Looking for Love in the Online Age - Convicted Felons Need Not Apply: Why Bans on Felons Using Internet Dating Sites are Problematic and Could Lead to Violations of the Computer Fraud & Abuse Act

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LOOKING FOR LOVE IN THE ONLINE AGE - CONVICTED FELONS NEED NOT APPLY: WHY BANS ON FELONS USING INTERNET DATING SITES ARE PROBLEMATIC AND COULD LEAD TO VIOLATIONS OF THE COMPUTER FRAUD & ABUSE ACT

By: Amy Tenney

Picture this: A felon, who has served his time and is a free man, walks into a bar intending to meet someone with whom to start a romantic relationship. There are no posted rules about who can be a customer and who may speak with the bar’s patrons. A relationship ensues. Now, picture this: That same man goes onto Match.com, with the same intentions, but because of the broad restrictions in place on all of the major internet dating sites, he is prohibited from using the site. He would thus either violate those restrictions by using the website — and potentially violate the Computer Fraud & Abuse Act in the process — or forego the potential of meeting a mate online.

Once convicted of a felony, a person is essentially branded for life and deprived of many liberties that others routinely take for granted. While it is more generally known that felons often lose their voting rights, have trouble obtaining employment, and may no longer possess firearms, there are also more subtle collateral consequences that follow convicted felons long after they have served their prison sentences.

This article discusses one such consequence: prohibitions against using online dating sites following a felony conviction and how the Computer Fraud & Abuse Act (“CFAA”) — a statute enacted to protect against malicious computer hackers — could be used to impose both criminal and civil liability on a convicted felon. While this consequence pales in comparison to disenfranchisement or deportation, the existence of such bans highlights both the lifelong stigma that people convicted of felonies face and the breadth of the CFAA and how it can be used in ways that Congress never intended. As our society moves further into a digital age, where more and more people meet their partners online, a large segment of our population is prohibited from doing so through paternalistic, yet ineffective, restrictions.

Part I provides a brief overview of collateral consequences. Part II describes the phenomenon of online dating and the terms of use that exclude convicted felons. Part III demonstrates how many of the fundamental issues in the criminal justice system are implicated by the sites’ broad terms of use. Part IV shows how these broad bans do not necessarily protect the public. Part V explains the obligations of online dating sites in light of a complex regulatory and legal landscape. Part VI explores the criminal and civil liability under the CFAA that felons may face for violating these prohibitions. Part VII concludes that not only do these prohibitions fail to further meaningful societal goals, but they also lull the public into a false sense of security when using online dating sites.

1. A Background on Formal and Informal Collateral Consequences

Collateral consequences to conviction

Thank you to Billie Jo Kaufman and David Curren for their invaluable feedback on drafts of this article and to Jackson C. Smith for his assistance with the footnotes.
have long existed and their breadth prevents convicted felons from ever fully putting their criminal records behind them. For centuries, a criminal conviction in some countries led to “civil death,” where the “ex-offender was treated as if already dead.” While the United States never fully adopted that approach, until about fifty years ago ex-offenders in the

Collateral consequences typically operate by some force of law. These formal consequences range from disenfranchisement to deportation, and beyond. In addition to those formal collateral consequences are myriad informal collateral consequences of conviction. While formal collateral consequences can be tabulated through painstaking review of laws and regulations, informal collateral consequences cannot be so counted. And that is emblematic of the problem with them. They are unquantifiable, yet are stigmas that convicted felons carry for life.

Informal consequences often arise out of some social or personal relationship. A landlord may choose not to rent to an ex-offender. An employer may choose not to hire an ex-offender. And, if hired, convicted felons generally earn less money than similarly situated non-felons. These decisions often reflect implicit (though sometimes explicit) biases that someone who has done “bad” cannot be rehabilitated.

A PERSON CONVICTED OF A FELONY DECADES PRIOR, WHO HAS SINCE BEEN REHABILITATED, WOULD NOT BE ELIGIBLE TO JOIN A DATING WEBSITE.

United States were subject to “automatic dissolution of marriage, denial of licenses ... and the inability to enter into contracts or engage in civil litigation.” Although the United States experienced a respite from the retributive focus of collateral consequences in the 1960s and 1970s, imposing collateral consequences came back with a vengeance through the anti-crime policies promulgated in the 1980s and 1990s.

In 2010, in a watershed case, the Supreme Court held in Padilla v. Kentucky that criminal defense attorneys must advise clients about the risks of deportation when entering guilty pleas. Since then, there has been a renewed emphasis on exploring and cataloging the multitude of consequences that convicted felons face, long after their court-imposed sentences are satisfied.

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2 Michael Pinard, Reentry and Collateral Consequences, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214 (2010).
4 Id. at 154-55.
5 Id. at 155.
7 In particular, The ABA National Inventory of Collateral Consequences of Conviction, http://www.abacollateralconsequences.org, has made impressive strides in identifying, describing, and cataloguing collateral consequences at the state and federal level.
9 Id.
10 Id.
11 See, e.g., ABA National Inventory, supra note 7.
12 Logan, supra note 8 at 1108; cf. Josh Fredman, How Do I Find Rental Housing with a Felony?, S.F. Gate, http://homeguides.sfgate.com/rental-housing-felony-8428.html (“It’s not easy to rent housing as a convicted felon.”).
14 Logan, supra note 8 at 1108.
Besides these specific collateral consequences comes the general social stigma that felons face. The cumulative effect of these collateral consequences is that diminished opportunities for employment and housing and a general social stigma lead felons to live as second-class citizens. This not only leads to increased recidivism, but perpetuates the notion that ex-offenders should not enjoy the same freedoms and liberties that most Americans take for granted.

II. A Brief History of Online Dating and the Terms of Use that Bind Users

Over the last decade, online dating has proliferated. Although accurate numbers are notoriously difficult to establish, according to a recent Pew Research Study, 20% of 25-34 year olds and 17% of 35-44 year olds have used online dating sites. What initially was a form of meeting people often thought to be reserved for the desperate, has transformed into a billion dollar industry boasting millions of users. In the United States alone, there are over 2,500

dating websites, catering to almost any objectives imaginable. Online dating has spawned its own sub-industry, ranging from consultants focused on helping daters best present themselves to a plethora of companies that purport to investigate dating site users to reveal any unsavory details about their pasts.

The popularity of online dating has not been without its consequences. Some online dating users have reported being assaulted or scammed by people they met online. Reports of financial scams and sexual assaults have understandably made online daters wary and have prompted both private companies and law enforcement to warn users to exercise caution and common sense.

23 See, e.g., Erika Ettin, Love at First Site: Tips & Tales for Online Dating Success from a Modern-Day Matchmaker (2014).
24 See, e.g., Sara KeaulanaI Goo, Dinner, Movie -- and a Background Check -- for Online Daters, WASH. POST (Jan. 28, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/01/27/AR2007012701210.html; Stephanie Rosenbloom, New Online-Date Detectives Can Unmask Mr. or Ms. Wrong, N.Y. TIMES (Dec. 18, 2010), http://www.nytimes.com/2010/12/19/us/19date.html?
At issue here is the further step that the major American internet dating sites have taken: prohibiting felons from using their sites.\textsuperscript{27} All of the major internet dating sites require users to agree to terms of service or terms of use to use their site.\textsuperscript{28} Typically, mere use of the site constitutes “agreement.” For example, Match.com binds its users by including the following provision in its Terms of Use: “[b]y accessing [the website] . . . you agree to be bound by these Terms of Use.”\textsuperscript{29} Illusory agreements like this are not limited to internet dating sites and have been fairly criticized in light of the overwhelming evidence that the vast majority of users do not read the terms, do not understand them, or both.\textsuperscript{30} The Terms of Use are subject to change at any time,\textsuperscript{31} making it even less likely that users are aware of the terms that govern them.

The terms of service vary slightly by internet dating site, but tend to be lengthy and focus on complex legal requirements and expectations.\textsuperscript{32} Those who become members – i.e., by providing “information to [the internet dating site] or [by participating]” on the site in any manner – “represent and warrant that [they] have never been convicted of a felony and that [they] are not required to register as a sex offender with any government entity.”\textsuperscript{33} Thus, convicted felons violate the terms of use by using the website.

\section*{III. How the Blanket Ban on Felons on Internet Dating Sites Highlights Many Unfortunate Trends in the Criminal Justice System}

The breadth of prohibitions against felons on internet dating sites is troubling. The terms exclude anyone who has been convicted of a felony, regardless of the felony, the case, or the time since the person completed the sentence is governed by a series of private agreements and policies that most people are only dimly aware of and virtually no one reads or understands.”; Sarah A. Constant, Comment, The Computer Fraud and Abuse Act: A Prosecutor’s Dream and A Hacker’s Worst Nightmare -- The Case Against Aaron Swartz and the Need to Reform the CFAA, 16 Tul. J. Tech. & Intell. Prop. 231, 238 (2013) (“Most users do not read a Web site’s terms of service before accepting them, so they are unaware of the legal rights they are giving up and bestowing.”); Krysta M. Smith, Copyright in the Mobile Media Era, 13 U. Pitt. J. Tech. L. Pol’y 1, 3 (2013) (“It is common knowledge that people usually do not read the terms of service agreements.”); cf. Scott Jon Shagin & Paula Shagin, Facebook at Your Own Risk The Dark Side of Social Networking Websites, N.J. Law. Mag., Oct. 2009, at 31 (noting that a “recent study shows that approximately 90 percent of Facebook users do not read their terms of service or make any attempt to understand Facebook’s privacy policy”).

\textsuperscript{27} Much of the debate concerning internet dating site prohibitions centers on sex offenders. The propriety of excluding sex offenders is beyond the scope of this article; rather, this article focuses on the wholesale prohibition of felons on internet dating sites.


\textsuperscript{29} Terms of Use Agreement, Match.com, http://www.match.com/registration/membagr.aspx (last revised Feb. 05, 2014). This article focuses on the terms of use on Match.com because they are representative of the terms on other major websites.

\textsuperscript{30} \textit{See, e.g.}, United States v. Nosal, 676 F.3d 854, 861 (9th Cir. 2012) (en banc) (“Our access to ... remote comput-

\textsuperscript{31} Terms of Use Agreement, Match.com, supra note 29.

\textsuperscript{32} Id.

\textsuperscript{33} Id. at §§ 1-2.
Such a wholesale prohibition affects a large segment of the U.S. population. Over the last few decades, federal, state, and local governments have criminalized many actions that previously were legal. Indeed, there are so many legislative and regulatory crimes that, at the federal level, no one has been able to accurately count the number of federal crimes in existence. At last count, in 2007 – and before the raft of criminalization dealing with the financial crisis – there were 4,450 federal crimes. By contrast, in the 1980s there were just 3,000 crimes. And that is only at the federal level. Many state governments are also engaged in criminalizing more and more actions. With more legislated crimes come more felons, and as of 2010, approximately 19.8 million convicted felons were living in the United States, accounting for 8.6 percent of the population. Thus, the sheer number of people in the United States affected by this blanket ban is staggering.

A corollary of over-criminalization is the proliferation of crimes for which no mens rea is required. The lack of a mens rea requirement means that someone can be convicted of a crime even without having any criminal intent. Many convicted felons are convicted for strict liability crimes that might not have a bearing on one's ability to be a good mate (whatever that standard is).

Nor is the blanket prohibition limited in time. A person convicted of a felony decades earlier, who has since been rehabilitated, would not be eligible to join a dating website. Such a prohibition not only is nonsensical, but also frustrates the penological goal of rehabilitation. And, in many situations, it would not make other users safer, given that “recidivism declines steadily with time clean.” By restricting felons, Internet dating sites essentially brand felons with a scarlet letter for life and exclude them from yet another part of the social folds of society.

In addition, the prohibition is troubling due to the many convicted felons who likely are not guilty of the crimes to which they pled guilty. The Government wields so much power because our prior default system of trial by jury, as envisioned in the Sixth Amendment to the United States Constitution, has now been transformed into a plea agreement system. As Judge Jed Rakoff discussed in 2012, the 'Mens Rea' Component Within the Issue of the Over-Federalization of Crime, ENGAGE, July 2013, at 24, http://www.fed-soc.org/publications/detail/the-mens-rea-component-within-the-issue-of-the-over-federalization-of-crime. See, e.g., John Jessup, 'Overcriminalization: Making Us a Nation of Felons?,' CBN NEWS, (July 9, 2012), http://www.cbn.com/cbnews/us/2012/March/overcriminalization-making-us-a-nation-of-felons/

And as John S. Baker, Jr. & William J. Haun, noted, "The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him.

40 See, e.g., Michael J. Reitz, Overcriminalizing the Wolverine State: A Primer and Possible Reforms for Michigan, MACKINAC CTR. FOR PUB. POL'Y, Oct. 27, 2014 (noting that on average, Michigan has been adding 45 new crimes annually, "44 percent of which were felonies"), http://www.mackinac.org/20644; Jeff Welty, Overcriminalization in North Carolina, 92 N.C. L. REV. 1935 (2014) (measuring the explosive growth of new crimes in North Carolina over several decades).

great detail in his important piece, “Why Innocent People Plead Guilty,” criminologists have concluded that up to eight percent of convicted felons are innocent of the charges to which they have pled guilty. Judge Rakoff notes that even if the studies are incorrect, and only one percent of convicted felons are wrongly convicted, that still equates to at least 20,000 people who are innocent of the crimes to which they pled guilty. All of them would be implicated by the sites’ wholesale bans.

Finally, it is important to note that restrictions such as these allow the “social [and] economic consequences of conviction” to continue unabated. Though the reasons are complex and difficult to generalize, what is clear is that there is a “societal impulse to reject people with a criminal record.” These knee-jerk reactions perpetuate the stigmas ex-offenders face, especially because “discrimination based on conviction is firmly entrenched as socially . . . acceptable.” The result of this discrimination is that ex-offenders can never fully put their convictions behind them.

IV. Banning Felons from Internet Dating Sites Does Not Necessarily Enhance Public Safety

Ostensibly, restrictions on felons on internet dating sites protect the public. As discussed above, the restrictions are over-inclusive and are not tailored in a way that would actually protect the sites’ users. But they are also under-inclusive. Surely not all people of disrepute have been convicted of a felony. Some may have been convicted of a misdemeanor, others may not have entered the criminal justice system despite their prior bad acts, and still others who are not part of the criminal justice system may commit criminal acts in the future. Critics would respond that a blanket prohibition such as the one present here might not solve the whole problem, but that it would be a good start. Such alarmist thinking is not productive and is one reason that the United States faces the over-criminalization problem discussed supra.

Moreover, the under-inclusive nature of a blanket ban on felons lulls online daters into a false sense of security. Several of the criminal and civil allegations arising out of assaults after meeting online involved alleged perpetrators who previously had not been convicted of a felony.

The prosecution of Ryan Logan is a prime example of these infirmities. Logan, a computer engineer with no criminal record, was indicted for assaulting two women he met on Match.com. He met the first woman in 2007 and allegedly sexually assaulted her soon thereafter. He allegedly raped the second woman a week after meeting her in person. At a single trial for both assaults, Logan was

47 Id.
48 Id.
49 Logan, supra note 8 at 1104.
51 Id. at 25.
convicted for the 2009 rape and acquitted of the 2007 incident.\textsuperscript{55} Logan’s case exemplifies the problems with the blanket ban on felons. Had Logan been arrested, indicted, and convicted of the first alleged sexual assault in 2007, he would have been prohibited from the site through its terms of service. But he was not, and despite the first victim’s allegations that he sexually assaulted her, his lack of felony status meant that he was free to use Match.com in 2009, leading to the assault of the second alleged victim.\textsuperscript{56} Moreover, according to a federal lawsuit later filed against Match.com, a “different Match.com user informed the website that Logan had allegedly raped her two years earlier. The site did not remove his profile and let him continue to use the service.”\textsuperscript{57} Thus, not only did the blanket ban on felons not prevent the second attack because he was not a felon, but, according to the allegations of the lawsuit, Match.com did not take reasonable actions to remove a user accused of sexual assault.\textsuperscript{58}

In another case, a woman attacked by a man she met online sued Match.com for “failing to convey how dangerous online dating can be.”\textsuperscript{59} But the man who allegedly attacked her had no known criminal record.\textsuperscript{60} Similarly, a Cleveland firefighter was indicted for raping a woman he met on Match.com, but apparently he was not a convicted felon.\textsuperscript{61} Notably, the man was indicted for two rapes—one for a woman he met online and another who he had met at a bar seven years earlier.\textsuperscript{62} At the time of the first alleged rape, prosecutors declined to prosecute due to insufficient evidence.\textsuperscript{63} These cases highlight the weaknesses of the current approach.

V. Government Action Concerning Internet Dating

No statutes or regulations currently require internet dating sites to exclude convicted felons. However, several states have enacted statutes directed at the Internet dating sites or have entered into agreements with Internet dating sites that have the effect of restricting the sites’ membership.

Several state legislatures have imposed requirements on internet dating sites to ensure that the public is protected from online predators. To date, Texas, New Jersey, New York, and Illinois have passed legislation.\textsuperscript{64} For instance, New Jersey, the first state to pass legislation imposing safety requirements on internet dating sites, requires internet dating sites to: (1) provide notice of the safety measures that the site takes to “increase awareness of safer dating practices”; and (2) disclose in a clear and conspicuous manner whether the site conducts criminal background checks on its members and, if so, whether those with criminal convictions may remain as members.\textsuperscript{65} Notably, these statutes do not require background checks to be conducted, which calls their efficacy into question.\textsuperscript{66}


\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} Id.


\textsuperscript{61} Id.


\textsuperscript{64} The sponsor of the Illinois legislation, Sen. Ira Silverstein, wanted to require the sites to conduct background checks, but said that the final language was a result of negotiations with the internet dating sites. See Erin Meyer, \textit{Sexual Predators Turn to Web to Snare Victims}, CHI. TRIB. (Nov. 22, 2012), http://articles.chicagotribune.com/2012-11-22/news/ct-met-online-dating-20121122_1_spark-networks-true-com-online-relationship-site.
The state that has taken the closest measure to imposing formal collateral consequences is California. In 2012, California Attorney General Kamala D. Harris entered an agreement with eHarmony, Match.com, and Spark Networks,\(^67\) which purports to provide members with a safer online dating experience.\(^68\) Much of the agreement focuses on educating users and providing tools to ensure safety, such as quick responses to member complaints and regular reviews of profiles to weed out fake profiles.\(^69\) Significantly, however, the sites must screen their members for sex offenders, when they can do so.\(^70\) Once identified, sex offenders are prohibited from being fee-based members.\(^71\) Although the agreement does not require the sites to remove profiles of all felons, it does require the removal of registered sexual predators.\(^72\) Assuming arguendo that a ban on sex offenders ensures a safer internet dating experience, that the agreement does not require the removal of all felons is significant. Not all felons are sex offenders and not all sex offenders are felons, and the decision to remove only registered sex offenders reflects the overbreadth of the blanket ban on felons.

Notably, in announcing the agreement, the parties stated that that “screening tools have many limitations which impact their efficacy.”\(^73\) Mandy Ginsberg, the CEO of Match.com, stated even more emphatically that “while these checks may help in certain instances, they remain highly flawed, and it is critical that this effort does not provide a false sense of security to our members.”\(^74\) This limitation is because often “sexual assault is underreported, underinvestigated and many offenders are not arrested.”\(^75\) Thus, the solution is just a Band-Aid that does not necessarily protect the public while it does not meaningfully possible.

VI. Potential Criminal and Civil Liability under the Computer Fraud & Abuse Act

The Computer Fraud & Abuse Act (“CFAA”) was enacted in 1984 to combat fraud via computer.\(^76\) Following the release of the movie War Games, Congress was concerned with the proliferation of computers and the “realization that criminals possess the capability to access and control high technology processes vital to our everyday lives.”\(^77\) Based on these concerns, the CFAA created new crimes pertaining to computer fraud, ranging from misdemean-

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69 Id.

70 Id.

71 Id.

72 Id. Note that sex offender registration durations vary by state, and in some situations, by offense. See, e.g., Jane Shim, Listed for Life, SLATE (Aug. 13, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/sex_offender_registry_laws_by_state_mapped.html. The propriety of banning sex offenders from internet dating sites is beyond the scope of this article.

73 Harris et al., supra note 68.


75 Erin Meyer, supra note 66.

76 LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1130 (9th Cir. 2009).

NOT ALL FELONS ARE SEX OFFENDERS AND NOT ALL SEX OFFENDERS ARE FELONS, AND THE DECISION TO REMOVE ONLY REGISTERED SEX OFFENDERS REFLECTS THE OVERBREADTH OF THE BLANKET BAN ON FELONS.

ors to felonies. In 1994, Congress amended the Act to create private rights of action.

A. Criminal CFAA Liability

An expansive judicial reading of the current provisions of the CFAA could subject a convicted felon who joins an internet dating site to prosecution. Section 1030(a)(2)(C) criminalizes the actions of someone who intentionally accesses a computer “without authorization” or who “exceeds authorized access” and obtains any information from the computer. Congress has not defined “without authorization.” It has defined “exceeds authorized access,” but in a circular way, namely: “the term ‘exceeds authorized access’ means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter.”

In recent years, the breadth of the phrases “without authorization” and “exceeds authorized access” has come under judicial scrutiny. In one notorious case, United States v. Drew, the United States prosecuted a woman for misusing MySpace. Defendant Lori Drew registered a fake profile on MySpace, intending to engage a teen-aged girl who had been a classmate of Drew’s daughter. Drew created a profile of a boy under a pseudonym, flirted with the classmate, and then later told the classmate he no longer liked her and that “the world would be a better place without her in it.” Later that day, the girl committed suicide.

Drew was prosecuted under 18 U.S.C. §§ 1030(a)(2)(C) and 1030(c)(2)(B)(ii), and the jury convicted her of the lesser included misdemeanor under Sections 1030(a)(2)(C) and (c)(2)(A). The Government alleged that Drew violated the CFAA by exceeding authorized access to MySpace by violating the site’s terms of service to which she agreed when she became a member (under a pseudonym). The Terms of Service provided:

This Terms of Use Agreement (“Agreement”) sets forth the legally binding terms for your use of the Services. By using the Services, you agree to be bound by this Agreement, whether you are a “Visitor” (which means that you simply browse the Website) or you are a “Member” (which means that you have registered with MySpace.com). The term “User” refers to a Visitor or a Member. You are only authorized to use the Services (regardless of whether your access or use is intended) if you agree to abide by all applicable laws and to this Agreement.

** By using the Services, you represent and warrant that (a) all registration information you submit is truthful and accurate; (b) you will maintain the accuracy of such information; (c) you are 14 years of age or older; and (d) your use of the Services does not violate any
applicable law or regulation. 86

These terms of service were part of a long document, which MySpace reserved the right to unilaterally amend. 87

The case turned on the application of the phrase "without authorization or exceeds authorized access." 88 The court concluded that even if violating MySpace's terms of service violated the applicable law or regulation, it could not itself be criminal because it failed to provide minimum guidelines to law enforcement and because it failed to provide sufficient notice to individuals that their actions could be criminal. 89 Therefore, the court granted the defendant's motion for acquittal. 90 The Government opted not to appeal. 91 A few years later, the Ninth Circuit held en banc in United States v. Nosal that the CFAA "does not extend to violations of use restrictions." 92 However, the Ninth Circuit's conclusion is at odds with those of other circuits. 93

BECAUSE OF THE BREADTH OF THE STATUTES, A CONVICTED FELON COULD BE SUBJECTED TO CIVIL LIABILITY UNDER THE CFAA IN SEVERAL WAYS.

Despite this circuit split, the Supreme Court has not ruled on the breadth of the CFAA. The Justice Department has stated that it needs the broad language, not to pursue run-of-the-mill terms of service violators, but to be able to respond to ever more sophisticated computer fraud. 94 The Government has, on the one hand, has implied that it would not prosecute for mere violations of terms of service, but on the other, has explicitly asked Congress to retain the broad language of the CFAA so it can use the statute in new novel ways. 95 In Nosal, the Ninth Circuit, concerned with the possibility of arbitrary and discriminatory enforcement, opted not to trust the Government despite its assurance that it would not "prosecute minor violations" and limited the CFAA within that Circuit. 96

Although the Justice Department likely has much more significant cases to prosecute, theoretically it could prosecute a felon for behaviors that it would never prosecute a non-felon for. 97 And it is not clear that it is limited to criminal behavior. 98

86 Id. at 454 (quoting MySpace Terms of Service).
87 Id.
88 Because the second two elements of Section 1030 are proven by virtue of using any computer to access any website, only the first element of access was essentially at issue. Id. at 456.
89 Id. at 464-67.
90 Id.
92 67 F.3d 854, 863 (9th Cir. 2012) (en banc).
94 Nosal, supra note 92 at 862.
96 Nosal, supra note 92 at 862, (citing United States v. Stevens, 120 S.Ct. 1577, 1591 (2010) (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”)).
coming a member of a dating site in contravention of the explicit terms of service which prohibit felons from becoming members. And, in a situation where the Government has no other means by which to bring a federal criminal prosecution, in any circuit but the Ninth, the Government could use the CFAA as it did in Drew.\textsuperscript{97} As the Ninth Circuit aptly stated, the Government’s decision to prosecute for a terms-of-service violation “may depend on whether you happen to be someone an AUSA has reason to go after.”\textsuperscript{98} The specter of criminal prosecution underscores both the breadth of the CFAA and the increased scrutiny that convicted felons can face even after they have served their sentences.

B. Civil CFAA Liability

The CFAA also provides for civil liability. A civil action against a felon who has violated the terms of service might be more likely than a criminal prosecution. Under the CFAA, a civil action may be brought by a person or entity that “suffers damage or loss” under the CFAA.\textsuperscript{99} Section 1030(g) permits a civil action where an offense led to (or attempted to lead to) loss to a person amounting to at least $5,000 in value, physical injury, or “a threat to public . . . safety,” among others.\textsuperscript{100}

Because of the breadth of the statute, a convicted felon could be subjected to civil liability under the CFAA in several ways. A dating website could bring a civil action against a felon who became a member in contravention of the terms of service if the site wants to market itself as a safe alternative to allegedly unsafe dating sites.\textsuperscript{101} Under 18 U.S.C. § 1030(a)(2)(C), the dating site could allege that by violating the terms of service, a felon exceeded authorized access by intentionally accessing a computer and obtaining information from a protected computer; i.e., any information from the dating website. The dating website could claim that the felon’s use of the site is a “threat to public . . . safety” under 18 U.S.C. § 1030(c)(4)(A)(IV), by claiming it could claim that it was harmed in some way through the felon’s presence on the website – either reputationally or due to some actions of the member.\textsuperscript{102} In such a situation, the dating site could sue to recover damages if the losses exceeded $5,000 in any given year.\textsuperscript{103}

Also, under the CFAA, “[a]ny person who suffers damage or loss by reason of a violation . . . may maintain a civil action against the violator . . . .”\textsuperscript{104} Because the provision is not limited to the owner of the protected computer or the proprietor of the website, a person damaged by a convicted felon’s presence on the site could sue. This would permit a member who was physically injured, who believed that there was a threat to “public . . . safety,” or who suffered monetary damages to sue under the civil provisions.\textsuperscript{105}

To be sure, these civil provisions are not limited to felons – under an expansive reading of the CFAA, anyone who violates terms of service so as to violate the provisions of the CFAA could be subject to liability. However, as described throughout this article, a convicted felon can be subject to liability solely because of his or her status, which raises concerns of fundamental fairness in our system of justice.
VII. Conclusion

People convicted of felonies spend the rest of their lives dealing with the formal collateral consequences of conviction. The blanket ban on felons using internet dating sites perpetuates the notion that convicted felons should be judged throughout their lives for their bad acts. Such thinking is "fundamentally at odds with the idea of America as the 'land of second chances.'"106 As our society moves further into a digital age, terms of service such as the ones discussed in this article will lead to further stratification, as a significant portion of society will be foreclosed from the social aspects of online dating which will continue the existence of an underclass of ex-offenders. Moreover, the breadth of the Computer Fraud & Abuse Act could permit the Government and private litigants to use that statute in a way that it was never intended in order to maintain a semblance of safety, regardless of how imagined it is.
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