THE VAGARIES OF VAGUENESS: RETHINKING THE CFAA AS A PROBLEM OF PRIVATE NONDELEGATION

The Computer Fraud and Abuse Act of 1986[1] (CFAA) was enacted with the primary purpose of combating computer hacking.[2] The Act prohibits using a protected computer without authorization or exceeding authorized access when the computer is used to accomplish one of several prohibited ends.[3] The CFAA is noteworthy and increasingly controversial for its breadth. The statute's broad definition of "protected computer" encompasses "effectively all computers with Internet access,"[4] and the ends prohibited by the statute include intentionally causing damage to the computer,[5] using the illicit access to further a fraud,[6] and obtaining information from any protected computer.[7] Criminal violations of the CFAA may be misdemeanors or felonies, depending primarily upon which impermissible end is alleged. For instance, a violation in furtherance of a fraud is a felony punishable by up to five years in prison;[8] unlawfully obtaining information from a protected computer is a misdemeanor but may be enhanced to a felony punishable by up to five years in prison if, inter alia, the offender committed the act in furtherance of "any criminal or tortious act."[9] The CFAA also provides civil remedies including compensatory damages and injunctive relief for "[a]ny person who suffers damage or loss by reason of a violation" of the statute, with some limits.[10] Cases under the CFAA often arise in the context of employee misappropriation of employer data,[11] but they have come to span subject matter as broad as automated collection of information from websites[12] and creation of a fake profile on a social networking website.[13]

Given the CFAA's vast reach[14] and the serious consequences for its violation, it is not surprising that the CFAA's breadth has been hotly

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1 Pub. L. No. 99-474, 100 Stat. 1213 (codified as amended at 18 U.S.C. § 1030 (2012)).

2 United States v. Nosal, 676 F.3d 854, 858 (9th Cir. 2012) (en banc).

3 18 U.S.C. § 1030(a).

4 *Nosal*, 676 F.3d at 859 (internal quotation marks omitted); *see* 18 U.S.C. § 1030(e)(2)(B).

5 18 U.S.C. § 1030(a)(5).

6 *Id.* § 1030(a)(4).

7 *Id.* § 1030(a)(2)(C).

8 *Id.* § 1030(c)(3)(A).

9 *Id.* § 1030(c)(2)(B).

10 *Id.* § 1030(g).

11 *E.g.*, United States v. Nosal, 676 F.3d 854 (9th Cir. 2012) (en banc).

12 *E.g.*, EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58 (1st Cir. 2003); Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

13 United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009).

14 The CFAA has become substantially broader, as well as more punitive, since its passage in 1986. For helpful descriptions of the CFAA's original form and amendment over time, see Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1563–

litigated. Likely the most substantial fight, and the one on which this Note will focus, is the debate over when it is that one "access[es] without authorization" or "exceeds authorized access" under the statute.[15] Indeed, a circuit split has developed regarding whether, or under what circumstances, an employee violates the CFAA by misappropriating an employer's trade secrets.[16]

In a recent contribution to the split, the Ninth Circuit applied the rule of lenity to hold that "the phrase 'exceeds authorized access' in the CFAA does not extend to violations of use restrictions," such as workplace computer-use agreements or website terms of service agreements.[17] Notably, the court did not hold that Congress is unable to enact such a statute, noting that "[w]e need not decide today whether Congress *could* base criminal liability on violations of a company or website's computer use restrictions."[18] The court's reasoning, however, implicitly appeals to the problem of vagueness, voicing concerns regarding both notice to citizens of what constitutes criminally liable behavior[19] and the potential for broad criminal liability under the statute to lead to "arbitrary and discriminatory enforcement,"[20] the two elements of the void-for-vagueness doctrine.[21] So too does much of the case law and academic literature discussing how to interpret the CFAA.[22]

This Note argues, however, that these concerns raised by courts and commentators sound less in traditional void-for-vagueness analysis than in the private nondelegation doctrine. The CFAA might, as written, be unconstitutionally vague regarding what qualifies as authorized

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71 (2010); and Pamela Taylor, Comment, *To Steal or Not to Steal: An Analysis of the Computer Fraud and Abuse Act and Its Effect on Employers*, 49 HOUS. L. REV. 201, 207–08 (2012).

15 *See* Kerr, *supra* note 14, at 1571 ("The vast scope of the current version of 18 U.S.C. § 1030 places tremendous pressure on the particular meaning of 'access without authorization' and 'exceeds authorized access,' the two closely related prohibitions at the heart of the CFAA."). The majority of the prohibited ends under the CFAA incorporate one or both of these exact phrases, or minor syntactical deviations from them. *See* 18 U.S.C. § 1030(a)(1)–(5).

16 *See, e.g.*, *Nosal*, 676 F.3d at 862–63 (noting conflict between the Ninth Circuit and the Fifth, Seventh, and Eleventh Circuits and declining to follow those circuits); Audra A. Dial & John M. Moye, *The Computer Fraud and Abuse Act and Disloyal Employees: How Far Should the Statute Go to Protect Employers from Trade Secret Theft?*, 64 HASTINGS L.J. 1447, 1452–62 (2013) (describing split between, on one hand, the Fourth and Ninth Circuits, as well as courts in the Second, Third, Sixth, and Eighth Circuits, and, on the other hand, the Fifth, Seventh, and Eleventh Circuits).

17 *Nosal*, 676 F.3d at 863. The Fourth Circuit has similarly applied the rule of lenity in a *civil* case under the CFAA, reasoning that "[w]here, as here, our analysis involves a statute whose provisions have both civil and criminal application, . . . our interpretation applies uniformly in both contexts." WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199, 204 (4th Cir. 2012) (citing Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004)).

18 *Nosal*, 676 F.3d at 863.

19 *See id.* at 860–62.

20 *Id.* at 860.

21 *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983).

22 *See* sources cited *infra* note 40.

access. If the CFAA were amended clearly to include use-restriction violations as behavior "exceeding authorized access," the statute would arguably both provide notice to citizens of what behavior was criminal and "establish minimal guidelines to govern law enforcement."[23] But the hypothetical amended CFAA (and thus the broad reading of the present CFAA) would remain troubling because it would essentially delegate to private parties the ability to define the scope of statutorily authorized access. Those private parties, in turn, could impose problematic use restrictions. Thus, the truly concerning aspect of the CFAA's operation is its delegation of power to private actors effectively to define, with hardly any constraint, what conduct will incur criminal liability under the statute.[24]

Part I of this Note explores the vagueness-related arguments that have been brought against the CFAA in litigation and in legal scholarship, with an eye toward identifying the values underlying the challenges. Part II examines the void-for-vagueness doctrine in greater depth and argues that the doctrine as currently conceived provides little support for challenges to the CFAA's broad reading. Part III explores the nondelegation doctrine, particularly the development and application of its variant relating to delegations of power to private parties. Part IV advances the argument that the broad reading of the CFAA is constitutionally problematic because it would implicitly delegate to private actors the ability to establish and change the scope of criminal behavior under the statute. Challengers to the broad reading of the CFAA should consider attacking the statute on this ground.

I. VAGUENESS AND THE CFAA

This Part describes the vagueness arguments that have been leveled against the broad construction of the CFAA, both in judicial opinions and in legal scholarship. These challenges emphasize — sometimes explicitly and sometimes implicitly — problems of notice, arbitrary enforcement, and apparent irrationality or absurdity. The Part begins, however, by briefly describing the CFAA and the litigation that has developed around its scope.

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[23] *Kolender*, 461 U.S. at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)) (internal quotation mark omitted).

[24] This Note focuses on the CFAA's application in the criminal context. Yet a strong argument might be raised against the CFAA's use in civil cases, as well. As discussed in Part III, one substantial factor in private nondelegation analysis is government participation. *See infra* p. 765. To whatever extent prosecutorial discretion might provide some redeeming amount of government participation in the criminal context, such participation is absent in civil cases between private parties. However, civil remedies like the compensatory damages and injunctive relief available under the CFAA, *see* 18 U.S.C. § 1030(g) (2012), differ importantly from criminal liability and merit full evaluation outside the scope of this Note.

A. Development of CFAA Litigation

As briefly discussed above, litigation over how to define authorization and authorized access has exploded over the past decade, with a pronounced circuit split developing.[25] Neither Congress nor the Supreme Court has intervened in the dispute, despite calls for action directed toward both.[26] However, while early decisions under the statute (often in civil cases) recognized a broad scope of liability, more recent decisions have begun to cut back against the statute's breadth, both in civil and in criminal cases.

Much litigation under the CFAA has centered on what it means to exceed authorized access, defined by the statute as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[27] As the Ninth Circuit recently noted, two interpretations predominate: "First, . . . it could refer to someone who's authorized to access only certain data or files but accesses unauthorized data or files — what is colloquially known as 'hacking.'"[28] "Second, . . . [it] could refer to someone who has unrestricted physical access to a computer, but is limited in the use to which he can put the information."[29] The latter interpretation has been used in various circumstances to support several theories of liability under the statute: access rendered unauthorized by knowing violation of an employer's computer access restrictions,[30] by violation of a duty of loyalty to one's employer,[31] and even by violation of a website's terms of use.[32] Conversely, some courts, including the Fourth and Ninth Circuits, have recently rejected liability under the CFAA premised upon violations of use restrictions imposed by employers[33] or

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[25] *See* sources cited *supra* note 16.

[26] *See, e.g.*, Petition for a Writ of Certiorari at 6–9, WEC Carolina Energy Solutions LLC v. Miller, 133 S. Ct. 831 (2013) (mem.) (No. 12-518), 2012 WL 5353899, at *6–9 (describing circuit split and arguing that the Court should resolve it); Dial & Moye, *supra* note 16, at 1465–66 (same); Andrew T. Hernacki, Comment, *A Vague Law in a Smartphone World: Limiting the Scope of Unauthorized Access Under the Computer Fraud and Abuse Act*, 61 AM. U. L. REV. 1543, 1581 (2012) ("After sixteen years without substantive change and numerous conflicting judicial opinions, the CFAA is ripe for amendments aimed at limiting its scope and clarifying its ambiguities.").

[27] 18 U.S.C. § 1030(e)(6).

[28] United States v. Nosal, 676 F.3d 854, 856–57 (9th Cir. 2012) (en banc).

[29] *Id.* at 857.

[30] *See, e.g.*, United States v. Rodriguez, 628 F.3d 1258, 1260, 1263 (11th Cir. 2010); United States v. John, 597 F.3d 263, 269, 271 (5th Cir. 2010).

[31] *See, e.g.*, Int'l Airport Ctrs., L.L.C. v. Citrin, 440 F.3d 418, 420 (7th Cir. 2006); Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc., 119 F. Supp. 2d 1121, 1125 (W.D. Wash. 2000).

[32] *See, e.g.*, EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 62–63 (1st Cir. 2003); Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238, 253 (S.D.N.Y. 2000).

[33] *See, e.g.*, WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199, 204 (4th Cir. 2012); *Nosal*, 676 F.3d at 860, 863–64.

websites.[34] This more recent set of cases has emphasized the importance of narrow constructions because the same liability-conferring language (and thus interpretations of that language) applies to both civil and criminal cases.[35]

B. Vagueness Challenges in Action

While many of the cases narrowly interpreting the CFAA appeal to the rule of lenity,[36] two recent cases — *United States v. Drew*[37] and *United States v. Nosal*[38] — have either held or suggested a complementary conclusion: that adopting the broader construction of the CFAA would render the statute unconstitutionally vague.[39] Academic commentary has argued the point directly.[40] This section describes those cases with an eye toward extracting the values and concerns motivating the courts' holdings.

1. United States v. Drew. — In September 2006, Lori Drew created a MySpace account "for a fictitious 16 year old male juvenile named 'Josh Evans,'" in violation of MySpace's terms of service.[41] Drew then used the fictitious account to contact and to flirt with Megan Meier, a thirteen-year-old classmate of Drew's daughter.[42] After roughly a month, "Evans" informed Meier that he was moving away and that "the world would be a better place without her in it."[43] Later that day, Meier committed suicide.[44] The government charged Drew with, inter alia, violating the CFAA by accessing MySpace's computers "without authorization or in excess of authorization to obtain information," a misdemeanor violation.[45] The jury ultimately convicted Drew of that charge.[46]

Drew, however, filed a motion for a judgment of acquittal, arguing that an intentional violation of a website's terms of service did not

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[34] *See, e.g.*, United States v. Drew, 259 F.R.D. 449, 462–65 (C.D. Cal. 2009).

[35] *See Miller*, 687 F.3d at 204 (citing Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004)); *Nosal*, 676 F.3d at 860 n.6.

[36] *See, e.g.*, *Miller*, 687 F.3d at 204–06; *Nosal*, 676 F.3d at 863.

[37] 259 F.R.D. 449.

[38] 676 F.3d 854.

[39] *Cf.* United States v. Lanier, 520 U.S. 259, 266 (1997) ("[A]s a sort of 'junior version of the vagueness doctrine,' the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." (citation omitted) (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 95 (1968))).

[40] *See, e.g.*, Hernacki, *supra* note 26, at 1554–64; Kerr, *supra* note 14, at 1571–87; Recent Case, 126 HARV. L. REV. 1454, 1460–61 (2013).

[41] *Drew*, 259 F.R.D. at 452.

[42] *Id.*

[43] *Id.* (quoting Indictment ¶ 16, *Drew*, 259 F.R.D. 449 (No. CR 08-0582)) (internal quotation marks omitted).

[44] *Id.*

[45] *Id.* at 453; *see* 18 U.S.C. § 1030(a)(2)(C) (2012).

[46] *Drew*, 259 F.R.D. at 453.

render access unauthorized or in excess of authorization under the CFAA.[47] Despite concluding that intentional violations "can potentially constitute accessing [a computer] without authorization and/or in excess of authorization under the statute,"[48] the court held that such a construction of the statute would "run[] afoul of the void-for-vagueness doctrine . . . primarily because of the absence of minimal guidelines to govern law enforcement, but also because of actual notice deficiencies."[49] The court implicitly recognized two types of notice problems: First, because the CFAA did not explicitly or implicitly criminalize breaches of contract, "'ordinary people' . . . would not expect criminal penalties" for violating a website's terms of service.[50] Second, the court acknowledged several notice issues posed by the vagaries of terms of service themselves: which violations of terms of service would render access unauthorized, what behavior would constitute a violation, and what impact the application of contract law and other contractual provisions would have on a criminal prosecution.[51]

Moreover, the court found, given the broad scope of most terms of service, "the question arises as to whether Congress has 'establish[ed] minimal guidelines to govern law enforcement.'"[52] Under the statute's broad construction, "there is absolutely no limitation or criteria as to which of the breaches should merit criminal prosecution. All manner of situations will be covered from the more serious (*e.g.* posting child pornography) to the more trivial (*e.g.* posting a picture of friends without their permission). All can be prosecuted."[53]

2. United States v. Nosal. — Whereas *Drew* dealt with the CFAA in the context of website terms of service, *Nosal* interpreted the same provision with respect to whether an employee's misuse of a work computer could constitute unauthorized access. In October 2004, David Nosal left his job at executive search firm Korn/Ferry International (KFI) in order to start a competing business.[54] Shortly thereafter, he convinced former colleagues to "use[] their log-in credentials to download" confidential KFI information to which they had access.[55] Nosal was indicted for, inter alia, violating the CFAA by aiding and abetting his former colleagues in "'exceed[ing their] authorized access' with intent to defraud" KFI.[56] Nosal filed a motion to dismiss the

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47 *See id.* at 456–57.
48 *Id.* at 461.
49 *Id.* at 464.
50 *Id.*
51 *See id.* at 464–65.
52 *Id.* at 466 (alteration in original) (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)).
53 *Id.* at 467.
54 *See* United States v. Nosal, No. CR 08-00237, 2009 WL 981336, at *1 (N.D. Cal. Apr. 13, 2009).
55 *Nosal*, 676 F.3d at 856.
56 *Id.* (alteration in original).

CFAA charges, which the district court ultimately granted, arguing that Ninth Circuit precedent precluded the CFAA's application to individuals' "misuse [of] information they obtain by means of [authorized] access."[57]

The Ninth Circuit, sitting en banc, affirmed and held — relying in part on the rule of lenity[58] — that "'exceeds authorized access' . . . is limited to violations of restrictions on *access* to information, and not restrictions on its *use*."[59] The court found the CFAA text ambiguous and engaged in a detailed statutory analysis,[60] but for present purposes the most important part of *Nosal*'s analysis is the court's extended discussion of the consequences of adopting the broad construction of the CFAA.

Although it did not mention the void-for-vagueness doctrine, the court appealed directly to the concerns that animate that doctrine. First, the court described the many commonly accepted employee activities that might violate corporate computer use policies — for example, "g-chatting with friends, playing games, shopping or watching sports highlights" — that "would become federal crimes," noting that "[u]biquitous, seldom-prosecuted crimes invite arbitrary and discriminatory enforcement."[61] Second, the court highlighted the "[s]ignificant notice problems [that would] arise if [it] allow[ed] criminal liability to turn on the vagaries of private policies that are lengthy, opaque, subject to change and seldom read"[62] and the corresponding problems with website terms of service "that most people are only dimly aware of and virtually no one reads or understands."[63] Invoking a parade of horribles — including the *Drew* prosecution as an example of prosecutorial excess — the court opted for the narrower reading of the CFAA, which would not present these vagueness problems.[64]

II. THE VOID-FOR-VAGUENESS DOCTRINE AND THE CFAA'S IMPERFECT FIT

This Part explores the weaknesses of the vagueness argument as it relates to the CFAA. Using the example of a hypothetical amended CFAA, the Part argues that a more clearly written statute would still implicate many of the notice, arbitrariness, and irrationality concerns

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[57] *Id.*; *see* LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1135 (9th Cir. 2009).

[58] *See Nosal*, 676 F.3d at 863.

[59] *Id.* at 864.

[60] *See id.* at 856–59. For a closer analysis of *Nosal*'s statutory interpretation, see Recent Case, *supra* note 40, at 1461.

[61] *Nosal*, 676 F.3d at 860; *see also* Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[62] *Nosal*, 676 F.3d at 860; *see also Kolender*, 461 U.S. at 357.

[63] *Nosal*, 676 F.3d at 861.

[64] *See id.* at 860–63.

identified in Part I. The CFAA as written might well be unconstitutionally vague, particularly with regard to what "unauthorized access" and "exceeding authorized access" mean, but the flaws described above run much deeper than ambiguous language on the face of the statute.

A. Contours of the Vagueness Doctrine

The void-for-vagueness doctrine, rooted in the Due Process Clause,[65] "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[66] This test is commonly described as containing two requirements: statutes must (1) provide fair notice or warning and (2) "set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'"[67]

A principal concern regarding notice is that a statute might be "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits."[68] "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law."[69] For this reason, for instance, loitering and vagrancy statutes have been struck down where even one who had read the law might not comprehend what behavior was proscribed.[70]

The Supreme Court has recognized, though, that in the criminal context "perhaps the most meaningful aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement."[71] This requirement is meant to shield citizens from "a criminal statute [that] may permit 'a standardless sweep

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65 United States v. Williams, 553 U.S. 285, 304 (2008).

66 *Kolender*, 461 U.S. at 357.

67 Smith v. Goguen, 415 U.S. 566, 572–73 (1974); *see also id.* at 572–73 nn.8–9.

68 City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (plurality opinion) (quoting Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966)).

69 *Id.* at 58; *cf.* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2720 (2010) ("We have in the past 'struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent" — wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.'" (quoting *Williams*, 553 U.S. at 306)).

70 *E.g.*, *Morales*, 527 U.S. at 56–57 (plurality opinion) (finding it "difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose'" under a loitering statute); Papachristou v. City of Jacksonville, 405 U.S. 156, 162–63 (1972) ("The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them."); *see also Williams*, 553 U.S. at 304.

71 *Smith*, 415 U.S. at 574.

[that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"[72]

B. Incongruity in Current Vagueness Arguments Against the CFAA

To best understand why the concerns underlying current challenges to the CFAA do not truly sound in vagueness doctrine, consider a hypothetical: Congress amends the CFAA to state explicitly that one exceeds authorized access when one violates a restriction on use of a protected computer, including terms of use imposed by employers and by the administrators of websites, among others. That is, the hypothetical codifies the broad interpretations that have been adopted in multiple circuits.[73]

Such a statute likely would not violate the vagueness doctrine as it has been applied to date. First, the statute would certainly provide the ordinary citizen notice of what behavior is proscribed[74]: in the workplace, she must obey her employer's computer access policies; on the Internet, she must obey the terms of service supplied by each website's owner. The hypothetical CFAA would hardly resemble the incomprehensible language held invalid in *City of Chicago v. Morales*,[75] in which a city ordinance prohibited citizens from "remain[ing] in any one place with no apparent purpose."[76] Nor would it present the problems of a clear but vacuous standard such as "annoying" conduct, which led the Supreme Court to hold that a statute was "vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'"[77]

Certainly, such a statute would impose a heavy burden on citizens to understand and keep track of the various agreements to which their computer use is subject. And challenges might properly be raised as to the opacity or vacuity of the terms of *particular* private use agreements. But those issues are distinct from the vagueness doctrine's emphasis on notice as to the meaning of a criminal *statute*, at least as the Supreme Court has thus far applied it.

Second, and similarly, the hypothetical CFAA would not pose the same threat of arbitrary and discriminatory enforcement as have stat-

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[72] Kolender v. Lawson, 461 U.S. 352, 358 (1983) (second alteration in original) (quoting *Smith*, 415 U.S. at 575).

[73] *See supra* notes 30–32 and accompanying text.

[74] *See supra* notes 68–70 and accompanying text.

[75] 527 U.S. 41.

[76] *Id.* at 56 (internal quotation mark omitted); *see also id.* at 56–57 (explaining the statute's inability to provide notice to citizens of what constituted an apparent purpose).

[77] Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

utes in vagueness cases to date. Consider *Kolender v. Lawson*,[78] for instance, which held that a statute requiring citizens to provide "credible and reliable" identification when stopped by police officers was unconstitutionally vague because it "contain[ed] no standard for determining" when the statute was satisfied and "[a]s such, . . . vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute."[79] The hypothetical CFAA would arguably leave no such discretion: the statute would be violated only when a use agreement had objectively been breached.

Breadth, that is, should not be confused with a lack of guidance (and thus vagueness). Nor should widespread violation imply vagueness. Speeding laws are not rendered vague by the fact that many drivers speed; neither would the hypothetical CFAA be rendered vague by the fact that many people arguably violate computer use agreements or online terms of service.[80] Although the hypothetical CFAA could potentially reach the same wide range of conduct that critics of the CFAA have highlighted — for instance, browsing gossip websites or accessing personal email at work, or creating a fake profile on an online dating website — that breadth would not be a product of vagueness in the *statute*. The statute would be eminently clear: computer users violate use agreements at their peril. Instead, the breadth — to the extent that it existed — would be based on the applicable private use restrictions. Vagueness doctrine as it currently exists concerns itself with unclear statutes, not clear yet broad ones.

To be sure, colorable arguments can be raised that the text of the CFAA, as currently written, is unconstitutionally vague because of the indeterminacy of what constitutes authorization.[81] But most of the concerns raised regarding the CFAA apply to lack of notice and broad scope vis-à-vis the content of private use restrictions, *not* the content of the statute itself.[82] Certainly, the vagueness doctrine could be extended to apply not only to the content of criminal statutes, but also to private agreements the violation of which is criminal.[83] After all, crit-

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[78] 461 U.S. 352 (1983).

[79] *Id.* at 358 (internal quotation marks omitted).

[80] One distinction should be noted. Speed limits are narrow and straightforward: a motorist must not exceed the posted speed. Private use agreements, as explained in this Note, may be broader and more complicated, potentially making arbitrary enforcement more likely in practice.

[81] *See supra* notes 39–40 and accompanying text.

[82] *See, e.g.*, United States v. Nosal, 676 F.3d 854, 860–62 (9th Cir. 2012) (en banc); United States v. Drew, 259 F.R.D. 449, 464–67 (C.D. Cal. 2009); Kerr, *supra* note 14, at 1576–78, 1581–83, 1585–87.

[83] *Cf., e.g.*, *Drew*, 259 F.R.D. at 467 ("[I]f any conscious breach of a website's terms of service is held to be sufficient by itself to constitute intentionally accessing a computer without authorization or in excess of authorization, the result will be that section 1030(a)(2)(C) becomes a law 'that affords too much discretion to the police and too little notice to citizens who wish to use the [In-

ics of the CFAA correctly note that given the pervasive role of computers in personal and professional life, the broad reading of the CFAA, at its worst, "would give the government the power to arrest almost anyone who had a computer at work, much like the government's theory in the Lori Drew case would give the government the power to arrest almost anyone who used MySpace.com."[84] Such an extension of the vagueness doctrine would, it should be noted, apply equally to the hypothetical amended CFAA, since the underlying private agreements could remain troublingly vague.

Rather than lump statutes and private agreements together, advocates of expanding the vagueness doctrine (and courts considering this route) should recognize and confront head on the doctrine's current limitations. Doing so would, at the very least, disentangle the available arguments that, first, the CFAA's current text is itself unconstitutionally vague and, second, the broad interpretation of the CFAA's text subjects citizens to criminal liability based on unconstitutionally vague private agreements. Moreover, even if all notice and arbitrary-enforcement problems in private agreements were eliminated, alleviating the concerns of current critics, the CFAA would still present many of the same private nondelegation concerns discussed below. The vagueness doctrine is not only an uncertain antidote to the CFAA's constitutional ills, but also an incomplete one.

III. THE PRIVATE NONDELEGATION DOCTRINE

But perhaps such an expansion of the vagueness doctrine is unnecessary. Recognizing such an extension of the doctrine would require recognizing that a private actor, not Congress, ultimately defines the scope of criminal liability. It is this de facto delegation of criminal lawmaking power by Congress that should be troubling in the first instance, and it is this aspect of the CFAA that challengers should target for attack. After all, criminal enforcement of even the clearest private agreement is invalid if based on an impermissible delegation. Moreover, as Part IV argues, many of the concerns regarding "vagueness" that have been raised against the CFAA are better framed as protests against Congress's delegating the task of federal criminal lawmaking to self-interested, unsupervised, and democratically unaccountable private parties.

This Part describes the federal private nondelegation doctrine and its development, in preparation for its application to the CFAA in Part IV. The Part begins by examining the origins of the private

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ternet].'" (alteration in original) (quoting City of Chicago v. Morales, 527 U.S. 41, 64 (1999) (plurality opinion))).

[84] Kerr, *supra* note 14, at 1587.

nondelegation doctrine and proceeds to trace its general contours as developed in Supreme Court and lower federal court case law.

A. The Origins of the Private Nondelegation Doctrine

The so-called "private nondelegation doctrine,"[85] true to its moniker, focuses on the legitimacy of legislative delegations of governmental authority to private parties, rather than to other departments of government, as does its public counterpart.[86] At the federal level, the doctrine seeks to protect both the separation of powers and the values of due process.[87] The doctrine attempts to reconcile the premise that "[e]ven an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority"[88] with the reality that private entities "may . . . help a government agency make its regulatory decisions, for '[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality' that such schemes facilitate."[89]

The doctrine, as explained below, is most often traced to the Supreme Court's decisions in *A.L.A. Schechter Poultry Corp. v. United States*[90] and *Carter v. Carter Coal Co.*,[91] and, as is true of the public

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[85] *See, e.g.*, A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 146 (2000); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 472 (2011).

[86] The public nondelegation doctrine prohibits Congress from delegating the legislative power vested in it by Article I of the Constitution to any other party. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); Loving v. United States, 517 U.S. 748, 771 (1996); *see also* U.S. CONST. art. I, § 1. To satisfy the doctrine, "Congress must 'lay down . . . an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (second alteration in original) (emphasis omitted) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). Famously, the Supreme Court has struck down only two statutes as impermissible delegations and has enforced the doctrine primarily by way of the constitutional avoidance canon of statutory interpretation. *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (citing Indus. Union Dep't v. Am. Petrol. Inst., 448 U.S. 607, 646 (1980) (plurality opinion)); *see also* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 242–43.

[87] *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1437–38 (2003) ("When it is state government, the constitutional textual basis is the Fourteenth Amendment's Due Process Clause, and the underlying concern is that public power may be abused to achieve particular private aims instead of the public interest. This same due process concern exists in the federal context, but here separation of powers constitutes an additional potential barrier to delegation of power to private actors." (footnote omitted)); *see also* Froomkin, *supra* note 85, at 146 ("[T]he private nondelegation doctrine focuses on the dangers of arbitrariness, lack of due process, and self-dealing when private parties are given the use of public power without being subjected to the shackles of proper administrative procedure."); Horton, *supra* note 85, at 472–73 (identifying concerns regarding transparency, accountability, neutrality, and abuse of power in private delegations).

[88] Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 671 (D.C. Cir. 2013).

[89] *Id.* (second alteration in original) (quoting Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935)).

[90] 295 U.S. 495 (1935).

[91] 298 U.S. 238 (1936).

nondelegation doctrine, its vitality is open to question. The Court has not invalidated a law on private nondelegation grounds since *Carter Coal*, but lower federal courts have applied the rule to both federal and state statutes.[92]

1. A.L.A. Schechter Poultry Corp. v. United States. — *Schechter Poultry* is likely best known as one of the two cases in which the Supreme Court actually struck down a federal statute on public nondelegation grounds.[93] The Court in *Schechter Poultry* confronted section 3 of the National Industrial Recovery Act, which "authorize[d] the President to approve 'codes of fair competition'"[94] submitted by industrial and trade groups.[95] Viewing the statutory scheme's broad mandate and feeble restrictions,[96] the Court concluded that "the discretion of the President . . . [was] virtually unfettered" and that "the code-making authority thus conferred [was] an unconstitutional delegation of legislative power."[97]

Yet both the Court and commentators have since noted the opinion's opacity regarding whether the statute's problem was solely the amount of power delegated or that failure combined with the key (and relatively unsupervised) role played by private parties.[98] After all, while describing the statute's operation, the Court in *Schechter Poultry* powerfully criticized the government's assertion that private economic actors could be trusted to craft fair, neutral codes of competition for their industries. Such delegation "is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[99] Given the Court's strong rejection of the unrestricted authority granted to the President, which included the power to reject the proposed codes and prescribe his own codes sua sponte, this passage relating to the industrial actors might best be read as unnecessary dicta. But whichever reading one takes of *Schechter Poultry*, the Court's private nondelegation analysis clearly prefigures the strong line against private delegation taken a year later in *Carter Coal*.

2. Carter v. Carter Coal Co. — The Court in *Carter Coal* addressed the Bituminous Coal Conservation Act of 1935, which in rele-

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92 Horton, *supra* note 85, at 476–79 & n.241.

93 *See* 295 U.S. at 541–42. The other case in which the Supreme Court struck down a statute on public nondelegation grounds was *Panama Refining Co. v. Ryan*, 293 U.S. 388. *See id.* at 420–30.

94 *Schechter Poultry*, 295 U.S. at 521–22.

95 *Id.* at 522.

96 *See id.* at 538–39.

97 *Id.* at 542.

98 *See, e.g.*, Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 456–57 (1989); *see also* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (mentioning *Schechter Poultry* as a case dealing with delegation to private parties).

99 *Schechter Poultry*, 295 U.S. at 537.

vant part empowered majorities of miners and large coal producers in each of twenty-three coal districts across the country to prescribe wages, hours, and prices within their respective districts.[100] Although coal producers were not required by law to comply with the codes of competition issued within each district, producers who did not comply were subject to a substantial excise tax.[101] The Court concluded that, under the statutory scheme:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.[102]

Striking down the delegation of power as a violation of due process, the Court concluded that "in the very nature of things, one person may not be entrusted with the power to regulate the business of another."[103] The Court's ultimate holding that the statute violated due process, rather than exceeding Congress's power under Article I, Section 1, is potentially important since states are subject to the former requirement but not the latter.[104]

B. The Modern Federal Private Nondelegation Doctrine

Yet like the public nondelegation doctrine, the private nondelegation doctrine did not long occupy the attention of the Supreme Court — no case since *Carter Coal* has been decided by the Court on those grounds. Notwithstanding that absence, the principle against private delegations has by no means been abandoned by the federal judiciary. Members of the Court have gestured toward the doctrine on multiple occasions, and lower courts deciding cases after *Carter Coal* have fleshed out its requirements.

The doctrine's exact contours have been described as "notoriously elusive,"[105] but commentators have noted three factors that guide the inquiry into a private delegation's permissibility: first, "whether [the

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100 *See* 298 U.S. 238, 281–83, 310–11 (1936).

101 *See id.* at 280–81.

102 *Id.* at 311.

103 *Id.*

104 The Court's mention of the Fifth Amendment's Due Process Clause in its nondelegation conclusion is important, given that the public nondelegation doctrine is typically linked either to Article I, Section 1 of the Constitution or the separation of powers more generally. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 371–72 (1989); *see also* Manning, *supra* note 86, at 223–24. The private nondelegation doctrine could similarly be understood as vindicating either Article I, Section 1's limits or the separation of powers. *See, e.g.*, Froomkin, *supra* note 85, at 153 (noting the divergent potential underpinnings and contending that the doctrine is one of due process); Horton, *supra* note 85, at 473–74 (discussing Article I, Section 1 and due process).

105 Horton, *supra* note 85, at 473.

delegation] authorizes private actors to make law in a non-neutral, nontransparent way"; second, "whether affected parties are adequately represented in the private lawmaking process"; and third, "whether the state retains control over the private delegate."[106]

Though judicial opinions seldom identify the factors clearly, the most important appears to be the presence of government supervision.[107] The Second Circuit, for example, held in *General Electric Co. v. New York State Department of Labor*[108] that a New York statute setting wage and other rates for state contracts based on the prevailing rates could be invalidated as an unconstitutional private delegation for "forcing the state to rely exclusively on collective bargaining agreements" in calculating those rates[109] if the challenger could demonstrate that the statute did not provide "sufficient standards" to guide the parties to the bargaining process.[110] Similarly, the Third and Fourth Circuits have understood the Supreme Court's private nondelegation decisions to mean "that Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others."[111] State courts have applied the doctrine similarly.[112]

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[106] *Id.* at 474; *see also* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1059 & n.459 (2005) (describing post–*Carter Coal* cases and concluding that "court decisions, including by the Supreme Court, demonstrate that governmental oversight of private decisionmaking will generally insulate Congress's private delegations from constitutional challenge," *id.* at 1059).

[107] *See* Nagy, *supra* note 106, at 1059; *see also* Metzger, *supra* note 87, at 1439 ("[S]everal lower courts have suggested that private delegations may violate due process, at least absent government supervision . . . ."). Notably, though, the D.C. Circuit has recently rejected the argument that "the government's 'active oversight, participation, and assent'" in lawmaking by a private party is sufficient on its own, holding that such a scheme would "vitiate[] the principle that private parties must be limited to an advisory or subordinate role in the regulatory process." Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 673 (D.C. Cir. 2013) (quoting Brief for the Appellees at 19, *Ass'n of Am. R.Rs*, 721 F.3d 666 (No. 12-5204)).

[108] 936 F.2d 1448 (2d Cir. 1991).

[109] *Id.* at 1456.

[110] *Id.* at 1458.

[111] Pittston Co. v. United States, 368 F.3d 385, 395 (4th Cir. 2004); *see* United States v. Frame, 885 F.2d 1119, 1129 (3d Cir. 1989).

[112] The private nondelegation doctrine "flourishes . . . in the state courts" applying state constitutional provisions. Froomkin, *supra* note 85, at 150. State constitutions, of course, often differ in important respects from the federal constitution and thus may support results that do not necessarily follow from the federal constitution. *See, e.g.*, Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469–70 (Tex. 1997) ("While the United States Supreme Court has upheld many statutes involving some degree of private delegation, state courts have frequently invalidated such provisions." (citations omitted)); *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 585–86 (2000) (describing state-level private nondelegation analysis and noting that "[a] majority of state constitutions contain nondelegation doctrines, some very strict," *id.* at 585). Still, as some have argued, state courts' "treatment of the issue underlines the importance of the doctrine today," Froomkin, *supra* note 85, at 155, and commentators attempting to distill the requirements of the federal private nondelegation doctrine have looked in part to state court analysis, *see, e.g.*, *id.* at 156–59 (citing Texas Boll Weevil Eradication Founda-

Further illustrating the key role of government supervision, in *Sunshine Anthracite Coal Co. v. Adkins*,[113] the Supreme Court upheld a post–*Carter Coal* Bituminous Coal Act against a private nondelegation challenge. The new version of the Act allowed private coal boards to set rules governing the sale of coal, but because those rules were subject to "approv[al], disapprov[al], or modifi[cation]" by the National Bituminous Coal Commission,[114] the Court held that there was no impermissible delegation to the industry.[115] The distinction between, on one hand, cases like *Carter Coal* and *General Electric*[116] and, on the other hand, *Adkins*[117] is significant: By formally approving the product of private decisionmaking as law, at least in theory, "the state assumes responsibility for the private lawmaking and thereby reduces transparency concerns. In addition, governmental involvement or review can discourage delegates from attempting to wield power in a non-neutral fashion."[118] In this way, government supervision serves both to assuage concerns regarding the source of lawmaking (and enforcement) authority and to ensure transparency and neutrality in the process. Government participation, given the state action doctrine, also ensures that affected parties may assert constitutional rights and limitations on power.[119]

The remaining two factors — the need for neutrality and transparency in private lawmaking and the opportunity for affected parties to participate — ultimately serve the end of blocking self-interested lawmaking by private parties, albeit through different means.[120] A delegation to a relatively neutral party is more likely to achieve a substantively fair outcome than is a delegation to a self-interested party; likewise, an affected minority privy to the lawmaking process is given at least some means to fight for a fair result or cry foul. For example, in *Carter Coal*, wage and other standards were not only to be set by private agreement among interested parties, but also determined by the most powerful industry actors to the exclusion of other coal pro-

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tion, Inc. v. Lewellen, 952 S.W.2d 454 (Tex. 1997), several times in the course of describing the doctrine); Horton, *supra* note 85, at 474–79 (same).

113 310 U.S. 381 (1940).

114 *Id.* at 388.

115 *Id.* at 399–400.

116 *See also, e.g.*, Geo-Tech Reclamation Indus., Inc. v. Hamrick, 886 F.2d 662, 663–66 (4th Cir. 1989) (noting, but not deciding, issue of possible private nondelegation problem in state statute authorizing denial of landfill permit on the basis of public disapproval).

117 For additional cases upholding potentially problematic private delegations because of government approval requirements, see Metzger, *supra* note 87, at 1440 n.250 (collecting cases).

118 Horton, *supra* note 85, at 479.

119 *Cf.* Metzger, *supra* note 87, at 1445 ("Private delegates' exemption from constitutional constraints means that they can wield . . . government powers in ways that raise serious abuse of power concerns.").

120 *See* Horton, *supra* note 85, at 474–78.

ducers and laborers.[121] "The effect," the Court stated, "is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority . . . . To 'accept,' in these circumstances, is not to exercise a choice, but to surrender to force."[122] Government oversight ought to ameliorate such concerns, particularly as government action is itself subject to due process requirements, but a rampantly self-interested and exclusionary scheme is problematic even if the government maintains some pro forma role.[123]

Despite plausible assertions that the private nondelegation doctrine bars relatively little under the federal Constitution,[124] the Court has noted its continuing discomfort with private delegations in dicta in cases like *Larkin v. Grendel's Den, Inc.*[125] In *Larkin*, the Court specifically avoided deciding "whether, or upon what conditions," state power over liquor licensing could be delegated to private entities because the fact that one of the delegees was a religious entity violated the Establishment Clause.[126] In the course of its Establishment Clause analysis, the Court noted concerns that translate easily to delegations to other potentially self-interested parties: "The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond" religiously neutral, permissible ones.[127] The Court's concerns in these instances — potential for arbitrary action and self-dealing by private parties — are hardly unique to its Establishment Clause jurisprudence.[128] And the private nondelegation question avoided in *Larkin* has been addressed in many informative settings by lower federal courts, such as challenges to a law setting

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121 *See* 298 U.S. 238, 310–11 (1936).

122 *Id.* at 311.

123 *Cf., e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1935) (criticizing the National Industrial Recovery Act's scheme of empowering self-interested industrial groups to prescribe intra-industry codes of competition as "unknown to our law," *id.* at 537, despite formal requirement of presidential approval).

124 *See, e.g.*, David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 689–94 (1986) (describing breadth and variety of delegation to private parties); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 710–11 (1975) (noting the breadth of delegation, despite constitutional objections).

125 459 U.S. 116 (1982). *Board of Education v. Grumet*, 512 U.S. 687 (1994), is analogous. *See id.* at 690 (plurality opinion). In that Establishment Clause case, the Court noted that "a State may not delegate its civic authority to a group chosen according to a religious criterion." *Id.* at 698. Although generally a state could grant power over a school district to the voters in a particular jurisdiction, the Court held, the district lines here intentionally and impermissibly "g[ave] the sect exclusive control of the political subdivision." *Id.*

126 459 U.S. at 122.

127 *Id.* at 125.

128 For other, analogous instances of the Court or individual justices expressing concerns regarding private delegations, see Metzger, *supra* note 87, at 1440 n.249 (collecting cases).

prevailing wages based on private agreements,[129] a law allowing political parties to set filing fees for primary elections,[130] and a law permitting a private regulated entity to coauthor rules and force arbitration in cases of disagreement with the government.[131]

IV. THE CFAA AS PRIVATE DELEGATION

With the major pieces of the private nondelegation doctrine in place, it is worth recalling the most prominent concerns that have been raised against the CFAA. Commentators and courts have expressed discomfort with the CFAA's apparent vagueness, in large part due to the statute's failure to articulate clearly to citizens and law enforcement what activity is unlawful, at least under the broad interpretation of the statute.[132] As the *Drew* court noted in the context of website terms of service, "utilizing violations of the terms of service as the basis for [a crime under the CFAA] . . . makes the website owner — in essence — the party who ultimately defines the criminal conduct. This will lead to . . . vagueness problems."[133] However, as demonstrated in Part II, these arguments against the CFAA fail to adequately distinguish between vagueness in the *statute* and vagueness in the *private use agreement*.

These fears do, however, track closely the concerns raised by private delegations. Even if the CFAA were amended to provide clear notice that violating a private computer use agreement would expose one to criminal liability under the statute, courts and commentators would likely still abhor a prosecution for using a company computer for "g-chatting with friends, playing games, shopping[,] . . . watching sports highlights," and other "activities . . . routinely prohibited by many computer-use policies."[134] The same is true of website terms of service and other private use agreements. A statute that criminalizes violating these agreements — often adhesion contracts, seldom read, drafted to benefit only the party who controls access, and subject to modification[135] — essentially abdicates the legislative role to self-interested private parties. Certainly, private parties may arrange their

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129 Gen. Elec. Co. v. N.Y. State Dep't of Labor, 936 F.2d 1448, 1458–59 (2d Cir. 1991).

130 Biener v. Calio, 361 F.3d 206, 216–217 (3d Cir. 2004).

131 Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 668, 670–73 (D.C. Cir. 2013).

132 *See* United States v. Nosal, 676 F.3d 854, 860 (9th Cir. 2012); United States v. Drew, 259 F.R.D. 449, 464–66 (C.D. Cal. 2009); *see also, e.g.*, Kerr, *supra* note 14, at 1571–87.

133 *Drew*, 259 F.R.D. at 465.

134 *Nosal*, 676 F.3d at 860.

135 *See id.* (noting the "vagaries of private polices [sic] that are lengthy, opaque, subject to change and seldom read"); *Drew*, 259 F.R.D. at 465 ("[W]ebsite owners can establish terms where either the scope or the application of the provision are to be decided by them *ad hoc* and/or pursuant to undelineated standards. . . . Additionally, terms of service may allow the website owner to unilaterally amend and/or add to the terms with minimal notice to users.").

affairs and interactions with each other by way of contract. But offering up the criminal sanction to enforce an employer's policy that workplace computers be used only for business purposes or a dating website's prohibition of inaccurate or misleading information is as troubling, if not more so, than the "legislative delegation in its most obnoxious form" that the Court struck down in *Carter Coal*.[136]

The three private nondelegation considerations discussed in Part III illustrate the CFAA's constitutional trouble.[137] First and perhaps most important is the absence of government involvement.[138] The Supreme Court has allowed delegations when private parties were merely given the power to prevent a government regulation from going into effect[139] and when government approval of rules was required prior to their going into effect.[140] Similarly, lower courts upholding delegations have emphasized how private activities can be rendered merely advisory or ministerial when exercised under "pervasive surveillance and authority" of government officials.[141] No such government involvement exists in use agreements enforced under the CFAA. Congress has passed no law, and no agency of the federal government is empowered to issue rules, regarding what types of use restrictions qualify as governing authorization and thus fall under the CFAA's domain. And no review, approval, or collaborative lawmaking process restricts criminal application of the CFAA to only fair or even rational use restrictions. Rather, each and every private use agreement purporting to provide conditions of authorized access — assuming that it complies with the strictures of the relevant jurisdiction's contract laws[142] — is capable of controlling whether and within what scope one operates a computer within the boundaries of criminal law, at least under the broad reading of the CFAA. No other government approval is required, and none is provided for.

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136 298 U.S. 238, 311 (1936).

137 *See supra* notes 106–107 and accompanying text.

138 *See* Horton, *supra* note 85, at 479 ("Otherwise impermissible private delegations could be valid if the government either participated in, or retained meaningful control over, the private lawmaking.").

139 Currin v. Wallace, 306 U.S. 1, 15–16 (1939). In *Currin*, the statute at issue authorized the Secretary of Agriculture to designate regulated markets only if two-thirds of growers approved the designation. *Id.* at 6.

140 Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 387–88, 399 (1940). Though not questioning *Adkins*'s continuing validity, the D.C. Circuit recently held that *combining* the supervised private-participation arrangement in *Adkins* with a scheme like that approved in *Currin* resulted in an impermissible private delegation. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 671–73 (D.C. Cir. 2013).

141 United States v. Frame, 885 F.2d 1119, 1128–29 (3d Cir. 1989).

142 Indeed, an interesting question might arise regarding whether a contract of adhesion is enforceable against the nondrafting party if it subjects her to such broad criminal liability.

Even the government involvement inherent in a prosecutor's choosing whether to charge a violation does little to curb the private lawmaking problem. Unlike in *Adkins*, where each rule adopted by private parties was subject to "approv[al], disapprov[al], or modifi[cation]" by a government agency before taking effect,[143] computer users subject to private use agreements have little or no way of knowing ex ante whether prosecutors would decline to prosecute a case against them. And a prosecutor's decision not to prosecute a case does not nullify the use agreement as in *Adkins*, even to the limited extent of preventing criminal prosecution later based on the same conduct and rule.[144]

The remaining private nondelegation considerations — the likelihood that delegees will exercise power fairly and transparently and the extent to which the interests of affected parties are represented in the process[145] — do little to buttress the CFAA. To be sure, the parties to computer use agreements discussed above do not stand in the same relation to each other as, for instance, economic competitors. Most often the parties are service providers and customers or clients, or else employers and employees. The drafters of use agreements, even absent the CFAA, have the power to limit customers' and employees' use of their computers, and users in some sense consent by subjecting themselves to such agreements. Thus, on one hand, *Carter Coal*'s wariness of power delegated "to private persons whose interests may be and often are adverse to the interests of others in the same business"[146] is not directly applicable here.

On the other hand, however, cases under the CFAA are likely to involve parties with significant disparities in power. Even absent the CFAA, employers and website providers have powerful incentives to prohibit activities broadly — for example, no accessing another person's account, no posting false information about yourself or others, no visiting social media or gaming websites during work hours — and to monitor for or punish violations sparingly and selectively, only when controversy arises or an undesirable user is involved. And because few

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143 *Adkins*, 310 U.S. at 388.

144 Casting doubt on the slight check offered by executive involvement, at least one court has expressed skepticism regarding whether prosecutorial discretion actually operates as an effective check on the CFAA's broad scope of delegation. *See* United States v. Nosal, 676 F.3d 854, 862 (9th Cir. 2012). The suicide of Aaron Swartz, the subject of a high-profile prosecution under the CFAA, in January 2013 has led others to criticize federal prosecutors for using the CFAA in exactly the opposite manner by interpreting the statute broadly. *See, e.g.*, Orin Kerr & Lawrence Lessig, *Why Is Congress Trying to Make Our Internet Abuse Laws Worse, Not Better?*, THE ATLANTIC (Apr. 22, 2013, 8:00 AM), http://www.theatlantic.com/politics/archive/2013/04/why-is-congress-trying-to-make-our-internet-abuse-laws-worse-not-better/275142.

145 Horton, *supra* note 85, at 474.

146 298 U.S. 238, 311 (1936).

computer users or workers would select among social-networking websites or potential employers based on their computer use policies, little pressure exists to counteract those incentives.[147] The result is that agreements criminally enforceable under the CFAA are "lengthy, opaque, subject to change and seldom read,"[148] not to mention extremely broad[149] and often subject to unilateral modification.[150] While certainly not all terms of service or workplace computer use agreements are so one-sided, the CFAA makes no effort to distinguish among them. Instead, it delegates power to define criminal liability to anyone with a computer and a contract. This delegation, even if different in operation from *Carter Coal*, bears a stark resemblance to its effect of enforcing private rules written by the powerful — not by any legislature — without ensuring fairness or participation for many of those subject to the rules.[151]

Certainly, this is not a self-evident application of the private nondelegation doctrine. The private use agreements at issue in CFAA cases do not govern the affairs of entire industries as did the codes of conduct in *Carter Coal*.[152] But the scheme under the CFAA is more pernicious, not less: In *Carter Coal*, a handful of powerful coal producers and labor interests were empowered to govern the affairs of their competitors, backed by the force of government power. Under the CFAA, broadly interpreted, every entity with control over another's access to an Internet-connected computer or to the entity's website is empowered to impose terms the violation of which is a federal crime.[153] If there is a federal private nondelegation doctrine, the CFAA violates it.

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147 *Cf.* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1225–29 (1983) (discussing incentives against shopping by adherents).

148 *Nosal*, 676 F.3d at 860.

149 *See, e.g.*, *id.* ("Consider the typical corporate policy that computers can be used only for business purposes. What exactly is a 'nonbusiness purpose'?"); *id.* at 861 ("Or consider the numerous dating websites whose terms of use prohibit inaccurate or misleading information.").

150 *Id.* at 862 ("Not only are the terms of service vague and generally unknown . . . but website owners retain the right to change the terms at any time and without notice.").

151 *See Carter Coal*, 298 U.S. at 310–11.

152 *See id.* at 280–83.

153 *See Nosal*, 676 F.3d at 860–62. Interestingly, the federal trade secrets statute, 18 U.S.C. § 1832 (2012), similarly relies on the absence of private authorization as an element of one's criminal liability under the statute. That statute, however, appears substantially less problematic than the CFAA on private nondelegation grounds, since in that context the secret-holder is empowered only to attempt to make something a trade secret and to refuse to authorize the putative offender to take or remove the secret. He may not, for instance, unilaterally decide what is and is not a secret. The potential for self-dealing and lack of transparency is greatly diminished in comparison to the CFAA's breadth.

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Critics are right: the CFAA has a constitutional problem. But the problem is less one of vagueness than it is one of private delegation. Absent action by Congress to eliminate the problem, which seems unlikely,[154] courts have two primary options. First, they may strike the statute down as an unconstitutional private delegation. Second, they may construe the statute to avoid the private nondelegation question: given the number of courts that have found the "without authorization or exceed[ing] authorized access" standard to be ambiguous, courts might adopt one of the narrow interpretations that would criminalize hacking but not violations of use agreements or breach of agency-related duties.[155] Reading the CFAA's use of terms like "authorization" to reach hacking but not violation of private use restrictions might be a fraught interpretive task, but courts of appeals have already begun to cross this threshold using the rule of lenity.[156] The Supreme Court has likewise proved itself adept at saving the constitutionality of statutes by way of creative interpretation.[157] The avoidance approach would also mirror the Court's approach to policing the public nondelegation doctrine.[158]

Whichever approach courts ultimately choose, eliminating the CFAA's private delegation would not deprive employers, website owners, prosecutors, or others of the ability adequately to protect important interests.[159] Nor would it undermine Congress's power to fight hacking, theft, and other ills associated with technological advances by using objective measures of liability. Rather, it would merely preclude Congress from abdicating the difficult task of crafting fair and effective criminal law to private parties.

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154 *See* Kerr & Lessig, *supra* note 144 (describing laws introduced in Congress, some of which would narrow the CFAA's criminal penalties and others of which would strengthen them); Hernacki, *supra* note 26, at 1583 ("Despite the uncertainty surrounding the scope of unauthorized access, lawmakers and regulators continue to propose CFAA amendments to impose increasingly harsh penalties.").

155 *See, e.g.*, Hernacki, *supra* note 26, at 1554–61 (describing three potential approaches to interpreting the CFAA's language regarding authorized access). This Note addresses the CFAA's criminal, rather than civil, application, but courts' decisions in this context could have significant implications for the CFAA's civil scope. *See supra* note 17.

156 *See* WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199, 205–06 (4th Cir. 2012); *Nosal*, 676 F.3d at 863.

157 *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder (*NAMUDNO*), 129 S. Ct. 2504, 2513–17 (2009). The merits, demerits, and proper limits of modern constitutional avoidance in statutory interpretation are outside the scope of this Note. For commentary, see generally, for example, Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

158 *See supra* note 86.

159 *See, e.g.*, *Miller*, 687 F.3d at 202 (noting that civil plaintiff "alleg[ed] nine state-law causes of action" in addition to CFAA claim); *Nosal*, 676 F.3d at 856 (noting that the defendant in that case was indicted for trade-secret theft, mail fraud, and conspiracy in addition to CFAA violations).