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Cyberspace: The New Frontier for Housing Discrimination--An Analysis of the Conflict Between the Communications Decency Act and the Fair Housing Act

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CYBERSPACE: THE NEW FRONTIER FOR HOUSING DISCRIMINATION – AN ANALYSIS OF THE CONFLICT BETWEEN THE COMMUNICATIONS DECENCY ACT AND THE FAIR HOUSING ACT

I. INTRODUCTION

*This is not in a trendy neighborhood – very Latino.
Non-Women of Color NEED NOT APPLY.
Christian single straight female needed.*¹

Despite Congress's enactment of the Fair Housing Act of 1968 ("FHA"), which regulates housing discrimination, one need spend only a few minutes searching for housing via the Internet before finding blatant FHA violations, such as the listing above. The FHA's efforts to end egregious housing practices aimed at persons of a particular race or socioeconomic status has certainly had some success. Nevertheless, those who wish to circumvent the FHA may now do so simply by using the Internet to disseminate discriminatory housing advertisements. Although more than forty years have passed since the civil rights movement, discrimination continues as was recently seen in advertisements stating racial preferences on websites designed to help Hurricane Katrina victims find housing.²

As the Internet has quickly become a staple of mainstream society, one might be inclined to question how such blatant discrimination is permissible under the FHA. In short, discrimination is not allowed under the FHA. The prevailing judicial interpretation of the FHA is that liability for discriminatory housing advertisements falls both on the creator of the discriminatory words and the intermediary, such as the publisher of a newspaper or a housing pamphlet.³ If the FHA was the

¹ These quotes were found on the Chicago Craigslist website and presented at trial in *Chi. Lawyers' Comm. For Civil Rights Under the Law v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 685-86 (N.D. Ill. 2006), *affid.*, 519 F.3d 666 (7th Cir. 2008) (holding that an online listing service was not liable for discriminatory housing advertisements posted on its website by third-party users of the service).

² *Infra* note 24 (noting that in a December 2005 hearing before the House of Representatives about housing discrimination after Hurricane Katrina, the executive director of the Fair Housing Action Center reported receiving more than two hundred discrimination complaints). A key provision of the FHA prohibits advertising that expresses preference for or limitations on a potential buyer or renter based on "race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604(c) (2006).

³ *Infra* note 24 and accompanying text (discussing several cases in which intermediaries were found liable for FHA violations).

sole operating law governing discriminatory online housing advertisements, the owner or operator of an online listing service could likely be held liable for discriminatory housing advertisements posted on his or her website, even if the posts were generated by a third party.⁴ The Communications Decency Act of 1995 (“CDA”) has a “Good Samaritan” provision (“Good Samaritan provision”) that operates contrary to the stated goals of the FHA.⁵

The Good Samaritan provision has been interpreted to insulate online intermediaries from liability for discriminatory comments made by third parties. Although congressional documentation indicates that this immunity provision was designed to protect interactive computer services that attempt to screen offensive content and to prevent an onslaught of online defamation litigation, the Seventh and Ninth Circuit Courts of Appeals have held the CDA may also be used to immunize interactive computer services from FHA violations perpetrated by users of their websites and forums.⁶ This Note proposes a textual revision to the CDA that would prevent interactive computer services from escaping liability for FHA violations contained in third-party user postings on their websites.

Part II of this Note provides a comprehensive review of the conflict between the CDA and the FHA.⁷ Next, Part III of this Note provides an in-depth analysis of the discourse between the CDA and the FHA, the

⁴ *Infra* notes 21–24 and accompanying text (illustrating how the FHA extends liability to the intermediaries of discriminatory housing advertisements and citing cases where publishers of newspapers, listing services, and advertising brochures were held liable for discriminatory advertisements generated by third parties).

⁵ See 47 U.S.C. § 230(c) (2006). This provision of the CDA is entitled “Protection for ‘Good Samaritan’ blocking and screening of offensive material” and prevents interactive computer services from being held liable for screening objectionable content on their websites and forums. *Id.*

⁶ *Infra* Part II.D (explaining the Seventh and Ninth Circuit decisions in depth). See 141 CONG. REC. H8471–73 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). Representative Cox, a co-sponsor of the bill that created the Good Samaritan provision, stated:

Currently, however, there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems. A New York judge recently sent the online services the message to stop policing by ruling that Prodigy was subject to a \$200 million libel suit simply because it did exercise some control over profanity and indecent material.

Id. at H8471.

⁷ *Infra* Part II.A (explaining the history and interpretation of the FHA); *infra* Part II.B–C (describing the development and operation of the Internet and discussing the creation and interpretation of the CDA); *infra* Part II.D (examining how the Seventh and Ninth Circuits have dealt with the textual conflict between the CDA and the FHA).

questionable existence of a circuit split, the adverse effects of the CDA's current application, and the proposed solutions to the conflict.⁸ Finally, Part IV of this Note proposes a resolution to the conflict that amends the CDA to eliminate all exceptions to the FHA and tailors the text of the CDA's Good Samaritan provision to apply to only those instances in which Congress intended immunity to apply, such as when an interactive service provider is treated as a publisher of third-party generated defamation or when the service has made a good faith attempt to screen "offensive" content on its website or user forums.⁹

II. BACKGROUND

Before analyzing the issues surrounding the tension between the CDA and the FHA, a working knowledge of the Internet and an understanding of the statutes at the heart of the conflict is needed.¹⁰ First, Section A highlights the development of the FHA, focusing on the advertising provision laid out in Section 3604(c) of the FHA.¹¹ Then, Section B provides a brief history of the Internet's development and operation, including an overview of federalism and jurisdictional issues that a court may face before it can decide an Internet-related action on the merits.¹² Next, Section C introduces the CDA by discussing the New York case leading to its creation, its legislative history, and key statutory interpretations of the CDA by the federal circuit and district courts.¹³ Finally, Section D discusses two major cases where the FHA's expansive imposition of liability for discriminatory advertisements directly

⁸ *Infra* Part III.A (considering whether the analytical differences between the Seventh and Ninth Circuit opinions constitute a circuit split and suggesting the potential outcome if the Supreme Court of the United States granted certiorari in a case where an online intermediary used the CDA to claim immunity for third party FHA violations); *infra* Part III.B (addressing the major pitfalls of the CDA's current application, including its evisceration of a pertinent section of the FHA, its tendency to support a do-nothing mentality among interactive computer services, its inconsistency with congressional intent, and its ability to prevent victims of housing discrimination from seeking relief); *infra* Part III.C (presenting the solutions posed by other scholars and addressing the strengths and weaknesses of each one, culminating in a call for a textual revision to the CDA).

⁹ See 47 U.S.C. § 230(c) (2006) (entitled "Protection for 'Good Samaritan' blocking and screening of offensive material").

¹⁰ *Infra* Part II (providing the framework for understanding the conflict between the FHA and the CDA).

¹¹ *Infra* Part II.A (discussing the history and development of the FHA).

¹² *Infra* Part II.B (providing a history of the Internet and special issues inherent to Internet-related cases).

¹³ *Infra* Part II.C (tracing the CDA from its inception through the courts prior to *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) and *Chi. Lawyers' Comm. For Civil Rights Under the Law v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008)).

conflicted with the interactive computer service immunity provided by the CDA.¹⁴

A. *Development of the Fair Housing Act*

One commentator described residential segregation as taking effect “slowly and deliberately” after the turn of the Twentieth Century, with the urban ghetto developing after World Wars I and II when African Americans began moving into industrialized areas.¹⁵ Even prominent and successful African American figures, such as Nat King Cole, were victims of racially based housing discrimination.¹⁶ After race-restrictive covenants were declared unconstitutional, African Americans who bought or rented homes in white neighborhoods were given an icy reception, often accompanied by violence.¹⁷

¹⁴ *Infra* Part II.D (discussing in depth the *Roommate* and *Craigslist* holdings and rationales).

¹⁵ Mark Seitles, Note, *The Reputation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVT. L. 89, 91 (1998) (briefly discussing race relations in America prior to the 1900s). Others have traced the roots of housing segregation in the United States as far back as the middle nineteenth century. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 289 (2004). While a small number of African Americans owned homes in expensive neighborhoods during the nineteenth century, many lived in crowded ghettos with derogatory nicknames, such as “Nigger Hill” or “Little Africa.” *Id.* The living conditions in these ghettos affected mortality rates as the potential for disease exposure and malnutrition was significantly higher in these areas than in other communities. *Id.* at 289–90. Some African Americans lived in “cold and exposed rooms and garrets, board shanties, five and six feet high, and as many feet square . . . without any comforts, save the bare floor, with the cold penetrating between the boards.” *Id.* at 290 (internal citation omitted). “Ghetto” in this Note is used as it was by the National Advisory Commission on Disorders and is defined as “an area within a city characterized by poverty and acute social disorganization, and inhabited by members of a racial or ethnic group under conditions of involuntary segregation.” Report of the National Advisory Commission on Civil Disorders 25 (1968) available at <http://www.eisenhowerfoundation.org/docs/kenner.pdf> (last visited Oct. 24, 2009).

¹⁶ Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 810 (2007). Kurth described Nat King Cole’s housing experience:

In August, 1948, popular music star Nat King Cole purchased an estate in a wealthy Los Angeles neighborhood with his wife and children. The Property Owners Association of the neighborhood expressed prejudice against the wealthy, cultured and sophisticated black singer’s presence in their community, and they tried to buy the home back from him at a profit. Cole declined the offer and asserted his rights to move into his home, only to be terrorized by his white neighbors, who planted signs that said “Nigger Heaven” on his property and burned the word “Nigger” into his front lawn.

Id. (internal citations omitted).

¹⁷ See BELL, *supra* note 15, at 290. See also Thomas J. Sugrue, *The Unfinished History of Racial Segregation*, POVERTY & RACE, July 15, 2008, <http://www.prrac.org/projects/>

In 1967, a study on racial violence, which was commissioned by President Lyndon Johnson, found that segregated housing greatly contributed to the volatile nature of large cities and “[d]iscrimination prevents access to many non-slum areas, particularly the suburbs, where good housing exists.”¹⁸ Within a year, Congress enacted the Civil Rights Act of 1968, which included Section 3604(c) of the FHA.¹⁹ Section 3604(c)

fair_housing_commission/chicago/sugrue.pdf (last visited Oct. 24, 2009). “Whites protested, picketed and used violence to keep blacks out of their neighborhoods, to prevent the construction of racially-integrated public housing projects in their communities, and to resist the development of affordable housing open to minorities.” *Id.* *Shelley v. Kraemer*, 334 U.S. 1 (1948) was considered a victory in the fight for desegregated housing. Kurth, *supra* note 16, at 808. In *Shelley*, a white property owner sold his home to an African American family in violation of a race restrictive covenant. 334 U.S. at 1. A disgruntled neighbor sought enforcement of the covenant against the African American family, but the Court refused and concluded that judicial enforcement of a racially restrictive covenant violated the state action doctrine and would violate the defendants’ right to equal protection. *Id.* at 20.

¹⁸ Report of the National Advisory Commission on Civil Disorders 23 (1968), <http://www.eisenhowerfoundation.org/docs/kerner.pdf> (last visited Aug. 1, 2009). In 1967, following an explosion of racially motivated disturbances in American cities, President Johnson established a commission to investigate three issues: what transpired in those American cities; what factors contributed to the discourses; and what preventative measures America should take. *Id.* at 1. In its research, the commission visited the riot cities and spoke with witnesses and experts, finding that “[o]ur nation [was] moving toward two societies, one black, one white—separate and unequal.” *Id.* Furthermore, the commission found that federal housing programs were not performing as effectively as predicted. *Id.* at 23. Specifically, the commission noted that:

To date, federal programs have been able to do comparatively little to provide housing for the disadvantaged. In the 31-year history of subsidized federal housing, only about 800,000 units have been constructed, with recent production averaging about 50,000 units a year. By comparison, over a period only three years longer, FHA insurance guarantees have made possible the construction of over ten million middle and upper-income units.

Id. at 24. The National Advisory Commission on Civil Disorders posited several recommendations to improve housing discrimination, including developing “a comprehensive and enforceable federal open housing law to cover the sale or rental of all housing, including single family homes.” *Id.* Other suggestions included a five-year plan to bring more low and moderate income housing within reach of African Americans and restructuring assistance programs to locate such housing away from the ghettos. *Id.*

¹⁹ See 42 U.S.C. §§ 3601–3619 (2006). The statute states “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” *Id.* § 3601. The provision regarding advertising of housing states:

[I]t shall be unlawful . . . [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

was intended to eliminate the special dangers posed by discriminatory housing advertisements, such as psychological harm and stigmatic effects.²⁰

A plain reading of Section 3604(c) suggests that publishers are liable to anyone who creates or transmits a discriminatory housing advertisement.²¹ In other words, it makes publishing a discriminatory advertisement a distinct and actionable wrong separate from the creation of the advertisement.²² The “Mrs. Murphy exemption” is the only

Id. § 3604(c). The term “dwelling” as used in Section 3604(c) means: “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.” *Id.* § 3602(b).

²⁰ *Id.* One writer stated that Section 3604(c) “works to prevent the substantial stigma, humiliation, and other emotional injuries caused by encountering discriminatory preferences or exclusions.” Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 975–76 (2002). Another commentator recounted a psychological study conducted in the 1940s where African American school children were asked to choose between a black doll and a white doll in response to a series of questions. Kurth, *supra* note 16, at 814–15. African American school children across the country chose the white doll when asked which one they liked better and which one was prettier, but they chose the black doll when asked which one “looks bad.” *Id.* at 814. Section 3604(c) also promotes community diversity and helps encourage the dissemination of accurate information about the law. Chang, *supra*, at 974–76. Chang presents the following hypothetical situation:

For example, a housing consumer faced with numerous notices specifying “no kids” might conclude that discrimination against families with children is permissible in all cases. Such miseducation of the public further frustrates fair housing efforts, which rely heavily on private complainants who identify illegal housing practices. Unless housing consumers are aware of their rights, they will not be alert to violations of those rights.

Id. at 976–77.

²¹ Diane J. Klein & Charles Doskow, *HOUSINGDISCRIMINATION.COM?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329, 335 (2008) (providing an explanation of publisher liability as it pertains to the FHA). Klein and Doskow note:

The law expands the class of those held legally responsible for non-discrimination in housing to include not just housing providers, but those who publish their advertisements. . . [u]nder the FHA, the “actual wrongdoers” are not limited to those who “originate the allegedly unlawful content” – by writing and placing the ads – but also those who publish them.

Id.

²² James D. Shanahan, Note, *Rethinking the Communications Decency Act: Eliminating Statutory Protections of Discriminatory Housing Advertisements on the Internet*, 60 FED. COMM. L.J. 135, 136 (2007) (arguing that the FHA holds publishers responsible for third-party content). Shanahan explains:

The 1968 [FHA] protects the supply of housing for those who may otherwise be discriminated against and functions to reduce overall

loophole allowing for discrimination in housing under the FHA and explicitly bars the exemption from applying to the advertising provision in Section 3604(c).²³ Federal district and circuit courts have liberally applied Section 3604(c) to many media outlets in order to impose liability for publishing discriminatory housing advertisements.²⁴ That said, a

discrimination in the housing market. The plain language of the statute indicates that it is intended to prevent newspapers and other publishing media from publishing classified advertisements that mention statutorily proscribed preferences in the sale or rental of a dwelling. The FHA holds publishers of discriminatory advertisements legally responsible for content provided by third parties.

Id. (internal citation omitted).

²³ The “Mrs. Murphy exemption” is a nickname for Section 3603(b), which provides that: [n]othing in section 3604 of this title (other than subsection (c)) shall apply to . . . rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

42 U.S.C. § 3603(b)(2). The nickname was derived because the original draft did not leave room for people such as Mrs. Murphy, a woman who did not want to rent her boardinghouse to African Americans. James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV.C.R.-C.L. L. REV. 605, 607–08 (1999). Some commentators have referred to the Mrs. Murphy exemption as “a loophole big enough to drive a Mack truck full of roommate-seekers through.” Klein & Doskow, *supra* note 21, at 334.

²⁴ See *Ragin v. N.Y. Times*, 923 F.2d 995, 999–1000 (2d Cir. 1991) (holding a newspaper liable under the FHA for publishing housing advertisements that depicted only whites as homeowners); *United States v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972) (stating “the congressional prohibition of discriminatory advertisements was intended to apply to newspapers as well as any other publishing medium”); *Wheatley Heights Neighborhood Coal. v. Jenna Resales Co.*, 447 F. Supp. 838, 842 n.3 (E.D.N.Y. 1978) (noting that a listing service falls clearly within the scope of the FHA’s expansive liability); *Saunders v. Gen. Serv. Corp.*, 659 F. Supp. 1042, 1057–59 (E.D. Va. 1987) (holding that an advertising brochure violated Section 3604(c) because it did not contain an Equal Housing Opportunity logo nor feature an adequate number of African American models in its pictures). One commentator argues that Section 3604(c)’s expansive language has not deterred housing discrimination, which is evident from the blatant housing discrimination in the wake of Hurricane Katrina. Stephen Collins, Comment, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 NW. U. L. REV. 1471, 1491 (2008). In a hearing before the House of Representatives concerning housing options for Hurricane Katrina victims, the executive director of the Greater New Orleans Fair Housing Action Center reported that he had received more than two hundred complaints about housing discrimination since the hurricane hit. *Housing Options in the Aftermath of Hurricanes Katrina and Rita: Hearing Before the Subcomm. on Housing and Cmty. Opportunity of the House Comm. on Fin. Servs.*, 109th Cong. 70 (2006) (statement of David E. Garratt) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:26753.pdf (last visited Aug. 1, 2009). The director brought twenty-eight pages worth of discriminatory statements from websites, such as *Katrinahousing.org*, *Katrinahome.com*, *DHRonline*, and *reliefwelcomewagon.com*. *Id.* A sample of the discriminatory statements included: “I would love to house a single mom with one child, not racist, but white only”; “Not to sound racist, but because we want to make things more understandable for our

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broad application of Section 3604(c) is at odds with the immunity provided by the CDA because the FHA extends liability to intermediaries.²⁵ To shed additional light on the issue, Section B explains the CDA and highlights some of the jurisdictional issues that may arise regarding its application in an Internet-related housing discrimination case.²⁶

B. The Internet and the Communications Decency Act

The World Wide Web was developed for a society whose demand for information and technology allowed Internet usage to spread quickly into homes, offices, and classrooms via the personal computer.²⁷ People

younger children, we would like to house white children"; and "Provider will provide room and board for \$400 but prefers two white females." *Id.* at 69-70. See also Jeffrey M. Sussman, Student Article, *Cyberspace: An Emerging Safe Haven for Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 215 (2007) (arguing that the application of the CDA to FHA violations has made the Internet a sanctuary for those who wish to discriminate).

²⁵ *Infra* Part II.D (discussing the Seventh and Ninth Circuit decisions in depth).

²⁶ *Infra* Part II.B (providing an overview of the Internet's development and special issues inherent to Internet-related cases).

²⁷ JAN SAMORISKI, ISSUES IN CYBERSPACE 25 (2002). The number of Internet hosts went from about five million in 1995 to over seventy million in 2000. *Id.* at 25 fig. 2.3. The number of websites increased from less than one million to more than eighteen million between 1996 and 2000. *Id.* at 26, fig. 2.4. A 2004 study released by the National Telecommunications and Information Administration reported that fifty-four percent of American households had Internet access in the home. A NATION ONLINE: ENTERING THE BROADBAND AGE, <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf> (last visited Oct. 24, 2009). According to the United States Census Bureau, more than one hundred and two million Americans had Internet access in their homes as of 2006, and an additional thirty-four million had Internet access at work. U.S. CENSUS BUREAU, INTERNET ACCESS AND USAGE AND ONLINE SERVICE USAGE: 2006, <http://www.census.gov/compendia/statab/tables/08s1127.xls> (last visited Aug. 1, 2009). Although the terms "Internet" and "World Wide Web" are often interchanged, this practice is erroneous because the World Wide Web is simply one method of accessing information on the Internet. Webopedia, *The Difference Between the Internet and the World Wide Web*, http://www.webopedia.com/DidYouKnow/Internet/2002/Web_vs_Internet.asp (last visited Oct. 24, 2009). The Internet's humble beginnings can be traced back to 1961 when a Massachusetts Institute of Technology scientist began researching methods to connect computers through digital bursts of data known as packet technology. SAMORISKI, *supra* at 22. The Defense Advanced Research Projects Agency ("DARPA") became involved with packet technology research in the mid-1960s in order to place the United States at the forefront of military scientific advancement. *Id.* See also FRED FEDLER ET. AL., REPORTING FOR THE MEDIA 407 (7th ed. 2001) (discussing early developments in digital technology, such as the first time several university computer sites were connected via the Internet). The modern Internet is built on Transmission Control Protocol/Internet Protocol ("TCP/IP"), a system that allows data to be broken into smaller pieces, transmitted by routers and servers, and reassembled at its final destination. JANINE S. HILLER & RONNIE COHEN, INTERNET LAW & POLICY 6 (2002). The Internet was created in part out of concern for the transmission of intelligence during a disaster, and the military found TCP/IP

are increasingly turning to the Internet as a source for news and information, which has resulted in a massive decrease in traditional print source circulation.²⁸ The latest technological advances have allowed

technology appealing because it was a "cheap, efficient, and almost indestructible system of network communication . . . [with the] ability to maintain communication in the event of disruption caused, for example, by nuclear war." SAMORISKI, *supra*, at 23. The Domain Naming System ("DNS"), which was originally government controlled, categorizes TCP/IP addresses in a hierarchical structure of primary and secondary domain names. HILLER & COHEN, *supra* at 6-7. In 1998, the Clinton Administration "enter[ed] an agreement with [the Internet Corporation for Assigned Names and Numbers ("ICANN")] to establish a process to transition current U.S. Government management of the Domain Name System to such an entity based on the principles of stability, competition, bottom-up coordination, and representation." Johanna Ambrosio, *Who Owns the Internet?*, INFORMATIONWEEK ONLINE, (July 26, 2006), available at <http://www.informationweek.com/newsletters/daily/showArticle.jhtml?articleID=191201674> (last visited Aug. 1, 2009). After a period of research and proposals, the Clinton Administration awarded the contract to ICANN. *Id.* ICANN is responsible for:

[m]anaging and coordinating the Domain Name System (DNS) to ensure that every address is unique and that all users of the Internet can find all valid addresses. It does this by overseeing the distribution of unique IP addresses and domain names. It also ensures that each domain name maps to the correct IP address. ICANN is also responsible for accrediting the domain name registrars.

ICANN FAQ, <http://www.icann.org/en/faq/> (last visited Aug. 1, 2009). The World Wide Web is a portion of the Internet that relies on its own computer language and is distinct from other components of the Internet, such as email, instant messaging, and Usenet news groups. See Webopedia, *supra*. European Organization for Nuclear Research ("CERN") scientist Tim Berners-Lee is regarded as the father of the World Wide Web, as he developed the programming protocols (hypertext transfer protocols or "HTTP") that simplified online navigation, linking computers to allow user accessibility of textual, visual, and audio files from anywhere on the Internet. SAMORISKI, *supra* at 24-25. For a compilation of articles discussing Tim Berners-Lee's contributions in greater detail, see the CERN website at <http://cernsearch.web.cern.ch/cernsearch/Default.aspx?query=generic2:Public%20Tim%20Berners-Lee> (last visited Aug. 1, 2009).

²⁸ Collins, *supra* note 24, at 1491. See William Pack, *U.S. Newspaper Circulation Continues to Decline*, SAN ANTONIO EXPRESS-NEWS, Oct. 28, 2008, at 2C (reporting that the San Antonio Express-News' daily circulation had dropped by 7.7 percent since 2007, but its online readership had increased 4.3 percent); Lorraine Mirabella, *Sun's Daily Circulation Falls 5.9% Over Six Months*, THE BALT. SUN, Oct. 28, 2008, at 15A (reporting that all of the nation's top twenty-five newspapers have recorded an average 4.8 percent decrease in the last six months and that the loss is a result of competition from online news sources); Staff Report, *Los Angeles Times to Lay Off 75 Staffers*, ATLANTA J.-CONST., Oct. 28, 2008, at C2 (noting that the L.A. Times' parent company laid off two hundred and fifty people in summer 2008, including one hundred and fifty in the newsroom); Jenifer B. McKim, *Delivering the News Without the Paper*, THE BOSTON GLOBE, Oct. 29, 2008, at 5 (reporting that the Christian Science Monitor will be the first national newspaper to eliminate its print edition in favor of improving the quality of its web edition). An ethics group leader from the Poynter Institute, a prominent resource for journalists, stated that many newspapers are "teetering on the brink of instability" and that she was not sure whether focusing solely on an online edition was "a last dying gasp or . . . the first steps of transformation." McKim, *supra*. In addition to using the Internet as a resource for news, Americans are turning to the Internet

users to access the Internet on cellular phones, personal digital assistants, in vehicles, and even on airplanes.²⁹ Although the Internet allows for the exchange of ideas and information with increasing speed and efficiency, its use poses serious questions for American lawmakers as to who should exercise jurisdiction over the information superhighway.³⁰

Jurisdiction gives a court the power to exercise legal authority over persons, property, and issues, and is typically based on geographic and political boundaries.³¹ The United States uses a dual system of government that often raises questions on whether a particular issue is

for a variety of tasks, such as shopping, banking, stock trading, and job searching. *See, e.g.*, Macy's Website, <http://www.macys.com> (allowing users to browse and purchase items from Macy's department stores) (last visited Aug. 1, 2009); U.S. Bank Website, <http://www.usbank.com> (providing U.S. Bank customers with online access to their personal and business banking accounts) (last visited Aug. 1, 2009); E-Trade Online, <http://www.etrade.com> (allowing people to buy and sell stocks online) (last visited Aug. 1, 2009); Monster, <http://www.monster.com> (last visited Aug. 1, 2009) (providing a forum where people may search for jobs, submit résumés, and screen potential employees online).

²⁹ *See* Tim Barker, *Smart Phones Connect with More Customers*, ST. LOUIS POST-DISPATCH, Sept. 9, 2008, available at 2008 WLNR 17072747 (discussing consumer mechanisms for coping without cell phones and the accompanying Internet access); Geek.com Team Post, *Internet in Your Car*, <http://www.geek.com/internet-in-your-car> (discussing various devices and service providers for Internet access in a motor vehicle); Wallstreet Fighter, *Internet Access On Airplanes Is Here*, <http://www.wallstreetfighter.com/2008/08/internet-access-on-airplanes.html> (discussing American Airlines' decision to allow Internet access for its patrons) (last visited Jan. 21, 2009).

³⁰ *See infra* notes 31-39 and accompanying text (discussing the problems faced by courts attempting to exercise jurisdiction over Internet cases).

³¹ HILLER & COHEN, *supra* note 27, at 11. The term "jurisdiction" is a general term with several definitions: "(1) [a] government's general power to exercise authority over all persons and things within its territory, (2) [a] court's power to decide a case or issue a decree, (3) [a] geographic area within which political or judicial authority maybe exercised; (4) [a] political or judicial subdivision within such an area." BLACK'S LAW DICTIONARY 393 (3d pocket ed. 2006). A court's jurisdiction consists of both personal and subject matter elements, and the exercise of jurisdiction is improper if either element is not present. JOSEPH W. GLANNON, *CIVIL PROCEDURE EXAMPLES & EXPLANATIONS* 59 (5th ed. 2006). Bases for personal jurisdiction include physical presence, domicile, consent, and "minimum contacts." *Id.* at 4. *See* *Pennoyer v. Neff*, 95 U.S. 714 (1877) (discussing the traditional modes of obtaining personal jurisdiction); *see also* *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (defining the "minimum contacts" test as a defendant's minimum contacts with a territory "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (internal citation omitted). Subject matter jurisdiction is "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." BLACK'S LAW DICTIONARY, *supra* at 396. Federal courts are courts of limited jurisdiction, meaning a federal court has subject matter jurisdiction only if its power to hear a particular type of case is authorized by the U.S. Constitution, federal statute, or judicial decision. JACK H. FRIEDENTHAL ET. AL., *CIVIL PROCEDURE CASES AND MATERIALS* 245 (9th ed. 2005).

properly regulated by state or federal law.³² In the past, states have enacted laws attempting to directly regulate aspects of the Internet, including online pornography and alcohol distribution; however, the dormant commerce clause invalidated most of those statutes.³³

³² CHRISTOPHER N. MAY & ALLAN IDES, *CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM* 268 (4th ed. 2007). Under the preemption doctrine, state law that is inconsistent with the goals or text of valid federal law cannot stand. *Id.* The federal law may include a textual provision explicitly preempting state law. *Id.* See Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) (2006) (“[T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they . . . relate to any employee benefit described in section 1003(a) of this title and not exempt under section 1003(b).”); Federal Debt Collection Procedure Act, 28 U.S.C. § 3003(d) (2006) (“This chapter shall preempt State law to the extent such law is inconsistent with a provision of this chapter.”). When it is impossible to comply with both a state and federal law, the conflicting provisions of the state law invalidated. MAY & IDES, *supra* at 268; see *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (holding that the test of whether a particular state statute can co-exist with a federal statute regulating the same subject is “whether both regulations can be enforced without impairing the federal superintendence of the field”). Finally, a state law may be preempted when Congress intends to give the federal government exclusive regulatory power over a particular subject matter, such as interstate commerce. MAY & IDES, *supra* at 269. When regulation of the Internet is at issue, the Commerce Clause typically answers these questions. HILLER & COHEN, *supra* note 27, at 11. The Commerce Clause provides that “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. Generally, the Commerce Clause allows Congress to regulate three main categories of commerce: the channels of interstate commerce; the instrumentalities of interstate commerce; and any activity that has a substantial effect on interstate commerce. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 366–67 (2005). The Dormant or Negative Commerce Clause, a purely judicial interpretation, prohibits states from passing legislation regulating activity within their boundaries that substantially hampers interstate commerce. HILLER & COHEN, *supra* note 27, at 12; see *C&A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 393–94 (1994) (invalidating a flow-control ordinance that set up a mandatory processing facility for solid waste because it discriminated against interstate commerce); *Raymond Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 678–79 (invalidating an Iowa statute prohibiting the use of sixty-five-foot double trailers within its borders because it placed a substantial burden on out-of-state trucking companies). Nevertheless, not all members of the Supreme Court believe in the existence of the Dormant Commerce Clause. See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., dissenting) (“The so-called ‘negative’ Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain . . .”); *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 127 S. Ct. 1786, 1799 (2007) (Thomas, J., concurring in the judgment) (“The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice.”).

³³ HILLER & COHEN, *supra* note 27, at 12, 16. Hiller and Cohen noted that “[t]he plaintiffs challenging these state laws argue that the Internet, by its borderless nature, is inherently a form of interstate commerce, and a state’s attempt to regulate conduct on the Internet poses an undue, and therefore, unconstitutional burden on it.” *Id.* at 12. See generally *S.E. Booksellers Ass’n v. McMaster*, 371 F. Supp. 2d 773 (2005) (granting pre-enforcement enjoinder of a state statute that would impose criminal sanctions on those who disseminate harmful materials to minors via the Internet because the statute violated the First Amendment and the Commerce Clause); *Granholt v. Heald*, 544 U.S. 460 (2005)

Nevertheless, the states' concerns regarding the Internet did not go unnoticed by Congress, which has since passed legislation addressing some controversial Internet issues.³⁴ Even though the Commerce Clause can make it difficult for states to enact new legislation directly regulating an Internet user's behavior, a state may still enforce its laws already on record against an Internet-based defendant.³⁵

The Internet's broad coverage creates controversy in the realm of personal jurisdiction.³⁶ States that have not amended their long-arm

(invalidating Michigan and New York statutes regulating alcohol distribution because they discriminated against interstate commerce). Despite the states' argument that concern for the ease with which minors could obtain alcohol via the Internet was a compelling state interest, the Court found that the states did not adequately demonstrate the need for discrimination such that the laws could be upheld under the Dormant Commerce Clause. *Granholm*, 544 U.S. at 489, 493.

³⁴ For example, the Unlawful Internet Gambling Enforcement Act of 2006 provides in part:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card); (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor [sic] or financial intermediary on behalf of or for the benefit of such other person.

31 U.S.C. § 5363 (2006). See also the Communications Decency Act, 47 U.S.C. § 230(c) (2006) (immunizing interactive computer services from liability for third party user content). The Twenty First Amendment provides, however, that "[t]he transportation or importation into any State, Territory or possession on the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2. In *Granholm*, the Court addressed the states' arguments under Section 2, holding that states have broad power to regulate some Internet activity under the provision, but that they must do so evenhandedly, treating in-state and out-of-state entities alike. 544 U.S. at 493.

³⁵ *Supra* note 33 and accompanying text (discussing the Commerce Clause's invalidation of state laws attempting to regulate Internet behavior); *infra* note 36 and accompanying text (providing an example of how one state amended its long-arm statute to reach Internet defendants for purposes of personal jurisdiction).

³⁶ HILLER & COHEN, *supra* note 27, at 16. In response to *Int'l Shoe Co. v. Washington*, a case that set forth the "minimum contacts" test, many states passed long-arm statutes enumerating certain types of contact with the state that would give courts within the state personal jurisdiction over a defendant. GLANNON, *supra* note 31, at 24-25; see *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); see, e.g., OHIO REV. CODE ANN. § 2307.382(A) (2004). The statute states:

statutes to include Internet contacts rely on the Supreme Court's evolving standard in this relatively new area of personal jurisdiction jurisprudence.³⁷ Although the Internet exposes the antiquity of the

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or goods in this state;
- (3) Causing tortious injury by an act or omission in this state;
- (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
- (7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity;
- (8) Having an interest in, using, or possessing real property in this state;
- (9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

OHIO REV. CODE ANN. § 2307.382. North Carolina, for example, has addressed the problem by amending its long-arm statute to include Internet contacts with the state. *See e.g.* N.C. GEN. STAT. § 1-75.4 (2007). The Local Injury, Foreign Act category of the North Carolina long-arm statute includes "[u]nsolicited bulk commercial electronic mail [that is] sent into or within this State by the defendant using a computer, computer network, or the computer services of an electronic mail service provider in contravention of the authority granted by or in violation of the policies set by the electronic mail service provider." *Id.* § 1.75.4(4)(c). For a complete listing of state long-arm statutes and a discussion of how each state treats electronic contacts for purposes of personal jurisdiction, see Vedder, Price, Kaufman & Kammholz, P.C., *Long Arm Statutes: A Fifty-State Survey* (2003) (available at <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/LongArmSurvey.pdf>) (last visited Aug. 1, 2009).

³⁷ HILLER & COHEN, *supra* note 27, at 17. *See* *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (1996) (holding that a Texas defendant was subject to personal jurisdiction in Ohio because he was party to a contract governed by Ohio law and sent several emails to the Ohio-based plaintiff). In *CompuServe*, the Court employed the standard of "purposeful availment" articulated by Justice O'Connor in *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987). *CompuServe*, 89 F.3d at 1265. In *Asahi*, Justice O'Connor argued that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112 (O'Connor, J.,

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Court's jurisdictional doctrines, history shows that the law will eventually adapt accordingly, even if it is in a Johnny-come-lately fashion.³⁸ Thus, a court can hear an Internet-related case on the merits only when the parties clear the personal and subject-matter jurisdiction hurdles.³⁹ Next, this Note steps away from the jurisdictional issues courts may face regarding Internet-related cases and focuses on the CDA's regulation of the Internet.⁴⁰

C. *Development of the Communications Decency Act*

In 1995, a New York trial court rendered a decision that compelled Congress to amend the Telecommunications Act of 1934.⁴¹ In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the New York Supreme Court considered whether an Internet service provider could be held liable for

plurality opinion); cf. *Zippo Mfg. v. Zippo Dot Com., Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (holding that a California-based defendant was subject to personal jurisdiction in Pennsylvania by virtue of its doing online business with Pennsylvania residents). In *Zippo*, the court found that the validity of personal jurisdiction "is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Zippo*, 952 F. Supp. at 1124.

³⁸ HILLER & COHEN, *supra* note 27, at 21. Hiller and Cohen compare the Internet to the advent of the assembly line and mass production of the automobile, arguing that "[w]hile the world of physical transactions may be like the stagecoach, and thus many of the rules developed to govern it may not be applicable to the Internet, the underlying legal principles will be applied to the electronic environment as they were to the automobile." *Id.* at 22.

³⁹ See *supra* note 31 and accompanying text (discussing the requirements of personal and subject matter jurisdiction).

⁴⁰ See *infra* Part II.C (discussing the development and application of the CDA). This Note does not further address jurisdictional issues related to the Internet. Part II.B.2 provides a cursory understanding of some of the issues a court may address before an action involving the Internet may be heard on the merits. This Note's primary focus is on the substance of the CDA, its controversial applications, and ways in which it may be improved.

⁴¹ Kurth, *supra* note 16, at 821 (arguing that the CDA was to effectively overrule the decision in *Stratton Oakmont Inc. v. Prodigy Servs. Co.*). See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (modernizing the Telecommunications Act of 1934 to incorporate Internet transmissions). See also *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). *Stratton Oakmont*, an investment-banking firm, commenced a libel action against Prodigy, an Internet service provider, resulting from several postings on a user message board. *Id.* at *1. *Stratton Oakmont's* president claimed the firm was defamed on a message board owned and operated by Prodigy. *Id.* "Money Talk," the online bulletin board on which the allegedly defamatory statements appeared, was "the leading and most widely read financial computer bulletin board in the United States [in 1994], where members [could] post statements regarding stocks, investments, and other financial matters." *Id.* Among the statements were claims that *Stratton Oakmont* was a "cult of brokers who either lie for a living or get fired" and that *Stratton Oakmont's* President had committed criminal and fraudulent acts in the public sale of stock. *Id.*

the content of its online message board.⁴² Ultimately, the *Stratton Oakmont* court found that the Internet service provider had published the defamatory statements and reasoned that its “conscious choice, to gain the benefits of editorial control, had opened it up to a greater liability than . . . other computer networks that make no such choice.”⁴³ Some commentators interpret *Stratton Oakmont* as imposing publisher liability in defamation actions on any online service that exercises any degree of control over the content of its user forums.⁴⁴ In response to the *Stratton Oakmont* decision, Congress passed the Telecommunications Act of 1996, which was designed to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of

⁴² *Stratton Oakmont*, 1995 WL 323710, at *3. In order for *Stratton Oakmont* to prevail, it had to prove that Prodigy published the allegedly defamatory statements. *Id.* Generally, a defendant who repeats or republishes libel is subject to the same liability as if he had published the original. *Id.* (citing *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 61 (1980)). Distributors of communication, however, are considered passive conduits of defamatory information and will not be held liable for its content unless they know or have reason to know of the defamation. *Id.* Libel is “the publication of defamatory matter by written or printed words, by its embodiment in physical form, or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.” RESTATEMENT (SECOND) OF TORTS § 568 (1977). “Publication” is a legal term of art meaning that the harmful content is communicated by the defendant to a third party. EDWARD J. KIONKA, *TORTS IN A NUTSHELL* 442 (4th ed. 2005). Four years after *Stratton Oakmont* was decided, the company’s chairman and president both pleaded guilty to ten counts of money laundering and securities fraud. Edward Wyatt, *Stratton Oakmont Executives Admit Stock Manipulation*, N.Y. TIMES, Sept. 24, 1999, available at <http://query.nytimes.com/gst/fullpage.html?res=9C06E6DC123FF937A1575AC0A96F958260> (last visited Aug. 1, 2009). The two men had participated in a seven-year scheme manipulating the stocks of thirty-four companies and defrauding investors of millions of dollars. *Id.*

⁴³ 1995 WL 323710, at *5. The New York Supreme Court found that Prodigy had held itself out as controlling the content of its message boards by utilizing an automated filtering system and by implementing guidelines for users and Board Leaders to follow. *Id.* at *4. The court noted that Prodigy’s system “may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what Prodigy wants, but for the legal liability that attaches to such censorship.” *Id.* at *5.

⁴⁴ See generally Douglas B. Luftman, Note, *Defamation Liability for On-line Services: The Sky is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1071 (1997) (describing the post-*Stratton Oakmont* sentiment as a “‘the sky is falling’ reaction” that would have amused Chicken Little). Luftman argues that if online services listen to “the sky is falling” advice and relinquish editorial control of their user forums, it will result in a self-fulfilling prophecy of stagnation from Internet users’ dissatisfaction with chaotic interactive environments. *Id.* Also, Representative Cox stated that the New York court’s ruling had sent a message to interactive computer services that they would be held liable for defamatory postings if they exercised control over the content posted by third party users. See 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte).

new telecommunications technologies.”⁴⁵ The CDA is a section within the Telecommunications Act of 1996 that supports development of the Internet, encourages a free market for the Internet, and promotes the control of offensive content by interactive computer services.⁴⁶

Prior to the enactment of the CDA, Congress considered two similar communications bills—the Exon-Coats bill in the Senate and the Cox-Wyden bill in the House of Representatives.⁴⁷ The Exon-Coats bill won

⁴⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). In an attempt to modernize the outdated Telecommunications Act of 1934, the updated version:

[F]undamentally restructures local telephone markets, ending the monopolies that states historically granted to local exchange carriers and subjecting incumbent local exchange carriers to a host of duties intended to facilitate market entry, including the obligation to share their networks with competitors

. . . .
Specifically, telecommunications carriers have the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; in addition, such carriers are not to install network features, functions, or capabilities that do not comply with guidelines and standards established in various sections of the Act regarding access by persons with disabilities and coordination for interconnectivity.

74 AM. JUR. 2d *Telecommunications* § 16, 309-10 (2001).

⁴⁶ See 47 U.S.C. § 230 (2006). Congress listed several policy reasons within the statute for the inclusion of the CDA:

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Id. § 230(b)(1)–(5). The CDA originally regulated the dissemination of pornography on the Internet and protected online services that blocked offensive content. See *infra* note 55 (discussing *Reno v. ACLU*, 521 U.S. 844 (1997), the case that invalidated the CDA's provisions related to pornography dissemination).

⁴⁷ Kurth, *supra* note 16, at 821; *infra* notes 47–51 and accompanying text (discussing the Exon-Coats and Cox-Wyden bills). Senator James Exon became a champion for children against the dangers of Internet predators and pornography in 1994 after watching a *Dateline* special about Internet pedophiles. Kurth, *supra* note 16, at 821. In addition to the *Dateline* special, the infamous Rimm Study of Internet pornography suggested that eighty-three percent of the images available on the Internet were pornographic. Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 53 (2006). The phenomenon piqued

the Senate's approval in June 1995 despite strong opposition from those who wished to abstain from Internet regulation and those who believed the proposed amendment was riddled with escape hatches for pornographers.⁴⁸

national interest when *Time* magazine ran a cover story about the study. *Id.* at 54. Not everyone believed, however, that the world's largest red light district was only a click away, as several professors criticized the study claiming that the methodology and procedure were flawed and that the study was conducted in an ethically questionable manner. *Id.* at 56. See also Lisa Sigel & Geoffrey Sauer, *Critique of Rimm Article on Online Pornography*, <http://sloan.ucr.edu/cyberporn/sigel.sauer.critique.htm> (last visited Aug. 24, 2009) (criticizing many of the research techniques employed in the Rimm study). On July 26, 1994, Senator Exon proposed a communications decency amendment intended to "help assure that the information superhighway does not turn into a red light district . . . [and to] protect children from being exposed to obscene, lewd, or indecent messages." 140 CONG. REC. 18046 (1994) (statement of Sen. Exon). Senator Exon explained that the amendment was also designed to modernize the Telecommunications Act of 1934, noting that the Act's provisions "were couched in the context of telephone technology [and] . . . must be updated for the digital world of the future." *Id.* In addition to shielding children from pornographic images, the amendment was to prevent online stalking and other misuse of the Internet. *Id.* The Exon-Coats bill would extend criminal penalties for indecency and obscenity-based violations, which had previously applied only to telephone services, and would place regulatory control in the hands of the Federal Communications Commission ("FCC"). Chang, *supra* note 20, at 989. Specifically, the amendment would replace references to "telephone" with the phrase "telecommunications device" and increase penalties for violations to one hundred thousand dollars and two years imprisonment. 140 CONG. REC. 18045 (1994) (statement of Sen. Exon) (containing the revisions proposed by Senator Exon).

⁴⁸ Cannon, *supra* note 47, at 66. On April 7, 1995, Senator Leahy proposed an alternative bill that called for a study to be conducted by the Department of Justice and the Department of Commerce. See S. 714, 104th Cong. (1995). Upon introduction, Senator Leahy noted:

Many of us are, thus, justifiably concerned about the accessibility of obscene and indecent materials on-line and the ability of parents to monitor and control the materials to which their children are exposed. But government regulation of the content of all computer and telephone communications, even private communications, in violation of the First Amendment is not the answer—it is merely a knee-jerk response.

CTR. FOR DEMOCRACY & TECH., LEAHY STATEMENT ON INTRODUCTION OF S.714, http://www.cdt.org/speech/cda/950407s714_leahy_statement.html (last visited Aug. 24, 2009). On June 7, 1995, Senator Grassley introduced a bill that censored the Internet and provided no defenses for violators. See S. 892, 104th Cong. (1995). The Grassley bill would create two distinct criminal offenses. 141 CONG. REC. S7922 (daily ed. June 7, 1995) (statement of Sen. Grassley). The first would have made it a crime to "knowingly or recklessly transmit indecent pornography to minors." *Id.* The second would have been applicable to online services that allowed users to post to bulletin boards and would have made it unlawful to "willfully permit an [adult] to transmit indecent pornography to a minor." *Id.* When Senator Grassley introduced the bill, he noted that "[w]ith the rise of global, international computer networks . . . Congress has a more extensive role to play in protecting children. [This] initiative responds to this changed environment by 'filling in the gaps' created by new technology." *Id.*

Protecting children from accessing sexually explicit material on the Internet was one of the motivating factors behind the Cox-Wyden bill in the House, but the bill was also proposed in opposition to the regulatory scheme created by the Senate's Exon-Coats bill and the *Stratton Oakmont* decision.⁴⁹ The Cox-Wyden bill would have overruled *Stratton Oakmont* and protected "interactive computer services" against liability resulting from third-party Internet content.⁵⁰ Despite the rejection, the Cox-Wyden bill was included as Section 230 of the CDA; however, one

⁴⁹ Chang, *supra* note 20, at 988-91 (listing the motivations behind the Cox-Wyden bill). Specifically, members of the House were aware of the public's negative response to the recently passed Senate bill and believed it might place unconstitutional restrictions on speech. *Id.* at 989-90. Representative Cox argued that "[t]he Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut." 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). See Michelle V. Rafter, *On-line Protestors Rally Against Decency Act*, ST. LOUIS POST-DISPATCH, Dec. 20, 1995, at 7C, available at 1995 WLNR 737201. "Close to 9,000 people had notified the lobby group that they had contacted their congressional representatives to protest Internet censorship, and new email messages were rolling in at the rate of a thousand every 10 minutes." *Id.* See also *supra* note 43 (detailing the New York trial court's approach in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)).

⁵⁰ Kurth, *supra* note 16, at 825 (arguing that in overruling *Stratton Oakmont*, Congress intended to promote self-regulation on the Internet). "Interactive computer service" is defined within the text of the CDA as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2) (2006). At the heart of the provision was the notion that those interactive computer services that made good-faith efforts to screen their content should not be liable if a piece of offensive information evades the filters. Kurth, *supra* note 16, at 824. The House bill forwent assigning regulatory control to the FCC in favor of utilizing a system that would encourage interactive computer services and individuals to screen potentially harmful content. Chang, *supra* note 20, at 990 (discussing the House's view that the inclusion of the FCC would be less effective and efficient than allowing self-regulation on the Internet). Representative Cox stated that "[i]f we regulate the Internet at the FCC, that will freeze or at least slow down technology. It will threaten the future of the Internet. That is why it is so important that we not have a Federal computer commission do that." 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The House passed the Cox-Wyden bill by a majority vote of 402-04 in what appeared to be a landslide victory for those who expressed anti-regulatory sentiment regarding the Internet. CTR. FOR DEMOCRACY & TECH., POLICY POST, (Aug. 4, 1995), available at <http://www.cdt.org/publications/pp230804.html> (last visited Aug. 24, 2009). The "Policy Post" newsletter claimed that the Cox-Wyden bill:

[prohibited] the FCC from imposing content regulations on the Internet or other interactive media[,] [removed] disincentives for online service providers to exercise editorial control over their networks and to provide blocking and screening technologies to their users[,] [and sought] to create a uniform national policy prohibiting content regulations in interactive media.

Id.

commentator describes its inclusion as a hollow victory because it has no effect on the provisions in the CDA that came from the Exon-Coats bill.⁵¹ Specifically, Section 230(c) contains a Good Samaritan provision that is particularly important for the purposes of this Note.⁵² A plain reading of the Good Samaritan provision suggests that all claims involving publisher liability resulting from third-party user postings are barred, but Congress failed to define the scope of immunity and the phrase “publisher or speaker.”⁵³ Further arguments exist as to whether

⁵¹ Cannon, *supra* note 47, at 68. Cannon called the Cox-Wyden Amendment “far from a victory,” noting that the amendment “specifically and curiously stated that ‘nothing in this section shall be construed to impair the enforcement of section 223 of’ Title 47, the very statute that [the Exon-Coats bill] sought to amend. As a result, the House and Senate amendments were described as fitting together ‘like a hand in a glove.’” *Id.* (quoting 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995)).

⁵² See 47 U.S.C. § 230(c) (2006). Section 230(c)’s grant of immunity directly conflicts with the expansive liability contained in Section 3604(c) of the FHA. See *id.* The provision reads:

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability:

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Id. The statute defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* § 230(f)(3). See also *supra* note 50 (defining “interactive computer service”). See generally *infra* Parts III-IV (discussing the CDA’s conflict with the FHA and proposing a revision to the text of Section 230(c)(1)).

⁵³ Chang, *supra* note 20, at 984 (stating that the Good Samaritan provision is unclear as to how “publisher” should be defined); 47 U.S.C. § 230(c). At common law, whether a person was a “publisher” for purposes of imposing defamation liability hinged on the “extent to which he participates with an author . . . of the defamatory statement in its publication.” PROSSER AND KEETON ON TORTS, § 113 (5th ed. 1984). Actors who are more intimately involved in the process may be held liable “because they have the opportunity to know the content of the material being published.” *Id.* §113. In contrast, “one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or had reason to know of its defamatory character.” RESTATEMENT (SECOND) OF TORTS § 581 (1977). The ordinary meaning of publisher is “[o]ne who publishes or makes something public; one who declares, announces or proclaims publicly . . . [o]ne who puts

Congress intended the Good Samaritan provision to apply beyond defamation cases, and, if so, whether the list of exceptions is exhaustive.⁵⁴ Generally, the courts have interpreted the Good Samaritan

anything into circulation.” OXFORD ENGLISH DICTIONARY 785–86 (2d ed. 1989); *cf.* *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124 (E.D. Va. 1997). The court found that “a publisher is not merely one who intentionally communicates defamatory information. Instead, the law treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control.” *Zeran*, 958 F. Supp. at 1133.

⁵⁴ Section 230(e) provides several exceptions where the Good Samaritan provision does not apply:

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

47 U.S.C. § 230(e). *See Chang, supra* note 20, at 991. “[T]he House also recognized that the application of traditional common law defamation principles in the context of the Internet might serve as an obstacle to harnessing the cooperation of the private sector.” *Id.* *But see Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, No. CV 03-09386PA(RZX), 2004 WL 3799488 (C.D. Cal. Sept. 30, 2004), *rev’d*, 521 F.3d 1157 (9th Cir. 2008). The court relied on the canon of statutory construction *expressio unius est exclusio alterius*, which means “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Id.* at *3. According to Sutherland:

As the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions. The maxim does not apply to every statutory listing or grouping. It has force only when the items expressed are members of an associated group or series, justifying the inference that the items not mentioned were excluded by deliberate choice.

2A SUTHERLAND STATUTORY CONSTRUCTION § 47:23, 398–99, 401, 404–6, 412 (7th ed. 2007) (internal citations omitted).

provision as providing near-absolute immunity for third-party FHA violations to interactive computer services.⁵⁵

Section 230's first major challenge came in *Zeran v. America Online, Inc.*⁵⁶ In this seminal case, the Fourth Circuit Court of Appeals found that Section 230 provided immunity to an interactive computer service

⁵⁵ *Infra* notes 56–71 and accompanying text (discussing several cases where courts have found interactive computer services to be immune from publisher liability through the CDA for third-party tort and statutory infractions). Section 223, a series of provisions originally proposed in the Exon-Coats bill, was the first portion of the CDA to be interpreted by the Supreme Court of the United States. See *Reno v. ACLU*, 521 U.S. 844 (1997). In *Reno*, immediately after President Bill Clinton signed the CDA, twenty plaintiffs challenged the constitutionality of CDA provisions designed to protect children from “indecent communications.” *Id.* at 861. In a facial challenge to the new statute’s constitutionality, the Court unanimously held that two provisions of Section 223 were unconstitutionally vague and overbroad, finding that:

[G]iven the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA’s burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.

Id. at 874. Congress addressed the legislation’s flaws in its introduction of the Child Online Protection Act, but a similar constitutional challenge was brought within less than twenty-four hours of President Bill Clinton’s signing of the bill. Sheryl Rakestraw, *Current Event*, 10 AM. U. J. GENDER SOC. POL’Y & L. 521, 521 n.3 (2002).

⁵⁶ 958 F. Supp. 1124 (E.D. Va. 1997), *aff’d*, 129 F.3d 327 (4th Cir. 1997). Shortly after the Oklahoma City bombing in 1995, an anonymous America Online (AOL) member defamed Zeran on an AOL message board. *Id.* at 1127. The poster listed Ken Zeran’s name and telephone number on a phony advertisement for shirts that carried messages such as “Visit Oklahoma . . . It’s a BLAST!!!,” “Putting the kids to bed . . . Oklahoma 1995,” and “McVeigh for President 1996.” *Id.* Zeran received a “flood of abusive telephone calls,” estimating about one every two minutes. *Id.* at 1128. Similar false advertisements appeared on the message boards even after Zeran notified AOL, and the phone calls did not subside until more than three weeks later. *Id.* Zeran brought a negligence action against AOL for its failure to remove the allegedly defamatory postings from its message boards, but AOL argued that Zeran’s action was preempted by the Good Samaritan provision. *Id.* at 1129. Zeran’s theory was derived from *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). *Id.* at 1128–29. See *Cubby*, 776 F. Supp. at 141 (holding that information distributors cannot be held liable unless they knew or had reason to know that the information was defamatory). The District Court for the Eastern District of Virginia also considered the three instances under which preemption is proper: where Congress expresses an intent to displace state law, where Congress implies such an intent, or where state law conflicts with federal law. *Zeran*, 958 F. Supp. at 1129 n.9 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990)). The court reasoned that Zeran had miscategorized distributor liability as distinct and separate from publisher liability when it was in fact “a species or type of liability for publishing defamatory material.” *Id.* at 1133. The court agreed with AOL, holding that “although the CDA does not preempt all state law causes of action concerning interactive computer services, it does preempt Zeran’s claim. This is so because his ‘negligence’ cause of action conflicts with both the express language and the purposes of the CDA.” *Id.* at 1135.

from a state law claim that treated the interactive computer service as a publisher.⁵⁷

In June 2003, the Ninth Circuit Court of Appeals considered the meaning of “provided” for the purposes of Section 230(c)(1).⁵⁸ In *Batzel v. Smith*, the Ninth Circuit reasoned that “provided” referred only to “third-party information provided for use on the Internet or another interactive computer service” and remanded the case to determine if the information at issue had been “provided” under Section 230(c)(1).⁵⁹ In

⁵⁷ *Zeran*, 129 F.3d at 330-31. The Fourth Circuit found the congressional intent “not difficult to discern.” *Id.* The court specifically noted that “[t]he imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.” *Id.* The plaintiff continued to rely on a theory of distributor liability, but the Fourth Circuit affirmed the decision of the trial court reasoning that computer-based companies may be liable each time they are notified that a potentially defamatory statement is posted on their message boards. *Id.* at 333. The court reasoned that:

Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.

Id.

⁵⁸ See *Batzel v. Smith*, 333 F.3d 1018, 1019 (9th Cir. 2003). In *Batzel*, a handyman who performed housework for an attorney sent an email to the Museum Security Network (“MSN”) alleging that the attorney said she was a descendant of a high ranking Nazi official and suggesting that the artwork in the attorney’s home may have been stolen from Jewish people during World War II. *Id.* at 1020-21. The sole operator of MSN sent the message to the MSN subscribers via listserv (an automated emailing list). *Id.* at 1021. The listserv mailings “[were] read by hundreds of museum security officials, insurance investigators, and law enforcement personnel around the world, who use the information in the [MSN] posting to track down stolen art.” *Id.* at 1022. The attorney filed a defamation action against several parties, including MSN, claiming that the handyman fabricated the allegations because she refused to show his screenplays to her Hollywood contacts and that she had lost several prominent clients because of the MSN listserv mailing. *Id.* The trial court denied MSN’s motion to strike under California’s anti-SLAPP (Strategic Lawsuits Against Public Participation) statute (CAL. CIV. PROC. CODE § 425.16) and his motion to dismiss for lack of personal jurisdiction. *Id.* at 1023.

⁵⁹ 333 F.3d at 1033. The handyman claimed that he never thought his e-mail would be posted on an international message board and that he never would have sent the e-mail had he known that it would be used in such a manner. *Id.* at 1032. The Ninth Circuit provided the following example to illustrate its rationale:

So, if, for example, an individual who happens to operate a website receives a defamatory “snail mail” letter from an old friend, the website operator cannot be said to have been “provided” the information in his capacity as a website service. Section 230(c)(1)

August 2003, the Ninth Circuit Court of Appeals found that Section 230 provided immunity for an online match-making service when a user posted a false profile depicting a celebrity.⁶⁰ In *Carafano v. Metrosplash.com, Inc.*, the Ninth Circuit narrowed its interpretation of “information content provider” and concluded the interactive computer service in question did not play a pertinent part in “creating, developing, or ‘transforming’ the relevant information.”⁶¹

In the same year, a U.S. District Court in Virginia expanded the scope of Section 230(c) to bar a claim brought under Title II of the Civil Rights Act of 1964.⁶² Although the plaintiff in *Noah v. AOL Time Warner*,

supplies immunity for only individuals or entities acting as “provider[s]” or “user[s]” of an “interactive computer service,” and therefore does not apply when it is not “provided” to such persons in their roles as providers or users.

Id. at 1033 (internal citation omitted). Furthermore, the Ninth Circuit expressly rejected the interactive computer service’s argument that the handyman’s confusion was irrelevant because the handyman was the author of the email. *Id.* Furthermore, on remand, the issue of whether the handyman was a “provider” was not resolved; North Carolina’s res judicata doctrine entitled the interactive computer service to summary judgment because the case was previously dismissed by a North Carolina trial court for failure to prosecute. *Id.*

⁶⁰ *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003). Christine Carafano was a popular actress, starring in television shows, such as “Star Trek: Deep Space Nine” and “General Hospital.” *Id.* at 1121. She began receiving threatening and sexually explicit phone calls in response to a Matchmaker.com (owned and operated by Metrosplash) personal profile designed by an unknown person in Berlin, Germany. *Id.* Carafano filed a suit against Metrosplash alleging defamation, negligence, invasion of privacy, and misappropriation of the right of publicity. *Id.* at 1122.

⁶¹ *Id.* at 1125. Carafano argued that Metrosplash should be considered an information content provider because it asked a series of questions and provided a drop down menu for “pre-prepared responses,” but the court found that even if Metrosplash could be considered an information content provider, Section 230(c) would still bar the claim “unless Matchmaker created or developed the particular information at issue.” *Id.* The court reasoned that Carafano’s contact information was “transmitted unaltered to profile viewers” and that the sexually provocative information in the essay section did not bare “more than a tenuous relationship to the actual questions asked.” *Id.* See also *supra* note 52 (providing the CDA’s definition of “interactive content provider”); *supra* note 50 (providing the CDA’s definition of “interactive computer service”).

⁶² *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 537 (E.D. Va. 2003). One provision in the Civil Rights Act of 1964 prohibits discrimination and segregation in places of public accommodation. 42 U.S.C. § 2000a (2006). The statute states in part:

(a) Equal access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the

Inc. argued that the statute treated the interactive computer service as “the owner of a place of public accommodation,” the court found that the plaintiff was attempting to treat the interactive computer service as a publisher in violation of Section 230(c).⁶³

Similarly, in 2006, a U.S. District Court in Pennsylvania broadened the Good Samaritan provision’s grant of immunity to include protection

premises; gasoline stations; places of exhibition or entertainment; other covered establishments.

Id. § 2000a(a)–(b). Noah, a Muslim, participated in faith-based chat rooms and on several occasions was barraged with vulgar, religiously discriminatory remarks written by other AOL members. *Noah*, 261 F. Supp. 2d at 535. At the time of the action, AOL had thirty million subscribers and provided a variety of online services, including real time chat rooms where subscribers could chat via instant text messages. *Id.* at 534. For example, Noah alleged that “[o]n July 18, 1999 ‘SARGON I’ wrote ‘Qura’n lies about everything—a Satan made verses of darkness and destruction!’, ‘Mohammed was no shit, only a killer, thief, a liar and a adulterer!’, and ‘BYE STUPID MUSLIMS . . . ALL GO TO HELL.’” *Id.* at 535. Even though Noah reported every incident to AOL, he claimed that AOL did nothing to eliminate the harassment in the Muslim chat rooms. *Id.* Noah brought a class action lawsuits against AOL under the Civil Rights Act of 1964 resulting from AOL’s failure to enforce the community guidelines within its member agreement. *Id.* The member agreement was a “legal document that details [a member’s] rights and obligations as an AOL member.” *Id.* The pertinent community guidelines provided:

You will be considered in violation of the Terms of Service if you (or others using your account) do any of the following: . . . [h]arass, threaten, embarrass, or do anything else to another member that is unwanted. This means: . . . don’t attack their race, heritage, etc. . . . Transmit or facilitate distribution of content that is harmful, abusive, racially or ethnically offensive, vulgar, sexually explicit, or in a reasonable person’s view, objectionable Disrupt the flow of chat in chat rooms with vulgar language, abusiveness

Id. at 536. The member agreement stated that AOL could take action, including termination of accounts, against those who violated the terms of service. *Id.*

⁶³ 261 F. Supp. 2d at 538. The district court reasoned that “[a]n examination of the injury claimed by plaintiff and the remedy he seeks clearly indicates that his Title II claim seeks to ‘place’ AOL ‘in a publisher’s role.’” *Id.* Noah also contended that Section 230(c) did not apply to actions brought under federal civil rights statutes, but the court found that Section 230(c)’s “expansive language grants a broad immunity limited only by specific statutory exclusions, none of which is applicable here.” *Id.* at 539. The court added:

Nor can it be plausibly argued that § 230 is limited to immunity from state law claims for negligence or defamation. Such a limitation is flatly contradicted by § 230’s exclusion of some specific federal claims. Those exclusions would be superfluous were § 230 immunity applicable only to certain state claims. Moreover, the exclusion of federal *criminal* claims, but not federal civil rights claims, clearly indicates, under the canon of *expressio unius est exclusio alterius*, that Congress did not intend to place federal civil rights claims outside the scope of § 230 immunity.

Id. (emphasis added).

from invasion of privacy and negligence claims.⁶⁴ The *Parker* court found that Section 230 barred the plaintiff's claims because the interactive computer service was not an information content provider as defined by the CDA.⁶⁵ Nevertheless, nearly all courts that have addressed the application of the Good Samaritan provision have followed *Zeran's* holding that the CDA provides immunity to interactive computer services from claims that treat the computer service as a publisher of third-party information.⁶⁶

⁶⁴ *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500 (E.D. Pa. 2006). Roy Parker was an author who claimed that Google should be held liable for defamation and invasion of privacy because it archived false statements about him posted by Google group users, provided a search function that returned a list of websites containing his name, and continued to cache such websites after being notified that they were defamatory. *Id.* Google operates a popular website that allows users to search the World Wide Web for websites, images, and documents. *Id.* at 496; see Google, <http://www.google.com> (last visited Oct. 24, 2009). In its intricate search process, Google makes a copy of each website and stores it in a storage tool called a cache and provides a link to the cache when listing search results for its users. *Parker*, 422 F. Supp. 2d at 496. Google also operates a multitude of user bulletin boards. See Google Groups, <http://groups.google.com> (last visited Oct. 24, 2009). Specifically, Parker claimed that "the act of Google users putting in a search query of his name [led] Google to produce a list of websites in which his name [appeared], thus creating what he [called] 'an unauthorized biography . . . that [was] an invasion of his right to privacy.'" *Parker*, 422 F. Supp. 2d at 500 (internal citation omitted).

⁶⁵ 422 F. Supp. 2d at 500. The court refrained from examining the elements of Parker's claim and noted that "each claim revolves around the tortious acts of a third party for which Parker holds Google accountable by virtue of its archived USENET system, its website search tool, and its caching system." *Id.* Relying on *Carafano*, the court examined the intent behind Section § 230, concluding that "Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party." *Id.* As a result, Internet publishers are treated differently from corresponding publishers in print, television and radio." *Id.* at 501 (citation omitted). The court reasoned that Google was not an information content provider because "[i]n each instance raised by Plaintiff's tort claims, Google either archived, cached, or simply provided access to content that was created by a third party." *Id.*

⁶⁶ See *Green v. Am. Online, Inc.*, 318 F.3d 465, 470-71 (3d Cir. 2003) (finding tort claims subject to AOL's immunity under 47 U.S.C. § 230); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000) (finding that Section 230 promoted freedom of speech in the "'new and burgeoning Internet medium' by eliminating the 'threat [of] tort-based lawsuits against interactive services for injury caused by 'the communications of others.'" (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (holding the CDA prevents causes of action that hold interactive service providers liable for information generated by third parties); *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001) (reasoning that Congress enacted Section 230 to protect information distributors and publishers from liability for third party defamation); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1013 (Fla. 2001) (stating that the *Zeran* court's analysis of the congressional purpose behind Section 230 was proper).

In contrast, a few courts have rejected the rationale used in *Zeran*.⁶⁷ Specifically, the Seventh Circuit Court of Appeals questioned *Zeran*'s validity after a trial court held the Good Samaritan provision barred a plaintiff's Electronic Communications Privacy Act claim.⁶⁸ The Seventh

⁶⁷ See *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, *7-*8 (N.D. Tex. Apr. 19, 2004). MCW filed a complaint against Badbusinessbureau for trademark infringement and violations of the Lanham Act. *Id.* at *1. Badbusinessbureau sought a Rule 12(b)(6) dismissal, citing Section 230(c) of the CDA for support. *Id.* at *7. The Texas court held that "Section 230(c) immunity is not so broad as to extend to an interactive computer service that goes beyond the traditional publisher's role and takes an active role in creating or developing the content at issue." *Id.* at *8. See also *Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir. 2003) (questioning the rationale in *Zeran* because the application of the Good Samaritan provision is inconsistent with its title); cf. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that an interactive service provider receives full immunity under Section 230(c) so long as a third party provides the content).

⁶⁸ *GTE Corp.*, 347 F.3d at 659-70 (suggesting that the text of Section 230 is illogical when read in conjunction with its title). The Electronic Communications Privacy Act states in part that:

(1) Except as otherwise specifically provided in this chapter, any person who intentionally—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication or disseminates by electronic means any advertisement of—

(i) any electronic, mechanical, or other device knowing the content of the advertisement and knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire, oral, or electronic communications, knowing the content of the advertisement and knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2512(1) (2006). In *GTE Corp.*, a person installed secret cameras in college locker rooms, bathrooms, and showers, and several college athletes brought a claim against GTE

Circuit contested the policy implications of Section 230's grant of immunity to interactive computer services regardless of whether they made an effort to screen offensive content.⁶⁹ The Seventh Circuit noted that "a statute's caption must yield to its text when the two conflict" and suggested readings that allowed for liability in some situations.⁷⁰

While district and circuit courts had interpreted the Good Samaritan provision as it related to tort-based actions, the Civil Rights Act of 1964, and the Electronic Communications Privacy Act, the judiciary would soon be faced with yet another collision on the information superhighway—a conflict between the protection provided by the CDA's Good Samaritan provision and the expansive liability imposed by the advertising provision of the FHA.⁷¹

when they discovered the footage on several websites hosted by GTE. 347 F.3d at 656–57. GTE claimed that Section 230(c) barred the students' claim and sought a Rule 12(b)(6) dismissal. *Id.* at 657.

⁶⁹ *GTE Corp.*, 347 F.3d at 657 (holding that an interactive service provider was not liable to the college athletes for the display of voyeur photos taken and posted by a user on its website). The Seventh Circuit addressed *Zeran's* validity in dicta, reasoning that "if [*Zeran's*] reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law?" *Id.* The court further questioned *Zeran*, noting that:

As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c)—which is, recall, part of the "Communications Decency Act"—bears the title "Protection for 'Good Samaritan' blocking and screening of offensive material", hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services. Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?

Id.

⁷⁰ *Id.* (citing *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528–29 (1947)). The Seventh Circuit suggested reading Section 230(c)(1) as a definitional clause as opposed to interpreting it as immunity from liability:

On this reading, an entity would remain a "provider or user"—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a "publisher or speaker" and lose the benefit of § 230(c)(2) if it created the objectionable information. The difference between this reading and the district court's is that § 230(c)(2) never requires ISPs to filter offensive content, and thus § 230(e)(3) would not preempt state laws or common-law doctrines that induce or require ISPs to protect the interests of third parties, such as the spied-on plaintiffs, for such laws would not be "inconsistent with" this understanding of § 230(c)(1).

Id.

⁷¹ See *infra* Part I.D (discussing the conflict between the FHA and the CDA).

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D. *At Odds: When the Good Samaritan Provision and the Fair Housing Act Collide*

In *Fair Housing Council of San Fernando v. Roommate.com*, the Ninth Circuit was the first to address the conflict between the CDA and the FHA.⁷² In *Roommate*, the trial court found that the CDA did not provide immunity to the corporate operator of an online roommate-matching website, an interactive computer service, for the FHA advertising violations on its website and distinguished between content that was created solely by third parties and content facilitated by the interactive computer service.⁷³ In affirming the trial court's ruling, the Ninth Circuit

⁷² See No. CV 03-09386PA(RZX), 2004 WL 3799488 (C.D. Cal. Sept. 30, 2004), *aff'd in part, vacated in part, rev'd in part* by 521 F.3d 1157 (9th Cir. 2008) (holding an interactive computer service liable for the defamatory content it helped create, but finding immunity for the defamatory advertisements created entirely by third parties).

⁷³ 521 F.3d at 1175. The defendant operated Roommates.com, a website designed to match people who were renting rooms with people who were searching for roommates. *Id.* at 1161. The website made a profit through advertising and premium subscriptions. *Id.* It was viewed about a million times each day and displayed approximately one hundred and fifty thousand postings. *Id.* In order to become a member of the website, potential Roommates.com subscribers were required to fill out questionnaires disclosing basic contact information as well as gender, sexual orientation, and family status and preferences related to those categories. *Id.* at 1173. This information then became the user's profile, along with an "Additional Comments" section where users could post their own information as they saw fit. *Id.* The plaintiff alleged that Roommate had violated the FHA in three ways: (1) requiring potential subscribers to fill out questionnaires listing discriminatory housing preferences, (2) posting the answers to the questionnaires on user profiles and using it as criteria in its search process, and (3) displaying discriminatory preferences in the "Additional Comments" section on the user profile. *Id.* at 1164-65, 1173. The Ninth Circuit found that the Good Samaritan provision did not provide immunity for Roommate regarding its required questionnaire and the inclusion thereof in user profile web pages, but that the "Additional Comments" section was "precisely the kind of situation for which section 230 was designed to provide immunity." *Id.* at 1165, 1168, 1174. The Ninth Circuit held that Roommate could be held liable for violations committed as a result of the answers on the questionnaire. The court noted that:

Roommate created the questions and choice of answers, and designed its website registration process around them. Therefore, Roommate is undoubtedly the 'information content provider' as to the questions and can claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services.

Id. at 1164. See also *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003) (noting that the party who displays content on a website may be liable even if the content was provided by a third party); *cf.* *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that a website operator was immune under the Good Samaritan provision even when it provided a questionnaire with pre-populated answers); see *supra* notes 60-61 and accompanying text (discussing the *Carafano* decision). In *Roommate*, the Ninth Circuit also considered the development and display of subscribers' discriminatory questionnaire answers, noting that the information was meant to help users decide which housing opportunities were most compatible with their own preferences and to steer searchers in

extensively clarified its decisions in *Batzel* and *Carafano*, which appeared to be contradictory to its holding in *Roommate* that the interactive computer service was liable for FHA violations resulting from questionnaires created by the service, but not for violations contained in free-form entries created entirely by third parties.⁷⁴

In contrast, the Seventh Circuit concluded in a similar case that the Good Samaritan provision immunized an online listing service riddled with user-generated postings that violated the advertising provision of the FHA.⁷⁵ In *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist*, the plaintiffs argued that an online listing service should be held accountable for FHA violations committed by those who posted

the direction of the best matches based on their criteria. 521 F.3d at 1165. The Ninth Circuit concluded, however, that *Roommate* crossed from mere transmitter to developer of the content by providing pre-populated answers to the questionnaire. *Id.* at 1166. Therefore, the court held that "a website helps to develop unlawful content, and thus falls within the exception to Section 230, if it contributes materially to the alleged illegality of the conduct." *Id.* at 1168.

⁷⁴ *Roommate*, 521 F.3d at 1170-72; see notes 58-63 and accompanying text (providing an in-depth discussion of the decisions in *Batzel* and *Carafano*). The Ninth Circuit noted that part of *Batzel's* holding was that an editor does not forfeit Section 230 immunity when making spelling, grammar, and length-based corrections so long as the editor's changes do not contribute to the defamatory content of the message. *Id.* at 1170. The court further explained that under *Batzel*, an editor can become a developer of content, and therefore precluded from Section 230 immunity, when he publishes material that he believes was not intended for him to post online. *Id.* at 1171. The Ninth Circuit stressed that its holding coincided with *Carafano's* rationale that "classif[ying] user characteristics . . . does not transform [it] into a 'developer' of the 'underlying misinformation.'" *Id.* at 1172 (citing *Carafano*, 339 F.3d at 1124). In *Carafano*, the website provided neutral tools to help create romantic matches that did not violate any statute, whereas *Roommates* forced subscribers to disclose characteristics and used the disclosures to match roommates in violation of the FHA. *Id.*

⁷⁵ *Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008). Plaintiffs presented a laundry list of discriminatory postings on Craigslist's Chicago's housing classifieds sections, including postings such as "NO MINORITIES" or "Only Muslims" by users who clearly did not meet the "Mrs. Murphy exemption." *Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 641 F. Supp. 2d at 685-86 (N.D. Ill. 2006), *aff'd*, *Craigslist*, 519 F.3d 666. See *supra* note 23 (explaining the "Mrs. Murphy exemption"). Specifically, the civil rights committee alleged that Craigslist "publishes housing advertisements on its website that indicate a preference, limitation, or discrimination, or an intention to make a preference, limitation, or discrimination, on the basis of race, color, national origin, sex, religion, and familial status." *Craigslist*, 641 F. Supp. 2d at 685. Craigslist.com lists classifieds for more than five hundred and fifty cities in over fifty countries and is a self-proclaimed repository of listings for "[j]obs, housing, goods, services, romance, local activities, advice—just about anything, really." Craigslist FAQ, <http://www.craigslist.org/about/factsheet> (last visited Aug. 1, 2009). For Craigslist's current Chicago housing classifieds, see <http://Chicago.craigslist.org/hhh> (last visited Aug. 1, 2009).

their housing listings on the listing service's website.⁷⁶ At trial, the district court embarked on its own analysis of Section 230's statutory construction, rejecting *Zeran* in favor of its own notion that Section 230(c)(1) "bars those causes of action that would require treating an [interactive computer service] as a publisher of third party content."⁷⁷ On appeal, the Seventh Circuit affirmed the district court's holding and asserted that "the question is not whether Congress gave any thought to the Fair Housing Act, but whether it excluded Section 3604(c) from the reach of Section 230(c)(1)" and reasoned that, under Section 230(c)(1), the plaintiff "cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."⁷⁸

⁷⁶ 461 F. Supp. 2d at 685. Specifically, the civil rights committee argued that the court should follow a Housing and Urban Development ("HUD") regulation that interpreted Section 3604(c) as applying to "[w]ritten notices and statements includ[ing] any applications, flyers, brochures, deeds, signs, banners, posters, billboards, or any documents used with respect to the sale or rental of a dwelling." *Id.* at 687 (citing 24 C.F.R. § 100.75 (2007)). Bryan Greene, HUD's Deputy Assistant Secretary for Enforcement and Programs, submitted a memorandum that stated:

Although the CDA does not state an intent to limit liability under the [FHA] or other civil rights states, some believe that Section 230 of the CDA gives Internet publishers immunity from lawsuits brought under federal and state civil rights statutes. However, HUD has concluded that the CDA does not make Web sites immune from liability under the [FHA] or from liability under state and local laws that HUD has certified as substantially equivalent to the [FHA].

Id. at 692 n.9. The court found that Greene's opinion was non-binding because Congress did not grant HUD the power to interpret the CDA. *Id.* at 692.

⁷⁷ *Id.* at 693. The district court found the *Zeran* interpretation contained overbroad language and failed to take into account the textual differences between Sections 230(c)(1) and 230(c)(2). *Id.* at 693-94. See *supra* notes 56-57 and accompanying text (discussing *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997)).

This explanation implies that Section 230(c)(1)'s immunity applies only to causes of action that seek to impose liability when an ICS acts like a professional publisher . . . [and] fails to include ICSs that do not edit, or choose what to post, but who nonetheless serve as a conduit for third-party content.

Craigslist, 641 F. Supp. 2d at 694. Under its new interpretation of Section 230(c)(1), the district court held that Craigslist was not liable for the FHA violations by virtue of the CDA because Craigslist was an interactive computer service whose website information originated "from 'another information content provider' . . . [and] to hold Craigslist liable under Section 3604(c) would be to treat Craigslist as if it were the publisher of third party content, the plain language of Section 201(c)(1) forecloses CLC's cause of action." *Id.* at 698.

⁷⁸ *Craigslist*, 519 F.3d at 671-72. In its decision, the Seventh Circuit explained that online services were a hybrid between classified pages in newspapers, which were included in the scope of Section 3604(c), and "common carriers such as telephone services, which are unaffected by [the provision]." *Id.* at 668. Furthermore, the Seventh Circuit found that Congress did not contemplate the FHA when it passed the CDA, stating that "the reason a legislature writes a general statute is to avoid any need to traipse through the United States Code and consider all potential sources of liability, one at a time." *Id.* at 671. In analyzing

Some commentators believe the magnitude of the conflict between the CDA and the FHA is so great that the Supreme Court should take an active interest in the topic.⁷⁹ While those who have commented on the CDA and the FHA do not all agree on the proper resolution, most have recognized that the judiciary's current application of the CDA has several unintended consequences.⁸⁰ Next, this Note analyzes a potential

the statutory text of the CDA, the Seventh Circuit reasoned that Congress could have used narrowly restrictive language in Section 230(c)(1) instead of "information" that the court classified as "the stock in trade of online service providers." *Id.* "[T]he actual statute has the word 'information.' That covers ads for housing, auctions of paintings that may have been stolen by Nazis, biting comments about steroids in baseball, efforts to verify the truth of politicians' promises, and everything else that third parties may post on a website." *Id.* The Seventh Circuit also addressed the plaintiff's argument that Craigslist "caused" the postings to be made, finding that "[n]othing in the service [C]raigslist offers induces anyone to post any particular listing or express a preference for discrimination." *Id.*

⁷⁹ See Klein & Doskow, *supra* note 21, at 376-78. Klein & Doskow argue that certiorari for *Roommate* would likely be granted if sought. *Id.* at 376. Nevertheless, the commentators warn that other jurisdictions may be suspicious of the Ninth Circuit's decision in *Roommate* because ninety percent of the Ninth Circuit cases heard by the Supreme Court in the 2006-2007 term were reversed. *Id.* (internal citation omitted). A circuit split is one factor the Court considers when deciding whether to grant certiorari, and the dissent in *Roommate* suggests that one may have been created. *Id.* at 377-79; see *Roommate*, 521 F.3d at 1177 (McKeown, J., dissenting); *infra* note 86 (providing the Supreme Court Rule governing grants of certiorari). One author compared *Roommate* and *Craiglist*, concluding that the Ninth Circuit's approach was improper and that the Seventh Circuit's approach better reflected the intent of Congress in drafting Section 230(c). J. Andrew Crossett, Note, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L. REV. 195, 207-08 (2008).

⁸⁰ See Shanahan, *supra* note 22, at 155 (suggesting that the FHA be added to the exceptions in Section 230(e) of the CDA); Collins, *supra* note 24, at 1495 (proposing a revision to Section 230(c) that would create an exception for FHA violations); Robert J. Aalberts, *The Communications Decency Act Trumps Fair Housing: A Collision of Public Policy?*, 36 REAL. EST. L. J. v (2007) (arguing that the conflict between the CDA and the FHA should be resolved by Congress). Other commentators believe the judiciary should be charged with harmonizing the CDA and the FHA. See Klein & Doskow, *supra* note 21, at 376-78 (suggesting the Supreme Court should resolve the conflict); Kurth, *supra* note 16, at 834-35 (arguing that the judiciary should read Section 230(c) to require a good faith effort by interactive computer services to screen offensive content before allowing immunity for FHA violations); see also *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978) (Berger, C.J., dissenting) (noting that the judiciary concerns itself with following the letter of the law and not what seems morally appropriate). One concern with the current application of the CDA is that it will nullify the effect of Section 3604(c) as more people abandon traditional print sources of information in favor of online sources. See Collins, *supra* note 24, at 1491; *infra* Part III.B.1. A second problem with the current application of the CDA is that it creates special status and an incentive for interactive computer services *not* to screen offensive content. Crossett, *supra* note 79, at 209; *infra* Part III.B.2. A third concern is that the Seventh and Ninth Circuits ignored precedent that requires both statutes in conflict to be given effect in favor of substituting Congressional silence for intent, a judicial exercise that is frowned upon in many contexts. See Chang, *supra* note 20, at 1002; *Morton v. Mancari*, 417 U.S. 535 (1974) (establishing the analysis courts should take when faced with a

circuit split, addresses the unpopular pitfalls of the CDA's current application, and weighs the strengths and weaknesses of proposed solutions to the conflict.⁸¹

III. ANALYSIS

Part III of this Note provides a detailed analysis of the conflict between the Good Samaritan provision of the CDA and the advertising provision of the FHA.⁸² Section A addresses whether a circuit split exists and opines that: (1) the Supreme Court likely would not have granted certiorari to *Roommates* or *Craigslist* if it had been petitioned and (2) that judicial action should not be used to resolve the conflict between the FHA and the CDA.⁸³ Section B explores several problems with the current application of the CDA, including assertions that it eviscerates the effect of Section 3604(c) of the FHA, encourages interactive service providers to take no action, is inconsistent with congressional intent, and leaves victims of housing discrimination with no source of relief.⁸⁴ Finally, Section C analyzes the proposed solutions to the statutory conflict, ultimately calling for a specific revision to the Good Samaritan

conflict between federal laws). See also Rosalie Berger Levinson, *Misinterpreting "Sounds of Silence": Why Courts Should Not Imply Congressional Preclusion of § 1983 Claims*, 77 *FORDHAM L. REV.* 775, 796 (2008) (arguing that Congress's inclusion of administrative or judicial remedies in a newer statute does not warrant an automatic inference that Congress intended to deny relief under an older statute); Marguerite M. Sullivan, Note, *Brown & Williamson v. FDA: Finding Congressional Intent Through Creative Statutory Interpretation – A Departure from Chevron*, 94 *NW. U. L. REV.* 273, 299 (1999) (arguing that congressional inaction does not equate with congressional policy in determining whether the Food and Drug Administration may regulate tobacco products); David S. Bogen, *Mr. Justice Miller's Clause: The Privileges or Immunities of Citizens of the United States*, 56 *DRAKE L. REV.* 1051, 1068 (2008) (arguing that it is unclear whether a state's boycott of foreign goods is consistent with federal law and asserting that "[c]ongressional silence indicates nothing"); *infra* Part III.B.3 (arguing that congressional silence should not be construed as intent to apply CDA immunity to interactive computer services in the context of FHA violations). A final issue is that immunizing interactive computer services from FHA violations may leave potential plaintiffs without relief because identifying anonymous defendants can be an arduous and costly task. Kurth, *supra* note 16, at 828; *infra* Part III.B.4. See also *Dendrite Int'l, Inc. v. John Doe No. 3*, 775 A.2d 756, 760–61 (N.J. 2001) (providing a rigorous standard for determining when an anonymous defendant's identity may be disclosed).

⁸¹ *Infra* Part III (analyzing the conflict between the FHA and the CDA).

⁸² *Infra* Part III (analyzing the conflict between the FHA and the CDA).

⁸³ *Infra* Part III.A (arguing that no viable circuit split exists between the Seventh and Ninth Circuits).

⁸⁴ *Infra* Part III.B (discussing the negative effects of the CDA's current application on victims of FHA violations, on the goals of the FHA, and on public policy).

provision of the CDA that better reflects congressional intent by limiting the provision's application.⁸⁵

A. *A Supreme Court Decision Would Not Resolve the Conflict*

In determining whether to grant certiorari, the Supreme Court considers several factors, including whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."⁸⁶ Some commentators question whether *Zeran*, *Roommate*, and *Craigslist* can co-exist and conclude that the Supreme Court would likely have granted certiorari in *Roommate* and *Craigslist* if it had been sought.⁸⁷

Nevertheless, the Ninth Circuit's holding in *Roommate* can be reconciled with *Zeran* and its progeny because *Roommate* is the only case

⁸⁵ *Infra* Part III.C (weighing the proposed solutions to the conflict between the FHA and the CDA and calling for a textual revision to the Good Samaritan provision).

⁸⁶ Klein & Duskow, *supra* note 21, at 376-78 (internal citation omitted). The Supreme Court Rule governing considerations for review on certiorari provides:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

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⁸⁷ Crossett, *supra* note 79, at 207-08 (arguing the existence of a circuit split by contrasting the rationales employed by the Seventh and Ninth circuits in *Craigslist* and *Roommate*, ultimately finding fault with the Ninth Circuit's interpretation of the CDA); Klein & Duskow, *supra* note 21, at 376-78 (expanding on the dissent's view in *Roommate* that "five Circuits (and many district courts) had interpreted Section 230 as imposing a flat ban on the imposition of liability on the basis of information provided by third parties" and speculating that certiorari would likely be granted if sought).

considering the conflict between the FHA and the CDA.⁸⁸ The *Craigslist* and *Roommate* decisions are not inconsistent because key factual differences between the cases led the Ninth Circuit to deny immunity for some of the FHA violations at issue in *Roommate*.⁸⁹ While the Ninth Circuit, in *Roommate*, found an interactive computer service liable for the display of discriminatory preferences resulting from the content of its questionnaires, the court also found the CDA provided the interactive computer service immunity with regard to free-form entries provided entirely by third parties, which was a nearly identical scenario resulting in the same legal outcome as *Craigslist*.⁹⁰

Despite the lack of conflict between the Seventh and Ninth Circuits, some commentators argue that *Roommate* presented the Supreme Court with the ideal opportunity to address the conflict between the CDA and civil rights legislation.⁹¹ Assume, *arguendo*, the Supreme Court had been given the opportunity and granted certiorari to *Roommates* or *Craigslist*.⁹²

⁸⁸ *Roommate*, 521 F.2d at 1172, n.33. Judge Kozinski, writing for the *Roommate* majority, stated:

The dissent coyly suggests that our opinion “sets us apart from” other circuits . . . carefully avoiding the phrase “intercircuit conflict.” And with good reason: No other circuit has considered a case like ours and none has a case that even arguably conflicts with our holding today. No case cited by the dissent involves active participation by the defendant in the creation or development of the allegedly unlawful content; in each, the interactive computer service provider passively relayed content generated by third parties, just as in *Stratton Oakmont*, and did not design its system around the dissemination of unlawful content.

Id. (internal citation omitted). According to Klein & Doskow, “[t]he strong public policy which had been applied uniformly from *Zeran* forward was subordinated to a policy overlooked by the drafters of § 230.” Klein & Doskow, *supra* note 21, at 377-78.

⁸⁹ Compare *supra* note 73 (discussing the facts in *Roommate*), with *supra* note 75 (recounting *Craigslist*'s facts). Klein and Doskow acknowledge the key difference between *Roommate* and *Craigslist* that “one service has, and the other lacks, the offending drop-down menus.” Klein & Doskow, *supra* note 21, at 377. Klein and Doskow focused, however, on the larger issue of the interpretation of Section 230 and the competing policy interests of the CDA and FHA, claiming that “[i]n piercing the immunity, the policy against advertising expressing discriminatory preferences was elevated above the immunity policy expressed in § 230.” *Id.*

⁹⁰ *Supra* notes 72-74 and accompanying text and notes 75-78 and accompanying text (discussing the reasoning of *Roommate* and *Craigslist*).

⁹¹ Klein & Doskow, *supra* note 21, at 378 (arguing in part that the CDA's current state of affairs may be reason enough for the Supreme Court to grant certiorari). According to Klein and Doskow, the possible circuit divide may cause those who have been harmed by housing discrimination online to shop their way into the Ninth Circuit, whereas interactive computer services want a forum that gives a broad reading to Section 230. *Id.* “The consistent holdings prior to [*Roommate*], and the strength of the immunity policy suggest the Supreme Court may take interest in this matter.” *Id.*

⁹² *Supra* note 86 (providing the criteria for granting certiorari).

The Court may have determined which circuit engaged in the proper analytical process, derived some combination of the two rationales, or created an entirely new method of analysis to resolve the issue.⁹³ Regardless of whether the Supreme Court may ever weigh in on the interaction between the FHA and the CDA, the conflict will likely continue to plague courtrooms with a tug-of-war between text and policy until Congress takes action, because the heart of the problem lies within the language of the CDA.⁹⁴

⁹³ For a discussion of the *Roommate* and *Craigslist* analysis, see *supra* notes 73–74 and accompanying text and notes 76–78 and accompanying text.

⁹⁴ Crossett, *supra* note 79, at 211 (arguing that it is ultimately Congress’s responsibility to reconcile the CDA and the FHA). Crossett notes:

the enforcement of the spirit of the law would come at the expense of the letter of the law, which is an unacceptable result. This demonstrates that the courts are not the appropriate mechanism of change to interpret the two competing statutes. The language of 230(c) is clear in the result that it demands, but it is a distasteful result and is inconsistent with the letter of section 3604(c) and with how the FHA has been interpreted by courts.

Id. at 211. See also Aalberts, *supra* note 80, at v (noting that Congress is charged with resolving statutory conflict). “Yet, unless Congress amends the CDA to create another expressed exception . . . supporters of the FHA . . . will have to rely on the good graces of [interactive computer services] . . . to assume a moral duty to eliminate or at least temper the tone of the discriminatory ads.” *Id.* While it is arguable that courts have on occasion shaped public policy at the expense of the letter of the law, Chief Justice Berger summarized the role of the judiciary with a quote from Robert Bolt’s *A Man for All Seasons*:

The law, Roper, the law. I know what’s legal, not what’s right. And I’ll stick to what’s legal. . . . I’m *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can’t navigate, I’m no voyager. But in the thickets of the law, oh there I’m a forester . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you[–]where would you hide, Roper, the laws all being flat? . . . This country’s planted thick with laws from coast to coast[–]Man’s laws, not God’s[–]and if you cut them down . . . d’you really think you could stand upright in the winds that would blow then? . . . Yes, I’d give the Devil benefit of law, for my own safety’s sake.

Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978) (Berger, C.J., dissenting) (internal citation omitted). *But see* Kurth, *supra* note 16, at 834 (arguing that the courts should read Section 230 as requiring as a prerequisite a good-faith effort to screen offensive content on the part of interactive computer services before receiving immunity).

B. *Why the CDA Should Not Apply to FHA Advertising Violations*

1. Evisceration of Section 3604(c)

Section 3604(c) was designed to reform the housing industry and eliminate the special dangers associated with housing discrimination.⁹⁵ Some argue that society has changed its discriminatory practices in recent years, but the numerous FHA violations following the Hurricane Katrina disaster in 2005 show that America has not progressed in eliminating housing bias nearly as far as some would believe.⁹⁶ While Section 3604(c) has been particularly strong in preventing discriminatory print advertisements by imposing publisher liability, the provision has been unsuccessful in its application to interactive service providers, and there are no signs of recovery without congressional intervention.⁹⁷ Moreover, newspaper circulation has seen a steady decline as more readers and advertisers are taking advantage of the Internet's popularity and real-time capabilities.⁹⁸ Notwithstanding the purposes behind Section 3604(c), discriminatory housing advertisements will continue moving into the mainstream, as the Internet has been deemed a "safe haven" for FHA advertising violations.⁹⁹ Rampant discrimination in

⁹⁵ Crossett, *supra* note 79, at 210 (discussing the purpose of Section 3604(c)); *supra* note 19 (providing the text of Section 3604(c)); *supra* note 20 and accompanying text (highlighting the dangers posed by housing discriminations).

⁹⁶ Collins, *supra* note 24, at 1491 (noting that HUD received complaints of housing discrimination on numerous housing websites designed especially for Hurricane Katrina victims). In a 2006 hearing before Congress, a HUD administrator said that she feared the discriminatory advertisements were causing psychological harm and that HUD was rigorously investigating the allegations. *Id.* at 1492. During the hearing, a representative from Massachusetts addressed the reality that Congress may have inadvertently designed the CDA to provide for the types of violations at issue and requested HUD's assistance in drafting corrective legislation if necessary. *Id.* See also *supra* note 24 and accompanying text (providing examples of the discrimination faced by Hurricane Katrina victims).

⁹⁷ See *supra* note 24 (listing cases in which Section 3604(c) liability was imposed on media including newspapers, listing services, and advertising brochures); *supra* Part II.D (providing an in-depth discussion of the holdings in *Roommate* and *Craigslist*). Some authors have argued that the conflict between the CDA and FHA should be resolved by a revision to the CDA. See Shanahan, *supra* note 22, at 155; Collins, *supra* note 24, at 1495; Crossett, *supra* note 79, at 211. But see Klein & Duskow, *supra* note 21, at 376-78 (suggesting that the Supreme Court may resolve the conflict between the CDA and the FHA); Kurth, *supra* note 16, at 834-35 (arguing that the judiciary could reconcile the conflict by "construing the CDA to require a good faith effort on the part of [interactive computer services] to implement screening and filtering mechanisms").

⁹⁸ Collins, *supra* note 24, at 1490-91; *supra* note 28 and accompanying text (discussing the circulation decreases that newspapers across America are experiencing because of competition from online news sources).

⁹⁹ Sussman, *supra* note 24, at 215 (arguing that application of the CDA to Section 3604(c) claims requires immunity for interactive computer services and creates a "safe haven" for

housing sales and advertising during the 1960s originally drove Congress to pass Section 3604(c).¹⁰⁰ The CDA, however, has turned the Internet, a mainstream medium, into a hotbed for housing discrimination by allowing interactive computer services to circumvent Section 3604(c), thereby bringing the state of the law full circle and eviscerating the FHA advertising provision.¹⁰¹

2. Special Status for Internet Companies and the Do-Nothing Mentality

Another criticism of allowing the CDA to provide immunity for an interactive computer service when its users have committed FHA violations is that Internet-based companies can escape liability in situations where traditional companies are held accountable.¹⁰² Although some interactive computer services receive a voluminous number of user posts each day and have a minimal number of employees, those services should not be held to a different standard from similar traditional companies who maintain a staff sufficient to ensure compliance with the FHA and other applicable laws.¹⁰³ Even if an

discrimination on the Internet); *supra* note 20 and accompanying text (discussing the special dangers sought to be avoided by Section 3604(c)).

¹⁰⁰ See generally Part II.A (discussing the development of the FHA).

¹⁰¹ *Supra* note 20 and accompanying text (discussing the purpose of the FHA); *supra* note 24 and accompanying text (illustrating the types of discrimination faced by the victims of Hurricane Katrina who were displaced from their homes); *supra* Part II.D (discussing the decisions in *Roommate* and *Craigslist*).

¹⁰² Crossett, *supra* note 79, at 209. “[E]nforcing the CDA against FHA claims creates an anomalous result, because immunizing websites results in newspapers being held liable for identical advertisements posted online, even if on that same newspaper’s website.” *Id.* See *supra* note 24 (providing a discussion of cases where the court extended liability to newspapers, listing services, and advertising brochures for publishing discriminatory housing advertisements in violation of the FHA). The Fourth Circuit allowed the most extensive liability for intermediaries, finding that the FHA advertising provision “was intended to apply to newspapers as well as “any other publishing medium.” *United States v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972). In *Craigslist*, the Seventh Circuit addressed an amicus brief submitted in support of the plaintiff that illustrated the judiciary’s willingness to apply the FHA to various media. 519 F.3d 666, 668 (7th Cir. 2008). Nevertheless, the Seventh Circuit was not persuaded by the brief, finding that “[o]nline services are in some respects like the classified pages of newspapers, but in others they operate like common carriers such as telephone services, which are unaffected by § 3604(c) because they neither make nor publish any discriminatory advertisement, text message, or conversation that may pass over their networks.” *Id.*

¹⁰³ Klein & Doskow, *supra* note 21, at 343 (arguing that online services should be subjected to the same expenses as traditional companies). Klein and Doskow explained:

There is no reason to exempt Internet roommate-matching services from having to bear the same costs that are borne by newspapers and other publishers who decide to enter the real estate advertising market, who must then police the contents of their real estate advertisements for illegal content. The Internet permits the

Internet service does not have the human capital to manually edit postings, there are several alternative methods of monitoring third-party posts to ensure housing advertisements are valid under the FHA, such as automated screening software and user-based notification programs.¹⁰⁴

Furthermore, the CDA's current application actually provides interactive computer services an incentive not to screen discriminatory

website operator to disseminate much more information, at much lower cost, than a traditional publisher In this way, those who enjoy commercial benefits from bringing together housing providers and housing seekers can cooperate to ensure that the anti-discrimination laws are not violated.

Id. (internal citations omitted). In *Roommate*, the Ninth Circuit noted that Roommates.com had about one hundred and fifty thousand active listings and received more than a million page views every day, but did not consider staffing issues in its holding. 521 F.3d 1157, 1161 (9th Cir. 2008). In *Craigslist*, however, the Seventh Circuit specifically addressed Craigslist's understaffing and posited that the costs of maintaining editorial control over posts would be too burdensome. 519 F.3d at 668–69.

An online service could hire a staff to vet the postings, but that would be expensive. . . . Every month more than 30 million notices are posted to the [C]raigslist system. Fewer than 30 people, all based in California, operate the system, which offers classifieds and forums for 450 cities. It would be necessary to increase that staff (and the expense that the users must bear) substantially to conduct the sort of editorial review that [plaintiff] demands.

Id.

¹⁰⁴ Chang, *supra* note 20, at 1007 (arguing that the FHA does not overburden interactive computer services and advocating the use of filtering technology). Chang stated:

Because such clear guidelines exist as to words and combinations of words that would likely violate § 3604(c), [interactive computer services] could utilize available filtering technology to automatically prescreen discriminatory text-based housing listings while minimizing the need for manual review. The same filtering technology currently used to block obscene language could be configured to block discriminatory words and phrases from classified housing listings.

Id. Chang concedes that the technology “is not foolproof and may be under- or overinclusive,” but suggests that the problem could be cured by utilizing advanced word-search techniques or by implementing a program that allows users to report discriminatory postings to the website operators. *Id.* But see *Craigslist*, 519 F.3d at 668–69 (finding fault with automated filters). “[S]creening, though lawful, is hard. Simple filters along the lines of ‘postings may not contain the words ‘white’” can’t work. . . . [A]utomated filters and human reviewers may be equally poor at sifting good from bad postings unless the discrimination is blatant; both false positives and false negatives are inevitable.” *Id.* Other commentators have suggested placing a banner advertisement on the user forum that contains the pertinent provisions of the FHA or creating drop down menus that only allow information permissible under the FHA. Klein & Doskow, *supra* note 21, at 343. But see Collins, *supra* note 24, at 1497–98 (arguing that user-based notification programs may be ineffective because they do not eliminate the harm caused by a discriminatory advertisement during the time it is available to the public and the program assumes that users know what type of content constitutes discrimination under the FHA).

advertisements because they are less likely to face liability if they take a hands-off approach.¹⁰⁵ A do-nothing mentality allows some interactive computer services to shirk their ethical duty of ensuring that housing listings are non-discriminatory without fear of repercussion and directly contradicts the congressional intent behind the Good Samaritan provision.¹⁰⁶

3. Silence and Intent Treated as the Same

Both the Seventh and Ninth Circuits erred by construing Congress's silence as an indication that the FHA was not excluded from the CDA's immunity provision.¹⁰⁷ As it stands, the CDA effectively preempts Section 3604(c) of the FHA's liability for intermediaries when interactive computer services are involved by providing near-absolute immunity for the intermediaries for clear FHA violations.¹⁰⁸ In other contexts, the Supreme Court has attempted to adhere to the provisions of both statutes when resolving conflicts between two federal laws.¹⁰⁹ Yet, even

¹⁰⁵ Crossett, *supra* note 79, at 210 (arguing that the Good Samaritan provision promotes inefficiency). Crossett asserts that "[b]ecause a website may avoid liability under the FHA by turning its website into a free-for-all (the less oversight, the greater chance of immunity), online housing consumers will be left to negotiate thousands of unfiltered advertisements, like on Craigslist." *Id.* Crossett argues that this method is inefficient for both web-surfers and the companies who want to serve them and will ultimately lead to greater violations of the FHA. *Id.* See *supra* notes 67-70 and accompanying text (discussing the Seventh Circuit's questioning of the logic behind the Ninth Circuit's decision in *Zeran* and the application that appeared to create a disincentive for interactive computer services to use filtering technology).

¹⁰⁶ Kurth, *supra* note 16, at 835. "Congress used the terms 'protection for blocking and screening' seven times in the rather brief § 230 of the CDA. This notion was at the heart of the legislation—that immunity was intended for those Web site hosts who made some good faith effort to curb malicious practices." *Id.* (footnote omitted). See *supra* notes 47-51 and accompanying text (discussing the legislative history of the CDA); *infra* Part III.B.3 (expounding the shortcomings of the CDA's application with regard to congressional intent).

¹⁰⁷ Chang, *supra* note 20, at 1001. Chang argues that the congressional silence about the CDA's implications on fair housing and the lack of an irreconcilable conflict between the laws means that the courts should adhere to the FHA's broad imposition of liability. *Id.*; *infra* notes 110-11 and accompanying text (arguing that congressional silence within the context of two federal laws should be treated the same way as when the situation involves a federal law and a state law).

¹⁰⁸ *Supra* note 24 and accompanying text (illustrating how the FHA's expansive liability applies to both the principal discriminator and the intermediaries); *supra* Part II.D (discussing *Roommate* and *Craigslist*, two cases where the CDA's immunity trumped FHA's liability for intermediaries).

¹⁰⁹ Chang, *supra* note 20, at 1001 (arguing that the judiciary should attempt to give both statutes effect). Also, in *Morton v. Mancari*, 417 U.S. 535, 550 (1974) the Court held:

when a dispute arises as to whether a federal law was meant to preempt a particular area of *state law*, which under the Supremacy Clause of the United States Constitution *must* give way to conflicting federal law, courts still may apply preemption only where there is a clear congressional intent to preempt state law.¹¹⁰

Applying this framework supports the argument that the Seventh and Ninth Circuits erred in their analyses because Congress's failure to contemplate the FHA while drafting the CDA is a far cry from clear congressional intent to preempt the FHA advertising provision in certain situations through application of the CDA.¹¹¹ In *Craigslist*, the Seventh Circuit reasoned that the purpose of drafting a general statute was so the legislature need not "traipse through the United States Code" to consider all possible sources of liability and improperly treated congressional silence as intent to include the FHA within the CDA's immunity provision.¹¹² While the Ninth Circuit chose to address the issue of congressional intent through *expressio unius est exclusio alterius* in

In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable

The courts are not at liberty to pick and choose among Congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible" The intention of the legislature to repeal "must be clear and manifest."

Id. at 550–51 (internal citations omitted). Chang's commentary provides an in-depth analysis of the possibility of reconciling the CDA and the FHA, ultimately concluding that the application of the FHA's advertising provision to interactive computer services does not frustrate the purpose of the CDA. *See* Chang, *supra* note 20, at 1003–08; *see also* Kurth, *supra* note 16, at 835 (arguing that the judiciary should solve the conflict by reading a good faith screening requirement into the Good Samaritan provision).

¹¹⁰ CHEMERINSKY, *supra* note 32, at 366–67 (providing an overview of the Supreme Court's preemption jurisprudence). Chemerinsky explains:

The problem, of course, is that Congress's intent, especially as to the scope of preemption, is rarely expressed or clear. Therefore, although the Court purports to be finding congressional intent, it often is left to make guesses about purpose based on fragments of statutory language, random statements in the legislative history, and the degree of detail of the federal regulation.

Id. at 367.

¹¹¹ *Supra* notes 47–51 and accompanying text (discussing the CDA's legislative history).

¹¹² Chi. Lawyers' Comm. for Civil Rights Under the Law v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008). The Seventh Circuit perceived the question to be "not whether Congress gave any thought to the Fair Housing Act, but whether it excluded § 3604(c) from the reach of 230(c)(1)." *Id.* *Cf. supra* note 54 (discussing the Central District of California's application of the doctrine of *expressio unius est exclusio alterius* to the CDA).

Roommate, its reasoning was equally unsound because the FHA was not even on the congressional radar when the CDA and its exceptions were drafted.¹¹³ That said, the FHA was a landmark piece of legislation designed to protect compelling interests in equal housing opportunities, and nothing in the legislative history of the CDA remotely suggests that Congress actually intended the CDA to erase such an important step in equality by providing immunity for advertising violations, no matter their form.¹¹⁴ The legislative history of the CDA reveals several purposes behind the inclusion of the Good Samaritan provision, and, if anything, the congressional silence on the topic of its application to the FHA illustrates that Congress *did not* intend for the CDA to provide immunity for interactive computer services in their role as intermediaries for discriminatory housing advertisements.¹¹⁵

¹¹³ *Supra* note 54 (discussing the canon of *expressio unius est exclusio alterius* and its application in *Roommate*); notes 47-51 and accompanying text (providing an overview of the CDA's legislative history).

¹¹⁴ *Supra* notes 15-20 and accompanying text (discussing the history and purposes of the FHA); notes 47-51 and accompanying text (providing the legislative history of the CDA). Congress listed five policy reasons for enacting the CDA, one of which was "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4) (2006). The Good Samaritan provision fits squarely within that particular policy goal. Furthermore, in *Craigslist*, the district court for the Northern District of Illinois recounted some of the goals Congress discussed as the CDA passed through the legislature, specifically that the statute "was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." Chi. Lawyers' Comm. For Civil Rights Under the Law v. Craigslist, Inc. 461 F. Supp. 2d 681, 689 (N.D. Ill. 2006) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997)). The district court relied heavily on the *Zeran* court's assessment that Congress was also concerned about the chilling effect that tort-based lawsuits have on free speech. *Id.*; *supra* note 57 and accompanying text (providing a discussion of the *Zeran* courts discernment of the nongressional intent behind the CDA). The district court also noted that Congress made the policy choice not to impose tort liability on intermediaries and reasoned that it would be impossible for interactive computer services to screen millions of messages. See *Craigslist*, 461 F. Supp. 2d at 689 (reasoning that "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect." (quoting *Zeran*, 129 F.3d at 331)).

¹¹⁵ *Supra*, notes 45-51 and accompanying text (explaining that in enacting the CDA, Congress was concerned with immunizing interactive computer services that utilized screening techniques to block offensive conduct and eliminating a flood of tort-based litigation in the wake of the decision in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)). The notion that silence should not be construed by courts as indicative of Congressional intent is not unique to the conflict between the FHA and the CDA, as commentators have made similar arguments regarding other areas of law. See Levinson, *supra* note 80, at 796 (arguing that congressional silence about administrative or judicial remedies in a statute does not warrant an automatic inference that Congress intended to eliminate Section 1983 relief in conjunction with certain statutes); Sullivan, *supra*

4. Victims May Be Denied a Remedy

Those who support the CDA's current dominance over the FHA argue that victims of housing discrimination are barred only from recovering from intermediary interactive computer services for third-party online housing violations and that the avenue of recovery against the third-party discriminators remains available.¹¹⁶ While this argument is plausible, the ability to post anonymous messages on the Internet may leave victims of housing discrimination without a readily available defendant.¹¹⁷ The burdensome task of identifying interactive computer service users may prove to be so costly and time-consuming that victims of housing discrimination will be discouraged from pursuing a remedy.¹¹⁸ If a victim cannot obtain a violator's identity on his or her

note 80, at 299 (arguing that Congressional inaction should not preclude the Food and Drug Administration from regulating tobacco products); Bogen, *supra* note 80, at 1068 (asserting that "[c]ongressional silence indicates nothing" when determining whether a state's boycott of foreign goods is consistent with federal law).

¹¹⁶ *Supra* notes 21–24 and accompanying text (discussing the broad application of the FHA advertising provision); *supra* note 52 (containing the text of the Good Samaritan provision, which mentions only "interactive computer services" and not the third party discriminators).

¹¹⁷ Kurth, *supra* note 16, at 828. See *supra* notes 56–57 and accompanying text (discussing *Zeran v. Am. Online, Inc.*, a case in which an anonymous posting resulted in the plaintiff receiving a flood of angry phone calls); *supra* notes 60–61 and accompanying text (providing an explanation of *Carafano v. Metroplash.com, Inc.*, a case in which a woman received unsolicited phone calls from users of an online dating service because an anonymous user created a false advertisement using the woman's name and likeness); *supra* notes 41–43 and accompanying text (discussing *Stratton Oakmont*, where an anonymous user posted allegedly defamatory statements about an investment banking company). Kurth argues that the same type of instance could arise in the context of fair housing. Kurth, *supra* note 16, at 828. "[I]ndividuals who find individual user violations of the Fair Housing Act on Websites such as Craigslist would have to go through the burdensome task of affirmatively identifying the individuals who posted the questionable ads, which may have been posted anonymously, and then filing suit against each individual." *Id.*

¹¹⁸ Kurth, *supra* note 16, at 828. One commentator provided insight into how difficult it may be to identify a user of a website such as Craigslist or Roommates.com. Collins, *supra* note 24, at 1494. According to Collins:

Although it is true that a housing advertisement must include contact information in order for prospective buyers and renters to express their interest, some [interactive computer services] protect their users' anonymity by hiding their email addresses. If an interested party wants to contact the person who posted an advertisement, he or she sends an email to a temporary, anonymous address that the [interactive computer service] specially created for the advertisement. The email is automatically forwarded from the anonymous email address to the user's actual address. The person responding to the advertisement never sees the advertiser's actual contact information unless the advertiser responds via email. In this way, online housing

own, the victim must first establish a *prima facie* case of discrimination and then pursue additional litigation to compel the disclosure of the defendant's identity.¹¹⁹ Commentators suggest that the difficulty of identifying individual online discriminators is a key reason why interactive computer services should be held liable for their users' discriminatory housing advertisements.¹²⁰ Next, Section C explores and evaluates solutions posed by various legal commentators, focusing on the strengths, weaknesses, and policy concerns of each.¹²¹

advertisers remain much more anonymous than traditional print advertisers, who generally have no choice but to provide an accurate phone number or email address.

Id.

¹¹⁹ Kurth, *supra* note 16, at 828. Kurth argues that "potential plaintiffs might be deterred from filing lawsuits given the increased costs and the seeming impossibility of identifying the faceless Internet offender." *Id.* The New Jersey Supreme Court is credited with positing the dominant analysis used when a plaintiff wishes to unmask an anonymous defendant. *Id.* The court produced the following analysis:

We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses . . .

[T]he trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a *prima facie* cause of action against the fictitiously-named anonymous defendants

Finally, assuming the court concludes that the plaintiff has presented a *prima facie* cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

Dendrite Int'l, Inc. v. John Doe No. 3, 775 A.2d 756, 760-61 (N.J. 2001).

¹²⁰ Kurth, *supra* note 16, at 828. "[I]f Web sites such as Craigslist maintained a degree of control in preventing the publication of FHA-violative housing ads, offenders could be prevented from [disseminating] their discriminatory housing preferences on such major Internet databases." *Id.* See Collins, *supra* note 24, at 1493-95 (arguing that interactive computer services are ideal candidates for gatekeeper liability because they are easier to identify than anonymous users and can utilize filtering systems to minimize violations).

¹²¹ *Infra* Part III.C (discussing the suggestions of allowing the judiciary to solve the conflict between the FHA and the CDA, adding the FHA to the already developed exceptions list, and amending the text of Section 230(c)).

C. *Weighing the Alternatives*

Although the application of the CDA to online FHA violations is a relatively new practice, three commentators present solutions to the conflict, which include allowing the courts to harmonize the FHA and the CDA by reading a good faith screening requirement into the text of the CDA, adding an FHA exception to Section 230(e), or revising Section 230(c) to exclude FHA violations.¹²² One commentator suggests the judiciary can resolve the conflict between the CDA and the FHA by granting immunity to interactive computer services for third-party FHA advertising violations only after a showing of a good-faith effort to block the discriminatory content.¹²³ This approach poses a minimal threat to free speech on the Internet and allows for a case-by-case analysis that adheres to the Supreme Court's practice of trying to equally enforce conflicting federal statutes.¹²⁴ Yet, this solution may not be viable in jurisdictions that firmly adhere to *Zeran* or shun the idea of judicial activism, as this approach overlooks the text of the law in favor of policy concerns.¹²⁵

In addition, two legal commentators who address the discourse between the CDA and the FHA concluded that Congress should resolve the conflict by amending the CDA, but posited revisions to different

¹²² *Infra* Part III.C.

¹²³ Kurth, *supra* note 16, at 834-35 (arguing that the suggested application also embodies the legislative intent behind the CDA and that "[w]ith this interpretation enunciated, courts could take individual cases on their facts to determine whether the challenged Website has met this standard and qualified for immunity").

¹²⁴ Kurth, *supra* note 16, at 835 (noting that the judiciary's case-by-case determination would result in restriction only for discriminatory housing advertisements). Kurth asserts that "[t]he fact that a user who posts an ad seeking to rent an apartment to 'Whites only' . . . might have that post removed by screening software, does not mean that the same user is not free to open his own Web site devoted to 'White power.'" *Id.* See Chang, *supra* note 20, at 1001-08 (arguing that FHA liability should apply to interactive computer services because the FHA and CDA can be reconciled); *supra* note 109 and accompanying text (discussing the analysis used by the Supreme Court when the Equal Employment Opportunity Act ran afoul of an older statute that allowed the Bureau of Indian Affairs to give a preference to Native Americans in its hiring decisions).

¹²⁵ *Supra* notes 56-57 and accompanying text (providing a detailed discussion of the Fourth Circuit's decision and rationale in *Zeran v. Am. Online, Inc.*). While the Seventh Circuit questioned the *Zeran* court's decision to construe the CDA in a way that conflicted with the statute's subtitles, the contentions were posed in dicta, which has minimal persuasive power. See *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (noting that the Good Samaritan provision seems to provide immunity to interactive computer services regardless of whether they attempt to screen offensive content); *supra* note 68 (providing a discussion of *GTE Corp.*). Some justices, however, do not take a proactive stance and believe that their role is to follow the letter of the law, regardless of its illogical structure or impractical effects. *Supra* note 94 (quoting then Chief Justice Burger's famous dissent from *Tenn. Valley Auth. v. Hill*).

sections of the statute.¹²⁶ One author suggests in his 2007 Note that Congress should add the FHA to Section 230(e), an explicit list of exceptions to the CDA.¹²⁷ While creating a special exception for the FHA has some of the same strengths as Kurth's proposition (suggesting the Court could resolve the conflict through a new interpretation of the CDA) and would likely be the quickest resolution to the conflict, it is a reactive step that ignores the CDA's textual shortcomings.¹²⁸

Another commentator advocates the creation of an exception for the FHA by combining elements of the CDA and FHA in a specific revision to the text of Section 230(c)(1).¹²⁹ Although this suggestion is a viable solution to the conflict between the CDA and the FHA, it contains the same deficiencies as Shanahan's proposal.¹³⁰ Furthermore, Collins recognizes that his solution is subject to several criticisms, including overreaction by interactive computer services, overburdening interactive computer services, and Congress's acceptance of *Zeran's* broad grant of immunity.¹³¹ Finally, Part IV of this Note suggests a remedy to the conflict between the FHA and the CDA—revisions to Section 230(c)(1)

¹²⁶ Shanahan, *supra* note 22, at 155 (recommending that Congress add the FHA to the list of exceptions in the CDA); Collins, *supra* note 24, at 1495 (proposing a revision to Section 230(c)(1) that would create an exception for the FHA).

¹²⁷ Shanahan, *supra* note 22, at 155. For the text of Section 230(e) see *supra* note 54.

¹²⁸ Kurth, *supra* note 16, at 834–35 (suggesting that the judiciary can solve the conflict through a new interpretation of the CDA); *supra* note 124 and accompanying text (providing a discussion of the strengths of Kurth's solution). See *supra* notes 69–70 and accompanying text (discussing the inconsistencies between the subtitles of the CDA and its application in FHA cases); *supra* Part III.B.3 (analyzing how the judiciary's application of the CDA mistakenly construes congressional silence and is contrary to the CDA's legislative intent).

¹²⁹ Collins, *supra* note 24, at 1495. Collins argues that Section 230(c)(1) should read "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider, *except for notices, statements, or advertisements with respect to the sale or rental of a dwelling.*" *Id.*

¹³⁰ *Supra* note 128 and accompanying text (discussing the weaknesses in adding the FHA to the Section 230(e) exception list).

¹³¹ Collins, *supra* note 24, at 1495–98. Collins also presents counterarguments to the perceived weaknesses in his suggested statutory revision. *Id.* He acknowledges that interactive computer services may become overzealous in their blocking of potentially discriminatory content, but that the practice can be overcome by allowing users to revise their screened advertisements in a manner consistent with Section 3604(c). *Id.* at 1496. Collins negates the argument that interactive computer services might be overburdened by noting that they would be held to the same legal standard as traditional print media. *Id.* at 1497; see *supra* note 24 (providing several cases imposing FHA liability on newspapers, listing services, and advertising brochures). Lastly, Collins considers whether Congress had accepted *Zeran* by passing the Dot Kids Act, but concludes that the new legislation has no bearing on the CDA and does not constitute acceptance of *Zeran*. *Id.* at 1498.

that clarify the scope of its application, are proactive in nature, and avoid the pitfalls inherent in other proposed solutions.¹³²

IV. PROPOSED REVISION

Although some scholars suggest revising the CDA to create an exception for FHA violations, a more appropriate revision is needed, one that eliminates exceptions and refines the text of the Good Samaritan provision to state its intended use.¹³³ First, the list of exceptions in Section 230(e) of the CDA should be stricken.¹³⁴ A list of exceptions, such as the one currently included in the CDA, opens the door to *expressio unius est exclusio alterius*, a canon of statutory construction that assumes any item not on the list was intentionally excluded by Congress.¹³⁵ Yet, such an assumption is erroneous when exclusion results from mere oversight as opposed to intent.¹³⁶ Rather than include a list of exceptions, Congress can accomplish the same end by adding a provision to Section 230(c) that limits its application to only those instances included within the CDA's text.¹³⁷

The Author's proposed resolution is centered on the following revisions to the Good Samaritan provision of the CDA:

- (c) Protection for "Good Samaritan" blocking and screening of offensive material
 - (1) Treatment of publisher or speaker:
For the purposes of determining defamation liability,
[n]o provider or user of an interactive computer service shall be treated as the publisher or

¹³² *Infra* Part IV (suggesting a revision to Section 230(c)(1) that is consistent with congressional intent and limits the application of the Good Samaritan provision).

¹³³ *Infra* Part IV (explaining this Author's proposed revisions to the CDA); *see supra* Part III.C (analyzing solutions posed by other legal scholars, including adding the FHA to the exceptions list under Section 230(e), revising the Good Samaritan provision to include an exception for the FHA, and allowing the judiciary to resolve the conflict through a new interpretation of the CDA).

¹³⁴ *Supra* note 54 (containing the text of 47 U.S.C. § 230(e) (2006), which includes exceptions for specific criminal provisions, intellectual property laws, consistent state laws, and the Electronic Communications Privacy Act).

¹³⁵ *Supra* note 54 and accompanying text (providing Sutherland's description of the canon of *expressio unius est exclusio alterius* and illustrating how the Ninth Circuit applied it to the CDA).

¹³⁶ *Supra* Part III.B.3 (arguing that congressional silence should not be construed as intent).

¹³⁷ *Infra* note 138 and accompanying text (containing the Author's proposed revisions to the Good Samaritan provisions).

speaker of any information provided by another information content provider.

(2) *Other [c]ivil liability:*

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action [] taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (A).

(C) *“Any action taken in good faith” as used in paragraph (A) means filtering software, specialized search engines, a reporting scheme, or any other method reasonably calculated to restrict access to the material described in paragraph (A).*

(3) *This provision shall have no other applications aside from those provided in paragraphs (1) and (2).*¹³⁸

Commentary

This framework allows for clearer application of the Good Samaritan provision and is more compatible with the congressional intent behind the enactment of the CDA because it provides immunity for defamatory statements posted by third parties, immunizes interactive computer services that make a good-faith attempt to screen offensive content, and limits the application of the CDA to only the uses provided within the text.¹³⁹ The revisions proposed to Section 230(c)(1) and 230(c)(2) draw a distinct line between the two subsections and eliminate the confusion associated with determining how the two subsections interact with each other.¹⁴⁰

Under the Author’s suggested revisions, Section 230(c)(1) would unequivocally prevent interactive computer services from being treated

¹³⁸ The Author’s original revisions are italicized. The remainder of the statutory text is from 47 U.S.C. § 230(c) (2006).

¹³⁹ *Supra* notes 45–51 and accompanying text (discussing Congresses intent behind the enactment of the CDA).

¹⁴⁰ *Supra* note 77 (providing the district court for the Northern District of Illinois’s analysis of the interaction between Sections 230(c)(1) and 230(c)(2)).

as publishers of content provided by third parties only in defamation actions.¹⁴¹ The revisions to Section 230(c)(1) are designed to provide absolute immunity in defamation actions while striking an adequate balance between the unfair imposition of liability on interactive computer services and censorship on the Internet.¹⁴²

The proposed revisions of Section 230(c)(2) provide civil immunity, most likely from First Amendment claims, for interactive computer services that make a good-faith effort to restrict access to patently offensive or obscene materials on their websites or forums.¹⁴³ Even though Rachel Kurth's position that a good-faith effort to restrict offensive content should be an implied requirement for immunity, this Note concludes that making the requirement explicit in the statute is preferable to creative statutory interpretation by the ever-changing judiciary.¹⁴⁴ The proposed revisions of Section 230(c)(2)(C) reinforce the "good faith" requirement by providing examples of means available to restrict content.¹⁴⁵ Nevertheless, the phrase "reasonably calculated to restrict access" allows for flexibility to account for the financial capabilities of individual interactive computer services.¹⁴⁶ Lastly, the proposed addition of Section 230(c)(3) to the CDA replaces the need for a list of exceptions by clearly stating the Good Samaritan provision shall have no use other than those listed in Section 230(c)(1) and 230(c)(2).¹⁴⁷

This Note's suggested revisions serve two purposes: (1) eliminating near-absolute immunity provided to interactive computer services for third-party FHA violations and (2) providing a proactive solution to the current conflict that is workable for future lawmakers. While adding the FHA to the exceptions list in Section 230(e) or amending the text in Section 230(c) to create an exception for the FHA would solve the current

¹⁴¹ *Supra* text accompanying note 138 (containing the Author's proposed revisions to the Good Samaritan provision); *supra* notes 41–43 and accompanying text (discussing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), a case in which an Internet service provider was held liable for defamatory messages posted by third parties on its "Money Talk" message board).

¹⁴² *Supra* text accompanying note 138 (providing the Author's suggested revisions to the CDA); see 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (noting Congressional concern for the protection of free speech on the Internet).

¹⁴³ *Supra* text accompanying note 138 (containing the Author's proposed statutory solution to the conflict between the CDA and the FHA).

¹⁴⁴ Kurth, *supra* note 16, at 834–35 (arguing the judiciary should be allowed to read a good faith requirement into the current text of the CDA).

¹⁴⁵ *Supra* text accompanying note 138 (listing the Author's proposed changes to the CDA).

¹⁴⁶ *Supra* text accompanying note 138 (listing this author's proposed changes to the CDA).

¹⁴⁷ *Supra* text accompanying note 138 (listing this author's proposed changes to the CDA).

conflict between the FHA and the CDA, the Author's proposed revisions of Section 230(c) also contemplate the potential for future misuses of the CDA.¹⁴⁸ With such a vast array of bills and a limited amount of time during any given legislative session, it is unreasonable to assume that Congress could ever contemplate every possible misuse of a given statutory provision.¹⁴⁹ Rather than wasting congressional time and resources amending the CDA each time a defendant attempts to utilize the CDA in an unforeseen manner, new applications are presumed invalid under the proposed amendment to the statute.¹⁵⁰ While Congress may always amend any portion of the CDA that no longer serves its purpose or is inconsistent with contemporary attitudes and needs, the proposed revisions to the CDA encourage efficiency in drafting, which eliminates the need for the same provision to be repeatedly amended after its initial passage.¹⁵¹ Furthermore, the proposed revisions put the application of the CDA in the hands of Congress instead of the judiciary and allows for harmonious coexistence between the FHA and the CDA.¹⁵²

V. CONCLUSION

Housing discrimination is an egregious form of prejudice that perpetuates stereotypes and causes psychological harm. Despite congressional efforts to eliminate the expression of such prejudices through the enactment of the FHA, housing discrimination remains prevalent on the Internet. Although a provision of the FHA extends liability for discriminatory housing advertisements to intermediaries, defendants have successfully used the Good Samaritan provision of the CDA to immunize interactive computer services from liability for third-party FHA violations posted on their websites and forums.

The CDA was enacted more than twenty-five years after the FHA, but congressional documents indicate that the legislators never contemplated a potential conflict between the FHA and the CDA. The CDA, a law that was intended to prevent a flood of defamation litigation and protect interactive computer services that make a good-faith effort to

¹⁴⁸ *Supra* Part III.C (presenting and analyzing alternative solutions to the conflict between the CDA and the FHA proposed by various scholars).

¹⁴⁹ *Supra* Part II.C (discussing the enactment of the CDA).

¹⁵⁰ *Supra* notes 113-15 and accompanying text (arguing that Congress did not foresee the conflict between the CDA and the FHA when it enacted the CDA).

¹⁵¹ *Supra* text accompanying note 138 (containing the Author's proposed revisions to the CDA).

¹⁵² *Supra* text accompanying note 138 (containing this author's proposed revisions to the CDA).

screen sexually explicit or offensive materials, has effectively eviscerated the advertising provision of the FHA and left victims of housing discrimination without a form of recovery for online FHA violations.

The Good Samaritan provision has several textual flaws, allowing for immunity broader than that envisioned by Congress and creating confusion as to how its two subparts should interact. These flaws could be cured by revisions that clarify how and when the CDA should apply. Furthermore, the addition of a clause limiting the application of the Good Samaritan provision only to those instances listed in the statute closes the door on the use of the CDA to protect interactive computer services from third-party FHA violations, as well as protects against future misuses of the CDA.

The judiciary cannot avoid affording immunity to interactive computer services for third-party FHA violations because the current text of the CDA demands such immunity. Rather than encourage the judiciary to engage in extreme activism in the name of public policy, the Author argues that the resolution to the conflict between the CDA and FHA is a textual revision by Congress and encourages legislators to draft statutes that clarify the intent behind their enactment. While a policy section provides some insight to future interpreters, legislators should strive to ensure that the substantive text of the law also embodies the specific intent of the statute.

Although those who wish to engage in housing discrimination have taken advantage of the Internet as their new frontier, Congress has the power to force interactive computer services to take responsibility for the content on their websites and forums and to prevent the Internet from serving as a catalyst of reversion to the same deplorable attitudes and housing prejudices that plagued America more than half a century ago.

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