Olson DeCourcey Alleyne

CRIMINALISING IDENTITY THEFT: A COMPARATIVE STUDY OF BARBADOS, ENGLAND AND AUSTRALIA

ABSTRACT

This thesis examines whether identity theft is an offence in Barbados, England or Australia and, more fundamentally, considers if the criminalisation of the misconduct is justified by reference to the normative theories of harm and morality.

The study is a doctrinal and theoretical one that draws on primary and secondary legal materials. Comparative examination of laws of relevance to identity-related misconduct are not new but this is the first involving these three countries, each of which presents a unique feature. More importantly, the thesis contributes to the literature on the special part of the criminal law by commencing detailed normative inquiry into the criminalisation of identity theft.

Adopting a conceptualisation based on its folk origins, identity theft is taken to mean the assumption of another’s identity through the use of that person’s personal identification information. The study focuses on the harm which may arise from that core act as distinct from that which may be consequential on conduct facilitated by, or associated with, it.

An examination of relevant offences in the countries of choice leads to the conclusion that the misconduct is not a criminal offence. Additionally, the study rejects the practice of sentencing courts in treating identity theft as an aggravating factor as an inadequate denunciation of the misconduct and a breach of the principle of fair labelling.

This necessitates the normative enquiry which includes considerations of objectification, ethically grey conduct, human dignity, consent and remote harm. With respect to the latter, the thesis offers a conceptualisation of the role of identity theft in facilitating wrongdoing. The study establishes a prima facie case for criminalisation based on morality, the risk of harm to direct victims and harm to the societal interest in identification.
Acknowledgements

My foremost gratitude I give to my mother, Miss Marjorie Alleyne, to whom I dedicate this study, posthumously. I thank her for single-handedly nurturing me and facilitating my intellectual growth.

I acknowledge my brother and friend the Honourable Mr. Justice William Chandler of the Barbados Supreme Court who enjoined me against failing to complete and former colleagues at the bar, Mr. Calvin Alleyne, Dr. Erskine Hinds, Dr. Adrian Cummings and Dr. Carol-Ann Smith who insisted that I comply with that order. I am deeply indebted to Ms Rene Butcher whose assistance and support made that compliance possible.

I give thanks also to Ms. Jane Sowler of the University of Leicester’s school of law who had ready answers to every question and my colleagues at the University of Leicester who made me believe that my research was of some interest.

I reserve my profound gratitude and deepest appreciation for my supervisors Professors Chris Clarkson and Sally Kyd Cunningham. For the short time that I benefitted from Professor Clarkson’s supervision, he convinced me of the viability of this project. Professor Cunningham’s patience, encouragement and expressions of belief in my capacity to complete the exercise inspired me beyond measure. I thank her sincerely for her careful supervision, insightful comments and faithful dedication to duty.
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<td>ACPR</td>
<td>Australasian Centre for Policing Research</td>
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<td>Australian Institute of Criminology</td>
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<td>AJ</td>
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<td>Boston University Law Review</td>
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<td>Court of Appeal</td>
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<td>IDB</td>
<td>Inter-American Development Bank</td>
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<td>IEEE</td>
<td>Institute of Electrical and Electronic Engineers</td>
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<td>IJLIT</td>
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<td>Commerce</td>
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<td>PII</td>
<td>Personal Identification Information</td>
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1.1 Background to Study

This thesis is about the criminalisation of identity theft, conceptualised narrowly as the assumption of a false identity by means of personal identification information (PII). The term PII can be taken to mean personal information by which an individual can be identified either by itself or combined with other information.

Two fundamental distinctions must be made between this narrow concept of identity theft and wider definitions that exist. The first is that it excludes from its scope the means by which PII may be acquired or the purposes for which identity theft may be employed. The second relates to consequences and flows logically from the exclusion of any reference to purpose. The concern of this thesis is the wrongfulness of identity theft and the direct harm done by that act to individuals whose identities are assumed - direct victims - and to the wider society. It draws a demarcation line around these aspects, separating them from the harm or wrongfulness of other acts that might be committed, or concealed, by means of the identity theft.

The principal concern of this thesis is whether identity theft is penalised under existing rules of criminal law and, if it is not, whether a prima facie case for criminalisation can be established by reference to the two most prominent normative standards for criminalisation known to western scholars: harm and legal moralism.

The genesis of the thesis lies in an intellect stirred by the emotive cries of direct victims who considered the law to be unresponsive to the negative experiences they endured from identity theft victimisation. Chapter two tells the stories of a few such victims as part of the process of tracing the origins of the term ‘identity theft’. However, presently, two stories serve to put into sharp focus the type of harm suffered by some direct victims and demonstrate the platform from which emotion reached out to intellect to plant the seed for this study. The stories also serve to highlight the harm-related distinction identified above and pursued more rigorously in chapter five.
The first story relates to one Mohammed Amir, 34. An alleged victim of identity theft, he was reported as having spent hundreds of pounds in the civil court. He spoke of his anguish. He was reported as planning to ‘change his name by deed poll and move from his home… in a desperate attempt to end his nightmare and protect his wife and five children’. He was said to have received visits from bailiffs and letters on a weekly basis demanding payment for services not engaged by him and to have expressed his personal distress by stating, ‘I work hard to support my family and we are being put through a living hell. I can’t sleep for wondering if the bailiffs will come. The police said in the law’s eyes, I am not the victim. But I risk losing everything.’

The statement attributed by Amir to the police suggests that no law exists in England which has as its principal concern the act of identity theft by which persons, like Amir, are victimised.

The second story is that of Kofi Sekyere, carried in the BBC News UK Online Magazine on 18th July 2007 under the caption, ‘ID theft left me in Slovenian prison.’ Sekyere’s passport had apparently been stolen from his apartment some years prior and someone using that passport was wanted for fraud. Sekyere’s name appeared on an international warrant issued by police in Germany where the defrauded company resided. Sekyere was arrested shortly after entering Slovenia on holiday and charged with defrauding the company of 450,000 euros. He was detained in prison for two nights. With respect to that experience, he is reported as saying that he ‘felt as if [he] was being stripped of [his] dignity.’ In the aftermath of the event, he summed up its effect on him in this way:

...psychologically it’s hit me hard and will always be with me. My name has been removed from the international “wanted persons” files but I still worry about travelling.

I will always be fearful that something else will happen – who knows what else could have been done by someone using my name.

---


These stories are but an infinitesimal percentage of the cases of identity theft complained of by direct victims and affected third parties since the end of the last millennium and no reference to them is required to create an awareness of identity theft. That term has become a buzzword over the past three decades with several governments, institutions and individuals committing legal, financial and intellectual resources to find measures to combat it.

However, despite the hype of the past three decades, identity theft and identity-related misconduct is not a new phenomenon. Caslon Analytics\(^3\) traces the practice back to biblical times.\(^4\) The antiquity of this type of misconduct has also been acknowledged judicially. In \(R \text{ v Harris}\), Ball J made the following statement:

> Both counsel commented about issues concerning identity theft, as though it were something … which has become a recent problem. I am an amateur historian … and one of the favourite books on my bookshelf is a very old book called, of all things, ‘Some Notorious Visitors to the Gallows,’ and it is all about identity theft in centuries past, when identity theft amounted to a capital crime.\(^5\)

It may well be that Ball J had in mind the various impersonation offences for which perpetrators were subject to penalty of death during the seventeenth and eighteenth century. In his collection of cases relating to the impersonation of law enforcement officers, Hurl-Eamon highlights the prevalence of assumed identities in early eighteenth century London in this way:

> Imposture is a common theme in seventeenth and eighteenth century England. Stories and plays abound of people adopting different disguises and identities. Dozens of contemporary pamphlets describe great pretenders, who were able to impersonate men of substantial wealth while disguising their own humble origins. There are also accounts of notorious women who lived as men and managed to fool hundreds of people before their true sex was revealed.\(^6\)

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\(^3\) Caslon Analytics is a respected Australian consultancy with a particular interest in technology and regulation; it is found at <www.caslon.com.au> accessed 15 February 2008.


\(^5\) [2004] BCJ No 2847, 2004 BCPC 532 (Crim D) [3].

In the era of which Hurl-Eamon writes, the identities of strangers were more commonly established by dress, demeanour and status symbols. In the contemporary world, persons generally rely on any of a number of bits of PII for their identification and it is by the use of such data that the assumption of false identities is now commonly achieved.

If identity related misconduct is so dated, what then has triggered this recent widespread concern? The simple answer seems to be that the twenty-year period 1990 to 2010 has seen a significant increase in cases of identity-related misconduct as compared to the preceding twenty years. Statistical data out of the USA, the UK, Canada and Australia point to such a conclusion.

Commentators have justifiably cautioned against uncritical reliance on statistics relating to identity-related misconduct. This advice is sound for at least three reasons. Hoofnagle mentions two of them. He comments that much of the available data is from survey research some of which yield incorrect measurements due to methodological flaws and fail to capture direct victims who never become aware of the wrong or who do not report victimisation. He notes also that statistics from law enforcement tend to be inaccurate due, inter alia, to under-reporting by direct victims and affected financial institutions and the failure to record the complaints of direct victims whom the police do not regard as the true victims.

The third reason for caution results from the absence of universally accepted meanings of ‘identity theft’ and related terms. This may give rise to uncertainty as to exactly what

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7 ibid 462.
9 Cabinet Office, ‘Identity Fraud: A Study’ (July 2002) ch 2; Home Office, Entitlement Cards and Identity Fraud (Consultation Paper, CM 5557) paras 4.2-4.4.
11 Text to nn 36 – 42 ch 4.
13 ibid 106-08.
conduct is being or has been measured by particular surveys. This point is discussed more fully in chapter two.14

However, caution notwithstanding, there is a widespread view that the turn of the millennium saw an upsurge in identity-related wrongs. This increase in prevalence has been attributed to a number of factors.15 These include (1) the fact that identity-related crimes carry the prospect of high rewards with a low risk of detection; (2) the easy availability of PII due to increased collection and storage of such data by government and non-governmental agencies, security breaches, the advance of information and communication technologies, and the opening of the Internet to public use: factors which have significantly increased the opportunity for people to acquire PII while concealing their own identity; and (3) the easy access to credit and credit cards coupled with flawed authentication procedures.

US data suggests that rates of identity theft are lower in states with small populations.16 It may well be that lower levels of occurrences of identity-related misconduct also exist in small island states. While statistics and research on prevalence rates are readily available through internet searches for large jurisdictions such as those identified above, the same does not obtain for smaller jurisdictions.

Barbados is a case in point. The most easterly of the Caribbean islands, this 430 square kilometre former British colony is home to approximately 280,000 people.17 A search of the catalogues of the regional university’s libraries reveals no concentration on identity theft and annual police statistics and internet searches assist none in this regard. That is not to suggest that there is an absence of awareness or concern regarding identity theft in Barbados. Commercial banks’ websites carry information alerting customers as to related misconduct18 and there have been occasional newspaper articles containing

14 paras 2-4 pt 2.1 and pts 2.7- 2.8.
15 For a detailed articulation of these reasons see CIPPIC Working Paper No 1 (n 10) 9-14.
17 Barbados Statistical Service, ‘2010 Population and Housing Census’ vol 1 (Barbados Statistical Service 2013) Table A.
reports of incidents. Nonetheless, there has been no national urgency leading to any governmental consideration as to whether legislative reform is required to combat it. The position is otherwise in England and Australia, the two larger countries whose laws will be examined in this study, along with Barbados’s.

1.2 Theoretical Framework

Such is the background against which the idea for this study emerged. The inquiry itself is set within a particular theoretical framework. Essentially, it examines identity theft from a criminalisation perspective.

The twenty-first century has witnessed a surge in theoretical and philosophical interest in the special part of the criminal law. The term ‘special part’ is used in contradistinction to the ‘general part’ which is said to contain ‘supposedly general doctrines, rules and definitions’. Duff and Green tersely describe the special part as ‘the part containing the definitions of particular offences’. Philosophers and theorists identify two central issues around which discussions relating to the special part tend to revolve. These are (1) what type of conduct should or should not constitute criminal offences, commonly referred to as criminalisation; and (2) how criminal offences should be defined and classified.

The growing body of related publications is rich and may roughly be classified into (1) those that explore general theories and principles relating to, or otherwise generally concerned with criminalisation; (2) those that look at the criminalisation of specific

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21 ibid.

22 See, ibid 4-17; Jeremy Horder, ‘The Classification of Crimes and the Special Part of the Criminal Law’ in RA Duff and Stuart P Green (eds), Defining Crimes (n 20) 21, 23.

forms of misconduct; and (3) those that focus on the definition, structure and classification of offences.

Discussions on the first two aspects of the criminalisation issue commonly involve references to normative theories establishing threshold criteria for criminalisation. Various theories are to be found in the literature but the dominant ones over the centuries have been the ‘harm principle’ and ‘legal moralism’. Duff and Green confirm the dominance of these theories and succinctly inform that, ‘The former takes harm and its prevention to be the primary concern of the criminal law; the latter takes wrongdoing or immorality, and its punishment or prevention, to be its primary concern.’


However, this is not to suggest that criminalisation should inevitably follow on satisfaction of any particular normative criterion. The criminal justice system is harsh and is backed by severe penalties. It exposes offenders to loss of money, liberty and, in cases of murder and high treason in Barbados, life.\textsuperscript{27} It should be invoked to control behaviour only as a last resort. Consequently, many theorists advocate an approach to criminalisation which limits the circumstances in which the criminal law will apply to a minimum.

Minimalism, as it is commonly referred to, requires consideration of a number of practical factors before a decision to criminalise conduct is taken. Ashworth describes these as ‘various evidential and pragmatic conditions [which include] the probable impact of criminalisation, its efficacy, its side-effects, and the possibility of tackling the problem by other forms of regulation and control’.\textsuperscript{28} References are made later in this thesis to practical limits recommended by other theorists.\textsuperscript{29} It suffices to note that minimalists hold that the application of a normative theory is not the final test in determining whether conduct should be criminalised but merely a necessary precondition.

\subsection*{1.3 Research Question}

Within that theoretical framework, this thesis makes a partial inquiry into the case for the criminalisation of identity theft as defined above. Succinctly stated, the research question is whether existing criminal offences penalise the assumption of false identities by means of PII and, if not, whether prima facie justification for such an offence can be established by reference to the normative theories of harm and legal moralism. The working hypothesis was that the first part of this question would be answered in the negative, the latter in the affirmative.

Initially, the thought was to limit the inquiry to harm to direct victims as a potential for criminalisation, given the influence that such harm had on the birth of the idea for this thesis. However, this seemed unnecessary in light of the narrow definition of identity

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{27} Offences Against the Person Act Cap 141, s 2; Treason Act Cap 155A, s 7; the death penalty has not been executed since 1984.
\item \textsuperscript{28} Ashworth (n 23) 64-65.
\item \textsuperscript{29} 136.
\end{itemize}
\end{footnotesize}
theft adopted and the fact that any criminalisation of that act would inevitably benefit direct victims. Nonetheless, that type of harm continued to be of special interest. The research substantiates the first part of the above hypothesis and points to a prima facie case for criminalisation.

1.4 Methods

The research question lends readily to the adoption of doctrinal and theoretical methods of inquiry. The ultimate criminalisation question is approached by a theoretical method that involves the application of established political, moral and philosophical theories as they relate to the exercise of state coercion and, more particularly, the criminalisation of conduct. To this end, the thesis adopts a multidisciplinary approach comprising applied political, philosophical and, to a lesser extent, ethical theories.

The lead up to this theoretical analysis is dominated by the doctrinal method, through which an exposition of some relevant offences is essayed. The overall objective of this exercise is to determine whether identity theft is already criminalised by existing offences. This expositional approach is accompanied by a degree of critical analysis and is presented through a lens of functional comparison of the law of Barbados, England and Australia. This comparative method is employed primarily from a ‘black-letter’ perspective, its principal purpose being to provide a critical exposition of the relevant law as it obtains in the three jurisdictions mentioned.

The choice of jurisdictions is not haphazard but is justified by reference to their shared legal traditions and different stages of legislative development with respect to identity-related crime. The English common law system of jurisprudence was exported to Barbados and Australia during the colonial process but the criminal laws of the now independent territories are at various stages of development.30

The law of Barbados exemplifies a non-interventionist position. That approach makes it necessary to consider the relevance of well-established offences such as theft and the deception offences and more modern legislation that was not formulated for identity-

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30 For the origins and administration of the criminal law in the various Australian jurisdictions see Simon Bronitt, ‘Australia’ in Kevin Heller and Markus Dubber (eds), The Handbook of Comparative Criminal Law (Stanford UP 2011) 50-55; for the Barbados experience, see KW Patchett, ‘Criminal Law in the West Indies’ (UWI Faculty of Law Library 1970).
misconduct, like that against computer misuse. The absence of legislative activity in Barbados is probably reflective of the fact that, despite growing awareness of identity theft, prevalence rates on the island have not been such as to mobilise national consideration as to how to confront it.

The Australian jurisdictions stand at the other extreme of the spectrum. Modern legislation exists at both federal and state levels purporting to create offences aimed specifically at identity-related misconduct. England stands midway along that curve. Though the issue of identity theft has been widely discussed at national level, government has not responded by enacting specific offences intended to apply in a general way to the misconduct. That jurisdiction places substantial reliance on two relatively recent legislative instruments, the Fraud Act 2006 and the Identity Documents Act 2010.

1.5 Existing Literature

The general body of academic work on identity-related misconduct, though growing, is relatively new. In 2002, Slosarik remarked that, ‘Academia [had] yet to address identity theft.’31 Six years later, McNally and Newman noted that not much had changed in that respect.32 However accurate those representations are with respect to extra-legal disciplines, a database search33 demonstrates that the phrase ‘identity theft’ appeared in a scholarly article as early as 199634 and that from 1998 articles dedicated to the topic started to emerge.35

A review of the large body of articles relating to identity-related misconduct has revealed no thread dedicated to the application of normative theories of criminalisation. The available legal literature is predominantly American and manifests a variety of

33 Search of Heinonline repeated on 10 November 2013.
themes. These include the absence of effective remedies for direct victims, doctrinal expositions and impact assessments of specific criminal offences, the provision of non-criminal measures to assist direct victims, the impact of the misconduct in particular areas such as bankruptcy, medical identity theft, the elderly, consumer protection, and immigration. This list is by no means exhaustive.

More specific reference is reserved for the few sources which touch on issues relating to criminalisation. In this respect, de Vries, Tigchelaar and van der Linden provide a useful starting point. They report on a project in which they considered the criminalisation of ‘identity fraud’, though not by reference to normative theories of criminalisation. They define ‘identity fraud’ as the obtaining, possession or intentional

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36 eg, see Higgins (n 35).
creation of false means of identification in order to commit unlawful behaviour, or having the intention to commit unlawful behaviour. The project measured that conduct against seventeen offences in order to discover existing gaps and determine if identity fraud was sufficiently unique to merit separate criminalisation. They report that gaps were discovered and found identity fraud to be distinguished by three unique features. Significantly, the fact that identity fraud concerns fraud in respect of means of identification was among those unique features.

This aspect of identity theft features significantly in chapter 5 of this thesis as a basis for finding material harm. Additionally, de Vries and colleagues make no definitive recommendation for criminalisation but note that among the relevant determinative factors must be ‘the demands of the rule of law, the general founding principles of criminal responsibility and its nature as ultimum remedium’. Justification based on normative inquiry is a necessary part of that process.

This method of searching for the uniqueness of conduct in considering a case for separate criminalisation is a feature of the literature on the ‘special part’. Tadros deploys it skilfully in his discussion as to whether domestic abuse should constitute a distinct criminal offence. However, this thesis avoids that method by separating identity theft, from the purposes for which it might be committed.

Some references to the criminalisation issue are found outside of conventional law journals. Thus, for example, the United Nations’s handbook on identity-related crime contains an outline of several important considerations relating to the criminalisation question. Critically, the author notes that states which criminalise identity-related misconduct generally do so as a prophylactic measure since ‘the primary abuse of identity can lead to a range of secondary crimes’.

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46 ibid pt 4.
47 ibid pt 5.2.
48 ibid pt 6.
51 ibid 35.
The UK Cabinet Office study makes a similar point in favour of the criminalisation of the misuse of identification information buttressed by the argument that fraud offences do not take account of the harm suffered by the direct victims of identity theft.\(^{52}\) This early-intervention-approach characterises the Australian effort which is examined in chapter four and is one of the bases on which the criminalisation of identity theft is considered in chapter five.

A more exhaustive academic argument that fits within the special part theoretical framework is that essayed by Stephan and others.\(^{53}\) Their analysis relates to the structure and classification of offences. They argue for the creation of a structure of identity theft offences based on the various ways in, and means by, which PII may be acquired. They note that the offences revolve primarily around obtaining PII, a feature which precludes any differentiation based on mode of acquisition. In terms of a replacement, they urge that the offences should be ‘re-crafted to more closely resemble the framework by which traditional theft crimes are delineated’.\(^{54}\) They argue that such an approach would allow for distinct sets of circumstances to be more accurately described and more appropriately punished.\(^{55}\)

This invocation of the traditional classification scheme that subdivides theft into a number of categories such as robbery, burglary, larceny, larceny by trick and embezzlement is somewhat unfortunate. The old theft structure has been the subject of criticism and consequential rejection in England and Barbados. The uniqueness of burglary and robbery is widely accepted\(^{56}\) and those offences continue to be part of the criminal law in those jurisdictions. However, the highly technical nature of the differences between larceny, embezzlement and fraudulent conversion contributed to

\(^{52}\) Cabinet Office Study (n 9) paras 10.28-10.30.


\(^{54}\) ibid 406.

\(^{55}\) ibid 408.

\(^{56}\) eg, see ‘Notes: A Rationale of the Law of Burglary’ (1951) 51 Columbia Law Review 1009; ‘Notes: A Rationale of the Law of Aggravated Theft’ (1954) 54 Columbia Law Review 84; Simester and Sullivan (n 25).
the abolition of those offences and the enactment of a single offence of theft built on the common factor of dishonestly treating someone else’s property as one’s own.\textsuperscript{57}

Hence, some apprehension over the transplant of this scheme to the identity theft milieu is understandable. Stephan and his co-writers identify various fact-situations which they equate to the different categories of offences known to ancient theft law. Reflections on the criticisms levelled at that law must engender some consideration as to whether the categorisations advocated by those authors are sufficiently clear-cut and distinct as to reflect morally distinctive wrongs. However, no purpose is to be served by the pursuit of such an exercise here, given the obvious disconnect between their argument and the approach taken in this thesis.

Two recent reviews of the Australian offences also fall within the theoretical framework of the special part.\textsuperscript{58} These are referred to in greater detail in chapter four. Both commentators express concern about overreach with Leader-Elliott applying the paradigm of the offence of conspiracy to point out features of the Australian offences that he considers to be undesirable. Steel theorises that the Australian offences are flawed on at least two grounds. Noting that many of them revolve around the possession of identification information, he argues that possession is an inappropriate basis for criminalisation on theoretical and practical grounds and that the concept of identification information is defined too widely.

Two further points must be made before closing this sectional comment on the legal literature. The first is an acknowledgement of the work of Sullivan; an impressive body of writing on identity-related misconduct which presents a construct of identity that the


author argues stoically is susceptible to theft as the term is defined in modern criminal law.\(^{59}\) This thesis makes copious reference to her work.

The second point is that two of the approaches adopted in this thesis are often manifest in a lot of the academic and other literature relating to identity-related misconduct. It is fashionable to review existing offences to determine the extent to which they cover misconduct as defined and to compare the position across jurisdictions. A defence of the adoption of these approaches in this thesis was offered in the preceding section.

### 1.6 Thesis Structure

The introduction apart, this thesis comprises four substantive chapters and a conclusion. Chapter two explores the concept of identity theft, introduces some related concepts such as identity, identifiers and identification and examines some typologies or models of identity-related crime that may prove useful in the later analysis.

Chapter three contains a review of existing offences in Barbados and England designed to determine their application to identity theft. A significant portion of the chapter is dedicated to the offence of theft and the more recent offences in England. The chapter also makes a sweeping survey of a raft of other offences which may sometimes be relevant but do not penalise the misconduct per se. It closes with a consideration of the judicial practice of taking account of identity theft as an aggravating factor when sentencing for offences in which the misbehaviour featured in some way.

Chapter four focuses exclusively on the specific federal and state offences that have been enacted in Australia. The salient features of these offences are examined in some detail and critical analysis provided with respect to crucial aspects. Significantly, it is determined that the offences do not penalise identity theft but constitute a number of preparatory offences based, in large measure, on possession and supply of PII or equipment for making related items. As such, these offences provide an appropriate setting for the introduction of theoretical considerations relating to the theory of remote

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harm as a basis for criminalisation. For that reason, that aspect of the theoretical
discussion is introduced in this chapter.

Chapter five is dedicated to the normative inquiry into criminalisation, an exercise
which becomes justified because of the failure of the analysis in the preceding chapters
to lead to any conclusion that identity theft has yet been criminalised. The chapter sets
out the two grand theories of criminalisation, harm and legal moralism and applies them
to the identity theft context. With respect to morality, it explores the notions that
identity theft is a lie and an act of objectification, both of which, it is contended, are
inherently immoral. The harm-based discussion considers the potential for
criminalisation based on the harm and risk of harm to direct victims, remote harm,
generally, and more specific societal harm to the community interest in identification.
The chapter closes with a brief consideration of some circumstances that merit special
consideration, in the context of the normative inquiry.

Chapter six signals the end. It summarises the primary outcomes of the study and
identifies some areas that could benefit from further academic inquiry.

1.7 Scope of the Study

Biblical wisdom cautions that ‘there is no new thing under the sun’.\footnote{The Official King James Bible Online Ecclesiastes 1:9 <http://www.kingjamesbibleonline.org/Ecclesiastes-Chapter-1/> accessed 14 October 2013.} Hence, claims as
to novelty and originality must be made circumspectly. This thesis makes a three-fold
claim in this respect. At the broad level, while comparative expositions of law relating
to identity-related misconduct are not uncommon, this is the first such exposition in
which the relevant laws of the three jurisdictions chosen for the purposes of this study
has been essayed. More importantly, the thesis contributes to the literature on the
special part by its harm-morality based normative inquiry into the criminalisation of the
adopted concept of identity theft.

Those broad areas of contribution represent the intended purposes to which the compass
was pointed at the onset of this academic journey. However, along the way, the thesis
employs some original conceptualisations. A major one is the categorisation of identity
theft for the purposes of determining whether criminalisation is justified on a remote
harm basis. It classifies identity theft into two broad categories, facilitative identity theft and non-facilitative identity theft. This categorisation depends on whether the identity theft is employed for criminal or other wrongful purposes or not. It then further subdivides non-facilitative identity theft into (a) precursory-facilitative, (b) directly-facilitative, and (c) evasively-facilitative, a scheme which is reflective of the role which the identity theft plays in any wrongdoing. Additionally, in considering the judicial practice of treating identity theft as an aggravating factor, the thesis adds to the evolving literature on fair labelling by attempting an application of the principle in that context.

Despite these modest claims, this study does not purport to capture all that may be relevant to any comprehensive consideration of the criminalisation of identity theft. Its limitations fall into two main categories, those that result from the methods of inquiry and those that fall within, but were deliberately omitted so as to narrow the focus of the study.

Firstly, the methods employed exclude empirical research. It, therefore, executes none of the quantitative studies that might be useful in considering a case for criminalisation. Rather the paper draws on existing knowledge from various disciplines and, in the conclusion, it identifies some areas of prospective research that might buttress some of the positions taken.

Secondly, the normative inquiry is limited to the two dominant theories of criminalisation, harm and morality. These bases were chosen by reason of their dominance. However, it is recognised that there are other emerging theories that could have been applied in the circumstances. Additionally, the study is concerned only with whether a prima facie case for criminalisation can be established. The further task required by the minimalist approach of applying practical considerations before making a final determination is outside the scope of the study.

A final limitation falls into neither of the identified categories but arises because of the factors that gave birth to the idea for the study. The thesis is concerned solely with identity theft and individuals. It leaves untouched entirely the area of corporate identity theft.
CHAPTER TWO
THE CONCEPT OF IDENTITY THEFT

2.1 Introduction

‘Identity theft’ is not a legal term of art deeply rooted in centuries of common law usage and possessing a meaning that is readily understood by lawyers. In this regard, it is unlike the phrase ‘malice aforethought’ or words like ‘murder’ and ‘manslaughter’, concepts long known to the common law and well understood by generations of those legally schooled. It is a phrase of relative recentness that owes its origin to popular thought rather than legislative expression, judicial ingenuity or academic abstraction. As a legal concept, it is yet to cement a place in the criminal jurisprudence of England or Barbados. It has, though, been adopted legislatively in Australia\(^1\) and is often used by sentencing judges in England,\(^2\) notwithstanding the absence there of any such designated offence.

The term lacks a settled meaning. The growing body of academic work, reports and internet references on the subject betray subtle differences in the ways in which it is used. Related terms such as ‘identity fraud’, ‘identity crime’ and ‘identity-related crime’ exist without universally respected boundaries demarcating the conduct comprising each of them. However, it is clear that the misuse of PII is at the core of the varying forms of conduct that persons subsume under these terms.

The absence of terminological standardisation in referring to such identity-centred misconduct has consequences that are of fundamental concern to those undertaking, and relying on, related research and academic work. A failure to determine and state with certainty what activity forms the subject matter of any study referenced by means of such illusory terms, renders the findings of that study unreliable, unless the understandings of the author and the reader happen to coincide. Hence, the first task of

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\(^1\) In 2003 South Australia enacted the *Criminal Law Consolidation (Identity Theft) Amendment Act 2003* (SA).

\(^2\) The earliest judicial reference to the term seems to be an acknowledgement by May LJ of the prosecution’s use of it to characterise the case against the defendant in *R v Sofroniou* [2003] EWCA Crim 3681, [2004] QB 1218 [3].
any serious researcher must be to clearly delineate the scope of activity under consideration and provide some justification for selecting the terminology employed to cover that conduct.

Recognition of this requirement is not new. Law reformers, parliamentarians and others interested in the scope and development of the criminal law would be imprudent not to heed the counsel. The need for standardisation, or at least certainty, is critical when considering whether the substantive criminal law penalises, or ought to be expanded to penalise particular forms of misconduct. Those executing such evaluations must have a clear focus and understanding of the misconduct under contemplation to which the appropriate doctrinal or normative analyses are to be applied. More fundamentally, in giving effect to any decision to criminalise, draftsmen must strive to define particular conduct with clarity, if their output is not to fail on grounds of uncertainty.

That is one major area of critical concern. The other relates to the very use of the term ‘identity theft’. This has attracted strident ‘lingo-legal’ criticism. In summary, it is that this composite term is a misnomer since the conduct suggested by its use is impossible to attain. Proponents consider the use of the phrase to be inappropriate, contending that an identity cannot be the subject matter of theft. This argument has superficial appeal but it requires detailed examination. Regrettably, much of the related discussion is summary and lacking in componential analysis. It provides no exhaustive treatment of the terms ‘identity’ and ‘theft’.

Taken at face value, this criticism provides a case against the use of the term ‘identity theft’ and for the adoption of phraseology that more aptly describes the conduct to which it relates. The attractiveness of the argument lies in its appeal for a ‘correct’ use


of language involving an adherence to conventional vocabulary, syntax and grammar. It might be contended that such linguistic purity best achieves clarity, a desired virtue for effective human communication through the use of language.\(^5\)

There is, though, an argument to be made against abandonment of the term ‘identity theft’ and the substitution of language reflecting a purer approach. Deviation from conventional language form and usage is not necessarily a vice. In appropriate cases, it may be an acceptable rhetorical virtue. The term is a folk expression and constitutes a powerful rhetorical device that has popular appeal. In that context, assertions as to inappropriateness based on linguistic and legalistic analyses are somewhat misplaced.

While the necessity for standardisation and certainty cannot be dismissed, a phrase so deeply rooted in popular contemporary language should not be jettisoned, for to do so would be to abandon references to it on wholly inappropriate grounds and remove what has become a common reference point for ordinary people and academics. Hence, throughout this thesis the term ‘identity theft’ will be employed to refer to the misconduct delineated as being of interest.

The object of this chapter is to critically examine this concept and illustrate some of the substance that lies behind it. Its fundamental purpose is to highlight and defend the use of the term in its original context and to establish that use as the genesis of the subject area of study. Hence, it starts with a look at the origins of the term and its legislative adoption in the USA. The objective of the historic discourse is not so much to achieve chronological exactitude but, rather, to unearth the source of the term and the factual scenarios its use was intended to mark.

It then details more fully the criticism of inappropriateness. Though reserving a critique of the more legal aspect of this argument for chapter three, it exposes the very inappropriateness of the argument itself and posits that, given its origins, the term ‘identity theft’ is more reflective of crime and property rhetoric than constitutive of any hard core legal concept.

Next follows an exposition of the distinction and relationship between identity, however conceptualised, and PII. The object of this section is to emphasise that the core conduct

involved in acts of ‘identity theft’ is the misuse of PII and to introduce the complex concept of identity. The result is the singling out of PII-related identity as the facet of most direct relevance.

The chapter then analyses and discusses some definitions of the term, associated phrases and typologies. This is not intended to be an exercise in mere pedantry but, rather, is designed to serve a three-fold purpose. The first is to substantiate the assertion as to inconsistency in the related terminology; the second to tease out some factors that might require consideration in any discussion relating to criminalisation of the misconduct; and the third to assist in the development of a framework within which a more detailed examination may be made of the types of conduct falling within the term.

In concluding, there is confirmation of the reliance on the origins of the term as the justification for the specific conduct selected as the focus of this study. First, then, it takes a look at the origins of the term.

### 2.2 Origins of the Term ‘Identity Theft’

The Phrase Finder\(^6\) wrongly traces the earliest recorded use of the term ‘identity theft’ to an article in the May 1991 edition of the Boston Globe.\(^7\) That article appeared on 27th May 1991.\(^8\) Written by Elizabeth Neuffer, it told the story of David Lombardi and Keith Ciummei. For almost a decade, the latter had passed himself off as Lombardi, having assumed his name, date of birth, social security number and residential address. The prosecutorial assertion was that Ciummei had stolen Lombardi’s wallet in 1982 and used the identification information it contained to acquire additional means by which to impersonate him. Ciummei’s list of misdeeds included deviating Lombardi’s mail, collecting his tax refunds, obtaining loans and credit, accumulating credit card debts and telephone charges, and committing multiple offences. He was charged with forgery, larceny and possessing false documents.

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\(^6\) The phrasefinder is an online site developed by Gary Martin in 1997 as part of a research project at Sheffield Hallam University. Its URL is <http://www.phrases.org.uk>.


In fact, though, two years earlier, on 6 July 1989, the term had appeared in the headline to a newspaper article written by Mike Billington. That headline read, ‘Identity theft Besmirches Victims’ Records.’ The article was concerned exclusively with the plight suffered by drivers whose names had been wrongly represented to the police as those of persons charged for traffic violations. Billington is reported as crediting his editor, Millard Eiler, with volunteering the term as an apt description for the misconduct discussed but could not say whether Eiler had himself adopted or created it.

The Oxford English Dictionary suggests an even earlier use of the term. It reports that on 30 September 1964, it appeared in a headline in the Billings Gazette that read, ‘Four to Testify on Identity Theft.’ According to the dictionary, the story related to the trial of a Russian couple who had used the names of four Americans to carry out their espionage. A confirmatory archival record of the particular newspaper story referred to was not found. However, the Winnipeg Free Press did carry a story on that date released by Associated Press. Euphemistically captioned, ‘Russian Spy Suspects Used Borrowed Names’, the article made reference to ‘four Americans who suffered a theft’ of their identities.

Extensive electronic searches of online databases have thrown up nothing to displace the finding that these represent the earliest recorded uses of the term. However, due regard must be given to the caution properly echoed by McNally that database results are an artifact of the databases themselves. Hence, there can be no guarantee that an earlier reference to the term is not hidden away in some source that has not been electronically archived. Nonetheless, the available ones point to a pre-1990 birth by, or conveyed through, a newspaper article.

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13 McNally (n 10) 30.
Further supporting evidence provides other illustrations of the factual context within which the term, or obvious adaptations of it, were used in that pre-legislative period. One example involved the use of an acquaintance’s name to avoid revealing a criminal past and secure enlistment to the US marines. That was the gist of a story reportedly carried in the Athens Messenger on 7 April 1966 headlined, ‘Death Reveals ID Thief.’

The fraud was discovered only after the fraudster was killed in action.

In 1982, Newsweek reportedly used the phrase ‘identity theft’ in its obituary of Ferdinand Waldo Damara, known as ‘the Great Imposter’. Immortalised in print and film, Damara assumed several real and faked identities as he shammed his way through a list of careers including the cloth, the navy, prison security, medicine and academia. Damara’s pursuits were largely noble but his means undoubtedly fraudulent. Lastly, in an August 1989 story, the victim of a robbery in whose name several fraudulent accounts were opened was quoted as saying that her identity had been ‘taken over’.

Ironically, the story in the Athens Messenger mentioned above described the occurrence as a ‘stranger than fiction story’. However, the use of the term ‘identity theft’ became increasingly embedded in popular jargon over the decades. As is documented by McNally, by 1995, the theme had been featured in television news, film and a published book. The Oxford English Dictionary considered the term to be sufficiently commonplace by September 2007 to merit addition to its lexicon. A recent series of internet searches netted a high volume of results.

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14 A report of this story is to be found at the Phrase Finder’s website. <www.phrases.org.uk/meanings/identity-theft.html> accessed 27 July 2009.

15 McNally (n 10) 28 refers to an article titled “Died” at page 75 of the June 21 1982 edition of Newsweek magazine and claims that Damara was the first person to be called an ‘identity thief’. However, the reported reference to 'ID Thief' in the Athens Messenger predates this.


18 McNally (n 10) 30-31.


20 It defined the term as ‘the dishonest acquisition of personal information to perpetuate fraud, typically by obtaining credit loans etc. in someone else’s name.’
This rough historical exercise demonstrates that, most likely, the origin of the term ‘identity theft’ is rooted in popular thought expressed by the print media and projected, through that medium, to the public. It suggests strongly that it emerged within the context of story-telling by news reporters rather than those of academic discourse, legislative invention or judicial creativity. It is unclear whether popular media created or adopted the term. Nonetheless, it is obvious, given the medium and context of first conveyance, that the emphasis must have been more on capturing public sentiment, attention and imagination, than on the construction of an academically sound phrase. It was used to label something about the activity at the heart of the stories told. A common feature of those stories was the assumption of another’s identity through the use of PII.

2.3 Statutory Embodiment of ‘Identity Theft’

History records Bob Hartle as the driving force behind the creation of the first ‘identity theft’ statutes. His relentless struggle was to bring to justice a stepfather who had assumed his identity and committed a number of fraudulent deeds in his name. It is a struggle that has been well documented by a Phoenix Newspaper. Through persistent effort, Hartle not only got reluctant state agencies to successfully prosecute his impersonator but managed also to enlist the services of Arizona state representative Tom Smith to introduce a bill authored by him, Hartle, into the Arizona legislature. This led in 1996 to the enactment of the first offence that was specifically tailored to target identity theft. Hartle then went on to engage congressmen John Shadegg and Senator Jon Kyl to promote a Federal bill that, in 1998, became the first statutory source in which the term ‘identity theft’ appeared.

Though having the distinction of being the first statute of its kind, the Arizona legislation did not contain the term ‘identity theft’ but used sufficiently suggestive language. It added two new offences to chapter 13 of the Criminal Code: taking the

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21 Performed on 6 May 2012 a search of the term yielded 63, 500,000 results at www.yahoo.com; 17, 400,000 at www.google.com 58, 600,000 at www.bing.com; and 63, 700,000 at www.altavista.com.


identity of another person and knowingly accepting the identity of another person. The first offence was expressed to apply to any person who:

...knowingly takes, purchases, manufacturers, records, possesses or uses any personal identifying information or entity identifying information of another person or entity, including a real or fictitious person or entity, without the consent of that other person or entity, with the intent to obtain or use the other person's or entity's identity for any unlawful purpose or to cause loss to a person or entity whether or not the person or entity actually suffers any economic loss as a result of the offense, or with the intent to obtain or continue employment.

The title to the federal statute, the Identity Theft and Assumption Deterrence Act, suggests a concern with two distinct, even if related, phenomena, these being ‘identity theft’ and ‘identity assumption’. However, the single offence created in section 003 is headed ‘Identity Theft” and is so worded as to include the use of an identity, something which may include identity assumption. This provision amended Title 18 of the United States Code which deals with ‘fraud and related activity in connection with identification documents’, inserting section 1028(a)(7), to make liable for a federal offence anyone who:

...knowingly transfers, possesses or uses, without lawful authority, a means of identification of another person with the intent to commit, or otherwise promote, carry on, or facilitate any unlawful activity that constitutes a violation of federal law, or that constitutes a felony under any applicable state or local law…

The phrase ‘means of identification’ is defined in section 1028(d)(3) as meaning ‘any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual’. The definition goes on to provide a non-exhaustive list that illustrates the breadth with which the words ‘any name or number’ must be interpreted. That list comprises (a) name, social security number, date of birth, official State or government issued driver’s license or identification number, government passport number, employer or taxpayer identification number; (b) biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

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25 Arizona Revised Statutes (n 23); the latter offence was defined as occurring where a person accepts PII from another knowing that the information does not identify the person providing it but, nonetheless, uses that information to determine whether the person presenting it has a legal right or authorisation to work in the USA.
(c) unique electronic identification number, address, or routing code; or (d) telecommunication identification information or access device.\(^\text{26}\)

Were similar offences to be found in all three jurisdictions to which this study relates, the potency of legislative adoption might have provided a case for imputing a meaning to the term ‘identity theft’, implied from its statutory context. This might then have formed the basis for contending that there is a settled meaning of the term among the jurisdictions of interest. However, such is not the case since specific offences are not to be found in Barbados or England. Thus, further consideration of the term is not foreclosed. The examination of the concept continues with an outline of the argument of inappropriateness.

**2.4 Rationalising the Term ‘Identity Theft’**

The contention that the term identity theft is a misnomer, being suggestive of conduct that is unattainable, is based on two lines of analysis. One is entirely literal, the other more legalistic. Sproule and Archer provide an illustration of the first type.\(^\text{27}\) However, to their credit, they accept that ‘in the final analysis, it would not be productive to challenge the widespread adoption and use of the term’\(^\text{28}\) and that ‘victim’s perceptions may explain the public’s preference for the word “theft”’,\(^\text{29}\) rather than ‘identification fraud’, which they prefer.\(^\text{30}\)

They accept a meaning of the word ‘identity’ found in the Merriam-Webster Online Dictionary as being the most apt.\(^\text{31}\) That defines the word as ‘the condition of being the same with something described or asserted <establish the identity of stolen goods>’.

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\(^{27}\) Sproule and Archer (n 4) pt 2.0.

\(^{28}\) ibid 3.

\(^{29}\) ibid 4.

\(^{30}\) ibid 3.

\(^{31}\) ibid 4.
describes it as ‘the act of stealing; specifically: the felonious taking and removing of personal property with intent to deprive the rightful owner of it’. 32 Then they conclude:

The activities that constitute what we call identity theft are not properly described by any of these definitions. Although physical property may be taken (as in a wallet, purse or card), such an act is not necessary to the crime, and unauthorized access to personal information does not deprive the owner of its use. 33

The internal logic of this literalistic argument can hardly be faulted. However, theft is a legal concept. For that reason, instinctively, the academic lawyer might be inclined to assess the merits of this argument by measuring the phrase and the conduct it entails rigorously against the elements of the offence of theft, conscious, always, that the law is not static but may be developed by judicial intervention or statutory amendment. This examination forms part of the discussion in chapter three.

However, without attempting any such detailed analysis, some legal articles have reached a conclusion similar to that arrived at by Sproule and Archer. One example of the more legalistic approach is provided by Watney who posits that the term ‘identity theft’ is misleading and that there is no common law or statutory offence so styled. He contends that the conduct referred to by laypersons by that term - i.e the utilisation of another’s identity - does not amount to theft. 34 He argues that identity ‘in the form of personal information relevant to a specific person is not tangible and the owner of that identity is not permanently deprived of it when it is assumed by another person’. 35

Watney had earlier rendered a definition of theft according to South African law, submitting that it may ‘briefly be defined as the unlawful and intentional appropriation of moveable, corporeal property which belongs to another with the intention to deprive that person of the possession of such property’. 36 The requirement of tangibility is no longer part of the law of the jurisdictions under review but the gist of the legalistic argument is that the conduct considered by laypersons as identity theft does not satisfy all the elements of the offence of theft. A very similar argument has been put in

32 ibid.
33 ibid.
34 Watney (n 4) 512.
35 ibid.
36 ibid.
Australia by the Model Criminal Law Officers’ Committee of the Standing Committee of Attorneys’-General (MCLOC).\textsuperscript{37}

In summary, therefore, the arguments run this way: the term ‘identity theft’ connotes the ‘theft’ of an ‘identity’; inherent in this, is the notion that an identity can be stolen; the idea that an ‘identity’ can be the subject matter of ‘theft’ is unsustainable; further, persons whose PII is misused are not deprived of that information or their identities.

It would be a major failing to leave open the inference that no major scholarship has emerged that has examined the application of theft law to concepts of identity. In a detailed and excellent discussion, Sullivan makes out a strong case that theft law applies to her concept of transactional identity.\textsuperscript{38} In large degree, some of the content of chapter three explores the application of the offence to PII and a concept of identity. However, the ultimate purpose of this more detailed legal analysis is not to evaluate the sterile debate as to appropriateness or otherwise of the term but to determine whether theft law offers a possible answer, in criminal law, to the wrong or harm wrought to persons whose PII is misused. Arguably, that is a legitimate inquiry in the context of a thesis that is assessing the need or justification for specific offences targeted at this form of misconduct.

The provision of such discussion notwithstanding, it is submitted that this argument of inappropriateness should be dismissed on the very ground on which it is advanced. It is an inappropriate argument made so by the application of inappropriate reference points by which to measure the applicability of the term it seeks to debunk. It is an argument that pays too much regard to literalistic meaning and legalistic doctrine and none to contextual historicity. It disregards entirely the right of lay people to coin a phrase to capture the conduct of which they speak. Rather than accept this creative addition to contemporary lexical growth, it seeks to rebuff it by reference to standards that are sterile, technical and, for those reasons, inappropriate. In so doing, it has caused an important feature to be overlooked: the power inherent in the rhetoric employed in the choice of phrase.


2.5 ‘Identity Theft’ as Rhetoric

Indeed, the American media is to be credited with propagating a powerful phrase that has gained currency worldwide and is generally understood by ordinary people as indicating how they feel about circumstances where a person falsely adopts another’s identity attributes especially to commit wrongdoing. Intuitively, it may well be that if one were to ask the man on the Clapham omnibus in England, on a sandy beach in Barbados, or in a busy Adelaide street in Australia, whether, in such circumstances, he considered that an identity was ‘stolen’, the answer would be a resounding ‘Oh, of course!’

If that is so, and given that the term originated in popular thought, it seems fair to conclude that the phrase as originally conceived was not intended to convey the certitude of a criminal offence but rather constitutes a rhetorical device that has had a widespread and lasting effect. As a term, it exploits rhetorical appeal to a combination of powerfully pervasive concepts in language, law and life. That rhetoric has emotive impact. It centres on ideas that touch all humanity: the notions of self, individuality, personhood and autonomy. It connects the misuse of PII to the individual to whom the information relates through an emotive link to his or her very essence. Further, it vividly conjures up the image of a crime commonly associated with the misappropriation of property, something owned by and often of value to the person from whom it was appropriated.

Thus, rhetoric of crime and property is employed and juxtaposed with the very sense of self to create a highly suggestive phrase. The notion of crime is well understood, conjuring up in the mind of the average individual the idea of serious moral or harmful wrongdoing meritorious of punishment. It characterises the perpetrator negatively and the wronged as a victim. It is a powerful rhetoric. So too is property. Harris sums up the power of property rhetoric in this way:

Property rhetoric is a pervasive phenomenon of both ordinary and literary discourse. Property is a familiar and deeply ingrained notion in the consciousness of everyone, including children. It is regularly invoked, analogically, to confer

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39 The phrase ‘Oh, of course’ was used by MacKinnon LJ in Shirlaw v. Southern Foundries (1926) Ltd [1939] 2 KB 206, 227 in indicating how a person would respond to a suggestion of the obvious.
heightened force on claims which, in themselves, have nothing to do with any of the structural elements of property institutions…  

This reference to rhetoric is not intended to be demeaning. As Fagundes states, ‘Rhetoric has a bad rap in contemporary public discourse’ with arguments being dismissed as ‘mere rhetoric’ by critics suggesting the employment of a logic flawed by ‘sloppy inexactitude’ or ‘characterized by disingenuous manipulation’.  

Rather, it is a reference that is appreciative of the finer aspects of this art as a tool of persuasion long idealised by classical philosophers.  

Rhetoric then may serve a practical purpose. The highest degree of this positiveness is captured by White who summarises Gorgias’ reference to it as ‘the art of persuading people about justice and injustice in the public places of the state’. As Fagundes notes, it refers ‘not to merely talking about talking, but to something with meaningful practical implications’. Citing White, he points out that as a technique of persuasion, it involves an appeal to a set of common understandings. In this case, the set of common understandings, expressed and implied, are some of the most universally pervasive and emotive concepts.

Fagundes points out that this appeal to common understandings has two major consequences in legal discourse. It frames legal arguments, thus influencing the substantive legal analysis that is applied to issues. Additionally, the appeal to familiar terms can be persuasive ‘by calling up particular associations that generate visceral reactions in listeners’.  

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44 Fagundes (n 41) 660.

45 White (n 43) 688-689.

46 Fagundes (n 41) 660.

47 ibid 660.
The employment of the term ‘identity theft’ has had the persuasive effect lastly mentioned. With respect to the first consequence, as has been demonstrated earlier, the terminology comprising the phrase has encouraged some to apply, in a summary way, principles of theft law in challenging the appropriateness of its use. However, the fundamental oversight that the term did not originate in legal discourse is enough to render the framing of the issues in that way improper. It is, thus, a moot point that leads to nothing productive. More broadly, though, the term has framed the more general issue as to the application of criminal law sanctions for the conduct it captures. There is further reliance on Fagundes in support of this last point. He concludes his introduction on rhetoric in this way:

Rhetoric not only frames public discourse, but also has the capacity to change how we think about the subjects of that discourse. Recasting same-sex marriage as a civil rights issue, for example, exemplifies this sort of ‘constitutive’ rhetorical move. It is not only an attempt to use language to persuade us to adopt a particular position, but seeks also to convince us about what the world actually is like (or at least, what it should be like). … So rhetoric represents not only a way of understanding the world; it is a form of reasoning with constitutive force because it has the potential to construct the way we think about the world. 48

The invocation of the language of ‘theft’ and the inherent concepts of ‘crime’ and ‘property’, in association with notions of ‘self’, have conditioned the world to perceive the misuse of PII for false identification purposes as the theft of something fundamental from the person to whom that information relates. This has the potential to condition persons to see identity theft as criminal and influence legislators to contemplate the enactment of new and specific offences as a combative measure.

2.6 Identity, Identification, and Identifiers

At least one point is evident from the stories relating to the origins of the term identity theft recounted above and the outlines of the arguments as to inappropriateness. It is that there is a distinction to be made between an ‘identity’, however conceptualised, and PII that might set one person apart from another, aid in identifying an individual, or enable a malefactor to assume another’s identity.

48 ibid 660-661 (citation omitted).
Identifiers or bits of PII are used for the purpose of identification. In so doing, they authenticate or may be taken as representative of the identity of the person to whom they relate. To fully explore these relationships, it helps to firstly introduce the concept of identity with a view to discerning the sense or senses in which it is most appropriately used in the phrase ‘identity theft’, leaving less elusive concepts such as identifiers and identification for later mention.

2.6.1 A Concept of PII-Based Identity

Early legal writings on ‘identity theft’ assume the reader’s ready understanding of the word ‘identity’. The failure to articulate the meaning, or sketch the concept, of the term was not limited to lawyers. Similar charges of disinclination toward certitude have been made of practitioners in other disciplines who during the decades of the eighties and nineties employed the word with varying epithets in their publications.

Two examples suffice and help to highlight the consequences of such failure. The first is an observation by Gleason who, writing with particular reference to immigration and ethnicity, states:

Today we could hardly do without the word identity in talking about immigration and ethnicity. Those who write on these matters use it casually; they assume the reader will know what they mean. And readers seem to feel that they do – at least there has been no clamor for clarification of the term. But if pinned down, most of us would find it difficult to explain just what we do mean by identity. Its very obviousness seems to defy elucidation: identity is what a thing is! How is one supposed to go beyond that in explaining it? But adding a modifier complicates matters, for how do we understand identity in such expressions as ‘ethnic identity,’ ‘Jewish identity,’ or ‘American identity’? 49

The second comment is from a political scientist. 50 Fearon describes as ‘almost … a scandal’ the absence of a concise statement as to how social scientists use the word, given its centrality to much of their research. 51 He ventures a possible explanation for

51 ibid 2.
this lacuna. Having noted the failure to define the term even when it ‘is the author’s primary dependent or independent variable’, he continues:

This is perhaps not so surprising. In the first place, while the origins of our present understanding of ‘identity’ lie in the academy, the concept is now quite common in popular discourse. Since we all know how to employ the word and we understand it in other peoples’ sentences, why bother with definitions or explanations? Second, in popular discourse identity is often treated as something ineffable and even sacred, while in the academy identity is often treated as something complex and even ineffable. One hesitates to define the sacred, the ineffable, or the complex.

However, more recently, scholarship across many disciplines has redeemed itself. There are many constructs of identity. The vast body of work on the subject spreads over many fields including history, anthropology, political science, criminology, sociology, philosophy, psychology, psychiatry, economics, law, human development, education, gender studies and family studies. It throws up a variety of qualifying references such as ‘personal identity’, ‘cultural identity’, ‘social identity’, ‘legal identity’, ‘individual identity’ and ‘State identity’. There are academic journals dedicated to the subject that serve as publication venues for related work across this broad range of fields.

Nonetheless, present purposes require no excursus into this expansive terrain, the task at hand being only to unearth a facet of the concept that is compatible with the popular use of the phrase ‘identity theft’ and appropriate in the context of this discussion. In this regard, it is convenient to start with the ordinary meaning of the word. It derives from the latin root ‘idem’, the same. Of the variety of meanings reflected in the Oxford English Dictionary, those of ‘personal identity’ seem most relevant. They read:

(a) The sameness of a person or thing at all times in all circumstances; the condition of being a single individual; the fact that a person or thing is itself and not something else; individuality, personality.

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52 ibid 4.
53 ibid.
54 Identity: An International Journal of Theory and Research published by Taylor & Francis Inc is one example.
Who or what a person or thing is; a distinct impression of a single person or thing presented to or perceived by others; a set of characteristics or a description that distinguishes a person or thing from others.

Focusing on the first of the extracted definitions, Fearon points out that it represents one of the older meanings of the word ‘identity’ and fails to be distinguished from the present sense in which the term is employed by social scientists, the latter use deriving substantially from Erikson’s treatment of the concept of ‘identity crisis’. More significantly though, Fearon rightly posits that this older usage is the sense in which the word is used popularly in the term ‘identity theft’. He states:

In this older sense, ‘identity’ refers to the (often legal) association of a particular name to a particular person - the quality of being a particular person, or the same person as before, as in ‘she revealed the identity of the murderer’ or ‘a case of mistaken identity.’ This usage is still very much with us. For example, there is a minor genre of newspaper articles about the theft of credit and other identification cards that refers to ‘stolen identities.’

Fearon’s exposition as to this contemporary usage of the term identity and its consequential connection to the term ‘identity theft’ relies heavily on the work of Laitin which is of some relevance to the current discussion. The latter explores the meaning of the word ‘identity’, highlighting a divide as to whether identities are ‘constructed like an art object’ or ‘inherited like skin colour’. As he notes, the idea of constructing identities is modern and largely the work of social scientists. However, it is the primordial construct of identity that has been reflected in popular usage. Laitin demonstrates this through a search of the Lexis-Nexis database of reports from the press. He summarises the results and contrasts constructivist identity, this way:

In the popular press, there is one realm in which writers insist that our identities are primordial. Indeed there is a clear notion of a personal identity (in the OED sense of ‘the condition of being the same as a person or thing described or claimed’) in which ‘identity projects’ are either criminal or bizarre. These discussions about

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57 Fearon (n 50) 8-9.
58 ibid 8 (citations omitted).
60 ibid 11.
61 ibid 12.
personal identities -- usually arising in legal discourse -- are in a different discourse realm from that of social identities, in which constructivist identity projects are considered permissible, though not always successful. … Since social identities are seen as constructed, they are always subject to reconstruction. … A short digression into the language of the popular press on ‘identity’ questions should make this distinction between primordial personal and constructed social identities clear.62

The primordial identity to which Laitin refers is essentially the biographical and other personal data that attaches to a person from birth and gets progressively more voluminous as we mature. This includes data such as name, gender, biometrics, marital status, and credit history. He subsumes such characteristics under the subset ‘personal identities’ and notes, rightly, that such identities are ‘firmly entrenched in a primordial or genetic discourse realm’ with the identity attributes having ‘a DNA-like continuity to them’.63 He demonstrates that popular discourse regards the unauthorised use of another’s identity ‘DNA’ as ‘theft’.64

Thus, it is this concept of a collection of personal data that serves to identify an individual and distinguish him or her from others that underlies the popular conceptualisation of identity theft. It is also at the root of the works of Finch65 and Sullivan66 two exponents of the view that the word ‘theft’ is entirely appropriate in this context.67

Making reference to Goffman,68 Finch categorises ‘identity’ into three ‘competing constructions’, individual identity; social identity and legal identity.69 She describes individual identity as ‘the sense of self that is based upon the internalisation of all that is known about oneself’70 and recognises that there is a ‘symbiotic relationship’ between

62 ibid 14.
63 ibid
64 ibid 15.
67 Their work in this respect is considered further in ch 3.
69 Finch (n 65) 87.
70 ibid.
that concept of identity and social identity. She defines the latter by reference to ‘the way in which individuals present themselves’.

More critically, she accepts Goffman’s description of legal identity ‘in terms of a set of characteristics that are unique to the individual thus providing a way in which one person can be differentiated from another’.

As Finch notes, legal identity is ‘largely fixed and immutable’ and ‘is more concerned with identifiability rather than identity as it seeks to make the link between a collection of facts and the person to whom they relate’. She reasons that, though social and individual identity can be affected by identity theft, neither can be stolen. She argues that it is legal identity that ‘has the potential to be adopted and abused by others [and] is at the heart of concerns about identity theft’. She rightly notes that, though lacking ‘a tangible physical presence’, legal identity ‘can be made manifest by the production of documents or the possession of knowledge that substantiates the claim to be the person in question’.

In her work, Sullivan argues that a select number of identifiers combined under specific digital identity schemes to authenticate transactions, create a form of identity. She constructs a concept of ‘digital identity’ in a transactional context based on data gathered in government administered electronic databases constituted as part of national identity schemes. Her construct is formulated with particular reference to databases as structured under the UK’s Identity Cards Act 2006 and the Australian Human Services (Enhanced Service Delivery) Bill 2007. She envisages two types of digital identities under these schemes: ‘database identity’ and ‘transactional identity’ or ‘token identity, as she refers to it in an earlier work.

By ‘database identity’ Sullivan means all the information that a registrant under the scheme is required to provide. Under the UK scheme, this embraced a full range of

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71 ibid 88.
72 ibid.
73 ibid.
74 ibid 89.
75 ibid 88.
76 ibid 89.
77 Sullivan (n 66) ch 2.
biographical, biometric and acquired data. However, a smaller subset of data was relevant for the purpose of establishing and verifying an individual’s identity under the scheme. It is this data which serves to verify the identity of individuals for transactional purposes that Sullivan refers to as ‘transactional identity’.  

2.6.2 The Process of Identification

In a sense, Sullivan’s concept of digital transactional identity is a limited one. This is so since it is premised on the existence of government administered identity databases, constructs that have been viewed unfavourably by some. Unsurprisingly, neither scheme referred to by Sullivan is existent today. The UK Act was repealed by the Identity Documents Act 2010 and the Australian Bill abandoned. However, her work, as does Finch’s, underscores the role of PII in human identification.

In his pioneering work on human identification in an information systems context, Clarke provides a generalised definition as well as one more apt to his specialist area. In general terms, he defined identification as meaning:

the act or process of ‘establishing the identity of, [or] recognizing,’ or ‘the treating of a thing as identical with another’ (Concise Oxford Dictionary) or ‘the act [or process] of recognizing or establishing as being a particular person’, but also ‘the act [or process] of making, representing to be, or regarding or treating the same as identical’ (Macquarie Dictionary).

Human identification, then, is about the establishing and accepting a particular person to be who he or she claims to be.

Clarke posits that in the information systems context, the purpose of identification is to ‘link a stream of data with a person’, thus adopting as an operational definition that ‘human identification is the association of data with a particular human being’. However, as Lopucki rightly points out, identification is really about identifying a

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79 Sullivan (n 66) 26-27.
82 ibid 7.
83 ibid 8.
person observed at one time to be the same person observed at another time. She notes that the linking of data with a particular human being is not the ultimate aim in the process of identification. The real purpose is to link a person with a person. One might add that, given that it is limited to the digital context, Clarke’s formulation is representative of one type of modality for achieving that objective.

Nonetheless, the question of human identification in a digital context assumes importance because of the extent to which commercial and business transactions as well as social relations are conducted in a digital environment. It may also have much direct relevance to a discussion on the criminalisation of ‘identity theft’ as there has been a proposal for the reconceptualisation of ‘identity theft’ from one of theft or the misuse of PII to one of human identification.

Building on the work of Clarke, Lopucki proposes this alternative solution. She identifies the problem not as the fact that ‘thieves have access to personal information, but that creditors and credit-reporting agencies often lack both the means and the incentives to correctly identify the persons who seek credit from them or on whom they report’. Her proposed solution is the construction of an electronic system that would enable creditors seeking to determine the identity of credit applicants to contact the true persons to whom the PII presented relates.

A description of Lopucki’s proposed system is beyond the scope of this thesis. It is to be noted, though, that while it provides an alternative solution to the engagement of the criminal justice system, it is of limited application since it is restrictive to particular interests that can organise their relationships through a digital medium. It fails to make contact with the ancient but existent world of non-digital conduct and digital activity where relations are less rigidly structured.

85 ibid.
86 ibid.
87 Clarke (n 81).
88 Lopucki (n 84) 94.
89 ibid 94-95.
90 For details see ibid pt v.
Sullivan’s concept of transactional identity is very much a reflection of this type of solution. However, her work differs from that of Lopucki since she goes on to contend that the databases give rise to a concept of identity that has the hallmarks of property and can be the subject matter of theft.\(^1\) This aspect of her work is considered in chapter three. Meanwhile, the focus turns to the notion of identifiers.

### 2.6.3 PII as Identifiers

Clarke provides a basic three-fold typology of the means of carrying out human identification that reminds that they are various identifiers by which the process of identification may be established. He classifies these into knowledge-based, token-based and biometrics.\(^2\) Detailed referencing of his categorisation and the examples given helps to identify the range of identifiers that might be employed in the process of identification. His first category comprises information which an individual would be expected to know about himself. Given examples are one’s family and given names, prior names, father’s name, mother’s name, mother’s and grandmother’s maiden names, date and place of birth, address, marital status, religion and occupation, passwords and personal identification numbers (PINs).\(^3\)

He defines a ‘token’ as some “‘thing’ which a person has in his or her possession, in particular documentary evidence”,\(^4\) and biometrics as ‘any and all of a variety of identification techniques which are based on some physical and difficult-to-alienate characteristic’\(^5\). His token-based category embraces things such as ‘birth and marriage certificates, passports, driver’s licences … employer-issued building security cards, credit cards, club membership cards, statutory declarations, affidavits or letters of introduction’.\(^6\)

Clarke presents examples of biometrics through a five-pronged classification scheme comprising: (i) appearance – this entails height, weight, colour of skin, hair and eyes, visible physical markings, gender, race, facial hair, wearing of glasses and supporting

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\(^1\) Sullivan (n 66) pt 6.5.
\(^2\) Clarke (n 81) 14-20.
\(^3\) ibid 14.
\(^4\) ibid.
\(^5\) ibid 17.
\(^6\) ibid 14.
photographs; (ii) social behaviour comprising habituated body signals, general voice characteristics, style of speech, visible handicaps and supporting video-footage; (iii) bio-dynamics exemplified by the manner in which one’s signature is written, statistically analysed voice characteristics, and keystroke dynamics, particularly in relation to login-id and password; (iv) natural pysiography, for example, skull measurements, teeth and skeletal injuries, thumbprint, finger print sets and handprints, retinal scans, earlobe capillary patterns, hand geometry and DNA-patterns and (v) imposed physical characteristics such as dog-tags, collars, bracelets and anklets, brands and barcodes and embedded micro-chips and transponders.\textsuperscript{97}

Other classification schemes are possible. A United Kingdom study adopts a simpler scheme that focuses on three elements of identity: biometric attributes; attributed identity which relates to the attributes that are given to a person at birth, for example, full name, date and place of birth and parents’ name and addresses; and biographical attributes.\textsuperscript{98} This latter category encompasses ‘life events and how a person interacts with structured society’.\textsuperscript{99} It includes registration of birth and marriage, details of education and qualification, electoral register entries, details of benefits claimed and taxes paid, employment history, mortgage account information, property ownership, insurance policies, and history of interaction with financial institutions, creditors, utilities and public authorities.\textsuperscript{100}

\section*{2.6.4 Related but Distinct Concepts}

These references demonstrate two things. The first is that there is a clear distinction between identity and the identifiers by which identification is established. Secondly, they illustrate the wide range of things that collectively make up an identity, though a subset of such information is usually sufficient to establish the identification of an individual and, hence, be suggestive of a particular identity.

Finch and Sullivan recognise the distinction between ‘identity’ and the set of ‘identifiers’ by which a person’s uniqueness is established. Finch implicitly makes the point, this way

\begin{itemize}
\item \textsuperscript{97} ibid 18.
\item \textsuperscript{98} Cabinet Office, ‘Identity Fraud: A Study’ (2002) para 2.4.
\item \textsuperscript{99} ibid.
\item \textsuperscript{100} ibid.
\end{itemize}
Therefore, it is clear that the legal construction of identity gives primacy to factual information regarding an individual; information that is largely unalterable. For example, birth certification is generally viewed as the foundation of legal identity as it records key pieces of information unique to the individual such as his or her sex, date and place of birth and details of his or her parents.\footnote{Finch (n 65) 88.}

This is acknowledged even by McGuire who provides a critical review of Finch’s conceptualisation of identity.\footnote{Michael McGuire, Hypercrime: The New Geometry of Harm (Routledge-Cavendish 2007).} However, he accepts the distinction between identity and identifiers. Relying on the work of Marx,\footnote{G Marx, ‘Identity and Anonymity, Some Conceptual Distinctions and Issues for Research’ in J Chaplan and J Torpey (eds), Documenting Individual Identity (Princeton UP 2001).} he opines that the ‘real distinction of interest is between identity itself and its complement identifiability, or better, identification – the process by which identity is epistemically established’\footnote{McGuire (n 102) 149.} He acknowledges that identity is a more elusive concept. Drawing on a definition of the term derived from Leibniz’s Law,\footnote{For a discussion of this ontological principle of the indiscernibility of identicals, see Sydney Shoemaker, ‘Personal Identity: A Materialist Account’ in S Shoemaker and R Swinburne (eds), Personal Identity (Basil Blackwell 1984) 72.} he concludes that identity ‘relates to all the properties that make us what we are’.\footnote{McGuire (n 102) 149.}

However, McGuire finds this concept to be unusable in regard to ‘contemporary requirements for identification’.\footnote{ibid.} He returns to the idea of identity attributes or PII, noting that ‘…identification is about the selection of some “privileged” or definitive subset of properties, convenient for bureaucratic purposes, which are considered sufficient to determine identity’.\footnote{ibid} He rejects the notion that identity can be stolen, abandoned or reverted to.\footnote{ibid 150.}

The true relationship and intricate linkage between identity and identification information is as stated by Saunders and Zucker who posit:

The notion of identity is inseparable from a person’s intrinsic nature and sense of individuality. Among other things, it relates to a person’s consciousness of ‘self’
and individuality, while allowing others to recognize or distinguish him or her from others. In society, the concept of identity is broader than merely knowing a person’s name or recognizing a person’s face. Rather, the identity of a person is often separate from his or her attributes and physical traits. In many instances, to learn or establish the identity of a person involves reference to a set of institutional or socially agreed upon identifiers that authenticates a person’s uniqueness in relation to others.\textsuperscript{110}

Mitchinson and others touch briefly on the subject confirming that, though there is an epistemological link between them, there is a conceptual difference between ‘personal identity’ and particular attributes.\textsuperscript{111} Further, according to them, unless the particular attribute is unique or highly restricted, attributes cannot be equated with identity.\textsuperscript{112} Thus, they posit that ‘even a collection of a large number of attributes does not amount conclusively to a personal identity [though] it may be enough to permit inference and to allow the extraction of statistically significant patterns’.\textsuperscript{113}

There are, then, distinctions between an identity, the identifiers or attributes that may be relied on to prove or authenticate that identity and identification, the act or process of doing so. This is not to deny the obvious relationship between them. A set of identifiers may be only part of a complex mix of attributes that constitute a person’s identity. Yet, it may be enough to facilitate the commission of identity-based misconduct.

Hence, it is appropriate to define the subject matter of misuse as both identity-related information and identity. Used in this context, the identity of which mention is made is best conceptualised as PII-manifested identity, given that the individual to whom the PII relates is manifested through the PII. The links between the concepts discussed are intricate and the legal specialist is to be forgiven, if unable to capture their distinguishing features in a minute way.

### 2.7 Definitions of ‘Identity Theft’

This emphasis on identification attributes is also evident in the many definitions of the term that abound. The early newspaper stories that have been credited with giving

\begin{itemize}
\item \textsuperscript{110} Saunders and Zucker (n 26) 185, citing Erik Erikson, \textit{Identity and the Life Cycle} (W W Norton & Co 1980)
\item \textsuperscript{111} N Mitchinson and others, ‘Identity Theft – A Discussion Paper’ (European Commission Research Centre EUR 21098 EN 2004) pt 2.1 para 3.
\item \textsuperscript{112} ibid.
\item \textsuperscript{113} ibid.
\end{itemize}
exposure to the term ‘identity theft’ provide a basis from which a definition can be sketched. Any such definition should be paramount unless it is established that popular thought allows for a development of the meaning of the phrase to embody more than is reflected in those originating reports.

At the core of any such sketch, no doubt, is PII. This is the material that in the hands of malefactors becomes a tool of wrongdoing. This tool is used by such persons to perform acts in the name of the persons to whom the information relates or to attribute conduct engaged in to them. The nature of these acts or conduct may vary extensively.

The early newspaper reports to which the origins of the term was traced earlier in this chapter do not support a conclusion that the mere acquisition of such information falls within the term. In each case, identity assumptive conduct had been engaged in by the perpetrator. However, the offences introduced in the US, whether by express reference, as in the case of the Federal offence, or by necessary implication, as in the case of Arizona, support a definition that embodies conduct that might be merely preparatory to the acts exhibited in the popular accounts.

Under those statutory formulations the mere transfer, acquisition or possession of the core material is enough once accompanied by the requisite ulterior intent. In modern western democracies, legislative expression continues to be potent, subject only to constitutional or other limiting grounds. Hence, the purely legalistic might be inclined to define identity theft in such a way as to suggest its occurrence by acts relating to the acquisition of PII only. However, none of the early newspaper stories unearthed evidenced a complaint that was limited to this sort of preparatory activity.

Nonetheless, there is no denying the obvious nexus between such activity and the conduct described in those articles. Undoubtedly, the stories that came to light through the media related to those persons who had knowledge of the acquisition of their PII because of the consequential misuse of that data. A person cannot complain if he, or

\[\text{114} \quad \text{pt 2.2.}\]

The doctrine of parliamentary sovereignty captured in the statement of Holt CJ in London (City) v Wood (1706) 12 Modern 669, 687; 88 ER 1592, 1602 (KB) that ‘an act of parliament can do no wrong; though it may do several things that look pretty odd …’ has given way in Barbados and Australia to the primacy of the written constitution and, been affected, in England, by a number of developments including the enactment of the Human Rights Act 1998.
she, is unaware that such information relating to him or her is known by potential wrongdoers. It is probable, though, that people will consider themselves victims of identity theft where they become aware that their PII has been targeted by such individuals or that related tangible sources of such information have disappeared in suspicious circumstances.

Be that as it may, the inconsistency in meaning is reflected in contemporary usages of the term by individuals and organisations with an interest in the subject. Among them, it is not used or defined in any singular, standard way. It has been defined differently by different persons and organisations. There is consensus as to the core material but less uniformity as to the outer contours of the activity required to constitute the misconduct. The answer to the question ‘what is identity theft?’ varies depending on the particular interest of the entity to whom or which it is posed. Additionally, a number of related terms can be found with respect to which there exists a similar lack of uniformity of use. The more common of these are ‘identity fraud’, ‘identity crime’ and ‘identity-related crime’.

The Canadian Internet Policy and Public Interest Clinic (CIPPIC) has provided a ready collection of thirty two definitions of ‘identity theft’ derived from Canadian governmental, commercial and law enforcement sources and contributors to periodicals. These definitions were published before the introduction, in Canada, of specific offences aimed at combating identity theft. It may be noted, in passing, that the offences do not directly target the false assumption of an identity but are aimed at preparatory conduct. They are obtaining and possessing identity information; trafficking in identity information and unlawful possession and trafficking in government issued identity documents.

The CIPPIC definitions are representative of the types of definitions found elsewhere. An analysis of them highlights the inconsistencies even among organisations with


common interest. It bears repeating that all the definitions make PII the central ‘thing’ on which the misconduct pivots. However, as to the surrounding conduct, some envisage acquisition and use as constituting the misconduct; others are so framed as to ground wrongdoing on the use of the information; while others define it by reference to acquisition with intent to commit crime. For convenience, these are referred to as ‘dual conduct’, ‘use’ and ‘acquisition’ definitions.

It suffices to provide an illustration from each of these categories. A terse example of a dual definition is that attributed to the Privacy Commissioner of Canada: ‘Identity theft is the unauthorized collection and use of your personal information, usually for criminal purposes.’\(^{118}\) The Calgary Police Services provides an example of a ‘use’ definition: ‘Identity theft is the wrongful use of another persons’ [sic] identifying information…to commit financial or other crimes.’\(^{119}\) The following example of an ‘acquisition’ definition is attributed to the Consumer Association of Canada of Manitoba: ‘Identity theft is described as “acquiring key pieces of someone’s identifying information in order to impersonate them and commit various crimes in that person’s name”’.\(^{120}\)

Of the thirteen definitions attributed to government agencies, eight fall into the ‘use’ category, four into ‘dual conduct’, and one into the ‘acquisition’ category. All three trade associations’ definitions were ‘dual conduct’ in nature, while of the four consumer associations’ definitions, two fell under ‘dual conduct’ and one in each of the remaining categories. Inconsistency was also evident among the nine definitions of law enforcement agencies. Five of those fall under the ‘acquisition’ category, and the remaining four were shared equally by the other two. Two of the three definitions from periodicals were ‘use’ definitions.

Overall, eleven of the thirty two definitions fall under the ‘dual conduct’ category, thirteen in the ‘use’ category and seven in the ‘acquisition’ category. A periodical-based

\(^{118}\) CIPPIC (n 116) 16, citing Privacy Commissioner of Canada, ‘Fact Sheet: Identity Theft: What it is and what you can do about it’ <http://www.privcom.gc.ca/fs-fi/02_05_d_10_e.asp>.


\(^{120}\) ibid; citing Consumer Association of Canada of Manitoba, ‘Identity Theft – Don’t Be A Victim’ <www.consumermanitoba.ca/scam/ID_theft.html>. 45
extract attributed to Wright is missing from the analysis.\textsuperscript{121} It is not a definition in the true sense of the word but, rather, a statement that is intended to say something about the form of misconduct. It invites an unusual consideration of the meaning of the term ‘identity theft’, even though, in fairness to its author, it is unclear that it was intended to have such an effect. It reads:

> Identity theft is [a] … crime, fuelled by the practice of extending credit or service to people when they identify themselves with information such as card numbers and social security numbers. Thieves know that if they possess little more information about a victim than, say, name, address and Social Security Number, they can steal credit or valuable services.\textsuperscript{122}

Wright’s reference to the possession of information ‘about a victim’ would suggest that he sees the person to whom the PII relates as the victim of the offence and, hence, the acquisition or use of the information as the offence. However his reference to thieves stealing credit or services invites consideration as to whether he is suggesting that the term means a theft of those things committed through the use of another’s identification data. So interpreted, ‘identity’ would be to ‘theft’ what ‘motor’ is to ‘manslaughter’ in the phrase ‘motor manslaughter’; a qualifying word that describes the mode of commission of the offence of theft.

However, nothing in the newspaper articles surveyed or the several other definitions considered supports such an interpretation of the phrase. Identity, however interpreted, is taken always to be a noun, indicative of the thing stolen, whether that is construed as referring to PII-based identity or the PII itself.

The conduct-based classification scheme devised above fails to capture some surrounding details. Some definitions suggest that the acquisition of the information must be unauthorised, wrongful or achieved by theft or other illicit means. Others contain no such qualifying references. Some are specific as to the use to which the PII is to be put and, in this regard, theft, fraud and deception are the specified activity. Others contemplate wider criminal use, though providing examples of theft and fraud. Yet others require nothing beyond the act of impersonation. A feature of some definitions is the requirement for an absence of knowledge on the part of the person whose


\textsuperscript{122} ibid.
identification information is misused, in some cases, as to the acquisition of the information, in others, as to the use. Non-consensual conduct is required by some definitions.

These seemingly peripheral details will all assume importance in the subsequent discussion on the criminalisation of identity theft and the review of the specific offences that have been created in Australia. For the moment, though, the exploration of definitions continues with a look at some related phrases.

2.8 ‘ID Fraud’, ‘ID Crime’ and ‘ID Related Crime’

The varied ways in which associated terms such as ‘identity fraud’, ‘identity crime’ and ‘identity-related crime’ are used lend to the uncertainty and increase the potential for confusion. As McNally and Newman note, ‘The terms identity theft and identity fraud are often used interchangeably…but they have also been viewed as separate yet related offense categories.’

Research has concluded that the term ‘identity theft’ is more commonly employed in the USA while ‘identity fraud’ seems to be the preferred general term in the UK. However, such general conclusions are to be taken with a measure of caution. Indeed, it has been noted that, more recently, both terms have been employed in the USA. In the UK Cabinet Office study, the term ‘identity fraud’ is used to cover the fraudulent acquisition of goods or services through the use of an assumed identity, be it real or fictitious. However, the term ‘identity theft’ also appears throughout the report without clear indication as to any difference that is meant to be conveyed by the use of one or the other term.

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124 Sproule and Archer (n 4) pt 4.0.

125 ibid 7.

126 Cabinet Office Study (n 98) paras 2.1 and 2.5.

127 eg, see ibid paras 1.2, 1.3, 5.11, 6.3, 6.6, 6.7, 7.1, 8.38, 9.21, 10.17, 10.28, 10.3, 10.30, 10.4, and 14.
Some entities clarify the distinctive ways in which they use the terms ‘identity theft’ and ‘identity fraud.’ McNally and Newman trace the genesis for the recognition of these terms as defining separate offences. According to them:

Historically, *identity fraud* was viewed as being committed against the collective bodies (e.g., governments, financial institutions) that received fraudulent personal information rather than against the people who were fraudulently identified by that information. The term *identity theft*, which did not appear until the late 1980s, was initially used to distinguish individual victims (identity theft) from collective victims (identity fraud) – both of whom were harmed by the same set of activities.\(^{128}\)

The use of the two terms in this way allows for a ready understanding that the same PII-based misconduct may result in dual victimisation with harm being suffered by the financial or other organisation targeted by the wrongdoer as well as the individual whose PII is misused. Hence, it is a classification scheme that is direct-victim based and preserves the original meaning of the term ‘identity theft’ as gleaned from the history of its emergence.

The reservation of the term ‘identity theft’ for use in this way is highly favoured since it allows for separate consideration of the harm suffered by direct victims. As will be demonstrated later, while the types of harm suffered by these persons may, in some cases, be of the kind sustained by financial or other institutions, they are exposed to other types of harm unshared by institutions. This provides a basis for distinguishing ‘identity theft’, so characterised, from criminal conduct wrought by means of the misuse of PII and, for that reason, is a strong factor for consideration in any related normative discussion on criminalisation. The potential for this special consideration gets lost where the misconduct of concern in this thesis is subsumed under a generic term employed to cover a gamut of identity-related wrongs. The Cabinet Office study reflects a use of the term ‘identity fraud’ in a way that does not set this aspect apart.\(^{129}\)

Terms such as ‘identity crime’ and ‘identity-related crime’ are even wider in scope, serving to highlight that PII might be involved in the commission of a wide range of offences. The Australasian Centre for Policing Research (ACPR) recommends that the term ‘identity crime’ ‘be used as the generic term to describe activities/offences in

\(^{128}\) McNally and Newman (n 123) 2 (citation omitted).

\(^{129}\) Text to n 126.
which a perpetrator uses a fabricated identity; a manipulated identity; or a stolen/assumed identity to facilitate the commission of a crime(s)’. Thus, they contemplated that the term would embrace identity fraud, as defined by them, and ‘relevant related offences including the possession, distribution and manufacture of relevant items, devices etc.; people smuggling and trafficking, drug trafficking; terrorism and money laundering’. At first blush, this usage appears consistent with that adopted by the United Nations Commission on Crime Prevention and Criminal Justice. The 2007 Secretary-General report states that it uses the term ‘to cover all forms of illicit conduct involving identity, including identity theft and identity fraud’. However, it then distinguishes between that concept and ‘identity-related crime’. It marks the distinction by reference to whether the identity abuse is ‘directed at … identity information itself or other information to which it is linked’. It reserves the term ‘identity-related crime’ for the latter instances.

Returning to the concept at hand, what remains unclear from the above extract from McNally and Newman is the precise conduct required to constitute identity theft. In their efforts at standardisation, the ACPR, in Australia, and the Home Office Steering Committee, in the UK, limit the term ‘identity theft’ to the acquisition of identity related information and, in the case of Australia, the assumption of the identity, reserving the term ‘identity fraud’ for the use of the information for unlawful activity. A similar use of terms is made by the Canadian Department of Justice which describes ‘identity theft’ as the preliminary steps of collecting, processing and trafficking in PII

\[\text{\[130\] ACPR, Standardisation of Definitions of Identity Crime Terms: A Step Towards Consistency (Report Series No. 145.3 March 2006) para 43.}\\ \text{\[131\] ibid fn 11.}\\ \text{\[132\] ECOSOC, ‘Results of the Study on Fraud and the Criminal Misuse and Falsification of Identity and Related Crimes: Report of the Secretary-General’ (UN Doc E/CN.15/2007/2007) para 113.}\\ \text{\[133\] ibid.}\\ \text{\[134\] Text to n 128.}\\ \text{\[135\] ACPR (n 130) para 43.}\\ \text{\[136\] The definitions are to be found on <www.identitytheft.org.uk/identity-crime-definitions.asp> accessed 4 July 2012; they have been adopted by some researchers in the United Kingdom. See, eg, Katy Owen and others, ‘The Fight Against Identity Fraud: A Brief Study of the EU, the UK, France, Germany and the Netherlands’ (Perpetuity Research & Consultancy International Ltd (PRCI) 2006) 6 <http://www.perpetuityresearch.com> accessed 10 August 2013.}\\
\]
for the purpose of eventual crime and reserves the phrase ‘identity fraud’ for the
deceptive use of such information in connection with crimes.\textsuperscript{137} Another illustration
comes from the approach taken by the Australian Institute of Criminology (AIC) which
defines identity fraud as using another’s personal information without permission and
‘identity theft’ as assuming, or, it seems, stealing enough personal information to
assume, another’s identity.\textsuperscript{138}

Thus, under these schemes, identity theft is a precursor to, but need not result in,
identity fraud. The specific ACPR recommendations read this way:

‘Identity Theft’ be used to describe the theft or assumption of a pre-existing
identity (or significant part thereof), with or without consent, and whether in the
case of an individual, the person is alive or dead;

‘Identity Fraud’ be used to describe the gaining of money, goods, services other
benefits or the avoidance of obligations through the use of a fabricated identity; a
manipulated identity; or a stolen/assumed identity;\textsuperscript{139}

A feature of the ACPR definitions is the requirement, in the case of identity theft, for
the identification information to relate to a genuine person, whether alive or dead, rather
than a completely fabricated identity. This is a widely recognised means of
distinguishing ‘identity theft’ from ‘identity fraud’ and wider forms of identity crime. It
is evident elsewhere in Australia.\textsuperscript{140} Such usage can also be found in England.\textsuperscript{141} This
distinction makes good sense in the context of the formulation of a concept of ‘identity
theft’ that is concerned with the damage done to individuals to whom the misused
information relates.

However, there is one rider. Arguably, room might have to be left within the construct
of identity theft for situations where, in fabricating an entirely fictitious identity, a

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{139}] ACPR (n 130) para 43.
\item[\textsuperscript{140}] See Roza Lozusic, ‘Fraud and Identity Theft’ (Briefing Paper No 8/03, NSW Parliamentary
Library Service May 2008) 3; Nicolee Dixon, ‘Fraud and Identity Theft’ (Research Brief No
2005/03, Queensland Parliamentary Library 2005) 1; MCLOC, ‘Final Report, Model Criminal
Code, Chapter 3: Credit Card Skimming Offences’ (February 2006) 17.
\item[\textsuperscript{141}] Katy Owen and others (n 136) 6; Roberto Binder and Martin Gill, ‘Identity Theft and Fraud:
Learning from the U.S.A.’ (PRCI 2005) 8 <www.perpetuity.com> accessed 10 August 2013;
Michelle Duffin, Gemma Keats and Martin Gill, ‘Identity Theft in the UK: The Offender and
\end{enumerate}
\end{footnotesize}
person selects identifiers that, unintentionally, come to be associated with a real person who suffers harm of some type as a result. This possibility is not as far-fetched as it may seem. In small societies, like Barbados, a few surnames are shared by significant portions of the population and members of large extended families tend to reside in the same geographical areas in close proximity to each other. In considering a specific offence, it will be necessary to look at the potential liability of someone who causes such unintentional harm, given the tendency of the criminal law to accept a species of recklessness as establishing sufficient fault on which to base criminal wrongdoing. \(^\text{142}\)

The terms ‘identity theft’ and ‘identity fraud’ have been used to capture yet another distinction in fact situations. Finch highlights a distinction between the two terms based on the degree of permanence with which the false identity is used. She suggests that, ‘identity fraud involves the impersonation of another person for a particular purpose after which the imposter reverts to their own identity, while identity theft is characterised by the abandonment of one identity in favour of another …’. \(^\text{143}\)

In her earlier work, \(^\text{144}\) Finch had presented a typology of identity theft that subdivided the misconduct into ‘partial identity theft’ and ‘total identity theft’. She also introduced two other categories, ‘criminal identity theft’ and ‘escape identity theft’. She regarded three factors as determinative of the category into which relevant conduct falls. These are ‘duration’ – the period over which the misuse of identity persists, ‘level of immersion’ – the depth to which the imposter delves into the victim’s life and the range and extent of the personal details misappropriated, and ‘motivation’ – the primary purpose for which the false identity was adopted.

Finch then called the temporary use of some identity details ‘partial identity theft’, and the permanent adoption of all of a victim’s details, ‘total identity theft’. Further, she theorised that if the ‘predominant motive’ involved is to commit a crime, the designation ‘criminal identity theft’ is appropriate. But, where the ‘overwhelming

\(^\text{142}\) Several offences are defined so as to admit of liability where a person has foresight as to some element of the offence. These include offences against individuals such as assault and wounding. For a discussion relating to case law on a similar point arising under a US statutory provision see Michael J Joyce, ‘Aggravated Identity Theft is Only Punishable Under Federal Statute if the Accused Knew that the Identification Information He Employed Actually Belonged to Another Individual: Flores-Figueroa v United States (2010) 48 Duquesne Law Review 145.


\(^\text{144}\) Finch (n 65) 90-92.
motivation’ is to distance oneself from some aspect of one’s past, she terms this ‘escape identity theft’.

It may be said that Finch somewhat overstates her criteria for setting apart ‘total identity theft’ since it is difficult to conceive of situations where all the details of a victim are adopted. Additionally, the references to ‘total identity theft’, ‘partial identity theft’, ‘criminal identity theft’ and ‘escape identity theft’ may not resonate well with non-academics. Theft is theft and, some may say, all theft is criminal. Nonetheless, these classifications are useful for analytical purposes as the nature and extent of resultant harm depend on a number of factors including the purpose for which the act is committed and whether the victimisation is one-off or repeated.

This distinction based on degree of use is not limited to Finch. Though not necessarily contemplating a wholesale abandonment of one identity in favour of another, Douglas-Stewart details it and heralds the upcoming discussion on harm in this way:

‘Identity Fraud’ refers to where a perpetrator uses another person’s personal information under that person’s name (usually credit card details or other financial information) on a limited number of occasions and in a single context (for example, to commit credit card fraud) for material gain.

In contrast ‘identity theft’ refers to where a perpetrator uses another person’s personal information on numerous occasions to masquerade as that person over an extended period of time to commit various acts in more than one context … [It] compromises the victim’s identity in a much more serious way than identity fraud, as the victim’s personal reputation is affected by the offender’s action. The damage is not easily reversed owing to the difficulty in identifying, locating and correcting records that relate to acts or crimes committed months or years earlier by the perpetrator.145

A critical consideration of the validity of this distinction is reserved for the discussion on harm. While it is accepted that the damage to the information holder may be more extensive and more difficult to reverse, it is open to debate whether there is merit in jettisoning less extensive use from within the ambit of the term ‘identity theft.’ A similar distinction is drawn by some between ‘true identity theft’, a term they reserve for situations where the PII is used to create new credit accounts and ‘identity fraud’. In

this sense, the latter term is used to cover those cases where an existing account is used, particularly a credit card account.\textsuperscript{146}

2.9 Models of Identity-Related Misconduct

The terminological confusion must now be clear. However, typologies such as Finch’s have the advantage of assisting researchers and those charged with the task of finding solutions to the problem, to focus on the major strands of a form of misconduct. The importance of typological method has been underscored firmly by Cheney.\textsuperscript{147} She makes out a strong case for breaking down financial frauds all falling under the legal rubric of identity theft into four types – fictitious identity fraud; payment card fraud; account takeover fraud and true name fraud. The ultimate purpose is to better understand how criminality, risks and mitigation strategies vary depending on a number of factors.

Several typologies exist, designed according to the perspective and area of concentration of those who constructed them. Two simple examples suffice. A typology presented on a popular website broadly classifies the misconduct according to purpose into financial identity theft; insurance identity theft; medical identity theft; criminal identity theft; drivers’ license identity theft; social security identity theft; synthetic identity theft; and child identity theft.\textsuperscript{148} By contrast, characterisations by reference to specific types of accounts and intrusion methods feature in typologies contained in a focused report based on suspicious activity in the securities and futures industries.\textsuperscript{149}

However, given the nature of this study, there is more to be gained from a concentration on particular models or paradigms of ‘identity theft’ than a review of the multiplicity of typologies that may be found to exist. Of particular benefit are those models that

\begin{footnotesize}
\textsuperscript{146} eg, see Ann Cavoukian, ‘Identity Theft Revisited: Security is Not Enough’ (Information and Privacy Commissioner/Ontario September 2005) 2.

\textsuperscript{147} Cheney (n 3).


\end{footnotesize}
outline the major steps comprising identity theft, as defined by their designer. Accordingly, they provide a framework within which one may focus on the process by which the misconduct is achieved. For convenience, these may be referred to as ‘process-models’.

Mitchinson and others provide an example of such a model. They suggest that the paradigmatic identity theft occurs when ‘one person – … a ‘rogue’ – obtains data or documents belonging to another – the victim – and then passes himself off as the victim’. They regard the concept as going beyond the act of acquisition. This is made clear in the three-step structure they set out as the ‘paradigm case’. According to them, the phases are:

(i) A rogue finds out some facts, about, or acquires some documents belonging to the ‘victim’
(ii) he then uses these facts or documents to contact various organizations pretending to be the victim
(iii) under these pretences, he either acquires control of the assets of the victim, or carries out acts with negative legal or financial consequences, which he misdirects to the victim

This model comes closest to capturing the essence of ‘identity theft’ as presented in its original manifestation. It focuses somewhat on the acts of the perpetrator and their effects on the direct victim, though it falls short of capturing any incidental non-financial or non-legal harm that such a victim might suffer.

Newman and McNally also present a useful three-staged model. However, they conflate Mitchinson’s third and second stage and introduce another element that has some significance in any harm-related study. They identify the three stages as (1) acquisition of the identity (2) use of the identity for financial gain or to avoid arrest or otherwise hide one’s identity from law enforcement or other authorities and (3) discovery. Curiously, they state that a particular crime may include ‘one or all’ of these stages.

This latter statement is puzzling since, clearly, there can be no discovery unless there is something to discover. Hence, it is difficult to comprehend the suggestion that the third stage alone can constitute the wrong. However, the real point those authors make with

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150 Mitchinson and others (n 111) pt 1 para 1.
151 ibid.
152 ibid pt 4.1.
153 Newman and McNally, ‘Identity Theft Literature Review’ (n 3) v.
respect to the discovery stage, is that it characterises ‘classic’ identity theft from other cases. According to them, the classic cases involve repeated use of the victim’s PII and longer pre-discovery periods. These are to be distinguished from cases involving a single misuse of identity-related information that is quickly discovered as, for example, a single act of credit card fraud.\(^{154}\)

Such three-phased models are common in the literature on identity theft. In a fascinating work in which the writer deconstructs the concept through an analogy to the well-known tale of ‘Goldilocks and the Three Bears’, McNally scripts the ‘story of identity theft’ as comprising three main ‘stages or scenes’: acquisition of personal use; misuse of personal information and outcomes of misuse.\(^{155}\) This model is reflective of one developed by Gordon and others who fragmented the identity theft/fraud process into three phrases: (1) the procurement of fictitious or stolen identities; (2) the creation of an identity, and the gaining of access to targeted sources; and (3) the actual use of the false identity to facilitate criminal activity.\(^{156}\)

This model does not allow for as concentrated a focus on the harm to the individual to whom the misused identification information relates. However, it qualifies for mention not least because it was used as a basis for a classification system developed by Sproule and Archer with the specific objective of enabling researchers to focus on particular aspects of identity crime.\(^{157}\) They expressed their objects and purpose this way:

\[
\text{We propose that it may be useful to develop and organize our classification system around each stage of the process. In the first phase, we can develop classification systems based on how the information or documents were obtained. In the second stage, we can develop classifications to help us understand how the false identity was developed and how access to targets was facilitated so that detection would be difficult or delayed. In the third phase we can develop classification systems that tell us the different type of crimes that were committed.}\(^{158}\)
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\(^{154}\) ibid.

\(^{155}\) M McNally, ‘Charting the Conceptual Landscape of Identity Theft’ in Megan McNally and Graeme Newman (eds), Perspectives On Identity Theft (n 123) 34-35.


\(^{157}\) Sproule and Archer (n 4) pt 5.3, Apps 1, 2 and 3.

\(^{158}\) ibid pt 5.3.
Later, reliance is placed on this classification system in illustrating the various phases relating to identity theft, as a precursor to the more limited type of harm.

2.10 Conclusion

Returning more directly to the concept in focus, it is clear that the term ‘identity theft’ has been used differently by different entities. However, this chapter has sought to re-discover the meaning of the term as conceived by its founding parents and their purpose for its conception. This return to historical sources has demonstrated a number of basic elements that suggest a specific focus from which some usages of the term have departed.

Centrally, the term relates to the misuse of PII. The historical context suggests strongly, though, that the phrase was coined in relation to stories written to highlight the perspective of the person to whom that information related and to capture the experiences suffered by such persons as a result of the misuse. The media stories focus on the victimisation of the persons to whom the PII related rather than the loss to financial or other institutions affected.

The stories are all about situations where the PII was used by malefactors to misrepresent their identity as that of the victims. Intended purposes varied. They included doing wrongful acts in the victims’ name; exploiting their financial resources; and causing financial commitments or legal liability to be attributed to them. In one case, the purpose of the wrongdoer was to distance himself from his past and start a new career. None of the stories told a tale of an affected victim where there was no use of the information.

Hence, it is fair to conclude that the assumption of an identity through the use of PII was crucial to the original concept. It seems also that it is an aspect of the affected individual’s identity or being that was considered stolen rather than the individual pieces of data. Nonetheless, this is not to ignore the potential for anxiety short of the use stage.

Thus, there is room for debate as to whether any criminal offence designed to target this form of misconduct should extend beyond the core behavior outlined above to include cases where PII is possessed with intent to use it for false identification purposes but no
identity theft has occurred. Early legislative attempts at criminalisation suggests a settlement of this debate in the affirmative but, significantly, those legislative models fall short of directly touching the real conduct in which the origin of the term is rooted.

This legislative approach and the nuances contained in the range of definitions that exist have been a source from which one can derive many factors that must be considered in any offence-creation exercise. These will be examined later in the context of the specific offences that exist in Australia and the theoretical search for a justification for the creation of specific offences to cover this form of misconduct.

Hence, the discussion as to whether offences crafted like those early provisions really criminalise ‘identity theft’ as originally conceived is postponed. So too is the consideration as to if these preparatory offences can be justified under any theory of remote harm, given their concentration on conduct that is not in itself necessarily wrongful or harmful. Inquiry into the role of consent, the application of the offence to instances of the employment of fictitious identities, and the type of ulterior misconduct contemplated are among the other issues to be explored.

The recognition that the term ‘identity theft’ was coined to focus on the experience of persons whose PII was misused is critical. The phrase adopted exploits powerful rhetoric to suggest that this form of misconduct strikes at the very being of those individuals and amount to a theft of identity. This popular derivation and powerful imagery provides every justification for the retention of the term in academic discourse despite the apparent strength of the argument as to its lexicographical inaccuracy. In any event, that argument must now fall away in view of the fact that the term now finds residence in the pages of leading dictionaries.

This thesis is concerned with the extent to which the criminal law does or should protect against the harm caused to such individuals and, in particular, whether normative theories of criminalisation are readily accommodative of special criminal offences in this regard. Hence, a more concrete look at the nature of the wrongdoing and an examination of the types of harm that may befall such victims must be essayed as part of the measuring process. In undertaking this task, process-models will assist to separate out the area of concern from that which is only peripherally relevant. However, the search for a criminalisation basis is not limited to harm, or harm in this narrow way.
Meanwhile, however, it is necessary to return to the examination of the appropriateness of the traditional offence of theft in this context and the applicability of other traditional offences.
3.1 Introduction

In the preceding chapter, it was argued that it is inappropriate to measure the aptness of the term identity theft against rigid legal terminology, given its non-specialist origins. Nonetheless, a substantial part of this chapter is dedicated to an evaluation of the applicability of theft law to identity theft. The exercise is not a pedantic one, neither is it aimed at quieting the anti-appropriateness camp. It forms part of a wider exercise designed to determine whether existing offences or judicial practices in England or Barbados adequately cover identity theft. If old and well-refined concepts with which courts, scholars and practitioners are familiar, or recent statutory evolvements, can be satisfactorily applied to contemporary concerns, a discussion as to the desirability of a new offence loses any urgency.

Given the prior reference to it, the offence of theft is a natural starting point and merits distinct and exhaustive treatment. However, it is not the only offence of relevance. A brief survey of existing offences in Barbados that might, in some degree, be relevant, is justified. So too is an examination of recent legislative interventions in England which touch, or relate to the problem, though not entirely or exclusively so. The two significant statutes that stand out in this respect are the Identity Documents Act 2010 and the Fraud Act 2006. Additionally, there is the well-established practice of sentencing courts in recognising identity theft as an influential factor in determining the type and level of sentences in offences in which the misconduct featured in some way. This offers itself for consideration as an alternative method by which the criminal justice system marks its disapproval of identity theft.

However, the survey of existing offences cannot be compartmentalised on a jurisdictional basis since most of the offences are common to Barbados and England. This overlap is not accidental but reflects the historical constitutional relationship between the two countries and the continuing influence of British jurisprudence on the development of the criminal law in Barbados.
As a settled territory, the common law of crime in force in England at the date of settlement together with then existing statutes of general application became applicable in Barbados. In 1639, a legislative assembly was established on the island, making it the third oldest parliament in the Commonwealth. Since then, the parliament of Barbados has continued the British method of legislating criminal offences in separate statutes, the content of which, generally, mimic English legislation. The Judicial Committee of the Privy Council remained the Island’s final appellate court until 2005 when it was replaced by the Caribbean Court of Justice but English precedents continue to be of persuasive value, and are often cited, in Barbadian courts.

Thus, the island’s substantive criminal law comprises common law and statutory offences, a large number of which exist or existed previously in England and British case law and secondary sources are relevant to an exposition of Barbadian law. Separation on a jurisdictional country basis would, therefore, ignore that reality.

### 3.2 Classification of Existing Offences

A survey of existing crimes reveals no general offence of identity theft. However, there are a number of statutory offences with respect to the commission of which identity theft may play a legally constitutive or directly facilitative role. These fall to be distinguished from other offences with which identity theft may be associated but not in a legally integral way. This latter category of offences may readily be omitted from this survey. In those cases, the identity theft might have been committed as a preparatory measure and, even if it coincides with the commission of the offence, it does not aid in establishing any constitutive element.

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1. For an exposition of the relevant principles relating to the reception of English law see *Blankard v Galdy* 90 ER 1089, (1693) Holt KB 341; *Anonymous* 24 ER 646, (1722) 2 Peere Williams 75 (Ch); CJ Tarring, *Chapters on the Law Relating to the Colonies* (3rd edn, Stephen & Haynes 1906) ch 1: KW Patchett, ‘Criminal Law in the West Indies’ (1970) (Xerox copy, UWI Faculty of Law Library) 1-4.

2. The constitutional amendments and legislation providing for the transfer of final appellate jurisdiction is set out at paras 12-19 in *Barbados Rediffusion Service Limited v Asha Mirchandani* (No 1) [2005] CCJ 1 (AJ), (2005) 69 WIR 35 [12]-[19].

3. eg, see *R v Taitt* (2011) 80 WIR 30 (CCJ) in which a number of English decisions relating to joint enterprise were referred to by counsel and the court.
A common example of the latter category of situations is the use of false identities by persons involved in terrorism. While section 3 of Barbados’s Anti-Terrorism Act lists a number of offences which are subsumed under the general rubric of terrorism, none of them requires engagement in identity theft for their commission nor does proof of identity theft establish any of their elements. Arguably, though, preparatory terrorism-related identity theft may play a legally constitutive role under section 5 of the UK Terrorism Act 2006. That provision makes it an offence for a person to engage in any preparatory conduct to give effect to an intention to commit or aid in the commission of terrorism.

In this context, the offence of theft which is found in Barbados and England qualifies for consideration since, as the ensuing discussion demonstrates, identity theft may constitute evidence of dishonesty, a critical element in that offence. However, that forms but part of the wider analysis essayed with respect to this offence.

### 3.3 The ‘Stolen’ Factor in Identity Theft

Reference was made in chapter two to the pioneering and outstanding work of Sullivan and Finch, both of whom conclude that some concept of, or relating to, identity can be stolen. Finch suggests ‘personhood’ to be the affected concept but gives no indication that she applies the word ‘stolen’ in a technical way. It is important to contextualise the conclusion she reaches in fulfillment of the promise to ‘explore what it means for a person’s identity to be stolen’. She writes:

…although [legal identity] lacks a tangible physical presence in the same way as other types of identity, it can be made manifest by the production of documents or the possession of knowledge that substantiates the claim to be the person in question. The ‘tangible’ thing that is ‘stolen’ is the personhood of another as manifested by the assertion to be that person which may or may not be supported by documentary or other evidence. As such, it involves the misuse of information that is specific to an individual in order to convince others that the imposter is the individual, effectively passing oneself off as someone else.

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4 Cap 158.
6 ibid 86.
7 ibid 89.
Finch links identity with personhood by noting that, as it relates to identity theft, ‘the concern is with identity as a means of ascertaining individuality and establishing personhood …’.\(^8\) She does not define the latter concept but might have had in mind the basic understanding of the term which corresponds with the dictionary meaning that describes it as ‘the quality or condition of being a person; esp. personal identity, selfhood’.\(^9\) Intuitively, there is a sense that she is correct that the personhood of an individual is affected negatively when someone else uses that person’s PII to pass himself or herself off as that person.

By contrast, Sullivan engages rigorous legal analysis in contending that ‘token’ or ‘transactional’ identity can be stolen.\(^10\) However, she makes no claim that an identity is stolen in every case of identity theft. She limits her thesis to the special circumstance of a state administered set of identifiers collected and constructed digitally, and designated by legislation, to verify the authenticity of persons for transactional purposes. She posits that outside of her identity construct, the misuse of PII to misrepresent an identity cannot constitute identity theft but should be classified as identity fraud.\(^11\)

However, some notion of an identity is impacted in all cases of identity theft. Additionally, in chapter two, the inextricable link between PII and identity was established. The misuse of PII was identified as core to the commission of identity theft. It was established that any number of pieces of such information may be used to identify an individual, through a process of identification. Additionally, it was demonstrated that a concept of legal, or personal, identity arises from this relationship between some of an individual’s PII and that individual, even outside of Sullivan’s structured digital arrangement.

Hence, three concepts emerge for consideration as ‘stolen’ factors in identity theft: identity, personhood and PII. However, an introduction to the law of theft is a necessary prelude to determining whether any constitutes a legal fit.

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\(^8\) ibid 87.


\(^11\) ibid 120.
3.4 An Overview of Theft Law

Many outstanding legal textbooks provide comprehensive expositional and critical discourses on the concept of theft and its constituent elements.\(^{12}\) What follows is a rudimentary sketch intended only to provide an overview of the relevant law.

In Barbados and England, theft is a comparatively modern legal concept. It was born in England with the enactment of the Theft Act 1968 and cloned, in Barbados, in 1994 with the passage of a statute of identical title.\(^{13}\) Its relative modernity stands in stark contrast to the offence of larceny which it displaced. One feature of the past law remains instructive. It is that the law required constant modification to ensure its application to increasingly sophisticated forms of stealing and new forms of wealth that emerged as the economic bases of societies changed.\(^{14}\) Modern theft law will be pressed from time to time to accommodate new forms of property.

Indeed, property is the central concept around which the offence is structured. Section 3(1) of the Barbados statute stipulates that the offence occurs where a ‘person … dishonestly appropriates property belonging to another with the intention of permanently depriving the other of that property’.\(^{15}\) The statutes reflect the opinion of Stephens that ‘all property whatever’ should be regarded as the subject matter of theft.\(^{16}\) Thus, section 2 of the Barbados Act mirrors section 4(1) of the UK statute\(^{17}\) in stipulating that the term property ‘includes money and all other property, whether real or personal, including things in action and other intangible property’.


\(^{14}\) For the origins and development of larceny law see: Jerome Hall, *Theft, Law and Society*, (2nd edn, Bobbs-Merrill 1952) ch 3.

\(^{15}\) See the Theft Act 1968 (UK), s 1(1) for UK equivalent.


\(^{17}\) Theft Act (UK) (n 15).
This definition is a partial one. It states what the term includes but not what it means, leaving it to judicial determination whether a particular thing is property for the purposes of the offence. However, whatever form property takes, it is an offence requirement that it has a certain relationship with someone other than the person accused of the offence. It must belong to another. The statute stipulates that the term ‘belonging to another’ extends to persons who have possession or control of, or a proprietary right or interest in, property.18

To be guilty of theft, a person must ‘appropriate’ property. The English statute provides that, ‘Any assumption by a person of the rights of an owner amounts to an appropriation …’ .19 Whatever meaning these words appear to convey, it has been held that any assumption of any of the rights of an owner amounts to an appropriation.20 Furthermore, it matters not whether or not the owner consents to or authorises the assumption of the right,21 the appropriation amounts to an adverse interference with or usurpation of the owner’s rights,22 or the person obtaining the property acquires an indefeasible title to it.23

Thus, as has been noted by commentators, the concept of appropriation is devoid of practical significance beyond being the minimal condition required to trigger the offence.24 In such a circumstance, it is widely acknowledged that the element of dishonesty constitutes the principal determinative factor in criminality for theft.25 A respected body of opinion has sharply criticised this key concept26 suggesting that it ought to be dispensed with,27 or statutorily defined or prescribed.28 Yet, there is only a

18 ibid s 5 (1); Theft Act (Barbados) (n13), s 6(1).
19 Theft Act (UK) (n 15), s 3(1); the Barbados Act (n 13), s 5(1) is in similar terms.
22 ibid.
24 Ormerod and Williams (n 12) para 2.11 state that the actus reus of theft ‘is reduced to vanishing point’; see also Clarkson, Keating and Cunningham (n 12) 752-753 who posit that the term has been ‘emasculated of any practical meaning’.
25 eg, see Law Commission, Legislating the Criminal Code: Fraud and Deception (Law Com CP No 155, 1999) para 3.20; 381; Ormerod and Williams (n 12) para 2.270.
partial definition that excludes three circumstances of appropriation from within its purview.\textsuperscript{29} This leaves the issue of dishonesty largely to the fact-finding tribunal, a position favoured provisionally by the Law Commission\textsuperscript{30} and defended by Tur.\textsuperscript{31}

The excluded situations exist where an act of appropriation is carried out by a defendant in the belief that: (1) he has a legal right to deprive the other of the property whether on behalf of himself or a third person; (2) the other’s consent would have been forthcoming if the other knew of the appropriation and the attending circumstances; and (3) except where the accused acquired the property as trustee or personal representative, the person to whom the property belongs could not be discovered through reasonable efforts. Additionally, it is prescribed that an appropriation is dishonest, notwithstanding a willingness to pay.\textsuperscript{32}

In \textit{R v Ghosh}, Lord Lane CJ formulated a dual test of dishonesty.\textsuperscript{33} The court is first required to decide whether the conduct complained of was dishonest ‘according to ordinary standards of reasonable and honest people’. If it so finds, it must then satisfy itself that ‘the defendant himself must have realised that what he was doing was by those standards dishonest’.\textsuperscript{34} Lord Lane went on to state that, in most cases, where the defendant’s actions are obviously dishonest by objective standards, the issue will not be in doubt. He opined further that Robin Hood and anti-vivisectionists act dishonestly despite their belief in the morality of their conduct, because they know that ordinary people would consider those actions to be dishonest.\textsuperscript{35}

The obvious question is: ‘What if they did not know that ordinary people would so consider their actions?’ In such cases, a \textit{Ghosh} direction becomes necessary. Hence, the

\begin{itemize}
\item \textsuperscript{29} Theft Act (UK) (n 15), s 2(1); Theft Act (Barbados) (n 13), s 4(1).
\item \textsuperscript{30} Law Com Paper No 155 (n 25) para 5.6.
\item \textsuperscript{32} Theft Act (UK) (n 15), s 2(2) (UK); Theft Act (Barbados) (n 13), s 4(2).
\item \textsuperscript{33} \textit{R v Ghosh} [1982] QB 1053 (CA).
\item \textsuperscript{34} ibid 1064.
\item \textsuperscript{35} ibid.
\end{itemize}
criminality of the morally questionable conduct of Robin Hood, anti-vivisectionists and others may still fall to be determined by fact-finding tribunals in such circumstances. It has been held that where the issue of the defendant’s belief as to the moral judgment of reasonable and honest people is not raised on the facts, a direction in accordance with the second limb of the Ghosh formula is unnecessary.\textsuperscript{36}

The final constitutive element of the offence is the intention to permanently deprive. As a general rule, there can be no theft if there is an intention to use the property temporarily and return it to the owner. The actor must intend to permanently deprive the other of the property. However, the legislation deems that the requisite intention exists where a defendant appropriated the property without ‘meaning’ the other person to lose it permanently but intending to treat the subject matter of the theft ‘as his own to dispose of regardless of the other’s rights’.\textsuperscript{37}

The provisions stipulate further that ‘a borrowing or lending may be so treated only if it is for a period and in such circumstances as to make it equivalent to an outright taking or disposal’.\textsuperscript{38} They describe one circumstance that is to be regarded as treating property to be disposed of regardless of the other’s rights. This is said to occur where a person who has possession or control of the property, parts with it under a condition as to its return that he, or she, may be unable to perform, if it is done for the person’s purposes and without the other’s authority.

There has been judicial acceptance\textsuperscript{39} of the description of section 6 (UK) as a provision which ‘sprouts obscurities at every phrase’.\textsuperscript{40} Its true reach has troubled English courts. Related judicial analyses have attracted the unflattering comment that they lack detailed discussion of the section and that the failure, sometimes, to refer to relevant previous decisions has resulted in ‘a confused and at times Delphic collection of judicial statements’.\textsuperscript{41} The judicial debate has been as to whether the section should be

\textsuperscript{36} R v Roberts (1987) 84 Cr App R 117 (CA); R v Price [1990] Crim LR 200 (CA).

\textsuperscript{37} Theft Act (UK) (n 15), s 6(1); Theft Act (Barbados) (n 13), s 7(1); In R v Raphael [2008] EWCA Crim 1014, [2008] Crim LR 995[45] the court rightly described s 6 as a deeming provision which allows for the establishment of the necessary intention whether there is none.

\textsuperscript{38} Theft Act (UK) (n 15), s 6(1); Theft Act (Barbados) (n 13), s 7(1).

\textsuperscript{39} R v Lloyd [1985] QB 829 (CA) 834.

\textsuperscript{40} JR Spencer, ‘The Metamorphosis of Section 6 of the Theft Act’ [1977] Crim LR 653.

construed narrowly, encompassing only those circumstances in which the requirement was considered to have been met under earlier law, despite an intention to return the property.\textsuperscript{42} The prevailing opinion favours a wider application of the provision.\textsuperscript{43}

### 3.5 Theft of Personhood, PII or Identity?

An evaluation of how these principles would fare in the identity theft context follows. However, as a precursor to that discussion, it is necessary to return to some of the competing concepts for consideration as property: personhood, PII and identity.

#### 3.5.1 Summary Rejection of Personhood

Personhood is not a self-defining term. Purdy makes the point that, ‘There is no ahistorical, context-free meaning of personhood.’\textsuperscript{44} However, at the core of personhood are self and identity. Garner drives home this point well.\textsuperscript{45} After asserting that the words ‘I am’ are ‘the briefest but most powerful phrase in language’ she goes on to assert that the ‘I am’ of personhood is self and identity and that, ‘At the centre of humanhood is this knowledge of our own existence which requires neither explanation nor objective verification.’\textsuperscript{46} It is this knowledge and consciousness which leads to a feeling of violation when a person’s body\textsuperscript{47} or, in this case, identity is used by others. In such circumstances, personhood is inevitably affected.

There is a body of literature which explores the intimate relationship between personhood and property.\textsuperscript{48} However, nothing has been unearthed which suggests that there has been any effort to characterise personhood as property. At this stage,

\textsuperscript{42} The restrictive interpretation is evident in \textit{R v Warner} [1970] 55 Cr App R 93 (CA) and \textit{Lloyd} (n 39); support for the wider interpretation lies in \textit{Fernandes} [1996] 1 Cr App R 175 (CA); \textit{R v Duru} [1974] 1 WLR 2 (CA); \textit{R v Bagshaw} [1988] Crim LR 321 (CA).

\textsuperscript{43} \textit{Fernandes} (n 42).


\textsuperscript{46} ibid.

\textsuperscript{47} For an articulation of this point with respect to rape see John Gardner and Stephen Shute, ‘The Wrongness of Rape’ in John Gardner (ed), \textit{Offences and Defences: Selected Essays in the Philosophy of Criminal Law} (OUP 2007).

\textsuperscript{48} A good discussion is contained in Margaret Radin, ‘Property and Personhood’ (1981-82) 34 Stanford Law Review 957; a survey of the literature is contained in Purdy (n 44) 1054-56.
therefore, it can be excluded as consideration for the subject matter of theft. The discussion turns to PII.

3.5.2 A Prima Facie Case for PII

Terms such as ‘PII’ have no particular technical meaning unless converted legislatively into a legal term. Examples of such conversion are to be found in the Identity Documents Act 2010, discussed below, and the Australian identity theft statutes set out in chapter four. However, generally, the term ‘PII’ is used to refer to information by which an individual can be uniquely identified either by itself or combined with other information. It is sometimes interchanged with ‘personally identifiable information’, a term more commonly used in the USA. The latter was defined by the Office of Management and Budget in 2007 as:

information which can be used to distinguish or trace an individual’s identity, such as their name, social security number, biometric records, etc. alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother’s maiden name, etc. 49

PII is distinguishable from personal information of which it is a subset. The terms ‘personal information’ and ‘personal data’ are used interchangeably. They have become common place since the end of the twentieth century with the emergence of legislation designed to protect individuals’ informational privacy. The Organisation for Economic Co-operation and Development (OECD) produced the earliest instrument providing international standards and guidelines specifically relating to the treatment of this category of information. 50 It defines the term ‘personal data’ as ‘any information relating to an identified or identifiable individual’. 51 Nonetheless, domestic data protection statutes have somewhat assimilated the term with PII. 52


51 ibid article 1.

52 Data Protection Act 1998 (UK), s 1 defines the term as data ‘which relate to a living individual who can be identified’ from that data or that data and other information in the
Kang provides a useful analysis of the term personal information. He indicates that it ‘describes the relationship between the information and a person, namely that the information—whether sensitive or trivial—is somehow identifiable to an individual’. He submits that information could be identifiable to an individual in three ways: (1) the fact that the information was authored by the individual; (2) the fact that the information is descriptive of the individual; and (3) the fact that the information is instrumentally mapped to the individual.

Al-Fedaghi and Thalheim articulate a distinction between PII and personal information that narrows the former concept considerably. They posit that PII has at its core some natural or artificial identifier that refers to a uniquely identifiable individual. They use the term ‘natural identifiers’ to refer to ‘a set of natural descriptors that facilitates recognizing a person uniquely’. Given examples include fingerprints, faces and DNA. By ‘artificial identifiers’, they refer to descriptors that are mapped to individuals such as social security numbers. Hence, to be classified as PII, data must contain an identifier. They classify personal information into PII and non-identifiable information.

Despite the legislative role mentioned, the general nature and function of PII is not dependent on statute. The link between individuals and PII precedes legislative involvement and the integral role of that type of information in the identification process is a historical one. This has been demonstrated recently by Higgs in a thought-provoking publication in which he defends the growth of an ‘ID culture’ as a consequence of civil liberties and democracy. PII is the instrument often used by perpetrators of identity theft. In a sense, the misconduct is really about the misuse of possession of the data controller; the definition includes any opinion about the individual or any indication of an intention in respect of him.

54 ibid 1207.
55 ibid.
57 ibid 620.
58 Edward Higgs, Identifying the English: A History of Personal Identification 1500 to The Present (Continuum 2011).
this type of information. Hence, though it is distinguishable from the concept of identity, it is not unreasonable to consider whether PII can be the subject matter of theft.

### 3.5.3 PII-Manifested Identity

Like personhood, identity is not self-defining. Some of the various ways in which the term is employed have been identified in chapter two. In the context of this thesis, the concept has been narrowed to an identity which can be made manifest by PII. This form of identity has been referred to varyingly as personal\(^5^9\) or legal identity.\(^6^0\) Any effort to equate a set of PII which is enough to identify an individual with the identity of that individual is derailed by the reminder of the attributes-identity divide highlighted in chapter two. A collection of attributes does not amount conclusively to an identity. However, it is often enough to suggest that a person is who he, or she, claims, or is considered, to be.

Apart from those identified by her under the schemes she discusses, Sullivan rules out the idea that any set of PII constitutes an identity. She treats the fact that her dataset not only identifies but also sets apart one individual from the rest of the population as decisive.\(^6^1\) She contends that items such as name, gender and date and place of birth, even if taken as a set, will not conclusively identify an individual. She illustrates this by reference to the fact that, particularly in large populations, there is likely to be more than one person of a particular gender who was born in London on a particular date. She considers the misuse of such data to be identity fraud, not identity theft, since an element of deception is involved.\(^6^2\)

This argument is forceful but not entirely compelling. The perpetrator of an identity theft will rarely use an unspecific address such as London. The misused address will more likely specifically correspond with that of the individual whose identity is being falsely represented. More particularly, it matters not if a set of PII that has been used in a particular identity theft might also apply to another person. Once the perpetrator successfully targets a particular individual to whom that information applies, the

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\(^{60}\) Finch (n 5) 89.

\(^{61}\) Sullivan (n 10) 114.

\(^{62}\) ibid.
victimisation of that person is achieved by means of a set of PII which was enough to identify him or her. It matters not that the data cannot be used to distinguish that victim from all other persons. It is the identification of the victim that is critical rather than the setting him apart from all others.

Admittedly, where a construct not only identifies but sets apart, it more closely approximates true identity but, in substance, it remains only a representative collection of PII, as is data used outside of Sullivan’s construct. Hence, a case may be made out that whenever an identity theft is wrought by means of a set of PII, that information should be considered constitutive of the victim’s identity. As Finch posits, this form of identity is more concerned with identifiability, but it is a form of identity nonetheless.

To take root as the basis of theft some statutory intervention might be required to deem the manifestation of the identity by means of PII, an actual identity. Alternatively, it is arguable that where an identity is manifested through the use of PII, the person engaging in the identity theft uses that identity as manifested. That manifested identity may therefore be considered as possible subject matter for the offence of theft. The discussion will, therefore, proceed to consider whether PII or such PII-related identity can be stolen.

3.6 Applying Theft Law to Identity Theft

In considering the application of theft law to the selected concepts, the elements of the offence will be considered in the order in which they appear in its definition. Hence the application of the element of dishonesty will be first considered followed by appropriation, property and the relationship requirement, and the intention of permanent deprivation. In each case, the discussion will proceed as if the other elements of the offence have been satisfied. This approach is taken to ensure that all the elements are properly considered in this evaluative exercise.

3.6.1 Identity Theft as Evidence of Dishonesty

There might be an intuitive inclination to assume that identity theft is dishonest according to the current standards of ordinary decent people. No surveys have been unearthed that test the correctness of that assumption. Nonetheless, the breadth of the

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63 Finch (n 5) 89.
concept of dishonesty in theft law is such that in determining whether that offence element is satisfied, account must be taken of the wider purpose for which the identity theft is committed. As acknowledged by leading commentators, courts must ascertain the alleged wrongdoer’s purpose, motive and explanations for an appropriation.64

Factors relating to purpose could be critical in concluding whether an act of identity theft is dishonest. Two sets of circumstances are illustrative. In the first, the actor’s purpose is to defraud, commit other crime, or falsely attribute liability and wrongdoing to another. In the second set, the purpose is to achieve a result which the actor considers to be morally right. For example, he might have used PII relating to a wealthy miser in order to get money to feed the poor or that of a doctor to gain admission to a house to save the life of a sick child.

In the first set of circumstances, the actor’s conduct is obviously dishonest and there would be little difficulty in reaching a conclusion that the element of dishonesty is satisfied. However, the second category of cases admit of different outcomes depending on the purpose which the actor considers to be morally right, the court’s assessment of the moral nature of that conduct, and whether the actor believed that reasonable and honest people regard that conduct as dishonest. Such is the effect of the law as pronounced in Ghosh.65

These examples are sufficient to show that the concept of dishonesty could be applied in the context of identity theft. Any difficulties that might arise are those inherent in the employment by the criminal law of such a morally evaluative concept as the defining element of the offence and the difficulties that could arise from the application of the dual test formulated in Ghosh.

3.6.2 Appropriation of PII and PII-Related Identity

This leads to the application of the appropriation element. Given the neutrality of the term, the mere use of another’s PII or PII-related identity would amount to an appropriation of that subject matter. This would be the case even if the information is such that it is known by several persons or is in the public domain.

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64 eg, see Ashworth and Horder (n 12) 390.
65 Ghosh (n 33) 1064.
The nature of information is such that it may be shared by several persons at the same time. Hence, though taken or used by one person it may still remain within the knowledge of the other. However, this does not hinder the successful application of the appropriation element. Any use of the information or identity would be an assumption of a right of the person to whom the information relates. The case law on appropriation considers this to be enough.

### 3.6.3 The Property Element: Complexity and Challenges

The questions as to whether PII or an identity can be regarded as property and, if so, who enjoys the required relationship with them are rather more complex. The idea of information as property has been widely debated. There has been no similar academic foray as it relates to PII-manifested identity as property.

No reported cases exist in England or Barbados in which the question as to whether PII or PII-related identity is regarded as property has been considered. However, there is some indication of a disinclination on the part of English courts to regard information as property. The leading case is *Oxford v Moss* in which it was held that confidential information would not be so classified. Despite the profundity of the issue, nothing in that decision provides a basis for meaningful discussion. Smith J, with whom the other justices agreed, thought the position to be ‘clear’ and provided no rationale for the decision.

While the English civil courts have afforded persons quasi-proprietary rights with respect to confidential information and trade secrets, they have not recognised information as property. The English position is not unique as is exemplified by

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67 (1979) 68 Cr App R 183 (DC).

68 ibid 184.

69 eg, see *Saltman Engineering v Campbell Engineering* (1948) 65 RPC 203 (CA); *Terrapin v Builders Supply Co* [1967] RPC 375 (CA); *Boardman v Phipps* [1967] 2 AC 46 (HL); *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415 (ChD); *Fraser v Thames Television Ltd* [1984] QB 44 (QBD); for a relevant discussion see Endesaw (n 66).
decisions out of Canada\textsuperscript{70} and Australia.\textsuperscript{71} However, the law is otherwise in the USA where the Supreme Court held that the Wall Street Journal had a property right in keeping certain information confidential and making exclusive use of it, prior to publication. The court stated that confidential business information had long been recognised as property.\textsuperscript{72} A similar position had been taken by a majority of the Ontario Court of Appeal which held, in \textit{R v Stewart}, that confidential information collected by a commercial enterprise ‘through the expenditure of time, effort and money for the purposes of its business’ was property.\textsuperscript{73} However, that decision was reversed by the Supreme Court.\textsuperscript{74}

Two key points emerge from this review of the judicial decisions. Firstly, judicial pronouncements favouring the characterisation of information as property were not generalised but limited to the category of confidential information meeting certain conditions. Secondly, in rejecting the notion that such information was property for purposes of the offence of theft, the Supreme Court of Canada opined that determinations as to whether property should be so characterised were best left to the legislature, given the implications that may arise from such a development.

It is widely acknowledged that decisions relating to the classification of information as property must be approached with caution.\textsuperscript{75} Implications for issues such as freedom of expression and the health of the information economy must be carefully weighed and a broad-brush or one-size-fits-all approach would not be appropriate. One category of information may more closely resemble property than others and the impact of property designation on other significant interests will vary from type to type.

Hence, Samuelson’s call for a coherent theory as to when information should be treated as property is understood.\textsuperscript{76} Nonetheless, consideration as to whether specific categories

\textsuperscript{70} \textit{R v Stewart} (1988) 1 SCR 963; 50 DLR (3d) 583 (SC); \textit{Lac Minerals Ltd v International Corona Resources Ltd} [1990] FSR 441 (SC); \textit{Cadbury Schweppes Inc. v FBI Foods Ltd} [2000] FSR 491 (SC).
\textsuperscript{71} \textit{Smith Kline & French Laboratories (Australia) v Secretary to the Department of Community Services and Health} [1990] FSR 617 (FC).
\textsuperscript{73} \textit{R v Stewart} (1983) 149 DLR (3d) 583 (OCA).
\textsuperscript{74} \textit{Stewart} (n 70).
\textsuperscript{75} eg, see Hammond (n 66) 150; Weinrib (n 66) 149; Samuelson (n 66) 18.
\textsuperscript{76} Samuelson (n 66) 18.
of information can be accorded the status of property may be forced without the realisation of such a theory. In any event, though, it is necessary to heed Hammond’s caution that, ‘Before we siphon off particular kinds of information into strenuously protected legal boxes we ought to be very sure that protection is warranted and very carefully delineated.’77

With this in mind, consideration will be given as to whether property-based protection should be accorded to the category of PII and, by extension, PII-based identity. The starting point must be to articulate a perspective on property as a framework for the discussion.

3.6.4 The Essentials of Property

In an excellent work, Munzer indicates that there are two ways of conceptualising property.78 The simple and more popular one characterises property as things while the other describes property as relations. The latter construct presents property as a relationship which exists between persons and particular things.79 The law denotes a thing as property by the prescription of a set of proprietary rights which distinguish one person’s relationship with that particular thing from all others.

As noted by Goold,80 this conceptualisation is ‘essentially a combination of Hohfeldian rights analysis81 and the later work of Honoré’ who identified eleven incidents of property as constituting a bundle of relevant advantages and disadvantages.82 These are (1) the right to possess; (2) the right to use; (3) the right to manage; (4) the right to the income; (5) the right to the capital; (6) the right to security; (7) the incident of transmissibility; (8) the incident of absence of term; (9) the prohibition on harmful use; (10) liability to execution; and (11) residual character. However, not all these incidents

77 Hammond (n 66) 150.
79 ibid 16.
81 WN Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning: And Other Legal Essays (WW Cook (ed), Yale UP 1923).
apply to all types of property and the collective set may vary with different types of property. Weinrib illustrates this by reference to the difference in the aggregate of legal relations that attaches to fee simple ownership as compared to easements and the fact that, ‘Ownership of a fee simple will itself mean different things in different jurisdictions and at different times’.83

Furthermore, this does not tell us what types of things should be recognised by the law as property. As Weinrib notes, used in this sense, property is a ‘conclusory term [which] does not help us to decide in what circumstances property rights should be awarded’.84

There are more fundamental bases on which the determination as to whether to designate a thing as property are to be made. Ultimately, recognition is based on an underlying theory of property inherent in which ought to be a rationalisation of its function.

In a comprehensive discourse, Ely identifies and discusses nine theories of property85 but concludes that it is the ‘general welfare theory’ that is ‘the real, the correct theory…’.86 He posits that this theory points to social utility as the basis of property and urges that, ‘Property exists because it promotes the general welfare and by the general welfare its development is directed.’87 He describes this theory as one of social evolution since property accomplishes its ends by evolving with society.88 Ely states it to be a legal theory also since property implies law and through law possessions develop into property but reiterates that the words of the theory show that law cannot be arbitrary.89 Using irrigation in the USA and enclosures of land in England as examples, Ely demonstrates how ‘the general welfare’ has dictated the evolution of new and higher forms of property rights’.90

83 Weinrib (n 66) 121.
84 ibid.
85 Richard Ely, Samuel Orth and Willford King, Property and Contract in their Relations to the Distribution of Wealth (Macmillan 1914) vol 2 ch XXII.
86 ibid 545.
87 ibid 546.
88 ibid.
89 ibid.
90 ibid 546-48.
The general welfare theory constitutes a theoretical basis on which to rest an argument for the recognition of PII, and related identity, as property, given the increasingly significant role played by identification in the contemporary world. However, this social welfare approach leaves aside the intimate connection between PII and identity, concepts that are all person-centred. Bergelson fills this breach in making her case for applying a property regime to that category of information.\(^9^1\) She resorts, inter alia, to the personality theory in support of her argument that personal information exists as an extension of the individual’s personality.\(^9^2\)

The personality theory is the most compelling of three that Bergelson invokes to back her conclusion that an individual has a claim to his or her personal information.\(^9^3\) As she explains,\(^9^4\) this theory originates in Hegelian philosophy.\(^9^5\) She continues:

> The underlying premise of the personality theory is that to achieve proper self-development — to be a person — an individual needs some control over resources in the external environment. That control is most commonly assured through the system of property rights \(\ldots\) \(^9^6\)

Personhood-property theorists have built on this foundation. This perspective sees property as reinforcing personhood by allowing individuals autonomy over their possessions. Purdy summarises the various theoretical versions of this approach and the variety of normative evaluations found in the literature.\(^9^7\) With respect to the former, he writes:

> In some versions, the most important aspect of this function is self-ownership, the power to dispose of one’s person and time freely and a protection against outright ownership by others. Other accounts place more stress on self-ownership as synecdoche, an aspect of property rights that expresses the logic or essence of the whole scheme of private property, and indeed of rights-holding itself. Still others regard ownership as enriching identity by enabling owners to identify with and express themselves through the external objects they control.\(^9^8\)

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\(^9^1\) Bergelson (n 66).
\(^9^2\) ibid 429-32.
\(^9^3\) ibid 419-32
\(^9^4\) ibid 429.
\(^9^6\) Bergelson (n 66) 429-430, citing Radin (n 48) and Hegel (n 95) para 45.
\(^9^7\) Purdy (n 44) 1054-56.
\(^9^8\) ibid 1054-55 (footnotes omitted).
As to the normative evaluations, he continues:

The major strain of the personhood approach praises property rights as supportive of freedom. Another school … argues that the conception of personhood that property rights support is normatively unattractive: too rigidly bounded, too individualistic, and correspondingly obtuse to the extent and importance of human interdependence. A third … takes a pluralist approach, arguing that property rights aimed at allocating resources in market-efficient ways are appropriate for resources valued chiefly as commodities, but that certain possessions, such as the home, the body and objects with intimate associations, have value more closely related to the identity of the person who owns them. On this account governing those goods as market resources distorts their meaning for personhood, and may devalue personhood itself.

The lastly mentioned of these theories and normative evaluations seem particularly relevant to this discussion. They combine to provide a theoretical framework within which the recognition of PII, and the corresponding concept of identity, can be accommodated. Writing about this function of property, Baker notes that it is to ‘protect people’s control of the unique objects and the specific spaces that are intertwined with their present and developing individual personality …’. Ownership in one’s PII enriches identity in the most meaningful of ways. If recognised as such, these concepts would fall into the category identified by Radin as deserving of greater legal protection, given its importance to the owner’s ‘sense of continuity of self over time’.

The idea that individuals should have legally acknowledged rights of control over their personal information is reflected by other academics who have written in the context of an information privacy paradigm. However, Bergelson’s appeal lies in her thesis that a property regime is best for the protection of the interest at stake. Admittedly, her focus differs from the present. Her search was for a juridical basis on which to protect individual privacy in personal information in a jurisdiction that lacked omnibus data

99 ibid 1055-56 (footnotes omitted).


101 Radin (n 48) 1004.

protection legislation to regulate the handling of such information by data collectors. However, much of her output is adaptable to the present context.

Bergelson identifies two major paradigms by which informational privacy can be protected: (1) privacy as secrecy and (2) privacy as control.\(^\text{103}\) She contends that in contemporary societies where individuals routinely communicate information about themselves to others on a daily basis, the ability to control the dissemination and use of personal information is the more relevant of the two.\(^\text{104}\) This control paradigm transfers readily to the present context. According to Bergelson, it ‘implements the liberal autonomy principle by seeking to place the individual at the centre of decision-making about personal information use’.\(^\text{105}\) She claims that, in many respects, it is a property paradigm since ‘it presumes that an individual has a qualified right to exclude others from accessing his personal information as well as a similarly qualified right to determine the terms on which this information may become available to others’.\(^\text{106}\)

Bergelson’s thesis is that this control paradigm is best achieved by means of recognition of property rights in personal information. She notes that under this model ‘personal information is not a personal right but rather a good, and the court’s job is to determine who has a prior claim to that good and how to regulate any coexisting and competing claims’.\(^\text{107}\) Arguably, the point she makes about access must be equally relevant to use.

### 3.6.5 Delimiting the Incidents of Property

If PII, or PII-related identity, were accorded property status, questions would arise as to which of the incidents of property might be relevant. As Bergelson recognises, the granting of a prior property right in their personal information to individuals can neither be absolute nor exclusive and care has to be taken to balance the varying interests of the public and other interest groups. In her words, ‘To give individuals an unabridged right in their data would threaten to immobilize it.’\(^\text{108}\)
This is particularly relevant to the area of PII. Much of that information as it relates to particular individuals is in the public domain, or at a minimum, might have been shared with, or is otherwise known by, other persons. Unlike, a treasured chattel that may be housed away from public view, many types of PII are disclosed to or accessible by other persons. Birth and marriage records are matters of public record. Names are often widely known and addresses are readily obtainable from telephone directories and internet databases. Careful thought is required to balance the right of the individual to have such information protected against the wider public interest and to devise appropriate accommodative legal mechanisms.

Bergelson recognises the differences between personal information and tangible forms of property and pays attention to this requirement. Sensibly, she reasons that the special nature of information calls for the recognition of a new bundle of rights. She agrees with Mell’s property-based approach to personal information, but rejects the latter’s idea that individuals should own such information in fee simple. Instead, she suggests a statutory framework by which three limitations should be imposed to satisfy the varying interest. These are (1) that individual interest in personal information be limited to a life interest; (2) the grant of a non-exclusive and unalienable automatic licence to data collectors who had already collected personal information; and (3) the grant of ‘non-exclusive automatic licences in favour of the society at large’.

However, the complexities involved in trying to pigeon-hole and regulate information use are great. Bergelson’s concentration on privacy protection results in outcomes that may be less desirable if the focus is narrowed to PII and its use in the identity theft context. Here, there must be fewer competing factors given the apparent inherent wrongness in that misconduct. Bergelson recognises that there may be some posthumous interest in personal information but, influenced largely by the idea that the importance of privacy dies with the individual, she is prepared to limit individual rights in personal information to a life interest. However, such a limitation could diminish

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110 ibid 76.

111 Bergelson (n 66) 438-42.

112 ibid 441.

113 ibid 440.
the protection to be afforded by the law of theft to the victims of identity abuse. As is illustrated later, the misuse of the PII of deceased persons can cause much anguish and suffering to surviving relatives.

This demonstrates the difficulties that inhere in classifying any particular category of information as property. Positive implications in one context might be otherwise in another. Hence, caution must be the watchword in any characterisation of PII as property. This makes the case for a sui generis offence, if an offence is considered to be required, a compelling one. Alternatively, statutory modification to the theft laws to deem PII property for the purposes of the Act would be required. It is, however, undesirable to categorise something as property for one purpose but not others.

A PII-related concept of identity poses fewer challenges since no compelling case can be made easily for the shared use of an identity. Sullivan is highly persuasive in her argument that the right to manage, use and control apply sensibly to her concept of ‘token’ or ‘transactional identity’. Equally so, is her case that there is a corresponding duty not to use that identity to harm others and to prevent others from so using it. These incidents apply equally to any PII-based construct of identity. However, the need for statutory intervention to deem this identity existent has already been noted. An identity does not ‘feel’ like property and, as with PII, special statutory formulation might be required to so designate it.

3.6.6 The Intention to Permanently Deprive

Finally, the spotlight turns to the intention to permanently deprive. There are acknowledged difficulties in applying current principles relating to this element to information. This arises because of the nature of information which allows for the sharing of sets of the same data by persons in different places at the same time. The same concern applies with respect to PII-based identity. Even though the perpetrator of an identity theft might be said to be using the identity of the person to whom the information relates, identity remains, nonetheless, with the latter.

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114 Text to nn 243 and 245 in ch 5.
115 For a coherent argument in this respect see Alex Steel, ‘Problematic and Unnecessary?: Issues with the Use of the Theft Offence to Protect Intangible Property’ (2008) 30 Sydney Law Review 575.
116 Sullivan (n 10) 126.
117 ibid.
It is possible to conceive of a situation in which this element may be satisfied. The example involves C, a person of limited mental capacity who walks around with his name and other PII written on a piece of paper. He does not know the information and has no means of recovering it, if he loses the paper. Aware of these facts, D hands over the paper to a third party while pretending to be C. D knows that the paper will be kept by the third party. However, such situations must be rare and in most cases of identity theft the information used is otherwise available to the person to whom it relates.

Weinrib concedes the difficulties that may arise in this respect but notes that, in some circumstances, the usefulness or value of the information may be impaired. He makes the point, too, that ‘the loss to the original possessor ... can be every bit as real, as if something tangible had been taken’. While this point may be more telling with respect to commercial confidential information, it is of some relevance in this context. Victims of identity theft sometimes experience subsequent difficulties in benefitting from the use of their PII and associated identities. They may also incur expenditure and expend time in dealing with the consequential problems.

This reference to the impairment of usefulness or value invites consideration as to whether the extended statutory meaning of the intention to deprive term could be invoked to cover cases relating to PII. Under the pre-theft law, the intention to deprive was said to exist if a person took property intending to return it only after he had exhausted its value or change its substance. This is not to suggest that the possible application of the deeming provisions would be limited to such circumstances, given the decision in Fernandes. The critical question in considering the application of section 6 (UK) would be whether the defendant intended to treat the misused PII or related identity as his own ‘to dispose of’.

Sullivan relies on R v Hall and DPP v Lavender for support in concluding that the term ‘to dispose of’ may be applied to information that continues to be within the

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118 Weinrib (n 66) 139.
119 R v Morfit (1816) Russ & Ry 307, 168 ER 817 (CCR); R v Richards (1844) 1 Car & Kir 532, 174 ER 925 (Assizes).
120 Fernandes (n 42).
121 ibid .
122 (1848) 1 Den 381, 169 ER 291 (CCR).
knowledge or possession of the person to whom it relates. In *Lavender* it was held that the removal of a door from one council property to another amounted to a disposal. The court opined that a ‘disposal’ included one to the owner and that all that was required was that the accused should have intended to treat the property as his own regardless of the owner’s rights. In *Hall*, the criminal transferred fat from his employer’s loft to another room where he attempted to pass it off as meat delivered for sale by a butcher to his employer.

Sullivan argues that the common relevant factor in the cases ‘is that the defendant was considered to have stolen the property even though it was not removed from the possession of the owner and the nature of the property was not altered by the offender’s actions’. She contends that the crucial factor is that the defendant exercised control over the property, and in so doing, usurped the owner’s right of control and exclusive use. She concludes that, similarly, a person who dishonestly uses a token or transaction identity usurps the owner’s rights.

This is an attractive argument which should apply equally to the concepts being considered here. However, there are some difficulties with it. Firstly, *Lavender* has been criticised by commentators on the basis that its effect is to convert all dishonest dealings with property into theft. Hence, to premise an argument on *Lavender* is to build that argument on sandy ground. Where PII is misused, indisputably, there is an intention to treat the thing as one’s own regardless of the owner’s rights. However, it seems highly artificial to conclude that there was an intention to permanently deprive the other of that information merely by that use. Once more, the difficulty here derives from the peculiar nature of information.

This leads to the second point. Both *Lavender* and *Hall* may be distinguished. In those cases, the property was removed from the owner’s possession and control, albeit temporarily. In many instances of identity theft, the owner retains possession and some control of the information which is used by the perpetrator. It is true, though, that the

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124 Sullivan (n 10) 127-29.
125 ibid 129.
126 ibid.
127 Ormerod and Williams (n 12) 121; Steel (n 41) 11-12; Clarkson, Keating and Cunningham (n 12) 787.
latter usurps the owner’s exclusive right of use. Furthermore, *Hall* can be distinguished from the typical identity theft scenario by the fact that there was an attempt in that case to sell the fat back to its owner.

There are some cases that appear to militate against the use of section 6 to support a conclusion that the deemed intention should apply in circumstances where the information remains at all times in the possession of the owner. Couser refers to the decision in *Lloyd* in which the intentional, temporary removal and copying of films from the perpetrator’s place of work was held not to amount to a deemed intention to permanently deprive. He reasons that ‘if removing something for a few hours will not amount to a constructive intention to permanently deprive, then not removing it all (sic) can hardly be a more culpable act’.¹²⁹

In *Mitchell* it was held that the requisite intention was not imputed under section 6 where the defendant briefly used a car before abandoning it.¹³⁰ A one-off use of PII, or related identity, may be compared to this situation. In any event, even where the use is repeated and long-term, the fact the information may still very much be in the possession or knowledge of the person to whom it relates raises a significant distinction.

It can hardly be said that the intention to permanently deprive requirement is comfortably met where PII or PII-related identity is the subject matter under consideration. Challenges were also identified with the element of property. Undoubtedly, these issues could be overcome by appropriate statutory amendments. However, the case for such is not sufficiently compelling. The implications of classifying PII as property has to be carefully thought through and amendments to the theft statutes to incorporate that, or PII-related identity, as property may lead to confusing distinctions in civil and criminal law. Steel may be right.¹³¹ The creation of a sui generis offence might be more appropriate than attempting to apply theft law to identity theft.

¹²⁸ *Lloyd* (n 39).
¹³⁰ [2008] EWCA Crim 850.
¹³¹ Steel (n 115).
3.7 Deception and Other Theft Act Offences

The theft statutes contain other offences that fall within the category of offences deemed to be of relevance to this discussion. Of note is the offence of falsifying documents with a view to gain or with intent to cause loss to another and a number of offences which include dishonesty as an offence element. These include abstracting utility services, robbery and assault with intent to rob, and burglary or aggravated burglary in the form of entering a building as a trespasser with intent to steal, or stealing anything in the building. However, the offences in which identity theft is most commonly employed are those that are based on the concept of deception.

3.7.1 The Deception Offences

Commonly known to criminal lawyers as the deception offences, these crimes no longer exist in England but continue to be part of the law of Barbados. Tersely described, the Barbadian offences are dishonestly obtaining property, a pecuniary advantage or services by deception and similarly evading liability. The relevance of these offences results from the fact that ‘deception’ and ‘dishonesty’ are core constitutive elements. The first term is defined to mean ‘any deception, whether deliberate or reckless, by words or conduct as to fact or law’.

It seems that Ghosh is applicable in determining whether the element of dishonesty has been satisfied. Hence, much of the above discussion relating to theft is relevant
The act of the identity theft itself may be prima facie proof of dishonesty though other factors such as motive and purpose may be determinative of whether that element is established.

3.7.2 A Miscellany of Offences

The common law recognised the offence of cheating. Hawkins defined it as covering ‘deceitful practices, in defrauding or endeavoured to defraud another of his own right by means of some artful device, contrary to the plain rules of common honesty …’. An offence of such breadth would cover identity theft once employed for fraudulent purposes. However, it is doubtful whether a bare lie resulting in loss was enough. In any event, the theft statutes abolished the offence of cheating but for its application to the public revenue.

Equally relevant offences are those prohibiting false or misleading disclosures to revenue and other government departments; offences prohibiting the assumption of a name resembling that of a member of the police force or, in any way, the passing off of a person of himself or herself as a police officer, in order to gain admission into premises or, otherwise, engage in an act that he or she is not lawfully entitled to do; and the offence of forgery.

In Barbados, the forgery offences are contained in the Forgery Act, a statute which is patterned after the repealed English Act of 1861. These contrast sharply with and are substantially more limited than those contained in the more modern UK legislation. The Barbados statute adopts a patchwork approach. It sets out a series of offences including forging, altering or uttering forged versions of specified documents or records

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143 paras containing text to nn 33-36 and pt 3.61.
144 Hawk 1 PC 318.
146 Theft Act (UK) (n 15), s 32 (1) (a); Theft Act (Barbados) (n 13), s 34 (1) (a).
147 eg, see Customs Act Cap 66 (Barbados), s 245; Income Tax Act Cap 73 (Barbados), ss 79(1)(h)(i) (ii) and (iii) and 79(2)(a)(i) (ii) and (iii); Customs and Excise Management Act 1979 (UK), s 167.
148 Police Act Cap 167 (Barbados), s 64.
149 Cap 133.
150 Forgery Act 1861.
including passports\textsuperscript{152} and birth, marriage and death certificates;\textsuperscript{153} the false and deceitful impersonation of an owner of stocks, shares or dividends, thereby transferring such or receiving money payable to any owner;\textsuperscript{154} acknowledging in another’s name instruments before a court;\textsuperscript{155} and making untrue statements to procure a passport.\textsuperscript{156} The more general offence relating to the use of forged or altered instruments only applies where there is intent to defraud and a demand for or receipt of property as a result.\textsuperscript{157} Furthermore, the failure of the Act to define the term ‘instrument’ leaves uncertainty as to the application of the provision to electronic resources.

These limitations have been overridden in England where there is a general offence of forgery. It is defined as the making of a ‘false instrument’ with intent to induce someone to accept its authenticity ‘and by reason of so accepting it to do or not to do some act to his own or any other person’s prejudice’.\textsuperscript{158} This offence is buttressed by seven ancillary offences which include using a false instrument with intent.\textsuperscript{159} Significantly, the Act defines ‘instrument’ in such a way as to make it applicable in modern technological environments.\textsuperscript{160} This notwithstanding, the court’s refusal in \textit{R v Gold}\textsuperscript{161} to apply the provisions to persons who had accessed an electronic database by using improperly obtained passwords and customer information, demonstrates that the provisions are not as far-reaching as they might have appeared.

### 3.8 Computer Misuse Offences

The passage of the Computer Misuse Act 1990 was the UK Parliament’s response to the decision in \textit{Gold} and the consequential concern that hacking might not have been illegal. The purpose of this statute as expressed in its long title is ‘to make provision for

\begin{footnotesize}
\begin{enumerate}
\item Forgery Act (n 149) s 20A.
\item ibid ss 20 and 21.
\item ibid s 4.
\item ibid s 19.
\item ibid s 20A.
\item ibid s 23.
\item Forgery and Counterfeiting Act (n 151) s 1.
\item ibid s 3; the required intent is identical to that in the s 1 offence; s 4 criminalises the use of a copy of a false instrument with intent.
\item ibid s 8(1)(d), 10(3) and (4).
\item See \textit{R v Gold} [1988] AC 1063 (HL).
\end{enumerate}
\end{footnotesize}
securing computer material against unauthorised access or modification; and for connected purposes’.

An Act of identical title and similar purpose came into effect fifteen years later in Barbados. Both Acts contain offences with respect to which identity theft may play an integral role in their commission, though there are differences between the two statutes. A person who falsely represents himself as another by means of that other’s PII and gains access to a computer system could be guilty of illegal access or the aggravated offence of access with intent to commit further wrongs.

3.9 What of Criminal Identity Damage?

The above survey identifies some of the offences that fall into the category determined to be of relevance to this discussion. It remains a fact that the offences do not penalise identity theft but require proof of other attendant circumstances. As such, they are not intended to protect direct victims or society against the harm that results from identity theft.

Having so concluded, this section closes with a discussion as to whether the offence of criminal damage could be adapted to apply to instances of identity theft where direct victims suffer impairment to the usefulness of their PII-related identity. The offence occurs where a person, without lawful excuse, intentionally or recklessly, damages or destroys any property belonging to another.

The immediate doctrinal objection to the application of this offence lies in the requirement that the subject matter of the offence must be ‘property,’ a term that is defined under the Acts to exclude intangible property. In Cox v Riley and R v

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162 Computer Misuse Act Cap 124B.
163 For example, the offence of making, supplying or obtaining articles for use in computer misuse added to the UK Act by s 37 of the Police and Justice Act 2006 is not an offence under the Barbados Act.
164 Computer Misuse Act 1990 (UK), s 1; Computer Misuse Act (Barbados) (n 162), s 4(a).
165 Computer Misuse Act (UK) (n 164) ss 2 and 3; Computer Misuse Act (Barbados) (n 162), s 9.
166 Criminal Damage Act 1971 (UK), s 1; Criminal Damage Act Cap 113B (Barbados), s 3.
167 Criminal Damage Act (UK) (n 166), s 10(1); Criminal Damage Act (Barbados) (n 166), s 2(1).
168 (1986) 83 Cr App R 54 (CA).
Whiteley\textsuperscript{169} the offence was applied to the destruction of data. However, in each case, the court acknowledged that damage to tangible property was required and held that that the storage medium on which the information was contained was such property. Critically, in neither case was it held that information is property of any type, far less tangible property. Consequently, legislative intervention would be required to make the offence applicable to sets of PII or PII-based identity. The discussion advances on the assumption that this hurdle could be surmounted by legislative decree.

While the desirability of recognising those concepts as property for one purpose but not others might be debated, there might be less compelling arguments against such recognition for purposes of the offence of criminal damage than theft. In considering the applicability of theft to information, sensitivity has to be shown to competing interests that might be affected by the grant of monopolistic rights protectable by the criminal law. The criminal damage offence would not impact on user rights relating to the relevant PII but protect the use and value of the PII-based identity.

In this respect, the offence application is accommodated by the practical, common sense approach taken by the courts as to what constitutes damage.\textsuperscript{170} Property has been considered to be damaged where its usefulness or value has been impaired or where expense is involved in restoring its usefulness.\textsuperscript{171} The discussion in chapter five will confirm that, in some instances, the ability of direct victims to use their PII-established identities effectively is compromised and expense may be incurred in re-establishing its usefulness. In such instances, it may not be far-fetched to conclude that usefulness or value has been impaired.

This concentration on the physical aspects of the offence is not to overlook the challenges that might arise when one turns to the mental component. Liability for criminal damage is based on intention or subjective recklessness.\textsuperscript{172} Hence, to establish damage to PII-based identity, the prosecution would have to show that the perpetrator of the identity theft intended to impair the usefulness of the direct victim’s identity or was

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\item[169] (1991) 93 Cr App R 25 (CA).
\item[170] In Roe v Kingerlee [1986] Crim LR 735 (DC) it was held that whether damage has occurred is ‘a matter of fact and degree’ and it is for the fact finding tribunal to apply common sense in determining the issue.
\item[171] Henderson v Battley (CA, 29 November 1984); Cox v Riley (n 168).
\item[172] R v G [2004] 1 AC 1034 (HL).
\end{enumerate}
aware that there was a risk that this could happen. The extent to which this may be done will vary from case to case. However, given the wide dissemination of information on identity theft and its effects, the likelihood of liability seems greatest in cases where the perpetrator commits multiple acts of identity theft against the same individual.

Sullivan argues for an application of the offence of criminal damage to her concept of transactional identity when the related PII is misused by a perpetrator of identity theft.\textsuperscript{173} Having called for an extension of the offence to intangible property,\textsuperscript{174} she contends that the requirement for additional information at the time of a transaction after a security compromise, changes a person’s ability to use his or her transactional identity under the scheme.\textsuperscript{175} Citing \textit{Samuels v Stubbs},\textsuperscript{176} in which it was held that a temporary functional derangement of a policeman’s cap caused by its being jumped on constituted damage, she argues that the misuse changes the identity’s usual function.\textsuperscript{177}

Hence, Sullivan’s approach to the possible application of this offence is substantially different to that taken above. This is necessary since she confines her discussion to a specific statutory scheme. Whichever approach is taken, this discussion is inapplicable to cases involving the PII of deceased persons, given the inability of the dead to use their PII-related identities. Ultimately, the entire consideration as to the applicability of the offence of criminal damage is moot, given the accepted limits of the offence definition. Hence, there is more to be derived from an examination of potentially applicable offences falling within the Identity Documents Act 2010 and the Fraud Act 2006.

3.10 The Identity Documents Act

The Identity Documents Act 2010 may aptly be described as a remnant of the Identity Cards Act 2006. The functions of the earlier statute as expressed in its long title included (1) to provide for a national registration scheme and the issue of identification cards to individuals; (2) to create offences relating to identity documents and materials
for making false identity documents; and to provide for the verification of information provided with passport applications.

Hence, though not exclusively a criminal statute, the Identity Cards Act created a number of offences, in sections 25 and 26, relating to the facilitation of identity-related misconduct.\textsuperscript{178} This statute proved to be controversial and it was repealed in 2010 with the enactment of the Identity Documents Act. However, sections 25 and 26 of the Identity Cards Act were re-enacted as amended and identity-related offences are now contained in sections 4, 5 and 6 of the new Act. Appearing under the general rubric ‘False identity documents etc’, the section headings label the three offences as: (1), ‘Possession of false identity documents etc with improper intent’;\textsuperscript{179} (2), ‘Apparatus designed or adapted for making false identity documents etc’;\textsuperscript{180} and (3), ‘Possession of false identity documents etc and related things without reasonable excuse’.\textsuperscript{181}

These offences all relate, and are limited, to identity documents. The term ‘identity document’ is defined as meaning any document which is or purports to be an immigration document, a passport, whether issued by the United Kingdom or otherwise, a document that can be used instead of a passport, and a driver’s licence whether issued in the United Kingdom or elsewhere.\textsuperscript{182}

The Act incorporates a definition of falsity from section 9(1) of the Forgery and Counterfeiting Act 1981,\textsuperscript{183} the effect of which is to further limit the scope of the legislation. An identity document is false if it purports to have been: (a) made in the form or terms in which it is made by a person who did not so make it; (b) made in the form or terms in which it is made on the authority of a person who did not so authorise it to be made; altered in any respect by or on the authority of a person who did not make or authorise the alteration, as the case may be; or made or altered on a date, or at a place, or otherwise in circumstances on, at or in which it was not, in fact, made or altered.

\textsuperscript{178} For a review of the Act see Clare Sullivan, ‘The United Kingdom Identity Cards Act 2006 — Civil or Criminal?’ (2007) 15 IJLIT 320.
\textsuperscript{179} Identity Documents Act 2010, s 4.
\textsuperscript{180} ibid s 5.
\textsuperscript{181} ibid s 6.
\textsuperscript{182} ibid s 7.
\textsuperscript{183} ibid s 9(2).
The apparent emphasis on ‘false identity documents’ may suggest that the purpose of the offences is to maintain the integrity of the limited set of state-issued documents identified. Indeed, in confirming a custodial sentence for the offence of possession of a false passport, the Court of Appeal rationalised that ‘modern society is dependent upon the integrity of identity documents’. However, lying beneath this rationale must be a consideration of the role such documents play in the identification process and the importance of identification for matters such as commerce, immigration and the enjoyment of state benefits and rights in modern welfare states.

The use of false documents may occur in cases other than identity theft and not every identity theft involves the use of false documents. Where a person alters a genuine passport bearing another’s name by attaching his or her photograph to it and uses that document to identify himself or herself as that other person, an identity theft occurs by means of a false document. However, a person may possess a counterfeit passport which contains his or her correct personal details. The object of such a person is not to pass himself or herself as another but to mislead persons that he or she has a validly issued passport with all the rights such a document may confer. By contrast, a driver who commits a traffic violation and gives the police the name of another person whose genuine driver’s licence he or she produces, commits an identity theft, though using a genuine document.

The statute does contain some offences which are more unequivocally linked to identity theft, though they do not directly penalise it. It is an offence to possess or have under one’s control an identity document that relates to someone else, with an improper intention or without reasonable excuse. Like the early American statutes, this provision does not strike at identity theft directly but seeks to nip it in the bud by criminalising the possession of another’s identity document with intent to commit identity theft or allow, or induce another, to do so.

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184 R v Makoka [2013] EWCA Crim 917 [10].
188 ibid s 6(1)(c); for a discussion on the relevant mens rea see R v Unah [2011] EWCA Crim 1837, [2012] 1 WLR 545; Andrew Ashworth ‘Identity Cards: Defendant Having in Her Possession a False Passport’ [2012] Crim LR 221 (comment).
This conclusion that these offences relate directly to identity theft is based on the definition of ‘improper intention’ found in section 4(2). Such exists where there is an intention to (1) use the document for establishing personal information about the perpetrator;\textsuperscript{189} or (2) allow or induce another to use it to establish, ascertain or verify personal information about the perpetrator or anyone else,\textsuperscript{190} other than the individual to whom it relates.\textsuperscript{191}

The term ‘personal information’ is defined to mean a person’s full name, other names by which previously known, gender, place of birth, external identifying characteristics, address of principal residence in the UK, address of every other place of residence in or outside the UK, previous places of residence in or outside the UK, times of residence at different places in or outside the UK, current and previous residential status, and information about numbers allocated to that person for identification purposes, and any documents to which they relate.\textsuperscript{192}

The major limitation of the Identity Documents Act as it relates to identity theft is that its application is limited to state-issued identity documents. Identity theft may be committed by means of a variety of PII. The Act fails to cover that range of information and, as such, does not qualify as one which attempts to criminalise identity theft generally. Additionally, where it does impact on identity theft it does so through preparatory offences rather than in a direct way. Given these limitations, major reliance must be placed on the Fraud Act 2006 to deal with cases of identity theft. The appropriateness of this statute for the purpose is considered next.

### 3.11 Fraud and Identity Theft

Unlike the Identity Documents Act, the Fraud Act facilitates the prosecution of identity theft directly. However, its primary purpose is the criminalisation of acts of fraud and its reach to identity theft is limited by that actuality. The Act is the culmination of several decades of discussion and debate in the UK as to how best to deal with misconduct involving the acquisition of gain by dishonest means. The debate was

\textsuperscript{189} Identity Documents Act 2010, s 4(2)(a).

\textsuperscript{190} ibid s 4(2)(b).

\textsuperscript{191} ibid s 4(3).

\textsuperscript{192} ibid s 8(1).
driven, largely, by concerns relating to the application of the multiplicity of pre-existing deception offences. The story of the Act’s criminological background and the law which it superseded has been covered well by Clarkson, Keating and Cunningham.193

The purpose of the Act as set out in its long title is ‘to make provision for, and in connection with, criminal liability for fraud and obtaining services dishonestly’. As the same authors demonstrate, the term fraud encompasses a wide set of misconduct ranging from the con-man who tricks an elderly person out of a valuable object for significantly less than it is worth to the more sophisticated computer-based methods used to divert money from accounts.194 These illustrations show that fraud may be brought about in a variety of ways. Identity theft is one method of defrauding.

The Fraud Act was not designed to target any particular type of fraud. It replaces the various deception offences by a general offence of fraud. It also creates an offence of obtaining services dishonestly. However, while it provides for the criminalisation of the essential conduct that comprises identity theft in a manner which the Identity Documents Act fails to do, the extent of its application is severely limited. Some reference to the provisions of the Act is required to substantiate these statements.

The Act provides for three forms of fraud: (1) fraud by misrepresentation; (2) fraud by failing to disclose information; and (3) fraud by abuse of position.195 In each case, the fraudulent act must be carried out dishonestly196 and the offence is completed once the offender intends to make a gain for herself or another or to cause, or expose another to the risk of, loss.197 Undoubtedly, fraud by false representation is sufficiently broad to capture most instances of fraud committed by the use of another’s PII. The term ‘representation’ is defined to mean any representation of fact or law and includes a representation as to state of mind.198 It may be express or implied.199

193 Clarkson, Keating and Cunningham (n 12) 792-97.
194 ibid 792.
195 ss 1 and 2.
196 ss 2(1)(a), 3(a) and 4(1)(b).
197 ss 2(1)(b), 3(b) and 4(1)(c).
198 s 2(3).
199 s 2(4).
Section 2(2) provides that a representation is false if it is untrue or misleading and the person making it knows that it is or might be so. Hence, the term false representation is sufficiently broad to encompass cases of identity theft. A person who uses the PII of another to portray himself as that person makes a false representation. This conclusion is no less possible where the representation is directed at a machine since the Act removes the common law uncertainties as to whether a machine can be deceived. Section 2(5) provides that a representation may be directed at any system or device which is designed to convey or respond to communication with or without human intervention.

Hence, as Anne Savirimuthu and Joseph Savirimuthu demonstrate, the Act is capable of catching the sending of fraudulent emails purportedly from trusted third parties to wrongfully gain access to a recipient’s PII. Contemporary jargon refers to this as phishing. This reference is significant for a further reason. It demonstrates that the fraud offence is committed on the sending of the emails and even if no funds are obtained from the victim’s account. The offence is complete once the prohibited act is done with the requisite intention. This is a highly significant feature of the Act. It means that the act of identity theft may constitute a fraud offence provided it is accompanied by the requisite statutory intent. The concept of false representation contained in the Act captures this misconduct in a direct way unlike the provisions of the Identity Documents Act which focus on preparatory conduct.

While one may look predominantly to the mode of false representation to penalise cases of identity theft, the other two modes of committing fraud may also be relevant. Thus, for example, where an insider seeks to perpetuate a fraud against his employer by pretending to be an outsider with whom the employer does business, in addition to the false representation, there is the abuse of a position. The Act defines this as occurring where the offender ‘occupies a position in which he is expected to safeguard, or not to

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200 For relevant cases, see n 100 ch 5.


202 Ormerod notes that the offence is an inchoate one that seems to criminalise lying in David Ormerod, ‘The Fraud Act 2006 - Criminalising Lying?’ [2007] Crim LR 193 (legislative comment).
act against, the financial interest of another person. 203 Similarly, there may be instances where the perpetrator of an identity theft breaches a legal duty to disclose information by making a false disclosure as to his PII. A false pre-contractual disclosure for the acquisition of insurance provides an example.204

However, the application of the Fraud Act in cases of identity theft is limited substantially by the requirement for the ulterior intent, on the part of the perpetrator, to make a gain for him or herself, or for another, or to cause loss, or expose another to the risk of loss.205 Ordinarily, the words ‘gain’ and ‘loss’ may seem sufficiently wide to cover most, if not all, of the consequences that might be intended by an act of identity theft. However, the statutory definitions of those terms limit them to economic consequences. The Act prescribes that the terms ‘extend only to gain or loss in money or other property’, whether that loss or gain be temporary or permanent.206 Hence, a lie unaccompanied by such an intention is not criminal under the Act.

The effect of the ulterior intent requirement is to render the fraud offence protective of financial and property interest only, making it inapplicable to instances of identity theft where the intended purpose differs. Thus, for example, the person who commits an identity theft to escape a past life but engages in no transactions that result in a monetary or property gain, or cause similar loss, is not implicated.

Once more, the element of dishonesty is assigned a major role in a major criminal offence. As is the case with the offence of theft, the Act does not define this critical term and the Ghosh formulation appears to apply. Hence, the same concerns raised with respect to the latter offence apply here. Whether an act of identity theft provides evidence of dishonesty is left to be determined by the fact-finding tribunal applying the standards of ordinary members of society.

Section 11 of the Act might also be applicable to identity theft. This provision makes it an offence to obtain a service by a dishonest act and in breach of sub-section (2). That sub-section requires that the person should obtain a service which is made available on

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203 s 4(1).
205 n 197.
206 s 5(2).
the basis that payment has been, is being, or will be made for it, without making the appropriate payment. He must know that the service was made available on that basis and intend not to make the appropriate payment. Again, the making of a false representation as to identity in order to evade payment for a service should be caught by this provision.

Passing reference must also be made to sections 6 and 7 of the Act. Section 6 makes it an offence to possess, or have under one’s control, articles for use in the course of or in connection with any fraud. Section 7 makes it an offence to make, adapt, supply or offer to supply any article for use in fraud knowing that the article was designed or adapted for such use and intending it to be so used. Again, the reach of these preparatory offences is limited since the conduct is penalised only if a fraud as defined by the Act is contemplated.

Additionally, while the scope of the provisions are sufficiently broad to capture articles which are used to manufacture false identity documents intended for use in a fraud, it stops short of covering the possession of all forms of PII intended for such use. Though given an extended meaning, the term ‘article’ is limited to ‘any program or data held in electronic form’.

The limitations of this Act as it relates to identity theft have been identified. The interest protected by the Act is economic. Any protection to those who fall victim to identity theft is limited by that consideration. It follows that the objective of the Act is to prevent economic harm and identity theft is captured only incidentally as a mode of bringing about the actus reus of the offence. Hence, while it might be true that the actus reus of the offence is ‘shockingly wide’, the ulterior intent narrows it in a manner that excludes its application to all cases of identity theft.

It has been said that, as a conduct crime, the fraud offence allows for pre-emptive intervention before any harm is realised. This is only partially true. Taken from an identity theft perspective, this proposition ignores the reality that the conduct of identity theft often has resultant non-financial harm to the individual whose PII is misused and

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207 s 8(1).
209 ibid.
to the wider society. This raises the question whether it is sufficient to limit the
criminalisation of identity theft in the way that the Fraud Act does or whether the
misconduct itself ought to be the central focus in the criminalisation process. That is the
subject of discussion in chapter five. This chapter closes by considering the
appropriateness of the practice that exists among sentencing courts of taking account of
identity theft, in sentencing for offences in which the misconduct played some role.

3.12 Identity Theft as a Sentencing Factor

Identity theft has been recognised and taken account of by sentencing judges in
England. The range of offences in which this has occurred covers conspiracy to
defraud, obtaining property by deception, using a false instrument, making an
untrue statement for the purpose of obtaining a passport, conspiracy to steal, conspiracy to obtain property by deception, conspiracy to obtain money transfers by
deception, making an untrue statement to procure a marriage, making a false
statement to the register of births and deaths, theft, conspiracy to import heroin,
possession of a false identity document, fraud burglary false accounting, and
dishonestly making a false representation to obtain benefits. It will be demonstrated

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210 R v Odewale [2004] EWCA Crim 145, [2004] 2 Cr App R (S) 47 (CA); R v Zahoor [2005]
EWCA Crim 1531; R v Boukadour [2005] EWCA Crim 2953; R v Dillon [2006] EWCA Crim
2770; R v Mahmood [2006] EWCA Crim 3158, [2007] 2 Cr App R (S) 17 (CA).
211 R v Seward [2005] EWCA Crim 1941.
212 ibid.
215 ibid.
216 Ibid.
217 Crossdale (n 213).
218 ibid.
223 R v McSheffrey [2008] EWCA Crim 251; there was no judicial acknowledgement that the factor
affected the sentence in this case.
225 ibid.
shortly that the rationale for this judicial practice is that the prevalence of identity theft necessitates the imposition of deterrent sentences or that identity theft constitutes an aggravating factor of which account must be taken in determining sentencing levels.

This judicial approach is not limited to England. It is also evident in Australia. In Stevens, the New South Wales Court of Criminal Appeal emphasised the need for deterrent sentences in deception cases involving the use of false identities. This case preceded the advent of specific identity-related offences in New South Wales but McClellan CJ envisaged the continuation of the practice. Before reaching this conclusion, he articulated the justification for higher sentences where forms of identity theft are involved. Writing extra-judicially, Johnson J provides this excellent summary of the Chief Justice’s comment:

The New South Wales Court of Criminal Appeal referred to the MCCOC (sic) Report concerning identity crime, the economic harm to the community resulting from identity fraud, the significant indirect effects on victims (the sense of invasion of privacy and the challenge to the sense of individuality), the ease with which identity crimes can be committed and the consequences if confidence is lost in the system of electronic banking because of a perceived vulnerability to identity crime, with all of these features serving to explain the need for personal and general deterrence for this class of offence.

However, this judicial practice merits some critique. There are two areas of concern. The first relates to the issue of labelling and the second to general fairness. These will be considered after a review of the background recommendations and an examination of some judicial examples.

### 3.12.1 The Recommendations and Guidelines

The idea that identity theft might be recognised by English courts as an aggravating factor in sentencing was mooted by the UK Cabinet Office Study in 2002. The study noted that the offences used to prosecute ‘identity fraud-related crimes’ do not

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226 eg, see Van Haltren v The Queen [2008] NSWCCA 274; Stevens v The Queen [2009] NSWCCA 260.
227 ibid.
228 Stevens (n 226) para 7.
sufficiently take into account the serious damage and harrowing experience of individual victims of identity theft. It suggested as a possible solution that the Home Secretary ask the Sentencing Advisory Panel to look at the levels of sentencing for the offences involved and that sentencing guidelines be issued.\textsuperscript{231}

In 2007, the Sentencing Advisory Panel in its consultation paper on fraud offences acknowledged the prominent role identity theft plays in such offences and agreed with the judicial approach that recognised it as an aggravating factor in cases of fraud.\textsuperscript{232} Particularly, the Panel noted that use of another’s identity was a feature in nearly all payment card and bank account frauds. It went on to suggest that courts should therefore depart from the suggested starting points in such cases and any other case in which identity theft was a feature to reflect it as an aggravating factor.\textsuperscript{233}

This proposal was adopted by the Sentencing Guidelines Council in 2009 in their guidelines relating to statutory fraud offences.\textsuperscript{234} These guidelines recognise the dual impact of credit and debit card fraud with harmful consequences resulting to card issuers and cardholders.\textsuperscript{235} They note that, with respect to cardholders, ‘The aggravation and stress of unscrambling the consequences of the offender’s criminal activities often far outweighs the impact of the financial loss suffered by the card issuer.’\textsuperscript{236}

The guidelines identify the use of another’s identity as one of four factors that are particularly relevant to fraudulent activity.\textsuperscript{237} They provide the following useful summary of the kind of harm that might arise:

Use of another person’s identity may increase the harm caused; this may depend on the origins of the stolen identity:

- using the identity of a living person is likely to cause emotional distress for that individual who will also have the practical and potentially stressful problem of untangling the financial consequences of the fraud;

\textsuperscript{231} ibid.
\textsuperscript{232} Sentencing Advisory Panel, ‘Consultation Paper on Sentencing for Fraud Offences’ (2007) paras 87-89, citing Odewale (n 210) and Crossdale (n 213).
\textsuperscript{233} ibid para 170.
\textsuperscript{235} ibid para 17.
\textsuperscript{236} ibid para 17.
\textsuperscript{237} ibid para 8.
• using the identity of a deceased person is likely to … cause considerable
distress to the relatives of the deceased …

3.12.2 Judicial Recognition of Identity Theft

Judicial recognition of identity theft as an aggravating factor in other offences predated
the 2007 report of the Sentencing Advisory Panel. Odewale\textsuperscript{239} is the earliest related
appellate decision found through database searches.\textsuperscript{240} It is one of three cases discussed
below to highlight the judicial approach and provide further examples of settings in
which identity theft might occur. The others are Quadri\textsuperscript{241} and Sivakumar.\textsuperscript{242}

In Odewale, the appellants challenged their sentences for conspiracy to defraud. Scott
Baker LJ detailed their misdeeds this way:

The purpose of the conspiracy was to defraud financial institutions. The conspiracy
ran from January 2000 to March 2002 and operated nationwide. The method of
operation was what is commonly called ‘identity theft’. The first step was the
location of suitable addresses, usually empty properties awaiting sale, or sometimes
properties vacated by the elderly who had been taken into care. The identity of
former occupants would be established by use of the electoral roll and sometimes
credit checks were made against the names of the former occupants to ensure that
they were creditworthy. False documents, such as driving licences or utility bills,
were obtained to support the assumption of the occupant’s identity. These were
then used to open an account with a bank or building society, whereupon loan
facilities, credit and debit cards were obtained. Arrangements were made to divert
mail and telephone calls to addresses and mobile phones associated with the
conspirators. One hundred and forty applications were made to financial
institutions, using 63 different names; 110 of these applications were successful.\textsuperscript{243}

Though reducing the sentences because of the trial judge’s inappropriate reference to
the racial origins of the appellants, the Court of Appeal endorsed the judge’s
pronouncements on identity theft and noted the nature and consequence of the identity-
based frauds. It stated:

\textsuperscript{238} ibid para 26.
\textsuperscript{239} Odewale (n 210).
\textsuperscript{240} Searches of WestlawUK and Lexis Library were made on 22 September 2010.
\textsuperscript{241} Quadri (n 214).
\textsuperscript{242} Sivakumar (n 222).
\textsuperscript{243} Odewale (n 210) [3].
The judge in passing sentence noted that the fraud operated nationwide and that it involved the theft of identities of innocent people. He rightly observed that it was not an offence without a victim. Numerous people had their lives upset by what had been done: both relatives of the elderly suddenly discovering that accounts had been operated in a family member’s name (those members who had either died or were in care); also individuals who were blacklisted by credit institutions because of the appellants’ activities.244

After referring to the financial loss, Scott Baker LJ went on to comment on the ‘loss to the 63 or so individuals whose identities were stolen’.245 He described it rightly as ‘a loss of a different kind, in particular the aggravation and the stress of unscrambling the consequences of the appellants’ criminal activities’.246 He concluded that ‘an identity fraud is a particularly serious form of conspiracy to defraud’ and that the trial judge had rightly referred to the prevalence of that type of fraud and was entitled to take account of it.247

Similar appellate endorsement is evident in Quadri.248 The appellants had combined with others to steal mail and use people’s identities to establish banking facilities and obtain credit, state benefits, and goods. The court expressed no disapproval of the trial judge’s description of identity theft as ‘pernicious criminal activity’249 or his reference to the mischief in these terms:

Identity theft is a growing menace. It costs the nation millions of pounds, with the assistance of bent postal workers it is easy to achieve. It has appalling effects on its victims, they feel, rightly, that their privacy has been violated, they grow anxious about where next they would discover that their names have been used and they often only find out the full extent of what has happened when they are accused of running up debts or find that their credit ratings have been destroyed. It takes immense efforts for them to convince sceptical banks that they are victims of fraud …250

The Court of Appeal went on to state:

this is an area in which deterrent sentences are increasingly required. We say that because it is common knowledge that there have been an increasing number of
such offences. They are a blight not only on the banking system and the use of credit cards but on the individuals who are caught up in them, wholly innocent and often unaware that their identities have been abused until a late stage. The judge, in our judgment, was quite justified in passing such deterrent sentences and the degree of deterrence required may well have increased at the present time as against that which might have seemed appropriate even a relatively short time ago when the scale of such offences was not as great as it is now.\textsuperscript{251}

The post-guidelines cases reflect judicial acceptance of identity theft as an aggravating factor in fraud offences. In this respect, \textit{Sivakumar}\textsuperscript{252} is instructive. In that case, the area manager of a chain of fast-food outlets had used a customer’s bank card to purchase goods. The court upheld the trial judge’s acknowledgement that nearly all payment card fraud involves identity theft and that a departure from normal starting points for sentencing to reflect this aggravating feature is justified.\textsuperscript{253}

\subsection*{3.12.3 Sentencing and Fair Labelling}

The judicial practice exemplified raises some concerns. The first relates to the issue of fair labelling, a principle of criminal justice more often associated with discussions about offence structures and designations. Indeed, this was the focus identified by Ashworth in his original formulation of the principle, then called representative labelling. He introduced it as one requiring ‘that widely-felt distinctions ought to be preserved, and that new categories of offences ought fairly to reflect the offender’s criminality …’.\textsuperscript{254}

Ashworth justifies this formulation of the principle by reference to some practical, derivative benefits and by the assertion that public moral judgment as to conduct differentiation should be respected by the law.\textsuperscript{255} As to the former, he posits that, ‘Fairness demands that offenders be labelled and punished in proportion to their wrongdoing…’.\textsuperscript{256} He goes on to point out that the label attached to particular forms of criminality is important ‘both for public communication and, within the criminal justice

\begin{itemize}
  \item \textsuperscript{251} ibid [26].
  \item \textsuperscript{252} n 222.
  \item \textsuperscript{253} ibid [8].
  \item \textsuperscript{254} Andrew Ashworth, ‘The Elasticity of Mens Rea’ in C Tapper (ed), \textit{Crime, Proof and Punishment} (Butterworths 1981) 54.
  \item \textsuperscript{255} Andrew Ashworth, \textit{Principles of Criminal Law} (5\textsuperscript{th} edn, OUP 2006) 88-89.
  \item \textsuperscript{256} ibid.
\end{itemize}
system, for deciding on appropriate maximum penalties, for evaluating previous convictions, classification in prison, and so on’.\textsuperscript{257} With respect to the latter, he states that ‘where people generally regard two types of conduct as different, the law should try to reflect that difference’.\textsuperscript{258}

There has been good academic output relating to this aspect of the principle, both quantitatively and qualitatively.\textsuperscript{259} However, though recognised as a principle of criminal justice, the contours and reach of ‘fair labelling’ are yet unfixed. In one of the more exhaustive discussions on the subject, Chalmers and Leverick explore whether the concept has any relevance to defences,\textsuperscript{260} disagreeing with Clarkson who argues that fair labelling concerns are less so relevant.\textsuperscript{261} In his recent work, Tadros builds on Ashworth’s justificatory resort to public sentiment in a well-crafted essay on the importance of fair labelling in securing public solidarity and confidence in law.\textsuperscript{262}

Arguably, the principle might have a role to play in reviewing the use of aggravating factors in sentencing since, as is the case with identity theft, the aggravated factor might itself be a form of wrongdoing and, as has been illustrated in the discussion relating to the Fraud Act, may sometimes constitute a distinct offence.

The idea that sentencing practices may raise fair labelling concerns is not novel. The principle was interpreted largely in this way by Williams.\textsuperscript{263} He took the principle ‘to mean not merely that the name of the abstract offence but the particulars stated in the

\textsuperscript{257} ibid 89.

\textsuperscript{258} ibid.


\textsuperscript{262} Victor Tadros, ‘Fair Labelling and Social Solidarity’ in Lucia Zedner and Julian V Roberts (eds), \textit{Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth} (OUP 2012).

\textsuperscript{263} Glanville Williams, ‘Convictions and Fair Labelling’ (1983) 42 CLJ 85.
conviction should convey the degree of the offender’s moral guilt, or at least should not be positively misleading as to that guilt . . . ‘.264

Allen265 and Hansdot266 illustrate the points of concern. In Allen, a Mr. Searson’s house was burglarised and papers taken which enabled the ‘theft’ of his identity. Subsequently, someone purporting to be him rang a garage, indicating that he was anxious to purchase an S class Mercedes and would come by shortly to pay a deposit. The appellant, Allen, visited the garage, passed himself off as Mr. Searson, paid a deposit of £500 and returned with a banker’s draft made out in the latter’s name for £42,735. The draft was in fact a forgery. Allen pleaded guilty to the theft of the car. In upholding the sentence of 16 months, the Court of Appeal noted among the aggravating factors that the case involved an identity theft.267

In Hansdot, the appellants were involved in a conspiracy to import a quantity of heroin which was smuggled in a consignment of rugs sent to a Mr. Cullen whose identity had been ‘stolen’. Hansdot formerly worked with Mr. Cullen. One of the appellants, Mr. Kahn, made a number of calls regarding the consignment and associated taxes to the shipping agents, purporting to be Mr. Cullen. Mr. Cullen was entirely innocent but was arrested and interviewed as a suspect. The Court noted that the use of his identity was ‘a serious aggravating factor’.268

In both cases, though the sentences imposed took account of acts of identity theft, nothing on the record reflects this. While it is true that identity theft is not a general offence known to the law of England, it is a form of wrong doing that has attracted great public concern. To take account of it in the sentencing process but not reflect it, in some way, on the offenders’ records is to unfairly label their actions. Persons reviewing their records in the future would not know that they are ‘identity thieves’.

Worst yet, in these cases, the acts of identity theft amounted to the offence of fraud, falling as they did within sections 1 and 2 of the Fraud Act. It must be wrong to consider something as an aggravating factor which could have been charged as a

264 ibid.
265 Allen (n 219).
266 Hansdot (n 220).
267 Allen (n 219) [8].
268 Hansdot (n 220) [17].
discrete offence. Furthermore, nothing on the record of these offenders reflect fraudulent wrongdoing. This demonstrates not only unfair labelling but unfairness generally.

The consequences of failing to clearly signal the offender’s wrongdoing have been articulated by Williams. They include the likelihood of future misunderstanding, injustice to the offender and unfairness to the prosecution or public.\(^{269}\) When identity theft is treated as an aggravating factor in sentencing for offences in which it plays a role, the recorded conviction might not reflect that the sentence imposed took account of this wrongdoing. Thus, the criminal justice system fails to clearly signal the wrongdoing of the offender in all its facets and the conviction record fails to communicate to future sentencing courts and the public that the offender’s history involves identity theft.

Hence, the sentencing approach is not the fairest or most effective way of communicating the criminal justice system’s disapproval of a particular type of wrongdoing. As Chalmers and Leverick stress, the language of labelling does not only involve description. It is underpinned by ‘the need to differentiate between different forms of wrongdoing’.\(^{270}\) A record of an offence that by a sentencing side-wind allows for the penalisation of identity theft seems to offend both these aspects of the concept of fair labelling.

For this reason, if a sufficient case could be made out for criminalising identity theft, resort to the sentencing process as a substitute would be grossly inadequate. A wrong so considered should not be concealed by the criminal justice system within a sentencing regime. In addition to its principal role, the criminal law is a tool of communication. In its expressive function, it not only signals to the public what conduct will or will not be tolerated but, in so doing, it fulfils its expressive and educative role in schooling the public as to conduct the society considers wrong or harmful. This role should not be relegated to the sentencing process.

\(^{269}\) Williams (n 263) 85.

\(^{270}\) Chalmers and Leverick (n 260) 221-222.
3.13 Conclusion

It would be a mistake to attempt to squeeze PII and PII-based identity into a property paradigm for purposes of applying the law of theft. The difficulty with applying the requirement for permanent deprivation and fitting the subject matter into the framework of the concept of theft is in itself a sufficient bar. The real harm in identity theft that is untouched by theft, fraud and the deception offences is the non-financial harm to the individual whose PII and related identity is abused. This harm is not akin to the harm protected traditionally by the law of theft.

The application of the law of theft in this context is no more appropriate than it is to cases where bodily orifices are violated non-consensually or reputations hurt by slanderous untruths. Whether the uncovered harm is best protected by the criminal law, at all, is the subject of discussion in chapter five of this thesis. If it is, the law of theft appears not to be the most effective vehicle and none of the offences highlighted in the above survey, nor the judicial recognition of identity theft as a factor in sentencing, presents a satisfactory alternative. The creation of a sui generis offence might be considered more appropriate. The legislative response in South Australia accords with this view and falls to be assessed in the ensuing chapter.
CHAPTER FOUR
THE AUSTRALIAN SPECIFIC OFFENCES

4.1 Introduction

Statutory offences specifically designed to combat identity-related misconduct exist across the Australian continent at federal and state level. South Australia took the initiative in this regard, enacting the first such provisions in 2003. The South Australian effort represents one of three distinct legislative models that were created on the continent. The second model followed four years later in Queensland. Between 2009 and 2011, similarly patterned provisions were enacted in New South Wales, Victoria, Western Australia, and at the federal level. These built on the Queensland model and represent the third distinct legislative model. On 10th October 2012, a bill was introduced in the Commonwealth parliament which, inter alia, proposed an expansion of the existing identity crime offences and the creation of additional offences. This bill received the Royal Assent on 28th November 2012 and the identity related provisions came into effect the next day.

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1 Criminal Law Consolidation (Identity Theft) Amendment Act 2003 (SA) amending the Criminal Law Consolidation Act 1935 (SA) and the Criminal Law (Sentencing) Act 1988 (SA).

2 Criminal Code and Civil Liability Amendment Act 2007 (Qld) amending the Criminal Code 1899 (Qld) and the Civil Liability Act 2003 (Qld).

3 Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009 (NSW) amending the Crimes Act 1900 (NSW), the Criminal Procedure Act 1986 (NSW) and other Acts.

4 Crimes Amendment (Identity Crime) Act 2009 (Vic) amending the Crimes Act 1958, the Sentencing Act 1991 (Vic) and the Children, Youth and Families Act 2005 (Vic).


7 Crimes Legislation Amendment (Serious Drugs, Identity Crimes and Other Measures) Bill 2012 (Cth).

8 Crimes Legislation Amendment (Serious Drugs, Identity Crimes and Other Measures) Act 2012 (Cth) s 2(1).
The adoption of the later common approach did not come about by happenstance. In July 2004, the Standing Committee of Attorneys-General (SCAG) directed its Model Criminal Law Officers’ Committee (MCLOC) to examine the issue of identity theft. This committee was established in 1990 by the SCAG to advance the goal of developing a national model criminal code for jurisdictions in Australia and to advise generally on criminal law issues. Following a period of public consultation, the Committee presented its final report in March 2008 in which it recommended the enactment of three offences. The report describes the offences as ‘dealing in identification information’, ‘possession of identification information with the intention of committing, or facilitating the commission of, an indictable offence’, and ‘possession of equipment to create identification information, in certain circumstances’. The state and federal legislation which followed the MCLOC’s report adopted this trio of offences, though not to the letter.

Consequently, the characteristic feature of the third model mentioned above is the presence of three offences reflective of those recommended by the MCLOC. The South Australian model is characterised by the existence of an offence of assuming a false identity. This offence is unique to that jurisdiction. The other South Australian provisions create an offence of misuse of PII and a series of offences relating to the production, possession and distribution of ‘prohibited material’. However, as is demonstrated later, these latterly mentioned offences show some similarity in content with those in the other jurisdictions.

Uniquely, Queensland originally enacted one offence provision which penalised conduct akin to that eventually covered by model dealing in and possession of identification information offences. However, that jurisdiction later added the

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9 The SCAG is a ministerial council comprising the Australian Attorney-General, the Minister of Home Affairs, and the Attorneys-General of the various states and territories, and the New Zealand Minister of Justice. It facilitates cooperation in matters of mutual interest.


11 ibid para 6.


13 Criminal Law Consolidation Act 1935 (SA) s 144B.

14 ibid s 144C.

15 ibid s 144D.

16 Criminal Code 1899 (Qld) s 408D(1).
equipment possession offence.\textsuperscript{17} Hence, present uniqueness is now more one of style than substance.

This chapter essays an overview and critique of the Australian offences. It identifies the salient features of the various enactments and highlights some essential differences that exist across the various jurisdictions. It will show that the offences are inchoate in nature and provide a critique that focuses on the case for their existence and the appropriateness of the penalties they allow for. The chapter also examines the concept of victim certification which is a standard feature of the legislative provisions. Though a digression from the discussion on the offences, these provisions are crucial since they provide a form of relief to persons whose PII is misused. The importance of this type of accommodation in a discussion on criminalisation is underscored. The chapter concludes with a reference to some of the features that may be relevant to the criminalisation discussion that follows in chapter five.

Overall, the narrow concern is to determine whether, or to what extent, the offences truly criminalise identity theft. More generally, though, the chapter serves to examine how the Australian legislatures have approached the criminalisation of identity-related misconduct. Amidst this all, an attempt is made to discern and comment on concepts and factors that are critical to the operation of the provisions and those that might be crucial to the later discussion on the criminalisation of identity theft.

This introductory section is followed by a narrative of the background to the legislative provisions to provide some insight into the factual and legal circumstances that would have propelled the Australians in the adopted legislative direction. This exercise is not intended to be informative in a general way but to detail the types of mischief and harms which the framers of the legislation contemplated and to summarise the pre-existing state of the law which led to the perception that these offences were required.

\textsuperscript{17} ibid s 408D(1A) was inserted by the \textit{Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010 (Qld)}, s 4.
4.2 Identity-Related Misconduct: A National Concern

Two principal factors propelled the movement toward the wave of identity crime statutes in Australia. They related to the growing incidents of identity-related misconduct, domestically and as a feature in terrorism and trans-border crimes. There has been much public concern about identity-related crime in Australia over the past two decades. The MCLOC noted that the issue of identity crime was of major concern to a cross-section of the Australian community comprising individuals, the financial sector, government agencies, law enforcement agencies and private organisations. This fact, in part, led the MCLOC, in July 2004, to seek the direction of the SCAG as to whether it should prepare model legislation on identity theft. 18

The second spawning factor was the concern about the role of identity misuse in terrorism and trans-border crime. On 5 April 2002, the Australian Prime Minister and the State and Territory Leaders signed an agreement relating to those activities. 19 The agreement was born out of the recognition, in the aftermath of the attacks in the USA on 11 September 2001, that it was necessary to create a new national framework with adequate capacity to confront such wrongs. The parties set an urgent and ambitious agenda which, among other things, included the settling, within twelve months, of model laws covering the area of assumed identities. 20 They further agreed to undertake work in a number of areas of law enforcement in an effort to remove all administrative and legal barriers encountered in pursuing criminals who operate across jurisdictions. Identity fraud featured among the list of areas. 21

These twin factors have been identified in several Australian publications. Relevant sources include the news release which was issued by the Government of South Australia on 25th February 2003 announcing plans for the legislation, 22 the New South

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18 MCLOC (n 10) para 1(b).
20 ibid cl 15.
21 ibid cl 20.
Wales Crime Commission Annual Report 2001-2002,\textsuperscript{23} the Queensland Parliamentary Library research publication,\textsuperscript{24} the New South Wales Parliamentary Briefing Paper\textsuperscript{25} and the Victoria Parliamentary Library Research Service Research Brief on the Crimes Amendment (Identity Crime) Bill 2009.\textsuperscript{26}

The general sentiment across Australia around the turn of the last decade was that the extent and cost of identity related fraud had been on the increase. The evidence suggests that, by then, identity-related crime had become a matter of community concern. In a 2000 review of the Australian National Audit Office’s report on the management of tax file numbers, the Federal House of Representatives Standing Committee on Economics, Finance and Public Administration (SCEFPA) acknowledged that, during the course of its inquiries, issues relating to identity fraud and proof of identity processes proved to be of community concern.\textsuperscript{27} The representations made before that committee on behalf of the individuals, financial institutions, governmental and law enforcement were not limited to identity fraud as it related to tax file numbers, but extended more generally. As a result of its inquiries, SCEFPA concluded that identity fraud was an issue of significance for the entire Australian nation.\textsuperscript{28}

This conclusion is consistent with those expressed by researchers and interest groups mentioned below. Nonetheless, determining the true magnitude of the problem and the cost arising from identity-related fraud with a degree of exactitude has not been possible. Two main reasons contributed to this limitation. Those were the unavailability of reliable statistics and the lack of terminological uniformity in defining the various forms of identity-related misconduct.


\textsuperscript{24} Nicolee Dixon, Identity Fraud (Research Brief No 2005/03, Queensland Parliamentary Library 2005) 1-2.

\textsuperscript{25} Roza Lozusic, Fraud and Identity Theft (Briefing paper No 8/03, NSW Parliamentary Library Research Service May 2003) para 1.

\textsuperscript{26} Claire Higgins, ‘Crimes Amendment (Identity Crime) Bill 2009’ (Research Brief No 1, Victoria Parliamentary Library Research Service 2009) 2.


\textsuperscript{28} ibid para 6.5.
SCEFPA lamented the unavailability of statistics as the non-existence of national figures had been confirmed to it by a number of groups with a direct interest in the subject. These include the Australian Institute of Criminology (AIC), the National Crime Authority and the Australian Federal Police. The issue was also noted by Criminologist Dr Russell G Smith of the AIC. In his submissions before SCEFPA, he also made the point that the lack of terminological consistency made it difficult to extract meaningful data from available police statistics.

Added to the above, it was recognised that identity fraud was under-reported by the commercial sector since many entities were reluctant to publicly disclose incidents for fear of damaging their businesses and eroding consumer confidence. Nonetheless, the anecdotal evidence suggested that the prevalence rate was on the rise. The Australian Bankers Association so advised the Committee during its inquiry. Dr. Smith summed up in this way:

> Official statistics have not been gathered on the extent to which fraud is carried out in this way. However, recent business victimisation surveys have indicated that fictitious identities are being used to perpetrate a variety of offences and that the problem is perceived as being an important security risk within organisations.

In his submissions before SCEPA, Dr. Smith indicated that reports from across the country had suggested that false identity documents played a role in almost every case of serious fraud committed in Australia. In terms of the incidence of identity fraud as compared to fraud generally, the estimation of the AIC was that one quarter of all frauds reported to the Australian Federal Police involved the use of false identities. Sentiments tending to the view of growing prevalence were expressed by a number of interest groups in their submissions on the MCLOC discussion paper that preceded its

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29 ibid para 6.13.
30 ibid para 6.10.
33 ibid para 6.15.
34 ibid para 6.12.
35 Russell (n 31) 2.
36 SCEFPA (n 27) para 6.12.
37 AIC, ‘Identity Fraud’ (Newsletter, Summer/Autumn no 17 2002) 3.
final report.\textsuperscript{38} These include the Australian Customs Service, the Australian Federal Police, the Australian Finance Conference – a national finance industry association -, the Queensland Council for Civil Liberties, and the Department of Police and Emergency Management.\textsuperscript{39}

Such data as there was relating to the monetary cost of identity-related fraud pointed to major financial fall-out from that type of misconduct. In its submissions before SCEFPA, Centrelink, an agency of the Australian Government Department of Human Services, indicated that it had detected approximately $12 million worth of identity-related fraud in 1999.\textsuperscript{40} In its 2001/2002 annual report, the New South Wales Crime Commission estimated the cost of identity fraud to the Australian community to be $3.5 billion dollars,\textsuperscript{41} while a 2003 report by the Securities Industry Research Centre of Asia-Pacific (SIRCA) claimed that in 2001 to 2002, identity fraud resulted in a loss to large businesses of $1.1 billion.\textsuperscript{42} The challenges involved in making sense of this data have been mentioned already.

There is far greater certainty as to other aspects of identity-related crime. The MCLOC final report\textsuperscript{43} and the Queensland,\textsuperscript{44} New South Wales\textsuperscript{45} and Victoria\textsuperscript{46} research papers noted the range of methods perpetrators of identity fraud have adopted to assume false identities, the means by which false identity documents were created, the various crimes that persons went on to commit by means of PII and the range of persons whom identity-related crime impacted. Evidently, this type of information was required to inform lawmakers as to the essentialities of any new offences.

\textsuperscript{38} MCLOC, \textit{Identity Crime} (Discussion Paper, Cth 2007).
\textsuperscript{39} The submissions may be found at <http://www.ag.gov.au/www/agd/nd/Page/Modelcriminalcode_IdentityCrimeDiscussionPaper-CopiesofSubmissionsReceived> accessed 24 September 2011
\textsuperscript{40} SCEFPA (n 27) para 6.9.
\textsuperscript{41} NSW Crime Commission Report (n 23) para 2.130.
\textsuperscript{43} MCLOC (n 10) paras 2.4- 2.5.
\textsuperscript{44} Dixon (n 24) 3-4.22.
\textsuperscript{45} Lozusic (n 25) 13-15, 17-18.
\textsuperscript{46} Higgins (n 26) 7-9.
An analysis of the summaries of seven cases that have been reproduced on the website of the South Australian Government’s Office of Consumer and Business Affairs shows that the false identities employed by fraudsters were either pre-existing or fictitious and, in the case of existing identities, that misused information related to living or dead persons. The cases also illustrate the multiple impacts that this mischief may sometimes cause. Instances were seen of financial loss to institutions and individuals. Further, it is noted on the website that these crimes also had an emotional impact, affecting many people, directly or indirectly, and the community as a whole.

It can be deduced from the references to individual and institutional financial loss that identity misuse supports the perpetuation of theft and fraud-based offences. The impact in Australia was not limited to such entities. The MCLOC noted some ‘intangible impacts’ such as access to immigration status and social security benefits, and the acquisition of professional qualification or affiliation. The Committee also commented on the employment of identity crimes by organised crime groups to facilitate activities such as smuggling or trafficking people and terrorism.

The literature recognised that PII was being obtained in a variety of ways. The techniques employed to acquire the identity details of real persons ranged from the simple to the technologically sophisticated. Examples of the more intriguing cases involved the use of online scams to lure unsuspecting individuals into providing their personal data; the sending of emails purportedly from legitimate organisations requesting customers to update or validate their personal information; the hijacking of individuals’ email facilities to send letters requesting money to assist with some claimed calamitous circumstance; and the use of electronic devices to obtain information from credit cards. However, simple non-technological means remained very common. These included rummaging through garbage; and peeping at personal information details as unsuspecting individuals went about their daily affairs. Attorney-General Mike Atkinson reportedly mentioned many of these techniques when the South Australian Government announced its planned legislation.


48 MCLOC (n 10) para 2.4.

49 SA Government News Release (n 22).
As for the manufacture of identification documents, it emerged that computer equipment, scanners and other forms of technology were being used to manufacture or forge identity documents such as birth certificates, drivers’ licences, credit cards, motor vehicle registration papers, passports and other documents capable of establishing identity. In its 2001/2002 annual report, the New South Wales Crime Commission highlighted an incident in which a computer based machine used to produce drivers’ licences had been recovered during the execution of a warrant at the home of a criminal. The machine had been stolen from a government agency.  

4.3 The Pre-existing Legal Landscape

The above snapshot omits a significant contextual feature of the legislative developments. Yet unmentioned is the state of the pre-existing law and its effectiveness as a response mechanism to the perceived threats and dangers posed by identity-related misconduct. Researchers identified a number of Commonwealth and State offences which could possibly apply to incidents involving the misuse of PII. One of the more comprehensive surveys is that contained in the MCLOC final report which set out an extensive, though not exhaustive, list. It comprised older offences such as theft and forgery and modern offences such as computer misuse and cybercrimes. Importantly, the general point made was that there were gaps in the coverage afforded by those offences.

Generally, the existing offences required proof of another criminal act and, though some offences had been created which targeted information misuse specifically, they were not of general application. Crimes aimed at the illegal extracting of data from magnetic strips on credit cards, commonly called skimming, provide an example of the latterly mentioned offences. There has been some debate as to whether this mischief should be covered by a special offence or whether it should be subsumed under a more general identity theft offence. This could be readily achieved by constructing any list of PII

50 New South Wales Crime Commission (n 23) para 2.129.
51 MCLOC (n 10) paras 5.4-5.5.
protected in an identity theft statute to include data stored or encrypted on credit or debit cards, as happened in South Australia.\textsuperscript{53}

An alternative approach to the criminalisation of skimming and internet banking was adopted by the Commonwealth in 2004 with the introduction of a number of offences.\textsuperscript{54} These offences are sufficiently broad to cover some instances of identity theft but are not of general application. They are limited to ‘personal financial information’ (PFI), a term defined to mean ‘information relating to a person that may be used … to access funds, credit or other financial benefits’.\textsuperscript{55} The persons to whom the information relates may be dead, alive, or artificial.\textsuperscript{56} The chief offence of relevance to identity theft is that of dishonestly dealing in PFI.\textsuperscript{57} The term ‘dealing’ is defined to include using PFI,\textsuperscript{58} hence its applicability to a person who pretends to be another by use of that other’s PFI.

However, the scope of this offence is limited by the definition of the term PFI and a requirement that the funds, credit or other financial benefits concerned relate to an authorised deposit-taking institution for the purposes of the Banking Act 1959, or a constitution corporation. Further, any funds involved must represent amounts that have been deposited with, lent to, or are otherwise to be provided or made available by such an entity.\textsuperscript{59}

The other offences contained in the legislation proscribe obtaining,\textsuperscript{60} possessing,\textsuperscript{61} making\textsuperscript{62} or supplying\textsuperscript{63} PFI and possessing,\textsuperscript{64} controlling\textsuperscript{65} or importing\textsuperscript{66} a thing with

\begin{itemize}
\item \textsuperscript{53} Criminal Law Consolidation Act 1935 (SA) s 144A.
\item \textsuperscript{54} Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004 (Cth) sch 3, amending ch 10 of the Criminal Code Act 1995 (Cth).
\item \textsuperscript{55} Criminal Code Act 1995 (Cth) s 480.1.
\item \textsuperscript{56} ibid s 480.1(3).
\item \textsuperscript{57} ibid 480.4.
\item \textsuperscript{58} ibid 480.1
\item \textsuperscript{59} ibid s 480.3.
\item \textsuperscript{60} ibid s 480.4.
\item \textsuperscript{61} ibid s 480.1; this provision defines ‘obtain’ PFI to include possession and making of PFI.
\item \textsuperscript{62} ibid.
\item \textsuperscript{63} ibid; this provision defines ‘dealing’ to include supplying.
\item \textsuperscript{64} ibid s 480.5.
\item \textsuperscript{65} ibid.
\item \textsuperscript{66} ibid s 480.6.
\end{itemize}
intent that it be used to obtain or deal in PFI or facilitate such wrongdoing. These offences are preparatory in nature, a feature which characterises the approach to criminalising identity-related crime in Australia.

4.4 The Recommended Offences

Such was the background against which Australian law reformers recommended the enactment of specific identity-related offences. Precursory remarks attributed to then South Australia’s Premier, Mike Rann, clearly indicated that the purpose and intent of the South Australian legislation was to prevent persons from committing crimes involving the use of PII relating to others. In the related news release, he was reported as describing the legislation as ‘a crackdown on people using someone else’s personal information with the intention of committing a crime’.67 Further, he was said to have stated that, ‘We’re going to nip this in the bud before the information is used to help terrorists, illegal immigrants and drug couriers, let alone assist with money laundering or frauds against people, business and governments’.68

According to the release, Attorney-General Michael Atkinson indicated that it was proposed to make it an offence to ‘[k]nowingly assume a false or fictitious identity and use that identity to commit a serious offence’; ‘[k]nowingly produce, possess or sell (without lawful authority) [PII] intending to commit a serious offence; or ‘produce, possess or sell document-making equipment intending to produce or obtain unauthorised means of [PII]’. The Attorney-General’s description of the proposed assumption offence as stipulating the use of the assumed identity for criminal purposes was erroneous. The enacted offence only requires the intent to commit a serious offence.69

However, the clearest indication of a national recommendation of specific offences is contained in the MCLOC final report.70 Having noted that there were gaps in the existing laws, the MCLOC opined that there was a clear need for ‘specific or narrowly

67 SA Government News Release (n 22).
68 ibid.
69 Criminal Law Consolidation Act 1935 (SA) s 144B(3).
70 MCLOC (n 10) para 6.
applied offences’ as a remedial measure.\textsuperscript{71} It went on to recommend the creation of the three model offences described above.\textsuperscript{72} The enacted offences as found in the Commonwealth, New South Wales, Victoria and Western Australia are examined next as are the offences found in South Australia and Queensland. Brief mention is made also of the more recent addenda to the Commonwealth offences made by the \textit{Crimes Legislation Amendment (Serious Drugs, Identity Crimes and Other Measures) Act 2012} (Cth).

\section*{4.5 An Overview of the Offences}

An exposition of the Australian offences is complicated by the existence of slight differences in offence definitions in the various jurisdictions. However, as Steel notes, ‘there is a fundamental agreement about the underlying definitions and type of behavior prohibited’.\textsuperscript{73} This provides a useful basis on which to organise a review of the offences. The survey starts with an examination of the only offence that requires the actual assumption of an identity for its commission.

\subsection*{4.5.1 Assuming an Identity with Intent}

In South Australia, it is an offence to assume a false identity intending by that act to commit, or facilitate the commission, of a serious criminal offence. Equally, it is an offence to falsely pretend to have particular qualifications, or to have, or be entitled to act in a particular capacity, intending likewise.\textsuperscript{74} A ‘serious criminal offence’ is an indictable offence or one prescribed, by regulation, for purposes of the offence.\textsuperscript{75}

Curiously, despite the narrowly proscribed misconduct, the charging section of the provision uses language of more general import, describing the offence as making a ‘false pretence’.\textsuperscript{76} Somewhat convolutedly, this apparently broad scope is narrowed by an earlier definition that delimits the notion of ‘false pretence’ to the categories of

\begin{flushright}
\textsuperscript{71} ibid.
\textsuperscript{72} Text to n 11.
\textsuperscript{73} Alex Steel, ‘The True Identity of Australian Identity Theft Offences: A Measured Response or an Unjustified Status Offence?’ (2010) 33 UNSWLJ 503, 509.
\textsuperscript{74} \textit{Criminal Law Consolidation Act 1935} (SA) s 144B.
\textsuperscript{75} ibid s 144A.
\textsuperscript{76} ibid s 144B(3).
\end{flushright}
A person assumes a false identity if he, or she, pretends to be, or passes himself or herself off as, another person, whether that other person be alive, dead, real, fictional, natural or artificial. The consent of the person whose identity is falsely assumed is not exculpatory.

Hence, the required conduct for the false pretence offence may involve, but is not limited to, identity theft. The virtue of this offence, therefore, is that, in one manifestation, it ensures an identity-fraud basis for the offence and, if the misused information relates to a living person, identity theft is necessarily involved. However, the offence is not applicable to identity theft per se. Its true purpose is reflected in the stipulation of an ulterior intent requirement as a constituent element. This early indication that the real objective is not to punish identity theft, but to stave off other consequential harms that may result from the misuse of PII, is a permeating feature of the Australian offences.

The remaining South Australian offences share features with the offences found in the other jurisdictions. For that reason, it is convenient to defer them for juxtaposed consideration with those offences. It suffices at this stage to mention two concepts that are incorporated in the other South Australian offences. One is the familiar concept of PII and this is dealt with more fully in the ensuing section. The other is the concept of ‘prohibited material’ to which the cluster of offences in section 144D relates. That term is defined to mean anything, including PII, that enables someone to assume a false identity or usurp another’s right of ownership to money, credit, information or any other benefit whether it be financial or non-financial. The related offences cover production, possession, sale or offering for sale, giving or offering to give. The possession of equipment for the making of prohibited material is also included.

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77 ibid s 144B(1).
78 ibid s 144A.
79 ibid s 144B(2).
80 ibid s 144A.
81 ibid s 144D(1)(a).
82 ibid s 144D(1)(b).
83 ibid s 144D(2).
84 ibid s 144D(3).
4.5.2. **Dealing in PII**

PII is a central concept in some of the offences contained in all the jurisdictions. Two types of offences can be identified in this regard, those which criminalise the possession of such information and those which relate to some sort of dealing in it. The possession offences are considered later. The other category is the subject of present exposition. In South Australia, this category of offences is not dealt with in one section but aspects of it are found in section 144C and section 144D. The implications of this become manifest in the comparative sentencing analysis undertaken later.

4.5.2.1 **The Prohibited Subject-Matter**

The concept of ‘PII’, as it is styled in South Australia, is consistent with that explored in chapters two and three, and distinguished from the wider category of personal information. It is referred to as ‘identification information’ in the other jurisdictions but the definition of the respective terms across jurisdictions reveal great similarities. Generally, it is defined to mean information that can be used to identify an individual, whether alone or in conjunction with other information, and whether the person to whom the information relates is living, dead, or fictitious. Each definition contains a non-exhaustive indicative list of examples of things falling within the scope of the term.

The critical feature of these definitions is their openness to the range of things that might fall within the term PII. They are general in scope and technologically neutral. They define this key term broadly and in a manner such as to ensure that it will not be overtaken easily by change. As is illustrated by the various indicative lists, the definitions embrace a range of types of information that span technological and non-technological spectra. Thus, for example, the New South Wales’ list includes names, addresses and dates of birth, on the one hand, and biometric data, voice prints and digital signatures on the other. They reflect an effort to create ‘future-proof’, technology neutral offences and this is commendable.

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85 pt 2.6.3-2.6.4.
86 pt 3.5.2
87 pt 3.5.2.
88 *Criminal Code Act 1995* (Cth) s 370.1; *Crimes Act 1900* (NSW) s 1921; *Criminal Code 1899* (Qld) s 408D(7); *Criminal Law Consolidation Act 1935* (SA) 144A; *Crimes Act 1958* (Vic) s 192A; *Criminal Code Act Compilation Act 1913* (WA) s 489; the South Australian definition does not include a parenthetic reference to the information being used alone or in conjunction with other information but this is immaterial.
Steel considers it ‘striking’ that the indicative lists extend beyond private information or secret passwords to information that may be in the public domain. He observes, rightly, that information such as a person’s name, address, date and place of birth and marital status may be readily accessible on the internet, in the case of celebrities and persons who subscribe to social networking sites.\(^{89}\) Steel is right that ‘identification information is neither necessarily restricted nor private information’\(^{90}\) and that ‘there is nothing unlawful in being aware of such information’.\(^{91}\) However, the various lists are truly representative of what they seek to illustrate: the type of means by which persons may be identified.

Steel’s comment with respect to the aspects of the lists that he describes as ‘striking’ would be more meritorious if the real objective of the legislative schemes was to render PII subject to the offence of theft. These offences seek to prohibit certain forms of misconduct with respect to such information. That being the case, no type of PII can be excluded. The fact that information may be public, widely known or consensually obtained does not make the mischief that can be wrought through improper usage any less serious. The case against these information-based offences lies, not so much in the categories of PII included, as it does in the dangers of making such information the basis of possession and other inchoate offences, a factor that Steel recognises.

A major difficulty concerns the uncertainty as to the extent to which physical information sources are included within the definitions. Information is distinguishable from media in, or on, which it might be recorded or stored. This distinction is not maintained consistently in the statutory definitions. In this regard, the legislative picture in Western Australia is fairly clear. That jurisdiction employs two concepts - ‘identification information’ and ‘identification material’. As in the other jurisdictions, the former term is defined to mean ‘information relating to a person…’. Importantly, though, in the case of Western Australia, the indicative list comprises examples only of information.\(^{92}\) It does not list drivers’ licences, passports or credit and debit cards but, rather, the references are to the information stored on such media. The term

\(^{89}\) Steel (n 73) 510.
\(^{90}\) ibid.
\(^{91}\) ibid.
\(^{92}\) *Criminal Code Act Compilation Act 1913 (WA)* s 489.
‘identification material’ is one of wider import, being defined to mean identification information and records that contain such information.\textsuperscript{93}

The picture is less clear in the other jurisdictions. In South Australia, for example, the definition of the term PII is expressed to include drivers’ licences,\textsuperscript{94} passports,\textsuperscript{95} credit and debit cards\textsuperscript{96} and ‘any means commonly used by the person to identify him or herself’.\textsuperscript{97} Arguably, this latter phrase covers any item which a person uses as a means of identification. In so far as the indicative list includes tangible information-related items, the definition, by use of word ‘includes’, enlarges the meaning of the word information to include the specified objects, or it removes any doubt that they fall within the meaning of the term ‘PII’.\textsuperscript{98}

The effect of this seems to be that if an individual owns a computer disc containing PII relating to him or her but does not commonly use this disc to identify him or herself, the disc would not be included in the definition of PII, as it relates to that individual. On the other hand, a credit card or a passport would be. It appears then that outside of the specific objects identified, whether a storage medium constitutes PII in South Australia depends on the use to which it is put by the individual to whom the stored information relates. In any event, the concept of ‘prohibited material’ includes PII and all objects that contain PII, provided they take a form which would enable a person to assume a false identity or exercise rights of ownership over another’s assets or information.\textsuperscript{99}

A similar position obtains in New South Wales\textsuperscript{100} and the Commonwealth law,\textsuperscript{101} where the meaning of the term ‘identification information’ is also expressed to include a driver’s licence, passport and a credit or debit card. However while the Commonwealth provisions contain a concept of ‘identification documentation’ which is limited to

\footnotesize{
\begin{itemize}
  \item[\textsuperscript{93}] ibid.
  \item[\textsuperscript{94}] Criminal Law Consolidation Act 1935 (SA) s 144A para a(ii) of definition.
  \item[\textsuperscript{95}] ibid para a(iii) of definition.
  \item[\textsuperscript{96}] ibid para a(vi) of definition.
  \item[\textsuperscript{97}] ibid para a(vii) of definition.
  \item[\textsuperscript{98}] See Elmer A Driedger, \textit{The Composition of Legislation; Legislative Forms and Precedents} (2\textsuperscript{nd} edn, The Department of Justice Ottawa 1975) 49 for the meaning of the word ‘include’ in statutory definitions.
  \item[\textsuperscript{99}] Criminal Law Consolidation Act 1935 (SA) s 144A.
  \item[\textsuperscript{100}] Crimes Act 1900 (NSW) s 192I paras (c) (d) and (g) of definition.
  \item[\textsuperscript{101}] Criminal Code Act 1995 (Cth) s 370.1 paras (c) (d) and (g) of definition.
\end{itemize}
}
documents or other things that contain or incorporates identification information and may be used to assist a person in pretending to or passing himself or herself off as another, the New South Wales law contains no such concept.

In Victoria, the indicative list is preceded by the words ‘being information such as’. That list then includes a driver’s licence, a passport and a credit or debit card. The use of the term ‘such as’, suggests that all information-bearing objects similar to the listed ones are included within the term identification information. However, this law also includes a definition which subsumes under the term ‘identification documentation’, documents or things that contain or incorporate PII and are capable of being used for purposes of pretending to be, or passing off as, another person. The position is similar in Queensland where the indicative list is introduced by a caption that suggests it contains examples of what constitutes identification information for an individual. However, the Queensland provisions have no concept such as ‘identification material’ or ‘identification documentation’.

Clearly, though, items such as passports, credit and debit cards and drivers’ licences are capable of falling within both definitions in the other jurisdictions, except Western Australia. In that jurisdiction, there is no uncertainty as to the non-application of the term ‘identification information’ to documents, though such information is also categorised under the wider rubric ‘identification material’. This approach accords with common sense and maintains certainty in the law, leaving no doubt as to the subject-matter to which the dealing offence applies. It remains to consider the prohibitions imposed with respect to PII.

### 4.5.2.2 The Prohibited Conduct

The concept of dealing in identification information is expressly employed in the Commonwealth, New South Wales and Queensland. The relevant dictionary

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102 ibid.
103 ibid para (d) of the definition.
104 ibid para (e) of the definition.
105 ibid para (h) of the definition.
106 ibid s 192A.
107 ibid s 192A.
108 ibid para (d) of the definition.
109 ibid para (e) of the definition.
110 ibid para (h) of the definition.
meaning of the verb ‘to deal’ is, ‘To carry on commercial transactions; to do business, trade, traffic (with a person, in an article).’

In the criminal sphere, this conjures up images of dealing in substances such as drugs or trading or trafficking in human beings. It appears an unusual term to apply to a class of information that is ordinarily regarded as innocuous but its use reflects contemporary reality.

The Commonwealth and New South Wales define the term as including making, supplying or using such information, while Queensland defines it to include supplying or using. However, Queensland also criminalises the obtaining of information, a term that is defined to include the making of the information. None of the remaining jurisdictions employ the term ‘dealing’ but each proscribes similar conduct. In Victoria, the offence covers the making, supplying and using of identification information while in Western Australia it is an offence to act similarly with respect to identification material.

In South Australia, the affected conduct is using, producing, selling, offering for sale, giving, and offering to give. While the offence of using is limited to PII, the other offences apply to prohibited material. Thus, they extend beyond PII to anything

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110 Crimes Act 1900 (NSW) s 192J.
111 Criminal Code 1899 (Qld) s 408D.
114 Crimes Act 1900 (NSW) 192I.
115 Criminal Code 1899 (Qld) s 408D(7).
116 ibid s 408D(1).
117 ibid s 408D(7).
118 Crimes Act 1958 (Vic) s 192B.
120 Criminal Law Consolidation Act 1935 (SA) s 144C.
121 ibid 144D(1)(a).
122 ibid 144D(2).
123 ibid.
124 ibid.
125 ibid.
else that enables a person to assume a false identity or usurp another’s right to funds, credit, information or benefits.

4.5.2.3 The Ulterior Intent Requirement

The requirement for proof of an ulterior intent is a standard feature of the dealing offences, as it is in the case of the other offences. With respect to the category of current focus, in all jurisdictions except South Australia, the required ulterior intent must relate to an indictable offence. The recent Commonwealth amendment extends it to a foreign indictable offence. According to the Explanatory Memorandum to the Bill, the objective of this extension was to ‘strengthen the current regime for identity crime by capturing individuals located in Australia who engage in international identity crime’. A foreign indictable offence is defined as an offence against a law of a foreign country, or a jurisdiction within a foreign country, that, if committed in Australia would amount to a Commonwealth indictable offence. Thus, if an Australian deals in PII intending to commit a fraud in England, or theft in Barbados, this conduct is caught under the amended provision. This amendment takes account of the trans-border nature of criminal activity and strengthens the potential for the imposition of criminal liability where Australians commit an identity-based offence that commences in Australia but is completed elsewhere.

The intended ulterior offence varies in South Australia. With respect to the misuse of PII, the intention must relate to a ‘serious criminal offence’, explained above as an indictable offence or one prescribed by regulation for the purpose. The more significant difference is to be found in the offences that relate to prohibited material. In

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126 Criminal Code Act 1995 (Cth) s 372.1(1)(c)(i); Crimes Act 1900 (NSW) s 192J; Criminal Code 1899 (Qld) s 408D(1); Crimes Act 1958 (Vic) s 192B(1)(b); Criminal Code Act Compilation Act 1913 (WA) s 490(1).

127 Crimes Legislation Amendment (Serious Drugs, Identity Crimes and Other Measures) Act 2012 (Cth), amending the Criminal Code Act 1995 by repealing and substituting a new s 372.1(1)(c) to include 372.1(1)(c) (ii).

128 Explanatory Memorandum, Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill (Cth) 2012 37.


130 Criminal Law Consolidation Act 1935 (SA) s 144C(1).

131 Text to n 75.
those cases, the ultimate conduct to which the intent must relate is described as ‘a criminal purpose’, a term that is defined to cover all offences. Hence, in South Australia, the prohibited material offences, which include producing and supplying PII, require proof of an intention to commit or facilitate the commission of any offence, indictable or summary. This is a significant point of contrast with dealing as it obtains in the other jurisdictions where the ulterior offence must be indictable. A more critical consideration of the role of the ulterior intent in these set of offences is essayed below.

4.5.2.4 Some Peculiar Provisions

Space must be found in this section to mention three peculiarities. The first relates to the oddity in the Commonwealth offence of a requirement for proof of an intermediate intent. The offence definition requires that the person who deals in the identification information must intend that someone, including the dealer, will use the information to pretend to be, or pass himself or herself off as, another person, whether alive, dead or fictitious. This intended identity misrepresentation must, in turn, be for the purpose of committing or facilitating the commission of a commonwealth or foreign indictable offence. None of the other jurisdictions require any such intermediate intent. The offence definitions link the proscribed physical conduct directly to the ulterior intent to commit or facilitate the commission of a target offence.

This unique feature in the Commonwealth provision of a conjoint intermediate and ulterior intent is bound to be eyed with skepticism by theorists concerned with the moral legitimacy of offences, over-criminalisation and the proper limits of the criminal law. Hence, further comment on this approach must form part of the critique that follows.

The practical virtue of the intermediate intent requirement is that it ensures that the offence is, to some extent, based on an identity misrepresentation. Steel posits that this ensures ‘a fraud basis to the offence’. However, unlike the case with the South

132 Criminal Law Consolidation Act 1935 (SA) ss 144D(1)(a) and 144D(2).
133 ibid s 144A.
134 pt 4.6.2.
136 ibid ss 372.1(1)(b) and (c).
137 Steel (n 73) 511.
Australian false pretence offence, that base is not grounded in a physical component of the offence but floats invisibly in the actor’s intermediate intent.

The second peculiarity arises in New South Wales. It relates to the role that the perpetrator must intend the prohibited physical conduct to play with respect to the ulterior intent, or in the case of the Commonwealth, the intermediate intent. In the latter jurisdiction, it is expressly required that a defendant must intend that the identification information be used to attain the intermediate objective.\(^{138}\) A similar nexus between information use and the ulterior intent exists in South Australia,\(^{139}\) Western Australia\(^{140}\) and Victoria.\(^{141}\) In South Australia, the person making use of the PII must intend ‘by so doing’ to commit or facilitate the commission of the serious offence. In Western Australia, the perpetrator must act intending that the identification material be used to commit or facilitate the commission of the indictable offence. So is it also in Victoria.

No such requirement is expressed in New South Wales. The offence definition states that a defendant must deal in identification information with the intention of committing or facilitating the commission of an indictable offence.\(^{142}\) This omission also applies to the possession offences. Steel comments that the absence of such a requirement in Western Australia must be an ellipsis.\(^{143}\) Commenting on the possession offence, he opines that without such a requirement, ‘every offence would also be an identity crime as everyone has knowledge of information relevant to the identity of others’.\(^{144}\)

The merits of this submission will be re-considered in the context of the possession offence. However, with respect to dealing in information, it makes no sense to divorce the making, supplying or using of the information from the intended offence. To do so would be to penalise the dealer for misconduct with respect to which a mental component of the offence does not coincide. Such an approach would be an unreasonable imposition of criminal liability. For this reason, the wording of the New


\(^{139}\) Criminal Law Consolidation Act 1935 (SA) s 144C.

\(^{140}\) Criminal Code Act Compilation Act 1913 (WA) s 490(1).

\(^{141}\) Crimes Act 1958 (Vic) s 192B(1)(b).

\(^{142}\) Crimes Act 1900 (NSW) s 192J.

\(^{143}\) Steel (n 73) 527.

\(^{144}\) ibid
South Wales provision cannot reasonably be construed as applying where a person happens to deal in identification information while harbouring an intention to commit some entirely unrelated crime.

The third peculiarity may be viewed more favourably. Uniquely, the Victoria offence definition expressly requires that the perpetrator be aware that the information is identification information or that there is a substantial risk that this is the case.\(^{145}\) This provision eliminates any room for doubt as to whether the prosecution must prove \textit{mens rea} with respect to the basic physical component of the crime. In Australian jurisdictions, where a statutory provision is silent with respect to the requirement for \textit{mens rea}, there is a strong presumption favoring its inclusion.\(^{146}\) Given the nature of these offences and the penalties that can follow a conviction,\(^{147}\) courts should be disinclined to hold that this presumption has been displaced. This conclusion in favour of \textit{mens rea} finds favour with Steel.\(^{148}\)

The peculiarities identified are not limited to the dealing offences. The overview of the possession offences which follows will demonstrate this.

\textbf{4.5.3 The Possession Offences}

The presence of possession-based offences is a common feature across the jurisdictions. However, while rooted in possession these offences require proof of an ulterior intent and, in the case of the Commonwealth, the additional intermediate intent on the part of a perpetrator. Each jurisdiction bars the possession of PII, however styled,\(^{149}\) and equipment that can be used for making documents containing PII.\(^{150}\) In South Australia and Western Australia, the firstly mentioned offence extends beyond PII to any such

\(^{145}\) \textit{Crimes Act 1958} (Vic) s 192B(1)(a).

\(^{146}\) \textit{He Kow Teh v The Queen} (1985) 157 CLR 523 (HCA).

\(^{147}\) These are discussed at pt 4.6.4.

\(^{148}\) Steel (n 73) 519.

\(^{149}\) \textit{Criminal Code Act 1995} (Cth) s 372.2; \textit{Crimes Act 1900} (NSW) 192K; \textit{Criminal Code 1899} (Qld) s 408D(1); \textit{Criminal Law Consolidation Act 1935} (SA) s 144D(1)(b); \textit{Crimes Act 1958} (Vic) 192C; \textit{Criminal Code Act Compilation Act 1913} (WA) s 491.

\(^{150}\) \textit{Criminal Code Act 1995} (Cth) s 372.3; \textit{Crimes Act 1900} (NSW) 192L; \textit{Criminal Code 1899} (Qld) s 408D(1A); \textit{Criminal Law Consolidation Act 1935} (SA) s 144D(3); \textit{Crimes Act 1958} (Vic) 192D; \textit{Criminal Code Act Compilation Act 1913} (WA) s 492.
information-bearing record, in the case of Western Australia,\textsuperscript{151} and to anything that facilitates identity assumption, in South Australia.\textsuperscript{152}

The reach of the ‘equipment’ offence also varies across jurisdictions. In New South Wales, the offence applies to ‘equipment, material or other thing’ capable of use for making identification information-bearing documents or things.\textsuperscript{153} Hence, in that jurisdiction, the possession of anything with the functional capacity for the specified use is prohibited, and constitutes an offence, if the possessor harbours the requisite intent.

Thus, possession of a piece of paper could give rise to liability. This is an astonishing result and one that must form part of any critical consideration of these offences. Similar extensive reach obtains in Western Australia where the phrase ‘identity equipment’ is defined to mean ‘any thing capable of being used to make, use, supply or retain identification material’.\textsuperscript{154} Again, this definition is troublingly loose. Does the word ‘supply’ include a motor car that is being used to transport a notebook with the names and addresses of potential burglary victims?

In the Commonwealth,\textsuperscript{155} South Australia\textsuperscript{156} and Queensland,\textsuperscript{157} the offence is limited to equipment, but the meaning of the term is reserved for judicial determination. This leaves uncertainty as to the scope of the offence. The Victoria provision also applies to equipment only but goes on to require that the equipment must be ‘capable of being used to make, use, supply or retain identification documentation’.\textsuperscript{158} Unlike the case in Western Australia, this definition restricts the subject matter to ‘equipment’ but specifies that it must have the functional capabilities set out. Whether there is any practical difference in these two provisions depend entirely on the interpretation which is given to the word ‘equipment’.

\textsuperscript{151} The offence prohibits the possession of ‘identification material’; see text to n 93 for definition.
\textsuperscript{152} The offence prohibits the possession of ‘prohibited material’; see text to n 99 for definition.
\textsuperscript{153} Crimes Act 1900 (NSW) s 192L(a).
\textsuperscript{154} Criminal Code Act Compilation Act 1913 (WA) s 492(1).
\textsuperscript{155} Criminal Code Act 1995 (Cth) s 372.3.
\textsuperscript{156} Criminal Law Consolidation Act 1935 (SA) s 144D(3).
\textsuperscript{157} Criminal Code 1899 (Qld) s 408D(1A).
\textsuperscript{158} Crimes Act 1958 (Vic) s 192D.
Under the Commonwealth law, there is no requirement for functional capacity. The exclusion was deliberate. The rationale for this approach was articulated in the Explanatory Memorandum. The Commonwealth Parliament thought that since the offence is a preparatory one, the functional capacity of the equipment is irrelevant. It considered the actor’s intention to be relevant and that he or she should not escape prosecution because the equipment possessed was not capable of making the identification document. It admitted that the omission of the requirement broadens the scope of the offence. Thus, the breadth of the offence is such that it can be said that it imposes liability for a criminal intent where it is impossible to achieve the ultimate crime intended.

In closing this section, one returns to Steel’s point about the ellipsis in the New South Wales offences which, if read literally, would render every offence an identity crime. An example clarifies Steel’s point. A encounters a female on a lonely road one dark evening. He recognises her as AB from Lambert Street. Hence, he possesses certain identification information in relation to her. He decides to rape her and proceeds to do so. Since he possessed the identification information at the time he formed the intention to rape, Steel’s suggestion is that he could be considered guilty of the Western Australian offence of possession with intent. This is an absurd result and one that could not have been intended by the legislature.

Another example highlights a possible absurdity with respect to equipment. All the jurisdictions, except Western Australia, require that the perpetrator intend that the equipment be used to make, or use, supply or retain, some document or thing that contains or incorporates identification information. There follows the further requirement that it be intended that the identification documentation be used to bring about or facilitate the commission of the further offence.

In Western Australia, the intermediate requirement is missing from the statutory provision. It is sufficient if the perpetrator possesses the equipment with intent that it be used to commit or facilitate the commission of the offence. Taken on its face, this allows for bizarre results. Thus, for example, a person who forms the intent to seriously

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159 Explanatory Memorandum, Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2010 (Cth) 9.

160 Text to nn 143-144.
injure someone by striking them with his personal computer, mobile phone or desk diary would be guilty of an identity crime. Such activity is only connected to issues of identity in the remotest way and cannot properly be characterised as an identity crime. One surmises, though, that such a result could hardly have been intended by the Western Australia legislature.

4.5.4 The Additional Commonwealth Offences

To complete this overview, brief mention must be made of the offences that were recently added to the Commonwealth law. The first category discussed below was born out of a realisation that organised crime groups are exploiting the internet and other modern communication technologies to gather and exploit PII. The second category was intended to confront the fact that persons involved in organised and serious crime travel by air use false identities in order to avoid detection and perpetuate crimes such as drug trafficking and money laundering.161

The Crimes Legislation Amendment (Serious Drugs, Identity Crimes and Other Measures) Act 2012 (Cth) created a special offence of dealing where it takes place using a carriage service,162 a term so defined as to cover internet or telecommunications services.163 The Act also makes it an offence to deal in identification information obtained using a carriage service.164 Both offences require the intermediate and ulterior intent for commission. A significant feature of these offences is the presence of a reverse onus provision. A person who is proven to have dealt in, or obtained, identification information, is presumed to have used a carriage service in doing so. The legal burden falls on that person to prove otherwise.165

Sections 376.2 to 376.4 set out five offences relating to false identities and air travel. In summary, these are using false PII at a constitutional airport reckless as to if the

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161 Explanatory Memorandum (n 128) 37.
162 Criminal Code Act 1995 (Cth) s 372.1A(1).
163 The Code’s dictionary incorporates a definition from the Telecommunications Act 1997 s 7 which defines the term as ‘a service for carrying communications by means of and/or unguided electromagnetic energy’.
164 Criminal Code Act 1995 (Cth) s 372.1A(3).
165 ibid s 372.1A(5).
information is used to identify the user as a passenger on a flight;\textsuperscript{166} obtaining flight tickets via a carriage service using false PII in relation to the intended passenger and being reckless as to whether the information would be used to identify that passenger;\textsuperscript{167} taking a flight using a travel ticket obtained through a carriage service by means of false PII;\textsuperscript{168} obtaining a flight ticket by using false PII in relation to the intended passenger, reckless as to whether the information is used to identify that passenger;\textsuperscript{169} and taking a flight using such a ticket where the PII results in the identification of a person as a passenger on the flight.\textsuperscript{170}

These air travel offences contrast sharply with the other Australian offences. They are grounded in physical acts which are wrongful and which facilitate or create a risk of further wrongdoing. The contrasting corresponding features of the other offences constitute the primary basis of the discussion which follows as to the acceptability of this package of offences.

4.6 A Critique of the Offences

The above expositional overview gives way in this section to a more critical assessment of the offences under consideration. It commences with an examination of the effect of the provisions.

4.6.1 The Effect of the Provisions

The fundamental point of note is that none of the jurisdictions penalise identity theft per se. This is the most striking feature of the offences on offer. This finding is shared by scholars though they apply different definitions to the term identity theft. Thus, for example, Steel who uses it to ‘describe the acquisition and retention of identification

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{166}] ibid s 376.2(1).
\item[\textsuperscript{167}] ibid 376.3(1).
\item[\textsuperscript{168}] ibid 376.3(2).
\item[\textsuperscript{169}] ibid 376.4(1).
\item[\textsuperscript{170}] ibid s 376.4(2).
\end{itemize}
\end{footnotesize}
information’\textsuperscript{171} concludes, tersely, that, ‘Conspicuously, the offences do not attempt to describe or prohibit the act of ‘identity theft’\textsuperscript{172}

Circumstances constituting some offences, such as dealing in identification information and the false assumption of an identity might include acts of identity theft. However, these offences all require proof of something additional to the basic act of using another person’s PII to assume that person’s identity. Thus, for example, if a perpetrator uses the PII of a real person to pass him or herself off as that person, this act of identity theft may constitute the basis of an offence but, in itself, is not criminal. It only becomes so if accompanied by an intention to commit an indictable offence or, in the case of the Commonwealth, a foreign indictable offence. The requirement for these additional elements is reflective of the fact that the purpose of the legislatures was not identity theft but consequential mischief and fallout.

Sullivan also concludes that the Australian offences do not criminalise identity theft or identity fraud ‘per se’.\textsuperscript{173} Her concepts of these terms are discussed in chapter three. As a summary reminder, she employs the term identity theft to refer to the dishonest misuse of another’s transactional identity for a transaction. That concept of identity comprises a particular set of identification information which is stored digitally under a confirmatory database scheme. She labels the use of any other identification information for fraudulent purposes, identity fraud.\textsuperscript{174}

Arguably, though, the offences involving the use of identification information include Sullivan’s concept of identity theft, once the transaction engaged in was intended and amounts to an indictable offence. This is so since any move to engage in the transaction by route of the database evinces the required ulterior intent and, in the case of the Commonwealth, the intermediate intention. Similarly, the offences relating to the possession of PII might be relevant where Sullivan’s transactional identity is violated.

If statutory labelling faithfully reflected content, it could be said that the South Australian provisions purport to deal with ‘identity theft’. This is so since the offences

\begin{itemize}
  \item \textsuperscript{171} Steel (n 73) 504.
  \item \textsuperscript{172} ibid 510.
  \item \textsuperscript{173} Clare Sullivan, \textit{Digital Identity: An Emergent Legal Concept} (University of Adelaide Press 2011) 118.
  \item \textsuperscript{174} ibid 114.
\end{itemize}
fall under that rubric and the term appears prominently in the amending statute by which the offences were enacted and incorporated into that state’s consolidating criminal law. Yet, the term identity theft is undefined in the provisions and none of the offences they contain is designated by specific reference to that terminology. If one was forced to draw an inference based on structure and language, it would be that the South Australian legislature regard the range of conduct proscribed as identity theft. This would be an absurd conclusion, given the extension of proscription to the possession of equipment.

None of the other jurisdictions employ the term ‘identity theft’, opting for broader terminology like ‘identity crime’, as is the case in Western Australia and Victoria, ‘identity crimes’, as is the case with the Commonwealth legislation and ‘identity offences’, as is the case in New South Wales. Even then, the statutory terminology is apt to mislead, at least if reference is made to the efforts at standardisation manifest in the ACPR report. That recommends that ‘identity crime, be defined as ‘offences in which a perpetrator uses a [false identity] to facilitate the commission of a crime(s)’.\textsuperscript{175} The offences do not require the commission of any other offence but merely an intention to do so. Such activity may be preparatory to engagement in identity-crime but cannot be aptly described as such.

There is, therefore, some incongruity between the statutory titles employed and the offences created. If law has a communicative function, then it should be discharged accurately for the avoidance of public opprobrium.

Undoubtedly, the framers of the Australian identity crimes were concerned about the range of potential harms that could be facilitated by means of identity-related misconduct rather than the narrower concept of identity theft. They have done so by means of a number of offences, the bulk of which are cast in an inchoate mode. Genuine concerns with maintaining reasonable restraints on the exercise of the state’s coercive power to create criminal offences, a commitment to minimalism and a subscription to the view that excess criminalisation is to be avoided combine to demand a rational basis for the enactment of these types of offences. Any critical discussion must focus on the type and nature of the wrongdoing and harm which the offences are intended to address.

the extent to which the realisation of those harms are removed from the components of 
the offence, and the means by which they are linked to those components.

4.6.2 Harms, Wrongs, and Inchoateness

An inchoate offence is one which is defined in such a way as not to require proof of 
actual harm as an element of the offence or, as Husak puts it, one that ‘proscribes 
conduct that does not cause harm on each and every occasion in which it is 
performed’.176 Williams puts it differently but the tenor is the same. He defines an 
inchoate crime as one that comprises ‘doing an act with the purpose of effecting some 
other offence’.177 Beyond the classic offences of attempt, conspiracy and incitement, as 
Husak notes, all jurisdictions enact additional inchoate offences.178 Final support for 
stating that the Australian offences are cast in an inchoate mode is drawn from 
Ashworth who writes:

there are many substantive offences which are defined in such a way as not to 
require the actual causing of harm: offences which penalize a person who does a 
certain act ‘with intent to do X’ are in reality defined in an inchoate mode, having 
many of the characteristics of inchoate offences. Crimes of possession are also 
especially inchoate: It is not the mere possession, so much as what the possessor 
might do with the article or substance, which is the reason for criminalization.179

Ashworth’s indication that it is the actor’s potential actions that constitute the rationale 
for these types of offences is a useful reminder that the object of such offences is the 
avoidance of harm. Husak aptly calls this harm which the offence seeks to avoid the 
ultimate harm.180 A major concern with inchoateness arises because of the distance 
between that ultimate harm and the offence’s constitutive conduct or state of affairs.

A generally accepted justification for the acceptance in criminal jurisprudence of these 
‘incomplete’ offences is that they are a prophylactic crime-fighting measure, designed 
to nip activity in the bud that might lead to harmful consequences. Academic 
scholarship does not reject the idea of such offences but, rather, focus on minimum

178 Husak (n 176) 161.
179 Andrew Ashworth, Principles of Criminal Law (5th edn OUP 2006) 444 (fn omitted).
180 Husak (n 176) 160.
criteria of acceptability. Packer captures one aspect of this tension between general appeal and the need for caution poignantly. He writes:

One of the most delicate problems in framing criminal proscriptions is to locate the point farthest removed from the ultimate harm apprehended at which meaningful preventative intervention can take place. If dangerous conduct can be deterred and dangerous persons identified well short of the point at which the danger becomes acute, so much the better. Or so it seems. Actually, increasing the radius of the criminal law in the interest of early intervention is a very risky business.\textsuperscript{181}

Packer identifies three considerations of relevance in determining justification: (1) the degree of likelihood that the preparatory conduct, if not inhibited, will result in harm of a type that the law should seek to avoid; (2) whether the preparatory conduct is ‘socially useful, or at least neutral’; and (3) the problem of enforcement.\textsuperscript{182} Husak’s work adds to these considerations and merits consideration because it is recent and comprehensive.\textsuperscript{183} Simester and von Hirsch’s articulation of some further limiting considerations is also highly relevant for its classification of these types of offences and discussion of relevant factors that might assist with the issue of liability.\textsuperscript{184}

Husak defends four limiting principles as it relates to the criminalisation of remote harm. The first is reflective of Packer’s first consideration. He urges that the offences are justified only if designed to reduce a substantial risk of harm. Secondly, he urges that the offence restriction must actually decrease the likelihood that the ultimate harm will occur. His third principle is that the ultimate harm should derive from conduct which the state would be permitted to criminalise. Fourthly, Husak urges that an offence would be over inclusive if it could be committed without increasing the likelihood of the ultimate harm resulting.\textsuperscript{185}

Simester and von Hirsch critically review Husak’s limiting principles and propose some additional ones. They devise a classification scheme for what they term ‘non-constitutive’ crimes comprising three broad categories: (1) ‘endangerment’ offenses, in which the prohibited activity … creates a risk of causing harm to others’; (2)
‘prophylactic offenses: cases in which the prohibited activity … conduces to harm only if accompanied by an autonomous act … either by the offender or by another; and (3) ‘a special set of cases … in which the offense is concerned to prohibit activities that are wrongs independently of the harm they cause’. They then set out the factors which, in their view, might justify criminalisation in each case. Like Packer, they accept that the neutrality of the prohibited conduct ought to be a relevant factor in determining whether a prophylactic offence might be justified.

The necessary exercise in applied theory which must follow this theoretical discourse is made more challenging by the nature of the offences under review. The identity theft offences seem to serve multiple roles. Additionally, different offences may fall into different classification categories and the same offence, depending on mode of commission, may fall into different categories. Whether these differences are of any theoretical significant is left to be explored after illustrating the classification point.

It is convenient to first identify the various roles these offences are intended to perform in order to deduce the harms or risks that might be said to be within their ambit. The narrative setting out the factual background to the offences revealed a threefold concern. Firstly, it was indicated that various harms could be brought about as a direct result of the misuse of PII. Put differently, there are some criminal offences that may be committed by means of such misuse. A classic illustration would be a fraud, or theft, that is accomplished by falsely claiming to be an account holder to a commercial bank in order to secure an advance of funds, whether by way of an account withdrawal or a mortgage loan. In such cases, the PII misuse is a tool or modality by which the fraud is wrought. This may be called the direct-harm facilitation role.

This role is distinguishable from the indirect-harm facilitation role also manifested in the background details. By the latter designation, one contemplates the circumstances in which organised crime personnel and others use false identities with the ultimate goal of facilitating acts such as terrorism and human trafficking. In these cases, unlike the direct-harm facilitation role, the identity misconduct does not form a necessary element of the ultimate wrongdoing but is a facilitative step in the preparatory journey towards that end.

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186 Simester and von Hirsch (n 184) 93-94.
The third discernible role rests on the fact that PII misuse may be engaged in to conceal the true identity of the perpetrator of a criminal act and, sometimes, to cause the false attribution of that act to someone else. The necessary consequence of this tactic is to assist a perpetrator in avoiding detection and make the process of law enforcement more difficult and time-consuming. Additionally, the risk of harm to the individual to whom the PII relates is obvious. The example drawn from the case of *Hansdot*\(^\text{187}\) in which Mr. Cullen was interviewed and arrested under suspicion of drug importation serves as a disturbing reminder.\(^\text{188}\)

When considered from a crime-detection perspective, identity-misuse offences may be treated, in some respects, analogously to the anti-mask laws found in the USA. A similar crime-prevention rationale has been advanced by government for anti-mask laws. The arguments have been marshalled well by Simoni who examines the range of anti-mask laws existent in the USA and sets out the possible degrees of inchoate offences that can be created in this context.\(^\text{189}\) He describes as general anti-mask laws those that ‘proscribe the simple concealment of physical identity in public, regardless of coexistent criminal activity’.\(^\text{190}\) At the other extreme are the criminal ‘anti-mask laws [which] prohibit mask-wearing during the commission of crimes’.\(^\text{191}\) He notes, however, that certain states ban the wearing of ski-masks only where there is an intention on the part of the wearer to commit specified unlawful acts.\(^\text{192}\)

Not surprisingly, the constitutionality of anti-mask laws has been an issue in the USA with challengers arguing that they infringe rights to free speech, freedom of assembly and substantive due process. It is the states’ response that is most relevant in the present context. Their case is that the offences are a prophylactic crime-fighting measure. Simoni sensibly concludes that what is required is a balance between these competing

\(^{187}\) [2010] EWCA Crim 1008.

\(^{188}\) Text to n 268 ch 3.


\(^{190}\) ibid 242 (fn omitted).

\(^{191}\) ibid 241-42.

\(^{192}\) ibid 243.
legitimate interests by the provision of an anti-mask law that safeguards constitutional rights while serving the state interest of crime prevention.\textsuperscript{193}

Drawing from the above, at least three approaches are possible in creating identity-related inchoate offences. The least favoured approached would be the creation of general crimes which would penalise the sheer acts of dealing, possessing PII, and the possession of identification document-making equipment. Though obviously aimed at short-circuiting crime, these would be unjustifiably restrictive of individuals’ expressive rights. Secondly, offences might be drawn narrowly to penalise persons who use PII in an effort to disguise or pass themselves off as others, while committing offences. No anti-justification challenge could be mounted against this approach. The third approach is reflected in Australia where engagement in basic identity information-related conduct accompanied by a specific criminal intent is criminalised.

Simoni notes that the anti-mask laws that penalise wearing masks accompanied by a specific criminal intent impact on persons even more likely to commit crime and that these laws tend to pass constitutionality tests in the USA.\textsuperscript{194} Significantly, though, most of the Australian offences fall below this threshold. The offences impute criminality for less overt acts than wearing a mask in public. They require no harm-threatening conduct such as would satisfy the Duff requirement for an attack on the ultimate protected interest. Duff distinguishes attacks on harm from endangerments. He opines that an actor must go beyond the ‘merely preparatory’ to be said to be making an attack.\textsuperscript{195} Essentially, he adopts the standards of the law of attempt which requires the taking of steps beyond the preparatory to be effectual.\textsuperscript{196} However, Duff does not ask us to imply that merely preparatory conduct should never be criminalised.\textsuperscript{197}

Admittedly, the statement in the preceding paragraph about the non-harm threatening aspect of the offences is a generalisation which applies unqualifiedly only to the possession offences. The South Australian false identity assumption offence requires steps beyond mere possession and, depending on the circumstances, these steps may be

\textsuperscript{193} ibid 273.
\textsuperscript{194} ibid 255-256.
\textsuperscript{195} RA Duff, ‘Criminalizing Endangerment’ in RA Duff and Stuart P Green (eds), \textit{Defining Crimes: Essays on the Special Part of the Criminal Law} (OUP 2005) 44.
\textsuperscript{196} ibid 45.
\textsuperscript{197} ibid 45 (fn 7).
regarded as more than merely preparatory. The same could obtain to a case of using PII which falls under the rubric of dealing. However, whether or not this is so would depend on the degree of proximity between the acts engaged in and any intended further offence.

This leads to the question of directness or indirectness. Writing with respect to endangerment offences, Duff considers an inchoate offence to be direct if no intervening ‘wrongful human action’ is required for the ultimate harm to follow from the prohibited conduct. Antithetically, an offence is indirect if harm would ensue only with the further act of the actor or other persons. He concludes that offences of direct endangerment are generally unproblematic.198 This conclusion is reasonable given that the actor sets in train and is fully responsible for the chain of events that bring about the ultimate harm. Thus, where the perpetrator of an offence of dealing or false identity assumption brings about a further offence by his, or her, actions, little issue can be taken for imposing criminal liability for the direct consequences of those actions once accompanied by the requisite mens rea.

However, in the possession offences further human action is necessary to bring about harmful consequences. These may be regarded as indirect inchoate offences. This may also be the case sometimes with the offences identified in the preceding paragraph. Simester and von Hirsch refer to these types of offences as prophylactic offences.199 In passing, it must be stated that Duff’s classification scheme is preferable. The term prophylactic offences may be taken generally to apply to all inchoate offences, having as their objective the prevention of further crime. Hence, endangerment and non-endangerment inchoate offences may all be considered prophylactic in nature and may or may not require further human intervention to bring about the ultimate harm.

Questions of terminology aside, there is consensus that where human intervention is required to lead to harm, criminalising the initial misconduct may be morally problematic. To assume that the actor, or even some other person, would intervene to bring about the harmful consequence is to disregard the principle of autonomy and assume that persons are not responsible citizens who will act in conformity with the

198 ibid 62-63.
199 Simester and von Hirsch (n 184) 93-94.
law. Furthermore, persons should be held responsible only for their actions. This is acknowledged by Simester and von Hirsch, and Duff.

However, these academics all concede that ‘indirect’ or ‘prophylactic’ offences may sometimes be morally legitimate. Simester and von Hirsch search for rationales on which to justify the existence of these offences. They theorise that justification might arise where the actor evidences some ‘normative involvement’ in any subsequent choice to commit the target offence. They contemplate that ‘actions that are like affirmation, and which in various ways assist, encourage, or otherwise endorse’ the ultimate wrongdoing, are required.

Simester and von Hirsch explore this further in a way that is highly relevant to the present context. They argue, convincingly, that ‘to supply a tool is to condone the use of that tool for its core function’. Thus, the supply provides evidence of normative involvement by the supplier in the subsequent use of the supplied product. However, Packer’s consideration of social usefulness or, at least, neutrality of use assumes importance here. Where the product supplied has as its core function a legitimate use, or is recognised as having multiple uses, some acceptable and some harmful, more is required before a justice system can fairly attribute criminal liability to the supplier of that product for any subsequent illicit use to which it is put.

PII and document-making equipment are not in themselves dangerous or harmful. There are several ways in which such information may be used or supplied to others or in which identification documents may be made by means of equipment that must be regarded as socially useful or, at least, harmless conduct. There is nothing inherently or necessarily wrongful in these information-related activities. At the same time, there has been ample public dissemination of information about cases of identity theft and identity-related crime over the past few decades with a resultant general awareness that PII and equipment may be used for negative purposes.

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200 ibid 98.
201 Duff (n 195) 63.
202 ibid; Simester and von Hirsch (n 184) 98.
203 Simester and von Hirsch (n 184) 99.
204 ibid 101.
205 Text to n 182.
It is here that the employment of the ulterior intention device in the offences assumes critical importance. Simester and von Hirsch opine that, in cases of recognised multiple uses, a person may be regarded as being ‘prima facie normatively involved’ in any of those uses.206 Whatever be the merits of that position, their follow-up statement that the existence of common legitimate uses should count as a factor against criminalisation is a compelling one.207 Significantly, they go on to posit that the inclusion of an ulterior mens rea in the inchoate offence might be one way of securing the necessary normative involvement since a person can then only offend if aware of the likely improper use.208

This position is shared by Duff who states that the principle of recognising autonomy in cases of direct inchoate offences ‘is qualified when the law criminalises conduct that is preparatory to an intended attack’.209 Strong reliance must be put on this reasoning to mount any argument that, despite their flaws, the Australian offences are justified. Even then, the fact that many of the offences are based on early-stage activity is worrying since the imposition of criminal liability in such circumstances denies the perpetrator any opportunity to escape conviction where he or she abandons the criminal intent before going forward with the intended action. As Duff puts it, the agent is denied ‘a suitable “locus poenitentiae”’.210

There is no room for debate as to the susceptibility of the ultimate harm to criminalisation since that harm is defined by reference to any indictable offence and, in the case of South Australia, in some instances, to any offence. This omnibus approach suggests strongly that at the point of enactment, legislative focus was on the general potential of reducing the use of false identities as a means of escaping, making detection more difficult or falsely attributing crimes to another. At least, this is the practical effect of the set of offences which are not limited to the prevention of specific offences shown to be associated, whether directly or indirectly with the misuse of PII. However, the downside has been the creation in most jurisdictions of astonishingly broad offences.

206 Simester and von Hirsch (n 184) 101.
207 ibid.
208 ibid.
209 Duff (n 195) 63.
210 ibid.
4.6.3 Some Troubling Observations

The above discourse demonstrates that the moral legitimacy of these offences is not beyond question. This section critically examines some more troubling aspects relating to them. The first observation is the presentation in the raft of offences of instances of double inchoateness. In his general sweep on inchoate offences in Australia, Leader-Elliott observes that such offences ‘can be nested, one inside the other, so that an inchoate offence can itself be a target offence for lesser inchoate offences…’.211 The section 372.2 Commonwealth offence is of particular interest in this regard. It penalises the possession of information, an overtly innocent act, with intent to commit an offence under section 372.1. The latter offence condemns ‘dealing’ in information, an overtly innocent act, with intent to commit a Commonwealth offence.

Double inchoate liability classically features in discussions as to the applicability of the offences of attempt, conspiracy and incitement to each other. As Clarkson, Keating and Cunningham note, ‘such liability should be viewed with considerable caution’.212 Logic might suggest that if there is cause for concern with inchoate liability generally, cases of double inchoateness might be doubly disconcerting. In his critical review of the offences, Leader-Elliott rightly notes that criminal liability for attempts to commit any of these inchoate offences has been barred.213 But, one may ask, what of incitement and conspiracy?

Nonetheless, the section 372.1 Commonwealth offence has a virtue about it. As noted above, the employment of the intermediate ulterior device ensures that the offence has a fraud basis.214 However, this approach lacks solidity in so far as it arises through the ulterior intent of the perpetrator, resulting in the inelegance of the linking of two ulterior intent requirements to arrive at liability.

A more effective method of ensuring a fraud or identity theft-related basis to these offences would have been to require the use of PII for such purposes. The South Australian false pretence offence provides the best example of this. Such an approach

213 Leader-Elliott (n 211) 82.
214 Text to n 137.
carries with it the virtue of requiring a further step toward the commission of the offence, thus narrowing the degree of remoteness between the basic act and the target harm. Such a requirement comes closer to bringing these offences in line with the established requirement in the crime of attempt for some act which is more than merely preparatory and more immediately connected with the commission of the target offence.\footnote{215}

The idea of using classic inchoate offences as a yardstick for measuring the acceptability of the Australian identity-related offences was applied by Leader-Elliot to highlight some of the flaws in the offences.\footnote{216} He uses the Commonwealth offence of conspiracy\footnote{217} as explained in \textit{R v LK}\footnote{218} and \textit{Ansari v The Queen}\footnote{219} as a model against which to critically analyse the offences. He makes some pertinent observations about the applicable penalties and recommends that they should not exceed those for the target offences.\footnote{220} Reference is made to some aspects of his observations in discussing the statutory penalties below.

However, it is fitting to complete the excursion into the justificatory bases for the Australian offences by returning to Packer. Penalties mean little if there are low rates of enforcement. Packer notes that the further removed conduct is from the ultimate harm feared, the greater the difficulties of detection and enforcement.\footnote{221} This seems a most likely result of the Australian offences. Here, a distinction made by Fletcher between manifest criminality and subjective criminality proves useful in showing up the extreme nature of these offences and the difficulties of proof that might attend them.\footnote{222} He uses the label subjective criminality to refer to offences which are not characterised by manifest physical conduct but by an intention to violate or risk the violation of a legally protected interest.

\footnotetext{216}{Leader-Elliott (n 211) 84-96.}
\footnotetext{217}{\textit{Criminal Code Act 1995} (Cth) s 11.5.}
\footnotetext{218}{[2010] HCA 17, (2010) 241 CLR 177.}
\footnotetext{219}{[2010] HCA 18, (2010) 84 ALJR 433.}
\footnotetext{220}{Leader-Elliott (n 211) 92.}
\footnotetext{221}{Packer (n 181) 271.}
\footnotetext{222}{George Fletcher, \textit{Rethinking Criminal Law} (OUP 2000) pt 3.1.}
Steel notes that the possession of information offence is one of extreme subjective or non-manifest criminality. The act of possession in this case may be entirely harmless and unobtrusive. The ulterior intent is the conversion factor that renders the act of possession criminal. Steel describes this offence as being at the end of the spectrum ‘where there is nothing in the prohibited acts to allow a bystander to identify the behavior as a crime’. An example suffices. It is adapted from one of that trilogy of cases well known to students of contract law that are concerned with the application of the doctrine of mistake in face-to-face transactions.

The reference is to *Phillips v Brooks*. Imagine then our swindler in that case not yet in the jewellery store, but some miles away. He has memorised the name and address of Sir George Bullough. Hence, he is invisibly armed with the prohibited matter. The information is prohibited because his heart is laden with intent to acquire some expensive jewellery by influencing the jeweller to accept his useless cheque. He will achieve his ruse by falsely claiming to be Sir George. Undoubtedly, the swindler is guilty of possessing information with intent in all the jurisdictions under consideration. However, his criminality is not manifest. He might pass scores of law enforcement officers as he makes his way to the intended crime scene but nothing about him might give rise to the slightest suspicion. At that stage of his offending, the likelihood of detection and prosecution is zero.

A slight variation of the facts would lead to the offence of ‘dealing’ with the same outcome. En route, the swindler walks alongside an accomplice who, intending that the former should bring about his fraudulent conduct, says to him: ‘The man is Sir George Bullough. He lives at No. 909 St James Square.’ Even if such a conversation is overheard, without a further exchange of words there is nothing to betray any criminal intent.

How then is intent to be proven in such offences where the prohibited conduct manifests no criminality? Fletcher points to confessions, admissions against interest and evidence of prior and subsequent conduct as ‘other acceptable means of proving intent’.

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223 Steel (n 73) 525.
225 [1919] 2 KB 243.
226 Fletcher (n 222) 118.
Though these constitute legal means of establishing the ulterior mental element, there are inherent dangers. Steel highlights the risks of persons admitting to firmer intentions than those actually harboured or making unwise admissions under questioning from law enforcement. These dangers are not confined to such offences but are justifiably stressed where the nature of the offences makes reliance on the identified evidence-gathering modalities so important. Not surprisingly, available data suggest no significant related prosecutorial activity. An electronic case law search for relevant appellate decisions yielded no results. Crime statistics disseminated by the various states do not include these offences in the selected categories and up to 30th June 2013, the Commonwealth reported having prosecuted only six cases under its relatively new law. These are one of ‘dealing’ and five related to air-travel but the reference to two specified offences is unclear.

4.6.4 Penalties

Despite apparent low levels of enforcement, a critical assessment must be made of the statutory penalties these offences attract. The relevant legislation sets out the maximum sentences that can be imposed for the various offences under discussion. As the Judicial Conference of Australia points out, the main purpose of such statutory maxima is to ‘indicate the appropriate penalty for cases falling within the worst category of cases of that nature’. Hence, when balanced with the other relevant factors to be considered in

227 Steel (n 73) 526.
232 ibid ss 376.2(1) (2 cases) 376.3(1) (1 case) and 376.4(1) or (2) (2 cases); see pt 4.5.4.
the sentencing process, maximum penalties provide a ‘yardstick’ for determining the appropriate penalty for an offence. Furthermore, a maximum penalty is generally indicative of the seriousness of the offence to which it applies.

Two aspects of the sentencing provisions merit critical comment. The first relates to the disparity in statutory maxima across jurisdictions. The maximum penalty for the ‘dealing’ offence ranges from three years, in the case of Queensland, to ten years, as is the case in New South Wales. In Western Australia, the relevant period is the greater of seven years or the term to which the offender would have been liable if he, or she, had been convicted of attempting the indictable offence, while the offence is punishable in Victoria and the Commonwealth by a maximum term of five years imprisonment. In South Australia, the false pretence and misuse offence are punishable to the same degree as the attempt to commit the intended serious offence.

In the Commonwealth, Queensland and Victoria, the possession offences carry a statutory maximum of three years, as does the possession of equipment in New South Wales. However, in that jurisdiction, the stipulated maximum for the possession of identification information is seven years, and, in the case of Western Australia both possession offences are punishable by a maximum of five years’ imprisonment, if tried on indictment or twenty four months and a fine of twenty four thousand dollars, on

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234 Markarian v The Queen (2005) 228 CLR 357, 352 [31] (HCA).
236 Criminal Code 1899 (Qld) s 408D(1); s 408D(1AA) provides for a term of seven years where the information is supplied to a member of a criminal organisation.
237 Crimes Act 1900 (NSW) s 192J.
238 Criminal Code Act Compilation Act 1913 (WA) s 490.
239 Crimes Act 1958 (Vic) s 192B(1).
240 Criminal Code Act 1995 (Cth) ss 372.1(1) and 372.1A(1).
241 Criminal Law Consolidation Act 1935 (SA) s 144B(3).
242 ibid s 144C(1).
243 Criminal Code Act 1995 (Cth) ss 372.2(1) and 372.3(1);
244 Criminal Code 1899 (Qld) ss 408D(1) and 408D(1A).
245 Crimes Act 1958 (Vic) ss 192C(1) and 192D(1).
246 Crimes Act 1900 (NSW) s 192L.
247 ibid s 192K.
summary conviction. In South Australia, the offences related to prohibited material are all punishable by three years imprisonment. Astonishingly, the Commonwealth air travel offences carry a maximum penalty of twelve months. This is substantially lower than the offences that involve no overt wrongdoing or manifest criminal acts.

Undoubtedly, the differences in statutory maxima reflect the autonomous right of each jurisdiction to set such levels of punishment as it thinks fit. However, one might have expected a greater uniformity in the stipulated maximum penalties, given the provision of national model legislation and the potential for cross-jurisdictional activity involving the commission of offences of this nature. It is surprising that the Commonwealth offences attract less severe penal impositions than do the state offences. There is some need for a standardisation and rationalisation of these sentencing provisions. Steel puts a compelling argument that ‘such a disparity between maximum sentences … strongly suggests that the setting of penalties is based on local political factors rather than any reasoned national approach’.

The MCLOC advances a good rationale for maintaining low levels of imprisonment for offences of this nature. It advocates that the offences are preparatory in nature and that it was traditional to set lower maximum penalties for inchoate offences. The imposition of a greater penalty for the offence of ‘dealing’ represented an attempt on its part to compromise between the preparatory nature of the offence, on the one hand, and its seriousness and consequential societal impact, on the other.

A sentencing rationale has also been offered in the Commonwealth for making the ‘dealing’ offence the target offence in the possession offences, rather than any indictable offence. It appeared incongruous that the preparatory offence of possessing equipment could carry a maximum penalty of three years imprisonment while the indictable offence intended to be committed with any documentation made by means of that equipment only carries a penalty of twelve months imprisonment.

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248 Criminal Code Act Compilation Act 1913 (WA) ss 491(1) and 492(2).
249 Criminal Law Consolidation Act 1935 (SA) s 144D.
250 Criminal Code Act 1995 (Cth) ss 376.2(1), 376.3(1), 376.3(2), 376.4(1) and 376.4(2).
251 Steel (n 73) 529.
252 MCLOC (n 10) 35.
253 Explanatory Memorandum (n 159) 35.
This issue of parity between inchoate offences and their corresponding target offences is a further reference point for critical comment. Ironically, the Committee regarded it as important in considering the possession offences, but insignificant in rationalising the level of sentence for the ‘dealing’ offence. Leader-Elliott deals with this point exhaustively.\(^{254}\) He points out that, as a general rule, penalties for inchoate offences do not exceed those of the corresponding target offences. As he notes, the penalty for an indictable offence can be as low as twelve months. Hence, in some instances, the perpetrator of one of the identity-related offences is exposed to greater punishment than if he or she had been charged with the target offence. He follows up that, probably justifiably, the opposite obtains where the indictable offence carries a more severe penalty than the statutory maxima applicable to the inchoate offence.\(^{255}\)

Leader-Elliott highlights the anomalous position further. He indicates that the offender who goes beyond mere preparation and is charged with attempt or, as a result of connivance, with conspiracy to commit the target offence, suffers a lesser penalty than a person charged with the preparatory offence.\(^{256}\) These incongruities are not easily defended. However, he advances that a possibly justifiable effect of the provisions is that they make the intention to engage in an identity fraud an aggravating factor in sentencing in those offences for which the statutory penalties are less than five or three years.\(^{257}\) His reference to fraud arises from the fact that he writes in respect of the Commonwealth offences which require proof of the intermediate intention to assume a false identity.

The reliance on identity theft as an aggravating factor in sentencing has been considered in the previous chapter. The reservations expressed about the sentencing practice could be avoided if a statutory formula is adopted to make offences committed by means of identity-related misconduct chargeable in an aggravated form. Further consideration might be required as to whether any such statutory method should extend to all offences.

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\(^{254}\) Leader-Elliott (n 211) 92.

\(^{255}\) ibid.

\(^{256}\) ibid; cf text to n 239 for the desired approach in Western Australia.

\(^{257}\) ibid.
In commenting on the reach of the offences occasioned by the broad application of the ulterior offence to all indictable offences, Steel argues that they compound the over-criminalisation problem.\textsuperscript{258} His concern rests on the fact that added to the indictable offences found in the criminal statutes, there are a number of regulatory provisions, breaches of which also constitute crimes. This position is heightened in South Australia where, with respect to some offences, the ulterior crimes are not limited to indictable offences but span the gamut of the crime spectrum.

Hence, Steel urges that the offences have the potential to increase the penalty for these quasi-crimes. This point needs further consideration. Arguably, the root of the issue of over-criminalisation is the regulatory offences themselves. If a particular regulatory crime is found to be justified, the public-interest in having perpetrators detected and not wrongly exposing others to the risk of prosecution are strong factors in favour of the applicability of these offences to them. However, Steel’s point is unquestionably valid where the regulatory offence is not justified.

5. Victim Certification

Ordinarily, one might expect a discourse on punishment to signal the end of the examination of a criminal statute. However, the offences reviewed do not represent the full extent of the identity crime statutes in Australia. A universal feature of the legislation is the provision for the issuance of certificates to persons who have suffered as a consequence of having their PII misused. These certificates are not a form of criminal sanction neither do they constitute a civil remedy. They are intended to assist victims of these offences in mitigating some of the consequences of their victimisation and with the reconstruction of their damaged personal and financial images.

The MCLOC noted this damage as including ‘damage to a person’s credit rating, the creation of a criminal record in the person’s name, and tremendous expenditure of time and effort restoring records of transactions or credit history’.\textsuperscript{259} It considered that, in these situations, it would be useful for the victim of identity crime to obtain a certificate showing that the transactions and/or criminal conduct were in fact carried out by

\begin{itemize}
\item \textsuperscript{258} Steel (n 73) 527.
\item \textsuperscript{259} MCLOC (n 10) 42.
\end{itemize}
another person purporting to be the victim. The certificate could contain details of the offence, the name of the victim, and any other matters the court considers relevant.

In making this recommendation, the MCLOC followed the lead taken in South Australia and Queensland. The committee’s recommendation was adopted by the Commonwealth, Western Australia, Victoria and New South Wales. Though the certificate provisions in the various jurisdictions are intended to serve a common purpose, there are significant differences in the legislative details. These differences could bear examination by reference to how each jurisdiction defines a ‘victim’, the effect of consent, who may apply for a certificate, the time at which certificates may be issued, who may issue certificates, the conditions for the issue of a certificate, the stipulated content, and the life span of certificates.

However, an exhaustive comparative study of the relevant provisions is unnecessary in this context. It suffices to focus briefly on the concept of ‘victim’ and the effect of consent. An examination of the relevant provisions shows that contrasting positions exist across jurisdictions with respect to both aspects. South Australia provides an example of a narrow application of the certificate provisions. In that jurisdiction, a victim for purposes of certificate entitlement is a person whose PII is used or whose identity is assumed, without his or her consent, in connection with the commission of the offence. By contrast, in the Commonwealth jurisdiction, anyone who suffers because of the crime is considered a victim and a person is entitled to a certificate whether or not he or she consents to the dealing.

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260 ibid.
261 ibid 42–43.
262 Criminal Law (Sentencing) Act 1988 (SA) s 54.
263 Criminal Code 1899 (Qld) s 408D(3)-(6).
265 Criminal Code Act Compilation Act 1913 (WA) s 494(2).
266 Sentencing Act 1991 (Vic) s 89E-89H.
267 Criminal Procedure Act 1986 (NSW) s 309A.
268 Criminal Law (Sentencing) Act 1988 (SA) s 54(3).
The most accommodating interpretation of the South Australian provision is that a person who consents to the use of his or her PII, other than in connection with the offence, derives protection from the statute. The Commonwealth provision goes too far in its attempt to guarantee such an outcome.\textsuperscript{270} It might have been enough to make the entitlement immaterial as to whether or not the person consented to the use of his or her PII. Alarmingly, even a person who consents to the commission of the crime secures protection in the Commonwealth.

The idea of a broad definition of victim was designed to ‘assist as many people as possible who may have been adversely affected by identity crime’.\textsuperscript{271} This approach is reflective of a legislative pragmatism that refuses to make persons whose PII is misused the sole beneficiary of a form of assistance that is uniquely suited to ameliorating the type of harm to which the wrongdoing pre-disposes them.

6. Conclusion

This leads to some concluding observations. The primary finding from the review of the Australian offences is that they are only peripherally concerned with identity theft. They do not criminalise the misconduct per se but are concerned with the prevention of consequential societal and third party harms that might arise from the misuse of PII. The Australians have shown no partiality towards the criminalisation of identity theft and the research discloses no debate as to whether, as an act, it is of such a degree of wrongness, or threatens harms of sufficient importance, so as to justify the intervention of the criminal law. If this question ever concerned the Australian legislatures, the outcome of their efforts has been such as to suggest a presumptively negative answer.

It is pertinent to make some general observations about features of the offences that are indicative of some of the issues that might form part of any discussion on the criminalisation of identity theft. Not least among these, is the question of harm. Offence creation should be guided by a clear focus as to the harm or wrongdoing which it is intended to minimise or proscribe. The events and discussion that heralded these offences and the elements of the offences suggest a concern with a wider range of harms than those, if any, suffered by individuals whose PII is misused. In pursuing the

\textsuperscript{270} Explanatory Memorandum (n 159) 10.
\textsuperscript{271} ibid 11.
question as to the criminalisation of identity theft, it will be necessary to separate the harm which results from that misconduct from the wider collection of harms that motivated the Australian legislatures into creating this set of offences.

A common feature of the Australian provisions is the application of the offences regardless of whether the PII relates to a real or fictitious person and, if real, whether the person is dead or alive. This general application makes sense in the context of legislation with a clear purpose of avoiding a wide set of mischiefs that may be wrought from identity misrepresentation. However, it is to be debated whether such an expansive approach is required where one is debating the criminalisation of identity theft.

In considering the criminalisation of identity theft, concern must be limited to real people, though consideration is given to the case for including those whose PII is misused posthumously. Though fictitious persons can suffer no consequences from acts of identity theft, this category may become relevant if the person creating the identity façade unintentionally implicates a real person in the process. How and whether liability should attach in such circumstances become an issue to be pursued later.

Next there is the issue of consent. The general approach evidenced in the body of offences considered is that the consent of the person whose PII is misused is irrelevant to liability. In the context of offences that have as their purpose the avoidance of harms identified above, it is reasonable to make consent immaterial. The public interest must necessarily trump any individual claims of autonomy in such circumstances where the focus is not on harm to direct victims but on the many wrongs that may be aided by identity-related misconduct. However, the position might be different where an offence focus is on direct victims, unless some wider societal interest can be identified the comparative value of which justifies the subversion of individual autonomy. This search takes place in the next chapter.

The final comments relate to the provisions for victim certification. They constitute a form of relief that is adjunctive to the criminal sanction, thus demonstrating a legislative policy that puts the remediation of harm to direct victims on the agenda of concerns. Their ubiquitousness must be seen as a legislative concession that, while criminal jurisprudence continues to be accused-oriented, restorative relief for victims is a necessity.
This opens debate as to whether there are alternative and more effective means of confronting identity theft since, if there are, principles of minimalism dictate an avoidance of criminalisation. However, this debate and the role, if any, of victim certification in that respect, are beyond the scope of this thesis. It remains to determine whether a prima facie case for criminalisation can be established.
CHAPTER FIVE
THE WRONG AND HARM IN IDENTITY THEFT

5.1 Introduction

The two preceding chapters examined some offences that are relevant to the proscription and punishment of identity theft. They demonstrate that the act is not a criminal offence though it may form part of wider prohibited conduct. This chapter explores the case for a specific offence of identity theft against the background of normative theories of criminalisation.¹

As to the lay of the land, this introductory section is followed by an overview of the two major theories of criminalisation, ‘harm’ and ‘legal moralism’. To properly contextualise the matter, there is a summary reminder of the essential conduct that constitutes identity theft as conceptualised for the purposes of this thesis. Next follows a discussion as to whether criminalisation might be grounded on either of these grand theories.

In this respect, two bases for concluding that identity theft is immoral are considered. The first rests on the fact that identity theft is, at its core, a lie. It is a false assertion and a deceptive act. Secondly, the argument is considered that identity theft is morally problematic because it objectifies direct victims.

The chapter then examines three possible harm-based approaches: (1) harm to direct victims; (2) remote harm; and (3) harm to the societal value in human identification. With respect to the first category, an exposition of the financial and emotional impact of identity theft on direct victims is essayed but these are considered inadequate as a basis for criminalisation. The remote harm discussion is twofold. First, it argues that criminalisation on the basis of the risk of harm to direct victims, is a possibility. Additionally, it considers whether a case can be made out for criminalisation as a means of preventing associated misconduct.

¹ Brudner draws a necessary distinction between normative theories of criminalisation which consider what a state ought or ought not to criminalise and constitutional limits which dictate what a state may or may not criminalise: Alan Brudner, ‘The Wrong, the Bad, and the Wayward: Liberalism’s mala in se’ 2.

Those apart, it is posited that identity theft harms two fundamental and important values, one humanistic, the other societal. At the humanistic level, the basic interest identified is that of human dignity, a slippery concept that requires some elucidation. The chapter builds on the objectification discussion to argue that human dignity is impaired by identity theft. Consideration is given to theories that advance human dignity as a basis for criminalisation and whether acts of identity theft generally meet the impact requirements of humiliation or degradation. These are identified as necessary factors that must limit any dignity-related approach to criminalisation. Shifting to the societal, it is argued that there is a societal value in identification that is undermined by identity theft, itself a social concern.

Juxtaposed with this discussion is an examination of how certain special issues and circumstances might be considered theoretically and in the context of any offence. Four such areas are identified. These are (1) the exclusion of obviously non-criminal conduct; (2) the treatment of ‘ethically grey’ conduct; (3) the effect of victim consent; and (4) the scope of any offence as it relates to the status of direct victims. However, as indicated above, an overview of the major criminalisation theories follows, beginning with the notion of harm.

5.2 Harm to Others: JS Mill

The ‘harm principle’ has been described, perhaps rightly so, as ‘the most commonly recognised criterion for criminalisation in democratic societies’\(^2\). It originates in the liberal philosophy of John Stuart Mill contained in his famous essay ‘On Liberty’.\(^3\) He reduced the essence of his theory to the pithy statement that ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.’\(^4\) Societal intrusion on paternalistic grounds is not merited, according to Mill. In his words, a person’s ‘own good, either physical or moral, is not a sufficient warrant’.\(^5\)

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\(^4\) ibid 158.

\(^5\) ibid.
Mill’s theory, therefore, is of general application, covering all forms of compulsion by a society against its members. As such, it necessarily includes, but is not limited to, criminalisation. It sets ‘harm to others’ as the qualifying requirement by which conduct might be considered appropriate for coercive regulation, though it does not stipulate that such conduct must necessarily be so controlled. According to him, while such harm is a qualifying requirement for criminalisation, coercive intervention is only justified where society is of the opinion that legal or social regulation is required.6

Restricting the application of this principle to the issue of criminalisation, Moore points out that, ‘The harm principle is both positive and negative.’7 It might be preferable to substitute the terms ‘permissive’ and ‘prohibitive’ for ‘negative’ and ‘positive’ to avoid the drawing of an inference, however unwarranted, of the expression of an evaluative judgment. The point is, merely, that the harm principle, as articulated by Mill, allows for the criminalisation of behaviour that is harmful to persons other than the agent of that conduct and prohibits the criminalisation of behaviour that only harms the agent.

Some limited consideration of the meaning of the word ‘harm’ and the ‘inherently ambiguous’8 capsulate phrase ‘harm to others’, is required to facilitate the application of the theory in this context. Mill provides no definition of the critical term ‘harm’. However, his writing supports the inference that harm involves ‘damage, or probability of damage’ to the ‘interests of others’, if that interest ought to be regarded as a right by society, whether ‘legal or moral’. Pain or loss resulting from the pursuit of legitimate objectives is insufficient.9

5.2.1 Feinberg’s Refined Harm Principle

This necessary relation between harm and interests has been a feature of many twentieth century discourses on criminal harm.10 The most recognised effort at refinement was

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6 Ibid 224.


8 The concept is so described in CMV Clarkson, Understanding Criminal Law (4th edn Sweet & Maxwell 2005) 262.

9 Mill (n 3) 224.

undertaken by Feinberg whose treatment of the subject has been highly influential, as predicted by Thompson. In the first of a quartet of texts on the moral limits of the criminal law, Feinberg defines ‘harm’ in terms of a setback to interests. Recognising, however, that not all setbacks to interests should be met with penal sanction, he urges that only such conduct that is wrong, in the sense that it violates a right, qualifies for consideration. He includes in his concept of harm not only ‘setbacks of interests that are wrongs’ but also ‘wrongs that are setbacks to interests’.

As to the term ‘interests’, Feinberg defines it as ‘all those things in which one has a stake …’. He distinguishes between (1) ulterior interests i.e. ‘a person’s more ultimate goals and aspirations’ and (2) welfare interests i.e. more basic interests that are shared by everyone and are necessary for the attainment of ultimate goals. It is the latter type of interests that ‘cry out for protection’. According to Feinberg, this category of welfare interests includes:

the interests in the continuance for a foreseeable interval of one’s life, and the interests in one’s own physical health and vigor, the integrity and normal functioning of one’s body, the absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual acuity, emotional stability, the absence of groundless anxieties and resentments, the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income and financial security, a tolerable social and physical environment, and a certain amount of freedom from interference and coercion.

Thus, Feinberg identifies and provides a general formula for the recognition of these ‘welfare interests’ that demand legal protection. Such interests are harmed when human

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12 Joel Feinberg, The Moral Limits of the Criminal Law: Harm to Others (OUP 1984) ch 1; the other volumes in the four part series are Offense to Others (OUP 1985); Harm to Self (OUP 1986) and Harmless Wrongdoing (OUP 1990).
13 Feinberg, Harm to Others (n 12) 36.
14 ibid.
15 ibid 34.
16 ibid 37.
17 ibid.
18 ibid.
19 ibid.
conduct wrongfully sets back, defeats, thwarts or impedes them.\textsuperscript{20} Feinberg adds an effectiveness requirement, restating the harm principle, in a ‘somewhat diluted formulation’,\textsuperscript{21} in this way:

It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.\textsuperscript{22}

Feinberg has not had the last word on the subject.\textsuperscript{23} However, his analysis remains sufficiently dominant to merit consideration in constructing a theoretical framework for the discussion to follow. It suggests that some consequential wrongful set back of a basic interest be identified as a prerequisite to the criminalisation of identity theft. There must also be satisfaction that offence-creation might, and is the most efficient way to, prevent, eliminate, or reduce that harm.

\textbf{5.2.2 The Harm-Morality Debate}

As is detailed below, Mill’s harm theory had early rivalry from Stephen’s theory of moralism which endorsed a more general approach to the criminalisation of immorality.\textsuperscript{24} These two formidable opponents sowed the seeds for the two grand theories of criminalisation that have been the subject of much discussion among academics, jurists and law reformers. This rich debate reached a high point in the middle of the last century when Professor HLA Hart and distinguished jurist Patrick Devlin took opposing positions in an exchange described by Mitchell as ‘a splendid encounter’ in which ‘the degree of sustained passion’ and ‘clarity of argument’ shown was ‘sufficient to cleanse the term “academic” from any taint of triviality or irrelevance’.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{20} ibid 51-55.
\item \textsuperscript{21} ibid 187; Feinberg so describes his statement of the harm principle since it purports to be neither a necessary nor sufficient condition for criminalisation.
\item \textsuperscript{22} ibid 26.
\item \textsuperscript{23} For a useful critique of Feinberg, see Hamish Stewart, ‘Harms, Wrongs, and Set-Backs in Feinberg’s Moral Limits of the Criminal Law’ (2001-02) 5 Buffalo Criminal Law Review 47.
\item \textsuperscript{24} James Stephen, \textit{Liberty, Equality, Fraternity} (Holt & Williams 1873).
\item \textsuperscript{25} Basil Mitchell, \textit{Law, Morality, and Religion in a Secular Society} (OUP 1967) 1; Mitchell discusses many of the issues raised in the debate.
\end{itemize}
It was a debate triggered by the publication of the Wolfenden Committee Report which adopted harm as one of the principle factors limiting the application of the criminal law.\(^{26}\) The Report enunciates a policy statement on the criminalisation of homosexuality and prostitution that denies the criminal law any general regulatory function over ‘the private lives of citizens’ or any obligation ‘to enforce any particular pattern of behaviour’ beyond what is required for effecting the purpose of the law. It states that purpose to be ‘to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others particularly those who are specially vulnerable …’.\(^{27}\) It deems the general enforcement of morality to be beyond the scope of the law’s legitimate concern.\(^{28}\) Hart espouses an approach not dissimilar to that adopted by the Report.\(^{29}\)

### 5.2.3 Mediating Principles and Remote Harm

There is, though, a final introductory point on the harm principle. As Feinberg notes, moral decisions and the application of ‘mediating maxims’ are required in applying the harm principle in order to avoid overreach.\(^{30}\) Thus, for example, he adopts the liberalist approach that consent to harm justifies subsequent harm-causing conduct.\(^{31}\)

Another relevant area is that of remote harm. As Duff and Green state, the harm principle might be read expansively so as to allow for the criminalisation of conduct to avoid the occurrence of harm that might follow indirectly from that conduct. This latter construction is accommodative of a theory of remote harm.\(^{32}\) The extension of the principle to such cases must be subject to moral limits. In this context, determination has to be made as to whether it is morally acceptable to criminalise identity theft on the basis that it often facilitates further wrongdoing.

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\(^{27}\) Ibid para 13.

\(^{28}\) Ibid para 62.


\(^{30}\) Feinberg (n12) 187.

\(^{31}\) Ibid 115-17; 215.

Finally, it is widely accepted that the harm principle should not be used to criminalise minor or trivial harms or conduct that results in transient states of mind but do not setback any interest.\footnote{Feinberg (n12) 215-16.} Application of these aspects is reserved to allow for the introduction of the other grand theory of criminalisation, namely, legal moralism.

\section*{5.3 Legal Moralism: J Stephen}

Mill’s harm principle has been intensely criticised by Stephen whose comprehensive work offers an alternative thesis to that he so harshly scrutinises.\footnote{Stephen (n 24).} The latter describes the criminal law as ‘the ratio ultima of the majority against persons whom its application assumes to have renounced the common bonds which connect men together’\footnote{ibid 147.}. Though succinct, this statement captures much of Stephen’s opposition to the harm principle and the role he espouses for the criminal law as it relates to the regulation of vice and immorality.

He highlights actual instances of coercion which seem not to be reliant on the notion of harm to others. He lists among the ‘more important of them’, coercion ‘for the purpose of establishing and practically maintaining morality and religion’\footnote{ibid 15.} and sees as their purpose ‘the attainment of a good object’.\footnote{ibid 16.} The criterion of a good objective is for Stephen a rationale for the employment of coercion and the object in enforcing morality is ‘to make people better than they would be without compulsion’\footnote{ibid 137.}. Hence, he supports the application of the criminal law to ‘the suppression of vice and so to the promotion of virtue’\footnote{ibid 148.}.

However, Stephen limits the application of the criminal law to vice in its ‘grosser forms’.\footnote{ibid 149.} He accepts that, given the harshness of the criminal law, vice in general should not be criminalised.\footnote{ibid 146-147.} He reserves the application of the criminal law for ‘the gravest...
occasions’ and instances where the conduct is ‘of such a nature that it is worthwhile to prevent it at the risk of inflicting great damage … upon those who commit it’.\textsuperscript{42} Thus, Stephen concedes that there is a sphere in which the law should not intrude for fear of producing more harm than good. Citing as examples ‘the internal affairs of a family’ and ‘the relations of love or friendship’, he likens state intrusion in such cases to attempting to remove an eyelash from a person’s eye with a pair of tongs. Graphically, he remarks that, ‘They may put out the eye, but they will never get hold of the eyelash.’\textsuperscript{43}

Nonetheless, Stephen sees the criminal law as a societal tool to ‘promote virtue and restrain vice’\textsuperscript{44} and, to that end, ‘in extreme cases it brands gross acts of vice with the deepest mark of infamy …’ thereby protecting ‘the public and accepted standards of morals from being grossly and openly violated’.\textsuperscript{45} Rejecting Mill, he concludes that gross and outrageous acts of wickedness must be prevented and severely punished.\textsuperscript{46}

Two final points might be made about Stephen’s thesis. Each represents a refutation of the harm principle. The first is that, for him, ‘the power of society over people in their minority is and ought to be absolute … ‘\textsuperscript{47} This is his basic ‘principle of interference’.\textsuperscript{48} Thus, the exercise of a state’s coercive power in a democratic society, being an expression of the will of the majority, can admit of no limit on the basis of harm to others. Secondly, he contends that no conduct is ever harmless.\textsuperscript{49} If this is so, then the harm principle is rendered useless.

\textbf{5.3.1 Devlin on Law and Morality}

In a thesis not dissimilar to Stephen’s, Devlin advocates the enforcement of morality as a means of preserving society.\textsuperscript{50} He argues that society has a right to pass judgment on matters of morality and to use the criminal law to proscribe immorality. He reaches this

\begin{itemize}
\item \textsuperscript{42} ibid 147.
\item \textsuperscript{43} ibid 162.
\item \textsuperscript{44} ibid.
\item \textsuperscript{45} ibid 163.
\item \textsuperscript{46} Ibid.
\item \textsuperscript{47} ibid 132.
\item \textsuperscript{48} ibid.
\item \textsuperscript{49} ibid 128.
\item \textsuperscript{50} Patrick Devlin, \textit{The Enforcement of Morals} (OUP 1965).
\end{itemize}
position by likening an ‘established morality’ to ‘an established government’, both he maintains being important for the welfare of society. Thus, the state is justified in using its law to protect society from the disintegration that might be consequential on the non-observance of its common morality. Tersely, he posits that “[t]he suppression of vice is as much the law’s business as the suppression of subversive activities …”.

Devlin mirrors Stephen in many respects. He finds the harm principle to be meaningless since the power of the state to legislate against morality is not subject to theoretical limits. He also acknowledges that not all immorality should be illegal. He advocates the application of a number of ‘elastic principles’ to guide the legislature on whether immoral conduct should or should not be criminalised. While reference to these principles is reserved here, it is to be noted that the type of immoral conduct Devlin considers punishable must be such as to engender a ‘real feeling of reprobation’ or deep disgust in right-minded persons. The mere fact that conduct is disliked by a majority is insufficient.

5.3.2 A New School of Moralism

Devlin, Stephen, Mill and Hart have something in common other than being forceful contributors to this jurisprudential debate. Their respective theories are all rooted in utilitarian principles. Utilitarianism as a basis of rationalising the criminal justice system has come under attack and modern moralists espouse alternative bases of rationalisation. Thorburn provides a sweeping summary of the attacks on the harm and utility principles. He writes:

On the one hand, the harm principle has been criticized for failing to constrain the massive expansion of the criminal law in recent decades. And on the other hand, the very idea of a utilitarian account of criminal justice has come under attack as fundamentally illegitimate. Because utilitarians treat the criminal justice system as just another policy instrument for minimizing the incidence of undesirable conduct,

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51 ibid 7-25.
52 ibid 13.
53 ibid 12.
54 ibid 14-23.
55 ibid 17.
they are unable to justify the way that the criminal justice system singles out particular individuals for censure and punishment in service of that end.56

The upshot has been the emergence of a new school of legal moralism as the dominant contemporary theory of relevance. Headed by Moore57 and Duff,58 this approach rejects a utilitarian rationale. Their view is that a society should not punish its members for deterrent purposes only, since to do so is to objectify them. They see the purpose of the criminal law as punishing moral wrongdoing, Moore on a retributivist basis and Duff on one of individual accountability to the polity for a failure to observe shared moral values.59

5.3.3 Practical Concerns Relating to Morality

Critical to any discussion on morality and criminalisation is the question as to how moral values are to be discerned. There are inherent difficulties in determining when and by whose standards conduct is to be considered immoral. No doubt, something is so regarded when it is thought to be bad and, for that reason, wrong. Morality is about good and evil. But of whose morality do we speak, and, if a community can be said to have a moral standard, how is it arrived at?

This double-barrelled question raises some complex issues as it relates to the morality of a particular type of conduct. Firstly, by what methodology should the issue of morality be determined? Clearly, for the purposes of criminalisation, moral subjectivism has no application. It is the society’s moral judgment that is relevant, though it is not always the case that a moral consensus can be detected on all issues. A societal headcount is not practicable. Thus, for Devlin, the determination as to the societal standard is to be made by reference to the ‘right minded person’ who can be found on

56 Malcolm Thorburn, ‘Constitutionalism and the Limits of the Criminal Law’ in RA Duff and others (eds), The Structures of the Criminal Law (OUP 2011) 85 (fn omitted).
59 For a discussion of Moore and Duff’s legal moralism see Thorburn (n 56).
60 There is ample support for this view; Devlin (n 50) 7-11 writes of a ‘public morality’ reflective of the societal judgment on matters of morality; Gross links the idea of ‘a moral wrong’ to ‘a general consensus’ in society in Hyman Gross, A Theory of Criminal Justice (OUP 1979) 13; in CMV Clarkson HM Keating and SR Cunningham, Clarkson and Keating, Criminal Law: Texts and Materials (7th edn Sweet & Maxwell 2010) 4, the authors describe immoral conduct as ‘something that offends against the community spirit’.
the Clapham omnibus or in the jury box.  

Other tests have been advocated. For example, Packer states that there should be an absence of ‘any significant body dissent (sic) from the proposition that the conduct is immoral’. Where there is significant social dissent or a social group may be offended or alienated by making an immoral act criminal, he sees the need for caution.

Another important question remains. Is the position of the majority sufficiently well-grounded, if arrived at intuitively and influenced by the emotions and prejudices of its constituents; or should it be the product of deliberate and rational judgment and made subject to standards of fairness and reasonableness? Intuitively, there is a strong suspicion that there would be no significant pockets of dissent to the view that identity theft is bad. This intuition is strengthened by the fact that everyone to whom this student put the related question, in everyday conversation, responded that identity theft is immoral.

Admittedly, there is little place for such unscientific polling in a serious academic inquiry. Ideally, what is required is an empirical study designed to measure public sentiment on the matter. Regrettably, the creation of new offences is rarely guided by such scientific and academic inquiry. Though, sometimes, the views of the polity might be canvassed, in most cases this cannot be said to be a fair measure of public opinion. While the role of such empirical data may be crucial, it is beyond the scope of this theoretical and doctrinal study to produce it.

### 5.4 Interrelationship of Harm and Morality

Before completing this normative framework, it is necessary to emphasise the interrelationship between harm and morality. It is true that, as Duff and Green sum it up, the harm principle ‘takes harm and its prevention to be the primary concern of the criminal law’ while legal moralism takes ‘wrongdoing or immorality, and its punishment or prevention’ to be paramount. However, as these theories have

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61 Devlin (n 50) 15.
63 ibid.
64 For a related discussion see Mitchell (n 25) ch 3.
65 RA Duff and Stuart P Green (n 32) 4.
developed beyond their founding fathers, there has been some recognition that the two approaches are not mutually exclusive.

Feinberg embraces some element of morality in his proposition that wrongful harms may attract criminalisation, though he firmly rejects legal moralism as a sufficient basis of criminalisation. Similarly, some utilitarian moralists invoke the harm principle to set apart what moral conduct should be criminalised from what should not be so treated. Moohr provides a more expansive discussion of examples of ‘interplay’ between the two.

Given the later discussion on the link between objectification, which is advanced as a moral wrong, and the impact on human dignity, it is useful to invoke Gardner and Shute who posit that the harm principle does not only facilitate the criminalisation of harmful wrongs but that it states that ‘the criminalization of wrongs is justified only to prevent harm’.

5.5 An Identity Theft Refresher

This latter interpretation of the harm principle is useful in the context of an act that may not always cause readily identifiable harm to its direct victim. This occurs where the direct victim is unaware of the act and no wrongful conduct is committed in his name or attributed to him. As conceptualised for present purposes, identity theft occurs when one person A, uses one or more bits of PII relating to another person, B to pretend to be B. Brief reflection on the process-models of identity theft mentioned in chapter two and the pre-legislative Australian research remind that the PII might have been obtained from any of a variety of sources, in a variety of ways and that the act of identity theft might have been for, or facilitative of, any of a variety of purposes.

66 Feinberg, Harm to Others (n 12) 34.
67 Feinberg, Harmless Wrongdoing (n 12).
68 eg, see Jerome Hall, General Principles of Criminal Law (2nd edn, Bobbs Merrill 1960) 220.
71 pt 2.9.
72 paras containing text to nn 47-49 in ch 4.
In this context a return to the classification system developed by Sproule and Archer proves useful.\textsuperscript{73} The first phase of their scheme provides a comprehensive categorisation of the variables relating to the obtaining of PII for purposes of identity theft. They examine the ‘who’, ‘what’, ‘how’ and ‘where’ relating to that phase of the identity theft process and set out exhaustive lists of variables under each category.\textsuperscript{74} However, none of these acquisition or source-related variables is relevant to the criminalisation discussion. They could assume importance in any offence-creation process which provided stiffer penalties for aggravated forms of the offence based on such factors. Stephan and others show how this might be done.\textsuperscript{75}

On the other hand, in considering the criminalisation of identity theft, it might appear to be impossible to separate entirely the core act from the purpose variables since, in some instances, the core act and purposive conduct may coincide entirely. Here, reference to Sproule and Archer’s categorisation of the purposes for which identity theft may be used is illustrative. They note five main areas of use: fraud, impersonation, blackmail, terrorism and immigration. They identify a variety of types of fraud and note that impersonation might be for revenge, for profit or to avoid criminal prosecution.\textsuperscript{76}

These lists are by no means exhaustive. However, any further comment on them is useful only in the context of an examination of the relationship between identity theft and any purpose for which it may be employed. From this perspective, identity theft may be classified as facilitative or non-facilitative. The first designation embraces use for ulterior purposes that are criminal or otherwise wrongful. Identity theft may be described as non-facilitative where no such ulterior purpose attaches to it. An example of this type would be where a perpetrator assumes another’s identity, perhaps to avoid a past life, but lives under that disguise without engaging in any wrongful acts whatsoever.

\textsuperscript{73} Text to n 158 ch 2.
\textsuperscript{75} Michael J Stephan and others, ‘Identity Burglary’ (2008-09) 13 Texas Review of Law & Politics 401; article briefly reviewed in ch 1, 13-14.
\textsuperscript{76} Sproule and Archer (n 74) app 3.
Three distinct roles of identity theft can be identified under the first category, leading to a sub-classification into (1) precursory-facilitative; (2) directly-facilitative; and (3) evasively-facilitative. By way of explanation, identity theft may be a step toward the commission of offences; an intimate part of the mode of committing offences; or a means of avoiding detection and prosecution, or other legal responsibility. This latter category may overlap with the others. Some examples should bring clarity to this classification scheme.

A person may commit identity theft to gain access to facilities where, or with respect to which, the ultimate offence may be committed. Thus, for example, a person intending to commit or facilitate the commission of a wrongful act on premises to which there is restricted access, or with respect to restricted computerised data, may use the PII of someone with access privileges, in order to gain access. Another example of this precursory-facilitative role would be the case of the intended terrorist who commits identity theft to gain disguised entry to a training institute to prepare him or her for the commission of the terrorist act. Here, the identity theft facilitates the commission of wrongdoing in an indirect or precursory way.

This precursory-facilitative role is distinguishable from the direct-facilitative one where the identity theft may wholly or partly comprise the actual mode of committing the offence or further misconduct. Examples of this direct-facilitative role abound in cases of fraud and immigration violations. The perpetrator who presents identity documents relating to another and pretends to be that other, thereby securing jurisdictional entry permission from a border official; or money, goods or services from a relevant provider, directly commits his or her wrongdoing by means of the identity theft.

Common examples of the evasively-facilitative role would be the obtaining of credit in another person’s name; the giving to the police of false identification information in an attempt to avoid a traffic violation; and the commission of a criminal offence while masquerading as another. This tactic is harmful not only because it is diversionary but also since it exposes the direct victim to the harmful consequences that might follow an accusation of criminality or otherwise bad conduct.

Unlike situations falling within the precursory-facilitative category, the other two categories may comprise cases in which it is, in a sense, impossible to separate the identity theft from the purpose for which it may be used. However, this apparent
inseparability is illusory. Conceptually, the act of identity theft can be distinguished from the purpose for which it is used, though the two may coincide. It is open to legislatures to consider whether any purpose for which identity theft is used should be a criminal offence, as is the case with theft, fraud, terrorism, immigration violations and human trafficking. Each purpose can be assessed for wrongfulness or harm-causing potential, separate and distinct from the identity theft involved in its attainment.

It is the wrongfulness or otherwise of the identity theft itself with which this thesis is concerned and the harm that may ensue from it. To that extent, the purposes for which identity theft may be employed are relevant only to the extent that they can be regarded as harm not directly caused by the identity theft and, hence, give rise to discussion as to whether they support a case for criminalisation on the basis of remote harm.

Specifically, then, the concern is with the act of identity theft itself and the harm it causes to the direct victims or, possibly, others who are closely connected to them, or to the wider society. It is often said that identity theft results in dual victimisation. Nonetheless, as defined for the purpose of this study, that is untrue as it relates to the act only, except to say that there is humanistic and societal victimisation. Any harm to a third party consequential on a purpose achieved by means of the identity theft, is attributable to that purpose. The discussion will return to the type of harm that direct victims may suffer but, first, there follows an examination of the morality of the act.

5.6 The Morality of Identity Theft

As indicated above, there are at least two bases on which identity theft might be considered morally problematic.\(^\text{77}\) The first is that identity theft is wrong because it is a form of lying, making false assertions and deceit. The second is that it is a form of human objectification. These will be discussed in the order mentioned.

5.6.1 Identity Theft as a Lie

As with all conduct, attending circumstances may displace or result in assumptions as to wrongfulness being questioned. However, intuitively, there is a general sense that identity theft is immoral. This intuitive position is based on the fact that, quintessentially, identity theft is a false assertion which is intended to result in

\(^{77}\) Pt. 5.1 para 3.
deception. The perpetrator falsely asserts that he is the individual to whom the PII relates, intending that the person to whom the falsehood is portrayed should believe and rely on it.

This intuitive position is not without a theoretical substratum. The morality of lying has been the source of philosophical and academic discourse. In a contribution relating to the criminal law, Green explores the conceptual differences between ‘lying’, ‘merely misleading’ and ‘falsely denying’. He posits that there are moral distinctions between these three forms of deception, with lying being more morally reprehensible than merely misleading. He describes ‘merely misleading’ as leading someone to believe something false ‘by saying something that is either true or has no truth value’, i.e is neither true nor false.

However, it is Green’s definition of lying that is relevant here. Adapting Humphries, he defines lying as ‘(intentional) deception that (1) comes in the form of a verifiable assertion, and (2) is “literally false”’. By verifiable assertion, he means, ‘a statement that has a determinable truth value (i.e., is either true or false, although its truth value may not be known at the time the assertion is made)’. He locates the wrongness in lying in the breach of the relationship of trust between speaker and listener and the fact that every lie or assertion implies a warranty of its truth. According to Green, such a warranty is lacking in the case of merely misleading statements. He posits that ‘merely misleading’ is less wrongful than lying because, in the former case, there is a responsibility on the listener to ascertain the truthfulness of what the statement suggests before believing it.

79 ibid 165.
80 ibid 164 (citation omitted).
81 ibid, Green so explains the phrase at 163.
83 Green (n 78) 163.
84 ibid.
85 ibid 166, citing Charles Fried, Right and Wrong (Harvard UP 1978) 67.
86 ibid.
87 ibid 165.
The idea of a moral distinction between lying and other forms of deception, with lying being more morally reprehensible, is not original to Green, 88 neither has the legitimacy of the distinction gone unchallenged. Alexander and Sherwin treat it as one without merit. 89 The arguments need not be rehearsed here since nothing negates the fact that identity theft involves a false assertion and, thus, falls within a category of behaviour that is generally considered immoral. Those authors note also that philosophers who distinguish between lying and deception, ‘condemn lying as the worst offence’. 90 If there is any merit in this distinction, the nature of identity theft puts it at the top tier of the moral gradient.

5.6.1.1 Rationales for Condemning Lying

The breach of trust rationale mentioned by Green is but one deontological base for condemning lying. Alexander and Sherwin confirm that ‘lies degrade the background of trust that supports human interaction’. 91 Additionally, they present a useful summary of the relevant theories. 92 Their review suggests that other deontological rationales can be classified into two camps: (1) the strict theories with their linguistic off-shoot; and (2) the autonomy-based theory. 93

St Augustine, 94 St Thomas of Aquinas 95 and Kant 96 are renowned absolutists. Reflecting Aristotle, St Augustine and Aquinas proffered that lying is against the laws of nature. According to them, the facility of speech was gifted by God to individuals to facilitate the expression of thoughts. Consequently, they urged, it is sinful to assert what one does not believe. To them, this is an absolute position that yields neither on account of motive or effect. Supporting this absolutist view, Kant opined that when a

88 For a reference to some relevant philosophers see Larry Alexander and Emily Sherwin, ‘Deception in Morality and Law’ (2003) 22 Law & Philosophy 393 fn 23.
89 ibid 402-03.
90 ibid 400.
91 ibid 398.
92 ibid 396-99.
93 at 398 the authors comment that, though cited by some non-consequentialists, the social trust theory is ‘consequentialist at heart’.
person misuses this natural oratorical power by misrepresenting his or her thoughts, this results in the elimination of that person’s dignity.\footnote{ibid.} This strict approach has more recently been premised on a linguistic base. Gormally posits that lying is wrong since it infringes a rule of language use. She argues that an assertion implies truth; lying is an offence against truth; and that, consequently, a lie results in a breach of the constitutive rule of language use.\footnote{Mary C Gormally, ‘The Ethical Root of Language’ in Peter Geach and Jacek Holowka (eds), \textit{Logic and Ethics} (Springer 1991) 49.}

The autonomy-based theory posits that lying is wrong because it disrespects the autonomy of those lied to. Alexander and Sherwin summarise the argument by stating that, ‘A successful lie distorts the reasoning process of the person lied to, displacing his will and manipulating his action for the speaker’s ends.’\footnote{Alexander and Sherwin (n 88) 397, citing Christine Korsgaard, ‘The Right to Lie: Kant on Dealing With Evil’ (1986) 15 Philosophy & Public Affairs 325.} Thus, it is said that the liar disrespects the victim’s capacity for reasoned self-governance. The theory is said to be deontological since the cause for complaint lies in the false belief created by the lie, independent of any effect that might be suffered by the victim. Unlike the strict theory, this one is elastic and allows that the prohibition against lying might be displaced where competing values are threatened. Once autonomy is regarded as a non-absolute ideal, it may be trumped in justified circumstances.

### 5.6.1.2 Deception in the Technological Context

Nevertheless, the universal application of a lie-based moral theory has to be reconsidered in light of the challenges posed by technology. The above analysis sits comfortably where the act of identity theft is so aimed as to have direct effect on a human mind. However, the prevalence of identity theft in automated environments such as the internet, automatic teller machines and computers raises a traditional concern as to whether technology can be deceived, or lied to. Judicial opinion favoured a negative response to this question.\footnote{Davies v Flackett [1973] RTR 8, 10 (DC); Holmes v Governor of Brixton Prison [2004] EWHC Admin 2020 (DC), [2005] 1 WLR 1857 [12]; Poland v Ulatowski [2010] EWHC Admin 2673 (QBD) [32]; Kennison v Daire (1986) 160 CLR 129 (HC).}

Writing specifically with respect to the deception offences, Chapman highlights the dilemma and poses the highly relevant question as to whether the ‘deception’ of a
machine is deserving of the same degree of moral censure as that of an individual. Arguably, any argument that ‘lying’ to, or ‘deceiving’ a machine is morally distinguishable from human-on-human deception is misplaced since it disregards the reality that the machine serves as an agent for a human entity, or a corporate entity that exists for the ultimate financial or other benefit of human beings. In both cases, a good or service is obtained through false manipulative means to the disadvantage of individuals. Persons might think poorly of the criminal law if it is too inelastic to accommodate such a reality in an era where automation is ubiquitous.

As Chapman illustrates, the desired outcome may be attempted legislatively. There are at least two bases on which any legislative or common law development might be rationalised. The first is to accept that, despite the presence of the mechanistic medium, in effect, a human being is lied to or deceived. The other is to attribute a degree of anthropomorphism to machines for the specific purpose.

The idea for the first approach derives from an argument advanced by Tapper. He argues that if the use of false data prevents human intervention at an early stage to preclude the processing of a fraudulent transaction, it is not obvious that the persons who would have otherwise intervened have not been deceived. This argument, though attractive, leaves open the possibility of non-application where human intervention could not have taken place, regardless of the integrity of the data. Hence, a wider, though less sophisticated, argument is required that any person who relies on machines for service or product delivery can, in the circumstances, be treated as having been deceived.

The second approach also involves some artificiality. To conclude that an automated or computerised system is deceived or lied to requires the attribution to the machine of a certain degree of cognitive function. Scientifically, automated systems may be said to possess a degree of ‘intelligence’ based on their capacity to systematically process various representations. However, they can act only as programmed and lack the

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102 ibid 93 and 95; Chapman examines the Value Added Tax Act 1994 s 72(6) and the Forgery and Counterfeiting Act 1981 s 10(3).
104 ibid 12.
capacity to think.105 Yet, in transitioning concepts analogously to the technological environment, it is understandable that human beings might personify machines.

Hence, we may recognise machines as servants or agents that might be considered deceived or lied to where such a conclusion would be appropriate, had it been their human principals that were acted upon. Though adherence to traditional thinking may be hard to break, the law must not lag behind technology. However, these challenges do not arise under the objectification-based approach that is considered below.

5.6.2 Identity Theft as Objectification

In the preceding section, the wrongness of identity theft was located in the impact on persons to whom the act is portrayed. In this section, the focus is squarely on the direct victims of the act. The argument is that identity theft objectifies those victims and that such objectification is morally wrong.

5.6.2.1 What is objectification?

For present purposes, the Oxford English Dictionary’s meaning of ‘objectification’ provides a useful starting point. It defines the term as, ‘The demotion or degrading of a person or a class of people (esp. women) to the status of a mere object.’106 Objectification breaches Kant’s fundamental moral exhortation that we should act in such a manner that we treat humanity ‘always at the same time as an end and never simply as a means’.107 Radin confirms this meaning of the concept, stating that when the term is used pejoratively with reference to persons ‘we mean, roughly, “what Kant would not want us to do.”’108 She distinguishes between object and subject by stating that, ‘The person is a subject, a moral agent, autonomous and self-governing. An object is a non-person, not treated as a self-governing moral agent.’109

109 ibid.
The lexicographic emphasis on females as subjects of objectification reflects the outstanding feminist work on the treatment of women in sexually-related activity like rape, pornography and prostitution. However, despite this concentration, objectification is not limited to gender issues or sexual conduct. Neither the general definition nor the related literature mandates such restrictive application. Objectification has been discussed in other contexts including the discriminatory treatment of persons on the basis of race and sex and the commodification of body parts. It needs to be determined if anything precludes its application to the identity theft context.

A closer examination of the concept of objectification is required for the execution of the task at hand. For this, reference must be made to the work of Nussbaum, who is credited with providing a searching and systematic analysis of the term. She seeks to clarify what she describes as a ‘slippery’ and ‘multiple’ concept by identifying seven ways in which a person might be treated as a thing. She labels and defines these as follows:

1. **Instrumentality**: The objectifier treats the object as a tool of his or her purposes.
2. **Denial of autonomy**: The objectifier treats the object as lacking in autonomy and self-determination.
3. **Inertness**: The objectifier treats the object as lacking in agency, and perhaps also in activity.
4. **Fungibility**: The objectifier treats the object as interchangeable (a) with other objects of the same type, and/or (b) with objects of other types.
5. **Violability**: The objectifier treats the object as lacking in boundary-integrity, as something that it is permissible to break up, smash, break into.
6. **Ownership**: The objectifier treats the object as something that is owned by another, can be bought or sold, etc.

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110 ibid 348.
111 A relevant discussion is found in Elizabeth E Blue, ‘Redefining Stewardship Over Body Parts’ (2007-08) 21 Journal of Law & Health 75.
113 Gardner and Shute (n 70) 7.
115 Nussbaum (n 112) 265.
7. Denial of subjectivity: The objectifier treats the object as something whose experience and feelings (if any) need not be taken into account.¹¹⁶

Nussbaum opines that any one or more of these factors amount to objectification, though she takes instrumentality to be the most basic of the lot.¹¹⁷ Langton suggests three additional means: reduction to body; reduction to appearance and silencing, terms which are not particularly relevant to this discussion.¹¹⁸

5.6.2.2 Applying Objectification to Identity Theft

The successful application of the concept of objectification to identity theft depends heavily on the intimate link between PII and direct victims. It has been established that a set of identifiers is enough to identify an individual. Thus, it may serve to create an impression of that individual’s presence at, or involvement in, a particular activity. Hence, through the act of identity theft, the direct victim is falsely represented as the agent of conduct brought about by someone else and, as a consequence, may be impacted in various ways. The mirage created by the perpetrator of the identity theft becomes, for practical purposes, a reality in which the direct victim appears to participate and is implicated, albeit involuntarily.

Consequently, it is no flight of fantasy to state that direct victims are involved in identity theft. This foundational construct makes it possible to reason that every case of identity theft meets several of Nussbaum’s seven modes of objectification. Fundamentally, the principal mode, instrumentality, is easily satisfied. Where A uses B’s PII to falsely present him or herself as B, A is using B as an instrument for A’s own ends. Equally, identity theft violates direct victims’ autonomy and right to self-determination through the unauthorised use of their PII to suggest their involvement in conduct and impute behaviour to them. Additionally, when that occurs, direct victims are treated as persons whose feelings and experiences might be disregarded. Thus, there is a denial of subjectivity.

¹¹⁶ ibid 256-57.
Violability is also implicated in identity theft since A may be said to have ‘broken into’ B, where A rips apart from B an aspect of B’s identity as represented through the PII used. As to inertness, arguably, with respect to each specific act of identity theft, the perpetrator treats the direct victim as though he or she is lacking in agency or activity, though in a wider context the victim’s human capacity may be acknowledged. However, where the perpetrator takes over the victim’s identity over a long period of time and commits repeated acts in that person’s name, this conduct shows greater disregard for the victim’s capacity to act for him or herself. Additionally, where conduct is falsely attributed, the direct victim is treated as though he or she is an inert, helpless object capable only of passively sustaining the disastrous consequences.

The notion of fungibility might be inapplicable where the person whose PII is misused is the only individual whom the perpetrator was prepared to victimise. This may occur, for example, where a particular family member, or celebrity, is the perpetrator’s sole target. However, when one considers how identity thieves acquire PII, it becomes obvious that, generally, one victim is as good as the other, once he or she falls within a targeted class. Many of the technical and physical methods of acquiring PII, such as database attacks, hacking, shoulder surfing and dumpster diving, are directed at anyone who happens to be vulnerable to exposure via those modalities. Hence, generally, to perpetrators, one victim is as good as the other.

An argument that identity theft connotes ownership of direct victims is more difficult to sustain. A definition of identity theft that incorporates the acquisition of PII might lend itself more readily to such a conclusion, given that digitalisation has facilitated the growth of the commodification of categories of information including PII. Bergelson discusses this development well with reference to supporting data. However, where a person uses PII to assume the identity of another, apart from the element of control, incidents of ownership are not readily discernible.

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119 Empirical data identifies broad categories of persons as victims of identity theft: in the USA, the Bureau of Justice victims’ statistics for 2008 show that persons in the 16 to 24 year old age group, persons living in households with an income of $75,000.00 or more and persons who owned credit cards were among the more likely targets. See Bureau of Justice Statistics, ‘Victims of Identity Theft, 2008’ <http://www.ojp.usdoj.gov/programs/identitytheft.htm> accessed 4 January 2011.

Despite this latter reservation, there is a sufficient indication that identity theft objectifies its victim. Assuming this to be so, why might this be considered morally problematic?

5.6.2.3 The Morality of Identity Theft Objectification

In an enlightening article, Papadaki indicates that for Kant and feminist philosophers Catharine MacKinnon and Andrea Dworkin, the wrong in objectification lies in the harm done to a person’s humanity. She notes that those feminists suggest that this harm is permanent and pervasive, rendering objectified women no longer fully human. Hence, the argument that in matters of sexual import, women are objectified even where they appear to consent to involvement in the condemned activity.

However, if, as Kant advocates, the characteristic feature of that humanity is the capacity to rationally set and pursue one’s ends, Papadaki is right that objectification is an overly narrow concept. As she suggests, so defined, it would exclude many cases where people are treated as objects. There may be instrumental use without any consequential damage or impairment to capacity for rationality and self-determination. This is the case with identity theft. Though studies exist that demonstrate that identity theft may have damaging psychological effects and rob victims of the capacity for future choice, not all direct victims are affected in this way. Furthermore, unlike females in the case of sexual objectification, victims of identity theft do not constitute any identifiable subordinate class.

Papadaki avoids this narrow approach to objectification. She rejects, as extreme, the thought that, except perhaps in odd cases, the instrumental use of persons harm their humanity in a Kantian sense. She opines that most persons think that the use of an individual as a sexual instrument does not inevitably result in serious damage to that

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121 Papadaki (n 114) 17–26.
123 Kant (n 107).
124 Papadaki (n 114) 26.
person’s rational capacity.\textsuperscript{126} Thus, she makes out a case for a broader concept of objectification than that attributed to Kant, Dworkin and MacKinnon.

Drawing on Nussbaum,\textsuperscript{127} Papadaki avoids the difficulty identified above by shifting the impact requirement on humanity. She states that most commonly, objectification involves a denial of an individual’s humanity in the sense of ignoring or failing to fully acknowledge that humanity.\textsuperscript{128} That, Papadaki asserts, is what is morally problematic with objectification in most cases.\textsuperscript{129} However, she does not adopt Nussbaum in a wholesale way. The latter contends that there can be such a thing as positive or beneficial objectification, terms she uses to refer to circumstances where the objectification has a beneficial or neutral effect on the objectified’s humanity.\textsuperscript{130} Papadaki rejects this, arguing that the term objectification should be reserved for morally problematic conduct.\textsuperscript{131}

Leaving aside, for the moment, this notion of positive or benign objectification, the point to note is that, Papadaki fashions a definition of objectification in which the denial of humanity is included as an alternative requirement to loss or impairment of rational capacity. Incorporating Nussbaum’s seven modes, she sums it up that, ‘Objectification is seeing and/or treating a person as an object … in such a way as denies this person’s humanity’.\textsuperscript{132} She explains that, ‘A person’s humanity is denied when it is ignored/not properly acknowledged and/or when it is in some way harmed.’\textsuperscript{133}

This conceptualisation of objectification is more readily applicable to identity theft. Surely, the person who commits identity theft through non-consensual use of another’s PII denies that direct victim’s humanity in the sense added by Papadaki. The question as to whether consensual use alters that outcome is reserved for later consideration.

\textsuperscript{126} Papadaki (n 114) 27.
\textsuperscript{127} Nussbaum, ‘Objectification’ (n 112).
\textsuperscript{128} ibid 32.
\textsuperscript{129} Papadaki (n 114) 31-32.
\textsuperscript{130} Nussbaum, ‘Objectification’ (n 112).
\textsuperscript{131} Papadaki (n 114) 31.
\textsuperscript{132} ibid 32.
\textsuperscript{133} ibid.
5.7 A Prima Facie Case of Immorality

The above analysis demonstrates that identity theft is morally objectionable. While this establishes a prima facie case for criminalisation, it does not follow axiomatically that it makes out a conclusive case. Not even pure moralists advocate that all moral wrongs should be crimes. They acknowledge that the criminal law should be reserved for the worst forms of immorality. One senses that identity theft may well fall into this category and that, given the types of misconduct often associated with it, it is an act that creates deep disgust in the minds of right-thinking persons.

Such intuitive sentiment needs to be backed by empirical studies. In this regard, reference is made to a study by Reysen which suggests that the likely outcome of any such inquiry might be confirmatory. Reporting on a study in which he measured the reaction of persons to ‘identity theft’, he concludes that the misconduct ‘represents a moral violation against an individual’s claim to display a public identity’. For the purpose of his study, Reysen defined identity theft ‘as a situation in which a person intentionally appropriates distinctive characteristics of another person’s identity’. The distinctive characteristics employed in the study were not PII, but those such as clothing, hairstyle and personality. He found, though, that when more than one characteristic was ‘stolen’, the affected individual became angry at what they considered to be a moral violation.

This suggests that there may be a third perspective from which identity theft may be seen as a moral wrong since Reysen’s reasoning seems readily transferable to an identity theft milieu defined by reference to the use of PII. It has been established that such data establishes a form of identity by which a person can be identified for transactional and other purposes. Even without exploring whether individuals have a legal right to an identity or the scope of any such right, it is arguable that individuals

135 ibid vi.
136 ibid.
137 ibid 3.
138 ibid.
have a moral claim to the exclusive use of their PII-manifested identity. Identity theft constitutes a moral violation of that right and, thus, stands to be condemned as a moral wrong on that ground also.

Nonetheless, this prima facie position might be buttressed if a harm-basis for criminalisation could be identified. The exploration of this aspect starts with the primary area of interest, harm to direct victims.

5.8 Harm to Direct Victims

Direct victims of identity theft may suffer certain consequential loss attributable to that mischief only. Such loss is separate and distinct from any economic, or other, loss which the victim may suffer as a result of any further wrongdoing wrought by means of the identity theft. This consequential identity theft loss may be financial or non-financial.

A short scenario should serve to clarify the distinction made in the preceding paragraph and provide a factual matrix for the analysis to follow. Over a period of two years, A commits a series of acts of identity theft against B during the process of which he defrauds several financial institutions of money and steals money that belongs to B. A also commits a single act of identity theft against C and steals money from C as a result. B spends a number of hours trying to reconstruct her credit reputation and expends money in dealing with false claims against her. The incidents impact on A and C emotionally causing anger, frustration and embarrassment. However, B is more severely impacted and is diagnosed with a mental disorder as a consequence.

5.8.1 Financial Loss to Direct Victims

Reviewing the above scenario, the financial loss to the lending institutions falls to be excluded from consideration for two reasons. Firstly, it is not a loss to the direct victim of the identity theft. More fundamentally, it is a loss that is directly attributable to the fraud and not to the identity theft. It is on this latter ground that the financial loss to B and C arising from the theft must also be excluded. The financial loss of concern is the out-of-pocket expenses incurred by B or to be credited to B in reconstructing B’s life. This loss cannot be attributed solely to the further wrongful acts of the perpetrator but arises substantially because of the identity theft.
Surveys demonstrate that some direct victims incur out-of-pocket expenses in post identity theft reconstructive efforts relating to their credit history, dealing with false claims and paying lawyer fees.\textsuperscript{140} Additionally, there is the loss of time sustained in resolving problems and, sometimes, the loss of opportunities. McNally and Newman identify these as including the ‘inability to obtain a job, purchase a car or qualify for various types of loans and the loss of their job’.\textsuperscript{141} This type of loss translates into further financial loss.

Interest in money and property attracts traditional protection from the criminal law through a range of offences, including theft and fraud. However, unlike the case with these offences, it is not axiomatic that every case of identity theft results in financial loss to direct victims of the type identified above. Indeed, survey results show that most victims suffer no out-of-pocket expenses.\textsuperscript{142} It is, therefore, difficult to conceptualise a general offence of identity theft aimed at protecting direct victims’ interests in property or money. Unless it could be rationalised on a basis of the risk of harm,\textsuperscript{143} any offence designed on this basis would have to cull those instances in which no such financial loss occurs and, thus, could not be framed as a general offence.

5.8.2 Non-Financial Harm to Direct Victims

Similarly, difficulties arise with respect to the non-financial or personal harm that direct victims of identity theft may suffer. This type of harm is summarised by McNally and Newman as comprising ‘the emotional impact or feeling of “violation”’\textsuperscript{144} that may result. They make reference to a study in which the emotional impact as reported by direct victims is detailed as including ‘strain on personal relationships, sleep disturbances, overwhelming sadness, fears for financial safety, and a sense of powerlessness’.\textsuperscript{145} These findings are supported elsewhere. Pontell and others indicate

\textsuperscript{142} ibid fnn 65 and 66.
\textsuperscript{143} see pt 5.10.2 for further discussion.
\textsuperscript{144} ibid 34.
that victims who were asked to report on their emotional state chose anger, feeling betrayed, feeling unprotected by laws, fears regarding financial security, sleep disturbance and a sense of powerlessness as the most frequent categories.\textsuperscript{146}

The difficulty with this range of emotions is that, generally, they do not constitute harm of a type which theorists perceive as threatening or setting back a protectable interest in criminal law. They are but examples of those ‘motley and diverse’ mental states identified by Feinberg as being insufficient, except in ‘exceptional cases’, for recognition as interests which individuals have an ulterior aim in avoiding.\textsuperscript{147} Feinberg’s lists includes ‘transitory disappointments and disillusionments, wounded pride, hurt feelings, aroused anger, shocked sensation, alarm, disgust, frustration, … irritation, embarrassment, [and] feelings of guilt and shame…’.\textsuperscript{148}

The exceptional cases to which Feinberg refers are those in which an experience may be so ‘severe, prolonged, or constantly repeated’ that ‘the mental suffering it causes may become obsessive and incapacitating, and therefore harmful’.\textsuperscript{149} The point is that where emotional impact becomes sufficiently entrenched and incapacitating as to constitute a setback to material interests, they constitute harm for the purposes of the harm principle. As Feinberg states, ‘An undesirable thing is harmful only when its presence is sufficient to impede an interest.’\textsuperscript{150}

There are reported instances of direct victims suffering emotional injury that became deep-seated and resulted in post-traumatic stress disorder. Marron refers to a number of surveys that present data on the subjective experiences of identity theft victims.\textsuperscript{151} These include one by Sharp and others that details the psychosomatic effects of identity theft.\textsuperscript{152} Marron notes that some victims might end up ‘chronically dysfunctional’ or


\textsuperscript{147} Feinberg, Harm to Others (n 12) 45-46.

\textsuperscript{148} ibid 45.

\textsuperscript{149} ibid 46.

\textsuperscript{150} ibid 47.

\textsuperscript{151} Marron (n 125) 25-27.

‘severely depressed’, betraying signs of post-traumatic stress syndrome. In such cases, the impact may be described as harmful for the purposes of the harm principle and, thus, sufficient to ground a prima facie case for criminalisation.

Again, however, this kind of impact is not common to every case of identity theft in the same way that in every case of inflicting grievous bodily harm, the victim suffers from some bodily or psychiatric harm such as to set back a welfare interest. Nonetheless, as with direct financial loss, the fact that in some instances such harm may materialise indicates that identity theft creates a risk of protectable harm. Whether this provides a basis for criminalisation is considered later.

However, the above analysis suggests that the case for universal criminalisation of identity theft based on harm to direct victims fails unless resort can be had to some other fundamental value which is harmed by the misconduct. In the following section, the possibility of human dignity being such a value is explored.

### 5.9 Human Dignity and Identity Theft

The notion of human dignity as a protected interest in criminal law shares philosophical moorings with the concept of objectification. As Hörnle and Kremnitzer note, Kant wrote of the worth of the human being as a person claiming that ‘he possesses a dignity (an absolute inner worth) by which he commands respect for himself …’ as a person of equal value to all others. Philosophers and legal theorists have built on this idea to promote human dignity as a protected interest in criminal law and, at least in one case, to sketch a normative theory of criminalisation as an alternative to the harm principle. However, this thesis joins no debate against the harm principle. Rather,
accepting human dignity to be a fundamental human value, it posits that any act that impairs it constitutes harm of a kind that falls within the harm principle.

Much of the scholarship relating to human dignity as a relevant concept in criminal law is concentrated in jurisdictions, like Germany and Israel, where constitutional provisions require the state to respect and protect human dignity. However, this does not bar consideration beyond those jurisdictions as to the incorporation of human dignity component into normative standards of criminalisation.

The reason for this is twofold. Firstly, western societies subscribe to rights’ documents which embrace notions of human dignity. Although the European Convention on Human Rights\textsuperscript{158} does not mention the term, respect for human dignity has been identified by the European Court of Human Rights as a fundamental objective of the Convention.\textsuperscript{159} The UK is a party to this Convention and has provided for its direct application in national law.\textsuperscript{160} In Barbados, the preamble to the Constitution contains a proclamation that the nation is ‘founded upon [inter alia] the dignity of the human person’.\textsuperscript{161} All these references are intended to show is that the legal systems are not divorced from the concept of human dignity.

Secondly, any consideration of human dignity is legitimised by the fact that it is a concept rooted in religious and civil philosophies that promote it as inherent and universal.\textsuperscript{162} Hence, while the notion of human dignity may be expressed or reflected in contemporary constitutional and human rights instruments, it does not depend on them for conceptual recognition.

5.9.1 The Concept of Human Dignity

To proceed sensibly, it is necessary to give contextual meaning to the concept of human dignity. The amorphousness of the term has led some to advocate its rejection as a

\textsuperscript{158} European Convention on Human Rights (1950) (Cmd 8969).
\textsuperscript{159} SW v UK (1996) 21 EHRR 363.
\textsuperscript{160} Human Rights Act 1998.
\textsuperscript{161} The Constitution of Barbados was originally the Schedule to the Barbados Independence Order 1966, SI 1966/1455 (UK).
\textsuperscript{162} For a historical review see Milton Lewis, ‘A Brief History of Human Dignity: Idea and Application’ in Jeff Malpass and Norelle Lickiss (eds), Perspectives on Human Dignity: A Conversation (Springer 2007).
useful concept, on grounds of imprecision. One writer describes it as ‘a slippery and inherently speciesist notion …’ which stifles debate and ‘encourages the drawing of moral boundaries in the wrong places …’. However, not all comments have been dismissive. Walrond discourages this rejectionist view. He accepts the criticisms of the term as simply indicating that ‘we are in the early stages of its elaboration …’. Ultimately, what is required is for those who invoke the concept to clarify the way in which they expect others to understand it. To this end, it is sensible to ascertain the way in which theorists and philosophers have employed the term in a criminalisation context and the sources from which they have drawn. In this regard, the work of Dan-Cohen, Hörnle and Kremnitzer, Hörnle and Margalit bear examination.

Dan-Cohen presents human dignity as a moral concept. His sense of human dignity has a Kantian base. He describes his dignity principle as ‘the view that the main goal of the criminal law is to defend the unique moral worth of every human being’. He characterises dignity as concerned with respect for persons and affronts to human dignity that deny ‘people’s equal moral worth …’. He highlights that, in this sense, human dignity is not to be equated with welfare or autonomy.

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164 Helga Kuhse, ‘Is There a Tension Between Autonomy and Dignity?’ in Peter Kemp, Jacob Rendtorff and Neils Mattsson (eds), Biethics and Biolaw: Four Ethical Principles (Rhodos International 2000) vol II 61, 74.


166 As to the various possible meanings see Andrew Brennan and YS Lo, ‘Two Conceptions of Dignity: Honour and Self Determination’ in Jeff Malpass and Norelle Lickiss (n 162); Doron Shultziner, ‘Human Dignity: Functions and Meanings’ in Malpass and Lickiss (n 162); David Mattson and Susan Clark, ‘Human Dignity in Concept and Practice’ (2011) 44 Policy Sciences 303.

167 Dan-Cohen (n 157).

168 Hörnle and Kremnitzer (n155).


171 Dan-Cohen (n 157) 150.

172 ibid 157.
5.9.2 Limiting the Application of Human Dignity

Notions of respect for individuals and equal moral worth permeate understandings of the concept of human dignity. In sketching his dignity-based theory of criminalisation, Dan-Cohen posits that crimes ‘would be defined in terms of conduct that is disrespectful of someone’s equal moral worth.’ Hörnle and Kremnitzer also locate their concept of human dignity in Kantian philosophy. However, they reject the breath of the idea of dignity as moral treatment in their effort to avoid the Kantian demand that one should respect oneself. Their concern is that it allows for the punishment of immorality in an unlimited way.

To limit the application of the concept, Hörnle and Kremnitzer invoke Kant’s learning on legal theory that the law ‘is the sum of those conditions under which the will of one person can co-exist with the will of another person under a general law of freedom.’ They argue that, ‘Using a broad moral notion of dignity within a legal argument is not consistent with kant’s overall concept.’ They urge that Kant’s moral concept of dignity can be transferred to the legal context by conceiving it as a defensive right, thus eliminating what they perceive as the ‘problematic notion of “duty towards oneself”’. Hörnle and Kremnitzer acknowledge the adoption in German constitutional theory and judicial decisions of a principle that treating someone as an object through instrumental use violates human dignity. It has been established that identity theft objectifies direct victims. Hence, on the above premise, the misconduct must be taken to be an affront on their dignity. However, the matter does not end there. There is a grave risk of over criminalisation if every instrumental use of individuals were made criminal. In everyday life, persons are often objectified in mundane ways. Hence, not all acts of instrumental use should be criminalised. Some limiting criteria are required to determine which such acts ought to qualify for criminalisation. In this respect, two factors have been suggested in the relevant literature: humiliating treatment and degradation.

173 ibid 166.
174 Hörnle and Kremnitzer (n 155) 145-46.
175 ibid 146, citing Kant (n 155) 337.
176 ibid.
177 ibid.
178 ibid.
5.9.2.1 Dignity as Non-Humiliating Treatment

Of the identified factors, humiliation is the more dominant. Its dominance seems to have been influenced by Margalit’s argument that, ‘A decent society is one whose institutions do not humiliate people.’\(^{179}\) Deducing from that proposition the idea that humiliating treatment is offensive to human dignity, Hörnle and Kremnitzer advocate the idea of ‘dignity as non-humiliating treatment’.\(^{180}\) They support the idea of human dignity as a protected interest by positing that ‘central features of human well-being are lost when the latter is reduced to tangible interests only’.\(^{181}\) They continue, ‘The importance of the socially construed world beyond the merely physical world means that humiliation has the potential to hurt substantially.’\(^{182}\) In a ‘rights-centred’ approach, Hörnle later argues that persons share an interest in not being subjected to humiliation and uses that as the basis for the justification of a human dignity right that should be protected by the criminal law.\(^{183}\)

The notion that humiliation is an acute dignity violation is echoed by others. Nussbaum notes that it is often understood as a particularly damaging insult to a person’s human dignity.\(^{184}\) She concludes that, ‘Humiliation typically makes the statement that the person in question is low, not on par with others in terms of human dignity.’\(^{185}\) She distinguishes ‘shame’ and ‘embarrassment’ from ‘humiliation’ urging that the former terms connote lighter matters which do not touch the person’s humanity.\(^{186}\) Shultziner points out that humiliation in this sense cannot be easily defined by reference to any concrete list of examples but that when humiliating conduct occurs ‘it is intuitively perceived by the humiliated person and those who share his feelings.’\(^{187}\)

\(^{179}\) Margalit (n 170) 1.


\(^{181}\) ibid 147.

\(^{182}\) ibid.

\(^{183}\) Tatjana Hörnle (n 169) 315.


\(^{185}\) ibid.

\(^{186}\) ibid.

5.9.2.2 An Objective Standard of Humiliation

Despite Shultziner’s reference to the subjective intuition of the humiliated person, the weight of academic opinion is that fundamental dignity-violating conduct is not dependent on the victim’s subjective feelings. Dan-Cohen urges that one must look to an action’s meaning to discern whether that action is consistent with dignity. Here, he seems to be relying on community standards or sentiment. Using the illustrations of slavery and insulting gestures, he posits that an action may offend dignity through overt, explicit content or, as with insulting gestures, its disrespectful meaning may be conventional, even if arbitrarily so.\(^ {188}\)

Hörnle and Kremnitzer also recognise the test of humiliation as an objective one, depending on communal sentiment rather than individual impact.\(^ {189}\) This objectivity requirement can be traced back to Margalit. He links humiliation to injured self-respect, defining it as ‘any sort of behavior that constitutes a strong reason for a person to consider his or her self-respect injured’.\(^ {190}\) He points out that the emphasis is on reasons for feeling humiliated as a result of the behaviour of others and explains that, ‘This is a normative rather than a psychological sense of humiliation’.\(^ {191}\) Humiliation as an objective element is distinguishable from some of the emotional states that a direct victim of identity theft might experience. Thus, for example, shame and embarrassment, described by Miller as ‘close cousins’\(^ {192}\) of humiliation have been distinguished as subjective emotional states.\(^ {193}\)

Nonetheless, while the necessity for this objective standard as to humiliation is generally accepted, it is debatable whether subjective feelings can be excluded entirely in determining when humiliation has occurred. Kleinig doubts whether they can be ignored. He opines that a person might be treated with indignity yet suffer no humiliation if, for whatever reason, he does not feel humiliated.\(^ {194}\) That may be so, but

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188 Dan-Cohen (n 157) 160-61.
189 Hörnle and Kremnitzer (n 155) 148-49.
190 Margalit (n 170) 9.
191 ibid 9.
193 Nussbaum, *Hiding from Humanity* (n 184) 204.
in the eyes of the onlooker that individual might be seen as humiliated. Neither Kant nor Dan-Cohen admits of any derogation from the concept of human dignity. It may well be enough that the individual’s moral worth has been attacked in the eyes of right-thinking individuals.

5.9.2.3 Degradation as an Alternative Factor

Kleinig draws a sharp distinction between humiliation and degradation. He takes no fundamental objection to the former as the limiting factor but considers the latter to be more appropriate. He urges that the latter is a dignitarian concept since where a person is degraded, his, or her, dignity as a human being is compromised. He contends that a person may be degraded even if he, or she, does not feel that way and that, ‘given degradation’s much stronger connections with subhumanity as well as weaker ties to feelings’, we should be more concerned about it than with humiliation.195

5.9.3 The Inadequacy of Human Dignity

The present context does not compel a resolution of the issue raised by Kleinig since, from an identity theft perspective the outcome is the same, whether humiliation or degradation is seen as the limiting factor. Though identity theft impacts on human dignity as an act of instrumental use, there is no sense that, generally, identity theft humiliates or degrades its direct victims. Although, conceivably, individual cases may comprise circumstances that merit the use of such labels, this is not a universal outcome.

Reference has been made previously to victims’ surveys that confirm that some victims report its impact in terms of words that are associated with humiliation and degradation. However, not every victim of identity theft report such consequences mentioned. Thus, for example, data arising out of the Identity Theft Resource Centre196 2009 survey showed that less than thirty percent of victims reported feeling embarrassment or shame, though in 2007, as high as eighty percent felt a sense of anger or rage.

Furthermore, those terms, though closely related, do not equate with humiliation or degradation and, while surveys and studies exist measuring or assessing the impact on

195 ibid 174-75.
196 The Identity Theft Resource Centre is a private organisation based in the USA which conducts regular surveys; <http://www.idtheftcenter.org/> accessed 15 January 2010.
victims, nothing unearthed suggests that, generally, identity theft is humiliating or degrading. One senses that it would be difficult to garner any substantial body of opinion that identity theft is generally so. Unlike the case with acts of sexual degradation, it is unimaginable that every act of identity theft would be perceived as offending the dignity of the direct victim in such a fundamental and erosive manner. Hence, any criminalisation on this basis would, at best, be patchy.

It follows that this humanistic type of harm does not constitute a basis for criminalising identity theft in a general way. Hence, it is necessary to look beyond actual harm to direct victims in search of a rational basis for criminalisation. The chapter, therefore, turns to the risk of harm to such victims and remote and direct harms to public interest.

5.10 Identity Theft, Remote Harm, and Endangerment

It has been demonstrated previously that identity theft may result in protectable harm to direct victims, though such harm is not an inevitable consequence. Additionally, it has been established that a range of crimes may be committed by means of, or facilitated through, identity theft. The misdeed also serves as a way of masking criminal liability, making detection difficult and falsely attributing wrongdoing to others. To adopt the language of Bazelon J writing with reference to the possession of implements such as dynamite fuses or brass knuckles, the conduct of identity theft, therefore, gives ‘rise to sinister inferences’. This evokes consideration as to whether the criminalisation of identity theft may be justified on a remote harm basis.

5.10.1 Identity Theft and Facilitated Wrongs

Many of the theoretical considerations relating to remote harm were introduced in chapter four. To essay the required analysis in this context, it is necessary to return to the purpose-oriented classification scheme of identity theft devised above. Not all the identified categories merit similar treatment. It will be argued that while the directly-facilitative and evasively-facilitative categories readily merit criminalisation, greater caution is required in the case of precursory-facilitative and non-facilitative identity theft.

198 see the 6 paras following text to n 76.
With respect to the first two categories, the perpetrator is, by the act of identity theft, simultaneously bound up in the further wrongdoing. In both instances, the coincidence in time of, and intimate connection between, the identity theft and the additional wrongful act justify the imposition of criminal liability for the identity theft. Not only has the perpetrator of the ulterior crime donned the mask but he has struck, or has attempted to strike, under its disguise. In the language of Diplock LJ, he or she has ‘crossed the Rubicon and burnt [the] boats’, a degree of commitment that is beyond that required for the classic inchoate offence of attempt.

The position is less straightforward as it relates to the other categories. In the case of the precursory-facilitative actor, there may be varied circumstances. In all cases, the identity theft is removed from the further wrongful act but the degree of removal may differ from case to case. Also, the perpetrator of the identity theft may or may not be the person who goes on to commit the further offence. Further, at the time of committing the identity theft, the perpetrator may or may not have the intention to commit, or facilitate the commission of, the further wrongdoing.

The following examples serve to highlight these different possibilities and foreshadow the moral concerns that are relevant. They all involve A, a member of a terrorist gang who uses the PII of a university student to access the university’s premises. The varied scenarios follow:

1. he accesses a chemistry lab from which he intends to steal chemicals to make a bomb;
2. intending to blow up a public building on Christmas day 2015, he accesses a science demonstration on the making of explosives;
3. on 3 October 2013, he accesses the student lounge for recreational purposes where he encounters the leader of a conservative political group and shoots him;
4. he and his son attend a social function for students and family members only, where his son sees the daughter of a rival gang and rapes her;
5. he accesses a course in basic philosophy to enhance his general knowledge.


\[200\] Criminal Attempts Act 1981 (UK) s 1 requires conduct beyond the mere preparatory.
These fictional situations suggest that any criminalisation of identity theft on a remote-harm basis could be considered morally objectionable. Any such development sweeps too broadly, even embracing cases of non-facilitative identity theft, as exemplified in scenario 5. General criminalisation would also be insensitive to the proximity of the ulterior offence to the identity theft. Hence, whether the ultimate offence is very proximate, as in scenario number 1, or whether it is far removed, as in scenario number 2, criminal liability would ensue. This is objectionable since it exposes persons to liability who might not have taken steps that are more than preparatory in relation to the ultimate offence.

In those latterly mentioned instances, as well as in scenarios 3 and 4, the commission of the ultimate offence requires further human action beyond the identity theft, either by the perpetrator of the identity theft, as in scenarios 1, 2 and 3, or another person, as in scenario 4. Hence, in those cases, the criminalisation of identity theft on a remote harm rationale would be morally challenged since it betrays a disregard of the fact that individuals are autonomous human beings who are capable of rational thought and are accountable for their own actions.\footnote{For a relevant discussion see Dennis Baker, ‘The Moral Limits of Criminalizing Remote Harms’ (2007) 10 New Criminal Law Review 370.}

It was acknowledged in chapter four that liability on a remote-harm basis may be morally acceptable if there is some normative involvement on the part of the perpetrator of the basic misconduct, in any subsequent choice to go on to further wrongdoing.\footnote{See text to nn 202 and 203 ch 4.} Such normative involvement might be identified in scenarios 1 and 2 where A intends to commit the further crime for which the identity theft is deliberately facilitative. In those situations, though substantially diminished, a moral difficulty remains since criminalisation at the stage of the identity theft denies A an opportunity to avoid liability even if A abandons the intention for the further offence. The degree of objection in this case narrows or widens depending on the proximity of the ultimate harm to the identity theft. Thus, moral objection might be stronger in scenario 2 than in scenario 1.

The above demonstrates that there is some basis for considering the criminalisation of identity theft on grounds of remote harm but moral challenges arise which precludes the
creation of a pure identity theft offence of general application. These objections might be mitigated by the inclusion of requirements for proof of an ulterior intent on the part of the perpetrator and the taking of steps that are more than merely preparatory to the commission of any intended offence.

5.10.2 Endangerment of Direct Victims

However, it remains to be considered whether a narrower focus on the potential impact of identity theft on direct victims might not provide an acceptable basis for the criminalisation of identity theft. The imputation of criminal liability on the basis of ‘secondary and derivative harm’ is accepted in criminal jurisprudence. Duff uses the quoted term to describe ‘being subjected to the threat, risk or fear’ of a harm that is protected by the criminal law.\textsuperscript{203} If identity theft exposes its direct victims to financial loss and psychiatric injury, the prohibition of that misconduct might be justifiable on the basis that it reduces the potential for such harm.

Seen in this light, identity theft may be regarded as endangerment misconduct which could qualify for criminalisation much as the offence of dangerous driving or discharging a firearm in public. A significant point in favour of this basis of criminalisation is that identity theft could cause damage to direct victims without the need for any intervening wrongful act by the perpetrator of the identity theft or anyone else. Hence, it meets no barrier based on principles of autonomy or otherwise. Furthermore, there is also no room for the criticism that the offender is denied an opportunity to withdraw, since the offence could be defined by reference to the very conduct that gives rise to the risk of harm.

Nonetheless, two moral challenges might arise. Any offence of identity theft would constitute one of ‘implicit endangerment’, a term employed by Duff to cover endangerment offences that do not specify the relevant risk in the offence definition.\textsuperscript{204} The downside of this is that unless it can be established that each case of identity theft creates a risk of harm to direct victims, those who do not actually endanger others would also be criminalised. Related to this is the concern that the offence-definition would require no \textit{mens rea} with respect to the risk in issue.

\textsuperscript{203} RA Duff, ‘Intentions Legal and Philosophical’ (1989) 9 OJLS 76, 86.

\textsuperscript{204} RA Duff, ‘Criminalizing Endangerment’ in RA Duff and Stuart P Green (eds), \textit{Defining Crimes} (n 32) 59.
The establishment of a prima facie case for criminalisation on this basis is important since it returns the focus squarely on the harm to direct victims. However, the chasm between any such conclusion and a final and justifiable decision to criminalise is repeated in the concluding chapter of this thesis. Next, however, is the analysis to determine whether this approach can be buttressed by one based on direct societal harm.

5.11 Harm to Societal Interest

A rich body of opinion exists in support of the view that harm to societal interest provides a strong basis for criminalisation. As Kleinig writes, ‘Criminable harm … is not to be determined solely by reference to the impairment of the welfare interests of assignable individuals but also by having regard to the social consequences of acts.’ He states that trust is the essential element that maintains society and argues that ‘harm to society is to be understood as the erosion of [relationships] of trust’. Though not stipulating any underlying rationale, Moohr confirms that where a societal interest is harmed directly, criminalisation is appropriate, even if there is no harm to an individual. Feinberg acknowledges that such crimes have an ‘unquestionable place’ in criminal codes.

Hence, a legitimate basis on which to consider the criminalisation of identity theft is by reference to the societal interest threatened or harmed by that conduct. In this respect, it is posited that identity theft undermines human identification, a process which is essential for an orderly and efficient society. Human identification serves a common, public and collective purpose. Identity theft constitutes a breach of the trust that is required for the integrity of the process and the maintenance of societal confidence in such an essential system.

The importance of identification as a societal function is pivotal to this argument. After tracing the evolution of its social and economic role, Clarke underscores some public

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206 ibid 35.
207 Moohr (n 69) 757.
208 Feinberg, Harm to Others (n 12) 11.
benefits of identification, historically and contemporarily. 209 He notes among its general purposes, the indication of a gesture of goodwill, the development of mutual confidence, the reduction of the scope for dishonesty, the facilitation of continued communications, and the enablement of one person to associate transactions and information with the other. 210 As he emphasises, organisations depend on the reliable identification of persons with whom they deal, particularly in an era characterised by large organisations and distance transactions. 211

Harper treats the subject more comprehensively. 212 He identifies two fundamental roles of identification, positing that it facilitates (a) personal and economic relationships; and (b) accountability in governmental, legal, commercial and social contexts. 213 Identification facilitates the formation and growth of social interpersonal relationships as well as relationships between persons and organisations, be they governmental, commercial or social. Additionally, identification facilitates accountability for wrongdoing, be it in a criminal, commercial or interpersonal setting.

Identification of wrongdoers is a critical step in the criminal justice process. Equally, identification is necessary if parties are to hold each other accountable in the event of a failed, or flawed, commercial transactions. Like Clarke, Harper underscores the importance of identification in contemporary societies where remote transactions are commonplace, given the migration of businesses to the digital environment. In such a setting, it is more difficult for parties to know that each other are who they claim to be. The potential for fraud through an abuse of identification processes undermines the public’s confidence in remote digital transactions and affects the pace at which trust in the online environment is built. 214

210 ibid 8.
211 ibid. 9.
212 Jim Harper, Identity Crisis: How Identification is Overused and Misunderstood (Gato Institute 2006).
213 ibid 81-94.
Harper identifies a third role for identification. He asserts that it ‘allows for the creation and use of reputation’. He provides the example of a character reference check by a company on a prospective employee. Identification is critical to the process by linking particular conduct to a particular individual. It performs a somewhat similar role with respect to credit and other types of references. Harper links this reputational point to the question of trust by asserting identification to be ‘an integral part of the trust building that is necessary for commerce among relative strangers’. He notes further that it ‘allows people’s reputations to be used in their favor, or against them, as the case may warrant’. Harper also highlights the importance of reputation in social relations and the role of identification in ‘enforcing and strengthening social mores’ by rendering persons accountable for poor behaviour in social systems.

Identification also plays a significant role in securing contractual and welfare benefits. One consequence of the relationship between persons and state or private organisations is individual entitlement to state or contractual benefits. Identification enables potential beneficiaries to access such benefits, thus constituting an important access threshold.

It is fair to conclude that identification, and by extension, the use of PII for that purpose, play a critical role in modern societies. That role has become increasingly important as societies have advanced technologically, leading to the growth in remote relationships through facilitative information and communication networks. It plays a fundamental part in the building and facilitation of social and commercial relationships and contributes to the building of societies and democracies by enabling the roll-out of government services and benefits. It also provides for accountability for wrongdoing. Harper aptly describes it as ‘a sort of social, economic, and legal glue’.

215 Harper (n 212) 95.
216 ibid.
217 ibid.
218 ibid.
220 Harper (n 212) 95.
5.11.1 **Identity Theft as a Social Concern**

Viewed through this lens, identity theft harms a significant societal interest. On the strength of the evidence out of Australia and the United Kingdom, it may be said that identity theft, in its more embracing senses, has become a social concern.

This conclusion is supported by the application of a model constructed similarly to that employed by Hall in determining that automobile theft had become a social problem in the USA. In so concluding, Hall applied a number of factors which included the frequency of the offence; the pecuniary loss sustained by victims and those who purchase stolen cars; the costs of theft insurance; the ecology of the crime; the market for stolen vehicles and its effect on legitimate traders; and the use to which stolen vehicles not resold are put.

In the case of identity theft, the reports out of Australia and England suggest that the prevalence of the activity, the harm suffered by direct victims, the financial costs to businesses, the financial and other costs to society, the challenges posed to law enforcement and the myriad uses to which false identities are put, combine to identify this form of misconduct as a social problem.

The threat to societal interest in identification posed by this social concern has emerged as the strongest fulcrum on which to posit any prima facie case for the criminalisation of identity theft. However, final conclusions are reserved until consideration of the special cases identified in the opening section of this chapter. This happens in the next section.

5.12 **Some Special Issues**

In exploring normative bases for the criminalisation of any misconduct, it is desirable to consider those circumstances that call for special consideration within the established framework of the moral limits for criminalisation. The question as to how liability might be excluded in such cases, in the event of criminalisation, is beyond the scope of

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222 ibid 233.
223 See pt 4.2.
the current study. Intriguing as that aspect of offence-creation may be, the focus at this stage remains a normative one. It begins with conduct that may be appropriately labelled ‘innocent identity theft’.

5.12.1 Innocent Identity Theft

One obvious situation in which criminal liability ought not to attach to acts of identity theft is where (1) the actor intends no harm in the senses established in this discussion; and (2) persons to whom the act is portrayed are not misled. A ready example is an act of impersonation in a comic or dramatic event. Such acts may be labelled ‘innocent identity theft’, if regarded as identity theft at all. Admittedly, they do fall within the conceptualisation of the term as constructed for this study.

This category of identity theft is not morally problematic in the strongest sense. The absence of any potential for deception precludes any such finding, though it may be arguable that, depending on the circumstances, the dramatist, or comic, objectifies the person he or she impersonates. However, the identity theft causes no protectable harm. The circumstances of the conduct lend to no possibility of remote harm and preclude a conclusion that the societal interest in identification is threatened.

It is conceivable that in a comic or dramatic presentation, the actor could go on to engage in conduct which might be considered humiliating or degrading of the person he or she impersonates. However, the act of the identity theft itself could not be considered humiliating or degrading so as to justify the intervention of the criminal law. Any humiliating or degrading conduct would have to be examined as a potential basis for criminal or civil liability but, conceptually, this must be distinguished from the act of impersonation itself.

5.12.2 Ethically Grey Conduct

Acts of innocent identity theft stand in contrast to the ‘ethically grey’. Linguistically, the colour grey is used to connote an uncertainty of position. The Merriam-Webster online dictionary defines the word ‘gray’, a variant of ‘grey’, to mean ‘having an intermediate and often vaguely defined position, condition or character’.227

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The use of identity theft in ethically grey circumstances and its implications were brought sharply into focus by Golub. He contrasts the clear message of unacceptability sent by the American legal system and the media about ‘identity theft’ to the ‘morally defensible’, ethically ‘gray’ or less rigid portrayal of ‘identity theft’ in popular culture. He illustrates his point by reference to three movies which raise the philosophical question as to whether the end justifies the means. These involved posing as another to save lives, committing other ‘good works’ in the identity theft process, and an instance in which identity theft was ‘ultimately a redeeming act for one of the characters’.

Golub contends that ‘in each case, the ethics of assuming someone else’s identity is not exactly black and white’ and concludes that ‘if another person’s identity is assumed for reasons other than criminal purposes and/or economic gain, then it may just be okay.’ Deeper inquiry into such ethically challenging situations commences with objectification.

5.12.2.1 Objectification and Ethically Grey Identity Theft

Objectification in ethically grey circumstances is, nonetheless, objectification. A possible defensive argument against this proposition would be that the perpetrator’s focus was the end result rather than the objectification that served, whether wholly or partially, as a means to that end.

In this context, Papadaki seeks to distinguish between intentional and unintentional objectification. She cites the case of a person who locks a friend in a room to prevent the friend, whose ice-skating skills are poor, from risking injury by skating. She argues that there is no intention to deny the friend’s humanity but to save her life. However, she states that this is a case of unintentional objectification since the person treats the friend as lacking in autonomy. Thus, she distinguishes intentional from unintentional objectification, with the distinctive feature being whether the perpetrator intends to

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228 Adam Golub is an Assistant Professor of American studies who writes and teaches about popular culture.


230 ibid.

231 Papadaki (n 114) 32-33.
harm, or deny, the objectified person’s humanity.\textsuperscript{232} Significantly, though, she concludes that unintentional objectification ‘is nonetheless a case of objectification, since denial of humanity has (albeit unintentionally occurred …’\textsuperscript{233}

The validity of Papadaki’s distinction is questionable especially in light of the more refined concept of oblique intention that is well known to criminal lawyers and philosophers. This concept was coined by Bentham to refer to the imputation of intention to persons who do not desire a certain outcome but foresee that outcome as a consequence of their actions.\textsuperscript{234} This concept is firmly established in law and philosophy,\textsuperscript{235} though legal boundaries as to the degree of foresight required to establish it have fluctuated.\textsuperscript{236} An application of the concept makes Papadaki’s conclusion that the considerate friend in her example betrays no intention to deny humanity dubious, if not incorrect.

Arguably, regardless of motive, one who imprisons another can be said to intend to disregard that other’s functional capacity to reason and engage in autonomous actions, even if only obliquely. Hence, in Papadaki’s example, the denial of humanity is intended, though it might not have been the friend’s primary purpose. Whatever view is taken on the matter, the outcome remains that objectification occurs even where a perpetrator claims the ultimate purpose of the identity theft to be some greater good.

An absolutist approach would have it that there can be no derogation from the duty not to deny a person his or her humanity. The consequence of this view would be the moral condemnation of acts of ethically grey identity theft, whether the ends are judged objectively good or bad. A just system of criminal law should avoid such harsh moral condemnation. The discussion as to whether this is best done by the provision of an appropriate defence, or otherwise, falls outside the settled boundaries of this thesis.

\textsuperscript{232} ibid 33.
\textsuperscript{233} ibid 34.
\textsuperscript{235} eg. see RA Duff, \textit{Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law} (Blackwell 1990) chs 3-4.
\textsuperscript{236} \textit{Hyam v DPP} [1975] AC 55 (HL) is widely taken to have established that it was sufficient that a consequence was foreseen as likely or probable; \textit{R v Woollin} [1999] 1 AC 82 (HL) requires foresight as a virtual certainty.
5.12.2.2 Lying, Autonomy, and the Ethically Grey

More accommodation for ethically grey cases of identity theft may be found under some species of the lie-based theories. The absolutist theories that deem lying as offences to laws of nature, sinful, or a breach of language use, admit of no mitigating circumstances. However, an autonomy-based theory as to the wrongness of lying is considered elastic since that value might be displaced where competing values are considered more important. Additionally, if lying is an offence against truth, the value of honesty is implicated and some moral relativists contend that this is not an absolute virtue.\(^{237}\)

It is through such elasticity that Golub’s ‘morally defensible’ or ‘ethically gray’ portrayal of identity theft in popular culture might be tested. The ultimate yardstick must be whether the values inherent in the ends pursued by the perpetrator of the identity theft are sufficient in degree to trump the values of autonomy and truth or justify a departure from the virtue of honesty.

Simon argues for a non-absolutist approach to the condemnation of lying, positing that the value of honesty should give way, in appropriate circumstances, to competing principles such as the avoidance of injustice.\(^{238}\) He does so in the context of a personal experience. He had instructed a paralegal at his university’s legal-aid clinic to telephone a welfare agency and, ‘in a secretarial tone’, state that the agency director’s immediate supervisor wanted to speak to the director.\(^{239}\) Truth is that Simon himself was trying to speak to the director, having failed to secure an earlier audience with him and suspecting, rightly, that the agency was stonewalling the clinic’s intervention on behalf of a recently released prisoner who had been wrongfully denied food stamps by the agency.

Arguing that moralists tend to over-condemn lying, Simon opines that there is no presumption in favour of honesty where values conflict. He accepts the need for sensitivity to the costs of lying but urges that ‘Quasi-Categorical Moralism’ against lying encourages ‘distrust of independent moral judgment and anxiety about moral self-
Conceding that this may sometimes be desirable, he maintains, nonetheless, that in many cases, this moralism ‘intensifies the dispositions that fuel the most ethically troubling conduct’.

Simon is right. These ethical questions can arise in varied situations. Recently, there have been disclosures in England that British police assumed the identities of dead children, without the knowledge or consent of their parents, and used false passports in their names during covert operations. The former head of the Metropolitan Police’s Special Branch in Britain, Roger Pearce, has argued that such acts of identity theft, though ‘distasteful in many ways,’ were justified ‘for protection of national security’.

This scenario highlights the challenges involved in considering ethically grey conduct. The situation is complicated by the additional disclosures that, under their disguised personalities, the officers fostered intimate personal relationships and engaged in conduct that have impacted negatively on the partners in those associations.

Undoubtedly, the British public are considering all these factors in fashioning their opinion on the morality of this police operation. It is later argued that the use of PII relating to the dead ought to be prohibited in any criminalisation process. The mix of facts in the unfolding story in Britain provide for an intriguing philosophical debate as to the rightness or wrongness of these acts of identity theft, given the overall reason invoked for their commission. That task is beyond the scope of this thesis. Nonetheless, the issue highlights the necessity for mechanisms for determining when conduct should be considered as justified or excusable and facilitative devices to exclude conduct so found, from criminalisation.

240 ibid 463.
241 ibid.
245 Lewis and Evans (n 243).
At the normative level, some species of the lie-based theories of morality provide such a device. A societal-harm approach to criminalisation would not be so accommodative but the criminalisation process should be slow to embrace conduct which is considered morally justified and any offence should contain sufficient elasticity to allow a fact-finding tribunal to determine whether criminal liability should attach to the conduct of persons who engage in ethically grey conduct. How this might happen is another matter.

5.12.3 **Consensual Identity Theft**

As compared with ethically grey situations, less accommodation is possible where a direct victim consents to the commission of identity theft. To be effective in criminal law, consent must be genuine and informed. For present purposes an assumption can be made that these essential requirements have been satisfied since they raise no special issues in this context.

The liberalist approach to consent admits of it being a defence to crimes in which individuals inflict harm on others. This view is grounded solidly in the requirement to respect the autonomy of individuals and their right to choose. However, it has been acknowledged that there are policy reasons for limiting the scope of consent as an exculpatory factor in criminal law. Undoubtedly, where harm extends beyond the consenting individual there is no place for the acceptance of consent as a defence. Hence, given the conclusion that identity theft harms a distinct societal interest, the possibility for an application of the liberalist theory must be excluded. However, this summary conclusion does not preclude consideration of some intriguing questions relating to consent and objectification and consent and human dignity infringement.

5.12.3.1 **Consent and Objectification**

As it relates to objectification, the primary question must be whether consent of the subject, alters the conclusion that a person has been objectified. While feminists may answer this question negatively with respect to women and sexually exploitive conduct, the answer is otherwise in cases of identity theft. Any argument that consensual identity

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246 *R v Konzani* [2005] 2 Cr App R 14 (CA).
247 This view is reflected in Feinberg, *Harm to Others* (n 12) 215.
theft objectifies the person who consents to the use of his or her PII appears to be untenable.

At this stage, it is useful to return to Nussbaum’s notion of benign or positive objectification and Papadaki’s suggestion that such cases should be excluded from the term ‘objectification’. Nussbaum defines benign objectification as treating someone as an object in a context of overall respect for their humanity. She illustrates it by reference to the ‘joyous’ surrender of autonomy, agency and subjectivity by two fictional lovers who identify each other with their sexual organs in a moment of amorous passion characterised by mutuality of respect and an atmosphere of equality. Nussbaum notes the ‘positive’ features of this denial of autonomy and subjectivity within the sex act but also within an overall context in which autonomy is respected and promoted. She notes that there is ‘an intense concern for the subjectivity of the partner at other moments’.249

By its nature, identity theft is radically different from consensually enjoyed love making. Identity theft often involves the added element of falsehood on a third agent, be that agent human or automated, and negative societal impact. Hence, the search for an analogous situation is futile. Nonetheless, imperfections apart, some scenarios demonstrate the incongruity in concluding that consensual identity theft is objectification. Alternatively, they show that, if it can be so labelled, it should be regarded as positive or benign objectification, viewed from the perspective of the person to whom the PII relates. The complexities are seen in the example which follows.

B, a law student, persuades A, a law graduate, to sit B’s final examination for B. To execute this fraudulent plan, A must present B’s university identification document at the examination centre to gain entry. Here, it is difficult to conclude that A makes an instrumental use of B. Indeed, it seems morally unsound to condemn someone for the instrumental use of another where that other has consented. In any event, any instrumental use of B by A is done within an overall context of respect for and acknowledgement of B’s humanity. This act should attract no moral censure, if the only relevant consideration was the issue of instrumental use. The exclusion of such conduct from moral condemnation on objectification grounds can be achieved by regarding it as a case of benign objectification, as would Nussbaum, or one of no objectification, as would Papadaki.

249 Nussbaum, ‘Objectification’ (n 112) 274-75.
Where there is no expressed consent, greater difficulties might arise. Another fictional scenario suffices. A and B are twin brothers. A is receiving emergency medical treatment in hospital. B visits A’s apartment at 11.30 a.m. and, on checking the mailbox, finds a letter marked ‘urgent’. Unable to reach A, B opens the envelope to discover that A has been requested to visit a business place by midday, on that day, with two pieces of identification to claim a valuable prize that A had won in a competition. Conscious that A needs money to pay his medical bills, B arms himself with two identification documents relating to A and proceeds to collect the prize which he later passes to A.

Here exists a prima facie case of objectification. Whether it can be said that B has denied his brother’s humanity might well depend on whether he had given any thought to what his brother might have advised in the circumstances, had he been able to communicate with him. In such an event, it is arguable that he had acknowledged his brother’s humanity, thus making this a case of benign objectification or no objectification, depending on whether one subscribes to Nussbaum or Papadaki. On the other hand, absent such consideration, it would seem that, despite the obvious intention to benefit his brother, this could be classified conclusively as a case of objectification.

### 5.12.3.2 Consent and Human Dignity Violation

There is greater uncertainty as to whether one can truly consent to harm to that inherent and fundamental moral worth that is encapsulated in the term human dignity. There is a significant philosophical divide on this point with powerful arguments emanating from both sides.

Liberalist thinking is reflected in the work of Hörnle and Kremnitzer who consider that any dignity-based offence should take account of individual autonomous rights to consent to humiliating treatment and that they should be able to do so without exposure to the criminal law.\(^{250}\) This view competes fiercely with the highly persuasive idea that human dignity is such a fundamental value that there exists an overriding duty to maintain it. Hence, there is no exculpatory role for consent or autonomy. This perspective is reflected by Dan-Cohen\(^ {251}\) and Baker.\(^ {252}\)

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\(^{250}\) Hörnle and Kremnitzer (n 155) 148.

\(^{251}\) Dan-Cohen (n 157) 162-63.
Ultimately, though, this is a moot question since the harm of identity theft stretches beyond any consenting direct victim to include significant societal harm. This excludes scope for the operation of the liberalist approach to consent and favours criminalisation of consensual identity theft.

5.12.4 The Required Status of Victims

Finally, brief consideration is given as to the scope of any offence in so far as it relates to the status of the person to whom the PII relates. A common feature of the Australian offences is that they apply whether the information relates to a real or fictional person and, if to a real person, whether that person be dead or alive. Such a broad reach is unsurprising and is entirely justified under a societal-harm approach to criminalisation. It could equally be supported under a lie-based wrong approach.

The other possible bases of criminalisation explored above would favour a restriction of the scope of the offence to PII relating to real persons since a human subject is required to ground criminalisation based on objectification, humiliation or degradation. Frankly, given the potential dangers that can arise from the use of false identities beyond harm or damage to direct victims, it would be impracticable to limit any offence in this way. Nonetheless, special recognition of the additional factors involved in the case of human subjects could be accommodated by means of an aggravated offence.

The extension of any offence to PII of deceased persons is something that can be accommodated under some of the jurisprudential bases considered in this chapter. The lie-based moral theory applies equally as does the societal harm approach and, while there can be no emotional or psychological harm to deceased persons, the evidence indicates that the family of the deceased often experiences that type of impact, though as was conceded earlier, this type of harm is rarely sufficient to trigger application of the harm principle.

The more intriguing questions are whether the dead can be objectified, humiliated or degraded and whether the law ought to recognise and protect posthumous dignitarian rights. It is unnecessary to consider these points, given the fact that the moral claim for the inclusion of this class of persons is readily tied to the avoidance of societal harm to

identification. Nonetheless, it is likely that academic support is to be found on both fronts.\textsuperscript{253}

Finally, the required approach to situations where a real person is implicated, though coincidentally, by the use of a fabricated identity remains a live issue. However, the imposition of liability for harm to a real person where a fabricated identity was used should hinge on the degree of moral culpability of the person adopting the identity. If it is that he, or she, was aware of the risk that a real person might be implicated by means of the identity adopted, but nonetheless went on to take risk, this would provide a sufficient basis for liability. This form of subjective reckless has been long accepted as a basis of criminal liability.\textsuperscript{254}

\section*{5.13 Prima Facie Bases for Criminalisation}

If the harm principle is regarded as the predominant theory of criminalisation and it is accepted that, of necessity, it includes societal or communal harm then the societal interest in identification emerges as the strongest basis for the universal criminalisation of identity theft.

The analysis lends no support to the hypothesis that any such basis exists when considerations are limited to the direct harm suffered by direct victims of identity theft. General reliance could also be placed on the concept of remote harm though it does not present as a solid basis for the creation of an offence of identity theft, per se. More promising is the notion that criminalisation might be posited on an idea of identity theft as endangering misconduct causing a risk of harm to direct victims. Additionally, the argument can be sustained that identity theft is a moral wrong based on its inherent lie-based nature and this combines with the harm established to provide a prima facie case for criminalisation.

These summary points, in conclusion, are addressed more expansively in the concluding chapter of this thesis.

\textsuperscript{253} On posthumous dignitarian rights see Nick Bostrom, ‘In Defense of Posthuman Dignity’ (2005) 19 Bioethics 202; Norman Cantor, After We Die: The Life and Times of the Human Cadaver (Georgetown UP 2010).

\textsuperscript{254} For relevant cases see \textit{R v Cunningham} [1957] 2 QB 396 (CCA).
6.1 The Project and the Outcome

This thesis partially examined the criminalisation of identity theft, narrowly defined as the assumption by one person of another’s identity by means of that person’s PII. It sought to discern the extent to which the misconduct is criminalised in Australia, Barbados or England, and finding it not to be so proscribed, commenced an inquiry into whether it ought so to be. That inquiry was conducted by reference to the two foremost normative theories of criminalisation: harm and morality.

Despite widespread concerns about its harmful effects and potential associated misconduct, it is a significant feature across the jurisdictions examined that the basic act of identity theft is not an offence. Barbados is yet to be stirred to national debate as to whether specific legislation is required. Despite some consideration, England has opted to rely, in some degree, on its comparatively new general fraud offence and offences under the Identity Documents Act 2010, all of which are of limited application. There, as in Barbados, there are a number of offences that may be applicable to identity theft but these require the commission of other wrongdoing for the establishment of criminal liability. Identity theft is not their primary aim or focus and is only incidentally implicated.

Alarmingly, even the Australian jurisdictions that have committed to specific identity-related offences have not criminalised the basic act of identity theft. They have enacted a number of preparatory crimes based on possession of, or dealing, in PII. Grounded theoretically on the concept of remote harm, these inchoate offences are intended to serve a prophylactic purpose. As such, their reach is amazingly wide in so far as the ultimate conduct they aim to reduce or eliminate is expressed in general terms by reference to, in most instances, serious offences. Troublingly, the bulk of these offences criminalise conduct that is not overtly wrong and offer no opportunity for withdrawal before concrete steps are taken toward execution of the ultimate criminal goal.
The moral legitimacy of the Australian offences rests on the requirement for proof of intent to commit the further criminal wrong. However, this requirement for an ulterior intent precludes any prospect of the offences penalising identity theft, per se. Even in South Australia where engagement in identity theft constitutes the *actus reus* of one of the principal offences, the ulterior intent requirement confirms that the aim or focus of the offence is to stave off general criminal wrongdoing that may be engaged in under that guise.

This existing state practice might lead the intellectually curious in a number of different directions. Quizzically, one camp may wonder why states have failed to criminalise identity theft, if the misconduct is commonly associated with the multifaceted catalogue of wrongdoing highlighted throughout this thesis. A consideration of existing legislative approaches may lead some to surmise that there is some fundamental reason why this basic misconduct remains untouched by the criminal law.

Another camp may frame its inquiry entirely differently and in a manner that would downplay the importance of the line articulated in the preceding paragraph. It may challenge the usefulness of focusing on the criminalisation of identity theft, arguing that such misconduct might be subsumed in the range of behaviour that the Australian-type offences aim to control.

A third category of persons might resort to the less compelling argument that in jurisdictions where such specific offences are lacking, other offences exist that can be pressed into service where identity theft play an integral constitutive role in establishing their elements. However, the obvious inability of these offences to apply generally to a form of misconduct that they were not intended to proscribe may easily cause this line of inquiry to recede. Nonetheless, its proponents may urge also that any deficiency is supplemented by the judicial practice of recognising identity theft as a factor in sentencing, a practice that allows for a direct focus on the misconduct and the harm that it causes to direct victims.

This thesis has provided a lens through which these various questions have been critically examined. The latterly expressed approaches can be disposed of summarily. With offences such as fraud, obtaining by deception, theft, computer misuse, terrorism or any of the other offences that may incidentally be implicated when identity theft is committed, the misconduct is relegated to the side lines or plays but an evidential role in
the establishment of the offence elements. This approach ignores entirely the consequences that may arise from the identity theft itself to direct victims and the society.

As for the sentencing practice, this in some way offends the principle of fair labelling which can be reasonably expanded to require that a criminal record and punishment should fairly reflect the wrongs that the guilty person might have committed. Furthermore, such an approach is not the most effective manner in which the law’s communicative function could be executed in the denunciation of identity theft.

The remaining two lines of inquiry can be addressed collectively. As seen above, the Australian preparatory offences have been subject to a degree of justifiable criticism pivoted largely on their moral legitimacy as inchoate offences, their reference to innocuous conduct and associated disparate penalties. To contend that their reach extends to the avoidance of identity theft is to embrace these offences, shortcomings and all. More fundamentally, the offences’ elements do not include the intention to commit identity theft as a proscribed ulterior intent that, by itself, could lead to a conviction. Hence, where a person commits the actus reus intending to commit identity theft but not to commit a discernible criminal offence, no liability attaches.

The exploratory application of normative theories of harm and morality to identity theft demonstrates that there is a prima facie case for criminalisation. Identity theft might be considered a moral wrong, given that it comprises essentially of the perpetuation of a lie. This offends against longstanding moral precepts. Additionally, identity theft objectifies its direct victims. However, it is doubtful whether this is enough to merit criminalisation since every act of objectification cannot justifiably be criminalised. There is a necessary nexus between identity theft objectification and human dignity violation. To this end, it is conceded that every act of identity theft does not necessarily result in the humiliation or degradation of its direct victims, thus failing to meet accepted limiting factors that might separate criminal objectification from non-criminal objectification.

This notwithstanding, further analysis has demonstrated that the apparent moral basis mentioned above is buttressed by an invocation of the harm principle which, though not uncritically acclaimed, has the distinction of being the dominant normative theory of criminalisation. The examination has not sustained an argument for criminalisation.
based on direct harm to direct victims. As hinted in the preceding paragraph, human dignity violation does not offer a basis for broad criminalisation. This was explored as a threatened fundamental value since harm to recognised protectable interests, such as injury to mental health and financial loss, does not inevitably follow the misconduct.

Nonetheless, the fact of the possibility of protectable harm to direct victims ensuing from identity theft means that there is a risk of such harm. This provides a normative basis on which criminalisation might be considered since it should reduce the risk of these protectable harms. Protection against such secondary or derivative harm is as much the business of the criminal law as is the protection of primary or direct harm.

Whilst that is so, however, there is a need for greater caution when considering criminalisation on the basis of second-order harm and the case for moral justification has to be more carefully scrutinised. With respect to identity theft, these concerns are mitigated by the fact that any offence would protect against risks that might arise as a direct consequence of the misconduct and that an offence defined in terms of identity theft would neither be inchoate or preparatory.

In this respect, the case for criminalisation based on the notion of endangerment to direct victims is morally stronger than that based on the prophylactic potential to stave off the wider variety of wrongs that might follow, or be associated with, the commission of acts of identity theft. The latter approach results in a patchy outcome in which the intervention of the criminal law might be morally justified in some situations but not in others. To build a case for criminalisation on such a premise would be to construct an overly broad offence on a base that is not sufficiently accommodative.

The challenges of moral justification that arise with the endangerment and remote harm approaches are avoided if one looks to the societal harm that is caused by identity theft. The argument that such misconduct undermines people’s confidence in identification processes is a highly meritorious one. Given the importance of identification in modern societies generally and, particularly, its contribution to the development of electronic commercial gateways, the strength of this approach as a basis for criminalisation cannot be ignored.
6.2 Some Further Requirements

All that stated, the discussion in this thesis has been largely theoretical. Despite occasional references to some research data, engagement in empirical research, or critical analysis of such that exists, is lacking. Hence, the study stakes its claim on theoretical analyses only and concedes a non-critical reliance on cited empirical research. References to research data are cautiously made conscious of the acknowledged analytical shortcomings. Hence, though firm in its conclusion that identity theft meets the normative thresholds of harm and legal moralism so as to qualify for consideration, this study leaves the door wide open for further analyses before this preliminary conclusion can be considered final.

This further examination is required not only to reach a more definitive position on the criminalisation question but also to strengthen the bases on which the prima facie position articulated here has been arrived at. In the latter respect, the need is acknowledged for further research in the area of identity theft and morality and the extent to which identity theft creates a risk of protectable harm to direct victims. The identity theft-societal harm thesis could also be buttressed by greater reference to empirical research.

The intuitive position taken as to the feeling of right-thinking people with respect to the immorality of identity theft needs to be supported by empirical data. If such data exist, then it has not been unearthed by this study. One suspects, though, that there is need for a carefully designed study in this respect guided by the kinds of considerations that theorists have highlighted as being necessary pre-conditions for the criminalisation of immoral conduct.

Equally, there is a need for adequate review of available data or the generation of reliable and useful data relating to the risk of financial loss and psychiatric harm to direct victims of identity theft. Criminalisation based on second-order harm or the reduction of the risk of primary harm must involve some analysis of the magnitude of the risk and the circumstances in which the risk is likely to obtain. Available information does suggest that protectable harm to direct victims is more likely in cases of repeat identity theft as compared to single acts. A proper examination of the available evidence in this regard, or the execution of any required research, can be the subject of further special inquiry.
This leads to the wider minimalist concerns. The establishment of a prima facie case leaves outstanding the practical considerations which minimalists suggest ought to be taken account of before concluding that criminalisation is the desired way of dealing with any particular misconduct. However tempting it might be to rush to the conclusion that identity theft ought to be made a criminal offence, two strong factors necessitate a pause for embarkation on the second phase of the process. The first is the concern of over-criminalisation. The second, however, is more fundamental. The heavy artillery of the criminal law ought not to be rolled out and pressed into service except when the circumstances allow of no other effective remedy. In this respect, identity theft should undergo the same critical consideration as any other form of perceived misconduct.
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