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PUBLIC POLICY FAVORITISM IN THE ONLINE WORLD: CONTRACT VOIDABILITY MEETS THE COMMUNICATIONS DECENCY ACT

By Lynn C. Percival, IV†

INTRODUCTION

Without § 230 of the Communications Decency Act, there would likely be no proliferation of message boards, no YouTube, and, much to the chagrin of laptop-equipped third-year law students, no Facebook. Section 230 allows Internet service providers (ISPs) and interactive website providers (collectively "operators") to host online content created by others without risking several types of civil liability. The statute has earned acclaim for its role in aiding the Internet's explosive growth.[1] Until now, § 230 scholarship has examined the propriety and proper scope of § 230 immunity.[2] This Article addresses the statute's impact on the law of contract.

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1. Cecilia Ziniti, Note, *The Optimal Liability System for Online Service Providers: How* Zeran v. American Online *Got it Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 610 (2008) (crediting a broad interpretation of § 230 with allowing the Internet, and particularly Web 2.0 websites, to flourish).

2. *See, e.g.*, Varty Defterderian, Note, Fair Housing Council v. Roommates.com: *A New Path for Section 230 Immunity*, 24 BERKELEY TECH. L.J. 563 (2009); Aaron Jackson, Note, *Cyberspace . . . The Final Frontier: How the Communications Decency*

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Courts have long impinged on the freedom of contract by voiding contracts, or parts of contracts, when they run contrary to public policy.[3] Section 230 presents a unique situation: if the performances or underlying conduct related to a contract violate a substantive area of law, but the operator is nevertheless immunized from liability, courts are faced with conflicting public policies when one party seeks to have the contract voided because it is violative of public policy. The statute encourages the operator's conduct, while the underlying substantive law simultaneously discourages the content provider's conduct. This Article argues courts should favor operators by employing a "one-sided-void-for-public-policy" approach: these contracts should generally be voidable at the operator's—but not the content provider's—option. This approach will inure to the benefit of operators that take advantage of § 230's rules. Creative operators can ensure they are not the "developers" of a significant amount of content on their websites, thereby affording them a contractual advantage over the content providers responsible for the material.

By its very nature, § 230 creates public policy conflicts.[4] In *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.*,[5] and *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,[6] for example, the public policy rationales behind § 230 and the Fair Housing Act (FHA) were sharply at odds. While the FHA seeks to stamp out religious bias (and other biases) in the housing market by punishing those who publish prohibited preferences in housing advertisements, § 230 prevents an operator's prospective liability when the advertisement originates from another source: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[7] Section 230 is fully introduced in Part I of this Article, where the policy objectives behind the statute and case

Act Allows Entrepreneurs To Boldly Go Where No Blog Has Gone Before, 5 OKLA. J.L. & TECH. 45 (2009); Ziniti, *supra* note 1, at 610; Brandy Jennifer Glad, Comment, *Determining What Constitutes Creation or Development of Content Under the Communications Decency Act*, 34 SW. U. L. REV. 247 (2004); Bryan J. Davis, Comment, *Untangling the "Publisher" Versus "Information Content Provider" Paradox of 47 U.S.C. § 230: Toward a Rational Application of the Communications Decency Act in Defamation Suits Against Internet Service Providers*, 32 N.M. L. REV. 75 (2002); Barry J. Waldman, Comment, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 RICH. J.L. & TECH. 9 (1999).

3. *See, e.g.*, Collins v. Blantern, (1767) 95 Eng. Rep. 850, 854; 2 Wils. K.B. 347, 350.

4. For § 230 immunity to arise, an operator must be trying to avoid liability for an action that would result in legal sanction or liability for a non-operator. Naturally, the policy behind § 230 and "real-world" laws inherently conflict.

5. Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C., 521 F.3d 1157 (9th Cir. 2008).

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

7. Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (2006).

law interpreting it are discussed. Part II explains how current online advertising services, such as Google's Adwords, function and how they fit into the § 230 immunity scheme.

To explain why courts should favor operators, Part III utilizes the policy tension between § 230 and the FHA that can arise in the context of an online advertising contract. Suppose, for example, a brick-and-mortar advertising agency entered into a contract through which the agency would post housing advertisements on the operator's website. If the rental agency expressed religious preferences in its ads, would either party be able to avoid contractual enforcement by asserting the contract is violative of public policy? Part III demonstrates that in most situations, operators—and only operators—should be able to avoid contractual obligations on public policy grounds.

Section 189 of the Restatement (Second) of Contracts provides a test for evaluating whether public policy should bar the enforcement of a particular promise. (Going forward, the restatements are referred to as the "First Restatement" and the "Second Restatement.") Section III.A explains how that framework functions and why it is a superior approach to that of the First Restatement. Section III.B demonstrates that when § 230 immunizes an operator from liability for illegal third-party content closely related to a contract between the operator and a content provider, the contract should generally be voidable at the option of the operator—not the content provider. Finally, other applications of this one-sided approach as well as a variety of implications for the media are discussed in Section III.C.

I. SECTION 230: THE STATUTE AND ITS CASE LAW

This part lays the groundwork for the rest of the Article. Section A explains how a New York trial court decision led to § 230's enactment. Section A also explains how operators can obtain immunity and how they can lose it, as well as the policy considerations that shaped the statute. Section B provides a discussion of the evolving contours of § 230 immunity.

A. *Section 230 Basics: Why it was Enacted, How it Works, and the Policy Considerations behind the Statute*

Section 230 is seen as the congressional response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[8] a New York defamation case. In *Stratton Oakmont*, the New York Supreme Court held that Prodigy, an ISP, was the publisher of all user-generated messages on an online message board because Prodigy exercised editorial control over the

8. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 137, 137–39 (1996) (codified as amended at 47 U.S.C. § 230).

content of web postings.[9] To circumvent the potential impact of this decision, Congress enacted § 230 as part of the Communications Decency Act of 1996.[10]

Under subsection (c)(1), "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[11] Subsection (c)(1) effectively defeats an element of a claim that requires the defendant-operator to be treated as a publisher. However, the statute's definitional subsection, subsection (f), carves out an exception to that immunity: an "information content provider" is defined as "any person or entity that is *responsible, in whole or in part, for the creation or development* of information provided through the Internet or any other interactive computer service."[12] Note that subsection (c)(1) only exempts an operator from being treated as the publisher of content provided by "*another* content provider." By developing online content "in whole or in part," an operator can *also* be classified as an information content provider, losing its immunity. Thus, there are three critical elements of a § 230(c)(1) defense: (1) the operator must be a user or provider of an interactive computer service; (2) the plaintiff's theory of recovery must require the operator to be treated as a "publisher or speaker"; and (3) the operator cannot be an "information content provider" of the content the plaintiff is seeking to attribute to that operator.[13]

Congress set forth five general policy objectives:

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9. *Id.* at *5. In an earlier New York district court case, the court discussed the rationale for treating a website like newspaper:

> A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.

Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991).

10. Representative Cox, who proposed § 230 along with Representative Wyden, made the following comments about the *Stratton Oakmont* decision:

> Mr. Chairman, that is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact every one of us will be able to tailor what we see to our own tastes.
>
> . . .
>
> [Our approach] will protect [online service providers] from taking on liability such as occurred in the Prodigy case in New York . . . .

141 CONG. REC. 22,045 (1995) (statement of Rep. Cox).

11. 47 U.S.C. § 230(c)(1).

12. *Id.* § 230(f)(3) (emphasis added).

13. Ziniti, *supra* note 1, at 610.

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
> (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.[14]

The congressional findings lauded the Internet's educational, intellectual, and cultural value,[15] and stated that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[16]

Limiting government interference with the Internet was a primary motive behind enacting § 230. The Senate approved an alternate proposal that provided very limited immunity, but the House rejected it.[17] House floor comments by Representatives Cox and Wyden, the architects of the statute, indicate § 230's immunity was intended to be part of a larger laissez faire approach to Internet regulation (or a lack thereof), by allowing Internet entrepreneurs to operate free of certain constraints imposed by "real-world" civil liability regimes.[18]

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14. 47 U.S.C. § 230(b).

15. *Id.* § 230(a)(1), (3), (5).

16. *Id.* § 230(a)(4). This finding has been particularly influential with the courts. In *Zeran v. America Online, Inc.*, the court placed heavy emphasis on subsection (a)(4), concluding Congress intended for the Internet to remain free of government interference. 129 F.3d 327, 330 (4th Cir. 1997).

17. *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, 822–23 (2007).

18. Representative Wyden contrasted § 230 with the rejected Senate approach:

> Now what the gentleman from California [Mr. Cox] and I have proposed does stand in sharp contrast to the work of the other body. They seek there to try to put in place the Government rather than the private sector about this task of trying to define indecent communications and protecting our kids. In my view that approach, the approach of the other body, will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected. . . .
>
> Mr. Chairman, the new media is simply different. We have the opportunity to build a 21st century policy for the Internet employing the technologies and the creativity designed by the private sector.

141 CONG. REC. 22,045 (1995) (statement of Rep. Wyden) (alteration in original). Representative Cox made a similar point with the following comments:

Before proceeding further, it is important to note that § 230 has no impact on intellectual property law.[19] As such, this Article has no bearing on contract actions involving trademark infringement or any other intellectual property issues.[20] Section 230 also provides another form of immunity that is largely beyond the scope of this Article: subsection (c)(2) provides civil immunity for actions taken in good faith to restrict access to objectionable material.[21] For the most part, this Article is limited to discussing subsection (c)(1) immunity.

B. *Section 230 Case Law*

Courts have generally concluded § 230 confers broad immunity on operators. They have not opted for a strict, literal reading of the definitional exception contained in subsection (f).[22] The difficult inquiry for the courts has been determining what amount of development is required to trigger the exception. Courts have held that establishing a network of message boards,[23] a dating profile network,[24] and an open-ended commercial bulletin board, such as Craigslist.com,[25] are insufficient. The defendants in these cases certainly developed the underlying content to some extent, which would seem to make them content

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Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.

Id. (statement of Rep. Cox).

19. 47 U.S.C. § 230(e)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.").

20. The relationship between operator liability and intellectual property infringement is an intriguing area of law in its own right. For an explanation of the intent-based liability scheme endorsed by the Supreme Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913 (2005), a significant copyright-infringement case, see, Jane C. Ginsburg, *Separating the Sony Sheep From the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577 (2008), and Ziniti, *supra* note 1, at 608.

21. *See* 47 U.S.C. § 230(c)(2).

22. Recall that information content providers are not entitled to immunity and that § 230 describes them as "any person or entity that is *responsible, in whole or in part, for the creation or development* of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3) (emphasis added).

23. Zeran v. America Online, Inc., 129 F.3d 327, 335 (4th Cir. 1997).

24. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008).

25. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003).

providers, and therefore outside the protection of § 230. A dating website encourages people to post their personal information, and a financial message board certainly "develops" the message board's content by promoting a focused theme of discussion. Fortunately, courts have not opted for this literal reading of the statute.[26]

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the Ninth Circuit refined the inquiry, concluding the exception applies when an operator "contributes materially to the alleged illegality of the conduct."[27] The Ninth Circuit test, which this Article calls the "underlying illegality test," takes a moderate approach. The test accounts for the inherent tension created by the definitional exception to immunity. The word "develop" is not read literally, but on the other hand, subsection (c)(1) is not treated as a source of unlimited immunity.[28] Chief Judge Kozinski articulated this balanced approach to immunity:

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26. A literal reading of the word "develop" would defeat the purpose of the statute and would fail to recognize that Congress intended to avoid the result of the *Stratton Oakmont* decision. Read out of context, a message board moderator that edits postings can be said to "develop" the message board itself—including all of its content. Because this is what occurred in *Stratton Oakmont*, *see supra* text accompanying notes 8–10, the word "develop" cannot include basic editorial functions.

27. Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C., 521 F.3d 1157, 1168 (9th Cir. 2008).

28. Several commentators have rejected the underlying illegality test, arguing the *Roommates.com* decision runs contrary to congressional intent. These critiques appear to suggest absolute immunity is appropriate when a third party creates content, but seem to ignore the possibility that operators can themselves be content providers by substantially collaborating with another party that is the *primary* content provider. One commentator, for example, has argued the court clearly ran afoul of congressional intent:

> Yet the majority feels that the policy scheme articulated by Congress has reached its expiration date and must therefore be altered. The *Roommates.com* decision contradicts Congress's clearly stated intent to immunize [operators], which was affirmed not only during the enactment of the statute but also after courts had an opportunity to interpret section 230.

Defterderian, *supra* note 2, at 585. Defterderian argues the endorsement of *Zeran* and other pre-*Roommates.com* decisions by the House Committee on Energy and Commerce in 2002 demonstrates *Roommates.com* clearly broke with congressional intent. *Id.* Indeed, the House Committee did endorse these decisions: "The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence and defamation . . . ." H.R. REP. NO. 107-449, at 13 (2002) (citations omitted). This does not, however, demonstrate the decision ran contrary to congressional intent as Representatives Cox and Wyden originally expressed it or when the House Committee endorsed *Zeran* and several other cases.

First, the statements by Cox and Wyden certainly espouse a laissez faire regulatory approach, but they do not describe the extent of § 230 immunity. *See supra* note 18 (quoting 141 CONG. REC. 22,045 (1995) (statements of Rep. Wyden and Rep. Cox)). Gushing over the value of the Internet and the importance of keeping government away from it is by no means stating that operators should be granted near-absolute immunity. Second, the House Committee's endorsement of *Zeran*, which spoke of "broad immunity," *Zeran*, 129 F.3d at 331, did not reject the approach taken six years later in *Roommates.com*. In retrospect, *Zeran* was not a close case. There, the plaintiff brought suit against AOL when AOL failed to remove offensive postings to an

> Where it is very clear that the website directly participates in developing the alleged illegality . . . immunity will be lost. But in cases of enhancement by implication or development by inference—such as with respect to the "Additional Comments" here—section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.[29]

More specifically, the court held that "a website helps to develop unlawful content, and thus falls within the exception to section 230, if it *contributes materially to the alleged illegality of the conduct.*"[30]

The test allows for significant development of an interactive website (such as focusing the website's theme) but prevents operators from requiring content providers to engage in illegal conduct in order to use the website. So while an operator like Facebook might encourage its users to make "wall-postings" and create "pages," it is not liable for a defamatory wall posting simply because the entity encourages users to post. The *Roommates.com* decision also provided guidelines regarding the *extent* of development required to trigger the exception. The court agreed with the Seventh Circuit's *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.* decision,[31] holding the exception is not triggered by content created by content providers through the use of open-ended text boxes.[32] Mandatory drop-down menus, however, are a different story. When drop-down menus con-

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AOL message board after being notified of their existence. *Id.* at 328–30. Nothing in the decision indicates AOL solicited or required the third parties to create illegal content, as was the case with the operator in *Roommates.com*. *See Roommates.com*, 521 F.3d at 1165 ("Similarly, Roommates requires subscribers listing housing to disclose whether there are 'Children present' or 'Children not present' and requires housing seekers to say 'I will live with children' or 'I will not live with children.'"). Neither *Zeran* nor any other decision had tested the definition of "develop" as the facts did in *Roommates.com*. Therefore, Congress's endorsement of *Zeran* cannot be seen as a rejection of the underlying illegality approach.

Furthermore, the underlying illegality test still provides *broad* immunity so long as courts do not adopt a strict liability approach—and the weight of § 230 case law indicates such an approach is not forthcoming. *Cf. infra* note 37 (explaining that the decision has been cited predominantly in decisions siding with defendants); *infra* note 35 (discussing the possibility of a strict liability version of the underlying illegality test). *But cf. infra* note 50 (discussing a recent case that held for the plaintiff in a § 230 case and referring to a commentator's concern that this case might disrupt § 230 case law). The word "develop" is still not interpreted literally—operators can still promote, edit, and otherwise *substantially develop* their websites provided they do not develop underlying illegality. And while it lacks the simplicity of a bright line approach, the underlying illegality approach gives meaning to the word "develop." The alternative would be to pretend subsection (f)(1) does not even apply to operators, which would truly run contrary to congressional intent. Perhaps most importantly, *Roommates.com* has not lead to a host of operator-hostile decisions. *See infra* note 37 (explaining that the decision has been cited predominantly in decisions siding with defendants).

29. *Roommates.com*, 521 F.3d at 1174–75.

30. *Id.* at 1168 (emphasis added).

31. *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008).

32. *Roommates.com*, 521 F.3d at 1174.

taining pre-populated answers must be completed to create a profile, which was the case in *Roommates.com*, an "illegal" answer provided by the user may be attributed to the operator.[33] Essentially, the operator is *forcing* the user to provide the content—even though no one is forcing the user to use the website. Logically, this analysis would extend to a pre-populated drop-down menu that must be completed to advance through many online processes, such as the creation of an advertisement.

The underlying illegality test is, of course, not a perfect solution, and it is currently rather rough around the edges. The courts have not explained whether operators are necessarily liable for *all* pre-populated content, since the drop-down menus in *Roommates.com* contained clearly illegal responses.[34] Liability might depend on the *likelihood* a drop-down menu will create illegal content. For instance, consider a mandatory menu that contains twenty legal responses and one illegal response. If the illegal answer was clearly illegal on its face, it seems the operator would be unworthy of § 230 protection. If the answer was illegal only in combination with a user's response to other mandatory questions (i.e., latent illegality), the outcome might be different.[35] But despite its imperfections,[36] courts from multiple circuits have cited the *Roommates.com* decision (largely in favor of defendants) suggesting that, fortunately for operators, it is emerging as the dominant approach.[37]

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33. *Id.* at 1116, 1166–68. The court stated that "[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information." *Id.* at 1116.

34. *See id.* at 1165 ("Roommate requires subscribers to specify, using a drop-down menu provided by Roommate, whether they are 'Male' or 'Female' and then displays that information on the profile page.").

35. This discussion raises the specter of pre-populated content *strict liability*, under which an operator could be liable for any pre-populated menu selection it provides for the user. While strict liability would help alleviate the uncertainty injected by latently and contextually illegal pre-populated content, it would wreak havoc on the viability of a variety web-based business models, a result the underlying illegality approach avoids by allowing judges to take a more nuanced approach. *Cf.* Hattie Harman, Note, *Drop-down Lists and the Communications Decency Act: A Creation Conundrum*, 43 IND. L. REV. 143, 166–67 (2009) (recognizing that a strict liability approach "eliminates the court's ability to examine the nuances presented by a particular piece of content in context," and discussing several other arguments against pre-populated strict liability).

36. For two alternate approaches to § 230 immunity, see, for example, *id.* at 170–74 (arguing for "A 'Safe Harbor'-style Rebuttable Presumption") and Zac Locke, Comment, *Asking For It: A* Grokster*-Based Approach to Internet Sites that Distribute Offensive Content*, 18 SETON HALL J. SPORTS & ENT. L. 151, 168–180 (2008) (arguing for a "Grokster-based inducement test").

37. As Professor Goldman's blog indicates, *Roommates.com* has overwhelmingly been cited in favor of defendants as of December of 2009. Eric Goldman, *Consumer Review Website Wins 230 Dismissal in Fourth Circuit*, TECHNOLOGY & MARKETING LAW BLOG (Dec. 29, 2009, 2:53 PM), http://blog.ericgoldman.org/archives/2009/12/

II. INTERACTIVE WEBSITE BUSINESS MODELS AND § 230

In order for the public policy conflict between § 230 and a substantive area of law to arise, the operator must first be entitled to § 230 immunity. This part considers online advertising business models that are amendable to a § 230(c)(1) defense. There are a variety of online advertising business models, the most prominent of which is the pay-per-click model.[38] In 2009, Google generated $22.9 billion in advertising revenue.[39] Google AdWords (Google's main advertising product) is a pay-per-click service, meaning advertisers generally pay when users click on ads, rather than paying when each ad is displayed.[40] Advertisers select certain keywords to associate with their advertisements, and when Google search engine users search for those keywords, the user-appropriate ads may appear with the search results.[41] The ad-creation process is almost entirely advertiser-driven—Google appears to have a relatively passive role.

In fact, the AdWords creation process seems tailor-made for § 230(c)(1) protection. The essential components of ads viewable to Google users are created through the use of open text boxes. First, a prospective advertiser must select a geographic region in which the ad

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consumer_review_1.htm (citing Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–05 (9th Cir. 2009); Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 968 (N.D. Ill. 2009); Goddard v. Google, Inc. (*Goddard II*), 640 F. Supp. 2d 1193, 1202 (N.D. Cal. 2009); Doe IX v. MySpace, Inc., 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009); Atl. Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009); GW Equity L.L.C. v. Xcentric Ventures L.L.C., No. 3:07-CV-976-O, 2009 WL 62173, at *4–5 (N.D. Tex. Jan. 9, 2009); Goddard v. Google, Inc. (*Goddard I*), No. C 08-2738 JF (PVT), 2008 WL 5245490, at *2–3 (N.D. Cal. Dec. 17, 2008); Best Western Int'l, Inc. v. Furber, No. CV-06-1537-PHX-DGC, 2008 WL 4182827, at *9–10 (D. Ariz. Sept. 5, 2008); Doe II v. MySpace, Inc., 96 Cal. Rptr. 3d 148, 157–59 (Cal. Ct. App. 2009); Joyner v. Lazzareschi, No. G040323, 2009 WL 695539, at *3 (Cal. Ct. App. Mar. 18, 2009); Shiamili v. Real Estate Grp. of N.Y., Inc., 892 N.Y.S.2d 52, 54–55 (App. Div. 2009)). *Roommates.com* was only cited twice for plaintiffs as of December of 2009. *See id.* (citing FTC v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009); NPS L.L.C. v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483 (Mass. Super. Jan. 26, 2009)). A Shepard's report on the *Roommates.com* decision indicates this trend has continued in 2010.

38. Advertisers pay when users click their advertisement and are linked to a particular advertiser's website. *Internet Advertising: The Ultimate Marketing Machine*, THE ECONOMIST (July 6, 2006), http://www6.economist.com/background/displaystory.cfm?story_id=7138905.

39. *2009 Financial Tables*, GOOGLE, http://investor.google.com/financial/2009/tables.html (last visited Sept. 6, 2010).

40. *Google AdWords*, GOOGLE, http://www.google.com/ads/adwords/ (last visited Sept. 11, 2010).

41. *Id.* For instance, a florist might select "flowers" and "next day delivery" as its keywords. Advertisers can improve the likelihood that their ad will appear by increasing the amount they are willing to pay for a "click." *See* Google, *An Introduction to Google AdWords*, YOUTUBE (Feb. 7, 2008), http://www.youtube.com/watch?v=ufzoM59bIQ8.

will be viewed.[42] Next, the advertiser will enter information into open text boxes labeled "Headline," "First descriptive line," "Second descriptive line," "Visible URL," and "Destination URL."[43] The advertiser will then enter keywords (again, into an open text box) that will be used to trigger the advertisement when a Google user uses those keywords in a Google search.[44] The various components are then automatically assembled into an ad and reviewed by Google employees. Recall that under both *Craigslist* and *Roommates.com*, operators are not the content providers of the content created through open text boxes.[45] Google's use of significant guidelines when reviewing the content of the ads does not negate its immunity.[46]

Goddard v. Google, Inc., a 2009 federal district court decision, extended § 230(c)(1) immunity to Google's AdWords service.[47] The plaintiff was trying to hold Google liable for harm caused by allegedly fraudulent AdWords advertisements.[48] Drawing on the *Roommates.com* decision, the court stated that the defendant could have prevailed if she could have established "that Google 'not only en-

42. *See id.* This is done through a mandatory drop-down menu, so under the *Roommates.com* decision, Google is also a content-provider of the advertiser's geographic region selection.

43. *Id.*

44. *Id.*

45. *See supra* text accompanying notes 27–32 (discussing the *Roommates.com* decision and the Ninth Circuit's agreement with the Seventh Circuit on this point).

46. *Cf.* Ramey v. Darkside Prods., Inc., No. 02-730 (GK), 2004 U.S. Dist. LEXIS 10107, at *19 (D.D.C. May, 17 2004) (advertisement hosting operator not a content provider when it included its website address on every advertisement, placed a watermark on all advertisement photographs, and categorized advertisements by subject matter). An operator's knowledge of illegality does not make it responsible for the illegal conduct. In *Zeran v. America Online, Inc.*, for example, the plaintiff alleged that, because he had informed America Online (AOL) of the defamatory nature of several postings and AOL had agreed to remove them, AOL was liable for failing to remove the posting. 129 F.3d 327, 328, 330 (4th Cir. 1997). The Fourth Circuit panel disagreed, concluding § 230 shielded AOL from being treated as a publisher. *See id.* at 332–33. It follows that even if an operator reviews content, detects illegality, and allows it to be posted on an interactive website, it is not liable for any illegality.

Section 230 actually seeks to enhance operators' ability to exercise editorial control over user content. *See supra* Part I.A. (explaining the statute was passed in response to a case that *imposed* liability because an operator exercised editorial control over some, but not all, content). In fact, civil liability cannot be imposed for efforts to restrict objectionable material:

> No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . .

Communications Decency Act of 1996, 47 U.S.C. § 230(c)(2) (2006). It is unclear whether the outright ban on civil liability covers content screening based on commercial or certain legal considerations; however, the statute certainly promotes the unfettered use of editorial control.

47. Goddard v. Google, Inc., 640 F. Supp. 2d 1193, 1201–02 (N.D. Cal. 2009).

48. *See id.* at 1195.

courage[d] illegal conduct, [but also] collaborate[d] in the development of the illegal content and, effectively, require[d] its advertiser customers to engage in it.'"[49] The plaintiff argued Google contributed to the underlying illegality because the AdWords creation process makes suggestions by matching words entered by users with words chosen by advertisers while creating ads.[50] The court rejected this argument because the plaintiff was not *required* to do anything.[51] The *Goddard* decision, which is an application of *Roommates.com*'s under-

49. *Id.* at 1196 ("These allegations, if supported by other specific allegations of fact, clearly would remove Plaintiff's action from the scope of CDA immunity.").

50. *See id.* at 1199 ("[P]laintiff alleges that Google effectively 'requires' advertisers to engage in illegal conduct. Yet Plaintiff's use of the word 'requires' is inconsistent with the facts that Plaintiff herself alleges. The purported 'requirement' flows from Google's alleged 'suggestion' of the phrase 'free ringtone' through its Keyword Tool, and from the MSSPs' purported knowledge that only 'free ringtones' generate substantial revenue-producing internet traffic.").

Shortly before this Article went to press, a Northern District of California decision declined to extend the result in *Goddard* to a different set of facts. Briefly, in *Swift v. Zynga Game Network, Inc.*, the court denied two operator-defendants' motions to dismiss on § 230 grounds because the court could not conclude the defendants were not content providers based on the pleadings (the court also questioned whether one defendant was an "interactive computer service provider"). C 09-05443 SBA, 2010 U.S. Dist. LEXIS 117355, at *12–19 (N.D. Cal. Nov. 3, 2010). The court distinguished *Goddard*, stating that the plaintiff had not alleged Zynga (one of the defendant-operators) was a neutral website and *had* alleged Zynga directly engaged in fraudulent transactions that were the subject of the case. *Id.* at *17. The opinion indicates Zynga operates social networking games, such as "Farmville," and hosted third-party advertisements within those games. The critical allegation for the court was that the advertisements were selling online currency that could be used to enhance one's performance in online games. In order to obtain online currency, users had to complete transactions with third-party advertisers. The court found this could amount to "material contribution" under the underlying illegality test. *See id.* at *15–16. ("Moreover, Plaintiff has alleged Zynga's 'material contribution' to the alleged unlawful activity by asserting that Zynga designed its games to intentionally create the demand for the virtual currency offered in those games, and then used this demand to lure consumers into the allegedly fraudulent transactions."). While the *Swift* court declined to extend the *Goddard* approach, it does not disturb *Goddard*'s application to "neutral" advertising schemes like Google's Adwords. Professor Goldman has sharply criticized the *Swift* decision, lamenting that it might bring out the worst in the *Roommates.com* regime. *See* Eric Goldman, *Ad Networks Can't Get 47 USC 230 Defense on Motion to Dismiss—Swift v. Zynga*, TECHNOLOGY & MARKETING LAW BLOG (Nov. 11, 2010, 1:01 PM).

51. *See id.* at 1199. The court's decision relied heavily on *Roommates.com*:

> This reasoning fails to disclose a "requirement" of any kind, nor does it suggest the type of "direct and palpable" involvement that otherwise is required to avoid CDA immunity. Such involvement might occur where a website "remov[es] the word 'not' from a user's message reading '[Name] did *not* steal the artwork' in order to transform an innocent message into a libelous one.

Id. (quoting Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C., 521 F.3d 1157, 1169 (9th Cir. 2008)). "Even accepting Plaintiff's factual allegations as true," the court continued, "the allegations do not come close to suggesting involvement at such a level, or, indeed, that Google's AdWords program was anything other than 'a framework that could be utilized for proper or improper purposes.'" *Id.* (quoting *Roommates.com*, 521 F.3d at 1172).

lying illegality test, indicates that websites can avail themselves of § 230(c)(1) immunity by utilizing Google's approach to web ads—utilizing open text boxes rather than mandatory drop-down menus in the ad-creation process.

Facebook's advertising scheme is very similar to Google's. Advertisers create their ads through the use of open text boxes, which await review by Facebook personnel.[52] Advertisers can target Facebook users through a variety of demographic characteristics supplied by users on their profile pages.[53] Although users provide much of this information through pre-prepared answers contained in drop-down menus, entering the information is not required. Therefore, the answers to these questions likely cannot be attributed to Facebook.[54]

III. ONE-SIDED PUBLIC POLICY PROTECTION

The First and Second Restatements of Contracts take markedly different approaches to the void-for-public-policy doctrine. Section A of this part argues that, because deterrence is the superior rationale for the void-for-public-policy doctrine, the Second Restatement's approach is the superior framework for evaluating contracts impacted by § 230. To explain why courts should favor operators when a party asserts the void-for-public-policy doctrine, Section B applies the Second Restatement framework by pitting § 230's policy objectives against the FHA's policy objectives. Section C explores other applications of this one-sided approach and discusses implications for the media.

A. *Public Policy Framework*

While courts often speak of the freedom of contract,[55] the general rule is that contracts will not be enforced when they run contrary to public policy.[56] Courts do not, however, apply the rule in an absolutist manner.[57] When a promise runs contrary to public policy, a promisee

52. *See Facebook Advertising*, FACEBOOK, http://www.facebook.com/advertising/?src=pf (last visited Sept. 5, 2010).

53. *Id.* Specifically, advertisers can target their audience by location, age, sex, keywords, education, workplace, relationship status, relationship interests, and languages. *Id.*

54. *See Roommates.com*, 521 F.3d at 1166 (holding that an operator's use of *mandatory* drop-down menus that forced users to input illegal answers rendered the operator content provider of the answers). Even if users were required to provide the answers, Facebook could still argue that the answers themselves were not illegal. Therefore, the argument goes, Facebook has not contributed to any underlying illegality that might be created when a particular advertisement uses personal information for illegal purposes. This might be a close call.

55. *See, e.g.*, NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 284 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 179–80 (1972); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

56. *See* 15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS § 79.1, at 1 (Joseph M. Perillo ed., rev. ed. 2003).

57. *See id.* at 2.

may still be able to bring an action for breach, and a promisor might not succeed in defending on the grounds that the promise violates public policy. Whether a court deems a promise unenforceable depends on the factors that cause the promise to be contrary to public policy.[58] Courts often use techniques falling "short of complete enforceability but also exceed[ing] complete unenforceability."[59] Unfortunately, when statutes *do* clearly annunciate a particular policy, they often fail to address the enforceability of contracts related to the underlying criminal or tortious conduct.[60] Courts must then look to the policy furthered by the statute or statutes in question and determine whether "[the policy] would be offended by full or partial enforcement, or by some other remedy such as restitution."[61] Even when a legislature has explicitly declared a particular type of contract violates public policy, some courts have permitted parties to enforce the offending promise, reasoning the statute was directed at the breaching party.[62] Some courts strictly refuse to enforce contracts involving conduct prohibited by statute, while others may enforce agreements related to legislatively prohibited activity.[63] This Article assumes courts will take the latter approach.

There are a variety of rationales for refusing to enforce contracts that conflict with public policy. One view—that enforcing illegal bargains is offensive to fundamental notions of judicial propriety and an improper use of judicial resources—was eloquently expressed by an English court, which declared, "No polluted hand shall touch the pure fountains of justice."[64] Pragmatic courts, on the other hand, view deterrence as the purpose of refusing enforcement.[65]

The deterrence rationale is more in tune with modern economic notions of contract theory that seek to make the promisee whole rather

58. *See id.* at 5.

59. *Id.*

60. For example, the FHA's "Declaration of Policy" statute declares that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States," but no FHA provisions address contracts in violation of that policy. *See* Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2006).

61. *See* GIESEL, *supra* note 56, § 79.2, at 58.

62. *See id.* at 6.

63. *Compare* Henderson v. Kentwood Spring Water, Inc., 583 So. 2d 1227, 1232–33 (La. Ct. App. 1991) ("Where a statute imposes a penalty on the doing of an act without either prohibiting it or expressly declaring it illegal or void, generally an agreement founded on or for doing of such penalized act is void."), *with* Duncan v. Cannon, 561 N.E.2d 1147, 1153 (Ill. App. Ct. 1990) (enforcing a contract for the installation of a boiler despite the violation of an ordinance requiring plans for the installation to be filed with a government agency).

64. Collins v. Blantern, (1767) 95 Eng. Rep. 850, 854; 2 Wils. K.B. 347, 350.

65. *See* Lewis & Queen v. N. M. Ball Sons, 308 P.2d 713, 720 (Cal. 1957) (stating that the reason for nonenforcement is deterring future illegal conduct rather than preventing unjust enrichment).

than punishing the breaching promisor.[66] Under this view, courts should refuse enforcement when nonenforcement will deter illegal conduct. They should tailor contractual remedies when absolute nonenforcement will not deter future illegal conduct or when it will overdeter beneficial conduct. Unless enforcement occurs in the form of specific performance,[67] the effect of a court's decision will only have a forward-looking impact. The non-breaching party has likely already performed its promise that has facilitated illegal conduct, and the breaching party has refused to perform its obligation. Therefore, under this view, public policy will only be promoted by discouraging *future* illegal actions or bargains.[68]

An economic efficiency analysis can help courts to ascertain whether deterrence will actually occur and whether that level of deterrence should be pursued. That a contract will have negative external effects does not necessarily mean that it is economically inefficient; rather, inefficiency occurs when the harm to third parties exceeds the net benefits to the contracting parties.[69] As one commentator has astutely explained, under economic theory analysis, courts should focus on determining what "negative externalities" are created by the illegality and whether enforcement will lead to a net increase in social welfare.[70] Thus, while a deterrence-grounded void-for-public-policy doctrine can "punish" one party to some extent, it does not do so unnecessarily, opting for the most economically efficient and socially

66. *See, e.g.*, 24 RICHARD A. LORD, WILLISTON ON CONTRACTS § 64:1, at 3–5 (4th ed. 2002) ("[T]he disappointed promisee is generally entitled to an award of money damages in an amount reasonably calculated to make him or her whole and neither more nor less; any greater sum operates to punish the breaching promisor and results in an unwarranted windfall to the promisee . . . ."); L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 52 (1936) ("[O]ne frequently finds the 'normal' rule of contract damages (which awards to the promisee the value of the expectancy, 'the lost profit') treated as a mere corollary of a more fundamental principle, that the purpose of granting damages is to make 'compensation' for injury.").

67. It is unlikely that a court will award specific performance when the desired performance is illegal. Therefore, enforcement will likely be in the form of damages in all but an extreme minority of cases.

68. *See* Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445, 1448 (2006) [hereinafter *Law and Economics*] ("The decision whether to enforce a contract will not change the externality associated with any particular case: either the act that causes the externality has occurred, or it has not and will not occur unless the judge commands specific performance as the remedy. The decision is therefore only useful insofar as it becomes precedent for future cases."). A more complex approach is taken by Professor Kostritsky, who argues that despite the variety of factors cited by courts in their calculus, many decisions can be explained by and should be determined by "efficient deterrence" considerations. Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115 (1988). She posits that the risk of nonenforcement should be placed on the "cheapest cost avoider." *Id.* at 122.

69. *Law and Economics*, *supra* note 68, at 1447.

70. *Id.* at 1448.

beneficial result. When it will hinder public policy objectives, courts should eschew nonenforcement.

The judicial propriety rationale, while not without merit,[71] can have a punitive effect. Courts subscribing solely to this theory would likely opt for nonenforcement in most situations or resort to giving undue weight to distaste for any illegality present in the contract, rather than the deterrent effect of nonenforcement. This conflicts with the general rule that contract remedies are designed to make the non-breaching party whole, rather than to punish the breaching party.

The First and Second Restatements of Contracts handle public-policy violations in different ways: one defines types of prohibited contracts ad nauseum; the other provides a malleable balancing test. The Second Restatement is the superior framework because it provides the flexibility to evaluate nonenumerated scenarios and encourages courts to evaluate the deterrent effect of nonenforcement. As one eminent treatise explains, the First Restatement speaks of illegal bargains while the Second Restatement utilizes a more flexible, public-policy-oriented approach.[72] Under the First Restatement, "'[a] party to an illegal bargain can neither recover damages for breach thereof, nor, by rescinding the bargain, recover the performance . . . thereunder or its value,' subject to various exceptions."[73] In contrast to the balancing-test approach utilized by the Second Restatement,[74] the First Restatement goes to great lengths enumerating various illegal bargains.[75] This list includes, among other things, bargains in restraint of trade,[76] illegal wagers,[77] usurious bargains,[78] and bargains made or to be performed on Sundays.[79] And just as the First Restatement defines illegal bargains *ad nauseam*, it also lists numerous exceptions to its general rule of refusing enforcement of illegal bargains.[80]

Section 178 of the Second Restatement provides that a contract should be unenforceable on grounds of public policy if legislation provides that it is unenforceable, or when "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[81] In determining the interest *in favor of enforcing a term*, courts are to weigh three factors: (1) the parties' justified expectations; (2) any resulting forfeiture if enforcement were

71. For example, enforcing contracts enveloped in illegality could foster a negative public perception of the courts.

72. 5 LORD, *supra* note 66, § 12:4, at 954–58 (2009).

73. *Id.* (citing RESTATEMENT (FIRST) OF CONTRACTS § 598 (1932)).

74. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

75. *See* RESTATEMENT (FIRST) OF CONTRACTS §§ 513–597.

76. *See id.* §§ 513–519.

77. *See id.* §§ 520–525.

78. *See id.* §§ 526–537.

79. *See id.* §§ 538–539.

80. *See id.* §§ 599–609.

81. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

denied; and (3) any special interest in favor of enforcement.[82] In weighing the policy *against enforcement* the court should consider the following: (1) the strength of the policy's legislative or judicial manifestation; (2) the likelihood that refusal will further that policy; (3) the seriousness of any misconduct, and whether it was deliberate; and (4) the degree of the connection between the misconduct and the term.[83]

To illustrate, consider *Davies v. Grossmont Union High School District*, a Ninth Circuit decision utilizing the Second Restatement approach to refuse enforcement of a contractual term restricting an individual's right to run for public office.[84] The source of the contractual term was a settlement agreement in which the plaintiff school district paid to settle several claims in exchange for the defendant's promise (among others) never to work for or run for an elected office with the school district.[85] When the defendant was elected to the school board, the school board brought an action to enforce the contract, and the district court held the defendant in contempt.[86] A Ninth Circuit panel reversed, holding enforcement of the clause violated the defendant's constitutional right to hold office, as well as the constitutional right of the public to elect him.[87] The court stated that restricting an individual's right to run for office must further a compelling state interest.[88] The interest in favor of settling litigation (embodied by the settlement contract) and the district's purported right to protect voters from the defendant's unpleasantness and policy objectives was insufficient to tip the scales in favor of enforcement.[89] The court explained that enforcing the term would cause substantial social harm because these types of agreements would corrupt the political process, since school board members were effectively settling claims to ensure their incumbency.[90]

The American Law Institute's (ALI) decision to omit a lengthy list of illegal bargains and exceptions and largely rely on judicial interpretations of public policy is certainly a significant change. But while the First Restatement relied on defining illegal bargains with specificity, it also stated that an illegal bargain can be classified as such when its formation or performance is "criminal, tortious, *or otherwise opposed to public policy*."[91] The substantial grant of freedom to interpret and

82. *Id.*
83. *Id.*
84. Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390 (9th Cir. 1991).
85. *See id.* at 1392.
86. *Id.* at 1393.
87. *Id.* at 1396.
88. *Id.* at 1397.
89. *Id.* at 1398.
90. *See id.* at 1398–99 ("As harmful as such agreements are in general, they are particularly offensive where, as here, the parties authorizing the payment are elected officials and the recipient is a potential political opponent. This sort of arrangement is a serious abuse of the power of incumbency.").
91. RESTATEMENT (FIRST) OF CONTRACTS § 512 (1932) (emphasis added).

weigh public policy under the Second Restatement's approach is obviously subject to criticism. As one court famously stated, public policy "is a very unruly horse, and when you once get astride it you never know where it will carry you."[92]

Yet the Second Restatement's approach is superior for evaluating the impact of public policy under modern contract theory, and more specifically, e-commerce transactions. The First Restatement relies on a predetermined group of illegal bargains. And while § 512 provides a catchall, it provides no means for evaluating when a contract is "otherwise opposed to public policy,"[93] suggesting the ALI drafters viewed it as an afterthought. While neither restatement's drafters likely contemplated Internet transactions, the Second Restatement's approach is designed with the flexibility to evaluate unanticipated types of transactions. The First Restatement's approach, on the other hand, relies on addressing every type of illegal bargain before it occurs. The FHA and § 230(c), particularly when they intersect, are square pegs that cannot be forced through the First Restatement's neat, round holes. Furthermore, the Second Restatement approach accounts for, and is likely to arrive at, the most efficient result in accord with modern economic contract theory. Evaluating the interests in favor of enforcement and nonenforcement comports with an efficiency-based approach because it allows courts to evaluate the net social consequences of a potential remedy, thereby giving judges the tools to ensure the most efficient result.

B. *Applying the Second Restatement's Approach*

Section 230 tilts the playing field in favor of operators. The statute exempts them from traditional liability regimes when they pass the underlying illegality test, and § 230 policy values are generally advanced when operators avoid liability. While the policy objectives of these traditional liability regimes may suffer to some extent when this occurs, the void-for-public-policy doctrine advances traditional liability policy goals prospectively, by discouraging future illegal conduct. If operators—who are favored by § 230 policy goals—are preferred over content providers—who are disfavored both by § 230 and the applicable liability regime—courts can simultaneously advance both § 230 and substantive liability policy objectives. This section tests this argument by pitting § 230 policy goals against those of the FHA.

As one court noted, "The irony of public policy is that public policy is never constant."[94] The intersection of the FHA and the Communications Decency Act is a prime example. The FHA prohibits publishing a housing advertisement, notice, or statement expressing a

92. Richardson v. Mellish, (1824) 130 Eng. Rep. 294 (C.P.) 303.
93. RESTATEMENT (FIRST) OF CONTRACTS § 512.
94. Donegal Mut. Ins. Co. v. Long, 564 A.2d 937, 943 (Pa. Super. Ct. 1989).

preference "based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."[95] The FHA's "Declaration of Policy" states "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[96] The FHA, however, fails to state whether contracts contrary to that public policy may be enforced.[97] On the other hand, § 230—enacted about three decades after the FHA—reduces the FHA's reach and can be construed as a shift in public policy. While the FHA prohibits housing advertisements stating religious preferences, § 230 immunizes the website operator, declaring the Internet should enjoy minimal governmental interference.[98] Of course, the content provider is without refuge from the FHA.[99] Utilizing the Second Restatement's balancing test produces a different outcome depending on which party brings an action for breach of contract.

1. When the Operator Seeks to Enforce a Contract

The pay-per-click models employed by Google and Facebook present a situation in which a breaching content provider might assert the void-for-public-policy defense. Suppose the content provider uses the ad-creation tools to input its desired advertisement components. The advertisement is arguably facially neutral, so an advertisement screener working for the operator would not detect any illegality from simply viewing the advertisement. The advertisement reads: "Featured Home: $299,000 4BR 3.5 BA Several Christian churches nearby, great family-values oriented neighborhood." The house is located in a subdivision that will not allow non-Christians to purchase a home, and the content provider intends for the advertisement to hint that this is the case; thus, the advertisement likely violates the FHA by expressing a subtle, impermissible preference.[100] After the operator hosts

95. Fair Housing Act, 42 U.S.C. § 3604(c) (2006).

96. *Id.* § 3601.

97. *See id.* §§ 3601–3619.

98. *See* Communications Decency Act of 1996, 47 U.S.C. § 230(c) (2006).

99. *See id.*

100. On its face, the advertisement might seem innocent enough; however, courts have sided with plaintiffs in liberally interpreting 42 U.S.C. § 3604(c) (making it illegal "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination"). In *Ragin v. New York Times Co.*, a leading FHA case, the court declared that the statute covered both overt and subtle discrimination. *See* 923 F.2d 995, 1000 (2d Cir. 1991) ("Neither the text of the statute nor its legislative history suggests that Congress intended to exempt from its proscriptions subtle methods of indicating racial preferences."). The court held that graphic advertisements "with models of a particular race and not others" can be sufficient to trigger § 3604(c) liability. *See id. Guider v. Bauer* bears a resemblance to our hypothetical.

the advertisement, which is clicked numerous times, the content provider refuses to pay.

With regard to the interest in enforcing the terms, keep in mind the following factors are considered: (1) the parties' justified expectations; (2) any resulting forfeiture that would occur if enforcement is denied; and (3) any special interest in favor of enforcement.[101]

An operator without knowledge of any illegality would justifiably expect the contract to be enforceable since the illegality is latent.[102] This is particularly the case because § 230 policy goals weigh in favor of operators tailoring editorial procedures to their needs and abilities. Recall that § 230 was created in response to the *Stratton Oakmont* decision.[103] If adopted by other courts, the *Stratton Oakmont* rule would have made operators liable for content on their websites when they elected to exercise editorial control over the website, thereby discouraging operators from exercising editorial control.[104] Congress *encouraged* operators to undertake traditional editorial functions by passing § 230. In this hypothetical, of course, the illegal content was publicly accessible because the operator *failed* to exercise complete editorial control (it did not catch everything). Nevertheless, enforcement does not cut against § 230 policy goals.[105] When designing their products, operators have balanced the goal of streamlining transactions against the need for editorial control, which § 230 encourages them to do. Punishing an operator for discouraging some—but not all—potentially illegal conduct flies in the face of the statute's purpose and would create a similar conundrum to the one created by *Stratton Oakmont*: operators would be encouraged to cease all screening efforts for fear of catching only some illegality.[106]

It is debatable whether refusing to enforce the contract would cause an operator to forfeit substantial advertising revenue. Under the pre-

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There the court held that the phrase "[p]erfect for single or couple" was not facially nondiscriminatory as a matter of law. 865 F. Supp. 492, 497 (N.D. Ill. 1994).

101. *See supra* text accompanying notes 81–83 (explaining the approach taken by Second Restatement).

102. The calculus changes somewhat when we assume the operator has detected illegality but hosted the advertisement anyway. However, § 230 policy favoring operators can be furthered by allowing operators to tailor their editorial functions to the needs of their websites and financial resources. If an operator wants to remove only clear-cut instances of heinous illegality, it should have the freedom to do so. This argument is addressed in greater detail *infra*.

103. *See supra* text accompanying notes 8–10 (discussing the *Stratton Oakmont* decision).

104. *See supra* text accompanying note 9 (summarizing the *Stratton Oakmont* holding).

105. *Cf. supra* notes 10, 18 (quoting § 230's legislative history, which suggests Congress did not intend to punish operators for blocking some, but not all, undesirable content).

106. This would frustrate congressional intent to encourage screening. *See supra* Section I.A (describing the circumstances surrounding § 230's enactment, including the *Stratton Oakmont* decision).

dominant pay-per-click business model, the forfeiture might be insignificant for a large operator such as Google or Facebook unless a large-scale content provider declined to pay for a significant number of "clicks." The inability to recover from one breaching advertiser will not bring down a large company; however, *many* breaching advertisers might subject an operator to "death by ten thousand duckbites."[107] Furthermore, a company like Google, which has a nearly endless supply of potential advertisers, might be entitled to lost-volume seller damages[108]—compounding the effect of nonenforcement.

An operator using a less streamlined approach than Google or Facebook might suffer in a different way. Assume the operator enters into a contract under which it agrees to host the content provider's advertisement for a month. After the advertisement is displayed for two days, the content provider discovers it is paying significantly above the market rate and breaches. The operator must then fill its ad space at the lower market rate. If the difference between the market rate and the contract rate is significant, restitution would likely provide little relief since it would be difficult to establish a significant benefit has been conferred. Only expectation damages will make the operator whole.

The public policy interest in favor of enforcement is strong. Enforcement will promote several § 230 policy objectives, including Congress's desire that the Internet flourish with minimal government intervention[109] and the goal of "promot[ing] the continued development of the Internet and other interactive computer services and other interactive media."[110] Allowing operators significant autonomy in establishing new revenue streams also furthers the stated purpose of promoting e-commerce.[111] And while Congress did not intend to promote religiously-based housing decisions, forcing operators to inquire into and edit the substance of all third-party content would slow transactions and hinder e-commerce.

Furthermore, the FHA's goal of preventing non-discriminatory housing postings will not be impeded if the contract is enforced; in fact, the deterrence rationale of nonenforcement[112] is better served *by enforcement.* Consider *Jones v. Phillipson*, where the Hawaiian Supreme Court permitted the promisee to enforce a contract because

107. Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C., 521 F.3d 1157, 1174 (9th Cir. 2008) (discussing the threat posed to operators if § 230 cases are not resolved in favor of operators).

108. *See infra* discussion accompanying note 124 (discussing the possibility of lost-volume seller damages).

109. Communications Decency Act of 1996, 47 U.S.C. § 230(b)(2) (2006).

110. *See id.*

111. *Id.* § 230(b)(1).

112. *See supra* text accompanying notes 65–70 (discussing the nonenforcement goal of deterrence).

nonenforcement would have aided the more blameworthy party.[113] The court held that a defendant contractor could not escape contractual liability by asserting that it (the contractor) was unlicensed and any contract requiring its services was violative of public policy.[114] The court concluded that refusing enforcement "would amount to a forfeiture 'wholly out of proportion to the requirements of public policy [and] appropriate individual punishment,' and would only 'redound . . . to the benefit' of the [contractor]."[115]

No new FHA violation will result due to enforcement, since a court will not grant specific performance that will require party supervision and forced illegal conduct. The content provider will be forced to pay damages sufficient to put the operator in as good of a position had the content provider performed.[116] Forcing the content provider to pay damages deters it from creating similar ads in the future—furthering FHA policy goals. And allowing the operator to obtain expectation damages furthers § 230 values by preserving free market principles and encouraging the continued development of the Internet.[117] Operators will continue to enter into mutually beneficial arrangements (contracts) with content providers that will enhance the development of Internet business models.

This section now turns to whether the policy interests in favor of enforcement are outweighed by the interests promoted by nonenforcement. Recall that the following factors are considered: (1) the strength of the policy's legislative or judicial manifestation; (2) the likelihood that refusal will further that policy; (3) the seriousness of any misconduct, and whether it was deliberate; and (4) the degree of the connection between any misconduct and the term.[118]

There are two clearly manifested clashing policies. The FHA is rather heavy handed. In order to eliminate housing discrimination, the Act forbids advertisers from expressing certain housing preferences, even if they are facially benign. On the other hand, § 230 places operators on a pedestal, allowing them to play by a different set of rules. This is, of course, accomplished by forbidding courts from treating them as publishers,[119] which is a requirement for the operator's liability under the FHA.[120]

Reading the statutes together, operators are not within the class the FHA regulates (when they are not also content providers). That § 230 was passed after the FHA lends support to this reading. The statute

113. Jones v. Phillipson, 987 P.2d 1015, 1026 (Haw. Ct. App. 1999).
114. *Id.*
115. *Id.* (quoting Wilson v. Kealakekua Ranch, Ltd., 551 P.2d 525, 528–29 (Haw. 1976)) (first two alterations in original).
116. Whether this is true likely depends on the above damages discussion.
117. *See supra* Part I (describing the policy objectives of § 230).
118. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).
119. *See* Communications Decency Act of 1996, 47 U.S.C. § 230(c) (2006).
120. Fair Housing Act, 42 U.S.C. § 3604 (2006).

can be cast as providing an exception to the FHA for operators. In other words, the FHA is now only directed at brick-and-mortar advertisers—not operators.

Nonenforcement can, however, promote FHA goals by painting with a broad brush. Preventing an operator from maintaining an action for breach of contract would send a clear message to operators: "carefully police your third-party-created advertising content, or it will be you, not the content provider, who suffers in a contract action." Such a pronouncement might ensure content providers do not have the opportunity to discriminate, by encouraging operators to forbid the posting of advertisements that might violate the FHA in any manner and to scrupulously enforce this prohibition.

But nonenforcement frustrates § 230's policy objectives by preventing operators from developing optimal editorial policies and inhibiting the free flow of information.[121] The FHA's policy goals can be furthered without resorting to the overdeterrent effect of nonenforcement. Allowing the operator to enforce the contract should have a deterrent effect on the content provider. This is particularly the case if the operator has not yet performed; not only has the ad not been displayed, but the content provider is forced to pay for it anyway. Refusing enforcement would have the exact opposite effect.

Consider the harm caused by nonenforcement. Operators would need to devote additional resources to screening. The cost of contracting could increase as well, as some parties might need to negotiate provisions that would allocate loss to one party in the event of nonenforcement. Both of these possibilities might restrict the current streamlined approaches used by Google and Facebook,[122] conflicting with § 230 policy objectives. Furthermore, recall that without § 230, operators would have to refrain from editing content-provider created content. Inappropriate and illegal content might overrun their websites, destroying the website's commercial viability.

If enforcement is generally permitted, the increase in illegal content on many websites would be limited because operators still have ample incentives not to host illegal content. Many operators seeking to confine their websites to hosting legal advertisements and other content will want to prevent their websites from being overrun. If an operator gains a reputation for hosting illegal advertisements—particularly discriminatory ones—the value of advertising on the operator's site

121. One might counter this argument by pointing out that 47 U.S.C. § 230(b)(4) encourages the development of "blocking and filtering technology." However, this subsection encourages operators to create filtering technology that is available to *users* so that they can screen out "objectionable or inappropriate online material." *Id.* Therefore, this policy objective actually encourages operators to let objectionable content remain if they so choose, and to let *users* decide what websites they wish to filter through the use of filtering technology.

122. *See generally supra* Part II (describing the AdWords and Facebook advertising methods).

would likely decline. Thus, operators have incentives to find the proper balance of policing their own websites. Unfortunately, this will not always deter lax editorial control. *Roommates.com* is a prime example of this phenomena, where allowing discriminatory conduct to flourish may have *helped* an operator's bottom line. But assuming courts adhere to a laissez faire approach to Internet content regulation, which was emphasized by Congress when it enacted the CDA, enforcement generally better serves public-policy objectives.

It is important to note that the enforcement of such a contract would only be in the form of damages. A court would not use its equitable powers to supervise the two parties and force the content provider to provide advertising content. Awarding damages would not be unprecedented, as several courts have allowed a plaintiff to maintain an action for the price even when the plaintiff has sold goods to a defendant *with knowledge* that the defendant intends to utilize or resell those goods in an illegal manner.[123]

Courts might take a variety of approaches in calculating damages. If an advertiser breaches and the operator cannot acquire a substitute advertiser, the operator should have no problem acquiring lost revenue through damages. If an operator fills the ad spot, the operator should have to establish that it is akin to a "lost volume seller" with regard to that ad space to recover damages. In other words, the operator would likely need to show that it has a nearly infinite supply of ad space. This is not a problem for Google, which shows a new batch of ads every time someone runs a Google search, but might present problems for websites that have a finite amount of ad space. Then again, non-search-engine websites could argue that because ads often change every time a page is refreshed, they also have an infinite amount of ad space.[124]

It is unlikely that considerations of misconduct and the deliberate nature of any misconduct render the contract unenforceable—especially when the operator is not aware of the illegality. In these situations, courts have often stated that the innocent party may enforce the contract.[125] Therefore, enforcement should not be refused due to misconduct when the operator lacks knowledge of the illegality.[126]

When the operator is aware of the illegality, the misconduct factor is a murkier issue. Consider a slight variation on the original fact pat-

123. *See* GIESEL, *supra* note 56, § 89.3, at 618–22, 620 n.7, 624–25.

124. This is by no means a complete analysis of damages calculations, which would require a significant technical discussion beyond the scope of this Article.

125. *See, e.g.*, Int'l Bank of Commerce–Brownsville v. Int'l Energy Dev. Corp., 981 S.W.2d 38, 42 (Tex. App.—Corpus Christi 1998, pet. denied) ("Under such circumstances, where one party is unaware of the true facts and believes the contract is lawful, the general rule that an illegal contract is unenforceable does not apply.").

126. The final factor, the degree of connection between the misconduct and contractual term, has no bearing here, since the operator has not engaged in any form of misconduct.

tern. This time, the advertisement arrives at the screener's desk as follows: "Featured Neighborhood: $350,000 4–5BR 4–5.5BA No Kids." Assume the operator's screeners are somewhat educated in fair housing law, realize that the advertisement might violate the FHA, but elect to permit the ad to be created anyway.

This scenario is similar to cases addressing bargains involving lawful performances by parties with knowledge of the other party's wrongful purpose. In these types of situations, courts will often permit enforcement by the innocent party provided the other party does not intend to further "an act or crime of great moral turpitude."[127] While the operator's knowledge cannot be ignored, it is not significant enough to bar enforcement under a variety of approaches to this issue.

Belmont v. Jones House Furnishing Co.[128] is one of many cases that allowed a promisee to enforce a contract despite the promisee's knowledge of the promisor's illegal purpose. The defendant argued that she should be able to avoid paying for the furniture she had purchased because the plaintiff knew the furniture was intended for a brothel operated by the defendant.[129] The court sided with the plaintiff for two reasons: first, the consideration furnished by the plaintiff, furniture, was not the type of thing that could only be used in a "bawdy house"; and second, the plaintiff did not derive any profits from the defendant's "bawdy" business.[130] *Belmont* is a prime example of two issues related to the degree of the promisee's participation in the illegality that help distinguish cases allowing enforcement and those opting for nonenforcement. The first issue is whether the consideration supplied by the promisee is legally neutral or readily capable of a legal use.[131] The second is whether the promisee is a

127. GIESEL, *supra* note 56, § 89.3, at 618–19 (citing Hanauer v. Doane, 79 U.S. 342, 346 (1870)).

128. Belmont v. Jones House Furnishing Co., 125 S.W. 651 (Ark. 1910).

129. *Id.* at 652.

130. *Id.*

131. *Compare* Jacobs v. Danciger, 41 S.W.2d 389, 391–93 (Mo. 1931) (knowledge of buyer's intention to use hops to illegally manufacture "home brew" insufficient to result in nonenforcement), *and* Samuel Bowman Distilling Co. v. Nutt, 10 P. 163 (Kan. 1886) (allowing the promisee to bring an action for the price when it sold liquor to the promisor knowing the promisor intended to resell the liquor in an illegal manner), *with* Chateau v. Singla, 45 P. 1015, 1015–16 (Cal. 1896) ("If this contract of copartnership had for its purpose the letting of apartments for purposes of prostitution . . . then the copartnership contract was illegal, against good morals, against public policy, and against the express mandate of the statute, and equity would no more entertain an action founded upon such contract for the relief of either of the parties to it, than it would entertain an action between two thieves for an equitable division of their plunder."), *and* Aiken v. Blaisdell, 41 Vt. 655 (1869) (preventing the promisee from enforcing a contract when the promisee knew the promisor was purchasing liquor in order to sell it in violation of the law, and aided the promisor in doing so by helping the promisor conceal the liquor). That consideration is *capable* of being used legally may not be sufficient to help stave off nonenforcement. It should be *reasonable* to believe that the consideration is something that will generally be used legally. This can be a fine line. Consider *Mills Novelty Co. v. King*, 174 Ill. App. 559 (1912).

participant in or benefactor of the illegal conduct.[132]

Under the *Belmont* approach, an operator's detection of illegality in a potential advertisement does not hinder its ability to enforce the contract. The service supplied by the operator can obviously be used for both legal and illegal purposes. The advertising service must, in fact, remain neutral to maintain its immunity. If the operator facilitates only illegal content, it will run afoul of the underlying illegality test.[133] It is the content provider's unique use of the web hosting service, like the *Belmont* defendant's bawdy use of the furniture, which converts a neutral instrumentality into an enabler of illegality.

The best argument in favor of nonenforcement under *Belmont* is that an operator is entitled to revenue only when a user clicks on the content provider's illegal ad.[134] In other words, the operator directly benefits from the illegality. But while the operator's profits are tied to the illegal content, the operator is not *promoting* the illegal nature of the advertisement. Instead, the operator merely profits from illegality when it fails to reject the ad during its review of potential ads.[135] Fur-

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The court refused to enforce a contract because the subject matter was a "gambling device" even though it could be used as a slot machine or a chewing gum dispenser. *Id.* at 562–63. However, the case cannot be said to stand for the proposition that supplying neutral devices that can be readily used illegally prohibits a promisee from recovering. The court's decision rested on its determination that the preponderance of the evidence indicated the machines were illegal gambling machines, and suggests that it simply did not believe that they could have any other purpose besides gambling. *See id.* ("The fact that they could also be used for selling gum, and that Mills testified that he did not know for which of such uses they were in fact purchased, does not, we think, even tend to prove that the machines sold were not gambling devices."). This view is supported by the court's statement that the promisee could not "reasonably expect that the purchaser intended to use . . . [the machines] for selling gum." *Id. Mills Novelty*, therefore, indicates that consideration supplied by the promisee should not be something that is unlikely to be used legally.

132. *Compare* Tyler v. Carlisle, 9 A. 356 (Me. 1887) (allowing the promisee to bring an action to recover money loaned to the promisor when the promisee knew the promisor intended to use the money for illegal gambling), *with* Emerson v. Townsend, 20 A. 984 (Md. 1890) (preventing the promisee from collecting on a note made in connection with an illegal card game the two were playing), Shaffner v. Pinchback, 24 N.E. 867 (Ill. 1890) (preventing the promisee from recovering a loan made in connection with a bookmaking business when promisee was to receive a portion of profits from the bookmaking operation), *and* White v. Buss, 57 Mass. (3 Cush.) 448 (1849) (promisee could not recover a loan made to promisor to be used for the purpose of illegal gambling when the loan was made at a time and place when both were gambling).

133. For an explanation of the underlying illegality test, see *supra* Section I.B. Refer to Part II for a discussion of interactive website advertising business models and an explanation of their relationship with § 230. For a discussion of the specific application of the underlying illegality test to Google's AdWords service in *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009), see *supra* notes 47–51 and accompanying text.

134. *See supra* Part II (discussing the interactive website advertising business models and explaining their relationship with § 230).

135. *See supra* text accompanying notes 41–45 (describing the AdWords creation process).

thermore, the operator is voluntarily self-policing its website, in accordance with § 230 policy objectives.

An operator should not be prevented from enforcing a contract simply because the operator discovers potentially illegal content and fails to remove it. Operators do not lose immunity by failing to remove illegal content after discovering it.[136] And it would be perfectly reasonable for an operator to create an internal policy under which only the most egregious or blatant forms of illegality are removed from advertisements, so long as the operator does not promote illegal conduct. This proposition meshes with § 230 policy objectives because operators are able to customize their editorial efforts based on their resources and level of expertise, which would have been impossible under the all-or-nothing *Stratton Oakmont* regime.[137] Punishing the operator for failing to eliminate all illegality it detects will only encourage the operator to detect less illegality. Operators would have an incentive to scrap their screening efforts altogether.

The Second Restatement expands on the *Belmont* approach: when the promisee has substantially performed, enforcement of the promisor's promise is not precluded due to the promisee's knowledge of an improper purpose related to the contract unless (1) the promisee's conduct was intended to further the improper purpose; or (2) the promisee knew of the improper purpose, and that purpose "involves grave social harm."[138] The *Belmont* analysis should satisfy the first prong of the restatement analysis. With respect to the second prong, the FHA violation should not be serious enough to prevent enforcement simply because the operator has knowledge of an improper purpose. The restatement suggests the operator must know the content provider has a truly horrendous purpose, such as a "threat to human life," in order to justify nonenforcement.[139] Therefore, under the Restatement's treatment of a promisee that had knowledge of the promisor's improper purpose, the "misconduct" factor would not weigh against an operator.

136. *See supra* note 46 (discussing Zeran v. America Online, Inc., 129 F.3d 327, 328, 332–33 (4th Cir. 1997)).

137. *See supra* Section I.A (describing the circumstances surrounding § 230's enactment, including the *Stratton Oakmont* decision).

138. RESTATEMENT (SECOND) OF CONTRACTS § 182 (1981). Section 182 purports to resolve the entire § 178 balancing test whenever the promisee has substantially performed. *See id.* cmt. a ("This Section states a rule that determines when this is so by resolving the problem of balancing in such a case. Situations that do not come within it because the promisee has not substantially performed are governed by the general rule stated in § 178."). But § 182's approach is a bit of an oversimplification that fails to take into account the unique conflicting public policy situation presented by § 230 and the FHA. Furthermore, it does not address the best way to deter illegal conduct. As such, this Article treats § 182 as part of the § 178 analysis, rather than a dispositive inquiry.

139. *Id.* § 182 cmt. b.

Some courts presume the criminalization of *malum prohibitum*[140] acts indicate a legislative intent not to punish the offender beyond the statutorily prescribed legal sanction when the legislative goals can be accomplished without nonenforcement.[141] The analysis adds an additional step to that of the Restatement, but the result is the same. The *malum in se* designation is a high bar. And while an FHA violation is no laughing matter, it is not on par with a rape, murder, or assault. In fact, there are FHA exceptions that permit individuals to engage in housing discrimination under certain circumstances.[142] Therefore, an FHA violation is unlikely to qualify as *malum in se*.

Furthermore, the FHA's policy can still be furthered without nonenforcement. Recall the discussion above, explaining that allowing enforcement will have a *deterrent* effect on content providers. Resorting to nonenforcement is not necessary to deter conduct that violates the FHA, and as explained above, the slight benefit derived from refusing enforcement would frustrate the public policy goals of § 230. As such, the *malum prohibitum–malum in se* approach does not harm the operator's efforts to enforce the contract.

Finally, if one concludes that the misconduct factor is a close call, or even that it weighs in favor of nonenforcement, it is but one of many factors in the Restatement's public policy framework. Because the freedom of contract is itself a form of public policy, the factors weighing against enforcement must "*substantially*" outweigh the factors supporting enforcement.[143] Thus, even under a critical eye, the operator that fails to remove illegal ads should defeat a content provider asserting the void-for-public-policy doctrine.

2. When the Content Provider Seeks to Enforce a Contract

The scales tilt in favor of nonenforcement when a content provider asserts the doctrine. A cursory glance at the restatement factors demonstrates the operator will be able to defend on void-for-public-policy

140. An act is *malum prohibitum* when it becomes "wrong" only because it is prohibited by statute. 40 AM. JUR. 2D *Homicide* § 73 (2008). An act is *malum in se*, on the other hand, when it is "naturally evil." *Id.* This would include crimes such as murder and rape.

141. *See, e.g.*, Warren People's Mkt. Co. v. Corbett & Sons, 151 N.E. 51, 53 (Ohio 1926) ("When a statute imposes specific penalties for its violation, where the act is not malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable, and the court must examine the entire statute to discover whether the Legislature intended to prevent courts from enforcing contracts based on the act prohibited, and, unless it does so appear, only the penalties imposed by the statute can be enforced." (quoting *In re* T.H. Bunch Co., 180 F. 519, 527 (E.D. Ark. 1910))); GIESEL, *supra* note 56, § 79.5, at 24–26.

142. *See* Fair Housing Act, 42 U.S.C. § 3603(b) (2006) (providing exemptions to anti-discrimination laws). There are, of course exceptions to murder and assault—self defense, for example.

143. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981) (emphasis added).

grounds for two reasons: first, the content provider is the source of the illegality; and second, Congress did not intend for § 230 to protect content providers. But when would the content provider even be able to bring a contract action? It seems that this is unlikely to occur under the Google or Facebook pay-per-clock models where operator bargaining power is strongest. If the content provider only pays when an ad is clicked, and Google pulls the ad because of content, then the content provider cannot argue that it has been harmed since Google is not obligated to host any ad submitted by content providers.

One situation in which a content provider would bring suit is when the operator is obligated to host an advertisement for a certain period of time. For instance, assume the content provider, who is in the business of marketing homes in newly built subdivisions, is hosting an open-house event. The content provider wants to post a banner on a website for the entire month preceding the event. Consider the primary example from Section 1, above. The advertisement reads: "Featured Home: $299,000 4BR 3.5 BA Several Christian churches nearby, great family-values oriented neighborhood." Again, the subdivision will not allow non-Christians to purchase a home. The operator does not detect the illegality and agrees to host it for a month. But when the operator eventually discovers the religious discrimination, the operator pulls the ad, and the content provider reacts by bringing suit.

Despite the potential economic harm the content provider may incur, it will be hard-pressed to recover because it supplied the illegal content. The content provider would not be justified in expecting to enforce the contract. The FHA clearly applies to brick-and-mortar advertisers, and § 230(c) explicitly excludes content providers from immunity. As such, the content provider should expect the contract to be unenforceable. The resulting forfeiture is a factor that might weigh in favor of enforcement. The loss could be significant for the content provider if the breaching operator discovered the market rate was significantly higher. The content provider would then need to procure advertising space at a higher rate, and possibly, at a significantly weakened bargaining position due to time restrictions. This seems inconsequential, however, when balanced against the content provider's knowing or reckless violation of the FHA.

On the other hand, nonenforcement will simultaneously promote the deterrence goal of the void-for-public-policy doctrine and the FHA's policy objectives. Content providers will be strongly discouraged from contracting in this manner. Allowing the content provider to enforce the contract cannot further § 230 or FHA policy goals. Enforcing these types of contracts would force operators to scrutinize all content more strenuously. It is also worth noting that enforcing the contract would work an ironic result. If the content provider brought suit under these circumstances, it would be subject to liability under the FHA if the operator did not remove them. The operator has actu-

ally done the content provider a favor by taking the ad down. Traditional wariness of supervising specific performance aside, a court would never grant the content provider specific performance because doing so would force the operator to host an illegal advertisement. In sum, the reasons for nonenforcement *substantially* outweigh the potential financial cost to the content provider.

3. Result: One-sided Voidability

Contracts impacted by § 230 are in many ways analogous to existing categories of contracts that are voidable at the option of only one party to the contract.[144] The void-for-public-policy doctrine seeks to deter undesirable conduct by refusing contractual enforcement. When an operator brings suit, nonenforcement would frustrate § 230 policy objectives and do little to deter conduct that violates a substantive area of law. Consequently, refusing to enforce the contract would be an improper use of the doctrine. When a content provider brings suit, on the other hand, enforcement should be refused because it will deter the content provider—who falls under the purview of the substantive area of law—from engaging in future undesirable conduct. This phenomena is perhaps best described as one-sided voidability.

C. *Other Applications and Media Implications*

The one-sided-void-for-public-policy approach largely benefits the media as a whole, but it can also help members of the media gain competitive advantages over one another. This section briefly discusses § 230 outside the context of the FHA, explaining how media operators can leverage the statute in their favor when they are dealing with potentially defamatory content. Section 230 is an obvious benefit for websites that are supported by advertisements created by other content providers. This will likely be the case for most websites that merely host, rather than create, advertisements. Although bloggers and online-news-site publishers are content providers with regard to most of their websites' content, they cannot be held responsible for the pay-per-click advertisements that support the website; nor can they be held responsible for user comments generated through open text boxes. They are "operators"—and only operators—entitling them to § 230 protection with respect to this content.[145]

Stepping away from Internet advertising schemes, media operators are in a particularly strong position when they can classify blog or

144. These categories include contracts affected by infancy and mental infirmity. *See* 17A C.J.S. *Contracts* § 145 (1999).

145. *See supra* text accompanying notes 29–32 (stating that under the *Roommates.com* decision, the use of open text boxes does not trigger the exception to § 230 immunity).

news contributors as contractors.[146] Consider the scenario presented by *Blumenthal v. Drudge*, where AOL prevailed in a defamation suit by using a § 230 defense.[147] AOL entered into a contract with Matt Drudge, who operates the Drudge Report (a political news website), which made the Drudge Report available to AOL subscribers.[148] The plaintiff brought a defamation suit against Drudge and AOL based on the content of one of Drudge's articles.[149] The court classified Drudge as a contractor rather than an employee or other agent.[150] While AOL paid Drudge to make his content available through the AOL network, the court held AOL had merely provided an interactive computer service, and was not liable for the content of Drudge's articles.[151]

Website operators can use the reasoning in *Drudge* to their advantage. Assume a website operator contracts to buy the exclusive rights to a significant news story from an independent journalist. After the journalist posts the story on the website, it turns out to be completely contrived and defames numerous individuals who would be considered "private" plaintiffs under defamation case law. Can the website operator, which is entitled to § 230 immunity, refuse to pay the journalist and defend against a breach of contract claim by arguing the contract violates public policy? The website should be able to achieve the same result as in the FHA or defamatory advertising scenarios. This time, there is a closer connection between § 230 and the illegality. There is no need to hypothesize as to whether Congress truly intended to allow operators to evade liability under defamation theories: Congress's reaction to *Stratton Oakmont* confirms defamation claims were clearly contemplated.[152] This strengthens most of the arguments addressed in Section B (to the extent they are not applicable solely to the FHA).

The analysis might change slightly, however, having left the realm of purely commercial speech. The reporter (who is the content provider) could counter with a First Amendment policy argument: a win

146. This could occur when a gossip blog advertises on another website by using a defamatory ad—perhaps a misleading headline combined with a person's picture. Fully analyzing whether this is in fact the case is beyond the scope of this Article. It is worth noting, however, that the situation analyzed above in Part III is analogous in several respects—particularly when the operator is unaware of the defamatory nature of a post.

147. Blumenthal v. Drudge, 992 F. Supp. 44, 48–53 (D.D.C. 1998). Matt Drudge, who was the content provider, lost his motion to dismiss on personal jurisdiction ground. *Id.* at 58.

148. *Id.* at 47. Drudge was paid $3000 per month. *Id.*

149. *Id.* at 46–48.

150. *See id.* at 50 ("It also is apparent to the Court that there is no evidence to support the view originally taken by plaintiffs that Drudge is or was an employee or agent of AOL, and plaintiffs seem to have all but abandoned that argument.").

151. *See id.* at 49–53.

152. *See supra* notes 8–10 and accompanying text.

for the website might have the effect of chilling the press's speech because the impending defamation suit will compound the journalist's economic loss. Not only will the journalist not realize his agreed-upon fee for producing the article, but he could also be liable to the defamed individuals as well. Such a result could discourage investigative journalism, detracting from the press's ability to fulfill its watchdog role. While analyzing the merit of this defense is beyond the scope of this Article, it seems that as the journalist's blameworthiness for the inaccuracy decreases, the merit of the defense would increase.[153]

Websites that are willing to use contractors—rather than employees—to provide most of their content are likely to be the greatest beneficiaries, both in "regular"[154] liability prevention § 230 cases and in contract suits. They can substantially insulate themselves from liability in contract and in noncontract cases. By taking the approach utilized by AOL in *Drudge*, a website would not be the content provider of those portions of its website, while still allowing it to exercise substantial editorial control of the content.[155] Furthermore, if content turns out to be defamatory, the operator might be able to recover money paid for the content or avoid paying the author's fee. These two benefits can substantially reduce legal expenses for operators because they can avoid the cost of paying lawyers to screen content prior to hosting it for public consumption.

CONCLUSION

Modern website advertising methods are tailor-made for a § 230 defense should the advertisement contain legally-sanctionable conduct. When § 230 is invoked, conflicting policy objectives presented by § 230 and "real-world" laws are evident. A content provider can be liable for content hosted by the operator, while the operator is held blameless. One party has run afoul of public policy, and the other has not. The balancing test created by the Second Restatement of Contracts is the appropriate manner to determine whether a party can avoid contractual enforcement on public-policy grounds. The balancing test allows courts to further deterrence goals, which are in keeping with modern contract theory. When a contract between an operator and a content provider exists and illegality is present in the contract,

153. The situation would present several difficulties for a court. For instance, is it sufficient that the operator merely has a reasonable belief that the content is defamatory? Or should the operator be required to actually establish that if it had published the content, such content would have been defamatory? Furthermore, how should defamation privileges and heightened burdens of proof for public matters factor in?

154. This would be a case in which an operator is trying to avoid liability for the content posted on its site in a lawsuit by a third party.

155. *See* Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.").

the operator should be able to avoid enforcement if it is entitled to § 230 immunity. The content provider, on the other hand, should have no such privilege.

The inherent conflict between § 230 and the FHA provides an example of one-sided voidability. When online advertisements created through the popular pay-per-click model violate the FHA, website operators will be able to avoid liability for the FHA violation and any contract claim brought by the content provider. Under the Second Restatement's balancing test, the interest in enforcing the contract against the content provider is significant—particularly because it will help deter future illegal conduct. On the other hand, allowing the content provider to enforce the contract against the operator does not deter illegal conduct without unduly disrupting § 230's policy goals. Instead, it can *encourage* illegal conduct by content providers.

The one-sided void-for-public-policy approach is yet another advantage that Internet media have over traditional print (and other traditional) media. Section 230 already gives websites a competitive advantage by significantly decreasing legal fees. By keeping clear of the ad-creation process, a website can avoid liability for anything contained in the ad. Furthermore, by contracting out for website content rather than utilizing website employees, an operator can even avoid liability for the main content on its website.