

WHEN “MAY” MEANS “SHALL”: THE CASE FOR MANDATORY LIQUIDATED DAMAGES UNDER THE FEDERAL WIRETAP ACT

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I. INTRODUCTION

Between 1978 and 1989, the Connecticut State Police Department recorded outgoing phone calls in thirteen police barracks throughout the State.¹ When this practice came to light during the investigation of a state trooper in 1988,² a mystery class of plaintiffs threatened to sue for violation of the Federal Wiretap Act.³ The class action resulted in a \$17 million settlement,⁴ in part because the State feared that it could be penalized as much as \$10,000 in damages per phone call under the Wiretap Act, for a total of over \$1 billion in civil liability.⁵

In 2004, the United States District Court for the Middle District of Florida entered default judgment against Michael Brown when he failed to defend against DirecTV's civil claim for inter-

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This Comment is dedicated to Ken and Wendy Peterson for always encouraging and inspiring me, and for making this and everything else in my life possible. I would also like to thank Casey Peterson, who for eighteen years has managed to be both a little brother and a best friend.

1. Thomas Scheffey, *High Cost of “Big Brother” Police Tactics: Critics of Wiretap Act Accord Contend Damages out of Sync with Damage Done*, 25 Conn. L. Trib. 22 (May 31, 1999).

2. *Id.* The trooper admitted that telephone conversations were tape recorded while he was being examined by a defense attorney who was trying to get evidence excluded. *Id.*

3. At the time the case was settled, a list of over 1,600 potential claimants was available. *Id.* However, any arrestee who called a lawyer was a potential plaintiff. *Id.*

4. *In re: State Police Litigation*, 1999 LEXIS 21491 (D. Conn. Dec. 2, 1999). The State settled without admitting to wrongdoing. Scheffey, *supra* n. 1, at 22.

5. *Id.*

cepting its broadcast services.⁶ Although Brown was found guilty of conversion of DirecTV's cable signal,⁷ causing actual damages of \$3,886.64, the Eleventh Circuit decided not to award liquidated damages under the Wiretap Act.⁸ DirecTV was forced to resort to other claims to recover actual damages.⁹

These cases illustrate the shortcomings of the Wiretap Act's civil damages provision and the divergent policy concerns that plague both sides of the argument over whether liquidated damages under the Wiretap Act are mandatory.

The Federal Wiretap Act¹⁰ makes it unlawful for any person to "intentionally intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication."¹¹ Additionally, the Wiretap Act makes it unlawful to use¹² or disclose¹³ information that is obtained through such an illegal wiretap. It also punishes persons who use, distribute, or sell devices used in the "surreptitious interception of wire, oral, or electronic communications."¹⁴

The penalty for violation of the Federal Wiretap Act includes both criminal and civil elements.¹⁵ Specifically, Section 2520 creates a cause of action that an aggrieved party may assert against a person or entity who has violated the Wiretap Act.¹⁶ This civil damages provision indicates that an aggrieved party may recover

6. *DirecTV v. Brown*, 371 F.3d 814, 816 (11th Cir. 2004).

7. *Id.* Brown was found guilty of violating 47 U.S.C. § 605(a) (prohibiting the unauthorized interception of satellite signals), as well as the Wiretap Act, 18 U.S.C. § 2511(1)(a) (prohibiting the interception of electronic communications). *Id.*

8. *Id.* at 819. For a discussion of the *Brown* decision, consult *infra* Part II(B)(5).

9. *Id.* at 816. The lower court awarded Brown actual damages of \$3,886.64 under 47 U.S.C. § 605(a), plus attorney's fees and costs. *Id.* For a discussion of the remedies that DirecTV successfully obtained, notwithstanding the court's failure to award liquidated damages, consult *infra* nn. 112–114 and accompanying text.

10. 18 U.S.C. §§ 2510–2522 (2000).

11. *Id.* at § 2511(1)(a).

12. *Id.* at § 2511(1)(d).

13. *Id.* at § 2511(1)(c), (e).

14. *Id.* at § 2512(1).

15. *Id.* at § 2511(4)–(5). The Wiretap Act provides for criminal penalties of a maximum of five years' imprisonment and a \$500 civil fine. *Id.* While the criminal aspects of the Wiretap Act are beyond the scope of this Comment, the existence of criminal penalties is significant because they constitute a deterrent to potential wiretappers. For a discussion of the Wiretap Act's civil damages provision as a "private attorney general" mechanism, which serves as an alternative to traditional criminal enforcement methods, consult *infra* Part III(B)(2).

16. *Id.* at § 2520(a).

“such relief as may be appropriate.”¹⁷ Appropriate relief is defined in Section 2520(b) as including: “(1) such preliminary and other equitable or declaratory relief as may be appropriate; (2) damages under subsection (c) and punitive damages in appropriate cases; and (3) a reasonable attorney’s fee and other litigation costs reasonably incurred.”¹⁸ Section 2520(c)(2) provides a method for computing damages for a specific kind of violation involving interception of certain unscrambled or unencrypted communications,¹⁹ and then provides that

[i]n any other action under this section, the court may assess as damages whichever is the greater of—

- (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
- (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.²⁰

The federal circuit courts are split as to whether Section 2520(c)(2) requires a court to assess mandatory liquidated damages against a wrongful party in a civil action commenced under Section 2520(a).²¹ Although the first circuit to address this issue determined that civil damages under the Wiretap Act are mandatory,²² the clear trend in the law is to give the trial court discretion either to award civil damages under the scheme found in Section 2520(c)(2) or to award no damages at all.²³

17. *Id.*

18. *Id.* at § 2520(b).

19. *Id.* at § 2520(c). For a discussion of the two different penalty structures in Section 2520(c)(2), and their importance for purposes of statutory construction of the liquidated damages provision, consult *infra* nn. 169–178 and accompanying text.

20. 18 U.S.C. § 2520(c)(2). Congress created an exception to this general rule of damages in 18 U.S.C. § 2520(c)(1), which addresses “private viewing of a private satellite video communication that is not scrambled or encrypted” or certain transmissions of radio communications. For a discussion of this exception to the general rule of damages, consult *infra* Part III(A)(3).

21. Five circuits—the Fourth, Sixth, Seventh, Eighth, and Eleventh—have ruled on the issue. For a discussion of the different circuits’ treatment of the issue, consult *infra* Part II(B).

22. *Rodgers v. Wood*, 910 F.2d 444 (7th Cir. 1990). For a discussion of *Rodgers*, consult *infra* Part II(B)(1).

23. The last four circuits to rule on the issue have determined that damages under

This Comment will argue that the civil damages portion of the Wiretap Act, as it has been interpreted by the majority of the circuit courts, is insufficient to deter potential defendants from violating the Wiretap Act because most private parties are left without any incentive to bring suit against Wiretap Act violators.²⁴ Flawed statutory construction has placed a wedge between the circuits and has left district courts guessing as to the state of the law.²⁵ Even in the jurisdictions in which a circuit court has determined that trial courts may use their discretion when awarding damages, district courts are left without criteria by which to guide that discretion.²⁶ Some of these troubled jurisdictions create their own criteria, piecing together the limited authority that is available from lower courts in other jurisdictions.²⁷ The result of this fragmented decisionmaking is one that Congress could never have intended.²⁸ Moreover, in light of the technological developments that have taken place since the last major revision of the Wiretap Act,²⁹ a mandatory civil damages provision is more necessary today than ever.³⁰

This Comment will suggest three possible solutions to this problem. First, the circuit courts could engage in a more rigorous and thorough form of statutory construction, which could ultimately lead them to determine that damages under the Wiretap Act are mandatory, not discretionary.³¹ Second, even if the circuits continue to determine that damages under the Wiretap Act

Section 2520 are discretionary, not mandatory. *Infra* pt. II(B)(2)–(5) (discussing the various circuit courts' treatment of Section 2520).

24. *Infra* pt. III(B)(2).

25. *Infra* pt. II(B)–(C).

26. *Infra* pt. II(C).

27. For a discussion of the piecemeal method of developing criteria upon which to exercise discretion, consult *infra* Part II(C).

28. For a discussion of congressional intent and the legislative history of the Wiretap Act, consult *infra* Part III(A).

29. For a discussion of how the Wiretap Act and Wiretap Act jurisprudence have failed to keep up with developments in technology, see Robert A. Pikowsky, *The Need for Revisions to the Law of Wiretapping and Interception of E-mail*, 10 Mich. Telecomm. & Tech. L. Rev. 1, 3–4 (2003) (describing the statutory scheme of the Wiretap Act as becoming “out of touch with the privacy expectations of the American public”).

30. See *U.S. v. Councilman*, 373 F.3d 197, 203 (1st Cir. 2004) (stating that it is possible “that the protections of the Wiretap Act have been eviscerated as technology advances”), *withdrawn*, 385 F.3d 793 (1st Cir. 2004).

31. For a discussion of the factors that would ultimately lead a court to construe the Wiretap Act to provide for mandatory damages, consult *infra* Part III.

are discretionary, they could provide lower courts with clear criteria by which to apply that discretion.³² Finally, Congress could rethink its approach to civil damages under the Wiretap Act and provide more specific, reasonable penalties for the diverse forms of wiretapping that the Act prohibits.³³ Any of these alternatives would achieve a result that is much more in line with Congress' desire to protect citizens' privacy with an effective Wiretap Act.³⁴

II. THE HISTORY OF 18 U.S.C. § 2520 AND THE DIVERGENT VIEWS OF THE CIRCUITS THAT INTERPRET IT

The Wiretap Act has undergone significant changes since Congress enacted it in 1968.³⁵ This Part will begin by examining the scope of the Wiretap Act's protections under current law.³⁶ Next, this Part will analyze the split between the five circuit courts that have addressed whether liquidated damages under the Wiretap Act are mandatory or discretionary.³⁷ Finally, this Part will demonstrate how district courts have been forced to piece together criteria to apply when deciding whether to award liquidated damages, because the circuit courts have left trial courts with no guidance.³⁸

32. For a discussion of the criteria that district courts have pieced together from other jurisdictions when deciding whether to award liquidated damages, consult *infra* Part II(C).

33. In 2000, Representative Charles Canady sponsored legislation that, among other changes to the Electronic Communications Privacy Act, would have changed the permissive word "may" to "shall." H.R. 5018, 106th Cong. § 4(b) (Oct. 4, 2000) (as reported by the House Judiciary Committee). The House Judiciary Committee held extensive hearings on the need for a "tougher" Wiretap Act in "the digital age." H.R. Rpt. 106-932 (Oct. 4, 2000). Although the Judiciary Committee reported favorably on the bill, it never reached the House floor for a vote. Likewise, Senator Patrick Leahy introduced a similar bill in the Senate, which never reached the floor for a vote. Sen. 3083, 106th Cong. § 3 (Sept. 20, 2000) (as introduced).

34. For a discussion of how a mandatory construction of Section 2520 is consistent with legislative intent, consult *infra* Part III(A).

35. Both congressional amendments and judicial interpretation have caused this change. See *infra* nn. 41-43 and accompanying text (discussing congressional amendments to the Wiretap Act); *infra* pt. II(B) (discussing five circuit courts' differing statutory interpretations of the liquidated civil damages provision in Section 2520(c)(2)).

36. *Infra* pt. II(A).

37. *Infra* pt. II(B).

38. *Infra* pt. II(C).

A. The Scope of the Wiretap Act's Protections

To understand the reason for the Wiretap Act's civil damages provision, one must examine the kinds of activity that the Wiretap Act prohibits.³⁹ The substantive provisions of the Wiretap Act were first codified in the Omnibus Crime Control and Safe Streets Act of 1968.⁴⁰ Congress enacted the 1968 version of the Wiretap Act to ensure privacy of oral and wire communications.⁴¹ In 1986, Congress enacted the Electronic Communications Privacy Act (ECPA) to expand the Wiretap Act's coverage beyond the traditional telephone wire to include electronic communications, such as pagers and voicemail.⁴² Finally, in 1994, Congress amended the ECPA to protect communications made by cellular phones.⁴³

The Wiretap Act protects against many different forms of eavesdropping.⁴⁴ For example, the Wiretap Act provides federal guidelines for the interception of private communications by law enforcement.⁴⁵ Law enforcement officers who do not follow the guidelines in the Wiretap Act may subject themselves,⁴⁶ and the

39. The name "Wiretap Act" became something of a misnomer after Congress enacted the Electronic Communications Privacy Act (ECPA) in 1986. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, tit. I, 100 Stat. 1848 (1986). The ECPA extended the Wiretap Act's protections beyond traditional "wires" to all electronic communications. *Id.* As such, the Wiretap Act protects a much broader group of communications than traditional wire communications. *Id.* Nevertheless, the Author will refer to the provisions in 18 U.S.C. §§ 2510–2522 generally as the "Wiretap Act."

40. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 211 (1968).

41. *Id.* (indicating that the Wiretap Act is needed "[i]n order to protect effectively the privacy of wire and oral communications").

42. 100 Stat. at 1848 (codified as amended in 18 U.S.C. §§ 2510–2522).

43. Communications Assistance of Law Enforcement Act, Pub. L. No. 103-414, § 202, 108 Stat. 4279 (1994) (codified as amended in 18 U.S.C. §§ 2510–2511); *see also Bartnicki v. Vopper*, 532 U.S. 514, 522 n. 6 (2001) (noting that "calls placed on cellular and cordless telephones can be intercepted more easily than those placed on traditional phones").

44. 18 U.S.C. §§ 2510–2522.

45. *Id.* at §§ 2516–2519.

46. State law enforcement officers are not entitled to absolute immunity from Section 2520 claims. *Forsyth v. Kleindienst*, 599 F.2d 1203, 1216 (3d Cir. 1979) (holding that FBI agents engaging in electronic surveillance without a warrant were not entitled to absolute immunity). Jurisdictions are split as to whether police officers, sued in their individual capacities, may claim qualified immunity for violations of the Wiretap Act. *Compare Berry v. Funk*, 146 F.3d 1003, 1013 (D.C. Cir. 1998) (holding that the existence of a statutory good faith defense in Wiretap Act shows congressional intent not to allow qualified immunity in Wiretap Act cases); *with Blake v. Wright*, 179 F.3d 1003, 1012 (6th Cir. 1999) (holding that public officials may assert qualified immunity); *Tapley v. Collins*, 211 F.3d 1210, 1216 (11th Cir. 2000) (stating that "the qualified immunity defense is so well-rooted in our

state or municipality for which they work,⁴⁷ to civil liability under Section 2520.⁴⁸ The Wiretap Act also protects against the unauthorized interception of communications by private parties.⁴⁹ Perhaps the most controversial application of the Wiretap Act is that of unauthorized wiretapping in the family home⁵⁰—for example, interspousal wiretapping.⁵¹ The Wiretap Act also prevents employers from intercepting employees' oral⁵² and telephone⁵³ conversations. Further, it goes so far as to protect customers from businesses that use surveillance devices to intercept private conversations.⁵⁴ The broad scope of the current Wiretap Act reemphasizes the importance of whether liquidated damages under the Act are mandatory.

jurisprudence that only a specific and unequivocal statement of Congress can abolish the defense").

47. Circuits are split as to whether the Wiretap Act creates a cause of action against a state or municipality. Compare *Adams v. City of Battle Creek*, 250 F.3d 980, 985 (6th Cir. 2001) (holding that governmental entities are not immune from suit under Wiretap Act); with *Abbott v. Village of Winthrop Harbor*, 205 F.3d 976, 980 (7th Cir. 2000) (holding that plain meaning of the word "person" under the Wiretap Act does not include government entities, so government entities are immune from suit).

48. 18 U.S.C. § 2520(a). The federal government may not be sued under the Wiretap Act, pursuant to the amendments to Section 2520(a) put in place by the USA PATRIOT Act, Pub. L. No. 107-56, § 223(a)(1), 115 Stat. 272, 293 (2001).

49. 18 U.S.C. § 2511.

50. See generally Shana K. Rahavy, *The Federal Wiretap Act: The Permissible Scope of Eavesdropping in the Family Home*, 2 J. High Tech. L. 87 (2003) (discussing the application of the Wiretap Act between family members).

51. The circuit courts are split as to whether the Wiretap Act applies to purely domestic conflicts. Compare *Anonymous v. Anonymous*, 558 F.2d 677, 677 (2d Cir. 1977) (holding that the federal wiretap statute does not encompass "mere marital disputes"); with *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991) (determining that the marital relationship does not exempt spouses from the protections of the Wiretap Act).

52. *E.g. Desilets v. Wal-Mart Stores*, 171 F.3d 711, 716 (1st Cir. 1999) (holding that Wal-Mart employees were entitled to minimum \$10,000 statutory damages when their employer used hidden recording devices to monitor their private conversations).

53. *E.g. Sanders v. Robert Bosch Corp.*, 38 F.3d 736, 742 (4th Cir. 1994) (holding that a security officer could recover civil damages under Section 2520 when his employer intercepted phone conversations with a "voice logger," a device that constantly recorded all of the conversations on a given telephone line).

54. *E.g. Karen A. Springer*, Student Author, *In God We Trust; All Others Who Enter This Store Are Subject to Surveillance*, 48 Fed. Comm. L.J. 187, 191–192 (1995) (describing the surveillance practices of Dunkin' Donuts, including audio surveillance equipment at five New Hampshire Dunkin' Donuts stores).

B. The Circuit Split

Five circuit courts have directly addressed whether the Wiretap Act's liquidated damages provision is mandatory or discretionary.⁵⁵ Only one circuit—the Seventh—has determined that liquidated damages are mandatory,⁵⁶ while the Fourth, Sixth, Eighth, and Eleventh Circuits have determined that they are discretionary.⁵⁷ The decisions of these courts, however, are based on a haphazard approach to statutory construction,⁵⁸ as the following analysis of each case demonstrates.

1. *Rodgers v. Wood*

The Seventh Circuit became the first circuit court to address the liquidated damages clause of the Wiretap Act when it decided *Rodgers v. Wood*⁵⁹ in 1990. In *Rodgers*, a homeowner recorded the telephone conversations of two police officers while they visited his home to execute a search warrant.⁶⁰ The homeowner then turned the tapes over to his attorney, who disclosed the private

55. While only five circuits have directly addressed the issue, other circuits have used Section 2520 to award liquidated damages without inquiring into whether the lower court had the discretion not to award damages if it so desired. *E.g. Desilets*, 171 F.3d at 716 (1st Cir. 1999) (awarding Wal-Mart employees minimum \$10,000 statutory damages for wiretap violations); *Konop v. Hawaiian Airlines*, 236 F.3d 1035, 1042 (9th Cir. 2001), *withdrawn on other grounds*, 262 F.3d 972 (9th Cir. 2001) (indicating that civil damages under the Wiretap Act are mandatory by saying that “[c]ivil damages are substantially greater under the Wiretap Act than under the Stored Communications Act”); *Kinsey v. Case*, 1998 LEXIS 24588 (10th Cir. Oct. 2, 1998) (holding that a school employee who recorded school principal's phone conversation in anticipation of being terminated was liable for the statutory minimum of \$10,000 under the Wiretap Act).

56. *Infra* pt. II(B)(1).

57. *Infra* pt. II(B)(2)–(5).

58. For a criticism of the methods of statutory construction used in these cases, consult *infra* Part III(A).

59. 910 F.2d 444 (7th Cir. 1990).

60. *Id.* at 445–446. The court ultimately sentenced the homeowner to four years of imprisonment for receiving stolen property under Wisconsin Statutes Section 943.34 (1990). *Id.* at 446. This case shows how many Wiretap Act plaintiffs are rather unsympathetic because the Wiretap Act violation that they complain of occurs during either an investigation into their own criminal mischief or during their detention. For example, the *Rodgers* court pointed out that the defendant was “righteously, and perhaps rightfully, indignant that the law require[d] him to pay \$20,000 to persons whose illegal activity he attempted to bring to light.” *Id.* at 449. For another example of particularly unsympathetic Wiretap Act plaintiffs, see Scheffey, *supra* n. 1 (describing a \$17 million settlement agreement between the State of Connecticut and arrestees whose outgoing telephone calls were recorded by state police).

conversations on at least four occasions,⁶¹ in violation of the Wiretap Act.⁶² After rejecting the attorney’s assertion of common law defenses,⁶³ the court addressed the issue of damages.⁶⁴

The court first recognized that “[t]he word ‘may’ in 18 U.S.C. [Section] 2520(c)(2) is ambiguous.”⁶⁵ It then addressed the principal argument in favor of a determination that liquidated damages under the Wiretap Act are discretionary—the 1986 Amendment⁶⁶ that increased the damages award tenfold and changed the mandatory “shall” to the permissive “may.”⁶⁷ After determining that “it is possible to infer that Congress intended to increase the penalties for violations, but to permit defendants to escape the increased penalties if their actions did not warrant so severe a sanction,” the court decided not to adopt this inference for two reasons.⁶⁸ First, Congress did not indicate why it chose to change “shall” to “may.”⁶⁹ Second, Congress explicitly addressed the possibility of having to award damages for lesser offenses when it etched out an exception in the 1986 Amendment for the interception of certain private satellite video communications.⁷⁰ The court reasoned,

61. The attorney disclosed the contents of the tapes to the director of a crime prevention hotline, the Assistant District Attorney who prosecuted the homeowner, representatives of the Milwaukee Police Department, and a county circuit judge. *Rodgers*, 910 F.2d at 446.

62. *Id.* This case involved a violation of 18 U.S.C. § 2511(1)(c), which prohibits intentionally disclosing the contents of a wire communication. *Id.*

63. The attorney asserted the attorney-client privilege and a state law privilege attaching to a person reporting criminal activity. *Id.* The court rejected both of these privileges in the law enforcement context, emphasizing that “[t]he [Wiretap] Act represents Congress’s careful balancing between the interests of the enforcement of criminal laws and the assurance of privacy in oral and wire communications.” *Id.* at 447.

64. *Id.* at 447–448.

65. *Id.* at 448.

66. 100 Stat. at 1848 (codified as amended in Sections 2510–2522 of the U.S.C.). Because the ECPA acts as an amendment to the Wiretap Act and because the courts that have addressed this issue commonly refer to it as an “amendment,” the Author will refer to the portions of the ECPA that amend 18 U.S.C. §§ 2510–2522 collectively as “the 1986 Amendment.”

67. *Rodgers*, 910 F.2d at 448.

68. *Id.*

69. *Id.*

70. *Id.* For a discussion of the creation of a separate penalty structure for private viewing of an unscrambled, unencrypted satellite video communication, consult *infra* Part III(A)(3).

[t]he fact that Congress chose to address concerns about the severity of the new penalty structure by creating a specific exception for certain actions suggests that Congress intended to limit the types of violations for which the penalties could be avoided. This conflicts with and ultimately defeats an inference that Congress intended to grant district courts the discretion to decide the cases in which the more severe penalties should attach.⁷¹

The majority, therefore, determined that liquidated damages under the Wiretap Act were mandatory.⁷²

The dissenting judge rejected the majority's determination that damages under the Wiretap Act were mandatory.⁷³ Although he recognized that it was a "close question," he determined that the facts of the case exemplified the problem that would arise if courts rigidly applied the statute.⁷⁴

2. Nalley v. Nalley

In 1995, the Fourth Circuit departed from the Seventh Circuit's interpretation of the statute when it decided *Nalley v. Nalley*.⁷⁵ In *Nalley*, a wife received an anonymous delivery of a tape recording of her husband and his extramarital partner having telephone conversations.⁷⁶ The wife played the tape for her family, the extramarital partner's husband, and her divorce attorney, which amounted to an illegal disclosure under the Wiretap Act.⁷⁷ While the husband and his extramarital partner admitted that they suffered no actual damages, they sought liquidated damages of \$10,000 under the Wiretap Act.⁷⁸

71. *Rodgers*, 910 F.2d at 448.

72. *Id.* Each officer was entitled to recover \$10,000 under the statute, for a total judgment of \$20,000. *Id.*

73. *Id.* at 450 (Wood Jr., J., dissenting in part).

74. *Id.* (stating that "[t]he facts in this case are an example of the unfairness that can result from a rigid application of the statute no matter the extenuating circumstances"). For a discussion of unsympathetic plaintiffs recovering under the Wiretap Act, consult *supra* n. 60.

75. 53 F.3d 649 (4th Cir. 1995).

76. *Id.* at 650.

77. *Id.* The sole issue on appeal was the damages issue. *Id.* at 651.

78. *Id.* at 650. The district court determined that the defendant's violation of the Wiretap Act was *de minimis* and failed to award statutory damages. *Id.* (determining that "it would serve no purpose to award damages to the Plaintiffs for this conduct").

After identifying the ambiguity inherent in the word “may,” the court looked to the text of the statute to resolve the ambiguity.⁷⁹ Like the *Rodgers* court, the *Nalley* court addressed Section 2520(c)(1), which provides a smaller amount of damages for interception of certain private satellite communications.⁸⁰ However, unlike the *Rodgers* court, the *Nalley* court discussed the contrasting language in Section 2520(c)(1) and Section 2520(c)(2) as well.⁸¹ Additionally, the court addressed the change from the mandatory language in the pre-1986 Act to the permissive language in the post-1986 Act.⁸² The court determined that, by amending the Wiretap Act, Congress could have “intended to grant district courts the discretion to accord similar leniency toward other less serious violators of the Act.”⁸³ Significantly, the court reasoned that discretion was necessary because “it is not reasonable to expect Congress to enumerate in [Section 2520 of] the statute every possible situation in which a lesser amount of damages would be appropriate.”⁸⁴ Therefore, the court concluded that trial courts had the discretion either to award liquidated damages under Section 2520(c) or to award no damages at all.⁸⁵

3. Reynolds v. Spears

The Eighth Circuit first addressed damages under the Wiretap Act in 1996 in *Reynolds v. Spears*.⁸⁶ In *Reynolds*, the owner of a liquor store recorded incoming and outgoing phone calls.⁸⁷ After a United States deputy marshal seized the tapes,⁸⁸ a store em-

79. *Id.* at 651.

80. *Id.* at 652–653. For a discussion of the creation of a separate penalty structure for private viewing of an unscrambled, unencrypted satellite video communication, consult *infra* Part III(A)(3).

81. *Nalley*, 53 F.3d at 653.

82. *Id.* at 652 (stating that, “[w]hen the wording of an amended statute differs in substance from the wording of the statute prior to amendment, we can only conclude that Congress intended the amended statute to have a different meaning” (citations omitted)).

83. *Id.* at 653 (citation omitted).

84. *Id.* (quoting *Shaver v. Shaver*, 799 F. Supp. 576, 580 (E.D.N.C. 1992)).

85. *Id.*

86. 93 F.3d 428 (8th Cir. 1996).

87. *Id.* at 430. The store owner lived in a mobile home adjacent to the store and shared a phone line with the store. *Id.*

88. The opinion does not indicate what reason the deputy marshal had to search the store and find the recording device.

ployee and her extramarital lover⁸⁹ successfully brought suit for damages under the Wiretap Act.⁹⁰ Alerted to the possibility of recovery, other individuals whose conversations were illegally recorded sued the store owner.⁹¹ The district court determined that it had the discretion not to award liquidated damages under the Wiretap Act, and the plaintiffs appealed.⁹²

On appeal, the Eighth Circuit determined that the district court was correct in determining that it had the discretion to award either liquidated damages or no damages at all under the Wiretap Act.⁹³ The *Reynolds* court refused to look beyond the plain meaning of the statute.⁹⁴ Although the court indicated that “in some unusual circumstances [it] might be persuaded to impute a compulsory aspect to an ordinarily permissive verb form,”⁹⁵ absence of legislative history that addressed the change from “shall” to “may” required the court to give the word “may” its ordinary meaning.⁹⁶ Like the *Nalley* court, the *Reynolds* court focused on the contrasting language in Section 2520(c)(1) and Section 2520(c)(2),⁹⁷ along with the change from “shall” to “may” in the 1986 Amendment,⁹⁸ to conclude that Congress intended to make damages under the Wiretap Act discretionary.⁹⁹ The court then determined that the lower court did not abuse its discretion when it refused to award liquidated damages, in part, because

89. The two eventually divorced their spouses and got married to each other. *Id.* at 430 n. 3.

90. *Id.* at 430. The employee and her extramarital lover were awarded a total of \$40,000 by the district court, because each was able to recover statutory damages against the husband and the wife, individually. *Id.* While the propriety of such a multiple judgment is questionable, it was not at issue in this case.

91. *Id.* These parties sought damages for a violation of Section 2520(c)(2), which prohibits the interception of wire or oral communications. *Id.* They did not seek damages for an illegal disclosure. *Id.* at 436 n. 8.

92. *Id.* at 430–431.

93. *Id.* at 435.

94. *Id.* at 434 (noting that “the change in the language from the mandatory to the permissive is clear”). The court considered the appellant’s argument that it should look to extrinsic factors to find an ambiguity, but it refused to do so. *Id.* at 433–435.

95. *Id.* at 434.

96. *Id.* at 434–435.

97. *Id.* at 435; see *Nalley*, 53 F.3d at 653 (indicating that a determination that liquidated damages are mandatory under the Act “would be in direct conflict with the distinction manifested in Congress’ use of contrasting verb forms”).

98. *Reynolds*, 93 F.3d at 433–434.

99. *Id.* at 435.

“[the defendant] was an amateur wiretapper, using unsophisticated equipment.”¹⁰⁰

4. Dorris v. Absher

In 1999, the Sixth Circuit addressed the damages issue in *Dorris v. Absher*.¹⁰¹ In *Dorris*, a group of employees at a Tennessee Rabies Control Center sued their supervisor for using a tape recorder to intercept their private oral conversations on the job.¹⁰² The supervisor played the tapes for his wife and friends, exposing highly personal conversations involving the supervisor.¹⁰³ After determining that the district court was correct in finding the supervisor liable under the Wiretap Act, the Sixth Circuit turned to statutory damages under Section 2520.¹⁰⁴

The court determined that the multiple interceptions were so interrelated that a single application of Section 2520(c) was proper.¹⁰⁵ Moreover, the court determined that “the plain language of the statute compels the conclusion that the district

100. *Id.* at 436. The court was clearly concerned that a mandatory construction of Section 2520 would be too harsh a penalty, given the increase in damages from \$1,000 to \$10,000. *Id.* at 435 (expressing concern for “the potential of the law to bring financial ruin to persons of modest means, even in cases of trivial transgressions”). For a discussion regarding why such a defendant-friendly construction of the statute is inconsistent with Congress’ stated intent to protect the privacy of communications, consult *infra* Part III(B).

101. 179 F.3d 420 (6th Cir. 1999).

102. *Id.* at 423.

103. *Id.*

104. *Id.* at 426–427.

105. *Id.* at 428. The defendant recorded conversations of four employees and played them twice—once at his house and once at his friend’s house. *Id.* at 423. He also disclosed the contents of the conversations of two of the employees twice—once when he dictated termination notices to his secretary and once when he actually terminated the employees. *Id.* at 424. Based on these multiple disclosures, the district court found a total of sixteen violations of the Wiretap Act—one violation against each of the four plaintiffs for the interception of their conversations, two violations against each plaintiff for disclosing their conversations at home and at his friend’s house, and two violations against each of the two plaintiffs that were terminated for disclosing the contents of their conversations in the course of their termination. *Id.* at 423–424. Therefore, the district court awarded the first two plaintiffs \$50,000 each against Charles Absher and \$20,000 apiece against Della Absher, and the other two plaintiffs \$30,000 apiece against Charles Absher and \$10,000 each against Della Absher, for a total liability of \$220,000. *Id.* at 424. On appeal, the Sixth Circuit recognized that the district court’s application of Section 2520(c) would lead to “highly inflated damage awards,” so it adopted a “single sum” approach. *Id.* at 428. Under this approach, if “the recordings, disclosures, and use of the illegally intercepted communications are sufficiently interrelated and time-compacted,” the \$10,000 liquidated damages award should only be applied once. *Id.*

courts have the discretion to decline the imposition of damages.”¹⁰⁶ In this respect, the *Dorris* court was less willing to look at extrinsic evidence to create an ambiguity than any of the circuit courts that had already addressed the issue.¹⁰⁷ The court spelled out a four-part routine by which courts must award damages under Section 2520 and remanded the case to the district court.¹⁰⁸

5. DirecTV v. Brown

The Eleventh Circuit became the most recent circuit to consider the damages issue in 2004 in *DirecTV v. Brown*.¹⁰⁹ In *Brown*, the defendant illegally intercepted DirecTV’s satellite transmissions using “pirate access devices.”¹¹⁰ The district court entered a default judgment against the defendant, issued a permanent injunction,¹¹¹ awarded DirecTV actual damages under 47 U.S.C. § 605(a),¹¹² and awarded DirecTV attorney’s fees and costs under Section 2520(b)(3).¹¹³ The district court, however, refused to award liquidated damages under Section 2520(c)(2).¹¹⁴

106. *Id.* at 429.

107. *See supra* pt. II(B)(1)–(3) (discussing the willingness of circuit courts to use extrinsic evidence to find an ambiguity).

108. *Id.* at 429–431. The court determined that the proper inquiry for a district court awarding damages under 18 U.S.C. § 2520(c)(2) should be as follows:

- (1) The court should first determine the amount of actual damages to the plaintiff plus the profits derived by the violator, if any.
- (2) The court should next ascertain the number of days that the statute was violated, and multiply by \$100.
- (3) The court should then tentatively award the plaintiff the greater of the above two amounts, unless each is less than \$10,000, in which case \$10,000 is to be the presumed award.
- (4) Finally, the court should exercise its discretion to determine whether the plaintiff should receive any damages at all in the case before it.

Id. at 430 (citations omitted). It is important to note that the court gave no guidance as to how courts should exercise discretion under the fourth prong.

109. 371 F.3d 814 (11th Cir. 2004). The *Brown* case was the most recent circuit-level case to address the damages issue as of the date of publication.

110. *Id.* at 816.

111. 18 U.S.C. § 2521 provides a mechanism whereby aggrieved parties can receive an injunction against illegal interception of communications.

112. 47 U.S.C. § 605(a) generally prohibits the unauthorized use or publication of private communications. Under this section, an aggrieved party may elect to receive actual damages or statutory damages of not less than \$1,000 and not more than \$10,000, as the court considers just. *Id.* at § 605(e)(3)(C).

113. *Brown*, 371 F.3d at 816.

114. *Id.*

On appeal, the Eleventh Circuit offered the most thorough statutory construction of the Wiretap Act’s damages provision to date, piecing together the arguments from the circuits that had already addressed the issue.¹¹⁵ The court first recognized that the word “may” could be construed to have a meaning other than its plain meaning.¹¹⁶ It then addressed the 1986 Amendment that changed the mandatory language to permissive language.¹¹⁷ The court also addressed the contrasting language in Section 2520(c)(1) and Section 2520(c)(2), just as the *Nalley* and *Reynolds* courts did.¹¹⁸ Finally, the *Brown* court directly addressed the argument made in *Rodgers*—that Congress addressed concerns about large mandatory damages awards when it created an award for smaller damages under Section 2520(c)(1).¹¹⁹ The *Brown* court rejected this argument and reemphasized the contrasting mandatory and permissive language in Section 2520(c)(1) and Section 2520(c)(2).¹²⁰ The court agreed with the majority of the other courts that had ruled on this issue, finally determining that liquidated damages under the Wiretap Act may be awarded only at the discretion of the trial court.¹²¹

C. How District Courts Exercise Discretion

None of the four circuits that have determined that Congress gave district courts the discretion to award damages under Section 2520(c)(2) have given district courts any guidelines by which they can exercise their discretion.¹²² Thus, these courts have been left to come up with their own criteria to apply.

115. *Id.* at 816–818.

116. *Id.* at 817 (indicating that the permissive language in the statute does not “truncate [the court’s] analysis” because “the Supreme Court has explained that this language is not always determinative”).

117. *Id.*

118. *Id.* at 817–818; see *Nalley*, 53 F.3d at 653 (indicating that a mandatory construction “would be in direct conflict with the distinction manifested in Congress’ use of contrasting verb forms”); *Reynolds*, 93 F.3d at 435 (looking to the mandatory language in Section 2520(c)(1) to conclude that “Congress was quite adept at enacting a mandatory award of damages for [Section] 2520 liability when it so chose”).

119. *Brown*, 371 F.3d at 818.

120. *Id.*

121. *Id.*

122. *Nally*, 53 F.3d at 653; *Dorris*, 179 F.3d at 429; *Reynolds*, 93 F.3d at 435; *Brown*, 371 F.3d at 818. The *Dorris* court did present a four-part test that constitutes “[t]he proper inquiry under the statute.” *Dorris*, 179 F.3d at 430. However, exercise of discretion is itself

In *Goodspeed v. Harman*,¹²³ for example, the United States District Court for the Northern District of Texas enumerated the following criteria relevant in deciding whether to award liquidated damages under the Wiretap Act:

- (1) the duration of the interception or the extent of the disclosure;
- (2) the reason for the interception;
- (3) whether the defendant reasonably believed that his actions were legal;
- (4) whether the interceptions resulted in actual damages to the plaintiff;
- (5) whether the defendant profited from the interception; and
- (6) whether the defendant has already been punished in some other proceeding.¹²⁴

The *Goodspeed* criteria did not include the violator's ability to pay.¹²⁵ In fact, the *Goodspeed* court specifically declined to adopt this criterion.¹²⁶ Other courts have disagreed, determining that the violator's ability to pay is a factor that should guide courts in exercising discretion under Section 2520.¹²⁷

the final step in the process, and the court provided little guidance by which a district court could exercise its discretion. *Id.* The court indicated that a district court's determination that the defendant's illegal wiretapping "was 'the type of conduct that the statute seeks to prevent'" is insufficient to determine whether the district court had abused its discretion. *Id.*

123. 39 F. Supp. 2d 787 (N.D. Tex. 1999).

124. *Id.* at 791 (citations omitted).

125. *Id.*

126. *Id.* at 791 n. 7 (refusing to consider ability to pay when considering whether damages should be awarded).

127. *E.g. Shaver*, 799 F. Supp. at 580 (stating that "the record demonstrates that the defendant is unemployed and does not independently own any significant items of property" and concluding that "[n]o useful purpose would be served by ordering the defendant to pay the plaintiff \$10,000 in statutory liquidated damages"); accord *Reynolds*, 93 F.3d at 435 (indicating that a discretionary construction would be logical "given the potential of the law to bring financial ruin to persons of modest means, even in cases of trivial transgressions").

The *Goodspeed* court enumerated its guiding criteria in the context of a traditional interception of cordless telephone conversations.¹²⁸ More recently, a series of courts have developed factors relevant in guiding discretion to award damages in cases in which the defendant illegally intercepted satellite cable signals.¹²⁹ For example, in *DirectTV v. Huynh*,¹³⁰ the United States District Court for the Middle District of Alabama consulted the opinions of other district courts in other jurisdictions to develop the following criteria:

- (1) whether the defendant profited by his violation;
- (2) whether there was any evidence that the defendant actually used his pirate access devices;
- (3) the extent of DIRECTV's financial harm;
- (4) the extent of the defendant's violation;
- (5) whether the defendant had a legitimate reason for his actions;
- (6) whether an award of damages would serve a legitimate purpose; and
- (7) whether the defendant was also subject to another judgment based on the same conduct.¹³¹

128. The defendant was charged with illegally intercepting private communications with a police scanner. *Goodspeed*, 39 F. Supp. 2d at 789.

129. The wave of litigation brought by DirecTV in the past two years has made the need for guidance even more apparent. James Malone, *Ruling May Be Hurdle for DirecTV: Company Won't Change Tactics in Piracy Suits*, Courier-J. (Louisville, Ky.) 1E (July 11, 2004). DirecTV, for example, was seeking civil damages in about 24,000 lawsuits in 2004 from individuals who illegally intercepted DirecTV's satellite television signals. *Id.* DirecTV's aggressive campaign against wrongdoers has generated significant backlash from the public. For example, the Electronic Frontier Foundation and Stanford Center for Internet and Society Cyberlaw Clinic have established a Web site that "is meant as a legal resource for the legitimate computer scientists, technology workers, and hobbyists who are being harassed by DirecTV's no holds-barred slash-and-burn legal strategy." Elec. Frontier Found. and Stan. Ctr. for Internet and Socy. Cyberlaw Clinic, *DirectTV Defense*, <http://www.directvdefense.org/index.shtml> (accessed Feb. 5, 2005).

130. 318 F. Supp. 2d 1122 (M.D. Ala. 2004).

131. *Id.* at 1132 (citations omitted).

The *Huynh* court used these factors to determine that the defendant, who violated the Wiretap Act, did not have to pay civil damages for his interception.¹³²

III. WHY COURTS SHOULD CONSTRUE SECTION 2520 TO PROVIDE FOR MANDATORY LIQUIDATED DAMAGES

Courts that properly construe Section 2520 should determine that liquidated damages are mandatory under the Wiretap Act. This Part will examine the reasons for this conclusion. First, this Part will examine the plain language and legislative history of the current version of the Wiretap Act to determine that mandatory damages are consistent with congressional intent.¹³³ Second, this Part will discuss the practical policy reasons that support such a construction.¹³⁴ Finally, this Part will explain the logical and practical problems with allowing courts discretion in awarding damages.¹³⁵

A. The 1986 Electronic Communications Privacy Act Is Consistent with the Assertion That Congress Intended to Keep Damages Mandatory

The 1986 ECPA¹³⁶ amended the original Wiretap Act to expand its coverage to include electronic communications.¹³⁷ The ECPA changed the original Wiretap Act in three ways that are material to an analysis of the damages provision. First, it changed the mandatory language of “shall” in the pre-1986 Act to the permissive language of “may.”¹³⁸ Second, it increased the

132. *Id.* The court’s principal reason for failing to use its discretion to award liquidated damages under Section 2520(c)(2) was that DirecTV could recover statutory damages under 47 U.S.C. § 605. *Id.* For a discussion of the operation of this statute’s damages provision, consult *supra* n. 113.

133. *Infra* pt. III(A).

134. *Infra* pt. III(B).

135. *Infra* pt. III(C).

136. 100 Stat. at 1848 (codified as amended in Sections 2510–2521 of the U.S.C.)

137. The Judiciary Committee reported favorably on the 1986 Amendment, indicating that “[the pre-1986 Wiretap Act] has not kept pace with the development of communications and computer technology” and that it has not “kept pace with changes in the structure of the telecommunications industry.” Sen. Rpt. 99-541 at 2 (Oct. 17, 1986) (reprinted in 1986 U.S.C.C.A.N. 3555, 3556).

138. *Infra* pt. III(A)(1).

amount of damages under the Act.¹³⁹ Finally, it created an exception to the general civil damages rule for the interception of unencrypted satellite communications.¹⁴⁰

1. Change from “Shall” to “May”

The pre-1986 Act provided that

[a]ny person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter *shall* . . . be entitled to recover from any such person . . . actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher.¹⁴¹

The post-1986 Act provides that

the court *may* assess as damages whichever is the greater of . . . the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or . . . statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.¹⁴²

All of the circuit courts that have addressed the damages issue have considered the change from the mandatory “shall” to the permissive “may.”¹⁴³ Some circuit courts conclude that this change in statutory language is dispositive.¹⁴⁴

The majority of courts that have addressed the damages issue indicate that the inquiry stops at the plain language of the statute.¹⁴⁵ The general rule of statutory construction is that courts

139. *Infra* pt. III(A)(2).

140. *Infra* pt. III(A)(3).

141. 18 U.S.C. § 2520(2)(a) (1982) (emphasis added).

142. 18 U.S.C. § 2520(c)(2) (2000) (emphasis added).

143. *Supra* pt. II(B).

144. *E.g. Nalley*, 53 F.3d at 652 (stating that “[w]hen the wording of an amended statute differs in substance from the wording of the statute prior to amendment, [the court] can only conclude that Congress intended the amended statute to have a different meaning”); *Dorris*, 179 F.3d at 429 (holding that “the plain language of the statute compels the conclusion that the district courts have the discretion to decline the imposition of damages” because “Congress expressly changed the verb from a mandatory form to a permissive one”).

145. *E.g. Nalley*, 53 F.3d at 652 (indicating that the plain language of the statute should be conclusive “when the change in the language of the relevant provision from ‘shall’ to ‘may’ is clear, . . . except in the rare case in which the literal application of the

will give unambiguous statutes their plain meaning in most cases.¹⁴⁶ However, in general, courts will not apply this “plain meaning” rule when it creates a result that is contrary to the intent of the legislature that enacted the statute or when it leads to an absurd result.¹⁴⁷ Indeed, the modern trend is for courts to look to legislative history at the outset to determine legislative intent, and then to look to the plain language of the statute.¹⁴⁸

A superficial examination of Section 2520 reveals the word “may” is generally used to give discretionary power as a permissive term.¹⁴⁹ Indeed, many courts have found this language to be a definitive statement of congressional intent.¹⁵⁰ However, the use of the word “may” is not conclusive;¹⁵¹ a court can construe this language to be mandatory even though it is permissive on its face.¹⁵²

statute will provide a result demonstrably at odds with congressional intent”); *Reynolds*, 93 F.3d at 434 (stating that, “[r]eluctant as [the court is] to rely on legislative history when it is in conflict with the plain meaning of the statutory language, [its] hesitation to draw inferences is not assuaged when there is no history at all”); *Dorris*, 179 F.3d at 429 (holding that the statute’s plain language “compels the conclusion that the district courts have the discretion to decline the imposition of damages”); *Brown*, 371 F.3d at 818 (holding that “[t]he use of the term ‘may’ is plain and means that an award of damages under section 2520(c)(2) is discretionary”).

146. *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917) (holding as “elementary” that a statute’s meaning must “be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms”).

147. *Harrison v. N. Trust Co.*, 317 U.S. 476, 479 (1943) (citations omitted) (stating that “words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how ‘clear the words may appear on ‘superficial examination’”).

148. Norman J. Singer, *Statutes and Statutory Construction* § 46.07 (6th ed., West 2000) (citations omitted). Singer writes that “if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statutes will be modified to agree with the intention of the legislature.” *Id.* He further noted that “contrary to the traditional operation of the plain meaning rule, courts are increasingly willing to consider other indicia of intent and meaning from the start rather than beginning their inquiry by considering only the language of the act.” *Id.*

149. 18 U.S.C. § 2520(c)(2).

150. *Supra* pt. II(B)(2)–(5).

151. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 197, 204 (2000) (giving a permissive construction to a provision of the Federal Arbitration Act that a district court “may” vacate an arbitration award under five specific situations). The *Cortez Byrd* Court stated that, “[a]lthough ‘may’ could be read as permissive . . . the mere use of ‘may’ is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority.” *Id.* at 198 (citations omitted).

152. *U.S. v. Thoman*, 156 U.S. 353 (1895) (holding that “[w]ithout question such a con-

The circuit courts that have focused exclusively on the change from "shall" to "may" have overlooked an important portion of the 1986 Amendment. While Section 2520(c) does contain the permissive "may," Section 2520(b), which defines "appropriate relief," uses the word "includes," which indicates that damages should not be discretionary.¹⁵³ If nothing else, the use of permissive language within the context of mandatory language creates an ambiguity that must be resolved through a thorough examination of legislative history.

Courts that address the damages issue should look beyond the plain meaning of the word "may" in the statute to find an ambiguity.¹⁵⁴ The existence of the express language that indicates that the party may receive "statutory damages" under the Wiretap Act makes the permissive language in Section 2520 ambiguous.¹⁵⁵ Moreover, the legislative history behind the 1986 Amendment indicates that a construction of Section 2520 that would not award mandatory damages to aggrieved plaintiffs would be contrary to Congress' intent.¹⁵⁶

2. Increasing Liquidated Damages from \$1,000 to \$10,000

The pre-1986 Wiretap Act provided a mandatory civil remedy of "actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000,

struction [‘shall’ for ‘may’] is proper in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power”); Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* 376 (2d ed., Fred B. Rothman & Co. 1980) (stating that “where a statute directs the doing of a thing for the sake of justice, or the public good, the word *may* is the same as the word *shall*” (emphasis in original)); *Black’s Law Dictionary* 1000 (Bryan A. Garner ed., 8th ed., West 2004) (noting that “[i]n dozens of cases, courts have held *may* to be synonymous with *shall* or *must*, usu[ally] in an effort to effectuate legislative intent” (emphasis in original)).

153. 18 U.S.C. § 2520(b). The full text of this subsection is as follows:

In an action under this section, appropriate relief *includes*—

- (1) such preliminary and other equitable or declaratory relief as may be appropriate;
- (2) damages under subsection (c) and punitive damages in appropriate cases; and
- (3) a reasonable attorney’s fee and other litigation costs reasonably incurred.

(emphasis added).

154. *Harrison*, 317 U.S. at 479.

155. 18 U.S.C. § 2520(c)(2).

156. *Infra* pt. III(B).

whichever is higher.”¹⁵⁷ The post-1986 Wiretap Act does not alter the \$100 a day penalty, but it does increase the minimum amount of liquidated damages to \$10,000.¹⁵⁸ Some courts have indicated that such a drastic increase in the minimum penalty under the Wiretap Act necessitates a provision whereby a trial court can exercise discretion in awarding damages.¹⁵⁹ Under this line of reasoning, some courts believe, Congress could not have intended to impose such an onerous penalty on those who commit the relatively harmless crime of violating the Wiretap Act.¹⁶⁰

This line of reasoning ignores a number of important facts, not the least of which is inflation. The \$1,000 penalty imposed in 1968 translates to approximately \$2,900 in 1986 and \$4,430 in 2005, after adjusting for inflation.¹⁶¹ Moreover, Congress’ stated purpose in enacting the 1986 Amendment was, in part, “to update and clarify [f]ederal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies.”¹⁶² Congress identified a gap between the strong protection that traditional forms of communication, like mail or voice communications, received from federal law and the relatively nonexistent protection of modern electronic communications.¹⁶³ Congress recognized that this gap in the law discouraged the use of new communications systems, encouraged unauthorized users to access electronic communications, discouraged businesses from using innovative forms of communications technologies, and exposed law enforcement officers to uncertainty and potential liability for their actions.¹⁶⁴ Increasing the minimum civil penalty un-

157. 18 U.S.C. § 2520(2)(a) (1982) (emphasis added).

158. *Id.* at § 2520(c)(2)(B).

159. *Reynolds*, 93 F.3d at 435; *Brown*, 371 F.3d at 818.

160. *Id.*

161. The U.S. Government Printing Office provides statistics regarding gross domestic product (GDP) deflators, which economists use to “standardize” measures of GDP between two years. U.S. Govt. Prtg. Off., *Table 10.1—Gross Domestic Product and Deflators Used in the Historical Tables: 1940–2009*, <http://www.gpoaccess.gov/ubudget/fy05/sheets/hist10z1.xls> (accessed Feb. 5, 2005). Using 2000 as a base year, the deflator for 1968 was 0.2451 and the deflator for 1986 was 0.7125. *Id.* Dividing the 1986 deflator by the 1968 deflator yields 2.907, a deflator that can be used to convert 1968 dollars to 1986 dollars. Multiplying 2.907 by \$1,000 (the amount of damages in the 1968 version of Section 2520) yields a 1986 equivalent of \$2,907. A similar calculation can be done for the estimated 2005 deflator (1.0858), yielding a conversion deflator of 4.430 and a 2005 equivalent of \$4,430.

162. Sen. Rpt. 99-541 at 1.

163. *Id.* at 5; Sen. Rpt. 99-541 at 5 (reprinted in 1986 U.S.C.C.A.N. 3555, 3559).

164. *Id.*

der Section 2520 would act both as an incentive to those who wish to use these new communication technologies and as a disincentive to those who might access these communications without authorization.¹⁶⁵ It is not unreasonable, therefore, to infer from the circumstances that surrounded the enactment of the 1986 Amendment that Congress intended to increase minimum civil damages under the Wiretap Act to \$10,000.

3. Creation of Section 2520(c)(1) As an Exception to Section 2520(c)

To conduct a full examination of the legislative history behind an act of Congress, the manner in which Congress arrived at the final draft of the bill is relevant.¹⁶⁶ The original version of the 1986 Amendment did not have the separate penalty structure for private viewing of an unscrambled, unencrypted satellite video communication that is provided for in Section 2520(c)(1).¹⁶⁷ Rather, the only language that appeared in the original version of the bill was the language that is currently found in Section 2520(c)(2).¹⁶⁸

While the bill was in a markup session in the Subcommittee on Patents, Copyrights and Trademarks, four senators "expressed concerns about the bill's penalty structure for the interception of certain satellite transmissions by home viewers."¹⁶⁹ Specifically, these senators were concerned that satellite dish technology would make possible the unintentional interception of certain types of unscrambled satellite transmissions, which should not be penalized as harshly as other types of wiretaps.¹⁷⁰ These concerns

165. For a discussion of the importance of the Wiretap Act in light of the need for public protection and the deterrence of potential wrongdoers, consult *infra* Part III(B).

166. Singer, *supra* n. 148, at § 46.07 (stating that "a court must look to reasons for the enactment of the statute and the purposes to be gained by it and construe the statute in the manner in which is consistent with such purpose").

167. Sen. Rpt. 99-541 at 6-7.

168. *Id.* The applicable language was as follows: "In any other action under this section, the court may assess as damages whichever is the greater of—(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000." 18 U.S.C. § 2520(c)(2).

169. Sen. Rpt. 99-541 at 6. The senators who were concerned with the penalty structure were Paul Lexalt, Chuck Grassley, Dennis DeConcini, and Alan Simpson. *Id.*

170. See *U.S. v. Shriver*, 989 F.2d 898, 903 (7th Cir. 1993) (concluding that "Congress, in enacting the 1986 amendments to the wiretap laws, intended to punish certain intercep-

led to an amendment to the bill that created a more complex, “two-track, tiered penalty structure for home viewing of private satellite transmissions when the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain.”¹⁷¹

This section of the Wiretap Act, Section 2520(c)(1), stands in stark contrast to Section 2520(c)(2) because Section 2520(c)(1) uses the mandatory word “shall,” while Section 2520(c)(2) uses the permissive word “may.” This has led most of the circuit courts that have considered this issue to determine that Congress intended to make damages under Section 2520(c)(1) mandatory and damages under Section 2520(c)(2) permissive.¹⁷² At least one court has concluded, however, that Congress addressed concerns that the \$10,000 minimum penalty would be too harsh on some violators by carving out an exception to the general rule in Section 2520(c)(1).¹⁷³ The existence of a less harsh penalty reemphasizes congressional intent to punish harshly those who commit more serious violations.¹⁷⁴

Nothing in the available legislative history indicates why Congress used mandatory language in Section 2520(c)(1) and permissive language in Section 2520(c)(2). While it is certainly not unreasonable to infer that Congress intended to make damages under Section 2520(c)(1) mandatory and damages under Section 2520(c)(2) discretionary, the penalty structure of Section 2520(c)(1) strongly indicates that this is not so. The less severe, but mandatory, penalties of Section 2520(c)(1) apply only to first-

tors of satellite transmissions to home satellite dishes, but not all” because “Congress was well aware that the technology of satellite dishes makes it possible for their owners unintentionally to pick up certain types of unscrambled satellite transmissions”); *DirecTV v. Benson*, 333 F. Supp. 2d 440, 448–449 (M.D.N.C. 2004). This case states that the penalty structure of Section 2511 reflects congressional “recognition that some section 2511 violators should be subject to less severe penalties than others” and that, “when enacting the ECPA in 1986, Congress recognized that home viewers of satellite television sometimes inadvertently pick up unscrambled satellite signals on their televisions.” *Id.* Further, the court writes that “[i]n Congress’s view, although these persons technically violate section 2511 they should not be subject to the statute’s harshest penalties.” *Id.* at 449. (citations omitted).

171. Sen. Rpt. 99-541 at 6–7.

172. *Nalley*, 53 F.3d at 653; *Reynolds*, 93 F.3d at 434–435; *Brown*, 371 F.3d at 817.

173. *Rodgers*, 910 F.2d at 448.

174. *Id.*

or second-time violators.¹⁷⁵ It is conceivable that a third-time violator could go unpunished by a particularly sympathetic district court that exercises discretion under Section 2520(c)(2),¹⁷⁶ while a first-time violator suffers the mandatory penalties provided for in Section 2520(c)(1), over which the judge has no discretion. This absurd result highlights the danger of giving broad discretion to district court judges either to award damages under the Wiretap Act or to award no damages at all.¹⁷⁷

**B. A Strong, Predictable, Consistently Applied Wiretap Act Is
Essential for the Protection of Personal Privacy Interests
in an Age of Electronic Communications**

When it enacted the first Wiretap Act in 1968, Congress made the following finding:

In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.¹⁷⁸

Congress enacted the Wiretap Act one year after the United States Supreme Court decided *Katz v. United States*,¹⁷⁹ a landmark wiretapping case.¹⁸⁰ The 1968 Omnibus Crime Control and Safe Streets Act of 1968 is, in part, a congressional response to

175. 18 U.S.C. § 2520(c)(1)(A)–(B).

176. *Id.* at § 2520(c)(1). For example, a court may be particularly persuaded by the defendant's inability to pay the judgment. *E.g. Shaver*, 799 F. Supp. at 580 (stating that "the record demonstrates that the defendant is unemployed and does not independently own any significant items of property" and concluding that "[n]o useful purpose would be served by ordering the defendant to pay the plaintiff \$10,000 in statutory liquidated damages").

177. For a discussion of how third-time violators are subject to the penalty structure of Section 2520(c)(2), see Sen. Rpt. 99-541 at 7.

178. 82 Stat. at 211.

179. 389 U.S. 347 (1967).

180. In *Katz*, the Court determined that unauthorized government wiretapping violated the Fourth Amendment's protection against unreasonable searches and seizures. *Id.* at 358–359.

the *Katz* decision.¹⁸¹ Congress wanted to specify the uniform conditions under which a wiretap may be used legally, and it wanted to facilitate the enforcement by imposing mandatory penalties on those who violate these rules.¹⁸² Furthermore, the 1986 Amendment to the Wiretap Act was intended to strengthen, not weaken, the protections of the Wiretap Act.¹⁸³

However, inconsistent application and enforcement of the Wiretap Act has reduced its deterrent effect on potential wiretappers.¹⁸⁴ Inconsistent application of the Wiretap Act's civil damages provision is just one of the many uncertainties that plague the Wiretap Act.¹⁸⁵ The result is that the public is becoming increasingly more vulnerable to the very invasions of privacy that the Wiretap Act was meant to discourage.

In this Part, this Comment will consider why it is important to have a strong Wiretap Act that is uniformly applied to deter prohibited conduct. It will begin by considering traditional remedies, and why they fall short of protecting against wiretapping activity.¹⁸⁶ Finally, this Part will discuss the practical enforcement issues that make a mandatory liquidated damages provision particularly important for wiretapping offenses.¹⁸⁷

1. *Alternative Remedies*

To understand the importance of a strong federal Wiretap Act, one must understand the alternative remedies that an aggrieved party may seek in court. What follows are the most com-

181. Sen. Rpt. 99-541 at 2.

182. *Id.* (stating that "Title III is the primary law protecting the security and privacy of business and personal communications in the United States today" and noting that "[i]ts regimen for protecting the privacy of voice communications is expressly limited to the unauthorized aural interception of wire or oral communications").

183. Sen. Rpt. 99-541 at 5 (indicating that "[t]he Justice Department strongly supports [the 1986 Amendment] because it strengthens the current wiretap law from a law enforcement perspective").

184. For a discussion of the use of the Wiretap Act as a deterrent mechanism, consult *infra* nn. 217-222 and accompanying text.

185. *E.g.* Christopher T. Blackford, *Judicial Interpretations of the Electronic Communications Privacy Act Raise Concerns about Whether the Airline Industries' On-line Business Ventures Are Protected*, 68 J. Air L. & Com. 819, 823 (2003) (opining that "judicial constructions of the Electronic Communications Privacy Act (ECPA) have been nothing short of atrocious").

186. *Infra* pt. III(B)(1).

187. *Infra* pt. III(B)(2).

mon alternatives to a federal cause of action under the Wiretap Act and a discussion of why they are insufficient to fulfill the purposes of a strong federal Wiretap Act.

a. State Wiretap Acts

Every state except Vermont¹⁸⁸ currently has some form of a wiretap act.¹⁸⁹ State wiretap acts run the gamut from imposing only criminal penalties on wrongdoers to imposing civil penalties equal to the penalties prescribed by the Federal Wiretap Act.¹⁹⁰

188. While Vermont does not have a wiretap act, Vermont's Supreme Court still allows other remedies to fill in the gap. *E.g. State v. Geraw*, 795 A.2d 1219, 1225–1226 (Vt. 2002) (suppressing an audio recording of an interview between defendant and a police officer because the officer violated the defendant's right to privacy under the state constitution).

189. Ala. Code §§ 13A-11-30, 13A-11-31 (1994); Alaska Stat. § 42.20.310 (2004); Ariz. Rev. Stat. Ann. § 13-3005 (West 2004); Ark. Code Ann. § 5-60-120 (1997); Cal. Penal Code Ann. §§ 631-632 (West 1999); Colo. Rev. Stat. Ann. § 18-9-303 (West 1998); Conn. Gen. Stat. § 52-570d (2000); Del. Code Ann. tit. 11, § 2402 (2001); D.C. Code Ann. § 23-542 (LEXIS 2001); Fla. Stat. Ann. § 934.03 (West 2001); Ga. Code Ann. § 16-11-62 (Harrison 2003); Haw. Rev. Stat. § 803-42 (2003); Idaho Code § 18-6702 (2005); 720 Ill. Compiled Stat. Ann. 5/14-1, 5/14-2 (1998); Ind. Code Ann. § 35-33.5-5-4 (West 2000); Iowa Code § 727.8 (West 2002); Kan. Stat. Ann. § 21-4001 (2000); Ky. Rev. Stat. Ann. § 526.010 (LEXIS 1999); La. Rev. Stat. § 15:1303 (2000); Me. Rev. Stat. Ann. tit. 15, § 709 (1998); Md. Code Ann., Cts. & Jud. Procs. § 10-402 (2002); Mass. Ann. Laws ch. 272, § 99 (LEXIS 1993); Mich. Comp. Laws § 750.539c (1999); Minn. Stat. § 626A.02 (1991); Miss. Code Ann. §§ 41-29-501-537 (2001); Mo. Rev. Stat. Ann. § 542.402 (West 1998); Mont. Code Ann. § 45-8-213 (2003); Neb. Rev. Stat. § 86-290 (2004); Nev. Rev. Stat. Ann. § 200.620 (LEXIS 2001); N.H. Rev. Stat. Ann. § 570-A:11 (2001); N.J. Stat. § 2A:156A-3 (2000); N.M. Stat. Ann. § 30-12-1 (2003); N.Y. Penal Law §§ 250.00, 250.05 (McKinney 2000); N.C. Gen. Stat. § 15A-287 (2003); N.D. Cent. Code § 12.1-15-02 (1997); Ohio Rev. Code Ann. § 2933.52 (Anderson 2004); Okla. Stat. Ann. tit. 13, § 176.4 (West 2003); Or. Rev. Stat. Ann. §§ 165.535, 165.540 (2001); 18 Pa. Cons. Stat. Ann. §§ 5703-5704 (West 1992); R.I. Gen. Laws § 11-35-21 (2002); S.C. Code Ann. §§ 17-30-20, 17-30-30 (West 2004); S.D. Codified Laws § 23A-35A-20 (1998); Tenn. Code Ann. § 39-13-603 (2003); Tex. Penal Code § 16.02 (1981); Utah Code Ann. § 77-23a-4 (2003); Va. Code Ann. § 19.2-62 (West 2004); Wash. Rev. Code § 9.73.030 (1998); W. Va. Code § 62-1D-3 (2000); Wis. Stat. § 968.31 (West 1999); Wyo. Stat. Ann. § 7-3-702 (2005).

190. *E.g.* Colo. Rev. Stat. Ann. §18-9-303(f)(2) (making wiretapping a felony in most cases, but not assigning civil damages); N.H. Rev. Stat. § 570-A:11 (2001) (providing that successful Wiretap plaintiffs are entitled to civil damages of the greater of statutory damages of greater than \$100 a day or \$1,000 or actual damages, plus punitive damages and attorney's fees and costs); Tenn. Code Ann. § 39-13-603 (providing that an aggrieved wiretap plaintiff "may recover" actual damages or the greater of \$100 a day or \$10,000, plus punitive damages and attorney's fees and litigation costs); Tex. Code Crim P. art 18.20, § 16(a) (1981) (authorizing civil cause of action for the greater of actual damages or liquidated damages computed as the greater of \$100 a day or \$1,000 for each violation, as well as punitive damages and attorney's fees and costs); Va. Code Ann. § 19.2-69 (providing no limit on actual damages, but capping liquidated damages at \$1,000); *see also Phillips v. Am. Motorist Ins. Co.*, 996 S.W.2d 584, 590 n. 6 (Mo. App. 1998) (identifying the thirty-three state statutes that provide civil remedies for wiretap violations).

State wiretap acts existed at the time that Congress first made wiretapping a federal crime,¹⁹¹ and they existed when Congress expanded the scope of the Federal Wiretap Act in 1986.¹⁹² These state statutes offer only a limited alternative to a federal Wiretap Act.¹⁹³ Many do not authorize the recovery of civil damages, so private parties have little or no incentive to report incidents of illegal wiretapping.¹⁹⁴ Moreover, these state statutes do not give the potential plaintiffs a federal cause of action.¹⁹⁵ The choice between state and federal court is a benefit to plaintiffs that would not be available in the absence of an effective federal Wiretap Act. This choice is made less meaningful by a non-uniform application of the Wiretap Act's civil damages provision.¹⁹⁶

191. *E.g.* Alaska Stat. §§ 42.20.310, 42.20.330 (1966) (prohibiting the use of an eavesdropping device or the use or divulging of any communications obtained through an eavesdropping device, and punishing violators with a Class A misdemeanor).

192. *E.g.* Ala. Code § 13A-11-31 (1977) (criminalizing intentional eavesdropping with a device as a Class A misdemeanor). Note, however, that some states have enacted wiretap acts subsequent to the 1986 Amendments. *E.g.* Ind. Code Ann. § 35-33.5-5-4 (1990) (authorizing a civil action for mandatory liquidated damages of \$1,000).

193. State wiretap acts are not immune to the vagaries of statutory uncertainty. *E.g.* *Phillips*, 996 S.W.2d at 593 (concluding, contrary to the plain language of Missouri's Wiretap Act, that the exclusionary rule only applies to official wiretaps); *Robinson v. Fulliton*, 140 S.W.3d 312, 314 (Tenn. App. 2003) (resolving a debate as to whether a court may award less than \$10,000 in statutory damages under Tennessee Code Annotated Section 39-13-601).

194. For a state-by-state analysis of local wiretapping laws, including an investigation into what civil damages, if any, are available, see Reporters Committee for Freedom of the Press, *A Practical Guide to Taping Phone Calls and In-Person Conversations in the 50 States and D.C.*, http://www.rcfp.org/taping/cwt_menu.html (last updated Winter 2003); see also *supra* n. 190 (describing the civil damages portions of five state wiretap statutes).

195. Under 28 U.S.C. § 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Accordingly, federal question jurisdiction would exist when a claim is stated under the Federal Wiretap Act but not under a state wiretap act.

196. If, for example, a potential plaintiff can recover either under the Federal Wiretap Act or a state wiretap act that provides for lower, but mandatory, liquidated damages, the plaintiff might choose to avoid the risk of being awarded no damages at all by asserting the state claim.

b. Invasion of Privacy

Invasion of privacy is a tort governed by state law.¹⁹⁷ If a person has kept certain information private and that information is discovered through a wiretap, the person may have a cause of action for unreasonable intrusion upon seclusion.¹⁹⁸ This form of invasion of privacy does not require the publication of the contents of the communication.¹⁹⁹ Moreover, if the wiretapping party uses the information discovered by a wiretap to place another unreasonably in a false light or appropriate that person's name or likeness to himself, he will be guilty of an invasion of privacy.²⁰⁰

While this remedy may be appropriate for domestic or employment-related wiretapping, the plaintiff who has suffered no actual damages still has no incentive to bring suit against a wrongdoer. Punitive damages are generally only available in an invasion of privacy suit if the plaintiff is able to show actual malice.²⁰¹ Moreover, this sort of remedy is simply not available for some forms of wiretapping, like the interception of a commercial transmission of satellite television.²⁰²

197. There are generally four forms of invasion of privacy: (1) "unreasonable intrusion upon the seclusion of another"; (2) "publicity that unreasonably places the other in a false light before the public"; (3) "appropriation of the other's name or likeness"; and (4) giving unreasonable publicity to private matters. *Restatement (Second) of Torts* § 652A (2001). Traditional wiretapping cases would fall under the "unreasonable intrusion upon seclusion" form of invasion of privacy.

198. Nearly every state has enacted legislation that allows an aggrieved party to assert an invasion of privacy claim. W. Page Keeton et al., *Prosser and Keeton on Torts* § 117, at 851 (5th ed. 1984); e.g. Mass. Gen. Laws ch. 214, § 1B (1997) (creating a "right against unreasonable, substantial or serious interference with [one's] privacy" and giving the superior court the right to award damages for violation of the right); Wis. Stat. Ann. § 895.50 (West 2005) (creating a cause of action for invasion of privacy and providing equitable remedies).

199. E.g. *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971) (holding the interception of telephone conversation actionable under state privacy laws even though those conversations were never publicized).

200. *Restatement (Second) of Torts* § 652A.

201. E.g. *Lerman v. Flynt Distribg. Co.*, 745 F.2d 123, 142 (2d Cir. 1984) (determining that punitive damages were unavailable to plaintiff misidentified as a topless actress, because no actual malice was shown).

202. A satellite television provider, for example, would have no protected privacy right because state statutes only extend such rights to persons. E.g. Mass. Gen. Laws Ann. ch. 214, § 1B (providing that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy" (emphasis added)); Neb. Rev. Stat. § 20-201 (West 2005) (expressing legislative intent to "give to any natural person a legal remedy in the event of violation of the right" (emphasis added)).

c. State-Law Conversion Statutes

Conversion is also a tort governed by state law.²⁰³ Therefore, conversion law would provide a remedy only in the case of wiretapping that involved the interception of commercial data or services, like DirecTV's commercial transmission of satellite television.²⁰⁴ However, jurisdictions are split as to whether intangible property can be the subject of a conversion claim.²⁰⁵ When a court would allow a conversion claim, damages would generally be limited to actual damages, which might be small.²⁰⁶ Moreover, the limited scope of a conversion remedy hardly makes it an effective deterrent to potential wiretappers.

d. Fourth Amendment Protections

The victims of a government wiretap may assert their Fourth Amendment rights against unreasonable searches and seizures, as well as any applicable wiretap claim.²⁰⁷ The Fourth Amendment provides citizens with the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."²⁰⁸ However, as with all constitutional violations, substantial damages generally are not available for a violation of

203. *Restatement (Second) of Torts* § 222A (defining conversion as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel").

204. *E.g. DirecTV v. Adrian*, 2004 U.S. Dist. LEXIS 14101 at **10–11 (N.D. Ill. July 22, 2004) (allowing a conversion claim for the unauthorized interception of DirecTV's scrambled satellite signals); *see also* Malone, *supra* n. 129 (describing DirecTV's aggressive campaign against wrongdoers).

205. *Adrian*, 2004 U.S. Dist. LEXIS 14101 at *10 (concluding that, although "the question is a close one," Illinois conversion law protects intangible property); *but see DirecTV v. Borich*, 2004 U.S. Dist. LEXIS 18899 at *11 (S.D.W. Va. Sept. 17, 2004) (concluding that West Virginia conversion law does not extend to a satellite signal, because it is intangible property).

206. *Scully v. US WATS, Inc.*, 238 F.3d 497, 509 (3d Cir. 2001) (indicating that, "[u]nder the conversion theory, damages are intended to compensate a plaintiff for actual loss" (citations omitted)).

207. *E.g. Kee v. City of Rowlett*, 247 F.3d 206, 217–218 (5th Cir. 2001) (rejecting Fourth Amendment and Wiretap Act claims of the grandmother and father of two deceased children, after police investigators used an authorized wiretap during the children's gravesite funeral service); *U.S. v. Santiago*, 185 F. Supp. 2d 287, 288–289 (S.D.N.Y. 2002) (finding a "substantial basis" for issuance of a wiretap authorization, and denying the defendant's requests for relief under the Federal Wiretap Act and the Fourth Amendment).

208. U.S. Const. amend. IV.

the Fourth Amendment.²⁰⁹ So a Fourth Amendment claim is not only insufficient to protect victims against non-governmental wiretaps; it also fails to provide the necessary incentive for an aggrieved party to bring suit.²¹⁰

For the reasons set out above, all of these “traditional” causes of action are insufficient to provide the blanket protection of a uniformly applied Wiretap Act.

2. Practical Enforcement Issues

Practical enforcement issues peculiar to the Wiretap Act and the kind of activity it seeks to prevent make a mandatory liquidated damages clause particularly appropriate. Specifically, the difficulty of assessing damages in privacy suits²¹¹ and the practical difficulty in enforcing privacy rights²¹² makes the ability to recover substantial damages for wiretapping an important aspect of the enforcement scheme of the Wiretap Act.

It is sometimes difficult (if not impossible) to determine actual damages caused by wiretapping.²¹³ While it is relatively easy to assign damages for interception of satellite cable signals,²¹⁴ valuation of damages gets more and more difficult when the offense does not involve the conversion of an excludable good or service. For example, if an individual uses a wiretap to discover that a man is having an extramarital affair, how can a court de-

209. *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding that substantial damages are only available to compensate for actual damages when a constitutional right is violated).

210. Although it is beyond the scope of this Comment, Congress also enacted an exclusionary rule in Section 2518 that is broader than the Fourth Amendment requirement. See Michael S. Leib, Student Author, *E-mail and the Wiretap Laws: Why Congress Should Add Electronic Communication to Title III's Statutory Exclusionary Rule and Expressly Reject a "Good Faith" Exception*, 34 Harv. J. on Legis. 393, 422 (Summer 1997) (indicating that “the statutory exclusionary rule found in Title III provided defendants with greater protection than that afforded by the Fourth Amendment by covering violations of Title III that were purely statutory”).

211. *Infra* nn. 215–218.

212. *Infra* nn. 219–225.

213. H.R. Jud. Comm., *Electronic Communications Privacy Act of 2000: Hearings on H.R. 5018, Prepared Testimony and Statement for the Record of Marc Rotenberg, Executive Director of the Electronic Privacy Information Center*, 106th Cong. (Sept. 6, 2000) (stating that “[a] liquidated damage provision is particularly important in privacy [statutes] because of the difficulty of otherwise assessing damages”).

214. As in *Brown*, actual damages could be computed as the market value of the services obtained through the illegal wiretap—the price that a legitimate consumer would have paid to receive those services. *Supra* nn. 111–115 and accompanying text.

termine the appropriate amount of damages?²¹⁵ Minimum statutory damages are necessary as a consistent, predictable surrogate for otherwise uncertain actual damages.²¹⁶

Minimum, mandatory statutory damages are also an important mechanism by which individuals' privacy rights can be enforced. The Wiretap Act creates a private cause of action that allows an aggrieved party to sue a wiretap violator, even if the aggrieved party suffers no actual damages.²¹⁷ This damages provision attempts to encourage private parties to come forward with claims against wrongdoers, particularly when traditional law enforcement mechanisms are insufficient or inappropriate to handle every case.²¹⁸ In theory, the availability of such a strong remedy should act as a deterrent because potential wiretappers would be less likely to engage in prohibited activity in the face of substantial mandatory penalties.²¹⁹

Traditionally, Congress has used an award of attorney's fees to encourage private enforcement of federal laws.²²⁰ And, indeed,

215. Apparently the *Nalley* court believed that such a violation caused very little damage. 53 F.3d at 653–654 (refusing to award liquidated damages to a husband for disclosure of a telephone call between the husband and his extramarital partner because damages were *de minimis*).

216. Christopher D. Bernard, a Connecticut attorney, stated that “[t]he purpose of Connecticut’s \$1,000 liquidated damages figure for illegal wiretaps, and the federal statute’s \$10,000 amount . . . is a recognition that this is not an economic loss that you can prove, but that it’s a real loss, and it’s to send a message to those who would steal these kinds of communications, that this is not to be tolerated.” He added, “If you didn’t have these liquidated damages, what remedy would you have?” Scheffey, *supra* n. 1 (quoting Christopher D. Bernard, attorney with Koskoff, Koskoff & Bieder in Bridgeport, Connecticut).

217. 18 U.S.C. § 2520.

218. Patrick J. Carome, Samir Jain & Neil M. Richards, *Libel Defense Resources Council Cyber Space Project, The Electronic Communications Privacy Act and Internet Privacy Litigation*, http://www.medialaw.org/Template.cfm?Section=Articles_and_Reports1; path Cyberspace Project: The Electronic Communications Privacy Act and Internet Privacy Litigation (July 2002) (noting that “[c]lass counsel appear to regard the potential availability of statutory and punitive damages under ECPA as two key factors that make that statute an appealing basis for class action suits”).

219. The use of incentives and disincentives to encourage and discourage conduct is not peculiar to modern western legal traditions. For example, Sun Tzu, the ancient Chinese general and philosopher, discussed the use of incentives and disincentives in the context of warfare more than 2,500 years ago: “In order to cause the enemy to come of their own volition, extend some [apparent] profit. In order to prevent the enemy from coming forth, show them [the potential] harm.” Sun Tzu, *The Art of War* 191 (Ralph D. Sawyer trans., Westview Press 1994).

220. One such attorney’s fees award is that of 42 U.S.C. § 1988, under which a prevailing party in a civil rights case can recover attorney’s fees and costs. *E.g. Baker v. John*

a successful party under the Wiretap Act can recover a reasonable attorney’s fee, regardless of whether he or she recovers damages under Section 2520(c).²²¹ However, the recovery of attorney’s fees does not provide the added incentive to bring suit that a mandatory liquidated damages provision does; it simply shifts the financial burden of doing so from the plaintiff to the defendant.²²² Lack of uniformity in the application of the civil damages provision of the Wiretap Act decreases the incentive for private parties to come forward with suits against wiretap violators. This ultimately undermines an important purpose of the civil damages provision—deterrence of private misconduct with the threat of effective private enforcement.²²³ The result is that the deterrent effect of the Wiretap Act’s civil damages provision is thwarted by judicial reluctance to embrace mandatory liquidated damages.

C. The “Discretionary” Construction of the Wiretap Act Is No More Logical Than the “Mandatory” Construction

Judicial construction of the civil damages portion of the Wiretap Act appears to have been largely guided by equity considerations rather than sound statutory construction. The courts that have determined that damages under the Wiretap Act are discretionary and not mandatory seem to be guided by an unwillingness

Morrell & Co., 263 F. Supp. 2d 1161, 1208–1209 (N.D. Iowa 2003) (awarding “incredibly modest” attorney’s fees of \$163,198.91 to an employee who succeeded against her employer on a Title VII sexual harassment claim). The Senate Report that first accompanied the Civil Rights Attorney’s Fees Act of 1976 legislation that enacted 42 U.S.C. § 1988, explained the purpose for the statutory award of attorney’s fees as follows:

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation[]’s fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Sen. Rpt. 94-1011 at 2 (June 29, 1976) (reprinted in 1976 U.S.C.C.A.N. 5908, 5910).

221. 18 U.S.C. § 2520(b)(3).

222. See Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 L. & Contemp. Probs. 179, 195 (1998) (describing one function of a private attorney general provision as shifting attorney’s fees from one party to the other).

223. See Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 B.Y.U. L. Rev. 1443 (2000) (asserting that the exclusionary rule is an insufficient deterrent to police misconduct, and arguing for a damages remedy for unconstitutional police actions).

to give force to a provision that can either be too generous to the unsavory plaintiff²²⁴ or too onerous to the unfortunate violator.²²⁵

Two common justifications for this “soft construction” are apparent: (1) Congress could not have intended a party that has been the subject of seemingly harmless wiretap offenses to recover what amounts to a windfall—\$10,000 for each offense; and (2) Congress could not have intended to subject a party that has committed a seemingly harmless offense to such a large amount of liability. While these concerns are both logical and appropriate, the solution that most courts have found²²⁶—ruling that civil damages are discretionary and not mandatory—is a serious impediment to the effectiveness of the Wiretap Act.²²⁷

When it enacted the Wiretap Act in 1968, Congress created a private cause of action for aggrieved parties to encourage them to report wiretap violators when traditional methods of law enforcement were imperfect or inefficient. The key motivator behind this “private attorney general” mechanism²²⁸ is the recovery of certain, mandatory statutory damages, which are assessed against any person who has violated the Wiretap Act.²²⁹ Since the Wiretap Act was originally enacted in 1968, technology has advanced tremendously.²³⁰ Wiretapping technologies and capabili-

224. See *supra* n. 60 and accompanying text (describing particularly unsympathetic Wiretap Act plaintiffs).

225. See *supra* n. 100 and accompanying text (discussing the *Reynolds* court’s concern about the “potential of the law to bring financial ruin to persons of modest means, even in cases of trivial transgressions”).

226. See *supra* pt. II(B) (discussing the circuit court split).

227. See *supra* pt. III(B) (discussing the need for a uniformly applied Wiretap Act).

228. The Author uses the term “private attorney general mechanism” in the sense that the Wiretap Act creates a cause of action that provides a monetary incentive for parties to bring suit against wiretap violators, as a surrogate for federal criminal prosecution. As one commentator has noted, “there is still no legal definition, nor any well-established pattern of usage, which precisely identifies a litigant as a ‘private attorney general.’” Rabkin, *supra* n. 222, at 194–195. For an investigation into the many varieties of the private attorney general that have arisen since the phrase was first coined in 1943, consult Bryant Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. Cal. L. Rev. 353 (1988).

229. The original Wiretap Act’s civil damages provision, prior to the 1986 Amendment, unquestionably called for mandatory liquidated damages. 18 U.S.C. § 2520(2)(a).

230. This technological advance was a major impetus for the 1986 Amendment that changed the language of the civil damages provision. Sen. Rpt. 99-541 at 5. The Judiciary Committee, in its Senate Report, described the importance of the Act as follows:

Most importantly, the law must advance with the technology to ensure the continued vitality of the Fourth amendment. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances. Congress must

ties have advanced as well, so the threat of an illegal wiretap is more immediate today than it was in 1968.²³¹ Congress recognized this increased threat in 1986 when it enacted the ECPA, which made the interception of an "electronic communication" a violation of the Act.²³² Congress certified the importance of privacy protections by increasing minimum statutory damages to \$10,000.²³³ It did this while recognizing less serious wiretapping offenses and assigning less serious penalties to those offenses.²³⁴

However, under the prevailing "discretionary" view, a potential aggrieved party has little or no incentive to assert his or her private cause of action.²³⁵ While he or she can still recover attorney's fees²³⁶ and get an injunction against the violator,²³⁷ the lack of statutory damages decreases the likelihood that a potential plaintiff will bring a claim. In a circuit that has not yet ruled on whether damages are mandatory or discretionary, the split between the circuits might have a "chilling effect" that causes plaintiffs not to bring suit. While a party may supplement his or her Wiretap Act claim with additional claims, these claims are sometimes unavailable and often do not provide a significant incentive to bring suit.²³⁸

Moreover, the plaintiffs that are unlikely to assert claims because of the low likelihood of recovery of liquidated damages are the plaintiffs that need the most protection under the Wiretap Act. National companies like DirecTV, with large, full-service legal departments, are likely to continue aggressively pursuing claims against violators notwithstanding the unavailability of

act to protect the privacy of our citizens. If we do not, we will promote the gradual erosion of this precious right.

Id.

231. Sen. Rpt. 99-541 at 5-6.

232. *Id.*

233. *See supra* pt. III(A)(2) (discussing the increase from \$1,000 to \$10,000).

234. *See supra* pt. III(A)(3) (discussing the contrasting language of Section 2520(c)(1) and Section 2520(c)(2)).

235. The aggrieved party may recover attorney's fees under Section 2520(b)(3), he or she may receive an injunction under Section 2521, and he or she may prohibit evidence obtained through a wiretap from being admitted as evidence under Section 2515. These remedies are utterly useless to the private litigant whose privacy rights have been violated, like the plaintiffs in *Nalley*. 53 F.3d at 650 (wife disclosed unauthorized recordings of husband's conversation with his extramarital partner).

236. 18 U.S.C. § 2520(b)(3).

237. *Id.* at § 2515.

238. *See* pt. III(B)(1) (discussing alternative remedies to the Wiretap Act).

liquidated damages, because they have an interest in prohibiting multiple, ongoing wiretap violations. Private parties who are subjected to the one-time illegal wiretapping of employers, reporters, or the police are the ones that are less likely to assert their private causes of action because of the unavailability of liquidated damages.

Interestingly, the construction that the “discretionary” circuits have given the Wiretap Act’s damages provision is no more logical than the mandatory damages that they seek to avoid. Private parties can recover actual damages, but only if they are above \$10,000.²³⁹ This is because Section 2520, as it is interpreted by these courts, allows a court discretion to award *the higher of* actual damages or statutory damages of \$10,000. This could potentially leave some wiretap victims uncompensated even for their actual damages, if a sympathetic judge does not want to award the full \$10,000 minimum.²⁴⁰ This is not the kind of penalty structure that Congress intended to enact.

IV. CONCLUSION

As communications technology grows, the privacy rights of ordinary individuals are more and more at risk. As a result, the need for an effective Wiretap Act is greater today than ever before. Regrettably, judicial construction of the Wiretap Act’s civil damages provision has significantly reduced the effectiveness of the Act to discourage wiretapping activity and to punish adequately those who engage in prohibited wiretapping.

Because it is unlikely that the circuit courts that have already ruled on this subject will overturn their decisions, the best way to resolve the issue would be a congressional clarification of the statute. In doing so, Congress should recognize that a single “catch-all” wiretap act is insufficient to address the many diverse forms of wiretapping that threaten our privacy today. A “catch-all” wiretapping statute should only act to complement more specific statutes that address particular wiretapping acts, such as

239. 18 U.S.C. § 2520(c)(2).

240. *See Shaver*, 799 F. Supp. at 580 (stating that federal courts have “the discretion to either award the damages described by § 2520(c)(2) or not to award any damages under § 2520(c)(2),” and noting that “the language of the statute does not allow the court to award any damages in an amount between these two choices”).

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employer wiretapping, police wiretapping, spousal wiretapping, and satellite television wiretapping. Civil damages provisions, which should be mandatory, could be more specifically written to address these unique circumstances, thus avoiding the logical inconsistencies inherent in a general wiretap act.

Before Congress revisits the civil damages provision of the Wiretap Act, however, district courts and circuit courts that have not yet ruled on the construction of Section 2520 should engage in the rigorous statutory construction that this Comment suggests. As a result, these courts should determine that liquidated damages under the Wiretap Act are mandatory, not discretionary. This outcome would bring judicial construction of the Wiretap Act in line with Congress' purpose of protecting privacy interests.