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Bill Diedrich

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Chapter 254: Closing the Loopholes on Identity Theft, But at What Cost?

Bill Diedrich

Code Sections Affected

Penal Code §§ 530.5, 530.8 (amended).
SB 1254 (Alpert); 2002 STAT. Ch. 254.

*This ordeal has been my worst nightmares come true. . . .*¹

I. INTRODUCTION

Until recently, the concept of identity theft has been a subject of many Hollywood films,² but it has had little practical effect on society.³ These films generally depict the actual physical taking of another's identity.⁴ However, with the modernization of commercial transactions, identity theft threatens the general public through loss of their commercial identities.⁵ The theft of personal information allows a perpetrator to assume the commercial identity of the victim and to make financial transactions as that person. While not a victim of a Hollywood physical taking,⁶ victims of identity theft are often left stripped of their financial good name and reputation.⁷

Unlike larceny,⁸ identity theft affects both a victim's property and sense of privacy.⁹ While a victim of traditional theft can replace his possessions, a victim

1. Joe Zicaro, *Joe's Story: "The Burden is Entirely on the Victim to Prove Fraud Over and Over and Over Again,"* (May 2000), at <http://www.privacyrights.org/victim7/htm> [hereinafter *Joe's Story*] (copy on file with the *McGeorge Law Review*).

2. See Internet Movie Database, *Face Off*, at <http://www.imdb.com> (last visited Sept.16, 2002) [hereinafter *Face Off*] (copy on file with the *McGeorge Law Review*) (proving that, over the past century, there have been nearly one hundred films dealing with identity theft, ranging from *The Sundown Rider* in 1932, to *Face/Off* in 1997).

3. See Identity Theft Resource Center, *Facts and Statistics*, at http://www.idtheftcenter.org/html/facts_and_statistics.htm (updated July 2, 2002) [hereinafter *Fact Sheet*] (copy on file with the *McGeorge Law Review*) (indicating that "[i]n 1992, Transunion received [thirty-five thousand] calls about identity theft," and in 2001, that number jumped to one million).

4. See *Face Off*, *supra* note 2 (listing one such example as "Face Off," where the two characters literally switched faces).

5. *Fact Sheet*, *supra* note 3.

6. *Face Off*, *supra* note 2.

7. See *Joe's Story*, *supra* note 1 (indicating that a number of collection accounts arose in Joe's name as a victim of identity theft).

8. CAL. PENAL CODE § 484(a) (West 1999 & Supp. 2002).

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or

of identity theft is faced with a difficult process to restore his reputation and financial record.¹⁰ Studies indicate that a victim of identity theft may have to “spend [over 175] hours to clear [his] name[.]”¹¹ Compounding this difficulty, businesses and financial institutions can be slow in assisting the victim in this process, resulting in further hardship for the victim.¹²

Unfortunately, incidents of identity theft have risen astronomically over the past ten years.¹³ In 2001, between 700,000 and 1.1 million people were victims of identity theft.¹⁴ While this number is discouraging, the financial impact is staggering. One study indicates that each victim of identity theft costs the business community seventeen thousand dollars.¹⁵ Therefore, with one million victims, at a rate of seventeen thousand dollars per victim, the annual cost of identity theft to businesses was roughly seventeen billion dollars.¹⁶ Moreover, the average cost for a victim to clear his financial record of the fraudulent entries is one thousand dollars.¹⁷ Therefore, the annual cost to victims of identity theft is approximately one billion dollars.¹⁸

Because identity theft is clearly lucrative to the criminal, the crime has evolved into its own enterprise.¹⁹ Creative criminals have been able to steal identities using a wider range of personal identifying information, including school identification numbers and health insurance information.²⁰ Moreover, a disturbing “middle market” has emerged, where people collect lists of personal identification information and sell them to illegal users.²¹ Astoundingly, these middle marketers had not broken any laws, as mere possession of another’s

pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

Id.

9. See *Joe’s Story*, *supra* note 1 (describing the intrusion felt by an identity theft victim).

10. See *id.* (detailing the arduous process of clearing ones name after being victimized by identity theft).

11. *Fact Sheet*, *supra* note 3.

12. *Joe’s Story*, *supra* note 1.

13. *Fact Sheet*, *supra* note 3.

14. *Id.*

15. *Id.*

16. See *id.* This study utilized the same mathematical equation using 700,00 victims, and came up with 11.9 billion dollars. *Id.*

17. *Id.*

18. See *id.* (indicating a formula using the 700,000 number). However, using the one million number, one thousand dollars multiplied by one million victims is one billion dollars. *Id.*

19. *Personal Identity Theft on the Rise*, at <http://www.usatoday.com/life/cyber/tech/cti525.htm> (last visited Sept. 16, 2002) (copy on file with *McGeorge Law Review*) (indicating that “[a]cross the country, an army of information brokers and private investigators are said to be stealing personal financial data and selling it.”).

20. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 2 (Apr. 2, 2002) (indicating that SB 1254 proposes to add to the list of personal identification information that it is against the law to possess with intent to defraud).

21. See *id.* at 7 (describing the process of collecting identification information and selling lists).

identifying information was not a crime in California.²² Therefore, a criminal who possessed one credit card would be guilty of a felony,²³ while another who possessed the identification information of one hundred people would be guilty of nothing.²⁴

Chapter 254 expands the list of protected personal identification information, provides additional support for victims of identity fraud to clear their names, and makes the possession of identification with intent to defraud a crime.²⁵ While Chapter 254 will likely be very popular with identity theft victims, its newly imposed criminal penalties bring identity thieves under California's Three Strikes Law,²⁶ which raises a question as to whether such potentially severe penalties are warranted.²⁷

II. EXISTING LAW

Section 530.5(a) of the California Penal Code provides "it is an alternate felony/misdemeanor²⁸ for a person to willfully obtain the personal identifying information of another person and to use such information to obtain, or attempt to obtain, credit, goods, or services in the name of the other person without

22. *Id.*

23. *See id.* at 8 (stating that "a suspect found in possession of one credit card number, and [twenty-five] victim profiles can only be charged with a single felony count of possessing the account information.").

24. *Id.* at 7.

25. CAL. PENAL CODE §§ 530.5(a)-(b), 530.8(a) (West 1999) (amended by Chapter 254).

26. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 8-9 (Apr. 2, 2002).

27. *See id.* at 8-12 (raising the concern that a conviction under Chapter 254, if charged as a felony, would be a strike under California law).

28. *See* CAL. PENAL CODE § 17(b) (West 1999). Oddly enough, there is not statute that actually uses the term "alternate felony-misdemeanor," but section 17(b) provides a definition through inference,

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

- (1) After a judgment imposing a punishment other than imprisonment in the state prison.
- (2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.
- (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.
- (4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.
- (5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

Id.

consent.”²⁹ A violation of section 530.5(a) is punishable by imprisonment in county jail for not longer than one year and “a fine not to exceed one thousand dollars.”³⁰ The punishment can escalate to “imprisonment in the state prison [and] a fine not to exceed ten thousand dollars.”³¹ This escalation occurs when the defendant is charged with a felony.³² Moreover, section 530.5(b) defines “personal identifying information” as “the name, address, telephone number, driver’s license number, social security number, place of employment, employee identification number, mother’s maiden name, . . . [bank] account number, or credit card number of an individual person.”³³

The California Penal Code allows victims of identity theft whose perpetrators have been convicted of a crime in their name to clear their criminal record.³⁴ Additionally, the Penal Code provides that an identity theft victim can receive information from credit card companies, financial organizations, finance lenders providing consumer loans and utility companies about attempts by perpetrators’ to use the victim’s identity.³⁵ However, there was no provision in the Penal Code compelling companies to assist victims in clearing their names.³⁶ This act was left to the Civil and Financial Codes, which require a “supervised financial organization” to provide information within ten business days.³⁷ These sections do not require the same compliance from cell phone companies, a common identity theft business.³⁸

III. CHAPTER 254

Chapter 254 creates a new crime and provides that

[e]very person who, with the intent to defraud, acquires, transfers, or retains possession of the personal identifying information, as defined . . . of another person, is guilty of a public offense, and upon conviction therefor, shall be punished by imprisonment in a county jail not to exceed one year,

29. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 3 (June 11, 2002); CAL. PENAL CODE § 530.5(a) (West Supp. 2003).

30. CAL. PENAL CODE § 530.5(a).

31. *Id.*

32. *Id.*; see SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 3 (Apr. 2, 2002) (explaining the sentencing provisions under existing law).

33. CAL. PENAL CODE § 530.5(b).

34. *Id.* § 530.5(c).

35. *Id.* § 530.8 (West Supp. 2003).

36. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 6 (Apr. 2, 2002) (indicating that the provisions requiring companies to assist victims of identity theft are located in the Civil and Financial Codes).

37. *Id.* at 7.

38. See *id.* at 6-7 (indicating that SB 1254 adds wireless communications to the list of required businesses); see also *Joe’s Story*, *supra* note 1 (listing Sprint PCS as one of the fraudulent accounts opened).

or a fine not to exceed one thousand dollars . . . , or by both that imprisonment and fine.³⁹

Chapter 254 also expands section 530.5(a) of the Penal Code by adding the following items to the “personal identifying information” list:

[H]ealth insurance identification number, taxpayer identification number, school identification number, state or federal driver’s license or identification number, . . . checking account number, PIN (personal identification number) or password, alien registration number, government passport number, date of birth, unique biometric data including fingerprint, facial scan identifiers, voice print, or other unique physical representation, unique electronic data including identification number, address, or routing code, telecommunication identifying information, . . . or information contained in a birth or death certificate.⁴⁰

Chapter 254 provides additional support for victims of identity theft by requiring the business where a fraudulent account was filed to provide necessary name clearing information to the victim within ten business days.⁴¹ Moreover, Chapter 254 adds wireless communications providers to the list of “entities.”⁴²

IV. ANALYSIS

Chapter 254 effectively eliminates the loopholes in identity theft, by making the mere possession of identifying information a crime.⁴³ Most importantly, it criminalizes the “middle market,”⁴⁴ which will likely deter potential “entrepreneurs” from entering into the identification business. Moreover, by adding to the current list of personal identification items,⁴⁵ Chapter 254 adds further protection to the victim by expanding the list of protected information⁴⁶ and requiring additional assistance for consumers.⁴⁷ Also, Chapter 254 adds cellular phone companies to the list of companies that must comply with the law,⁴⁸ as identity thieves open cellular phone accounts with stolen information.⁴⁹

39. CAL. PENAL CODE § 530.5(d) (amended by Chapter 254).

40. *Id.* § 530.5(b) (amended by Chapter 254).

41. *See id.* § 530.8(a) (amended by Chapter 254) (stating that “[t]he person or entity with which the application was filed or the account was opened shall provide copies of all forms and information required by this section, without charge, within [ten] business days”).

42. *Id.*

43. *Id.* § 530.5(a) (amended by Chapter 254).

44. *Id.*

45. *Id.* § 530.5(b) (amended by Chapter 254).

46. *Id.*

47. *Id.* § 530.8 (amended by Chapter 254).

48. *Id.*

49. *Joe’s Story*, *supra* note 1.

However, one potential criticism of part of Chapter 254 is that its penalties may be too severe, given the non-violent nature of the offense.⁵⁰

By expanding the list of personal identifying information that falls under section 530.5(b) of the Penal Code, Chapter 254 expands a pre-existing alternate felony/misdemeanor statute.⁵¹ This indirectly expands the scope of California's Three Strikes Law.⁵² The law provides that any felon convicted of three dangerous or serious felonies must be sentenced to a term of no less than twenty-five years in prison.⁵³ In addition, the law provides that on strike two, the sentence shall equal twice its normal limits.⁵⁴ As part of Chapter 254 falls within this law, its classification limits judges from dismissing it as a "strike."⁵⁵ This can lead to very severe penalties for a non-violent crime.

Perhaps Chapter 254 and section 530.5(a) of the Penal Code should be classified as misdemeanors. Similar crimes like possession of burglary tools⁵⁶ and publishing access cards⁵⁷ are both classified as misdemeanors and thus do not fall within the Three Strikes Law.⁵⁸ However, this argument falls short in two regards.

First, as part of Chapter 254 and section 530.5(a) of the Penal Code are alternate felony/misdemeanors, the court has discretion over whether to punish the crime as a felony or a misdemeanor.⁵⁹ If the crime is punished as a misdemeanor, a conviction will not count as a "strike" under California law.⁶⁰ Additionally, even if a defendant is charged with and convicted of a felony, a judge has discretion to treat the offense as a misdemeanor so that the conviction does not fall within the Three Strikes laws.⁶¹ Therefore, there is discretion at two points in the criminal justice system to deem the crime a misdemeanor.⁶² Moreover, in both situations, as the decision is discretionary, it is likely that the more serious offenders will be punished as felons while others are punished as misdemeanors.⁶³

50. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 16-17 (Apr. 2, 2002).

51. CAL. PENAL CODE § 530.5(b) (enacted by Chapter 254).

52. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 8-9 (Apr. 2, 2002).

53. CAL. PENAL CODE § 667(e)(2)(A)(ii) (West 1999).

54. *Id.* § 667(e)(1).

55. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 8-9 (Apr. 2, 2002) (indicating that, as a wobbler (alternate felony/misdemeanor), Chapter 254 can only be dismissed as a strike if the defendant's record indicates that they should be treated as if they should not fall under the Three Strikes law).

56. CAL. PENAL CODE § 466 (West 1999).

57. *Id.* § 484(j) (West 1999).

58. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 10 (Apr. 2, 2002).

59. *Id.* at 8-9.

60. *Id.* at 9. (stating that if a prosecutor chooses to charge the crime as a felony, the judge has discretion to deem the offense a misdemeanor). If he does not exercise this discretion, a conviction counts as a "strike." *Id.*

61. *People v. Superior Court (Alvarez)*, 14 Cal. 4th 968, 975, 60 Cal. Rptr. 2d 93, 96-97 (1997).

62. *Id.*

63. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 9 (Apr. 2, 2002)

Second, possession of burglary tools⁶⁴ and publishing access cards⁶⁵ can each be classified as a property crime.⁶⁶ In these instances, the victim suffers a financial loss and certainly some emotional loss.⁶⁷ However, with identity theft, the loss is likely much more severe.⁶⁸ The recovery process is more expensive, takes longer, and is often very difficult to go through.⁶⁹ Moreover, with identity theft, there is an additional invasion of privacy that does not occur in other property crimes.⁷⁰ Privacy is a value so treasured in American society that it is protected in the Constitution.⁷¹ Moreover, while a deprivation of privacy is considered a serious intrusion, the effects of such an offense are nearly impossible to quantify.⁷² Therefore, while a property crime can be deemed a felony or a misdemeanor based on the amount taken,⁷³ identity theft robs victims of a much more important right that is nearly immeasurable. Thus, possession of personal identification items with intent to defraud is likely a much graver offense than can be measured by the dollar amount taken, and therefore should be punished as a felony. Given its immeasurable damaging effects, possession of personal identification should be treated as a crime like extortion,⁷⁴ which is a felony.⁷⁵

V. CONCLUSION

As American society grows more technologically savvy, American criminals will likely become more technologically savvy. It is the difficult job of our legislative system to keep up with dynamic criminals by passing legislation to criminalize acts that, while vile and despicable, fall short of criminal under

(indicating that a judge's discretion is open as long as his decision is not "arbitrary and contrary to substantial justice").

64. CAL. PENAL CODE § 466 (West 1999).

65. *Id.* § 484(j) (West 1999).

66. Crimes against property are defined as: "A category of criminal offenses in which the perpetrator seeks to derive unlawful benefit from—or do damage to—another's property without the use or threat of force." BLACK'S LAW DICTIONARY 379 (7th ed. 1999).

67. *Joe's Story*, *supra* note 1.

68. *Id.*

69. *See supra* Part I (describing the process necessary to clear one's name in the event of an identity theft).

70. *Joe's Story*, *supra* note 1.

71. *See* U.S. CONST., amend. IV:

The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While the Fourth Amendment does not specifically refer to privacy, it has been interpreted to refer to a right to privacy. *Id. See generally* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J. concurring) (referring to a reasonable expectation of privacy under the Fourth Amendment).

72. *Id.*

73. CAL. PENAL CODE § 484(a) (West 1999).

74. *Id.* § 518 (West 1999).

75. *Id.*

antediluvian statutes.⁷⁶ Chapter 254 is one such piece of legislation.⁷⁷ It effectively closes the loopholes in identity theft laws by expanding the protected information list⁷⁸ and creating a new criminal offense for the possession of identifying information.⁷⁹ While the penultimate concern for legislators is to pass laws that are effective and not too severe, their ultimate concern is to protect society's interest.⁸⁰ While part of Chapter 254 may prove extremely severe for an identity thief,⁸¹ the structure of the California penal system calls for the court's discretion⁸² to ensure that a result that does "not . . . impede or defeat the ends of substantial justice."⁸³

76. See *supra* Part IV (describing how Chapter 254 closes a loophole that allowed holders of identity information to escape prosecution).

77. *Id.*

78. *Supra* note 40 and accompanying text.

79. See *supra* Part III (describing the criminal offense).

80. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 7-8 (Apr. 2, 2002) (describing the need for Chapter 254).

81. See *supra* Part IV (describing how a violation of Chapter 254 can count as a "strike" on the criminal's record).

82. See *id.* (indicating that the prosecutor has discretion in determining whether to charge a violation of Chapter 254 as a felony or as a misdemeanor).

83. See *Alvarez*, 14 Cal. 4th at 977, 60 Cal. Rptr. 2d at 98 (quoting *People v. Warner*, 20 Cal. 3d 678, 683 (1978)).