

LEGISLATIVE PRIORITIES

New York State Law Enforcement Council

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NEW YORK STATE LAW ENFORCEMENT COUNCIL

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*New York State Sheriffs'
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*Citizens Crime Commission
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PREFACE

The New York State Law Enforcement Council was formed in 1982 as a legislative advocate for New York's law enforcement community. The Council's members represent the leading law enforcement professionals throughout the State, including the Attorney General of the State of New York, the New York State District Attorneys Association, the New York State Association of Chiefs of Police, the New York State Sheriffs' Association, the New York City Criminal Justice Coordinator, and the Citizens Crime Commission of New York City. Since its inception, the Council has been an active voice and participant in improving the quality of justice and in the continuing effort to provide for a safer New York.

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DETER CRIMINALS WITH GREATER PENALTIES FOR AGGRAVATED IDENTITY THEFT

Identity theft is on the rise in New York. In 2007, complaints from New Yorkers to the Identity Theft Data Clearinghouse rose by 17% over the previous year, from 16,452 to 19,319.¹ A 2007 study found that New York State has the highest rate of identity fraud among states, with New York City leading among metropolitan areas.² Statewide, arrests for the crimes of identity theft and unlawful possession of personal identification information more than tripled between 2003 and 2007. Not only the number, but also the seriousness of identity theft crimes encountered by law enforcement is increasing, with first-degree identity theft making up a larger share of identity theft arrests in 2007 than it did in 2003.³

Rightfully so, consumer concerns about identity theft are higher than ever.⁴ Yet penalties remain low and prosecutors lack the tools for identity theft that they already use against other, similar crimes. The New York State Law Enforcement Council proposes a comprehensive legislative package to make the prosecution of identity theft in New York more vigorous, efficient, and equitable, and to help law enforcement prioritize identity theft cases against the most organized and predatory criminals.

1
FED. TRADE COMM'N,
IDENTITY THEFT
VICTIM COMPLAINT
DATA: NEW YORK
5 (2007), *available at* <http://www.ftc.gov/bcp/edu/microsites/idtheft/downloads/CY2006/New%20York%20CY-2006.pdf>; FED. TRADE COMM'N, CONSUMER FRAUD AND IDENTITY THEFT COMPLAINT DATA: JANUARY-DECEMBER 2007 19 (2008), *available at* <http://www.ftc.gov/opa/2008/02/fraud.pdf>.

2
ID ANALYTICS, INC.,
US IDENTITY FRAUD
RATES BY GEOGRAPHY 2
(2007).

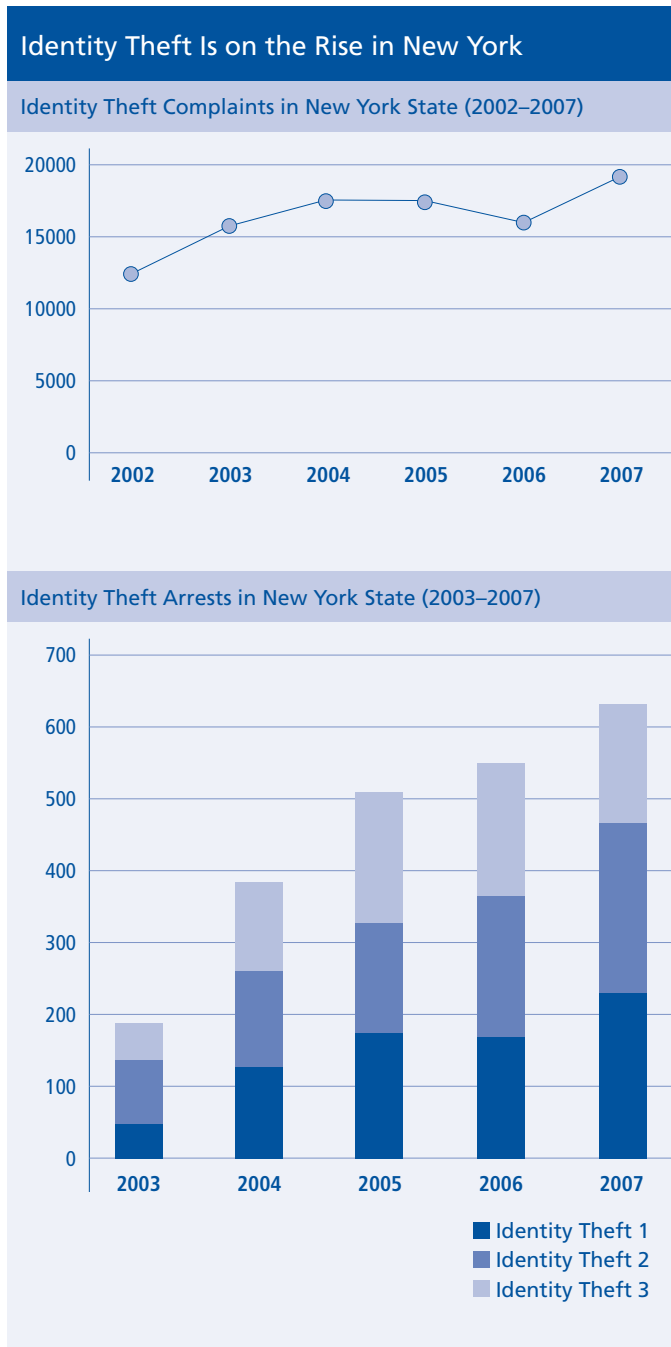
3
Div. of Crim. Justice
Serv., Computerized
Criminal History
system (Feb. 2008)
(unpublished statistical
report, on file with
LEC).

4
*Survey: Identity Theft
Concern Grows*,
BOSTON BUS. J., Oct.
9, 2007, *available at* <http://boston.biz-journals.com/boston/stories/2007/10/08/daily20.html>; Dawn Kawamoto, *ID Theft Remains Top Concern for Consumers*, CNET NEWS, Feb. 8, 2007, http://www.news.com/ID-theft-remains-top-concern-for-consumers/2100-7348_3-6157327.html.

Identity theft complaints from New York consumers to the Federal Trade Commission increased by 50% over the past five years. The seriousness of identity theft crimes encountered by law enforcement is also on the rise: whereas Identity Theft in the First Degree accounted for 28% of total identity theft arrests in 2003, it now makes up 37% of identity theft arrests.

Source (for top chart): Fed. Trade Comm'n, Consumer Fraud And Identity Theft Complaint Data: January-December 2007 19 (2008), available at <http://www.ftc.gov/opa/2008/02/fraud.pdf>; Federal Trade Commission State Data, <http://www.ftc.gov/bcp/edu/microsites/idtheft/reference-desk/state-data.html> (last visited Mar. 6, 2008)

Source (for bottom chart): Div. of Crim. Justice Serv., Computerized Criminal History system (Feb. 2008) (unpublished statistical report, on file with LEC).



CREATE AN AGGRAVATED IDENTITY THEFT STATUTE

Low Penalties Attract Criminals to Identity Theft

New York needs serious penalties to deal with the most egregious identity thieves: those who steal large amounts of money, target the most vulnerable persons, and victimize colossal numbers of people. In spite of mounting complaints about identity theft and increasingly complex and sophisticated criminals, the highest penalty for identity theft in New York State remains a D felony. This stands in contrast to other criminal frauds and larcenies, nearly all of which have B or C felony-level crimes available for the most serious cases.⁵

The relatively low penalties for identity theft make it an attractive—that is, low-risk and high-profit—alternative to other kinds of financial crimes and frauds. It is time to amend the Penal Law to remove the perverse incentives for identity thieves in New York.

New York has recognized the deterrent effect of high penalties on economic criminals in the past. When the State Legislature increased the penalties for grand larceny to their current levels in 1986, lawmakers reasoned that the potential perpetrators of economic crimes are rational about the costs and benefits of their planned transgressions:

The white collar criminal can be deterred. Economic crime is planned in advance: the actor weights the risks and calculates the potential profits...by increasing substantially the potential punishment, the attraction of wrongfully taking property will be diminished.⁶

The Legislature should extend this reasoning to identity theft. By creating an aggravated identity theft

⁵ C felonies include Health Care Fraud in the Second Degree (PL § 177.20), Insurance Fraud in the Second Degree (PL § 176.25), and Grand Larceny in the Second Degree (PL § 155.40); B felonies include Health Care Fraud in the First Degree (PL § 177.25), Insurance Fraud in the First Degree (N.Y. PL § 176.30), and Grand Larceny in the First Degree (N.Y. PL § 155.42).

⁶ Memorandum of Senator Dean G. Skelos, ch. 515, 1986 N.Y. LAWS (increasing penalties for white collar offenses).

statute, New York will signal to identity thieves that their crimes are taken every bit as seriously as any other financial crime.

Penalize Thieves Who Steal Large Amounts of Money

Under New York identity theft law, the theft of \$60,000 is no more serious than the theft of \$6000. Using another’s identity to take any amount over \$2000 is considered Identity Theft in the First Degree, a D felony.⁷ The penalties and dollar thresholds defined by the identity theft statutes stand in stark contrast to other theft and fraud crimes like grand larceny or insurance fraud, which provide B felonies for theft of over \$1,000,000 and C felonies for theft of over \$50,000. A B felony like Grand Larceny in the First Degree carries a minimum prison sentence of one year,⁸ while a D felony like Identity Theft in the First Degree generally results in probation on a first conviction. Creating an aggravated identity theft statute for large amounts of money is logically consistent with New York’s treatment of other frauds and thefts.

7
N.Y. PENAL LAW §
190.80.

8
N.Y. PENAL LAW §
70.00(3)(b).

While identity thieves who have stolen large amounts of money can usually be charged simultaneously with the more serious felony of Grand Larceny in the First or Second Degree, in some unfortunate cases thieves who have clearly stolen large amounts get away with nothing more serious than a D felony. Identity thieves who divide their thefts among banks and stores in different counties can avoid more serious grand larceny charges because of how stolen sums are calculated under New York’s rules.

New York’s larceny statutes do not allow prosecutors to add together smaller individual amounts stolen from different victims and in different counties in order to charge a more serious crime, whereas the identity theft statutes do allow the aggregation of stolen sums resulting from a single criminal transaction. Unfortunately, identity thieves have little reason to be concerned that the amounts they have stolen may be aggregated under identity theft, given that the penalty for identity theft of \$100,000 is no greater than the penalty for stealing \$5000. Creating a higher charge for identity theft of large amounts of money will remove the benefit for identity thieves who use stolen identities over several jurisdictions.

New York’s Penalties for Grand Larceny Far Exceed Penalties for Identity Theft				
Amount Stolen	Grand Larceny	Sentence Range	Identity Theft	Sentence Range
\$1,000.01	Grand Larceny 4°	0 to 4 years	Identity Theft 2°	0–4 years
\$3,000.01	Grand Larceny 3°	0 to 7 years	Identity Theft 1°	0–7 years
\$50,000.01	Grand Larceny 2°	0 to 15 years	Identity Theft 1°	0–7 years
\$1,000,000.01	Grand Larceny 1°	1 to 25 years	Identity Theft 1°	0–7 years

Identity theft of over \$1 million is punished at the same level as grand larceny of over \$3,000.

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Fifty Thousand Dollar Theft Unchargeable in Prosecution of Multi-County Identity Theft Case: In October 2006, the defendant was arrested in a Nassau County store for attempting to purchase appliances using a stolen identity. The defendant, a resident of Kings County and an employee of NYC Transit, had used credit cards in the names of stolen identities on several occasions in Nassau County. At the

time of his arrest, he had more than ten credit cards and convenience checks in the names of stolen identities, as well as personal identification information of forty additional persons, in his car. Using one of those stolen identities, he had charged more than \$50,000 to one Chase credit card account, which he took over by changing the address of the cardholder and having a new card issued. He also stole over \$2000 using a separate credit card account (under the same identity); these thefts, but not the Chase thefts, took place in Nassau County.

Since the defendant had stolen a total of \$52,000 using a single stolen identity, Nassau County could charge Identity Theft in the First Degree to cover the whole amount. (Prosecutors have broad license under the law to charge identity theft for all the money stolen using one victim's identity, even if much of the criminal activity occurred in another jurisdiction.)

However, jurisdiction under the larceny statutes is more limited. Unfortunately for Nassau prosecutors, none of the \$50,000 in charges to the Chase account had occurred in their county, meaning that Nassau prosecutors could not charge the defendant with larceny for that amount. The highest charges available in Nassau were two D felonies and an E felony,⁹ although the defendant's \$50,000 theft clearly met the threshold for the C felony of Grand Larceny in the Second Degree.

If another DA had tried to prosecute the defendant for the \$50,000 grand larceny, both offices would have been left open to accusations of double jeopardy, since both prosecutions would have stemmed from the criminal use of a single stolen identity.

Had an aggravated identity theft statute existed for

identity theft of large amounts of money, or if prosecutors had broader venue to charge grand larceny when it is part of an identity theft scheme, the defendant's most serious crimes would not have gone unpunished. It was clear from evidence seized that using many credit card accounts in the names of some of the fifty stolen identities, the defendant had netted over \$200,000 in cash advances, merchandise, and even Metrocards within a matter of months. Instead, he pleaded guilty to Identity Theft in the First Degree, Scheme to Defraud in the First Degree, and Unlawful Possession of Personal Identification Information in the Third Degree and will be sentenced to a year in jail. *People v. Oluwashola, Nassau County*

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Create Higher Penalties for Identity Theft Against Many Victims

Before 2002, the only legal victims in New York prosecutions involving losses from identity theft were banks and credit card companies. One of the important results of the 2002 state law criminalizing identity theft was the recognition that “consumers are, in fact, victims of identity theft.”¹⁰ New York should expand on this consumer-friendly approach to fighting identity theft by offering a higher penalty when a defendant steals using the identities of many different people.

Each individual victim of identity theft suffers from an invasive and time-consuming crime. On average, a victim of identity theft spends four hours repairing the damage to his or her credit rating and financial reputation. For the top 10% of victims, the amount of lost time rises to fifty-five hours¹¹—fifteen hours

⁹ Identity Theft in the First Degree, a D felony; Grand Larceny in the Third Degree, a D felony (for the non-Chase theft); and Scheme to Defraud in the First Degree, an E felony.

¹⁰ Memorandum of Assemblywoman Audrey I. Pheffer, ch. 619, 2002 N.Y. LAWS (criminalizing theft of identity and the unlawful possession of personal identification information).

¹¹ SYNOVATE, FED. TRADE COMM'N, 2006 IDENTITY THEFT SURVEY REPORT 5 (2007), available at <http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf>.

¹² Katrina Baum, IDENTITY THEFT, 2005, at 5 (U.S. Dep't of Just., NCJ 219411, 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ito5.pdf>.

more than the standard American work week. One in six households victimized by identity theft spends one month or more resolving problems.¹² In addition to lost productivity and administrative hassle, an invasive crime like identity theft causes psychological harm. All of these destructive effects are magnified when large numbers of victims are affected, yet a defendant who fraudulently uses one person's credit card in New York is charged with the same degree of identity theft as a defendant who uses cards stolen from 100 victims.

New York police and prosecutors have uncovered identity thieves targeting more than 100 victims. Some of these criminals have made a strategic choice to cover their tracks by targeting as many victims as possible. In order to escape detection while still enjoying a steady stolen income, such criminals use many victims' identities but limit each use to a relatively small amount. In this way, they reduce the chances that victims will notice suspicious account activity and pursue the matter with law enforcement.

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Defendant, Living Off Identities of More than 100 Victims for Six Months, Avoids Prison Time: In November 2003, the defendant was arrested at a FedEx site on Manhattan's West Side while picking up a package that had been ordered using a stolen credit card number. At the time of arrest, the defendant was carrying a bag containing names, addresses, phone numbers, e-mail addresses, and credit card numbers for more than 100 individuals. Investigators discovered that the defendant had been living off the credit card numbers for six months, using them to book Brooklyn and Manhattan hotel rooms over the Internet and order hundreds of dol-

lars worth of takeout food. The defendant, who stole or attempted to steal more than \$20,000 in all, was charged with eighty-two counts of identity theft, forgery, and grand larceny, among other crimes. However, prosecutors were not able to charge any crime higher than a D felony. *People v. Coston, New York County*

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Other states including Minnesota, New Jersey, Arizona, Florida, and North Carolina already include the number of victims as a factor in their identity theft statutes.¹³ Doing so in New York would confirm that this behavior is orders of magnitude worse than the victimization of one or two people and would acknowledge the increased costliness and inconvenience caused by identity thieves who target dozens or hundreds of individual victims at a time.

¹³ MINN. STAT. § 609.527; N.J. STAT. ANN. §§ 2C:21-17, 2C:43-6(a)(2); ARIZ. REV. STAT. ANN. § 13-2009; FLA. STAT. § 817.568; N.C. GEN. STAT. § 14-113.22.

Maximum Punishments in Other States for Identity Theft Involving Multiple Victims	
Number of Victims	Maximum Prison Time for Identity Theft (in years)
New Jersey 	10
Minnesota 	10
	20
Florida 	15
	30
New York 	7
	7
The maximum penalty in New York is the same whether there is one victim or twenty.	

Punish the Financial Exploitation of the Vulnerable and Elderly

An aggravated identity theft statute should also provide higher penalties for those who steal from elderly or other vulnerable victims. Not only are these victims often specifically targeted by identity thieves, but they also find it more difficult to recover from identity theft.

Identity thieves find such victims to be attractive targets for a variety of reasons. Members of these groups are more likely to be socially isolated in general, which makes it less likely that they will hear about and be on guard against the latest identity theft schemes. Lack of technological savvy among older victims leaves them at a disadvantage when it comes to avoiding and detecting suspicious activity concerning their accounts. Dependence on caregivers can also open the door for unscrupulous health aides or financial advisors to steal their personal information and plunder their life savings.

The repercussions of identity theft are especially devastating to these victims when they live on fixed incomes, which makes it difficult or impossible to recoup their lost savings through new earnings. Older persons are also more likely to be targets for the most serious kind of identity theft, in which new accounts are opened in the victim's name (as opposed to exploitation of existing credit lines). This type of fraud is difficult to discover, more costly, and challenging for victims to recover losses.¹⁴

Several states, including Delaware, Illinois, Ohio, and Pennsylvania, provide for enhanced penalties for identity thieves who target the elderly or disabled.¹⁵ Elderly and disabled victims also already hold a special

status under several existing New York statutes; for example, enhanced penalties are available for physical endangerment or sexual abuse of “vulnerable elderly,” “incompetent or physically disabled,” or “mentally disabled or mentally incapacitated” persons.¹⁶ New York should extend this protection of its most vulnerable victims against predatory identity thieves.

ENHANCE THE USE OF EXISTING CRIMINAL STATUTES AGAINST IDENTITY THIEVES

Add Social Security Numbers to the List of Personal Identification Information

In addition to the crime of identity theft, New York has a related crime for defendants who unlawfully possess “personal identification information” knowing that such information is intended to be used to further a crime. The statute lists different types of “personal identification information,” including bank account numbers, mother's maiden name, and computer passwords.¹⁷ However, Social Security numbers (SSNs) are glaringly omitted from this list.

For identity thieves, a victim's Social Security number is the most versatile and important form of personal information.¹⁸ Like account numbers and computer passwords, which do appear on the list of “personal identification information,” SSNs provide easy access to bank funds, brokerage accounts, and other important and private information. In fact, SSNs are even more useful than these other types of information because identity thieves need SSNs in order to open fraudulent new accounts. And the damage resulting from the theft of a SSN is long-lasting: unlike

¹⁶ See, e.g., N.Y. PENAL LAW §§ 130.30(2), 130.45(2), 130.66(2), 260.25, 260.30, 260.32, 260.34.

¹⁷ N.Y. PENAL LAW § 190.81.

¹⁸ Thomas B. Leary, Comm'r, Fed. Trade Comm'n, Prepared Statement to Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce (Sept. 28, 2004), available at <http://www.ftc.gov/os/testimony/040928test.shtm>.

¹⁴ Lois C. Greisman, Assoc. Dir., Fed. Trade Comm'n, Prepared Statement to Senate Special Committee on Aging (July 27, 2005), available at <http://www.ftc.gov/os/testimony/050727confraudolder.pdf>.

¹⁵ DEL. CODE ANN. tit. II, § 903(c); 720 ILL. COMP. STAT. 5/16G-20(a)(1); OHIO REV. CODE ANN. § 2913.49(I)(3); 18 PA. CONS. STAT. § 4120(c)(2).

a credit card account number, password, or Personal Identification Number (PIN), a person's Social Security number is extremely difficult to change, even after its security has been compromised.

Since SSNs are not only common targets of identity thieves, but also provide the greatest opportunities for misuse, amending the crime of unlawful possession of personal identification information to include Social Security numbers will hugely enhance the value of this statute.

Allow Identity Theft Rings to Be Prosecuted as Organized Crime

Efforts to combat large identity theft rings are impaired by the inability to use existing statutes designed to take down organized criminal enterprises. In 1986, the Legislature passed the Organized Crime Control Act (OCCA) to give prosecutors stronger tools against sophisticated, well-organized criminal enterprises. These criminal rings tend to be structured so as to insulate their leaders from detection and prosecution. OCCA created the B felony crime of Enterprise Corruption to make high-level charges against the leaders of such groups possible.

By definition, Enterprise Corruption can only be used when the organization has engaged in certain specific criminal acts. This list of criminal acts includes many types of theft and fraud.¹⁹ However, the Enterprise Corruption statute was created years before legislators and the general public were even aware of anything called "identity theft." As a result, ringleaders cannot be charged with Enterprise Corruption for their identity theft crimes.

Unsurprisingly, organized crime leaders are turning to identity theft as a low-risk, high-margin criminal ac-

tivity. Surveys of actual cases reveal the level of profits to be found in organized identity theft: rings with six or more defendants cause a median loss of \$150,000.²⁰ Despite the shift toward organized identity theft rings, law enforcement is hampered by its inability to target those at the highest levels of these organizations.

Allow Related Crimes to Be Charged Along with Identity Theft in a Single Jurisdiction

A special provision in the Criminal Procedure Law gives prosecutors broad jurisdiction over identity theft, in recognition of the fact that this crime can and does frequently cross county lines.²¹ In New York, a defendant can be charged with identity theft in any county where part of the crime took place or where the victim lived, even if the defendant was not physically present in that county. However, this special provision does not extend to the crimes which nearly always accompany identity theft, such as grand larceny or criminal possession of a forged instrument.

As a result, a single defendant may face simultaneous prosecutions in two or more counties for various crimes related to an identity theft, all arising from the same criminal transaction. These redundant prosecutions are an unnecessary and inefficient drain on judicial and prosecutorial resources. In addition, the defendant has to shuttle between counties for court dates and may have to pay for private attorneys or retain assigned counsel in each county.

New York should amend the Criminal Procedure Law so that prosecutors in identity theft cases can charge *all* of the related crimes which form part of the criminal venture in their county.

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GARY R. GORDON ET AL, CTR. FOR IDENTITY MANAGEMENT AND INFORMATION PROTECTION, IDENTITY FRAUD TRENDS AND PATTERNS 26 (2007), available at http://www.utica.edu/academic/institutes/ecii/publications/media/cimip_id_theft_study_oct_22_noon.pdf.

21
N.Y. CRIM. PROC. LAW § 20.40(4)(l).

19
N.Y. PENAL LAW § 460.10(1).