

# DISCRIMINATORY HOUSING ADVERTISEMENTS ON-LINE: LESSONS FROM CRAIGSLIST

RIGEL C. OLIVERI\*

## TABLE OF CONTENTS

Introduction .....	1126
I. The FHA and The Ban on Discriminatory Housing Advertisements .	1129
A. <i>Overview of the FHA</i> .....	1129
B. <i>The Ban on Discriminatory Statements</i> .....	1130
1. The Extensive Reach of § 3604(c) .....	1131
2. Limitations to § 3604(c) .....	1134
C. <i>The “Mrs. Murphy” Exemption</i> .....	1135
1. Coverage and Rationale .....	1135
2. Even Mrs. Murphy Landlords Are Not Exempt from § 3604(c) .....	1138
II. The CDA and Its Conflict with the FHA .....	1139
A. <i>The CDA</i> .....	1139
B. <i>Cases Addressing the Conflict</i> .....	1140
1. Chicago Lawyers Committee for Civil Rights Under Law v. Craigslist, Inc. ....	1140
2. Fair Housing Council of San Fernando Valley v. Roommates.com .....	1141
III. Immunity Pulls Back the Curtain on Discriminatory Ads .....	1143
A. <i>How Many Violations?</i> .....	1144
B. <i>What Do the Discriminatory Housing Ads Look Like and Who         Is Posting Them?</i> .....	1145
1. Ads for Roommates Are Far More Likely to Contain Problematic Language Than Ads for Traditional Rental Housing .....	1145
2. The Most Common Basis for Discrimination—by Far—Is Familial Status .....	1146
3. The Statements Are Not Consistently Anti-Minority .....	1148
4. Descriptions of the Person Who Placed the Ad Are More Common Than Preferences for a Particular Roommate Type .....	1149
IV. Assessing the Information .....	1151
A. <i>There Is a Qualitative Difference Between Roommate Ads and         Ads for Traditional Rental Housing</i> .....	1151

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\* Associate Professor of Law, University of Missouri School of Law. B.A. University of Virginia, J.D. Stanford Law School. The author was formerly a Trial Attorney for the U.S. Department of Justice’s Civil Rights Division, in the Housing & Civil Enforcement Section. I am grateful for comments and suggestions from Bob Schwemm, Tim Iglesias, Ann Houghtaling, and Michael Byrne. I would like to thank my research assistants, Carly Duvall and Tressa Kelly and my library liaison, Cindy Shearrer, for their excellent assistance. I sincerely appreciate the generous support of the University of Missouri’s Summer Faculty Research Program.

<i>B. There Is a Difference Between Familial Status and Other Bases for Discrimination</i> .....	1153
V. Using the Information .....	1153
<i>A. Roommates Should Be Exempt</i> .....	1154
1. The Disconnect Between the Exemption's Purpose and Its Application .....	1154
2. The Law's Protection of the Right of Intimate Association ..	1155
3. Norm Theory Supports Exempting Roommates .....	1160
<i>B. Only Roommates Should Be Exempt</i> .....	1163
<i>C. Exempt Roommates Should Also Be Exempt From § 3604(c)</i> ...	1164
1. Arguments in Favor of Exempting Roommates from § 3604(c) .....	1164
2. Arguments Against Exempting Roommates from § 3604(c) ..	1167
<i>D. There Is Still a Need for Website Publisher Liability</i> .....	1172
<i>E. More Attention Must Be Paid to Familial Status</i> .....	1176
Conclusion .....	1181
Appendix—Methodology .....	1182

## INTRODUCTION

Suppose you live in a two-bedroom apartment and your roommate moves out. You want to stay in the apartment, but you cannot afford the rent on your own, so you go to an on-line housing locator site like Craigslist and post an ad under “Roommate Wanted.” Because you work from home, you would prefer a roommate who does not party late into the night and who does not have small children who will make noise. You state this in your posting. Two candidates contact you. One has a two year-old. One has no kids. You select the childless candidate. You might think that you have just engaged in an ordinary roommate-seeking transaction, the likes of which occur every day. You would be right. But you have also violated the federal Fair Housing Act (FHA) and are subject to civil prosecution for posting a discriminatory advertisement and also probably for discriminating on the basis of familial status in your choice of a roommate.

The law governing discriminatory on-line advertisements for housing is complex, and involves a collision of federal statutes. Section 3604(c) of the FHA makes it illegal “[t]o make, print, or publish” discriminatory housing statements, notices, or advertisements.<sup>1</sup> While this section clearly applies to housing providers and professionals who make discriminatory housing-related statements. Because of the statute’s “print or publish” language, it has also been applied to newspapers, television, radio, and any other media that carry discriminatory advertisements. Publisher liability for discriminatory housing ads has been the law for decades.<sup>2</sup> Because newspapers and other media have the incentive to screen out discriminatory advertisements, such advertisements have largely vanished from public view.<sup>3</sup>

1. 42 U.S.C. § 3604(c) (2006).

2. 17 AM. JUR. 2D *Civil Rights* § 3604(c) (2006).

3. See Andrene N. Plummer, Comment, *A Few New Solutions to a Very Old Problem: How*



Websites that feature advertisements for housing, like traditional print media, would certainly be covered by the FHA's advertising prohibitions. But in an effort to encourage the growth of the Internet as a tool for commerce and the exchange of ideas, Congress passed the Communications Decency Act of 1996 (CDA), which shields website operators from liability for the contents of user-generated material that appears on their sites.<sup>4</sup> This negates the publisher liability provision in § 3604(c) with respect to many website operators.

Without the threat of publisher liability, websites have no incentive to screen out discriminatory ads. At the same time, anyone with access to a computer can instantly post housing advertisements on-line, usually without charge and with some level of anonymity. The result is that discriminatory housing ads proliferate in cyberspace. And although the websites that host the ads are immunized from liability, the individuals who post the ads are not.

This situation is problematic from a fair housing standpoint. But it also presents a valuable opportunity for the study of what the Legal Realists call "law in action."<sup>5</sup> For the first time in a generation, discriminatory housing advertisements are out in the open and available for study. In a sense, these advertisements allow us to see the mental process of the people who place them. We can examine the discriminatory ads to determine who places them, what sort of housing they involve, and what sort of discrimination is at issue. We can also get a sense for how common discriminatory housing ads are on-line, so that we can determine the extent of the problem they present.

This Article contains a comprehensive review of discriminatory housing ads appearing on the popular online community Craigslist. This review reveals that a significant number of on-line housing ads—roughly several hundred on any given day—violate the FHA. A detailed examination of the content of the ads yields a number of interesting findings. For example, the vast majority of those who post discriminatory on-line advertisements for housing are placed by people seeking roommates. Roommate ads are also qualitatively different from ads for traditional rental housing. They often contain highly specific preferences about characteristics that are not protected by the law (such as diet, political affiliation, and cleanliness) and would not be used in an advertisement for a traditional rental. Similarly, roommate ads also frequently contain detailed descriptions of the person who placed the ad in terms of nonprotected characteristics. These ads represent an advertiser looking for much more than simply someone with whom to share rent. The roommate relationship is an intimate one. Most roommate-seekers seem to be looking for someone with similar attitudes, habits, backgrounds, and lifestyles.

Although ads that discriminate based on race, religion, or ethnicity are the most jarring (and have received the most publicity), there are actually very few of them. The overwhelming majority of ads that violate the FHA discriminate

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*the Fair Housing Act Can Be Improved to Deter Discriminatory Conduct by Real Estate Brokers*, 47 HOW. L.J. 163, 178 (2003).

4. 47 U.S.C. § 230(c) (2006).

5. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 14 (1910).

on the basis of familial status, which is defined as whether a person is the custodial parent or guardian of a minor. When the ads are divided between traditional rentals and roommates, this pattern is even more pronounced. Virtually none of the ads for traditional rental housing express a racial, ethnic, or religious bias. Instead practically all discriminate based on familial status.

Of the few roommate ads that do mention race, ethnicity, or religion, the discrimination is not consistently anti-minority. Instead, it tends to go in all directions. Put another way, one is just as likely to see an ad expressing a preference for a “Muslim woman of color” as for a “white Christian male.” Moreover, many of the ads that mention race, religion, or ethnicity do not state a preference for a particular type of roommate at all but rather contain a self-description of the person taking out the ad, as in “white Christian male seeks roommate.”

This information is useful in formulating appropriate responses to the problem of discriminatory on-line housing advertisements, both in terms of improving legislation and public awareness of the law. One conclusion is clear: Given the large numbers of discriminatory ads that are out there and the enormous practical difficulties of prosecuting the individuals who post the ads, the most effective way to reduce the number of discriminatory on-line housing ads is to create publisher liability for the websites who host them. To accomplish this Congress would need to amend the CDA to include an exception for discriminatory housing ads.

Although amending the CDA will solve the problem of discriminatory ads by incentivizing websites to screen them out, we should also make use of the information we have learned from looking at the ads. For example, it appears that there is a problem with applying the FHA to roommates. The FHA contains an exemption for small landlords who live in the same building as their tenants, designed to safeguard the privacy and associational rights of property owners who live in close proximity to their tenants.<sup>6</sup> The exemption, however, does not cover co-lessees who seek to live together as roommates. Moreover, the exemption does not include § 3604(c), so an exempt landlord is still prohibited from advertising discriminatory preferences. The sheer number of potentially discriminatory roommate ads suggests that many roommate-seekers are unaware that the law applies to them and their advertisements, which is understandable given the complexity of the law. Additionally, the nature of the ads—with their emphasis on personal characteristics—helps demonstrate the intimacy of the roommate relationship. When people are advertising for roommates, they are often seeking more than just a person to share rent; they seek a friend, or at least a like-minded companion. There is an apparent social norm that people view the selection of a roommate as a highly personal, individualized choice, in which government interference is inappropriate. This indicates that the FHA’s current small-landlord exemption should be reconfigured to protect roommates.

The data also make clear that the problem of discriminatory housing advertisements is overwhelmingly one of familial status discrimination,

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6. 42 U.S.C. § 2000a(b)(1) (2006).



regardless of whether shared or traditional rental housing is at issue. This suggests that there is a problem both with public awareness of the law and public acceptance of the law. Campaigns should be undertaken by the Department of Housing and Urban Development (HUD) and fair housing advocates to educate people about the law and the need for it.

Part I of this Article discusses the FHA, with a particular emphasis on § 3604(c) and the Act's exemption for small landlords. Part II describes the conflict between the FHA and the CDA and the cases that address this conflict. Part III sets forth the results of a comprehensive review of discriminatory on-line housing advertisements, in terms of who takes them out, what they look like, what sort of housing they involve, and what the grounds are for discrimination. Part IV contains a preliminary analysis of the data, focusing on the fact that most discriminatory ads are taken out by roommates and the fact that the overwhelming majority of discriminatory ads discriminate on the basis of familial status. Part V puts forth policy and legislative proposals as informed by the data, existing case law, and social norm theory: the CDA should be amended to take § 3604(c) into consideration, so that website operators are liable for discriminatory housing ads posted to their sites by users; the FHA's exemptions should be reconfigured to cover people in shared living situations and not small landlords; roommates—and only roommates—should be permitted to advertise their discriminatory preferences; and increased efforts must be made to educate the public and shift social norms about familial status discrimination in housing.

## I. THE FHA AND THE BAN ON DISCRIMINATORY HOUSING ADVERTISEMENTS

Enacted in 1968, the FHA was intended “to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>7</sup> This broad statement of purpose underscored the objective of its proponents to replace America's segregated residential landscape with “truly integrated and balanced living patterns.”<sup>8</sup>

### A. Overview of the FHA

As originally enacted, the FHA prohibited housing discrimination based on four protected characteristics: race, color, religion, and national origin. Sex was added to the list of protected characteristics in 1974,<sup>9</sup> and disability and familial status were added in 1988.<sup>10</sup> Although the FHA is a lengthy statute, most of the statute focuses on the manner in which the Act is to be enforced. The relatively

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7. *Id.* § 3601.

8. 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale).

9. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 109, 88 Stat. 633 (1974).

10. Fair Housing Amendments of 1988, Pub. L. No. 100-430, § 5, 102 Stat. 1619 (1988); 42 U.S.C. § 3604 (2006). “Familial status” refers to whether one is the custodial parent or guardian of a minor child. *Id.* § 3602(k).

few substantive provisions are contained in §§ 3604, 3605, 3606, and 3617.<sup>11</sup> Of these, the most significant is § 3604, which is divided into several subparts.

Section 3604(a) prohibits discriminatory refusals to sell or rent a dwelling, or to negotiate for the sale or rental of a dwelling, and any other conduct that makes housing unavailable because of a protected characteristic.<sup>12</sup> Section 3604(b) bans discriminatory terms and conditions in the sale or rental of dwellings, and the discriminatory provision of services and facilities in connection therewith.<sup>13</sup> Section 3604(c), which is discussed in greater detail below, makes it illegal to make or publish discriminatory housing statements or advertisements based on a protected characteristic.<sup>14</sup> Section 3604(d) forbids making false representations to a person that a property is unavailable, when such representation is made because of a protected characteristic of that person.<sup>15</sup> Taken together, these provisions were intended to encompass the full range of ways in which housing discrimination could be carried out.

### *B. The Ban on Discriminatory Statements*

The FHA's ban on discriminatory statements, 42 U.S.C. § 3604(c), makes it 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 [protected characteristics], or an intention to make any such preference, limitation, or discrimination.<sup>16</sup>

The need for a provision like this is clear. Without one, housing providers could (and did) discriminate based on protected characteristics by simply telling a particular housing-seeker that the housing was off-limits to him or her. A published advertisement could achieve this result more easily, as it would reach a larger group of people, and persuade the disfavored ones from even attempting to buy or rent the housing.

Until recently, § 3604(c) "has not been the subject of much litigation or debate,"<sup>17</sup> and often has little independent significance. This may be because litigants and commentators tend to focus on statutory provisions such as §§

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11. 42 U.S.C. §§ 3604, 3605, 3606, 3617 (2006).

12. *Id.* § 3604(a).

13. *Id.* § 3604(b).

14. *Id.* § 3604(c).

15. *Id.* § 3604(d).

16. *Id.* § 3604(c).

17. Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 191 (2001) [hereinafter Schwemm, *Discriminatory Housing Statements*]. Professor Schwemm goes on to discuss the large number of fair housing cases that contain evidence of discriminatory statements but where § 3604(c) claims have neither been pursued by plaintiffs nor recognized by courts. *Id.* at 255-63.



3604(a) and (b), that prohibit discriminatory conduct, as opposed to discriminatory speech (although the lines between these can be blurry).<sup>18</sup> This focus, in turn, is likely because the damages for a denial of housing or a terms and conditions violation tend to be higher than the damages for a discriminatory statement. For a §§ 3604(a) or (b) claim, the plaintiff is entitled to compensatory damages caused by the denial of housing or the discriminatory terms, whereas the plaintiff's compensatory damages for a § 3604(c) claim are limited to the emotional harm caused by hearing or reading the statement itself.<sup>19</sup> Absent extraordinary circumstances, this is not likely to translate into a very high dollar amount.<sup>20</sup>

Nonetheless, § 3604(c) occupies an important position in Congress' plan for comprehensive open housing legislation, and defendants ignore it at their peril. One indication of the significant role Congress intended for § 3604(c) to play is the fact that the coverage of this provision is more extensive than other substantive provisions of the FHA. Additionally, the wording of § 3604(c) guarantees that it will apply in multiple and varied contexts.

1. *The Extensive Reach of § 3604(c).*—The reach of § 3604(c) is quite broad in a number of ways. First, it applies regardless of the speaker's intent. The statutory language only requires that the statement convey a preference or limitation to the "ordinary listener" or the "ordinary reader," not that the speaker have intended to convey such a preference or limitation.<sup>21</sup> As a result, § 3604(c) has been referred to as a "strict liability" provision.<sup>22</sup>

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18. Often, a § 3604(c) violation will accompany a denial of housing under § 3604(a) or a terms and conditions violation under § 3604(b), for the simple reason that people who engage in discrimination tend to make statements to that effect. Moreover, a denial of housing or discrimination in terms and conditions can be accomplished by means of a discriminatory statement, for example, a landlord who tells a black applicant "I won't rent to you because you are black" or a landlord who posts a building rule that "Children are not allowed in the common areas." In those cases, there have been two violations, both the statement and the denial of housing or the discriminatory terms that the statement represents.

19. See, e.g., *HUD v. Denton, Fair Hous.-Fair Lending Rptr.* ¶ 25,014 (H.U.D. A.L.J. Nov. 12, 1991), available at 1991 WL 442794, remanded to *Fair Hous.-Fair Lending Rptr.* ¶¶ 25,024, 25,281 (H.U.D. A.L.J. Feb. 7, 1992), available at 1992 WL 406537 (awarding family no damages for a § 3604(c) violation, because any harm suffered was the result of eviction, rather than the discriminatory statement that accompanied their eviction notice). Punitive damages are available to individual litigants for all FHA violations, 42 U.S.C. § 3613(c) (2006), and the government can also obtain a civil penalty for these violations under appropriate circumstances. See 42 U.S.C. §§ 3612(g)(3), 3614(d)(1)(C) (2006).

20. See, e.g., *HUD v. Dellipaoli, Fair Hous.-Fair Lending Rptr.* ¶ 25,127 (H.U.D. A.L.J. Jan. 7, 1997), available at 1997 WL 8260 (awarding plaintiffs \$500 for hearing discriminatory statement).

21. *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991). The court noted that "[t]he ordinary reader is neither the most suspicious nor the most insensitive of our citizenry." *Id.*

22. *HUD v. Roberts, Fair Hous.-Fair Lending Rptr.* ¶ 25,151, at 26,217 (H.U.D. A.L.J. Jan. 19, 2001), available at 2001 WL 56376; *Dellipaoli*, ¶ 26,077; see also Schwemm, *Discriminatory*

Moreover, § 3604(c) does not just prohibit blatantly discriminatory statements such as “I will not rent to black people.” This is because there are a number of ways a person can communicate discriminatory feelings. Subtle discriminatory messages can be just as effective as flagrant ones in dissuading people from attempting to procure housing. As the Second Circuit Court of Appeals held in *Ragin v. New York Times Co.*:

We do not limit the statute-not to say trivialize it-by construing it to outlaw only the most provocative and offensive expressions of racism or statements indicating an outright refusal to sell or rent to persons of a particular race. . . . Ordinary readers may reasonably infer a racial message from advertisements that are more subtle than the hypothetical swastika or burning cross, and we read the word “preference” to describe any ad that would discourage an ordinary reader of a particular race from answering it.<sup>23</sup>

If § 3604(c) were limited to only the most direct statements of bias, housing providers could just move to using more subtle messages and still accomplish largely the same results. This, as the court has recognized, would defeat the whole purpose of the law.<sup>24</sup> Courts therefore employ an “ordinary reader” or “ordinary listener” standard when evaluating § 3604(c) cases.<sup>25</sup> The ordinary reader, it is said, “is neither the most suspicious nor the most insensitive of our citizenry.”<sup>26</sup>

HUD has published guidance and regulations describing the sort of communications that would likely be deemed to violate § 3604(c).<sup>27</sup> This

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*Housing Statements*, *supra* note 14, at 215-16.

23. *Ragin*, 923 F.2d at 999-1000.

24. *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972) (“If an advertiser could use the phrase ‘white home’ in substitution for the clearly proscribed ‘white only,’ the statute would be nullified for all practical purposes.”).

25. *See id.* at 213-14; *see also Ragin*, 923 F.2d at 999; *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 29 (D.C. Cir. 1990) (applying a “reasonable reader” standard); *Blomgren v. Ogle*, 850 F. Supp. 1427, 1439 (E.D. Wash. 1993).

26. *Ragin*, 923 F.2d at 1002.

27. HUD’s Regulations on discriminatory advertising can be found at 24 C.F.R. § 100.75. Under the doctrine set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, HUD regulations interpreting the FHA are to be followed so long as they are “a permissible construction of the statute.” 467 U.S. 837, 842-44 (1984). A number of FHA decisions have deferred to HUD’s interpretive regulations pursuant to *Chevron*. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW & LITIGATION 7:4 n.17 (2007) [hereinafter SCHWEMM, HOUSING DISCRIMINATION].

In addition, HUD adopted a detailed set of “Advertising Guidelines for Fair Housing” in 1972, which it later published in a set of regulations that appeared for many years at 24 C.F.R. §§ 109.5-109.30 [hereinafter HUD Guidelines], available at <http://www.fairhousing.com/index.cfm?method=page.display&pageid=605>. In 1996 HUD removed these regulations because it felt that such “guidance did not amount to regulatory requirements that were appropriate for codification in the Code of Federal Regulations.” Streamlining of HUD’s Regulations Implementing the Fair Housing



authority makes clear that the “ordinary reader” standard will be satisfied by more subtle discriminatory statements. For example, advertisements should not contain a description of the landlord, current tenants, or area that mentions protected characteristics, such as “white private home,” “Christian,” or “Hispanic residence.”<sup>28</sup> Section 3604(c) can be violated by catch words or colloquialisms if used in a discriminatory context, such as “exclusive” and “restricted” development or “mature persons” preferred.<sup>29</sup> Non-verbal visual depictions, including symbols and human models can also communicate discriminatory preferences sufficient to violate the statute.<sup>30</sup> Merely asking about the protected characteristics of a homeseeker may constitute a violation, under the theory that in most cases such characteristics are irrelevant. Any inquiry implies that a housing decision will nevertheless be made on that basis.<sup>31</sup>

By its terms, § 3604(c) applies not only to the individuals who draft and place discriminatory advertisements, but also to the newspapers and other media who “publish” such advertisements. In an early and influential case, *United States v. Hunter*, the Fourth Circuit held that a newspaper could be liable for printing a classified ad for an apartment in a “white home.”<sup>32</sup> Working from the statutory language, the court reasoned that, “[i]n the context of classified real estate advertising, landlords and brokers ‘cause’ advertisements to be printed or published and generally newspapers ‘print’ and ‘publish’ them.”<sup>33</sup> In the wake

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Act, 61 Fed. Reg. 14,380 (Apr. 1, 1996). Although HUD stated that it would provide the information in a handbook or other materials rather than maintain it in the C.F.R., *id.* at 14,378, it has so far failed to do so. Nevertheless, the remaining HUD Regulations continue to refer to the material in Part 109, as does a 1995 internal HUD memo regarding discriminatory advertising that was made available to the public. See Memorandum from Roberta Achtenburg, Assistant Sec’y for Fair Hous. and Equal Opportunity (Jan. 9, 1995), *reprinted in* Fair Hous.-Fair Lending ¶ 5365 [hereinafter HUD Memo] (providing guidance regarding advertisements under § 3604(c) of the FHA). For a thorough discussion and history of HUD’s advertising regulations and guidance, see SCHWEMM, HOUSING DISCRIMINATION, *supra*, 15:3, at 15-8 to -11.

28. HUD Guidelines, *supra* note 27, at 109.20(a), (e)-(f).

29. *Id.* at 109.20(a)(8), (d).

30. *Id.* at 109.20(c), 109.25(c). In *Ragin v. New York Times Co.*, a newspaper was found liable for publishing thousands of housing advertisements over a multi-year period that consistently featured only whites as homeseekers, homeowners, and tenants. 923 F.2d 995, 998 (2d Cir. 1991). According to the plaintiffs, the few people of color in the ads were usually depicted as service employees. *Id.* at 1001.

31. See, e.g., *Jancik v. Dep’t of Hous. & Urban Dev.*, 44 F.3d 553, 554-57 (7th Cir. 1995) (finding landlord’s telephone inquiry as to the race of prospective tenant violated § 3604(c)); *cf.* *Soules v. Dep’t of Hous. & Urban Dev.*, 967 F.2d 817, 824-25 (2d Cir. 1992) (recognizing that rental agent’s query about prospective tenant’s children could in theory violate § 3604(c), but finding that the circumstances of the conversation did not indicate potential discrimination).

32. 459 F.2d 205, 221 (4th Cir. 1972).

33. *Id.* at 210. The decision in *Hunter* was reinforced a few months later by the decision *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc). In that case, the D.C. Circuit held that § 3604(c) prohibited the recording of deeds with racially restrictive covenants, and that the

of the decision in *Hunter*, newspapers and other media had a clear legal incentive to screen out discriminatory housing advertisements. As a result, discriminatory housing ads all but vanished from sight for many years.<sup>34</sup>

Finally, § 3604(c) has a greater reach than other substantive parts of the FHA in that it applies to defendants that are otherwise exempt from the statute. Put another way, there are several categories of defendants who are allowed to engage in discriminatory housing behaviors, but who are still not permitted to make discriminatory statements or to advertise their discriminatory preferences.<sup>35</sup>

2. *Limitations to § 3604(c)*.—There are just a few significant limitations to § 3604(c). The first is the requirement of a relationship between the speaker and the housing transaction at issue. Because the statute requires that the discriminatory statement be made “in connection with the sale or rental” of housing, the discriminatory statement must be made within the context of a sale or rental transaction or relationship, or by an individual such as a housing provider who can in some way affect such a transaction or relationship.<sup>36</sup> This means that, for example, a neighbor is not typically in a position to violate § 3604(c) by making biased statements (although if such statements are sufficiently egregious or harassing to interfere with a neighbor’s enjoyment of her home, they may violate other provisions of the FHA).<sup>37</sup>

The First Amendment creates a related—although narrow—limitation. As a content-based restriction on speech, § 3604(c) has long come under attack on First Amendment grounds. But because the provision is limited by its terms to statements or advertisements that are connected to a sale or rental transaction, the speech at issue in a § 3604(c) case should virtually always be considered commercial speech.<sup>38</sup> This is particularly so for discriminatory advertising,

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Recorder of Deeds could be liable for accepting such deeds. *Id.* at 638.

34. See SCHWEMM, HOUSING DISCRIMINATION, *supra* note 27, § 15:3, at 15-9 (noting that after *Hunter*, “litigation involving the more blatant forms of discriminatory advertising all but ceased”); Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 220.

35. This will be discussed at greater length in *infra* Part I.C.

36. Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 22 (2008). This does not mean that only owners and real estate professionals are proper defendants under § 3604(c). Anyone who is in a position to affect a sale or rental transaction—including people who advertise for roommates—can potentially violate this part of the statute.

37. *Id.* at 34-35; Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 265-66.

38. Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 269-70. Discriminatory statements that are unrelated to any particular housing transaction, on the other hand, are unlikely to be considered commercial speech and any attempt to read § 3604(c) as prohibiting them will be barred by the First Amendment. See, e.g., *Wainwright v. Allen*, 461 F. Supp. 293, 298 (D.N.D. 1978) (finding that a bigoted statement by landlord to HUD investigator was not in the context of any transaction, and so First Amendment prevented it from serving as the basis for civil liability); *United States v. Real Estate One*, 433 F. Supp. 1140, 1154 n.8 (E.D. Mich. 1977) (suggesting, in dicta, that one housing salesperson’s racially offensive remark to another would be protected speech if not made in connection with a particular sale transaction).



which is clearly speech “proposing a commercial transaction” under the Supreme Court’s definition.<sup>39</sup> Although still covered by the First Amendment, commercial speech is given less constitutional protection than other forms of speech, specifically, it can be prohibited if it is factually misleading or if it concerns unlawful activity.<sup>40</sup> Thus, most discriminatory housing statements and advertisements can be banned because housing discrimination is illegal, and a statement of discriminatory housing preference inaccurately implies that protected characteristics may form the basis of a housing decision.<sup>41</sup>

Finally, HUD has defined a very narrow category of ads that, in the agency’s view, should be exempted from § 3604(c): It is permissible to state that housing is limited on the basis of sex where the sharing of living areas is involved, or when the dwelling at issue is a dormitory facility used by an educational institution.<sup>42</sup> Although nothing in the language of the statute indicates that there should be an exception for sex-specific ads for shared housing, the agency clearly recognized that significant social norms and personal concerns (such as safety, modesty, and morality) would be implicated absent such an exception.

### C. The “Mrs. Murphy” Exemption

The FHA contains four specific exemptions, the most significant of which for this discussion is the so-called “Mrs. Murphy exemption.”

1. *Coverage and Rationale.*—Named for a fictitious elderly Irish widow who is forced to rent out rooms in her home to make ends meet,<sup>43</sup> the exemption covers rooms or units in dwellings intended to be occupied by four or fewer families<sup>44</sup> so long as the owner of the building lives in one of the units.<sup>45</sup> Such owners are exempt from most—but not all—of the substantive provisions of the

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39. Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 562 (1980).

40. *Id.* at 563-54.

41. The FHA’s exemptions for particular defendants and types of housing from all of the substantive provisions in the statute *except* § 3604(c) causes a problem for this reasoning, because it creates a situation in which the underlying conduct is not illegal. This dilemma is discussed in the following section.

42. HUD Guidelines, *supra* note 27, § 109.20 (6)(5); HUD Memo, *supra* note 27, at 2-3.

43. The concept of Mrs. Murphy originated in the legislative debate over a different piece of legislation, the Public Accommodations title in the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006). At that time, Mrs. Murphy was conceived of as the operator of a boardinghouse (which would have been covered as a public accommodation) who rented out rooms in her home to transient guests. See James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exception to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 608 (1999) (citing 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1154, 1741-44, 1194 (Bernard Schwartz ed., 1970)). She later resurfaced during the debates over the FHA, this time as a landlady who owned and lived in a building and who rented out other units in the building to tenants. See the discussion *infra* notes 55-59 and accompanying text.

44. The FHA defines “family” to include “a single individual.” 42 U.S.C. § 3602(c) (2006).

45. *Id.* § 3603(b)(2).

FHA.<sup>46</sup> Thus, a Mrs. Murphy landlord is free to refuse to rent to minorities because of their race, behavior that would otherwise violate § 3604(a). She may also impose discriminatory terms and conditions upon her minority tenants, such as higher rents or security deposits, which for other landlords would violate § 3604(b). And she may lie to minorities who inquire about housing, telling them she has no vacancies when in fact she does, which would violate § 3604(d) if not for the exemption.<sup>47</sup>

The rationale behind the Mrs. Murphy exemption was the protection of the privacy and associational rights of small landlords who live in close proximity to their tenants.<sup>48</sup> Mrs. Murphy first appeared in the debates over Title II of the Civil Rights Act of 1964, which addressed public accommodations, including hotels and other places of temporary lodging.<sup>49</sup> Senator George D. Aiken of Vermont came up with the concept of Mrs. Murphy in order to argue that small boarding house operators should not be treated the same as big commercial hotels under the Act. He suggested that Congress “integrate the Waldorf and other large hotels, but permit the ‘Mrs. Murphys,’ who run small rooming houses all over the country, to rent rooms to those they choose.”<sup>50</sup>

A boarding house or rooming house was typically just a house in which transient guests occupied the various bedrooms.<sup>51</sup> The boarders did not have their own bathroom, kitchen, or living area. The only thing separating Mrs. Murphy from her boarders was a hallway, perhaps a flight of stairs, and her own bedroom door. This is a very intimate living situation, in which concerns of privacy and owner discretion are significant. In fact, the owner’s discretion to “receive or reject whom he or she wishes” is part of the very definition of the

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46. *Id.* § 3603(b).

47. *Id.* Indeed, it behooves Mrs. Murphy to lie to potential tenants who she wishes to reject for discriminatory reasons. As discussed in this Part, Mrs. Murphy is not exempt from § 3604(c), which means that she is not permitted to advertise or to make any “statement” of her discriminatory preferences. Thus, she may discriminate against minorities without penalty, but she cannot tell them the real reason for their rejection. See Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 192-93.

48. As Senator Walter Mondale, co-sponsor of the FHA, stated: “The sole intent of [the Mrs. Murphy exemption] is to exempt those who, by the direct personal nature of their activities, have a close personal relationship with their tenants.” 114 CONG. REC. 2495 (1968) (statement of Sen. Mondale); see also John T. Messerly, Note, *Roommate Wanted: The Right to Choice in Shared Living*, 93 IOWA L. REV. 1949, 1960-74 (2008) (arguing that the Mrs. Murphy exemption implicates constitutional rights of privacy, intimate association, expressive association, and possibly the free exercise of religion).

49. See 42 U.S.C. § 2000a (2006).

50. ROBERT D. LOEVY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964*, at 51 (1990).

51. 40A AM. JUR. 2d *Hotels* § 5. The only difference between a boarding house and a rooming house or lodging house is that boarding houses typically also provided one or more meals as part of the arrangement. This Article will refer to “boarding houses” because that is what Mrs. Murphy is typically referred to as operating.



term “boarding house.”<sup>52</sup> During the debates over Title II, Senator Hubert Humphrey stressed that:

There is no desire to regulate truly personal or private relationships. The so-called Mrs. Murphy provision results from a recognition of the fact that a number of people open their homes to transient guests, often not as a regular business, but as a supplement to their income. The relationships involved in such situations are clearly and unmistakably of a much closer and more personal nature than in the case of major commercial establishments.<sup>53</sup>

These concerns resonated with Congress, which ultimately defined Title II’s coverage as follows:

any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence.<sup>54</sup>

In 1968 Mrs. Murphy reappeared in the FHA as a property owner who rented out “rooms or units in dwellings containing living quarters . . . intended to be occupied by no more than four families living independently of each other.”<sup>55</sup>

The language of the exemption clearly states that it only covers “owner[s].”<sup>56</sup> Because exemptions to the FHA are to be narrowly construed, it would be improper for a court to interpret this term to include renters or tenants.<sup>57</sup> A comment in the legislative debates from one of the FHA’s opponents also makes clear that the exemption is not broad enough to cover renters:

Furthermore, the limited exemption relating to four-unit dwellings contained in the pending amendment applies only to owners. It would not protect a person who was himself renting or leasing his home and taking in boarders. A person in this category would still be compelled to meet all the burdensome requirements of the act and throw open his

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52. *Id.*; see also 40A AM. JUR. 2d *Hotels* § 6 (noting that in the case of boarding, lodging, or rooming houses, the proprietor deals with his or her customers individually concerning the terms and length of the accommodation and reserves the right to reject any or all applicants).

53. STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 43, at 1194.

54. 42 U.S.C. § 2000a(b)(1) (2006).

55. *Id.* § 3603(b)(2).

56. *Id.* This history offers a clue as to why the Mrs. Murphy exemption only protects owners: because the original boardinghouse version of Mrs. Murphy was virtually always going to be the owner of the property. It makes little sense for someone to operate a boardinghouse business out of a house they are only renting. Thus, when the exemption made the leap to the FHA, it was still aimed at protecting the “owner” of the property.

57. See *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995) (holding that the Fair Housing Act is a remedial civil rights statute that must be given a generous construction, therefore the exceptions thereto must be read narrowly).

private home to any one who wanted to move in with him.<sup>58</sup>

There is only one published federal case in which a roommate tried to claim the Mrs. Murphy exemption, and the court flatly denied the attempt.<sup>59</sup>

2. *Even Mrs. Murphy Landlords Are Not Exempt from § 3604(c)*.—The only part of the statute from which Mrs. Murphy landlords are *not* exempt is § 3604(c).<sup>60</sup> As a result of this “non-exemption,” even though a Mrs. Murphy landlord is allowed to discriminate against potential tenants, she cannot advertise her discriminatory preferences.<sup>61</sup> Although the legislative history is not clear as to why Congress singled out § 3604(c) in this manner, a number of courts have offered rationales for treating discriminatory statements differently.

The first, articulated in *Hunter*, is that the non-exemption prevents large-scale exclusionary effects that will be caused by discriminatory advertising.<sup>62</sup> The court reasoned that “seeing large numbers of ‘white only’ advertisements in one part of a city may deter nonwhites from venturing to seek homes there, even if other dwellings in the same area must be sold or rented on a nondiscriminatory basis.”<sup>63</sup> Thus, ads taken out by people who are entitled to discriminate may have an additional market-narrowing effect on nearby properties whose owners are not so-entitled or inclined to discriminate.

Another reason for the non-exemption is to prevent the widespread misperception that housing discrimination is legal.<sup>64</sup> In all likelihood, the majority of people in America are not aware of the Mrs. Murphy exemption. If Mrs. Murphy landlords were allowed to place discriminatory ads in a newspaper,

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58. 114 CONG. REC. 3345 (1968) (statement of Sen. Stennis).

59. *See* *Marya v. Slakey*, 190 F. Supp. 2d 95, 104 (D. Mass. 2001). In addition, other cases make clear that the Mrs. Murphy and other fair housing exemptions should not extend beyond the property’s owner. *See, e.g., Singleton v. Gendason*, 545 F.2d 1224, 1226 (9th Cir. 1976) (refusing to allow lessees to take advantage of another exemption in the FHA that is also reserved for owners); *Guider v. Bauer*, 865 F. Supp. 492, 495-96 (N.D. Ill. 1994) (holding that tenant of duplex who was daughter of owners and was in the process of purchasing duplex did not qualify as an “owner” for Mrs. Murphy purposes).

60. 42 U.S.C. § 3603(b) (2006) (stating that “nothing in section 3604 of this title (other than subsection (c)) shall apply” to Mrs. Murphy landlords). This regulation has been officially withdrawn, but is still relied upon for guidance.

61. *United States v. Hunter*, 459 F.2d 205, 213 (4th Cir. 1972) (“While the owner or landlord of an exempted dwelling is free to indulge his discriminatory preferences in selling or renting that dwelling, [he does not have] a right to publicize his intent to so discriminate.”).

62. *Id.* at 213-14. It appears that the white man who took out the discriminatory advertisement in *Hunter* would have qualified for the Mrs. Murphy exemption. *Id.* at 213 n.10. Although the man still could have been liable for the § 3604(c) violation, there is no indication that he was ever sued for it.

63. *Id.* at 214; *see also* Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 249.

64. *See* Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 250 (noting that one of the purposes of § 3604(c) generally is to prevent people from believing that housing discrimination is an accepted norm); *see also* *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27-29 (D.C. Cir. 1990).



the average readers of that newspaper would most likely assume that both discriminatory advertising and housing discrimination in general, are not against the law. At the very least, the potential for mass confusion is significant.

A final argument for the non-exemption is that barring discriminatory statements can prevent the psychic harm that minority home seekers will experience from seeing discriminatory advertisements.<sup>65</sup> This concern is heightened by the fact that advertisements are usually placed in media where they will be viewed by large numbers of people. As the *Hunter* court noted, “[n]ewspapers have a far more widespread coverage than privately circulated advertisements, magnifying the . . . deleterious effect discriminatory advertisements might have on the congressional purpose” of the FHA.<sup>66</sup> The discriminatory advertisement is thus like a figurative door being slammed in the face of everyone from the protected category who views the ad.

## II. THE CDA AND ITS CONFLICT WITH THE FHA

### A. *The CDA*

In 1996, Congress passed the Telecommunications Act, Title V of which is known as the CDA.<sup>67</sup> The Act was intended to ensure that the then-nascent Internet could flourish as a forum for intellectual discourse, commerce, and information sharing without excessive government regulation.<sup>68</sup> In the year before the statute was enacted, the New York Supreme Court had ruled that Prodigy, a host of Internet message boards, was liable for comments that were written by third party users of the site.<sup>69</sup> The court determined that Prodigy’s policy of screening out offensive content on its site constituted editorial control and thus made it akin to a newspaper publisher.<sup>70</sup> Because it was acting as a publisher, the court held that Prodigy could be liable for defamatory messages that were posted to its message boards.<sup>71</sup>

The ruling in *Prodigy* troubled lawmakers, who wanted to facilitate the free flow of ideas on the Internet but also wished to encourage website operators to

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65. See *HUD v. Schmid*, Fair Hous.-Fair Lending Rptr. ¶ 25,139, at 26,149 (H.U.D. A.L.J. July 15, 1999), available at 1999 WL 521524 (finding that § 3604(c) “gives persons seeking housing the right to inquire about the availability of housing from a housing provider without having to endure the insult of discriminatory statements”); *HUD v. Gruzdaitis*, Fair Hous.-Fair Lending (P-H) ¶ 25,136, at 26,119 (H.U.D. A.L.J. Aug. 14, 1998), available at 1998 WL 482759 (same); see also Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 249-50.

66. *Hunter*, 459 F.2d at 215.

67. The Telecommunications Act, 47 U.S.C. § 230 (2006).

68. *Id.* § 230(b)(2).

69. *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. May 24, 1995), overruled by statute, 47 U.S.C. § 230.

70. *Id.* at \*2. In fact, the court noted that Prodigy had compared itself to a newspaper in prior public statements, and had held out its exercise of editorial control over the comments as an advantage of the site. *Id.* at \*3.

71. *Id.* at \*7.

screen and filter offensive content, particularly pornographic or indecent material.<sup>72</sup> Thus, a provision entitled “‘good Samaritan’ blocking and screening of offensive material” was added to the CDA:

(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—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 . . . ; or—any action taken to enable or make available to information content providers or others the technical means to restrict access to material described [in the previous clause].<sup>73</sup>

Read as a whole, this provision would seem to create immunity only for those website operators who are taking steps to screen out offensive material.<sup>74</sup> If the first paragraph is taken in isolation, however, it accomplishes a much broader purpose: It exempts website operators from all publisher liability for the user-supplied content that they display. If this is the correct interpretation, then the CDA is squarely in conflict with the FHA’s publisher liability provisions. There is no evidence that Congress was aware of this potential conflict when it passed the CDA.<sup>75</sup>

### B. Cases Addressing the Conflict

1. *Chicago Lawyers Committee for Civil Rights Under Law v. Craigslist, Inc.*—Craigslist is a popular website that operates as a virtual bulletin board, featuring various discussion forums and classified advertisements for housing,

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72. CONG. REC. H8469 (daily ed. Aug. 4, 1995).

73. 47 U.S.C. § 230(c) (2006).

74. At least once commentator advocates reading the statute in this manner. See 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, 834-35 (2007); see also *Doe v. GTE Corp.*, 347 F.3d 655, 660-61 (7th Cir. 2003) (noting in dicta that a more sensible approach would be to immunize only those sites that attempt to block offensive or illegal material).

75. 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, 1002-03 (2002) (noting the “complete legislative silence as to the potential interaction between” the two statutes, and observing that the same Congress that passed the CDA also enacted fair housing legislation during the same session).



employment, goods and services, and personals, among other things.<sup>76</sup> The content of the postings is entirely user-supplied.<sup>77</sup> In 2006, the Chicago Lawyers' Committee for Civil Rights Under Law brought suit against Craigslist, alleging that it violated § 3604(c) of the FHA.<sup>78</sup> The complaint identified more than one hundred discriminatory housing advertisements that had been posted to the Chicago section of the site.<sup>79</sup> Craigslist moved for judgment on the pleadings, arguing that § 230(c) of the CDA gave it complete immunity for any cause of action related to third party content on its site.<sup>80</sup> The motion was granted, although for slightly different reasons than argued by the defense.<sup>81</sup> The District Court did not agree that the CDA grants immunity to all interactive computer services against all suits based on third party content. Rather, it found that the CDA only barred causes of action such as defamation, which require a finding that the defendant acted as the publisher of the third party content.<sup>82</sup> The court went on to find that § 3604(c), with its specific reference to publishing, was a clear example of such a cause of action.<sup>83</sup> The case was appealed to the Seventh Circuit, which affirmed the dismissal on these grounds.<sup>84</sup>

2. Fair Housing Council of San Fernando Valley v. Roommates.com.—In 2003, the Fair Housing Council of San Fernando Valley sued Roommates.com, an on-line roommate locator service.<sup>85</sup> The factual backdrop of this case was significantly different from *Craigslist*. Where Craigslist simply allows users to post ads to the site, Roommates uses a much more involved process. The site's users must first become members by creating a personal profile. The user creates

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76. For background and general information about Craigslist, see [craigslist/about > factsheet](http://www.craigslist.org/about/factsheet), <http://www.craigslist.org/about/factsheet> (last visited Mar. 26, 2010).

77. *Id.*

78. Complaint, Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. Feb. 3, 2006) (No. 06 C 0057), available at 2006 WL 344836.

79. *Id.*

80. 461 F. Supp. 2d 681, 682 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008).

81. *See id.* at 695-96.

82. *Id.* There are some situations in which a website operator might have non-publisher liability for the content on its site. For example, a website operator may be liable for contributory infringement if its system is designed to help people steal copyrighted material. *Id.* at 695 n.12; *cf.* Green v. Am. Online, 318 F.3d 465, 471 (3d Cir. 2003) (finding that a website operator not liable for allowing one user to send another a "punter" program through the site, which caused the second user's computer to shut down).

83. *Craigslist*, 461 F. Supp. 2d at 698.

84. 519 F.3d 666, 672 (7th Cir. 2008).

85. Fair Hous. Council of San Fernando Valley v. Roommate.Com, LLC, No. CV 03-09386PA (RZX), 2004 WL 3799488, at \*1 (C.D. Cal. Sept. 30, 2004), *rev'd and remanded* by 489 F.3d 921 (9th Cir.), *reh'g en banc granted* by 506 F.3d 716 (2007), *on hearing, en banc* 521 F.3d 1157 (2008). There was some confusion about the proper name for the defendant in this case. Although the service's web address was [www.Roommates.com](http://www.Roommates.com), the company that operated the service was named Roommate.com, LLC. Although the court chose to refer to the defendant as Roommate, this Article will refer to it as Roommates.

the profile by selecting from a number of predetermined options provided by the site, including “age, gender, sexual orientation, occupation, and number of children.”<sup>86</sup> The user does not have the option of leaving any of these blank.<sup>87</sup> If the user is listing a room for rent, he must also respond to prompts seeking information about the residence, current occupants of the household, and roommate preferences in terms of “age, gender, sexual orientation, . . . and familial status.”<sup>88</sup> Roommates then uses this information to match people seeking housing with those who are offering it.<sup>89</sup> Users can also create nicknames, attach photographs, and write “free-form . . . ‘comments’” to further describe themselves and their roommate preferences.<sup>90</sup>

The Fair Housing Council claimed that Roommates violated § 3604(c) and related state fair housing statutes in three ways.<sup>91</sup> First, the nicknames that some users selected for themselves contained descriptions based on race, ethnicity, gender, and religion.<sup>92</sup> Second, the free-form comments written by some users contained discriminatory statements. And third, the predetermined options on the profile questionnaire required users to provide information about protected characteristics about themselves and their preferred roommate.<sup>93</sup>

The case was originally dismissed on summary judgment, with the District Court ruling that the CDA gave Roommates complete immunity from suit.<sup>94</sup> The ruling was appealed to the Ninth Circuit,<sup>95</sup> which eventually heard the case en banc and handed down a more nuanced ruling.<sup>96</sup> The court found that the CDA did not provide immunity for Roommates under these circumstances. Specifically, Roommates was liable both for requiring users to answer questions about protected characteristics and for publishing the profiles containing this information.<sup>97</sup> The CDA offers no protection in situations like this because, by actively soliciting and shaping the content on the website: “Roommate becomes much more than a passive transmitter of information provided by others; it

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86. *Id.* at \*1.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at \*2.

92. *Id.* Such nicknames included ChristianGrl, Latinpride, Asianpride, Whiteboy, and Blackguy. *Id.*

93. *Id.* at \*2. Gender and familial status are protected characteristics under the federal FHA. 42 U.S.C. § 3604 (2006). California’s state fair housing law, which also contains an advertising provision, protects these characteristics as well as sexual orientation. CAL. GOV’T CODE § 12955 (2005).

94. *Roommate.Com*, 2004 WL 3799488 at \*6.

95. *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 489 F.3d 921 (9th Cir.), *reh’g en banc granted by* 506 F.3d 716 (2007), *on reh’g en banc* 521 F.3d 1157 (2008).

96. *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

97. *Id.* at 1175.



becomes the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not ‘creat[e] or develop[ ]’ the information ‘in whole or in part.’”<sup>98</sup>

The court also found Roommates liable because its matching system operated to “steer users based on” their identified protected characteristics.<sup>99</sup> Users were only sent listings from people with compatible preferences, and they were prevented from seeing listings for roommates that did not match their gender, sexual orientation, and familial status.<sup>100</sup> The liability here stemmed not so much from the user-supplied content but from the fact that Roommates used this information to restrict access to listings based on people’s protected characteristics.<sup>101</sup> But the court did find that the CDA shielded Roommates from liability for the discriminatory statements that users posted in the “Additional Comments” field.<sup>102</sup> Like the ads posted to Craigslist, this portion of the user profile was entirely user-generated and free-form, and Roommates did not use it to match or screen the listings.<sup>103</sup>

### III. IMMUNITY PULLS BACK THE CURTAIN ON DISCRIMINATORY ADS

As discussed previously, the recognition of publisher liability for discriminatory housing ads gave publishers the incentive to screen out such ads. Thus, after the early 1970s discriminatory housing ads largely vanished.<sup>104</sup> Today, however, the landscape has changed. The Internet’s ease, ubiquity, and anonymity mean that anyone can post a housing ad whenever the urge strikes. At the same time, the immunity granted to website operators by the CDA and recognized in *Craigslist* and *Roommates* means that these ads are not screened or reviewed by anyone. The result is that discriminatory ads are appearing in cyberspace that would not have been seen in print fifteen years ago.

Although fair housing advocates understandably find this situation problematic, it is extremely useful from an informational standpoint. For the first time in a generation we can view the ads, unfiltered, and get answers to the following questions: How much discriminatory preference is still out there? What does it look like? What are the most common bases for discrimination? Who is expressing it?

The data in the following paragraphs are drawn from several sources, including the *Craigslist* and *Roommates* complaints, a recent nationwide NFHA

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98. *Id.* at 1166 (quoting 47 U.S.C. § 2305(f)(3) (2006)).

99. *Id.* at 1167.

100. *Id.* The court differentiated the Roommates model from using an ordinary search engine. With a search engine, the user decides the search criteria. Even if the user runs a search based on discriminatory characteristics, the search itself is user-initiated and user-defined; the search engine itself is neutral. *Id.* at 1169-70.

101. *Id.*

102. *Id.* at 1172 n.33.

103. *Id.* at 1173-74. The appellate courts did not address the plaintiff’s claims about the allegedly discriminatory screen names selected by the users.

104. 17 AM. JUR. 2D *Civil Rights* § 394 (2010).

study of discriminatory housing advertising,<sup>105</sup> and my own empirical analysis of 10,000 Craigslist advertisements from ten cities across the country (“the Ad Review”).<sup>106</sup> Although this sample is not perfectly scientific, it gives a good picture of where the discriminatory ads are coming from and what they typically entail.

### A. *How Many Violations?*

It is impossible to know with certainty how many discriminatory housing ads appear on the Internet in a given month or year. But all available evidence indicates that there are a great many. The NFHA Report identified more than 7500 discriminatory housing ads on websites serving all fifty states, including major metropolitan areas, smaller cities, and rural areas.<sup>107</sup> The NFHA Report does not say how many total ads were reviewed, meaning that it is not possible to garner from the NFHA Report what percentage of ads found on the Internet are discriminatory.

The Ad Review found 538 problematic advertisements in a total pool of 10,000, indicating that approximately 5.4% of all ads posted to Craigslist at any given time potentially violate the law.<sup>108</sup> Extrapolating total numbers from this is difficult because the Ad Review covered only ten cities, and it only included ads on Craigslist. But based on these numbers and given the enormous volume of ads on Craigslist and other websites, it is clear that there are a significant number of problematic and discriminatory ads appearing in cyberspace.

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105. NAT’L FAIR HOUS. ALLIANCE, FOR RENT: NO KIDS! HOW INTERNET HOUSING ADVERTISEMENTS PERPETUATE DISCRIMINATION (2009), available at <http://www.nationalfairhousing.org> (follow “Fair Housing Resources” link, then follow “Reports and Research” link, then follow “Download” link in box titled “For Rent: No Kids!”) [hereinafter NAT’L FAIR HOUS. ALLIANCE, FOR RENT: NO KIDS!]. In compiling this report, NFHA attorneys and cooperating member organizations reviewed thousands of housing ads posted to websites throughout the United States. *Id.* at 4.

106. I conducted my review as follows: I examined housing advertisements on Craigslist for ten major urban areas across the country: Atlanta, Boston, Chicago, Dallas, Denver, Las Vegas, Los Angeles, Minneapolis, New York City, and St. Louis. For each city, I reviewed 1000 ads—500 ads that appeared under the “Housing/Apartments” heading (which is for traditional rentals) and 500 ads that appeared under the “Rooms/Shares” heading (which is for roommates and shared living situations). Each block of 500 ads was reviewed in a single day to minimize the likelihood of repeat postings. I pulled any ad that potentially violated § 3604(c) of the FHA and categorized the offending language according to which protected category or categories it implicated. A detailed methodology can be found at *infra* Appendix.

107. NAT’L FAIR HOUS. ALLIANCE, FOR RENT: NO KIDS!, *supra* note 105, at 4-5.

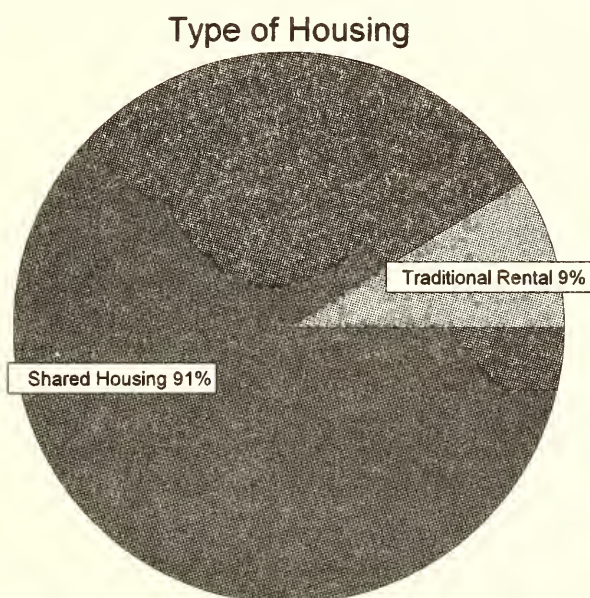
108. I describe the ads that I flagged in terms of “problematic language,” “possible bias,” and “potential violations” because, as discussed below, many of the ads that I flagged do not express an obvious discriminatory intent. The language is enough to raise a red flag under the HUD Guidelines, and it should be enough to have a complaint survive a motion to dismiss for failure to state a claim, but it would be up to a court to determine whether a particular ad satisfies the “ordinary reader” standard. *See* *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991).



*B. What Do the Discriminatory Housing Ads Look Like and Who Is Posting Them?*

A qualitative analysis of the problematic advertisements reveals a number of interesting findings.

1. *Ads for Roommates Are Far More Likely to Contain Problematic Language Than Ads for Traditional Rental Housing.*—The vast majority of discriminatory housing ads are taken out by individuals seeking roommates or shared housing<sup>109</sup> as opposed to landlords seeking a traditional tenant. The Ad Review flagged 489 ads for shared housing but only forty-nine ads for traditional rental housing.<sup>110</sup> Thus, 91% of all problematic housing ads identified were ads seeking roommates.



Roommate ads are also likely to contain other detailed preferences or requirements that do not violate the FHA.<sup>111</sup> Some people express very specific

109. I use the term “shared housing” to mean the following: A situation in which two or more unrelated persons live together where each has some private space (usually a bedroom) while sharing common indoor areas such as kitchen, living, and dining rooms, and outside yard areas. The occupants freely interact with one another, collectively pay bills, and carry out a variety of day-to-day household maintenance chores and management tasks.

110. It is harder to draw conclusions from other studies on the breakdown between ads for roommates versus those for traditional rental housing. The NFHA Report fails to delineate what percentage of the ads it found were for roommates as opposed to traditional rental housing. Roommates.com, as its name implies, *only* features ads for shared housing. The *Craigslist* complaint does not specify which housing categories the various ads fell under. *See* Complaint, Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006) (No. 06C 0657), 2006 WL 344836.

111. One of the more creative ads was part of the case against Roommates.com: “I am not looking for freaks, geeks, prostitutes (male or female), druggies, pet cobras, drama, black muslims

preferences about characteristics such as the political affiliation, diet preferences, sleep and hygiene habits, and social lives of their roommates.<sup>112</sup> They may seek a roommate who is “Harvard-affiliated,”<sup>113</sup> “comfortable with a clothing optional atmosphere,”<sup>114</sup> “health conscious and hip,”<sup>115</sup> “meticulously clean, very quiet [and] hard working,”<sup>116</sup> or who “likes cheap beer and throwing water balloons at people from our windows at 2am.”<sup>117</sup> Such detailed descriptions of desired tenants do not appear in ads for traditional rental housing.<sup>118</sup>

2. *The Most Common Basis for Discrimination—by Far—Is Familial Status.*—One of the most dramatic findings is the bases for discrimination that the ads contain. Although the ads that discriminate based on race, religion, and ethnicity are perhaps the most jarring (and, not coincidentally, have received the most attention), they are extremely rare. The Ad Review found only thirty-eight ads that could be read as having a racial bias, thirty-two ads with a possible bias based on national origin, and twenty-nine ads with a possible religious bias, for a total of ninety-nine.<sup>119</sup> Thus, all of the ads that potentially discriminated on the

or mortgage brokers.” *Fair Hous. Council of San Fernando Valley v. Roommate.Com, LLC*, No. CV 03-09386PA(RZX), 2004 WL 3799488, at \*2 (C.D. Cal. Sept. 30, 2004), *rev’d and remanded by* 489 F.3d 921 (9th Cir.), *reh’g en banc granted by* 506 F.3d 716 (2007), *on hearing, en banc* 521 F.3d 1157 (2008). The statement of discrimination against black Muslims violates the FHA’s prohibition against discrimination based on race and religion, but the other categories are not based on any protected characteristic. 42 U.S.C. § 3604(c) (2006). *See also* ad posted to Craigslist for a roommate in Minneapolis: “No bible thumpers, no bigots, no strung out meth addicts, no former presidents, no one over eight feet tall, no white-collar criminals.” Minneapolis craigslist, Rooms & Shares, Oct. 22, 2009 (on file with author).

112. *See, e.g.*, “You should probably be a mature . . . health conscious individual . . . Preferably vegetarian . . . You should not be an extremist in any sense of the world as we attempt to live \*in balance.\*” Boston Craigslist, Rooms & Shares, June 9, 2009 (on file with author); “You are active and socialize outside the house . . . conservative about energy, . . . environmentally aware, . . . and either vegetarian or don’t cook meat in the apartment. . . . Also it helps if you are a heavier sleeper.” Boston Craigslist, Rooms & Shares, June 10, 2009 (on file with author).

113. Boston Craigslist, Rooms & Shares, June 8, 2009 (on file with author).

114. Boston Craigslist, Rooms & Shares, June 9, 2009 (on file with author).

115. Los Angeles Craigslist, Rooms & Shares, Oct. 9, 2009 (on file with author).

116. New York City Craigslist, Rooms & Shares, Oct. 30, 2009 (on file with author).

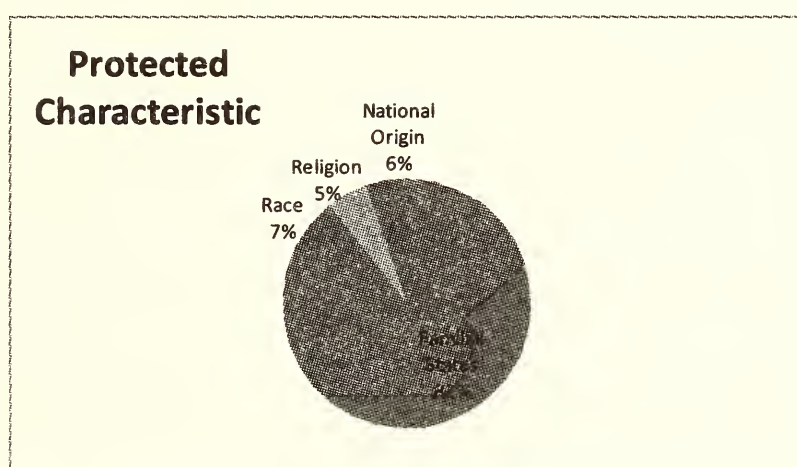
117. Chicago Craigslist, Rooms & Shares, Oct. 28, 2009 (on file with author).

118. The only specific characteristics mentioned in the ads for traditional rentals were for tenants who were professional and quiet.

119. Disability as a protected category is not dealt with in the Ad Review. There were virtually no ads of either housing type that could be read as discriminating against people with disabilities. There were only two ads that stated a dispreference for people with a history of alcohol or drug treatment. *See* Boston Craigslist, Rooms & Shares, June 9, 2009 (on file with author) (“NO drugs or AA”); Boston Craigslist, June 9, 2009 (on file with author) (“Individuals should . . . ‘Not’ have a history of alcohol and/or drug treatment or abuse”). Sex is not addressed either. As discussed *supra* note 42 and accompanying text, roommates are allowed to express preferences based on sex, and there were no ads for traditional rental housing that mentioned sex. Thus, the only protected



basis of race, religion, and national origin combined made up less than 1% of the sample. The most common basis for discrimination in all of the ads, for both roommates and traditional rental housing, is familial status. The Ad Review revealed 439 ads that potentially discriminated based on familial status, or close to 4.4% of the sample.<sup>120</sup> The NFHA Report found similar results, leading to the conclusion that “[t]he most common FHA violation that NFHA and its members found on the Internet was advertising discriminating against families with children.”<sup>121</sup> Although not a formal analysis, it is telling that the *Craigslist* complaint cited four ads that discriminated based on race or color, compared with eighty-one ads that discriminated on the basis of familial status.<sup>122</sup>



When the variables for type of housing and basis for discrimination are put together, the differences between traditional rentals and shared housing become even more pronounced. In the Ad Review, all of the ads that expressed a racial or religious preference were roommate ads, as were virtually all of the ads mentioning national origin. Of the forty-nine problematic ads flagged for

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characteristics that the Ad Review and this Article focus on are race, religion, national origin, and familial status.

120. This number may be an extremely conservative estimate. As described in the Appendix, I flagged ads by using the HUD Advertising Guidelines and § 3604(c) precedent as guides. Thus, in the absence of blatant statements like “no kids,” I focused on particular buzz words like “mature,” “retired,” and “single.” But the vast majority of the ads made clear that children were not living in the house and implied that children would not be welcome, without using this kind of loaded language. Many ads contained highly specific and detailed descriptions of the desired roommate, while failing to mention children. This raises a strong presumption that a person with a child would not be welcome. Although an argument could be made that these ads fail the ordinary reader test, without more I did not flag them. Without direct or indirect statements focusing on children, I believed the connection to familial status discrimination to be too attenuated. This is my taxonomy, however, and a court could reach a different conclusion.

121. NAT’L FAIR HOUS. ALLIANCE, *FOR RENT: NO KIDS!*, *supra* note 105, at 5.

122. *See* Complaint, Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006) (No. 06C 0657), 2006 WL 344836.

traditional rental housing, forty-seven stated a preference based on familial status although only two potentially discriminated on the basis of national origin. Put another way, familial status was practically the only basis for discrimination in the ads for traditional rental housing.

3. *The Statements Are Not Consistently Anti-Minority.*—The type of discriminatory preference in the ads is also noteworthy. In 1968, supporters of the FHA and its advertising provisions were most likely concerned with remedying a situation in which the vast majority of discriminatory housing statements were anti-minority (specifically, anti-black).<sup>123</sup> Today the picture is much different. Simply put, the discrimination runs in all directions. To be sure, there are some “traditionally” discriminatory ads, for example: “NO MINORITIES”<sup>124</sup> and “African Americans and Arabians tend to clash with me so that won’t work out.”<sup>125</sup> There are others, however, that discriminate *in favor* of minority groups, such as: “Only Muslims apply,”<sup>126</sup> “Non- Women of Color NEED NOT APPLY,”<sup>127</sup> and “looking for gay latino.”<sup>128</sup>

The Ad Review found that, overall, statements favoring minority groups (fifty-six) actually predominated over statements favoring majority groups (forty-one).

- **Race:** The thirty-eight ads were closely divided between pro-white and pro-minority: twenty favored whites, while seventeen favored non-whites (nine for blacks and eight for Asians).<sup>129</sup>
- **Religion:** Of the twenty-nine ads flagged for religion, most were pro-Christian or pro-religious generally, while a significant number either favored minority religions or expressed a bias against religion generally: Fifteen favored Christians, six favored Jews, one favored Mormons, one

123. See, e.g., Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 223 n.162; see also Hearings on the Fair Hous. Act of 1967 before the Subcomm. on Hous. and Urban Affairs of the S. Comm. on Banking and Currency on S. 1358, S. 2114, and S. 2280 Relating to Civil Rights and Hous., 90th Cong. (1967), at 120 (statement of Roy Wilkins, Executive Director of the NAACP and Chairman of the Leadership Conference on Civil Rights: “There is nothing more humiliating to a father and a mother and two small children when he . . . wants to purchase a home, and somebody tells him you can’t do it because you are black.”); 114 CONG. REC. 5641 (1968) (remarks of Sen. Mondale: “I still believe that one of the basic and fundamental objections to discrimination in the sale or rental of housing is the fact that through public solicitation the Negro father, his wife and children are invited to go up to a home and thereafter to be insulted solely on the basis of race.”)).

124. Complaint, ¶ 19, *Chi. Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006) (No. 06C 0657), 2006 WL 344836.

125. *Id.* ¶ 17.

126. *Id.* ¶ 40.

127. *Id.* ¶ 21.

128. *Id.* ¶ 24.

129. The remaining ad identified the neighborhood in which the housing was located as “white, puerto rican and mexican, some asian and black too.” New York City Craigslist, Rooms & Shares, Oct. 30, 2009 (on file with author).



avored Buddhists, four expressed a general pro-religion preference, and two expressed a strong dispreference for religious people.

- **National Origin:** The thirty-two ads flagged for national origin were overwhelmingly in favor of particular national origin minority groups or foreigners generally: Twenty-six ads expressed a preference for “International” people, Hispanics, Europeans, or people from particular foreign countries, while only two expressed a preference for Americans or against foreigners.<sup>130</sup>

Familial status is a significant outlier here. The ads that mention familial status almost never express a bias in favor of families with children.<sup>131</sup>

4. *Descriptions of the Person Who Placed the Ad Are More Common Than Preferences for a Particular Roommate Type.*—The majority of ads that mention race, national origin, or religion do so not in terms of the preferred characteristics of the roommate, but rather as self-descriptions of the person taking out the ad or descriptions of the neighborhood in which the housing is located. Put another way, it is more common for a person to say “I am a white Christian male looking for a roommate” than “I am looking for a white Christian male roommate.” In total, sixty-four of the problematic ads consisted of a self- or neighborhood description, while just thirty-two of the ads contained statements of preference about the prospective roommate.

- **Race:** Of the thirty-eight ads flagged for race, in twenty-seven the problematic language was a self-description of the person who placed the ad, one contained a description of the area, and only ten stated an overt preference for a roommate of a particular race.<sup>132</sup>

130. The remaining four ads identified the neighborhoods in which the housing was located using ethnic terms. New York City Craigslist, Rooms & Shares, Oct. 30, 2009 (on file with author) (describing neighborhood as “white, Puerto Rican and mexican, some asian and black too”); New York City Craigslist, Rooms & Shares, Oct. 30, 2009 (on file with author) (“Great neighborhood to practice your Spanish”); New York City Craigslist, Apts/Housing, Oct. 30, 2009 (on file with author) (“historically Irish” neighborhood with growing “Asian and Latino communities”); Dallas Craigslist, Rooms & Shares, September 2, 2009 (on file with author) (area is “mainly Mexican”).

131. It is not clear whether, as a matter of statutory application, familial status discrimination could even “go both ways.” The way the statute defines familial status—as one or more individuals under the age of eighteen being domiciled with a parent or guardian—seems to indicate that it only protects families with children, and not people who are discriminated against because they do not have children. See 42 U.S.C. § 3602(k) (2006). This interpretation would also be consistent with the legislative history of the FHA, which contains plenty of statements of concern about discrimination against families with children, and no mention of discrimination against people who do not have children. See 134 Cong. Rec. S19722-23 (1988) (remarks of Senator Karnes); sources cited *infra* notes 216-18. If this interpretation is correct, and there is no reason to doubt that it is, then familial status is different from race, religion, national origin, and sex, all of which protect anyone who is discriminated on these bases, regardless of their particular race, religion, national origin, or sex.

132. Two of these were an ad (which was posted twice) by a “white male” who sought to live with an “Asian female.” charlesdragon@sbcglobal, Chicago Craigslist, Rooms & Shares, Oct. 27,

- **Religion:** Of the twenty-nine ads flagged for religion, seventeen consisted of self-identification, one contained a religious description of the neighborhood, and only eight stated an overt preference for a roommate with particular religious beliefs (or non-beliefs).<sup>133</sup>
- **National Origin:** Of the thirty-two ads flagged for national origin, fourteen contained self-descriptions, four contained neighborhood descriptions, and fourteen stated an overt preference for a roommate of a particular national origin.

As discussed previously, such self-descriptions and neighborhood descriptions can violate the FHA just as easily as an ad stating a preference for a particular type of roommate.<sup>134</sup>

It is worth noting that, of the race, religion, or ads that stated a preference for a particular type of roommate, almost none stated a dispreference for any particular group.<sup>135</sup> Put another way, while some ads stated “seeking Christian roommate,” there were no ads which stated “no Jews.” Obviously, stating a preference for one group implies a dispreference for the rest, and it violates the law just as a statement of dispreference would. Significantly, however, the sort of nasty and bigoted statements of dispreference identified in the *Craigslist* and *Roommates* cases were not found in the Ad Review.<sup>136</sup> Familial status is the exception. Many of the familial status ads were quite blatant in their dispreference for children.<sup>137</sup>

Finally, just as roommate ads are likely to include detailed descriptions of the person sought, they also likely contain a significant amount of information about the person who is taking out the ad. People often specify their age, profession, sexual orientation, eating habits, social activities, and hobbies. They may “LOVE bikes and beer . . . and jamming out in our undies,”<sup>138</sup> or live by

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2009 and Oct. 28, 2009 (both on file with author).

133. The remaining three contained vague statements of religiosity which could arguably be considered as describing the person placing the ad, but which I catalog separately because they do not directly self-identify. *See, e.g.*, Chicago Craigslist, Rooms & Shares, Oct. 29, 2009 (on file with author) (“God Bless”); Dallas Craigslist, Rooms & Shares, Sept. 3, 2009 (on file with author) (same); Atlanta Craigslist, Rooms & Shares, May 26, 2009 (on file with author) (“stay blessed”).

134. *See, e.g.*, *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972).

135. The only two ads to state a dispreference for a particular group were the two ads stating that overly-religious people would not be welcome.

136. One explanation might be the fact that the Ad Review only looked at a snap-shot of ads from a single one- to two-day period, whereas the plaintiffs in *Craigslist* and *Roommates* presumably searched many days or months worth of ads to come up with the most problematic. It might also be the case that the publicity from these cases, combined with the information-providing efforts that Craigslist has implemented since the lawsuit have resulted in greater awareness of the law. Therefore, fewer advertisers are willing to make blatantly bigoted statements.

137. One ad, for example, made clear just how negatively the poster viewed children when it stated: “No drugs, felons, or children.” Dallas Craigslist, Rooms & Shares, Sept. 2, 2009 (on file with author).

138. Chicago Craigslist, Rooms & Shares, Oct. 28, 2009 (on file with author).



“Christian-based principles.”<sup>139</sup> The ad may be placed by a “Jetta-driving Asian Jew,”<sup>140</sup> a “[q]ueer mom with a great view,”<sup>141</sup> or “three early twenty-something girls who love Costco, cooking, trying new vegetables, Glee and walking/running in the park.”<sup>142</sup> Such extensive self-descriptions of the person placing the ad are not found in ads for traditional rental housing.<sup>143</sup>

#### IV. ASSESSING THE INFORMATION

What can we take from is information? Some preliminary conclusions can be made about the nature of on-line housing advertisements, which forms the basis for the policy recommendations in the next Part.

##### *A. There Is a Qualitative Difference Between Roommate Ads and Ads for Traditional Rental Housing*

The vast majority of potentially discriminatory ads are those for shared housing. Virtually all of the ads that mention the protected categories of race, religion, and national origin are roommate ads. Thus, to the extent that there is a problem of discriminatory advertising on the Internet, roommate ads are the primary culprit.

The most significant reason for this is the nature of the living situation between roommates. Roommates share intimate living spaces. They often establish social relationships with one another and forge a shared identity around their living arrangements. Many people seeking roommates are either seeking someone like themselves,<sup>144</sup> or someone who will be comfortable with them,<sup>145</sup> in ways that simply do not make sense in traditional landlord-tenant situations. As a result, roommate-seekers are much more likely to express detailed preferences about their desired roommates—both in terms of protected and non-protected characteristics—than landlords will about their tenants. Similarly, roommate ads frequently contain much more information about the person placing the ad than ads for traditional rental housing. In a very real way, ads for

139. Atlanta Craigslist, Rooms & Shares, May 26, 2009 (on file with author).

140. Los Angeles Craigslist, Rooms & Shares, Oct. 15, 2009 (on file with author).

141. Chicago Craigslist, Rooms & Shares, Oct. 28, 2009 (on file with author).

142. Chicago Craigslist, Rooms & Shares, Oct. 29, 2009 (on file with author).

143. None of the ads for traditional rental housing in the Ad Review contained any description of the person who placed the ad.

144. For example, one ad sought “a person whose personality matches mine.” Boston Craigslist Rooms & Shares, June 10, 2009 (on file with author).

145. See, e.g., Boston Craigslist, Rooms & Shares, June 8, 2009 (on file with author) (“MUST LIKE DOGS AND BRITISH PEOPLE”); Los Angeles Craigslist, Rooms & Shares, Oct. 15, 2009 (on file with author) (“We are both asian-american but that doesnt mean you need to be too. it does help though since you know those crazy asians like to cook strange looking things.”); Dallas Craigslist, Rooms & Shares, Sept. 3, 2009 (on file with author) (“[O]ther renter also a christian but we are not bible toot en, scripture quot en people.”).

roommates tend to resemble personal dating ads.<sup>146</sup> Personal dating ads almost always include the advertiser's gender and race. This practice is so routine that abbreviations like "WM" and "BF" are used instead of spelling out the words "White Male" or "Black Female."<sup>147</sup> A significant number of advertisers for roommates adopt these same abbreviations.<sup>148</sup>

Another reason why roommate ads are the primary culprits is that most roommate-seekers are renters as opposed to property owners or professional landlords. As such, they are less likely to know about the FHA and its requirements as they pertain to advertising.<sup>149</sup> Even if they are aware on some level that there are laws against housing discrimination, they may not realize that the law applies to them as roommate-seekers.<sup>150</sup> Roommate-seekers may

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146. Some, in fact, seem to be an unsettling combination of the two. An ad posted to craigslist for shared housing in Dallas headlined "Seek Female/Woman Live in Companion" states that the housing is "OPEN TO ANY WOMAN . . . AS LONG AS YOU ARE ATTRACTIVE TO ME." Dallas Craigslist, Rooms & Shares, Sept. 3, 2009 (on file with author). Another posted to Craigslist for shared housing in Chicago has the headline "Free room in exchange for services" and states "Free for a woman, room and board in exchange for housework and other 'duties.' Must be female and single." Chicago Craigslist, Rooms & Shares, Oct. 29, 2009 (on file with author). A third, which was flagged because it specifies a racial preference, was posted by a man offering "Free Housing for Single Female." Dallas Craigslist, Rooms & Shares, Sept. 2, 2009 (on file with author). A fourth, which was flagged because it stated the race of the person taking out the ad, offered a "free place to stay for female w/benefits." Atlanta Craigslist, Rooms & Shares, May 26, 2009 (on file with author).

147. Lisa C. Ikemoto, *Male Fraud*, 3 J. GENDER, RACE & JUST. 511, 524 (2000).

148. Indeed, most of the ads in the Ad Review that were flagged for making a racial statement did so in this manner.

149. Although, as discussed *supra* note 78, landlords and property owners may not be terribly well informed about the law, either.

150. The level of ignorance about roommate liability under the FHA cannot be overstated. Although the bulk of the evidence for this proposition is anecdotal, it has been overwhelming. To begin, as discussed *infra* notes 153-54 and the accompanying text, academics who have published articles on the subject in law review articles have presented this aspect of the law incorrectly. Additionally, when I have presented this paper to law faculties, and described the topic to lawyers and law students, I have been uniformly met with surprise and disbelief that roommates are not allowed a say in who they live with and cannot advertise their preferences.

Finally, an unscientific observation that nevertheless speaks volumes: In 1992, a popular movie was released entitled *SINGLE WHITE FEMALE* (Columbia Pictures 1992), about a woman who advertises for the eponymous single white female roommate in the classifieds. The roommate she selects meets the stated racial and gender requirements, but turns out to be a murderous psychopath. See *Single White Female* (1992)—Plot Summary, <http://www.imdb.com/title/tt0105414/plotsummary> (last visited July 13, 2009). Such an ad clearly violates the FHA and no newspaper would have published it. See *supra* Part I.C. Obviously, the story is fictional and somewhat implausible. The fact, however, that an ad that articulated a racial preference was the central plot point in a major Hollywood movie—indeed, the ad copy is the *title* of the movie—without any controversy attached to the racial preference it articulated indicates a mass ignorance of the law.



mistakenly believe that they are covered by the Mrs. Murphy exemption, and they may not realize that even exempt landlords must abide by § 3604(c).<sup>151</sup> The law is complex and obscure enough that even academics get it wrong.<sup>152</sup> For example, a recent article about the *Roommates* case contains an entire section entitled “When Is It Lawful to Discriminate, But Not To Advertise That You Do? When You’re Looking For A Roommate.”<sup>153</sup> Another article on discrimination more generally states flatly in the second sentence: “We may decide on everything from our roommate to spouse, stating specifically that we are only interested in rooming with or marrying a person of a specific race, and that we choose to exclude all others.”<sup>154</sup>

*B. There Is a Difference Between Familial Status and Other Bases for Discrimination*

Familial status discrimination is the clear outlier in a number of ways. Far more ads discriminate on the basis of familial status than for all of the other protected characteristics combined.<sup>155</sup> It is the only characteristic that is found in significant numbers in ads for traditional rental housing. Finally, the ads that mention familial status are consistently anti-child.

Put another way, if we were to take familial status discrimination out of the equation, there would be virtually no discriminatory ads for traditional rental housing, and relatively few for shared housing. Thus, to the extent that there is a problem with discriminatory housing advertisements, it is a problem with familial status discrimination.

V. USING THE INFORMATION

This data makes clear that discriminatory ads are overwhelmingly likely to be taken out by individuals seeking roommates, and they are far more likely to discriminate based on familial status than on any other protected category. Those ads that do mention race, ethnicity, or religion are likely to discriminate in all directions, and to consist of self-descriptions of the person taking out the ad.<sup>156</sup>

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The film also may have exacerbated public ignorance of the law, as people who saw the movie (or even just the advertisements for the movie) could have been led to believe that such a housing advertisement was lawful.

151. See *supra* Part I.C.

152. See *supra* note 148.

153. 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, 334 (2008). As discussed *infra* Part V.A, there are significant constitutional arguments in favor of allowing people to discriminate in their choice of roommates. The case law, however, has not supported this conclusion.

154. Kenneth L. Shropshire, *Private Race Consciousness*, 1996 DET. C.L. MICH. ST. U. L. REV. 629, 629-30.

155. See *supra* Part III.B.2.

156. See *supra* Part IV.

This information can and should inform any discussion of how to proceed. There are a number of interests and values at stake, some of which may conflict. On the one hand, it is important to prevent and remedy housing discrimination, which includes preventing discriminatory advertisements that may deter people from ever trying to procure particular housing. At the same time, it is important to safeguard the freedom of association and expression of individuals who share intimate living space, to eliminate confusion about the law, and to ensure opportunities and convenience to advertise and find housing for users of on-line sites.

### A. Roommates Should Be Exempt

It is significant that the vast majority of ads that contain discriminatory statements are ads for roommates. First, it implies that a large number of people have no idea that the FHA applies to roommate advertisements. It also indicates that people perceive the roommate relationship differently than the relationship between landlord and tenant in a traditional rental situation. Put another way, there appears to be a social norm that the roommate relationship—just like one’s choice of friends or intimates—is not one to which the concept of “discrimination” readily applies. This opens up the inquiry as to whether roommates should be covered by the FHA at all and whether the Mrs. Murphy exemption needs to be amended to include them.<sup>157</sup> There are a number of reasons why the exemption should be changed.

1. *The Disconnect Between the Exemption’s Purpose and Its Application.*—The stated purpose of the Mrs. Murphy exemption—to protect the associational and privacy rights of people who share intimate living space<sup>158</sup>—fails to match up with the people it actually covers. It protects owners of small apartment buildings who live in separate units and have no meaningful interactions with their tenants, but it does not protect tenants who actually do share intimate living space. Although this poor fit has existed for as long as the Mrs. Murphy exemption, the problems it presents have become more salient now that (1) increasing numbers of people are living with roommates and housemates,<sup>159</sup> and (2) many are advertising for roommates and housemates on the Internet, and thus exposing themselves to prosecution for discrimination.

Bringing the exemption back to its original purpose of protecting the privacy and associational rights of people in shared living situations involves a relatively easy fix. Congress could amend the statute to expressly exempt individuals in shared living situations, regardless of whether they are owners or renters. Alternatively, HUD could issue a regulation specifying that individuals in shared

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157. For a discussion of the Mrs. Murphy exemption, see *supra* Part I.C.

158. See *supra* note 48.

159. In 1990, the number of households that were comprised of roommate, housemates, or other groups of nonrelatives was roughly 2.5 million. In 2000, there were roughly 3.2 million such households, a 28% increase. FRANK HOBBS, U.S. CENSUS BUREAU, EXAMINING AMERICAN HOUSEHOLD COMPOSITION: 1990 & 2000, tbl. A-3, at 34 (2005), available at <http://www.census.gov/prod/2005pubs/censr-24.pdf>.



living arrangements may not to be prosecuted (much as HUD already provides protection for statements of sex-preference in shared housing<sup>160</sup>).

2. *The Law's Protection of the Right of Intimate Association*.—Looking to the original purpose of the Mrs. Murphy exemption is merely a first step, for it raises a deeper question about the validity of the privacy and associational rights argument in the first place. Rather than simply shifting the definition of who is permitted to discriminate, it is important to ask why anyone should be entitled to exclude people based on protected characteristics solely because of the intimacy of their living situation. In fact, whether privacy and associational rights should entitle people in shared living situations to discriminate has not been clearly settled, although a review of precedent finds significant support for the argument that they should.

The U.S. Supreme Court has not spoken clearly on the level of Constitutional protection appropriate for nonfamily members who choose to cohabit. On one hand, decisions such as *Village of Belle Terre v. Boraas*<sup>161</sup> evince little sympathy for the associational rights of unrelated individuals to live together vis à vis the rights of families. There, the Court upheld a zoning ordinance that prohibited groups of unrelated individuals from living together.<sup>162</sup> Applying a rational basis standard of review, the Court found that the Village's stated goal of reducing congestion and providing a family-friendly environment for children was a sufficient state interest to justify the ordinance.<sup>163</sup>

The Court's decision elicited a strong dissent from Justice Marshall, who argued that:

The choice of household companions—of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution.<sup>164</sup>

The *Belle Terre* decision has been widely criticized by commentators,<sup>165</sup> and

160. See HUD Regulation Regarding Fair Housing Advertising, § 10920(a)(5), available at <http://www.hud.gov/offices/fheo/library/part109.pdf>. This regulation has been officially withdrawn, but is still relied upon for guidance.

161. 416 U.S. 1 (1974).

162. *Id.* at 8-9. "Single family" zoning ordinances that limit housing in certain areas to people who are related by blood, marriage, or adoption remain commonplace today, although most contain an exception allowing for some number of unrelated people to live together as roommates. See ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* 3D § 9.30 (1986).

163. *Belle Terre*, 416 U.S. at 8-9.

164. *Id.* at 16 (Marshall, J., dissenting) (citations omitted).

165. See, e.g., Robert J. Hartman, *Village of Belle Terre v. Boraas: Belle Terre is a Nice Place to Visit—But Only "Families" May Live There*, 8 URB. L. ANN. 193 (1974); Norman Williams, Jr. & Tatyana Doughty, *Studies in Legal Realism: Mount Laurel, Belle Terre and Berman*, 29 RUTGERS L. REV. 73, 76-82 (1975); Michael Alan Barcott, Note, *Village of Belle Terre v. Boraas:*

a number of state courts, under their respective state constitutions, have chosen to grant greater protection for the rights of unrelated people to live together.<sup>166</sup>

At the same time, the Court is reluctant to *force* associations on people in intimate settings. Although the family is still considered the most intimate relationship, and worthy of protection from government interference, the Court has indicated that other relationships deserve protection, too.

In *Roberts v. U.S. Jaycees*,<sup>167</sup> the Court noted that:

[The Bill of Rights] must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.<sup>168</sup>

The *Roberts* Court suggests a methodology for determining whether a relationship is sufficiently intimate to warrant protection:

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns

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"*A Sanctuary for People*," 9 U.S.F. L. REV. 391 (1974).

166. See, e.g., *City of Santa Barbara v. Adamson*, 610 P.2d 436, 442 (Cal. 1980) (holding that a city ordinance that would prohibit more than five unrelated adults from living together was an invalid intrusion into life-style decisions); *State v. Baker*, 405 A.2d 368, 375 (N.J. 1979) (holding that city ordinance that would prohibit more than four unrelated people from living together violates Due Process); *City of Des Plaines v. Trottner*, 216 N.E.2d 116, 120 (Ill. 1966) (striking down ordinance that would prohibit more than two unrelated individuals from living together because it would "penetrate [too] deeply . . . into the internal composition of a single housekeeping unit").

The Supreme Court refused to extend *Belle Terre* further in *Moore v. City of East Cleveland, Ohio*, which dealt with a zoning ordinance that essentially forbade extended families from living together. 431 U.S. 494, 495-96 (1977) (plurality opinion). A plurality of the Court found that the zoning ordinance sliced too "deeply into the family itself" and intruded on private family living arrangements. *Id.* at 498-99.

167. 468 U.S. 609 (1984).

168. *Id.* at 618-19 (citations omitted).



giving rise to this constitutional protection. . . .

Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. . . . [F]actors that may be relevant include size, purpose, policies, selectivity, [and] congeniality . . . .<sup>169</sup>

The relationship between roommates is sufficiently intimate to implicate protection from government interference under this criteria. Only a small number of people are involved in most roommate or shared housing situations. The decision about whom to room with is obviously highly selective and exclusive. Although it is true that one purpose of the relationship is financial, in the sense that roommates typically live together in order to share rent, the roommate relationship is quite different from a profit-making commercial venture.<sup>170</sup> The relationship is also very likely to be or become one of friendship, or at least companionship. Many roommate-seekers who posted to Craigslist were obviously hoping to find a like-minded person with whom they could share thoughts, experiences, and beliefs.<sup>171</sup> The relationship between roommates is similar in some ways to a romantic relationship. This explains why many roommate ads resemble personal dating ads, down to the familiar abbreviations for race, gender, and ethnicity. It is settled that people are permitted to discriminate in terms of race, ethnicity, and religion in their choice of romantic partners.<sup>172</sup> Even if two roommates dislike one another, the interaction between people who share living space is distinctly personal. Given the almost sacred position that the home occupies in American law and culture, it follows that living arrangements should be given more freedom from government regulation

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169. *Id.* at 619-20 (citations omitted).

170. Messerly, *supra* note 48, at 1976 (“Economically speaking, it is safe to assume that most people looking for roommates do not anticipate making a profit but rather defraying their own living costs or perhaps attempting to live in dwellings that they otherwise could not afford.”).

171. *Id.* at 1978 (“[T]he roommate-housemate relationship has the potential to become a deep, intimate relationship where mutual support, companionship, and trust play integral parts.”).

172. A few commentators have pointed out that having and expressing overt racial preferences about romantic partners can be harmful, even as they recognize that the law cannot interfere with such intimate personal decisions. See Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1310 (2009) (arguing that intimate discrimination can limit opportunities for other types of affiliation); Matt Zwolinski, *Why Not Regulate Private Discrimination?*, 43 SAN DIEGO L. REV. 1043 (2006); Note, *Racial Steering in the Romantic Marketplace*, 107 HARV. L. REV. 877, 883-84, 889 (1994) (arguing that racial signifiers in personals ads lead to “stigmatic injury” and serve as an impediment to an integrated society).

than other less intimate forms of association.<sup>173</sup>

Scholarly opinion weighs in favor of recognizing that people have a constitutionally recognized right against state interference in their choice of roommates. Professor Kenneth L. Karst argues, for example, that “[m]easured against the freedom of intimate association, any governmental intrusion on personal choice of living arrangements demands substantial justification, in proportion to its likely influence in forcing people out of one form of intimate association and into another.”<sup>174</sup> In light of this discussion, shared living situations are sufficiently personal and intimate to implicate constitutional protection from interference by the state, even when interference by the state takes the form of antidiscrimination laws.<sup>175</sup> Thus, individuals should be

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173. See, e.g., *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (“Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home . . . to any person . . . solely on the basis of personal prejudices . . .”); *Ravin v. State*, 537 P.2d 494, 503 (Alaska 1975) (“If there is any area of human activity to which a right to privacy pertains more than any other, it is the home.”).

174. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 687 (1980). See *id.* at 692 (“The freedom to choose our intimates and to govern our day-to-day relations with them is more than an opportunity for the pleasures of self-expression; it is the foundation for the one responsibility among all others that most clearly defines our humanity.”); see also Messerly, *supra* note 48, at 1978 (“It is essential for our society to continue to recognize the principles of liberty that form the basis of the right to choice in shared living . . .”).

175. An interesting line of state cases deals with a different but related issue: whether a landlord’s freedom of religion should trump housing discrimination statutes. In these cases, a landlord cites religious objections to renting to same-sex couples or to unmarried heterosexual couples. (Because neither sexual orientation nor marital status is a protected category under the federal FHA, such cases only arise in states whose fair housing statutes cover those categories.) The courts have come out differently on whether religious rights should prevail in these situations. Compare *Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909, 931 (Cal. 1996) (enforcing a state law prohibiting marital status discrimination against landlord did not violate her religious freedom under the state or federal constitutions) and *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 278 (Alaska 1994) (holding that “[b]ecause [the landlord] would have rented the properties to the couples had they been married, and he refused to rent the property only after he learned they were not, [the landlord] unlawfully discriminated on the basis of marital status”), with *State ex rel. Cooper v. French*, 460 N.W.2d 2, 11 (Minn. 1990) (holding that enforcing a state law prohibiting marital status discrimination violated landlord’s religious liberty under the state constitution and conflicted with a state law that outlawed fornication). Although these cases are instructive as examples of the types of analyses that come into play when housing discrimination laws run up against other Constitutional protections, they are of limited usefulness to this Article because they do not deal with shared living and privacy rights. They are also likely to depend on vagaries of state law, such as whether a particular state has a statute criminalizing the protected behavior, or how broadly the religious liberty clause in the state’s constitution is interpreted. For a more thorough discussion of this line of cases, see Stephanie Hammond Knutson, Note, *The Religious Landlord and the Conflict Between Free Exercise Rights and Housing Discrimination Laws—Which Interest Prevails?*, 47 HASTINGS L.J. 1669 (1996).



permitted to select with whom they live, and should be permitted to discriminate in this selection using whatever criteria they wish.

One could argue that, given such existing support in the case law, any roommate who is sued for violating the FHA need only assert a privacy or associational rights defense. The lack of direct precedent on the issue, however, makes this tactic potentially risky. There have been only three reported cases in which roommates have been accused of violating fair housing laws. In *Marya v. Slakey*,<sup>176</sup> the only federal case to address this issue, the defendant roommate moved for summary judgment, arguing that she should fall under the Mrs. Murphy exemption.<sup>177</sup> The court denied the motion, narrowly construing the exemption to apply only to property owners.<sup>178</sup> The defendant did not raise the constitutional defense. In *Department of Fair Employment & Housing v. DeSantis*,<sup>179</sup> an administrative hearing officer determined that a woman could be liable under a state fair housing statute for refusing to allow an African-American man to be her roommate and for making statements to that effect.<sup>180</sup> Again, no constitutional defenses were raised. *State ex rel. Sprague v. City of Madison*<sup>181</sup> is the only case in which roommates raised a constitutional defense based on privacy and associational rights to the application of a fair housing law (in this case, a municipal fair housing ordinance).<sup>182</sup> The court rejected the argument with little analysis, stating simply that the roommates “gave up their unqualified right to such constitutional protection when they rented housing for profit.”<sup>183</sup>

In contrast, in *Seniors Civil Liberties Ass’n v. Kemp*,<sup>184</sup> the Eleventh Circuit made a strong statement (albeit in dicta) that privacy and associational rights might trump antidiscrimination laws when it comes to shared housing.<sup>185</sup> The individual plaintiffs in *Seniors* were two elderly residents of a condominium complex that prior to the Act’s amendment had prohibited children under the age of sixteen from living in the complex. The plaintiffs argued that, by forcing their

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176. 190 F. Supp. 2d 95 (D. Mass. 2001).

177. *Id.* at 100.

178. *Id.* at 104.

179. Nos. H 9900 Q-0328-00-h, C 00-01-180, 02-12, 2002 WL 1313078 (Cal. F.E.H.C. May 7, 2002).

180. *Id.* at \*5. Ultimately, the hearing officer determined that only the allegation related to the discriminatory statement was proven, and so the defendant was not found liable for the denial of housing.

181. 555 N.W.2d 409, 1996 WL 544099 (Wis. Ct. App. Sept. 26, 1996) (unpublished table decision).

182. *Id.* at \*3.

183. *Id.* This reasoning is somewhat suspect. As noted by Messerly, most people who live with roommates are not renting housing for “a profit,” but rather sharing expenses with someone so they can both afford to live in a particular place. See Messerly, *supra* note 48, at 1976. One could draw an analogy to two people who carpool and split the cost of the gas. It would not make sense to describe either of these people as operating a taxi service for profit.

184. 965 F.2d 1030 (11th Cir. 1992).

185. See *id.*

complex to allow children as residents, the Act unconstitutionally violated their right of privacy and freedom of association.<sup>186</sup> The court rejected the privacy argument precisely because the case did not involve an intimate living situation: "If the Act were trying to force plaintiffs to take children into their home, this argument might have some merit. But the Act violates no privacy rights because it stops at the [plaintiffs'] front door."<sup>187</sup> The court denied the plaintiffs' free association argument by concluding that the plaintiffs had not shown that their condominium complex met the criteria set forth in *Roberts* for constitutional protection.<sup>188</sup>

Although an honest application of the *Roberts* analysis would extend protection to the roommate relationship, the case law is less than clear. A legislative solution is preferable to the uncertainty of forcing roommates to be sued and then asserting a substantive due process defense. Thus, the Mrs. Murphy provision should be amended to cover shared housing. In the alternative, HUD could amend its regulations to make clear that roommates are not subject to the FHA at all (as opposed to the regulation, now withdrawn but looked to as guidance, which allows roommates to discriminate only on the basis of sex).

3. *Norm Theory Supports Exempting Roommates.*—Norm theory, with its focus on real world behaviors and how these intersect with the functions of law, can also inform this discussion. As norm scholars have observed, the interplay between laws and social norms is a variable one: at times a norm will operate in opposition to a law, at times a law and a norm will work together to influence people's behavior, and at times the two will influence one another.<sup>189</sup> In order to determine whether the law should ignore, strengthen, or undermine a social norm, we must look to a variety of factors, including the desirability of the behavior that the norm encourages, whether there is a consensus on what proper conduct would be, and the effectiveness of government action to bring about change.<sup>190</sup> On the question of whether roommates should be covered by the FHA, these factors mitigate in favor of exemption.

In this case we have a norm—that roommates be permitted to consider any characteristics they deem important when evaluating a potential roommate—in conflict with a law that prohibits roommates from discriminating on the basis of

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186. *Id.* at 1036 ("If the right of . . . privacy protects the decisions concerning the begetting and rearing of children, then the decision not to have children around must be afforded the same protection.") (quoting plaintiff's brief).

187. *Id.*

188. *Id.*

189. See Richard H. McAdams, *The Origin, Development, and Regulations of Norms*, 96 MICH. L. REV. 338, 347 (1997).

190. See generally Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997) (outlining a comprehensive theory of social norms and government action which incorporates considerations of economic efficiency, morality, and the efficacy both of the norm and of state intervention); see also Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 953-67 (1996) [hereinafter Sunstein, *Social Norms and Social Roles*] (setting forth five grounds for governmental efforts to alter social norms).



certain protected characteristics. State interference is certainly appropriate to deter harmful conduct such as racial subordination, the perpetuation of status-based inequality, or the operation of an unjust caste system.<sup>191</sup> Such conduct reduces individual autonomy, diminishes the dignity and respect that people deserve, and constitutes a failure of the market.<sup>192</sup> However, it is not at all clear that the social norm at issue here leads to inequality, subordination, or a caste system. Recall that, with respect to race, religion, and national origin, the preferences go in all directions, and are just as likely to be expressed by minority groups members in favor of other minorities as they are by majority group members.

Regardless of whether a particular group is harmed more than another by a social norm, it may still be important for the law to express society's disapproval of that norm.<sup>193</sup> The FHA clearly expresses the view that race, religion, and national origin have no place at all in decisions about housing, no matter who is the target. Most people endorse this view.<sup>194</sup> Yet at the same time, a significant number of people believe that a person should have complete discretion when it comes to deciding who to share intimate space with and they would be disturbed at state interference with this choice. One can see why religion and national origin might be significant in a particular roommate relationship for reasons that have nothing to do with animosity toward a particular group, for example where a Jewish person insists on a roommate who will keep kosher or where a person of Chinese descent wishes to have a roommate with whom she can speak Mandarin or Cantonese. And while we might like to think that race has no place in the roommate relationship, the reality is that for some people it does.<sup>195</sup> Thus,

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191. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1074-82 (1995) (explaining why, from a normative perspective, legal intervention is necessary to counteract racial discrimination and subordination); Sunstein, *Social Norms and Social Roles*, *supra* note 190, at 962-64 (discussing how law should counteract caste systems); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2043-44 (1996) [hereinafter Sunstein, *On the Expressive Function of Law*] (describing the necessity of collective action when the prevailing norm leads to inequality).

192. See Sunstein, *Social Norms and Social Roles*, *supra* note 190, at 962-63 (describing how a caste system interferes with autonomy and well-being); Sunstein, *On the Expressive Function of Law*, *supra* note 191, at 2044 (discussing how inequality erodes dignity); McAdams, *supra* note 191, at 1074-82 (arguing that racial discrimination leads to market failure).

193. See generally Sunstein, *On the Expressive Function of Law*, *supra* note 191.

194. See MARTIN D. ABRAVANEL & MARY K. CUNNINGHAM, U.S. DEP'T OF HOUS. & URBAN DEV., HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS 13, 18 (2002).

195. For example, studies reveal that randomly paired college roommates of different races were significantly more likely to break up than roommates of the same race, depending on how difficult it was to terminate housing arrangements on a particular campus. Tamara Towles-Schwen & Russell H. Fazio, *Automatically Activated Racial Attitudes as Predictors of the Success of Interracial Roommate Relationships*, 42 J. EXPERIMENTAL SOC. PSYCH. 698, 701 (2006); Natalie J. Shook & Russell H. Fazio, *Roommate Relationships: A Comparison of Interracial and Same-*

we can support the expression of non-discrimination in housing while simultaneously disagreeing with the effect of applying the FHA to roommates. Under Cass Sunstein's seminal formulation, support for the statement that the law makes must be rooted in judgments about the law's consequences.<sup>196</sup> If the effect of a law seems bad or ambiguous even to that law's supporters, we should rethink whether this is an appropriate application. Here, while it is appropriate to retain the FHA's basic statement against nondiscrimination in housing, it is also necessary to carve out an exemption to avoid consequences that few would accept.

There are a few other circumstances under which norm scholars contend that government interference with social norms is inappropriate. First, state action should be avoided where the action would invade an individual's rights (as opposed to merely interfering with preferences or choices).<sup>197</sup> As discussed previously, a strong argument can be made that people have privacy and associational rights in deciding with whom they wish to live.

State action should also be eschewed where it would be futile or counterproductive.<sup>198</sup> Policing roommate decisions would be extremely difficult, to say the least. Craigslist and other websites notwithstanding, many roommate relationships are formed without any sort of public advertising, as when friends and acquaintances simply decide to live together. Even if a person chooses to advertise for a roommate on-line, the transaction is almost certainly a "one-off"—a situation not likely to be repeated with any regularity and therefore not amenable to the type of investigation and testing that would ferret out discrimination by an apartment complex or real estate broker. In the absence of an express discriminatory statement by the roommate-seeker, and given the myriad non-protected characteristics that people commonly take into consideration when selecting a roommate, it would be practically impossible to prove that he or she is engaging in impermissible discrimination.

Of greater concern, however, is the fact that applying the FHA to roommates is likely to cause a counterproductive backlash.<sup>199</sup> People who would generally support the antidiscrimination goals of the FHA may well be offended at the thought of the state interfering with their decision with whom to share intimate

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*Race Living Situations*, 11 GROUP PROC. & INTERGROUP REL. 425, 429 (2008). The studies also found that racially heterogeneous roommates tended to spend less time together and to be less involved with each other's friends. Towles-Schwen & Fazio, *supra*, at 700.

196. See Sunstein, *On the Expressive Function of Law*, *supra* note 191.

197. *Id.* at 2049; Sunstein, *Social Norms and Social Roles*, *supra* note 190.

198. Sunstein, *On the Expressive Function of Law*, *supra* note 191, at 2049; Sunstein, *Social Norms and Social Roles*, *supra* note 190, at 965.

199. Linda Hamilton Krieger notes that backlash is likely to occur when a transformative legal regime (such as a civil rights law) "generates outcomes that diverge too sharply from entrenched norms and institutions to which influential segments of the relevant population retain strong, conscious allegiance." *Afterward: Socio-Legal Backlash*, 21 BERK. J. EMP. & LAB L. 476, 477 (2000).



living space.<sup>200</sup> The potential for backlash is even greater when we consider who would be affected: individuals who are not engaged in profit-making activity, who likely have limited means in the first place (hence their need to look for a roommate to defray living expenses), and who are of all races, religions, and ethnicities. The specter of the FHA being applied to prevent ordinary people from exercising control over an intimate aspect of their lives would lend support to the opponents of civil rights laws, who often seek portray them as unduly interfering with individual autonomy. The fact that the targets would be people of all races, religions, and ethnicities, many of whom are not obviously acting out of animus toward other groups but rather an affinity for their own, would only worsen this effect.

### *B. Only Roommates Should Be Exempt*

The discussion above, with its emphasis on the high degree of intimacy involved in shared living situations, leads to another conclusion: People who do not share intimate living space should not be exempt from the Act. Although this argument does not necessarily stem from the current situation with online advertising, it is the logical next step in the reexamination of the Mrs. Murphy exemption.<sup>201</sup>

The boarding house-operator version of Mrs. Murphy found in Title II of the Civil Rights Act of 1964 rented out “rooms” within a “building.”<sup>202</sup> As discussed previously, concerns for this Mrs. Murphy’s privacy and associational rights were paramount because she was essentially sharing her home with transient strangers.<sup>203</sup> Title II exempted her from coverage, thus allowing her to discriminate against anyone she did not feel comfortable living with for any reason.<sup>204</sup>

In 1968, Mrs. Murphy reappeared in the FHA as a landlord who rented out “rooms *or units*” in a “dwelling[] containing living quarters . . . intended to be occupied by no more than four families *living independently of each other.*”<sup>205</sup> Although this could describe a simple homeowner who rents out rooms in her house, it could just as easily describe someone who owns a four-unit apartment building in which each unit is a completely separate apartment with its own entrance, kitchen, bathroom, and living space.<sup>206</sup> The occupants of this building

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200. See *id.* at 520 (cautioning that if “well-meaning and thoughtful” people are likely to resist the application of law to a norm, then backlash is likely to result).

201. See *supra* notes 43-68 and accompanying text.

202. 42 U.S.C. § 2000a(b)(1) (2006).

203. See *supra* notes 48, 51-53 and accompanying text.

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

205. 42 U.S.C. § 3603(b)(2) (2006) (emphasis added).

206. It is also just as likely. In 2000, about 1.3 million households contained “roomers” or “boarders.” HOBBS, *supra* note 159, tbl. 1, at 5. According to a HUD survey in the mid-1990s, just over 1.1 million rental units were located in buildings with two to four units with a resident owner. HOUS. & HOUSEHOLD ECON. STATS. DIV., U.S. CENSUS BUREAU, PROPERTY OWNERS & MANAGERS SURVEY tbl. 108 (1995), available at <http://www.census.gov/housing/poms/mt108.txt>.

are unlikely to see one another except in passing in the hallways. This version of Mrs. Murphy is less likely to share any space—much less intimate living space—with her tenants, and therefore her associational rights and privacy are no longer implicated. Although the rationale for the exemption is the protection of privacy and associational rights, many of the people covered by this exemption do not share intimate living space with their tenants in any meaningful way. This has long rankled fair housing advocates, who see the Mrs. Murphy exemption as little more than a license for small landlords to discriminate for no good reason.<sup>207</sup>

There are other more practical benefits in realigning the Mrs. Murphy exemption to cover only shared housing: This change would make the law less complicated and easier for the layperson to understand. The definitional boundary between shared living and all other types of housing is a much easier one for people to grasp than the current, somewhat arbitrary, line drawn at owner-occupied buildings containing four units or less. Drawing the line at shared housing also makes it easier to tell from the outset who is exempted and who is not. An advertisement for a roommate will virtually always make clear that shared living is involved. In fact, “rooms/shared” and “apts/housing” are separate categories on Craigslist.<sup>208</sup> In contrast, it is impossible to tell from an advertisement whether the housing is covered by the current Mrs. Murphy exemption or not. It might not even be obvious upon inspection of the property, if the owner fails to mention that she also lives in the building.

### C. *Exempt Roommates Should Also Be Exempt from § 3604(c)*

If the Mrs. Murphy exemption is realigned to cover only people in shared living situations, then such individuals should also be exempt from § 3604(c). There are a number of reasons for this, some practical and some legal, although there are also some very legitimate concerns with this approach.

1. *Arguments in Favor of Exempting Roommates from § 3604(c).*—As a practical matter, exempting roommates from all portions of the FHA is more efficient for everyone involved. The Mrs. Murphy non-exemption as it currently exists has been criticized because it creates a situation in which Mrs. Murphy is free to discriminate against particular prospective tenants but is prohibited from warning them ahead of time that their efforts to rent from her will be futile. This wastes the time and energy of both parties.<sup>209</sup> Although it would undoubtedly be upsetting for minority home-seekers to confront biased advertisements, it may ultimately be *more* discouraging if they continually go to the trouble of

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207. See, e.g., Walsh, *supra* note 43, at 613 (noting that the intimacy rationale is weakened by “the physical separation” of the owner from the renters).

208. See, e.g., Craigslist, <http://newyork.craigslist.org>.

209. Messerly, *supra* note 48, at 1975-76. As the white man who took out the discriminatory classified ad in *Hunter* explained, “It’s really a kindness to colored people. There’s no use making them . . . come here when I’m not going to rent to them.” *United States v. Hunt*, 459 F.2d 205, 215 (4th Cir. 1972).



attempting to secure housing only to be turned down for unknown reasons.<sup>210</sup> If people were free to advertise their preferences, the argument goes, at least home-seekers would know whom to call and with whom not to bother.

There is also something a little backward about a regime in which particular conduct is permitted, but statements of intent to commit that conduct are not. To pick up on the metaphor used earlier: The § 3604(c) non-exemption means that Mrs. Murphy cannot *figuratively* slam the door in a minority homeseeker's face through a discriminatory advertisement, but she is free to *literally* slam the door in his face when he appears in person attempting to rent from her—so long as she does not tell him why.

Including § 3604(c) in the exemption also eliminates the potential First Amendment<sup>211</sup> problems created by the current system, particularly with respect to ads that discriminate based on familial status. As discussed above, commercial speech can be regulated if it is misleading or if it concerns an unlawful activity.<sup>212</sup> Because housing discrimination is illegal, under the commercial speech doctrine, housing advertisements that contain discriminatory preferences can be banned. This is not necessarily the case, however, for a landlord who is exempt from the other provisions of the FHA. Although other civil rights statutes prohibit housing discrimination when it is based upon race, religion, or national origin,<sup>213</sup> there are no additional federal laws that prohibit housing discrimination when it is based upon gender or familial status, and there are limited protections against disability discrimination in the private housing market. In the absence of any state law containing such a prohibition, an exempt landlord is completely free to discriminate on these bases, and an ad describing his preferences therefore does not involve any illegal conduct. Nor does such an ad incorrectly imply that he can discriminate based on particular protected characteristics—because, in fact, he can.<sup>214</sup> Although there have been cases in

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210. Of course, this can—and does—happen even with non-Mrs. Murphy landlords. The difference, however, is that when non-exempt landlords discriminate, they are violating the FHA, whereas Mrs. Murphy is not.

211. U.S. CONST. amend. I.

212. See *supra* notes 38-41 and accompanying text.

213. By its terms, the Civil Rights Act of 1866 prohibits racial discrimination in the making of contracts, 42 U.S.C. § 1981 (2006), and racial discrimination in the sale or rental of property, *id.* § 1982, both of which are relevant to the rental transaction. The Supreme Court has interpreted these prohibitions to extend to discrimination based on national origin and religion as well because at the time these statutes were passed people from certain religious groups or geographically distinct areas were commonly considered to be of different “races”. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) (holding that “Jews” were considered a distinct race at the time of passage of § 1982); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610-13 (1987) (holding that “Arabs” were considered a distinct race at the time of passage of § 1981).

214. See Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 278. In a situation like this, where the speech is neither unlawful nor misleading, the speech restriction would be put through additional tests as set forth in *Central Hudson*. Specifically, a court would ask whether (1) the government interest in the regulation is substantial; (2) the regulation directly advances the

which exempt landlords have been found liable for violating § 3604(c) based on familial status discrimination not otherwise prohibited by law, none deals with this obvious First Amendment problem.<sup>215</sup> The *Craigslist* court pointedly noted, in dicta, that “any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment.”<sup>216</sup>

It is not even clear, however, that the commercial speech doctrine should apply to roommate ads. As discussed above, although there may be some economic aspect to the roommate relationship, strictly speaking, it is not a commercial or profit-making enterprise.<sup>217</sup> Many of the ads bear very little resemblance to advertisements for traditional rental housing, and indeed, do not look much like commercial advertisements at all. While ads for traditional rental housing focus on describing the attributes of the housing, people often use roommate ads as a platform to make a statement about who they are,<sup>218</sup> what the acceptable norms and behaviors of their households are, how they structure their lives, and the values they would like to share with a roommate.<sup>219</sup> The ads are quirky, confessional, sometimes funny, and often quite earnest, reading more like personal statement essays.<sup>220</sup> Without the commercial speech doctrine, restrictions on the ability to advertise for roommates are even more difficult to justify from a First Amendment perspective.

Eliminating the § 3604(c) non-exemption will also do away with the

government’s asserted interest; and (3) the regulation is no more extensive than necessary to serve the government’s interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980). Even if the government interest in combating the effects of discriminatory advertising is considered substantial, it would be difficult to satisfy the second and third prongs of the test in cases where the underlying behavior is legal. *See Schwemm, Discriminatory Housing Statements*, *supra* note 17, at 280-82.

215. *See, e.g.*, *HUD v. Schmid*, Fair Hous. Fair Lending Rptr. ¶ 25,139 at 26,149 (HUD ALJ July 15, 1999) (finding familial status discrimination when a landlord stated, “this apartment has a pool, so we don’t want children or pets”); *HUD v. Dellipaoli*, Fair Hous.-Fair Lending Rptr. ¶ 25,127 (HUD ALJ Jan. 7, 1997) (finding familial status discrimination when owner of two-family dwelling told a prospective renter that teenagers were prohibited from renting out the upstairs unit).

216. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008).

217. Indeed, the Ad Review revealed a small but significant number of ads that sought a roommate purely for companionship—either romantic or platonic. These ads made clear that the roommates’ share of the rent would be free or a nominal amount.

218. *See supra* text accompanying notes 131-42.

219. *See supra* note 174 and accompanying text.

220. The medium undoubtedly also contributes to the tone of the ads. Because the ads are posted without editing or review, the people who post them may come to view them like blog postings or comments to a discussion forum, in which a less formal, more conversational tone is used than one would find in newspaper classifieds. The fact that users of Craigslist and similar sites are not usually charged a fee (compared with advertisers in print media, who typically must pay per line or per character) likely also contributes to the chatty, effusive nature of the ads.



confusion that it creates. The fact that an exempt landlord can discriminate but not advertise discriminatory preferences is difficult for many to grasp. A significant number of the questions and comments posted to Craigslist's "Fair Housing Forum" concern this issue.<sup>221</sup> It is clear from reading these comments that the misconception that Mrs. Murphy landlords are entirely exempt from the FHA is extremely common.<sup>222</sup>

To summarize, allowing roommates to advertise their discriminatory preferences has several advantages: 1) It eliminates the inefficiencies that the non-exemption creates; 2) it protects the First Amendment rights of roommate-seekers both to engage in commercial speech that does not concern unlawful activity and to engage in expressive speech about the sort of people with whom they wish to form a household; and 3) it will reduce a good deal of the persistent confusion that exists due to the disconnect between allowing covered individuals to discriminate while preventing them from expressing their discriminatory preferences.

2. *Arguments Against Exempting Roommates from § 3604(c).*—The biggest problem with this approach is that it would permit some discriminatory housing statements for the first time since the passage of the FHA. This is problematic because it could cause people to experience psychic discomfort when they look through the classifieds for housing, lead to market limitations, and mislead the public into thinking that housing discrimination and discriminatory advertising are lawful.<sup>223</sup> These negative effects will be far less pronounced, however, if the field of permissible discriminators is limited to roommates.

To begin, people are likely to view roommate ads differently than those for more arms-length housing transactions, and their level of discomfort with these statements will vary accordingly.<sup>224</sup> Seeing a discriminatory preference in an ad for traditional rental housing would (appropriately) be disturbing to most readers. Given the high degree of intimacy involved in the roommate relationship, such preferences are less offensive. The ads suggest that the people who take them out are looking for "the right fit"—someone who they will be comfortable living with and whom will be comfortable living with them. This is particularly so in light of the fact that many of the problematic roommate ads contain self-descriptions of the person taking out the ad. People advertising for a shared living arrangement clearly want potential responders to have a significant amount of information about them—both in terms of protected characteristics like religion and unprotected characteristics like television viewing habits—and it is

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221. craigslist, about > FHA, <http://www.craigslist.org/about/FHA> (follow "Questions? Comments? Check out the fair housing forum" hyperlink).

222. The confusion is heightened by the fact that HUD regulations currently permit people in shared living situations to advertise preferences based on sex, but no other protected categories. *See supra* notes 27, 41, 119.

223. *See supra* notes 62-65 and accompanying text.

224. One could argue that this different view of roommate ads cuts in favor of treating these ads under a different "ordinary reader" standard than those ads for traditional rental housing. *See supra* notes 24-25 and accompanying text.

likely that the people reading the ads also want this information.

It is also apparent that the trend of individuals wanting to room with people like themselves is not limited to particular group. Prior to the FHA's enactment, readers were likely to be confronted with a slew of "white only" housing ads, which would understandably cause distress for any non-white reader (and probably many white readers as well). Today the preferences expressed are as diverse as the people taking out the ads. While an individual reader might still be bothered by a particular ad, the hegemonic effect of ads that consistently favor the majority group is no longer present. Moreover, the text of the ads underscores the notion that the advertisers are not typically acting out of racial, ethnic, or religious animosity toward other groups. Rather, they seem to be acting out of a desire for a roommate with a similar background with whom they can share common values and experiences—such as an apartment where everyone keeps kosher or a house for European expatriates. This should reduce the likelihood that a person would experience discomfort reading the roommate ads.<sup>225</sup>

Similarly, allowing roommates to state discriminatory preferences would not have the same market-limiting effects as allowing discriminatory ads for traditional rental housing. Although seeing discriminatory ads for rental housing in large apartment buildings might give the impression that whole areas are off limits to groups with particular protected characteristics, it is clear that a given roommate ad applies only to one particular shared living situation with a specific person. Put another way, one is much more likely to take from a roommate ad that this person wants to live with a fellow Christian than this whole neighborhood is off-limits to people who are not Christians. Moreover, the fact that the few roommate ads specifying race, religion, or national origin tend to state preferences in all directions also makes it less likely that they will cause a consistent market limiting effect.

With respect to familial status, the picture is different. There are many more ads that discriminate based on familial status, and they give a consistent message that people with children are seldom welcome as roommates anywhere. Questions about market limitations are significant in light of the fact that one of the primary arguments in favor of amending the FHA to add familial status as a protected category was that many families with children faced serious shortages of housing because of the prevalence of child restrictive policies in the private rental market.<sup>226</sup> Surveys showed that 36% of rental properties excluded children entirely, while an additional 44% imposed restrictions on the age and number of

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225. It is, of course, possible that if roommates are no longer covered by the FHA the ads will change. We may see more of the type of nasty and bigoted ads that were featured in the *Craigslist* and *Roommates* cases, which would increase the likelihood of reader discomfort. While there is a clear social norm against publicly making such statements, the anonymity of the on-line medium undoubtedly reduces the power of the norm.

226. For an overview of child restrictive policies and state laws to combat them, see generally Note, *Why Johnny Can't Rent—An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829 (1981).



children allowed.<sup>227</sup> This trend caused large numbers of families with children to live in substandard or overcrowded housing, to double up with other families, to split apart, or to become homeless.<sup>228</sup> Granting protection for familial status was therefore a necessary and appropriate response to this situation.

Whether the persistent bias in roommate ads operates as a meaningful market limitation for people with children, however, is a different question. As discussed previously, the Ad Review revealed that the vast majority of people who advertise for roommates on Craigslist do not have children (or at least do not indicate that they have children). Although there is currently no data on how many people with children use Craigslist to search for a shared housing arrangement, it is doubtful that this is common.<sup>229</sup> Most people with children would probably not want to live in close quarters with a stranger whom they met on Craigslist.<sup>230</sup> In the United States it is a cultural norm that families do not usually live with other people who are not family members.<sup>231</sup> It may be commonplace to live with roommates when one is young and single, but after a person marries and has children the expectation—and the reality—is that the family will have a house or apartment of its own.<sup>232</sup>

It is also unlikely that allowing roommate ads to contain discriminatory statements will cause people to believe that housing discrimination is legal or that other types of discriminatory housing ads are legal. Again, this relates to the different ways people view roommate ads. One can be aware of the fact that housing discrimination is illegal while simultaneously assuming that individuals

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227. ROBERT MARANS ET AL., A REPORT ON MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY ch.7 (1980).

228. JANE G. GREENE & GLENIA P. BLAKE, HOW RESTRICTIVE RENTAL PRACTICES AFFECT FAMILIES WITH CHILDREN 1, 9 (1980), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/3a/26/5f.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/3a/26/5f.pdf) (prepared for the Office of Policy Dev. & Research, U.S. Dep't of Housing and Urban Dev.).

229. Craigslist also features a “housing wanted” page, on which users who are in need of housing can post requests. The housing can be of any type—shared or rental. Based on an unscientific review, it appears that most people looking for shared housing are single people. The few posts by single parents or couples with children are almost always seeking a rental house or apartment as opposed to a shared living arrangement.

230. This assumes that they have the option of having a living arrangement that does not require them to share space with a stranger. Obviously, if a person with children is homeless, he or she would prefer to share an apartment with someone from Craigslist than to live on the street.

231. I use a loose definition of “family” here. A man who lives with his girlfriend and her two children may not technically be considered related to them because of the lack of a marital or blood tie. He is, however, part of the family unit, operating as a “functional” spouse and parent in a way that a random stranger from Craigslist would not.

232. Census data show that people who live with children are far less likely to live with housemates compared to people without children. In 2000, there were over 2.3 million households containing housemates and no children, and 302,824 containing both housemates and natural children. U.S. CENSUS BUREAU, EXAMINING AMERICAN HOUSEHOLD COMPOSITION, *supra* note 159, tbl. A-3, at 34.

are allowed to decide with whom they share a home. The Ad Review indicates that people apparently already draw a distinction between housing discrimination on the regular rental market and discrimination in shared housing, based on the fact that there were very few problematic ads for regular rental housing (and virtually none which stated preferences based on race, religion or national origin) but hundreds for roommates. Put another way, it appears that many people already believe that it is legal to express discriminatory preferences when seeking a roommate, and this belief has not led to a corresponding level of discriminatory ads for other types of housing.

There is one final argument against allowing exempt individuals also to be exempt from § 3604(c): Preventing such individuals from advertising their discriminatory preferences might lead to a change in social norms over time. For example, Joe, a white person, might think he only wants to live with another white person. Because he cannot say this in his ad, Joe is forced to interact with people of other races who reply to the ad. When he does, he may actually discover that he likes a particular person and decide that he can in fact live with someone of a different race. Allowing Joe to avoid interacting with people of different races will cut off this possibility for personal growth.<sup>233</sup> Similarly, when all of the Joes out there are free to advertise their discriminatory preferences, we become accustomed to seeing them. This desensitization leads us to accept without questioning the propriety of allowing race, religion, or ethnicity to play a role in determining our friends and intimates. Segregation, it can be said, starts at home. Our high levels of housing segregation are only possible because people consistently choose to marry and live with others of the same race. Until everyone starts questioning their “intimate” prejudices, large-scale change will be impossible.<sup>234</sup>

This argument is compelling. Greater inclusiveness at the societal level starts with the individual, and most would celebrate a world in which people no longer felt it necessary to include racial identifiers in their roommate advertisements. Yet the solution is probably not to prevent people from making such statements. First, to the extent that the ideal of nondiscrimination conflicts

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233. This argument was suggested to me by Professor Eduardo Moisés Peñalver at the panel discussion for this Symposium.

234. See Note, *Racial Steering in the Romantic Marketplace*, *supra* note 172, at 894 (“[P]rivate discrimination of the sort these signifiers [in personal dating ads] convey is both the first and the final frontier of racial difference; until individuals can be dissuaded from accepting as normal the choice of intimates by race, race will always divide.”). Studies show that living with a person of another race can reduce prejudice. See Colette Van Laar et al., *The Effect of University Roommate Behavior on Ethnic Attitudes and Behavior*, 41 J. EXPERIMENTAL SOC. PSYCH 329 (2004).

At the same time, some scholars recommend a renewed emphasis on decreasing housing discrimination in order to create more comfortable spaces for interracial couples and to facilitate new relationships across racial lines. Emens, *supra* note 172, at 1398-99. The “chicken and egg” nature of neighborhood-level racial separation and individual decisions to associate with members of one’s own race has been an intractable problem, and is an issue beyond the scope of this Article.



with the norm of people being able to freely choose roommates based on whatever criteria they wish, as argued above, that the latter must prevail. If this is so, then it does little good to conceal the existence of these preferences and may in fact impose costs, both on an individual or on a societal level.<sup>235</sup> At the level of the individual, it is fairly paternalistic to use the law as a tool to encourage a person to change his preferences by preventing him from articulating them, particularly where the law does not prevent him from acting on them. (This is precisely the situation in which a social norm would be more efficient and less invasive than a legal intervention.<sup>236</sup>) Moreover, a statements ban deprives potential responders (and others) of useful information about the individual. At a broader level, keeping this information under wraps prevents us from realizing and assessing the true nature of the preferences and norms that are out there.

Finally, if there is a social norm that accepts expressions of such preferences in roommates,<sup>237</sup> it appears to be one shared by people of diverse racial, religious, and ethnic backgrounds. While this alone does not mandate the conclusion that the FHA should not apply to roommates, it does beg the question of whose interests are being protected by its current application—advocates who believe in the ideal of keeping housing advertisements free of discriminatory statements, or people of various racial, religious, and ethnic backgrounds who wish to express their diversity.<sup>238</sup> Encouraging a shift in social norms by preventing roommate-seekers from advertising such information about themselves or expressing such preferences for their desired roommate would, ironically, disproportionately affect minority group members who want to differentiate themselves from the majority or who seek a roommate who is a member of a minority group.

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235. Richard McAdams refers to the phenomenon of when the law conceals the existence of a social norm or of norm violations as “privacy” or “secrecy”. See McAdams, *supra* note 189, at 425-31. McAdams argues that an efficiency analysis must consider the costs of privacy: information necessary to satisfy preferences does not freely circulate, the public lacks information about the prevalence of a norm or of norm violations so that a weak norm may persist after the consensus around it fails. *Id.* at 429-431.

236. Indeed, to the extent that we do not see more roommate ads articulating racial, religious, or ethnic preferences, it is entirely possible that this is because people are conscious of social norms against making such statements, not because they are acting pursuant to the FHA.

237. In light of the fact that there were only 99 such ads out of a total pool of 5000, it would be a stretch to describe this as a dominant social norm.

238. The tension between valuing diversity and valuing nondiscrimination has long been addressed by civil rights and critical theory scholars. See generally Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991); Ian F. Haney López, *“A Nation of Minorities”*: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2007); Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. REV. 1175. A thorough discussion of this issue is beyond the scope of this Article.

*D. There Is Still a Need for Website Publisher Liability*

Once roommates are taken out of the equation, ads that potentially violate the FHA are relatively rare. The Ad Review revealed forty-nine problematic ads for rental housing out of 5000, or approximately 1% of the total. But this still adds up to a lot in terms of absolute numbers. The Ad Review was a snapshot of the first 500 ads visible on a given day for ten cities. For each city, each batch of 500 ads represented the total ads posted over a one or two day period. If we multiply forty-nine by half of the days in a year (182), this amounts to over 8900 discriminatory ads per year for just the Ad Review's ten cities—and these are only ads that appeared on Craigslist. Thus, in all likelihood, there are tens of thousands of discriminatory ads posted in cyberspace each year.

Currently, the only enforcement option for fair housing advocates is to aggressively prosecute the individuals who post the discriminatory ads.<sup>239</sup> This is the approach being pursued by the National Fair Housing Alliance (NFHA), a consortium of more than 220 non-profit fair housing organizations. NFHA has filed over 1000 administrative complaints against such individuals with the Department of Housing and Urban Development.<sup>240</sup> Other NFHA member organizations are pursuing a similar strategy.

This situation is less than ideal for a number of reasons. Pursuing an ad-by-ad enforcement strategy against individual advertisers is enormously inefficient. Websites hosting housing advertisements must be constantly monitored; discriminatory ads must be identified; and a complaint must be filed either in court or with the appropriate administrative agency.<sup>241</sup> If a complaint is filed in court, the litigation process can be time-consuming and expensive. Administrative complaints must be processed and investigated, then individually conciliated or referred for further litigation. Government agencies and advocacy groups like NFHA are the only entities equipped for such large-scale and intensive efforts. It is unlikely that many government agencies will commit the

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239. Craigslist urged this approach and the Seventh Circuit Court of appeals endorsed it. *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (2008) ("Using the remarkably candid postings on craigslist, the Lawyers' Committee can identify many targets to investigate. . . . It can assemble a list of names to send to the Attorney General for prosecution.").

240. NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT: TIME FOR A CHANGE: 2009 FAIR HOUSING TRENDS REPORT 32 (2009), available at <http://www.nationalfairhousing.org/linkclick.aspx?fileticket=dsT4nlHikhQ%3d&tabid=3917&mid=5321> [hereinafter NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT]. Most of the complaints were filed against landlords or rental management companies, as opposed to people seeking roommates. Telephone Interview with Anne Houghtaling, General Counsel for NFHA (Dec. 7, 2009).

241. NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT, *supra* note 240, at 32. Complaints about violations of the federal FHA may be filed with HUD, which is statutorily obligated to investigate and attempt to conciliate the charge. *See* 42 U.S.C. § 3610 (2006). For violations of state fair housing laws, complainants may file a complaint with the state's administrative agency. *Id.* § 3610(f). State agencies' mandates and procedures for investigating and attempting to conciliate claims are usually similar to HUD's.



time and resources necessary for such an undertaking, and NFHA is already having difficulty handling the complaints for the violations it has identified.<sup>242</sup>

Pursuing legal action against people who post discriminatory ads to websites is also complicated by the difficulty in identifying the posters.<sup>243</sup> Sites like Craigslist do not typically collect identifying information about the people who post information to the site.<sup>244</sup> In addition, many sites protect their users' anonymity by creating a temporary and anonymous e-mail address for each advertisement.<sup>245</sup> The e-mails sent to this temporary address are then forwarded to the user's real address.<sup>246</sup> The responding individual never sees the true contact information unless the advertiser answers the inquiry.<sup>247</sup> It is possible to seek compulsory disclosure of a defendant's identity in state courts, but often the plaintiff must first set forth a prima facie case and obtain a third-party subpoena for the website operator's records.<sup>248</sup> If the website operator only has an e-mail address for a particular individual, then an additional search process is necessary to determine the owner of the e-mail account. These hurdles alone would be enough to dissuade most individual plaintiffs from filing suit. It was this problem, in fact, that thwarted NFHA's attempt to file administrative complaints with HUD against more than 1000 individual Internet advertisers. HUD rejected the complaints because they did not contain specific identifying information about the targets. HUD has stated that it will not use its subpoena power to compel the websites to provide identifying information about the individuals who post discriminatory ads.<sup>249</sup>

The sheer number of discriminatory advertisements on the Internet and the inefficiency of individually prosecuting the people who take out the ads lead to the conclusion that the CDA should be amended to take the FHA into account.<sup>250</sup>

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242. NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT, *supra* note 240, at 32; NAT'L FAIR HOUS. ALLIANCE, FOR RENT: NO KIDS, *supra* note 105, at 7-8.

243. *See* Kurth, *supra* note 74, at 828.

244. *Id.* at 828-30. Even if Craigslist did collect identifying information, as it now does when people post ads for "Adult Services," there is almost no way to guarantee that the information supplied corresponds to the person who actually made the posting. Brad Stone, *Craigslist to Remove 'Erotic' Ads*, N.Y. TIMES, May 14, 2009, at B1 (noting that erotic services advertisers now simply use "fake credit cards or untraceable debit cards").

245. Stephen Collins, Comment, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 NW. U. L. REV. 1471, 1494 (2008).

246. *Id.*

247. *Id.*

248. *See* MADELEINE SCHACHTER, LAW OF INTERNET SPEECH 317 (2d ed. 2002).

249. NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT, *supra* note 240, at 32-33.

250. A number of commentators advocate this result. *See* Collins, *supra* note 245, at 1495; *cf.* Chang, *supra* note 75, at 1001-03 (arguing for a judicially created FHA exemption for housing advertisements from the CDA); 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, 211 (2008) (arguing that Congress should either amend the CDA to take the FHA into account, or state expressly that Congress intended the CDA to supersede the FHA).

This could be accomplished by simply adding the FHA to the list of exemptions already contained in the CDA.<sup>251</sup> As a result, website operators would be treated like newspapers with respect to the housing advertisements they run. They would be given the same incentives that publishers of traditional media have to filter out advertisements containing discriminatory housing messages, and the same incentives to educate users about the FHA's requirements.<sup>252</sup>

This is the single most effective way to reduce the number of discriminatory ads in cyberspace. The experience of print media bears this out. After § 3604(c) was unequivocally applied to newspapers, discriminatory classified ads were virtually eliminated because newspaper editors had the incentive to screen them out.<sup>253</sup> The same would likely happen if website operators were covered by the statute. Many commentators have argued that gatekeeper liability for website operators is the preferred approach for dealing with unlawful or malicious content, in part because website operators are in the best position to control the activity that takes place on their sites.<sup>254</sup> The ability to sue website operators, the least cost avoiders, also eliminates the need for fair housing plaintiffs to undertake the inefficient task of identifying and prosecuting the individuals who post discriminatory ads.<sup>255</sup>

One of the most significant arguments against gate-keeper liability is that the volume of postings to many sites makes it impossible to police their content. A

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251. The CDA currently states that it is not to apply to prosecutions under a "Federal criminal statute," claims "pertaining to intellectual property," and claims involving "application of the Electronic Communications Privacy Act of 1986," or similar state statutes. 47 U.S.C. § 230(e)(1), (2), (4) (2006).

252. See *supra* note 70 and accompanying text.

253. See *supra* note 3 and accompanying text.

254. See, e.g., Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 236-38 (2006) (arguing that "indirect liability is primarily attractive in cases where the indirectly liable party can detect, deter, or otherwise influence the bad acts in question. [Internet Service Providers] seem to be a natural choice under this criterion"); Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 265-68 (2005) (noting that "the key question for determining the propriety of intermediary liability is the plausibility that the intermediary could detect the misconduct and prevent it" and that "gatekeeper liability is systematically more likely to be effective in the modern Internet environment than it has been in traditional offline environments").

255. Lichtman & Posner, *supra* note 254, at 233-35 (noting that indirect liability is particularly necessary when the primary malfeasors are beyond the reach of the law, either because they are too difficult to identify or because they are judgment-proof); Mann & Belzley, *supra* note 254, at 259, 268, observe that

regulation that seeks to prevent misconduct through controlling primary malfeasors is not always effective, particularly when individuals are judgment proof or when prosecution is not efficient either because of the high volume of transactions or because of the low value of each transaction. . . . [T]he relative anonymity the Internet fosters makes remedies against primary malfeasors less effective than in the brick-and-mortar context.



classifieds page for a newspaper in a mid-sized town might have a few dozen housing ads in a given week, whereas Craigslist has thousands of ads posted to its site each day, from all fifty states and Guam, Puerto Rico, and the Virgin Islands. As a result, according to Craigslist screening out discriminatory ads would be extremely difficult and not cost-effective. Because Craigslist's operates as a mere "bulletin board" for user-supplied content, it has a small number of employees relative to the volume of ads it hosts.<sup>256</sup> Craigslist would have to dramatically increase its employees to individually screen all housing ads. These costs would then presumably be passed on to site users. Although the costs may be minimal, this would still be a departure for many housing locator sites, which are free. The screening requirement may also cause time delays. Even minor delays may prove unacceptable to users who have become accustomed to having their ads posted immediately. These burdens could cause Craigslist and others to stop offering housing lists.<sup>257</sup> Given the huge number of people who currently go online to advertise and locate housing, this would be a significant loss to consumers.

Whether it is feasible for website providers to screen ads is obviously an important concern, but the fears about it are likely overblown. Although it is true that a website typically hosts a larger volume of third-party-supplied content than a print newspaper, the availability of filtering software makes it much easier to screen electronic content. Many sites already exercise some level of control over third-party content by screening for offensive or obscene postings.

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256. See, e.g., Memorandum in Support of Craigslist's Motion for Judgment on the Pleadings, Chicago Lawyer's Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 2006 WL 1232496 (N.D. Ill. Apr. 14, 2006) (No. 06 C0657) ("With a small staff in a single office in California, defendant craigslist, Inc. operates a website dedicated to local community classifieds and forums, where people share ideas and find things they need in their lives . . . and the vast majority of craigslist's services . . . are provided without charge. The quantity of user-supplied information exchanged on the craigslist site is enormous: in a typical month, users post more than 10 million new notices to the site.").

257. This is what Craigslist claims. See Brief of Defendant-Appellee Craigslist, Inc., Chicago Lawyer's Committee for Civil Rights v. Craigslist, Inc., 519 F.3d 666, 2007 WL 4453962, at \*24 (7th Cir. 2007) (No. 07-1101). There is reason to believe that Craigslist's dire predictions about its own viability may be overblown. First, given the ease of posting things on-line and the dominant role that the Internet plays in modern life, it is safe to assume that small fees and minor delays will not cause people to rush back to the often cumbersome and expensive process of placing ads in print media. Second, Craigslist's own history belies its argument. Under pressure from several state attorneys general, Craigslist recently agreed to start charging people a fee to post ads for "Adult Services" on its site and to require them to provide a credit card number for identification purposes. Although this may have caused a slight decrease in the postings on Craigslist for adult services, see Stone, *supra* note 244, there are still thousands of these ads on the site. Moreover, this new policy has also generated millions of dollars in revenue for Craigslist. Andrew Beaujon, *Will Craigslist's New Stance on Adult Ads Save Alt-Weeklies?*, WASH. CITY PAPER, June 2, 2009, available at <http://www.washingtoncitypaper.com/blogs/citydesk/2009/06/02/will-craigslist-new-stance-on-adult-ads-save-alt-weeklies/>.

Website operators could employ filtering software that searches for hot-button words like “minorities,” “kids,” and “Christian” and automatically embargoes ads that contain those words until they can be reviewed further. Similarly, a relatively simple program could cause a “warning” message to pop up if a user attempts to submit an ad containing potentially problematic language. This would give the user the opportunity to remove the language. If the user chooses to leave the language, the ad would be filtered for individualized review. Using such techniques would relieve website operators of the burden of reviewing every single ad posted to the site.<sup>258</sup> Instead, they would only have to arrange for a staff person to review the ads that are filtered. Ads that contain suspect words but which turn out to be harmless could be cleared for posting after a brief review.

Another argument against making website operators liable for discriminatory ads is that this may lead them to overreact and over screen.<sup>259</sup> Specifically, they may filter out all ads that contain potentially problematic language, sweeping up individual ads that are not discriminatory.<sup>260</sup> Thus, an ad that states “black marble countertops in kitchen” might be unfairly blocked. At the same time, clever advertisers could word their ads in such a way as to evade filtering techniques. The steps outlined in the previous paragraph should address concerns about overscreening. At worst, some ads (which the user has chosen not to modify despite a warning message) might experience a delay in being posted. Concerns about cleverly worded ads slipping through could be mitigated by giving website operators an affirmative defense: If they use reasonable screening and blocking techniques, they will not be liable if a discriminatory ad evades them.<sup>261</sup>

#### *E. More Attention Must Be Paid to Familial Status*

Although publisher liability will go a long way toward eliminating discriminatory rental ads online, it is important to recognize that this merely throws a cover back over the issue. The underlying problems that caused so many discriminatory ads to appear will still remain. We will miss a valuable opportunity, then, if we fail to use the lessons we have learned from the

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258. See Chang, *supra* note 75, at 1006-08; Mann & Belzley, *supra* note 254, at 268 (“[A]dvances in information technology make it increasingly cost effective for intermediaries to monitor more closely the activities of those who use their networks.”). Indeed, Craigslist already allows users to run searches for specific terms, which is what allowed me to find so many discriminatory ads. Craigslist also currently employs a system in by which users can flag ads that are offensive for any reason. After a certain number of flags, the ad is taken down.

259. Chang, *supra* note 75, at 1006-08.

260. *Id.*

261. This general approach is advocated by Professors Mann and Belzley, who contend that giving internet intermediaries “safe harbors” if they engage in specifically defined conduct is preferable to a blanket imposition of liability. They reason that this approach encourages the intermediary to utilize “more sensitive and less blunt” screening techniques and preserves the Internet’s “generative potential.” Mann & Belzley, *supra* note 254, at 248-49.



discriminatory ads that we have seen. One of the clearest lessons is that there is a problem with the way the public perceives familial status and housing. Even without publisher screening, landlords are expressing virtually no racial, religious, or ethnic bias in their online classified ads.<sup>262</sup> The discriminatory ads placed by landlords are almost entirely based on familial status.<sup>263</sup> Thus, the discussion should be refocused on familial status discrimination, and the particular challenges it represents: Why is this still such a common basis for discrimination in ads,<sup>264</sup> and what should be done to address these underlying causes?

One problem may be a lack of information about the fact that familial status is a protected category under the FHA. It is clear that the general public is largely ignorant of this fact. A recent HUD survey of public awareness of fair housing laws found that only 38% of people knew that it was illegal to discriminate on the basis of familial status in housing.<sup>265</sup> Although it is safe to assume that individuals who rent housing are more knowledgeable about the FHA than the average member of the public, they may still be uninformed. As one commentator has noted, “many landlords are small owners . . . who are

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262. It is important to note that the relative dearth of housing ads on Craigslist that express a racial, ethnic, or religious bias in no way means that housing providers no longer discriminate on these bases when it comes to making decisions about to whom to rent. To the contrary, all evidence demonstrates that such discrimination is pervasive, widespread, and extremely common in the traditional rental market. See Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 456-460 (2007) [hereinafter Schwemm, *Why Do Landlords Still Discriminate*] (describing the high degree of noncompliance with the FHA, in contrast with other civil rights laws). The best recent study on this issue was prepared for HUD, based on thousands of paired tests in dozens of metropolitan areas in 2000. The rental tests revealed that whites were favored over blacks 21.6% of the time, and over Hispanics 25.7% of the time. MARGERY AUSTIN TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE 1 HDS 2000, at iii-iv (Urban Inst. Metro. Hous. and Cmty. 2002). Based upon these numbers, scholars estimate that annually, rental discrimination occurs against blacks more than 1.6 million times and against Hispanics more than 1.1 million times. NAT'L FAIR HOUS. ALLIANCE, 2004 FAIR HOUSING TRENDS REPORT at 2-3 (2004) (on file with author).

263. See *supra* text accompanying notes 119-22.

264. Although it is by far the most common basis for discrimination in on-line ads, familial status is only the third most-common basis for discrimination in complaints filed with governmental and fair housing agencies, after race and disability. See NAT'L FAIR HOUS. ALLIANCE, 2008 FAIR HOUSING TRENDS REPORT 48 (2008), available at <http://www.nationalfairhousing.org/Portals/33/reports/2008%20Fair%20Housing%20Trends%20Report.pdf>. Of course, the relatively smaller number of complaints may in part be attributable to public ignorance of the fact that familial status is a protected category. See *infra* text accompanying note 250.

265. See ABRAVANEL & CUNNINGHAM, *supra* note 194, at 11. In contrast, 67% of respondents knew that a housing ad that discriminated on the basis of religion would be illegal, and 81% knew that restricting a home sale to white buyers would be illegal. *Id.*

generally not subject to any training or licensing requirements.”<sup>266</sup> Some 80% of the 4.3 million households who earn rental income from a second property have just one rental property, and at least one-third of these are only single-family rentals.<sup>267</sup> Small property owners tend to manage their properties themselves, without employing agents or an outside management company.<sup>268</sup> Indeed, the significant number of ads for rentals that blatantly discriminated on the basis of familial status identified by the Ad Review suggests that some portion of the people taking out the ads were ignorant of the fact that they were violating the law.<sup>269</sup>

If it is merely a problem of information availability, the solution is a more effective public education campaign about the familial status provisions of the FHA, which could be undertaken by HUD, fair housing organizations, local rental licensing agencies, and other entities with an interest in eliminating familial status discrimination in housing. Additionally, all websites that feature housing advertisements could be encouraged to provide this information to users in a clear and easy-to-find manner, much in the way that Craigslist does now.<sup>270</sup>

Greater public education about the law, however, is probably not enough. The fact that some landlords clearly do not see it as a problem to post rental ads that blatantly discriminate on the basis of familial status indicates that there is also a problem with the way that the public perceives familial status. By now, most people recognize that it is not socially acceptable to make statements of racial, religious, or national origin bias in rental housing advertisements. This is in large part due to the successes of the civil rights movement in changing attitudes about what is appropriate to say publicly about race, religion, and ethnicity.<sup>271</sup>

The same does not hold true for familial status. It is simply not as socially taboo to express bias against families with children in the housing context.<sup>272</sup> There are a number of reasons for this. First, familial status as a protected category is fundamentally different from race and ethnicity. Race and ethnicity are the paradigmatic, foundational categories upon which modern civil rights law

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266. Schwemm, *Why Do Landlords Still Discriminate*, *supra* note 262, at 474.

267. *Id.* at 474 & n.102 (citing reports from the Joint Center for Housing Studies of Harvard University).

268. *Id.* at 474.

269. *See supra* text accompanying notes 115-18.

270. *See Craigslist*, *supra* note 207. Although this ultimately will not make a difference for the content of the ads for traditional rental housing—which, under my previous proposal will be screened—it may help to educate users about their substantive obligations under the FHA.

271. This broad recognition that it is unacceptable to make racially biased statements does not correspond to a lack of discrimination in practice. There is still ample evidence of housing discrimination based on race and national origin. *See supra* note 250.

272. One of the ads in the Ad Review perfectly illustrates the disparity between social norms regarding expressions of bias against children versus expressions of bias based on other characteristics: “[I] don’t care what gender, nationality, religion, or sexual orientation you are . . . no children please.” Dallas Craigslist, Sept. 2, 2009 (on file with author).



is based. They are immutable traits over which a person has no control, unlike familial status.<sup>273</sup> In contrast with race and ethnicity, the United States does not have a long history of invidious discrimination against families with children in all aspects of society. Indeed, “the FHAA’s ban on familial status discrimination is unprecedented among the nation’s anti-discrimination laws.”<sup>274</sup> It is not at all clear, therefore, that familial status cases are viewed as having the same degree of public importance as cases based on race or ethnicity.<sup>275</sup>

Other scholars argue that, unlike race and ethnicity, familial status is relevant to a person’s suitability as a tenant. They contend that objective factors such as increased noise and property damage cause landlords to discriminate against families with children, not some generalized animus against children.<sup>276</sup> Whether this is accurate, it is clear that Congress believed that the preference for living away from families with children is reasonable, as evidenced by the significant exemption it created in the FHA for Housing for Older Persons.<sup>277</sup> The statute specifically allows communities for seniors (either fifty-five or older or sixty-two or older) to exclude children, provided that certain requirements are met.<sup>278</sup> The record contains multiple statements by members of Congress that elderly people need to be “protected” from having to live near families with children, particularly because of their need for “peace and quiet.”<sup>279</sup>

Whether it is because familial status is not taken seriously as a protected category or because people genuinely believe there are disadvantages to living near or renting to families with children, a significant majority of people surveyed believe that familial status discrimination should be legal in rental

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273. Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745, 757-58 (1993) [hereinafter Schwemm, *The Future of Fair Housing Litigation*]. Of course, although a person has some degree of control over whether she will have a child, a child has no control over whether or not he is born. I thank former student Brendan Fox for this insightful observation.

274. *Id.* at 758.

275. *Id.* at 757.

276. Michael A. Wolff, Comment, *The Fair Housing Amendments Act of 1988: A Critical Analysis of “Familial Status,”* 54 MO. L. REV. 393, 405-06 (1989).

277. *Id.* at 406-07 (arguing that “the problems children pose for the elderly are similar to the problems they pose for everyone else” and thus the Housing for Older Persons Exemption operates as an implicit recognition that it is reasonable for other housing providers to exclude children as well); cf. Schwemm, *The Future of Fair Housing Litigation*, *supra* note 273, at 758 (recognizing that the housing for older persons exemption endorses the concept that familial status discrimination is appropriate in some circumstances).

278. 42 U.S.C. § 3607(b) (2006).

279. See, e.g., 134 CONG. REC. S10,544, S10,551 (daily ed. Aug. 2, 1988) (statement of Sen. McCain) (arguing that it is important not to “impinge upon the right of older Americans to enjoy peace and quiet in their retirement years”); *id.* (statement of Sen. Hatch) (arguing that the elderly have a right to live “in an environment that may be more peaceful than one which includes young children,” and that there must be “some safeguard exemptions to the familial status language to protect” such housing options).

housing.<sup>280</sup> Changing these attitudes will require a shifting of social norms, and therefore we must first determine whether this is a situation in which the law should accommodate the norm or should instead displace the norm. Using the norm theory framework discussed previously, the first question to ask is whether the norm—here to exclude families with children from rental housing opportunities—is a harmful one. Does it, for example, perpetuate inequality and subordination of a particular group? Unlike the previous example of roommate preferences, which went in all directions and tended to favor minorities, the Ad Review and the legislative history of the FHA demonstrate that families with children are consistently disadvantaged in rental housing. In addition to the burden this places on families with children, there are social costs attendant with families who become homeless or who are forced to live in overcrowded and substandard conditions. Moreover, using the law to combat this social norm does not infringe on any rights. Unlike the roommate situation, in which privacy and associational rights were implicated, there is no “right” of landlords not to rent to families with children, or of people (other than certain elderly individuals) to live in a complex or neighborhood that is child-free.

Thus, the public must be convinced of the necessity and moral value of protecting families with children from housing discrimination in the rental market.<sup>281</sup> Rational choice theorists recognize that one way of changing a social norm is to provide people with additional information that will cause them to reevaluate their attitudes, as when anti-smoking activists sought to publicize the health effects of smoking.<sup>282</sup> In this vein, HUD or fair housing organizations could undertake advertising campaigns that describe the severity of the problem of discrimination against families with children that led Congress to add familial status to the FHA in the first place, including the widespread nature of the discrimination and the fact that it led to dire consequences for many families and for society as a whole.<sup>283</sup> A significant proportion of the American people are likely unaware of the magnitude of the problem that led Congress to act in 1988, and they might change their attitudes about familial status discrimination once given that knowledge.

Another method of changing norms is to alter the social meaning of particular behaviors in order to change people’s attitudes toward them, as when anti-smoking activists sought to portray smoking as dirty, rude, and low-class.<sup>284</sup>

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280. ABRAVANEL & CUNNINGHAM, *supra* note 194, at 21 (finding sixty-two percent of respondents thought that familial status discrimination should be legal).

281. Schwemm, *Why Do Landlords Still Discriminate*, *supra* note 262, at 507-08 (arguing that increased enforcement of the law is unlikely to change persistent levels of discrimination, and that convincing people of the validity of fair housing laws may be the most effective way to ensure their compliance).

282. *See, e.g.*, Sunstein, *Social Norms and Social Roles*, *supra* note 190, at 930-31, 949; Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 618-19 (2004).

283. *See supra* note 213.

284. *See* Sunstein, *Social Norms and Social Roles*, *supra* note 190, at 949-951.



In this vein, HUD and others could include in their advertising campaigns an emotional appeal to the importance of the family in American life and the adversity many families face in finding adequate housing. Thus, a landlord's policy of excluding families with children would be re-framed: rather than a simple business decision taken for the perceived marginal convenience of his other tenants, it can be shown as a callous and devastating act which causes needless suffering for children.

### CONCLUSION

Ultimately, the practical effect of my proposals would be as follows: Website operators would be liable for publishing discriminatory ads for non-shared housing. These ads, which comprise a relatively small number of the discriminatory ads, would therefore be screened from sight. Armed with the knowledge that there is clearly a continued ignorance of and resistance to the fair housing law with respect to familial status, housing advocates should focus their attention on both raising awareness and changing public attitudes. At the same time, people in shared housing situations, and only those people, would be exempt from both the substantive and the advertising aspects of the FHA.

The solutions I propose are not perfect, and I reach them with some ambivalence. As an academic who firmly believes in the need for fair housing laws and the goal of housing equality for all, it is not easy for me to conclude that a large segment of individuals should be allowed to freely express discriminatory housing preferences. But the highly individualized and expressive nature of the roommate ads, the diversity of preferences they articulate, and the intimate quality of the roommate relationship itself convince me that this is the best course of action, both as a legal and as a social matter.

There are many issues that this Article leaves for another day, the most significant of which is how the legal framework should address new technologies. For example, discriminatory housing ads can appear on other types of websites beyond classifieds, such as an individual's Facebook page.<sup>285</sup> The more personal the page is, the less palatable government regulation, screening, or civil liability for content will be. Perhaps an easy line can be drawn between websites that specifically offer classified advertisement services and personal websites. But what happens when these lines begin to blur, as people use existing technologies in new ways, such as a real estate company setting up a Twitter feed to sell property, or as entirely new developments allow for marketing based on increasingly sophisticated data mining and content delivery? One can imagine any number of scenarios in which technological advances present new challenges for the law. If and when this happens, hopefully scholars will recognize the opportunity for study, just as policy makers will use the information to develop effective and sensible legal responses.

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285. See generally Susan B. Barnes & Neil Frederick Hair, *From Banners to YouTube: Using the Rearview Mirror to Look at the Future of Internet Advertising*, 5 INT'L J. INTERNET MARKETING & ADVERTISING 223 (2009).

## APPENDIX—METHODOLOGY

I surveyed ads posted to Craigslist for ten cities: Atlanta, Boston, Chicago, Dallas, Denver, Las Vegas, Los Angeles, Minneapolis, New York, and St. Louis. For each city, I reviewed 1,000 ads, 500 posted under “apts/housing” (which is for traditional rentals and sales of housing) and 500 under “room/shared” (which is for roommates and other shared living situations). Each block of 500 ads was reviewed in a single day to minimize the likelihood of repeat postings. Upon review, it appeared that a small number of ads were repeat postings. I did not eliminate the repeat ads from consideration for two reasons. First, as a practical matter, many ads looked alike, and it was not always possible to confirm that a particular ad was a repeat posting; Second, each ad ran separately and, if discriminatory, would constitute a separate violation.

In some instances, the text of an ad posted to the “apts/housing” category made clear that it was in fact an ad for shared housing. In those cases, I reclassified the ad as one that properly belonged under “rooms/shared.”

I only reviewed ads for compliance with the federal Fair Housing Act, meaning I only flagged ads that potentially discriminated based on race, sex, national origin, religion, disability, or familial status. I did not flag roommate ads that discriminated on the basis of sex, as HUD has issued regulatory guidance stating that such discriminatory preference is legal in shared living situations.

I flagged any obviously discriminatory advertisements, such as those which stated “no kids.” I also flagged ads in which the advertiser self-identified according to any protected category. Because the standard for proving a violation is keyed to the “ordinary reader,” I flagged ads that, although not overtly discriminatory, would still indicate discriminatory preference to the average reader. In so doing, I followed the guidance provided by HUD and the § 3604(c) case law. When in doubt about whether an ad should be considered discriminatory, I did not flag it. Thus:

- I concluded that ads which stated “Perfect for students or young professionals” indicated a dispreference for families with children because these are two groups with little in common except for age and the likelihood that they will not have children. I did not, however, flag ads that simply stated “Students welcome” or “Great for students,” under the assumption that complexes that accept students (which not all rental complexes do) and are located near a university could announce these factors without necessarily indicating that families were not welcome. Similarly, I did not flag ads seeking “professionals,” as this alone would simply indicate a preference for a person with a well-paying job and a (presumably) well-ordered lifestyle.
- I flagged ads that used catch phrases such as “seeking a mature and quiet individual” or “perfect for newlyweds or retired couples”.
- I flagged ads that specified a maximum occupancy that was less than that set



forth in HUD's so-called "Keating Memo," which stated that two-people per bedroom was presumptively reasonable. Anything less than this—for example, an ad for a 2-bedroom apartment that says "two-person limit"—discriminates against families with children. I did not, however, flag ads which sought a single person (i.e., "roommate wanted") so long as nothing in the ad stated that it was limited to one individual.

- I flagged ads that stated a preference for people fluent in a particular language.
- I did not otherwise flag ads that might have had a disparate impact on particular protected categories. For example, an ad that required applicants to provide a drivers license would disproportionately prevent people with certain disabilities from applying, or an ad stating a preference for U.S. citizens would disproportionately affect national origin minorities. I chose not to flag these ads because the very definition of a disparate impact claim is that it does not allege overt discrimination of the sort that would communicate a preference to the ordinary listener.
- Similarly, I did not flag ads that said they would not accept responses from out of the state or out of the country. Although these statements would likely have a disparate impact on national origin minorities, it is clear from reading the ads that the advertisers are concerned with fraud, spam, and lack of accountability that might result from dealing with someone in another state or country via the Internet. I did, however, flag ads which stated "no foreigners."
- I did not flag ads that were essentially ads for employment where housing was part of the remuneration, such as live-in housekeeper or nanny.

