatures have typically concluded that the ordinary common law of damages is inadequate to their purposes for one or more of two reasons. First, some portion of an award may be intended to approximate plaintiff's likely actual damages, possibly including damages not compensable at classic common law, without requiring proof of such damages. Second, even if plaintiffs have suffered no actual damages, some portion may be intended to encourage them to sue to vindicate the public policy protected by the statute. Any award in excess of the amounts needed to accomplish these first two objectives is likely to be deterrent or punitive, and therefore subject to the concerns courts face in setting or reviewing deterrent or punitive awards.

The problem for judges and juries is that the damages that perform these different functions are typically wrapped together in a single lump sum. Juries do not typically award one amount as an approximation of likely actual damages, a second to induce plaintiff to litigate, and a third as punishment for the wrong. Were they to do so, such awards would likely be much better anchored in reality. Because juries are invited instead to award a single lump sum, however, they probably give little separate thought to each of these separate functions. The single lump sum is more likely to be awarded from the gut—that is, "*as the court considers just*." And this, in turn, is likely to make judicial review of the resulting award for compliance with the law deeply problematic.

If it is thought to be desirable to better anchor statutory damage awards in the facts of the particular case and the purposes of the particular statute, a first step might be to ask juries to award separate amounts to effectuate each of that statute's purposes—one to approximate likely actual damages (not proven actual damages, since plaintiffs are not required to prove their actual damages), a second as a token to induce plaintiffs to sue to vindicate the policies underlying the statute (but only if the first is inadequate to the purpose), and a third as punishment. Thus, for example, a jury considering an award of statutory damages for the unlawful downloading of twenty-four songs might conclude that (1) $240 generously approximates plaintiff's likely actual damages, (2) $5000 plus attorneys' fees is sufficient to give plaintiff an incentive to litigate, and (3) a further award in some amount (probably not $1.92 million) is just punishment in the

circumstances. A mechanism for asking juries to just do this already exists—the special verdict.

Another possibility would be to permit introduction of evidence of actual damages or likely actual damages not by plaintiff, since plaintiffs are not required to prove actual damages, but by defendant. If a defendant accused of having unlawfully downloaded twenty-four songs can put before the jury the fact that she could have purchased those same songs lawfully for ninety-nine cents each, it seems much less likely that the jury will award a judgment of $1.92 million against her for her wrongful action.

In response, some may assert that one of the purposes of statutory damage provisions is to make actual damages irrelevant. This, however, is not true. One of the purposes is to relieve plaintiff of his evidentiary burden in circumstances in which actual damages are hard to prove.[188] But clearly, the amount of actual harm inflicted is relevant to whether an award of any particular size would be "just"—the statutory benchmark under the Copyright Act. To preclude defendant from effectively litigating whether plaintiff's requested award is "just" would be to preclude her from defending herself altogether in a case with strong punitive overtones. It would be like prohibiting a criminal defendant from introducing mitigating evidence at a sentencing hearing.

In judge-tried cases, problems can also be minimized if finders of fact look to awards in similar cases as precedent, as courts now commonly do when making statutory damage awards under the Migrant and Seasonal Agricultural Worker Protection Act.[189] Technically, of course, such awards are not "law," and have no precedential value. Seeking consistency among awards, however, minimizes the likelihood of disparate awards on similar facts and will eventually produce a set of de facto common law rules as to what may be "just" in the circumstances.

3. Drafting Unambiguous Statutory Damage Rules Scaled to the Severity of the Offense

We are likely to be stuck with open-ended and ambiguous statutory damage provisions for many decades to come. In the meantime, however, legislatures can do much to avoid problems by writing new statutes more carefully. As has been noted, for example, damages under the Omnibus Crime Control and Safe Streets Act of 1968[190] are scaled to the severity of

188. Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1053–54 (D. Minn. 2010), *vacated*, 692 F.3d 899 (8th Cir. 2012).

189. *See supra* note 107 and accompanying text.

190. Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510–2522); *see also* Karnezis, *supra* note 109.

the offense: (1) between $50 and $500 for a first offense of privately viewing a non-encrypted video or radio communication not for an illegal purpose and not for commercial advantage, (2) between $100 and $1000 for a repeat offender, still not for an illegal purpose and not for commercial advantage, (3) but if the offender has an illegal purpose or obtains a commercial advantage, damages equal to the greater of actual damages or the greater of $100 per day of violation or $10,000 total.[191] Had Congress similarly distinguished between commercial use and personal use downloading under the Copyright Act, much mischief could have been avoided.[192]

Even providing non-binding guidance within the statute itself can improve decision-making. Consider, for example, the Fair Debt Collection Practices Act, which provides for statutory damages in the discretion of the court, but asks the court to consider at least three factors: (1) the frequency and persistence of noncompliance by the debt collector, (2) the nature of the noncompliance, and (3) the extent to which the noncompliance was intentional.[193] Placing such guidance within the statute itself avoids arguments about whether consideration of legislative history is permitted in statutory interpretation.

B. Anchoring and Over-Compensation

Anchoring, a psychological quirk in the way we process information, may exacerbate problems with the rationality of awards under some statutes—the Copyright Act comes particularly to mind. Psychologist Daniel Kahneman uses the following example to explain how anchoring works. If you are asked how old Gandhi was when he died and do not know the answer, you will tend to give the average age people die. If you are instead asked whether Ghandi was 114 years old when he died, you will likely give a much higher answer; if you are asked whether he was 35 years old when he died, a much lower. Logically, how the question is asked should not matter. But repeated experiments prove that it does. We

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191. 18 U.S.C. § 2520(c) (2012).

192. While the Copyright Act of 1976 limited statutory damages by explaining that "all the parts of a compilation or derivative work constitute one work" for purposes of calculating statutory damages, courts have interpreted this inconsistently. Pub. L. No. 94-553, § 504, 90 Stat. 2541, 2585 (1976) (codified as amended at 17 U.S.C. § 504(c)(1)); *see also* H.R. REP. NO. 94–1476, at 162 (1976). Some courts awarded statutory damages on a per album basis. Bryant v. Media Right Prods., Inc., 603 F.3d 135, 142 (2d Cir. 2010); UMG Recordings, Inc. v. MP3.com, Inc., 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000). But others continued to impose damages per song, not per album. *See* Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 313, 321 (S.D.N.Y. 2011).

193. 15 U.S.C. § 1692k(b)(1) (2012).

tend to use any number included in the question as an anchor in determining our answer.[194]

Consider two possible ways of writing the Copyright Act's statutory damage provision.

First: "The copyright owner may recover an award of statutory damages in a sum of not less than $750, *as the court considers just*."

Second: "The copyright owner may recover an award of statutory damages in a sum of not less than $750 or more than $150,000, *as the court considers just*."

The anchoring literature predicts that juries will use the concrete dollar amounts given in the second version as anchors. In a case that seems factually midway between the worst possible and best possible (but still unlawful) behaviour, they may split the difference, awarding, say, $75,000 per work infringed—almost exactly what the jury awarded in *Capitol Records Inc. v. Thomas-Rasset*,[195] to punish a defendant who had illegally downloaded and shared twenty-four songs over the Internet. Had the *Capitol Records* jury instead been instructed to award statutory damages "in a sum of not less than $750, as you consider just" for the wrong of downloading twenty-four songs, anchoring theory suggests that the award would likely have been much lower.

It is possible, therefore, that setting a high upper bound to statutory damage awards, rather than no upper bound, may result in higher average awards—for irrational reasons. The *Capitol Records* jury may not have set its award at $1.92 million for any of the reasons Congress had in mind when it wrote the statute; it may rather have been influenced—irrationally—by a number Congress placed in the statute as an upper limit on damage awards, a number not intended to function as an anchor at all. Legislatures may wish to consider this problem when considering whether to set high upper bounds to such awards.

C. Class Actions and the Multiplier Effect

Both statutory damages and class actions are techniques for allowing corrective litigation to go forward notwithstanding the sometimes small actual damages, if any, suffered by each individual victim.[196] Separately, they may each make sense. Combined, however, they can produce

194. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 119–128 (2011) (explaining ways that our brains work to process information and make decisions).

195. 680 F. Supp. 2d 1045, 1048–50 (D. Minn. 2010), *vacated*, 692 F.3d 899 (8th Cir. 2012).

196. Scheuerman, *supra* note 16, at 109 ("Class actions thus provide an incentive to sue that would not exist if the plaintiffs had to proceed individually.").

outlandish results. In the introduction, we noted the Chuck E. Cheese litigation, in which defendant admitted to having printed more than five digits of its customers' credit card numbers.[197] Under the Fair and Accurate Credit Transactions Act, defendant would have been liable for statutory damages of between $100 and $1,000 for each individual failure—an amount Congress apparently thought sufficient to induce individual plaintiffs to sue to enforce the Act.[198] Because the case was brought as a class action, however, defendant's total exposure for its harmless one-digit mistake was almost $2 billion.

We have called this the Chuck E. Cheese problem; it might also be called the "multiplier effect." Class actions take amounts thought to be reasonable to induce individual plaintiffs to bring individual actions, notwithstanding the lack of actual damages, and turn them into caricatures of a lawyer's fevered imagination. As the court wrote more soberly in an order approving a settlement in *Parker v. Time Warner Entertainment Co.*: "Each of these tools is intended to encourage the prosecution of cases that would otherwise be too costly for an individual plaintiff to pursue. The combination of the two threatens defendants with the multiplication of statutory damages, possibly beyond the contemplation of Congress and the limits of due process."[199]

As is often true in the law of statutory damages, whether denial of class certification is an appropriate solution to the problem is not unambiguously clear.

The problem was recognized as early as 1969 when, in the widely-cited case of *Ratner v. Chemical Bank New York Trust Co.*,[200] the District Court for the Southern District of New York rejected class certification in a TILA class action where "the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act."[201] Three years later, in *Kline v. Coldwell, Banker & Co.*,[202] a case under the Sherman Act involving requested certification of both plaintiff and defendant classes, the Ninth Circuit appeared to follow suit. "In order to certify the action as a proper class action," the court reasoned, "it is necessary to demonstrate that the class

197. *See supra* note 13 and accompanying text.
198. *See* 15 U.S.C. § 1681n (2012).
199. 631 F. Supp. 2d 242, 246 (E.D.N.Y. 2009).
200. 54 F.R.D. 412 (S.D.N.Y. 1972).
201. *Id.* at 416.
202. 508 F.2d 226 (9th Cir. 1974).

action is superior to other available methods for the fair and efficient adjudication of the controversy as required by Rule 23(b)(3)."[203] This requirement was not met, the court held, if a case sought "outrageous amounts in statutory penalt[ies]" such that it would lead to an "absurd[] result."[204]

In a 1995 case similarly not involving statutory damages, Judge Posner, writing for the Seventh Circuit, agreed with the Ninth Circuit's reading of the class action rule.[205] The court ordered decertification of the plaintiff class in question in part because of

> a concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability, when it is entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune that has befallen [plaintiff class] to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions.[206]

Were class certification permitted to stand, Judge Posner wrote, defendants might "easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."[207] He went on to quote Judge Friendly, who had called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements."[208]

The Second Circuit expressed similar concerns in *Parker v. Time Warner Entertainment Co*.[209] Plaintiff there sought to certify a class of cable television subscribers, each of whom qualified to receive minimum statutory damages of $1000 for Time Warner's alleged violation of the Cable Communications Policy Act.[210] The court acknowledged "the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class."[211] "By seeking to collect statutory damages of $1,000 for each of

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203. *Id.* at 233.

204. *Id.* at 234–35.

205. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

206. *Id.* at 1299.

207. *Id.* at 1298.

208. *Id.* (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

209. 331 F.3d 13 (2d Cir. 2003).

210. *See id.* at 22; *see also id.* at 23 (Newman, J., concurring) (noting that $1000 in statutory damages per person was at stake).

211. *Id.* at 22.

up to 12 million cable subscribers," the court observed, "[the] lawsuit could potentially impose on Defendant Time Warner liability for $12 billion. Even for one of the world's largest corporations, that is a lot of money."[212] Nevertheless, the court reversed as premature the district court's refusal to certify the requested class.[213] Six years later, as part of a comprehensive settlement of the case, class certification was granted.[214] District courts in other cases, however, continued to follow *Ratner*.[215]

Then, in *Bateman v. American Multi-Cinema, Inc.*,[216] the Ninth Circuit reversed course. The problem with certifying a class in *Kline*, the court observed, was not the size of the potential award relative to the size of the defendant. The problem was rather that certification of the defendant class in that case would have rendered each member of the class jointly and severally liable for penalties imposed for other members' wrongdoing—an absurd result not present in the standard FACTA case.[217] But "[t]o deny class certification based on the potential amount of damages as compared to the extent of harm," the court reasoned, "presumes that Congress left it to the courts to evaluate the relative amount of liability necessary to serve the statute's compensatory and deterrent purposes."[218] Noting that Congress had capped statutory damages in class actions in a number of other contexts, the court noted that Congress had not done so with regard to FACTA. "In the absence of such affirmative steps to limit liability, we must assume that Congress intended FACTA's remedial scheme to operate as it was written. To limit class availability merely on the basis of 'enormous' potential liability that Congress explicitly provided for would subvert congressional intent."[219] The court left open the possibility of a different result, however, if "the potential liability would result in bankruptcy."[220]

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212. *Id.* at 25–26 (Newman, J., concurring).

213. *Id.* at 22–23.

214. Parker v. Time Warner Entm't Co., 631 F. Supp. 2d 242, 279 (E.D.N.Y. 2009).

215. *See, e.g.*, Torossian v. Vitamin Shoppe Indus., CV 07-0523 ODW SSX, 2007 WL 7648594, at *4–5 (C.D. Cal. Aug. 8, 2007) (denying class certification in FACTA case seeking between $22.7 million and $227 million from defendant with assets of $160 million); Najarian v. Charlotte Russe, Inc., No. CV 07-501-RGK(CTx), 2007 U.S. Dist. LEXIS 59879, at *7 (C.D. Cal. June 12, 2007) (denying class certification in FACTA case for aggregated statutory damages of $220 million to $2.2 billion when the company's total stock equity was only $206 million); Spikings v. Cost Plus, Inc., No. CV 06-8125-JFW, 2007 U.S. Dist. LEXIS 44214, at *12 (C.D. Cal. May 29, 2007) (denying proposed class of 3.4 million people in FACTA case where statutory damages of $340 million to a maximum of $3.4 billion swallowed defendant's net worth of approximately $316 million).

216. 623 F.3d 708 (9th Cir. 2010).

217. *Id.* at 715.

218. *Id.* at 719.

219. *Id.* at 722–23.

220. *Id.* at 723.

In the wake of *Bateman*, district courts in the Ninth Circuit began certifying plaintiff classes in FACTA cases. In *In re Toys "R" Us-Delaware*,[221] for example, the trial court reversed its prior denial of class certification in a case involving potential statutory damages of between $2.9 billion and $29 billion (the company's net worth was $117 million.)[222] Unsurprisingly, within a month after the class was certified, the case settled.[223]

What is now the law? In the Ninth Circuit, *Bateman* rules. Nationwide FACTA class actions are therefore brought in the Ninth Circuit. No other circuit appears to have had an opportunity to speak to the question. Given the Seventh and Second Circuits' expressed reservations in prior cases, it is not clear they would follow *Bateman*. Given that plaintiffs' attorneys can effectively choose their circuit, however, we may never know.

A simple legislative solution is readily available. As has been noted, the Fair Debt Collection Practices Act of 1978, the Electronic Fund Transfer Act of 1978, and the Migrant and Seasonal Agricultural Worker Protection Act of 1983 all include explicit caps on class action statutory damage awards.[224] All statutory damage rules with respect to which plaintiff class actions are a real possibility should so provide.

In the meantime, corporate defendants face an impossible dilemma. As the *Bateman* court noted, defendants may ultimately seek reduction of any award that is unconstitutionally excessive.[225] (The *Bateman* court itself reserved judgment on this question).[226] To do so, however, they must forego settlement and endure the entry of judgment—a judgment which if upheld may spell corporate ruin. There is no way to test the constitutional question without placing the entire company at risk.[227] So defendants are

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221. *In re* Toys "R" Us-Del., Inc. – Fair & Accurate Credit Transactions Act (FACTA) Litig., 300 F.R.D. 347, 378 (C.D. Cal. 2013).

222. *Id.* at 359–60.

223. *See In re* Toys "R" Us-Del., Inc. – Fair & Accurate Credit Transactions Act (FACTA) Litig., 295 F.R.D. 438, 444 (C.D. Cal. 2014) (noting that the parties reached a settlement on February 19, 2013).

224. *See supra* notes 68–81, 100–108, and accompanying text.

225. *Bateman*, 623 F.3d at 723.

226. *See id.*

227. The Supreme Court has suggested that an excessive penalty imposed in such a way as to be practically impossible for defendant to contest without first exposing itself to liability may be unconstitutional. *See* St. Louis, Iron Mountain & S. Ry. v. Williams, 251 U.S. 63, 64–65 (1919) ("[T]he imposition of severe penalties as a means of enforcing a rate, such as was prescribed in this instance, is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial proceeding, the validity of the rate—that is, whether it is confiscatory or otherwise—before any liability for the penalties attaches."). The language in question, however, was dictum given in a different regulatory context.

under great pressure to settle even statutory damage class action suits of questionable merit.

D. Excessive Statutory Damages

Many legal scholars have compared the problem of excessive statutory damages to punitive damage awards, which are now subject to due process limitations.[228] In the *Time Warner* case, the Second Circuit recognized the potential due process concerns raised when statutory damages are aggregated in class actions, citing *State Farm Mutual Auto Insurance Co. v. Campbell*, part of the Supreme Court's excessive punitive damages jurisprudence.[229] It noted, however, that such due process concerns could not be raised without "actual evidence presented that raises a reasonable possibility that principles of due process may restrict an ultimate damages award."[230] As a practical matter, of course, in the face of multiplier effects, most defendants cannot afford to risk judgment; they settle instead.

Were a court ever to reach the excessive damages issue, it would need to resolve a threshold question: Are legislatively authorized statutory damage awards subject to the Supreme Court's punitive damage jurisprudence? Or are they rather limited, if at all, by the Eighth Amendment's prohibition of "excessive fines"?

With respect to the first, the Supreme Court held that excessive punitive damage awards may violate the due process clause in *BMW of North America, Inc. v. Gore*.[231] Gore claimed that BMW had committed fraud by hiding prior repair work to the car it sold him.[232] There was evidence that BMW had done so and had engaged in similar practices nationwide.[233] The jury awarded Gore actual damages of $4,000 and punitive damages of $4 million, an amount later cut to $2 million.[234] In reviewing punitive damage awards under the due process clause, the Supreme Court held, courts should consider "[1] the degree of reprehensibility of the [defendant's conduct]; [2] the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award; and [3] the difference between this remedy and the civil

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228. *See, e.g.*, Holmstrand, *supra* note 180 (noting the due process implications when uninjured plaintiffs seek statutory damages); Scheuerman, *supra* note 16, at 131–32 (arguing that courts should apply the same punitive damages due process framework to aggregated statutory damages).

229. Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003).

230. *See id.*

231. 517 U.S. 559 (1996).

232. *Id.* at 563.

233. *Id.* at 563–64.

234. *Id.* at 565, 567.

penalties authorized or imposed in comparable cases."[235] The amount of any such award should be no more than that which will support the twin rationales of punishment and deterrence.[236] In the circumstances, it held, a 500 to 1 ratio of punitive to actual damages was excessive.[237] In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[238] the Court noted further that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[239]

Consider, in light of this jurisprudence, the *Capitol Records, Inc. v. Thomas-Rasset* jury's award of $1.92 million as damages for downloading twenty-four songs for personal use. Some portion of that amount was for actual damages—probably not more than a few hundred dollars. If the remainder was punitive, the award clearly violated the standards set forth in *Gore* and *Campbell*. The problem, of course, is that the $1.92 award was not separated into actual and punitive components. What this means, however, is that if *Gore* and *Campbell* apply to statutory damages, the task of disaggregating lump-sum statutory damage awards becomes more urgent.

It is possible, however, as the Supreme Court itself suggested in *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, that statutory damages should be thought of instead as being awarded in lieu of penalties payable to the state.[240] If so, constitutional limitations on such damages would derive from the excessive fines clause, not from the due process clause. In *United States v. Bajakajian*,[241] the Supreme Court held that a challenged forfeiture constituted an excessive fine within the meaning of the Eighth Amendment because it was "grossly disproportional to the gravity of the defendant's offense."[242] Importantly, *Bajakajian* proportionality focuses on the defendant and his actions, not on the broader social problem the statute in question is intended to address. Prof. Barry Johnson explains:

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235. *Id.* at 575.

236. *See id.* at 568.

237. *Id.* at 574.

238. 538 U.S. 408 (2003).

239. *Id.* at 425.

240. *See* 251 U.S. 63, 66–67 (1919); *see also* Colleen P. Murphy, *Reviewing Congressionally Created Remedies for Excessiveness*, 73 OHIO ST. L.J. 651, 690–91 (2012) (describing the Court's rationale in *Williams*); Daniel R. LeCours, Note, *Steering Clear of the "Road to Nowhere": Why the BMW Guideposts Should Not Be Used to Review Statutory Penalty Awards*, 63 RUTGERS L. REV. 327, 345–46 (2010) (describing policy reasons for statutory damages).

241. 524 U.S. 321 (1998).

242. *Id.* at 324.

> The majority embraced an individualized, desert-oriented vision of proportionality review, focusing on a comparison of the gravity of the individual's particular offense with the severity of the particular punitive forfeiture imposed. In contrast, the dissent embraced a utilitarian proportionality review, emphasizing legislative determinations about the seriousness of classes of offenses and taking into account factors not related to the individual's offense, such as the need for severe punishment to serve crime control interests.[243]

Were *Bajakajian* and the excessive fines clause to be applied to Mrs. Thomas-Rasset and her twenty-four downloaded songs, for example, the focus would be on the gravity of her particular offense, not on the gravity of illegal downloading generally.

It is beyond the scope of this article to resolve which line of cases, *Gore* or *Bajakajian*, applies to statutory damages or what either demands in the statutory damage context, if it applies. For our purposes, it is sufficient to note that until the various components of lump-sum statutory damage awards can be disaggregated, applying either will be difficult. If neither *Gore* nor *Bajakajian* applies, however, avoiding constitutional limitations on excessive penalties is trivial: a legislature need only structure such penalties as statutory damages. One assumes that this cannot be so.

V. CONCLUSION

Courts and commentators have not heretofore treated statutory damage provisions as a class of legal rules with common purposes, problems, and possible solutions. As this article demonstrates, doing so may advance our understanding of such provisions, assist courts in interpreting and administering specific such provisions, and help legislatures draft new statutory damage rules in ways that minimize problems and more effectively accomplish the legislatures' intended purposes.

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243. Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461, 492 (2000) (footnote omitted).