

FINDING MEANING IN THE DEATH OF VIRTUAL IDENTITIES

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ABSTRACT

Historically speaking, legal fiction assumes that identity and the credentials proving identity are one and the same. It is an important fiction that allows us to access information associated with our identity and restrict others from doing the same. Crimes of identity theft are commonly manifested through the usurpation of one's credentials to falsely verify identity. Legal doctrine such as agency theory makes the assumption that identity and credentials are only transferrable together. Technology, especially the Internet, alters this fiction by allowing the creation of multiple credentials that enable access to multiple identities manifested throughout the world. The one-to-one relationship between credentials and identity is severed, thus making existing legal analogies insufficient in the virtual world. A number of these issues can be obviated by restructuring the legal fiction to embrace separate and distinct credentials and identities. This paper will discuss how the two-pronged approach applies to the death of virtual identities.

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INTRODUCTION

The concept of identity is as complex as our own sense of self. We use identity every day to confirm that we are who we say we are.² Yet, how can we define what identity is? Despite our constant use of identity in the physical world, identity is a virtual thing, impossible to empirically define.³ Philosophers use the term “identity” to denote a variety of fluid meanings including persistence, personhood and distinctiveness.⁴ Instead of diving deeply into the metaphysical, this paper will address the idea of identification as the perceptions interpreted by other individuals that uniquely identify us.⁵ This paper will refer to these identifying perceptions as *credentials*, and the entity that the credentials help to identify is the *identity*. Ordinarily, we group credentials and identity into a single, indivisible unit, failing to

² *E.g.* NYS DMV – IDENTIFICATION REQUIRED TO APPLY FOR A DRIVER LICENSE, <http://dmv.ny.gov/driver-license/prove-identity-age-permitlicense> (last visited Sept. 20, 2014); *see also* David A. Szwak, *Credit Cards in America*, 13 J. MARSHALL J. COMPUTER & INFO. L., 573, 574 (1995) (explaining how identification is fundamental to a working credit industry).

³ Zoe Bray, *Boundaries and Identities in Bidasoa-Txingundi, on the Franco-Spanish frontier* (July 2002) (unpublished Ph.D. dissertation, European University Institute) (on file with European University Institute).

⁴ *See id.* at 27.

⁵ DAVID A. WHETTEN & PAUL C. GODFREY, *IDENTITY IN ORGANIZATIONS* 19 (1998).

differentiate between the two.⁶

We consistently transfer and convey our identities to others within the framework of legal fiction.⁷ This framework is an important legal fiction that allows us to access information associated with our identity and restrict others from doing the same. For example, agency law permits a principal to transfer his identity and credentials to an agent, allowing the agent to perform tasks under the guise (and legal protection) of the principal.⁸ Legal fiction also allows for the creation of fictitious identities, such as corporations, and the transfer of their identities to the actions of others.⁹ Despite being the same physical person, our existing legal fiction shields a CEO from liability because she was acting under the identity of the corporation.¹⁰ Conversely, in situations classified as “identity theft,” only credentials are fraudulently acquired. Although the identity thief may later use those credentials to assume the identity of the victim, the victim will always retain their own identity separately and independently from the thief.¹¹ When the false assumption is discovered, the victim simply asserts his or her own identity to rebuff the thief’s actions.¹²

In order for virtual identities to be as useful as physical-world identities (as well as compatible with our traditional legal notions), credentials need to be separated from identity and made transferable from one entity to another. In a world connected by social media, a single human cannot possibly interact on an individual level with hundreds of millions.¹³ Identities created for customer service cannot

⁶ See Stephen Mihm, *Dumpster-Diving For Your Identity*, N.Y. TIMES MAGAZINE, December 21, 2003, at 42; L.A. Lorek, *Stolen Identity: Law Enforcement Can't Keep Up with Electronic-Age Crime*, SAN ANTONIO EXPRESS NEWS, Sept. 12, 2002, at 1E.

⁷ See, e.g., RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (transferring personal identities and credentials to an agent); See also *Practical Guide 8: How to Report Changes in Identify of Legal Entities*, EUROPEAN CHEMICALS AGENCY, (2010), http://echa.europa.eu/documents/10162/13643/pg_8_legal_entity_change_en.pdf (last visited Sept. 20, 2014) (Explaining how corporate identities are transferred and credentials in acquisitions).

⁸ See, e.g., RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

⁹ *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 43-44 (1900) (concluding corporations are legal creatures separate and distinct from their shareholders); See also 18 AM. JUR. 2D *Corporations* § 1 (2014).

¹⁰ *Waters-Pierce Oil Co.*, 177 U.S. at 43-44.

¹¹ See, e.g., U.S. FEDERAL TRADE COMMISSION, *TAKING CHARGE: WHAT TO DO IF YOUR IDENTITY IS STOLEN* (April 2013) at 3-4, available at <http://www.consumer.ftc.gov/articles/pdf-0009-taking-charge.pdf>.

¹² *Id.* at 13-14.

¹³ Robin Dunbar, *Neocortex Size as a Constraint on Group Size in Primates*, 22 J. HUMAN EVOLUTION 469-93 (1992) (discussing the suggested cognitive limit to the number of people with whom one can maintain stable social relationships as a value between 100-230 based on human brain size and extrapolations from primate results).