



1-1-2001

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Lance M. Davis

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## Recommended Citation

Lance M. Davis, *Crimes / With or Without Authorization, It's Still Identity Theft*, 33 MCGEORGE L. REV. 231 (2002).  
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# With or Without Authorization, It's Still Identity Theft

Lance M. Davis

## Code Section Affected

Penal Code § 530.5 (amended).

AB 245 (Wyland); 2001 STAT. Ch. 478.

## I. INTRODUCTION

Becoming Tiger Woods was simple. All Anthony Lemar Taylor needed was Woods' birth name, Eldrick T. Woods; social security number; and date of birth.<sup>1</sup> Armed with this personal information, Taylor filled out a Department of Motor Vehicles application.<sup>2</sup> He later received a driver's license bearing the name of the famous golfer but displaying a photograph of Taylor.<sup>3</sup> With his new license, Taylor secured lines of credit, allowing him to purchase a motorcycle, a seventy-inch television, and some stereos under Woods' name.<sup>4</sup> Before he was caught, Taylor acquired nearly seventeen thousand dollars in merchandise and made a down payment on a Lexus.<sup>5</sup>

Celebrities, like Tiger Woods, are not the only victims of identity theft. Nationwide, approximately 500,000 identity thefts occur each year.<sup>6</sup> California ranks fourth in the number of reported identity theft crimes.<sup>7</sup> Only the District of Columbia, Nevada, and Arizona have more incidents of this crime.<sup>8</sup> Trans Union, one of the three major credit-reporting agencies, reports that complaints of identity theft have increased forty percent in the past two years.<sup>9</sup> Although computer hacking and the Internet are the tools most commonly associated with the crime, thieves often get personal information from something as simple as an

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1. See *Woods' Identity Thief Gets Maximum Sentence*, VENTURA COUNTY STAR, Apr. 29, 2001, at C02 [hereinafter *Woods' Identity Thief*] (recounting the events which led to Taylor receiving the maximum penalty under California's three-strikes law—two hundred years to life in prison).

2. Kimberly Kindy, *DMV Can't Catch a Tiger By His ID An Imposter Allegedly Used The Golfer's Name To Acquire A Driver's License From The Agency*, ORANGE COUNTY REG., Dec. 20, 2000, at A1.

3. *Id.*

4. *Id.*

5. *Id.*

6. See Suzanne Choney, *Ex-Victim a Champion of Identity Theft Rights*, SAN DIEGO UNION-TRIB., Jan. 9, 2001, at 2 (reporting the story of Linda Foley who was victimized by an identity thief and now heads the Identity Theft Resource Center, which is affiliated with San Diego's Privacy Rights Clearinghouse).

7. *Id.*

8. See Carrie Kirby, *Stolen Identity Poses Rising Crime Threat; Identity-Theft Victims Struggle Against Rising Tide of Abuse*, S.F. CHRON., Feb. 11, 2001, at B1 (discussing the difficulties faced by identity theft victims and the fact that the crime has gained prominence in California).

9. *Id.*

apartment rental application.<sup>10</sup> Once a thief obtains the necessary information, the average victim may spend 175 hours, over the course of two years, trying to repair the damage done to his or her credit.<sup>11</sup>

California addressed this growing problem by creating the crime of identity theft in 1997.<sup>12</sup> Chapter 478 eliminates the “authorization” element of this crime with the purpose of expanding the application of the identity theft statute.<sup>13</sup> The new law allows for prosecution of those who gain another’s personal identifying information with or without the victim’s authorization.<sup>14</sup>

Whether or not the “authorization” element of identity theft burdens prosecution remains unclear.<sup>15</sup> Also, altering the identity theft code section may not be necessary because several other code sections still apply to persons who use another’s identification.<sup>16</sup> However, by eliminating the “authorization” element of the crime the Legislature makes conviction of identity theft easier and clarifies any confusion created over the issue of authorization.<sup>17</sup>

## II. LEGAL BACKGROUND

In 1997, California became one of the first states to create the crime of identity theft.<sup>18</sup> Section 530.5 of the Penal Code originally provided that anyone who willfully obtains another person’s personal identifying information would be found guilty of a public offense if it was done so without that person’s

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10. See *id.* (reporting that one victim believes a perpetrator obtained his personal identifying information from an apartment rental application); see also Letter from Kaye Caldwell, California Policy Director, The Internet Alliance, to Mark Wyland, Assemblymember (Mar. 16, 2001) (on file with the *McGeorge Law Review*) (noting that a study conducted by California Public Interest Research Group (CAL PIRG) and the Privacy Rights Clearinghouse found that only three percent of identity theft victims surveyed believed the thief obtained the information from the Internet).

11. Kirby, *supra* note 6, at B1; see Maria Ramirez-Palafox, Legislative Review Note, *Identity Theft On the Rise: Will the Real John Doe Please Step Forward?*, 29 MCGEORGE L. REV. 483, 484 (1998) (describing the time and effort required to remedy identity theft).

12. CAL. PENAL CODE § 530.5 (West 1999 & Supp. 2001); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 156, at 6 (July 15, 1997).

13. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 2 (Apr. 24, 2001) (expressing the goal behind creating AB 234).

14. *Id.*

15. See *id.* at 1-2 (stating the author’s rationale for AB 245 without mention of any existing problems with prosecution of identity theft under existing law).

16. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 5 (July 10, 2001) (examining the necessity of the new amendment in light of other code sections).

17. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF 245, at 2 (Apr. 17, 2001) (stating the goal of AB 245: to broaden the reach of the identity theft law and increase its effectiveness in reducing the incidents of the crime).

18. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 2 (Apr. 24, 2001); see Jerilyn Stanley, Legislative Review Note, *Identity Theft: Supporting Victims in Recovering from the Crime of the Information Age*, 32 MCGEORGE L. REV. 566, 567 (2001) (explaining that Arizona first enacted such legislation in 1996 and California followed suit the following year).

authorization and that information was used unlawfully.<sup>19</sup> One purpose for the 1997 law was to clearly acknowledge that identity theft victimizes the individual impersonated rather than the businesses defrauded.<sup>20</sup>

Section 530.5 defines “personal identifying information” as including any of the following: “name, address, telephone number, driver’s license number, social security number, place of employment, employee identification number, mother’s maiden name, demand deposit account number, savings account number, or credit card number.”<sup>21</sup> Section 530.5 also mandates that court records reflect the innocence of an identity theft victim when a thief commits a crime in the victim’s name.<sup>22</sup>

Penalties for identity theft range from a fine of less than one thousand dollars to imprisonment.<sup>23</sup> The statute’s latitude in sentencing classifies the crime as a “wobbler.”<sup>24</sup> The sentencing judge retains the discretion to impose either a felony sentence, such as time in state prison, or a misdemeanor sentence, including time in county jail or a fine.<sup>25</sup>

Since 1997, California has enacted a number of laws to address the problem of identity theft.<sup>26</sup> Section 530.6 of the Penal Code creates a judicial process by which the victims of identity theft can clear their names and avoid prosecution for the acts of the thief.<sup>27</sup> Penal Code Section 530.7 establishes a database of victims of identity theft to assist them in clearing their names.<sup>28</sup>

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19. CAL. PENAL CODE § 530.5 (West 1999 & Supp. 2001).

20. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 156, at 4 (July 3, 1997) (quoting the author as asserting that, under existing law, the store is considered victimized while the consumer whose identity has been stolen is not considered the victim). *But see* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 8 (July 10, 2001) (explaining that section 529 of the Penal Code (false personation) describes the victim of the crime as the one whose identification was taken rather than depicting the retail store or credit card company as victims).

21. CAL. PENAL CODE § 530.5(b) (West Supp. 2001).

22. *Id.* at § 530.5(c).

23. *Id.* at § 530.5(a); see ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1374, at 1 (Apr. 21, 1998) (stating that, in 1998, the Legislature increased the penalty for identification theft from a misdemeanor to an alternate misdemeanor-felony).

24. See 22A CAL. JUR. 3D., *Criminal Law: Post-Trial Proceedings* § 251 (2000) (defining a “wobbler” as a crime that, in the court’s discretion, “may be sentenced alternately as a felony or as a misdemeanor”).

25. See 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment* § 367 (3d ed. 2000 & Supp. 2001) (discussing California’s three strikes law and the discretion granted to sentencing judges when dealing with misdemeanor-felony offenses).

26. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 3 (Apr. 24, 2001).

27. See CAL. PENAL CODE § 530.6 (West Supp. 2001) (stating that a person who believes that he has been victimized by a violator of section 530.5 can initiate an investigation by law enforcement, receive a police report, and petition the court for an expedited judicial determination of his factual innocence of any misdeeds done in his name by the identity thief); see also Ramirez-Palafox, *supra* note 11, at 574-76 (evaluating the strengths and weakness of section 530.6).

28. CAL. PENAL CODE § 530.7 (West Supp. 2001).

## III. CHAPTER 478

With Chapter 478, the Legislature attempts to close a perceived loophole in the identity theft statute.<sup>29</sup> The original wording of the statute required that the thief obtain personal identifying information “without the authorization” of the victim.<sup>30</sup> The original statute failed to take into account a situation where a victim had a legitimate reason to volunteer personal identifying information.<sup>31</sup> Chapter 478 remedies the problem by removing the words “without the authorization of that person.”<sup>32</sup> The deletion of this element of the crime clarifies the existing law so that anyone who uses another person’s identifying information in an unlawful manner violates California’s identity theft law, making the victim’s authorization irrelevant.<sup>33</sup>

## IV. ANALYSIS OF THE NEW LAW

A. *Authorized or Unauthorized Use*

In order to violate California’s existing identity theft law, the thief must possess another’s personal identifying information without authorization.<sup>34</sup> Chapter 478 attempts to broaden the scope of the law to include those who misuse someone else’s personal identifying information even if they obtain it with that person’s authorization.<sup>35</sup>

A receptionist at a doctor’s office, for example, could request and receive information from one of the doctor’s patients and use it to obtain credit cards, open lines of credit, or open checking accounts in that patient’s name.<sup>36</sup> The author of Chapter 478 states that, because the receptionist would have gathered the information with the patient’s authorization, there is no violation of the existing identity theft law.<sup>37</sup> Arguably, the authorization is a concession to receive medical treatment, not a consent to abuse by the receptionist.<sup>38</sup> The patient gives

29. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 2 (Apr. 24, 2001) (stating the rationale behind striking the requirement that information be obtained without the authorization of the victim).

30. CAL. PENAL CODE § 530.5(a) (West 1999 & Supp. 2001).

31. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 3 (Apr. 24, 2001) (discussing the problem with the “authority” element and the necessity of eliminating it).

32. CAL. PENAL CODE § 530.5(a) (amended by Chapter 478).

33. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 9 (July 10, 2001) (reporting the author’s statement as to the need for AB 245).

34. CAL. PENAL CODE § 530.5(a).

35. *Id.* (amended by Chapter 478).

36. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 3 (Apr. 24, 2001).

37. See *id.* (discussing how a person could obtain identifying information of another with that person’s authorization without violating the existing identity theft law).

38. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 9 (July 10,

the information to be used for a specific purpose and any deviation from that purpose should be described as “unauthorized.”<sup>39</sup> A determination of this matter depends on how narrowly a court defines the “authorization” element.<sup>40</sup> The elimination of the “authorization” element avoids confusion over whether actual authority is or is not granted, thus making prosecution of the crime easier.<sup>41</sup>

### B. Proving the Elements

A criminal prosecutor must prove all of the elements of a crime in order to obtain a successful conviction.<sup>42</sup> The author of Chapter 478 makes no claim that any identity theft defendants have ever been acquitted because the prosecution failed to show a lack of authorization.<sup>43</sup> However, by eliminating this element of the identity theft law, Chapter 478 essentially frees the prosecutor of the burden of proving a lack of authorization, enabling her to convict an accused identity thief more easily.<sup>44</sup> Chapter 478 “broadens the category of persons who are guilty of identity theft,” possibly leading to increased convictions of the perpetrators of this crime.<sup>45</sup>

### C. Overlapping Statutes

If an identity theft prosecution fails because the “authority” element is not proven, the Penal Code is still replete with other statutes under which the thief could be charged.<sup>46</sup> A person commits the felony-misdemeanor offense of “false personation” when he “does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture or penalty” and

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2001) (stating that although the receptionist in the above scenario has the apparent consent of the victim, the victim did not give true consent for the receptionist’s actions).

39. *Id.*

40. *See id.* (discussing actions that would constitute authorization).

41. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 3 (Apr. 24, 2001) (explaining how a person could previously avoid prosecution by receiving the information under some type of authorization).

42. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 1.8(b) (3d ed. 2000) (discussing the burden of proof in a criminal prosecution which requires that all elements must be proven beyond a reasonable doubt); *see also In re Winship*, 397 U.S. 358, 364 (1970) (holding that the United States Constitution’s “Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

43. *See generally* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 4 (July 10, 2001) (failing to mention that the bill is necessary to prevent lost convictions).

44. *See* LAFAVE, *supra* note 42, at § 1.8(b) (explaining that the burden is on the prosecution to prove the elements of a crime).

45. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 2 (Apr. 24, 2001) (expressing the goals embodied in AB 245).

46. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 5 (July 10, 2001) (discussing other criminal laws that may apply when a person takes and uses another’s identification).

“whereby any benefit might accrue” to the perpetrator.<sup>47</sup> Punishment for the crime includes a fine not to exceed ten thousand dollars, imprisonment in a county jail, or incarceration in state prison for as long as three years.<sup>48</sup> The California Supreme Court has described this statute as having broad application.<sup>49</sup> Describing the reach of section 529 of the California Penal Code, the court stated “the Legislature sought to deter and to punish all acts by an impersonator that might result in a liability or a benefit, whether or not such a consequence was intended or even foreseen.”<sup>50</sup>

The Penal Code also includes a provision to charge an individual who obtains another person’s identifying information and uses the information to purchase goods or services by false pretense.<sup>51</sup> Such a crime can be prosecuted as either a misdemeanor or a felony, depending on the amount of goods or services purchased unlawfully.<sup>52</sup>

Furthermore, a person who uses another’s automatic teller machine (ATM) card or credit card and, without the owner’s permission, retrieves cash or makes purchases can be charged with the unauthorized use of an access card.<sup>53</sup> This crime also carries a felony-misdemeanor sentencing scheme.<sup>54</sup>

#### D. Too Many Theft Statutes?

The Legislature has taken aim at a number of specific, narrowly defined forms of theft by enacting many new criminal laws.<sup>55</sup> The California Senate Subcommittee on Public Safety is concerned that too many theft statutes may dilute the effectiveness of the justice system.<sup>56</sup> Prosecutors may be confused when deciding under which code section to prosecute when a single criminal act

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47. CAL. PENAL CODE § 529 (West 1999).

48. *Id.*

49. *See* *People v. Rathert*, 24 Cal. 4th 200, 205-06, 99 Cal. Rptr. 2d 779, 783 (2000) (holding that section 529 encompasses any act that might result in liability and that it does not require a specific intent to harm the impersonated person).

50. *Rathert*, 24 Cal. 4th at 206, 99 Cal. Rptr. 2d at 783.

51. *See* CAL. PENAL CODE § 532 (West 1999 & Supp. 2001) (providing that, if someone defrauds another by using false pretenses to obtain credit, he is guilty of larceny to the extent of the money or property he obtained).

52. *Id.*

53. *See id.* § 484g (West 1999) (providing that anyone who “obtains money, goods, services, or anything else of value by representing, without the consent of the cardholder, that he or she is the holder of an access card and the card has not in fact been issued, is guilty of theft”).

54. *See id.* (stating that the crime is considered grand theft if the value stolen exceeds four hundred dollars in any consecutive six-month period).

55. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 13 (July 10, 2001) (explaining that the recent adoption of numerous types of theft bills may cause confusion).

56. *See id.* (discussing the implications of expanding new theft statutes to match evolving technological advancements and the problems of near identical acts being described in multiple ways in the code, causing confusion for the “average person to understand the code, for prosecutors to charge crimes, for defense attorneys to defend[,] and for judges to impose sentence.”).

meets the elements of “forgery, larceny by false pretenses, false personation, identity theft, use of an access card without consent, and computer crime.”<sup>57</sup> Since there are numerous code sections that address specific types of theft, a defendant could attack a general theft conviction on the grounds that the prosecutor should have charged him under a more specific, applicable statute.<sup>58</sup>

## V. CONCLUSION

No clear indication exists that the identity theft element requiring a showing of a lack of authorization has actually been a stumbling block to prosecution of identity theft or that identity thieves have escaped conviction because they received the information *with* their victim’s permission.<sup>59</sup> However, the Legislature enacted section 530.5 of the Penal Code, the original identity theft statute, only four years ago, and its full impact is still to be determined.<sup>60</sup> From the year 1999 through 2000, the State incarcerated seven people for violations of the identity theft law.<sup>61</sup> That number might seem low for a crime that has reached epidemic proportions in California,<sup>62</sup> but since identity theft is punishable as a misdemeanor or as a felony, many of those convicted may not be sentenced to prison.<sup>63</sup> The total number of convictions may, in fact, be much higher than the number of incarcerations.

Despite the criticisms of expanding (or even having) a specific statute for identity theft, the growing frequency of this type of offense, the ease with which it can be committed, and the great potential gain for the criminal<sup>64</sup> make this crime one deserving of the Legislature’s special attention.<sup>65</sup> Chapter 478 has the potential to ensnare more perpetrators of this crime and prevent the continued

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57. *Id.*

58. *See id.* (discussing the possible use of such a defense by an accused identity thief without providing any authority to justify such a concern).

59. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 8-9 (July 10, 2001) (questioning the elimination of the authorization element).

60. *See id.* at 6-7 (explaining the history of section 530.5).

61. *See* SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 245, at 1 (Aug. 20, 2001) (estimating the fiscal effect if the broader statutory language leads to seven more people receiving the felony punishment for the crime).

62. *See* Kirby, *supra* note 2, at B1 (reporting that California ranks fourth in the nation as to the number reported identity thefts).

63. *See supra* Part II (discussing the sentencing scheme of section 530.5).

64. *See supra* Part I (discussing the increasing number of incidents of identity theft, the simplicity of its commission and its profitability for criminals); Letter from David C. Knight, Executive Director, California Financial Services Association, to Carl Washington, Chair, Assembly Public Safety Committee (Mar. 14, 2001) (on file with the *McGeorge Law Review*) (stating that identity theft is “escalating at a very rapid pace” because the crime provides a “high return and low risk for serious punishment.”).

65. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 2 (Apr. 24, 2001) (stating the author’s observation that “identity theft is a nearly invisible, ‘new generation’ crime that has dramatically increased over the last decade”).



increase of abuse.<sup>66</sup> By eliminating the element of authorization, Chapter 478 broadens the language of the existing identity theft statute and reduces any possible ambiguity over who is a perpetrator of this insidious offense.<sup>67</sup>

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66. See Letter from James C. Gross, Nielsen, Merksamer, Parrinello, Mueller & Naylor, L.L.P., to Carl Washington, Chair, Assembly Public Safety Committee (Apr. 16, 2001) (on file with the *McGeorge Law Review*) (stating that the law will help to decrease the incidents of this crime).

67. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 245, at 4 (July 10, 2001) (stating that the increased incidence of this crime is fueled by the highly technological nature of our society, and the language of the law should encompass those who come by another's personal information with that person's authorization).