

The Shari'ah Approach to Criminalise Identity Theft

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ABSTRACT

Identity theft is one of the crimes that threaten both society and individuals. Millions of people have been badly affected by identity theft following misuse of their identities by criminals. The term 'identity theft' is used to include all illicit activities (gathering, utilising, buying selling, etc.) that target personal information (including natural and legal persons). Identity theft is not a new crime, and it has grown and become a major concern in the era of information. Around the globe, laws and regulations have been enacted and revised to accommodate the phenomenon. Based on the divine rules of Islam, the Shari'ah has its own formula and perspectives on matter such as identity theft. This paper attempts to define the term 'identity theft' and then recollect and examine some of the Shari'ah rules related to the crime in general and discuss their applicability to this insurmountable matter of identity theft so as to demonstrate solutions that can be offered to Muslim-populated jurisdiction. It is a doctrinal rather than empirical study, therefore, it attempts to explore the Shari'ah rules based on the primary sources of Islam, i.e. the Qur'an and the prophetic traditions (hadith), as well as the juristic opinions of prominent Muslim scholars. The study finds that the Shari'ah law is very resourceful with principles and theories on which laws on identity theft can be established. This paper demonstrates another area where the Shari'ah should be further explored to answer to the challenges of contemporary society. It is argued that a study such as this will positively contribute to the field of justice as it looks at identity crime from another approach and also suggests further research to help alleviate identity theft especially in the Muslim communities.

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INTRODUCTION

Identity theft is one of the crimes that threaten both society and individuals and

“unlike other crimes, victims of identity theft may not know they are victims until weeks or months after the theft has occurred” (An Australian Government Initiative, 2014). In the digital age, interests of people, especially in regard to property, are in serious danger. In traditional theft, thieves usually exercise their physical strength to commit the act of crimes. However, cybercriminals can steal millions of dollars while sitting in their divans and even without their innocent victims knowing about it. Consumer Sentinel Network Data Book highlighted an increase in the number of identity theft victims in the USA during the last 12 years (from 2001 to 2012). In 2001, for instance, the number of victims was about 137 hundred while in 2012, it was over one million (Consumer Sentinel Network Data Book, 2012). It was also indicated that about 15 million of the United States residents have had their identities used fraudulently each year resulting in an estimated loss amounting to \$50 million (www.identitytheft.info, 2014). In 2012, around 7% of those aged 16 years or older became victims of identity theft (Erika Harrell, 2013). Identity theft can result in an experience of nightmare as in case of Adrian Richards, a UK citizen who is currently liable for a £130,000 unpaid tax bill in Germany and has to hire solicitors to fight a £34,000 court order (The Telegraph, 19 Oct 2013). Mr. Richards’s passport was stolen and identity thieves used his passport to conduct unlawful activities that resulted in this debt.

As many cybercrimes are out of the scope of the traditional laws, lawmakers around the globe have responded by creating special rules that can be applied to digital crimes such as identity theft. Fortunately, the Shari’ah has come to guide mankind and solve their problems. The Holy Qur’an (Al-Hadid: 57) says, “We sent afore time Our Messengers with Clear Signs and sent down with them the Book and the Balance (of Right and Wrong), that men may stand forth in justice” (Abdullah Yusuf Ali, 2007, p. 686). The Shari’ah has its own rules (ahkam) that can be applied to all crimes regardless of the time and location. Generally, the Shari’ah is aimed at benefiting the society and individuals and its laws are designed to protect their benefits and to facilitate their lives (Kamali, 2007, p. 395). This article attempts to positively contribute to the ongoing discussion by looking at identity theft from an Islamic perspective. It starts with a clarification of the term ‘identity theft’ in its academic usage. Then, it collects and analyses some relevant Shari’ah laws and discuss their applicability to identity theft. This is followed by conclusions for the paper by giving relevant recommendations.

DEFINITION OF IDENTITY THEFT

Nabeth (2009) mentioned that the concept of identity can be approached from two perspectives: the structural and the process perspectives. In the structural perspective, identity as a representation is used as a reference to “a set of attributes (permanent or temporary) describing the characteristics

of the person in context of practical activities” such as positions. In the process perspective, identity is viewed as “a set of process relating to disclosure of information about the person and usage of this information.” Here, identity consists of elements that identify persons and link them to some authorisation such as identity cards. It is worthy to note that ‘identity’ is a term that is shared by many specialists in various fields of knowledge and thus we hear legal, social, technological and commercial identities and so forth (Sidi Mohamed, 2014).

Broadly speaking, identity theft is a term used to describe misusing identities and it is considered as one of the most known identity crimes. Therefore, various terms (e.g., identity crime, identity theft and identity fraud) have been used to describe the act of misusing identities and related information. James Blindell (2006) observes that in the USA, the term ‘identity theft’ is used to cover all types of identity crimes while in the UK and Australia, terms such as ‘identity fraud’ and ‘identity crime’ are used respectively to cover such crimes. Historically, as mentioned by Shun-Yung and Huang (2011), the term ‘identity theft’ was used to describe crimes committed against individual victims while ‘identity fraud’ is the term used to describe crimes against collective bodies such as the government and financial institutions. More recently, according to the authors, the term ‘identity theft’ is used to distinguish the act of obtaining personal identifying information and ‘identity fraud’ applied to the act of utilising such information.

The Canadian Criminal Code (R.S.C., 1985, c. C-46, s.402.2) defines identity theft by stating that, “Everyone commits an offence who knowingly obtains or possesses another person’s identity information in circumstances giving rise to a reasonable inference that the information is intended to be used to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence”. In the United States, an identity theft offender has been defined to include anyone who “knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law” (Newman, Megan, & McNally, 2005, p. 1).

Academically, Mohamed Chawki and Mohamed S. Abdel Wahab (2006, p. 2) define the ‘term identity’ by stating that “Identity theft occurs when someone uses or exploits the personal identifying information of another person such as: name, social security number, mother’s maiden name, ID number, etc...to commit fraud or engage in other unlawful activities. The OECD Ministerial Meeting on the Future of the Internet Economy in Seoul (2008, p. 12) described how identity theft is committed by the criminals: “ID theft occurs when a party acquires, transfers, possesses, or uses personal information of a natural or legal person in an unauthorised manner, with the intent to commit, or in connection with, fraud or other crimes.”

In general, the above definitions include common key elements such as the object of identity theft (data or information), the acts (acquiring data, using or manipulating it, etc.), mental elements (obtaining and using information, etc.) and missing authorisation from the victim. The four mentioned elements “are required for the development of a criminal law provision in defining the structure” (Gercke, 2011). Thus, identity theft is an umbrella term used to place together many offences pertaining to identity (Zulhuda, 2012). For the purpose of this paper, ‘identity theft’ is used to include collecting personal information in illegal ways, misusing identities (manipulation, forgery, etc.) and using them in various unlawful ways.

Identity Theft Toolkits

Lawson mentioned that identifying information can be obtained through victim’s negligence and deception, third party public disclosure and third party negligence or deception (Lawson, 2011). These tactics range from very simple ways such as theft of wallets, documents, dumpster diving, shoulder surfing, listening to oral disclosures of personal identity, to more sophisticated methods such as phishing, pharming, and using hacking and malicious software in which the perpetrators utilise high technology devices to commit their offences (Almerdas, 2007). Some of these tools seem to be unlawful (haram) in the Shari’ah perspective because they either contravene specific laws such as theft, spy and privacy (secret

laws or general laws such as prohibition of oppression and harming or causing damage to others’ property, as will be discussed in the later section of this paper.

Purposes of Identity Theft

Identity crime is committed for different purposes. For example, criminals can engage in illegal activities such as selling personal information to other criminals, accessing and using their victims’ credit or debit cards and taking over their existing accounts or opening new bank accounts, obtaining a passport or other identity documents in someone else’s name, obtaining government benefits and services using the victim’s name, concealing their identities while travelling illegally, smuggling drugs, engaging in money-laundering, terrorism or other crimes, misleading law enforcement or court officials by directing them to the wrong persons, etc. (ICCLR, 2011).

IDENTITY THEFT FROM THE SHARI’AH PERSPECTIVE

Protecting individuals’ interests and benefits is the main objectives of the Shari’ah, as evidenced from Islamic resources including the holy Qur’an (Kamali, 1991, p. 395). The Shari’ah rules can be applied to all matters including identity theft in the digital age as the rules provide general and specific guidelines for all offences regardless of time and place (Ahmed Vathi, n.d., p. 36). Laws of Shari’ah (ahkam shar’iah) can be divided into two categories; defining law (al-Hukm

al-Taklifi) and declaratory law (al-Hukm al-Wad'i) and each has different types. The former can be defined as "a locution or communication from the Lawgiver addressed to the mukallaf which consists of a demand or of an option" whilst the latter is "communication from the Lawgiver which enacts something into a cause (sabab), condition (shart) or a hiderence (mani^c) to something else" (Kamali, 1991, pp. 323-325).

Prohibition of theft by the Shari'ah can be taken as an example of defining laws and theft punishment can be given as an example of declaratory laws (Khallaf, n.d., pp. 100-103). In this regard, it can be argued that the Shari'ah protects identities not only through general rules, but also by relying on specific rules (ahkam) and regulations. Laws on theft, forgery, fraud, spying and disclosure of secrets, in addition to sanctity of property are applicable to at least some forms of identity theft. In addition, other Shari'ah laws such as the sanctity of houses, sanctity of man's honour, prohibition of spying and prohibition of disclosure of secrecy could also be employed to curb identity theft in the digital age. The following are some examples of the Shari'ah laws that can arguably be applied to identify them.

Information Theft

Interestingly, under the Shari'ah, theft is one of the most serious crimes in Islam as it falls under the hudud crimes. In Islam, theft consists of infringement of property and privacy of others. Normally, property

is protected by imposing a heavy penalty on the thieves. The Qur'an (al-Maeda: 38) reads, "As to thief, male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in Power, Full of Wisdom." Likewise in one authentic narration, the Messenger of Allah (PBUH) said, "May Allah curse the thief who steals an egg for which his hand is cut off, or steals a rope for which his hand is to be cut off" (Ibn Hajar al-Asqalany, 2003, p. 461).

The term 'theft' is known as '*sariqah*' in Arabic, which means the act of taking or appropriating something in a secret way or without the permission of the owner. It includes taking objects and other things such as hearing speech, as the Qur'an (*Al-Hijr*: 18) says, "But any that gains a hearing by stealth, is pursued by a flaming fire, bright (to see)." Meanwhile, Ibn Rushd (1981) defines theft as "...taking the property of others in a secret way without being in his trusteeship." Likewise, 'Abd Allah Ibn Mahmud (n.d.) mentions the following definition; "*Theft is the act of taking a sound-minded adult secretly a certain storing amount of money or its value, belonging to others, without a valuable reason*" (in other words, without having a reason to believe that such property is lawful for him).

It can be learned from these definitions that theft under the Shari'ah consists of taking the property or possession of others without their permission in a specific manner. Additionally, these definitions contain some conditions related to criminals

and conditions related to property. These conditions are important as they distinguish thefts from other financial crimes such as usurpation (*Ghasb*), embezzlement, (*Al-Ikhtilas*), breach of trust (*Al-Khiyanah*) and so forth.

Once these strict requirements are met, as well as all strict evidentiary conditions are fulfilled and the accused is found guilty by the court for committing theft, the punishment for the thief is the amputation of the right hand.

Does Identity Theft Qualify for Theft Liable for Hudud punishment?

In order to apply theft laws to identity theft, however, one needs to examine whether all the required conditions for theft are present on the occurrence of these crimes. As mentioned above, identity theft includes stealing personal information and utilising this information and each one will be examined in the light of the Shari'ah law.

a. Stealing Personal Information

Cybercriminals can gain information on someone's identity in many ways. Here, the focus is on stealing personal data under the perspective of the Shari'ah. According to Ibn Rushd, the majority of scholars are unanimous that stealing valuable property which can be bought and sold, subjects the thief to the hadd punishment. Thus, the question here is the personal information valuable property in the eyes of the Shari'ah. Can personal information be bought and sold?

Without any doubt, in this digital age, information becomes essential and valuable because "the data...has a very real, commercial value - possession of data itself is every bit as important as possession of physical real estate or capital good" (Barrett, 1997, p. 16) and people use the information in their daily lives. Having said that information is a valuable possession does not necessarily mean that stealing it is a theft under the Shari'ah because wine and pigs are valuable but stealing them is not considered a theft, which is liable for hadd punishment. In other words, the commercial value of information is only one of the conditions required in the stolen thing. Can personal information be bought and sold? Under the Shari'ah perspective, for instance, the object (goods) that can be bought or sold has to be a pure and beneficial thing that can be handed to the new owner (Shaikh Khalil, 1981).

Additionally, dealing with information as an asset is only a new occurrence in this digital age and for that reason, it is missing from traditional Islamic discussions. Nevertheless, another issue related to stealing information has been cited by Islamic jurists. It is the issue of stealing books including Qura'nic and *fiqh* books. In this regard, the Hanafi school, for instance, says that stealing Qur'anic and *fiqh* books does not subject the thief to theft punishment because the books are usually kept for reading and the letters do not have financial values (Abdallah Ibn Mahmud, n.d.). However, other scholars are of the opposite view. For example, the Maliki

school viewed stealing Qur'anic or *fiqh* books as a theft. This opinion was justified by arguing that stealing things which can be sold is a punishable theft (Abd Al-Wahhab, 1997).

It is noteworthy to mention here the opinion of a contemporary Islamic jurist, Dr. Yusuf al-Qaradawi, about stealing information. Al-Qaradawi (2011), when asked about stealing protected information, is of the opinion that information is not a property even though it may have great value and thus, stealing it is not a conventional theft or in other words, stealing information is not a theft in the terminology of Islamic jurists. It seems that Al-Qaradawi has been influenced by the Hanafi school of thought. It is arguable that the opinion of al-Qaradawi is a justifiable opinion because the general rule of Shari'ah, as explained before, provides that *hudud* must be abandoned in the event of doubt or uncertainty. Thus, bearing in mind that the term 'personal information' includes different types and in the light of the above, one can come to the conclusion that stealing personal information may not be a punishable with the *hadd* punishment because the nature of the stolen subject matter is not clear.

b. Using Stolen Information to Commit Theft

Stolen information can include financial information such as credit card information, passwords and physical ATM cards, and such information may enable criminals to access victims' existing accounts, transfer

money from victims' accounts to another, buy goods online, etc. These activities are absolutely forbidden by the Shari'ah because they infringe the sanctity of the property of others.

By analogy, Islam has announced that it is illegal to enter the houses of others without permission even though the houses are empty (The Quran, An-Nur: 27). The point being highlighted here is that the financial accounts of others are important personal information that must be protected. In the light of the rules relating to theft, accessing accounts without transferring money cannot be considered as a theft. It is like accessing the physical store or place of property and it is known that one of the conditions of theft is to bring the property out of its store or safe place. The jurists state that if the thief enters the place and takes the property but it is taken from his hands before he exits, it will not amount to the crime of theft which is liable for *hadd* punishment. It is submitted that the same rules can be applied to cybercriminals who misuse personal data to access others' accounts without permission or authority; though there may be no theft, such unauthorised access of information itself is wrong and can amount to a *ta'zir* punishment.

In another scenario, cybercriminals can commit further crimes such as transferring money from the victims' accounts to another account. In this case, the criminals can be considered thieves and can be punished by the prescribed punishment if all other conditions are fulfilled. To illustrate this,

theft rules can apply to anyone who takes respected property secretly from its proper place which he enters without permission if all other conditions are fulfilled. Careful examination of these crimes can lead one to conclude that the definitions of theft in Shari'ah can apply to them if all other conditions are fulfilled. On this particular issue, Al-Qaradawi (2011) commented that stealing money from banks by using information such as number on cards and password is a complete theft because all conditions of theft are fulfilled.

FRAUD AND FORGERY IN THE SHARI'AH PERSPECTIVE

Fraud is another part of the Shari'ah criminal law that can be applied to identity theft. According to Ibn al-Arabi (1998), fraud (al-ghish) is derived from the Arabic word 'al-ghashash' which means muddy water as a fraudster usually mixes good and bad quality and hides the reality. He added that all Islamic jurists unanimously agreed that fraud is forbidden by the Shari'ah because it contradicts the obligation of giving advice. It is narrated by Imam Muslim that the Prophet (P.B.U.H) said, "A person who takes up arms against us in not one of us and likewise the one who cheats us is not one of us" (Imam An-Nawawi, 1984, p.770). Undoubtedly, identity theft includes fraud because the criminals fraudulently use victims' identities to obtain goods or services. Phishing is also another manifest of fraudulent act that criminals employ to collect information, as explained before.

Other than fraud, forgery law is also relevant to the crime as identity criminals do expand their illegal actions to manipulate documents or create forged documents. Forgery is "the crime of copying a document, signature, painting, etc. in order to deceive people" (Oxford Wordpower, 2006, p. 309). Similarly in Arabic, the term tazwir (forgery) means to falsely create or say something in order to deceive others (Butrus Al-bustani, 1987). From the Shari'ah point of view, forgery is one of the major sins that are forbidden by the Shariah. The Holy Qur'an (Al-Hajj: 30) states, "...and shun the word that is false." Closely connected to the above, the Shari'ah forbids perjury or false testimony and counts it among the major sins. False testimony is derived from 'al-zur' which according to Imam al-Nawawi (1323H) is disguising falsehood and making it like truth. In fact, "identity thieves can use personally identifiable information to create fake or counterfeit documents such as birth certificates, licenses, and Social Security cards" (Finklea, 2014) and thus, the Shari'ah law of forgery can be employed to combat identity theft.

LAWS OF SPYING AND DISCLOSURE OF SECRECY

Identity thieves employ highly sophisticated methods such as phishing, pharming, and using hacking and malicious software to unlawfully collect personal information (Suhail Almerdas, 2007). Cyber trespass and hacking seem to be illegal (haram) in the eye of the Shari'ah because they

infringe the well-known Shari'ah rules such as infringement of the sanctity of others' property and prohibition to encroach and spy on others.

Spying

Regarding spying rules, the Shari'ah forbids spying and infringement of the sanctity of other people as the Holy Qur'an (Al-Hujuraat: 12) says, "O you who believe! Avoid much suspicions, indeed some suspicions are sins. And spy not, neither backbite one another..." Similarly, the Prophet s.a.w said, "Beware of suspicion, for suspicion is the worst of false tales. Do not look for other's faults. Do not spy one another" (An-Nawawi, a. P. 1185-6). According to Muslim jurists, spying (al-tajassus) is looking for private information and everything that is kept in secret. Furthermore, spying is an unlawful activity regardless of the means that are taken in doing it. It includes spying on people through doors, as well as using new technology (Hasan Al-Ghafiri & Muhammad Al-Alfi, 2007).

By analogy, cyber trespassing and hacking are akin to spying; hence, one can say that doing so is breaking the rules because cyber-intruders and hackers usually rummage into the victims' computers or computer systems to find secrets and private matters such as financial or personal information and this is exactly what a spy does. For instance, gathering information in a secret way such as installing software programme in the victims' computer to

intercept communication and listening to oral disclosure of personal information could be considered as spying from the Shari'ah point of view.

Rule of Secrecy

In the Shari'ah point of view, keeping secrets is a vital matter. As an illustration, it is narrated that Anas (one of the Prophet's companions) said, "The Prophet (PBUH) came to me while I was playing with the boys. He greeted us and sent me on an errand. This delayed my return to my mother, when I came to her, she asked, "What detained you?" I said; "Allah's Messenger sent me on errand." She asked, "What was it?" I said it's a secret. My mother said; "Do not disclose to anyone the secret of Allah's Messenger." Anas said to Thabit: "By Allah, were I to tell it to anyone I would have told you" (An-Nawawi, p. 596-7). This authentic hadith indicates that keeping a secret was an essential matter in the early Muslim society. The jurists say that keeping secrets includes all things such as secret information, private matters, conversation, correspondence and so forth (Ahmad Ibn Ghunim, 1997). Since identity thieves are working under the table, it is arguable that the rule of secrecy could apply to their activities, at least in some instances.

SANCTITY OF PROPERTY AND IDENTITY THEFT

Regarding the sanctity of property, the Messenger of Allah said this when He was delivering the final sermon on the day of

An-Nahr (the sacrifice) in Makkah, “Your blood, your property, and your honour are sacred to you all like the sacredness of this day of yours, in this city of yours and in this month of yours” (Al-Imam An-Nawawi, 1998). This authentic hadith shows how the Shari’ah respects and protects property from any interference.

Additionally, identity theft is considered an act of aggression and mischief against the property of others which is forbidden by the Shari’ah as stated on the Qur’an (*Al-Baqarah*: 188), “And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that you may eat up wrongfully and knowingly a little of (other) people’s property.” As Ibn Juzay (1430H) mentioned, aggression against property encompasses four kinds of unlawful actions: (1) taking property away without the owner’s permission, (2) taking advantage of property, (3) destroying property, and (4) spoiling property completely or partially or making it less beneficial. It is argued that identity theft can be considered an aggressive activity against property as it includes the four elements of aggression. For instance, identity criminal can take over existing accounts, documents, services, etc., and use them without permission or even with the victims’ knowledge.

CONCLUSION AND RECOMMENDATIONS

The discussion reveals that identity theft has become a major challenge in the information age as it is a menace to all

societies regardless of age, position or location. Different preventive measures have been employed to tackle the crime. In some countries, identity theft is a stand-alone crime, while in others, it is “covered by a multitude of rules including unlawful access to data, fraud, forgery, and intellectual property rights, etc” (OECD, 2008). From the Islamic perspective, identity theft is a crime that can be treated by various Shari’ah principles and rules, as explained above.

The Shari’ah principles relating to the law of theft is applicable to identity theft in different scenarios as in cases of account takeovers which “occur when an unauthorized party gains online access to an existing bank account by stealing the access credentials to the account and then conducts illegal transactions” (Castell, 2013). Where all the strict conditions of theft are fulfilled, the prescribed *hadd* penalty (*Haddu al-sariqah*) can then be imposed. On the contrary, if any of the requirements of *hadd* is not fulfilled, the discretionary penalty (*Ta’zir*) is then applicable.

It was also pointed out that fraud and forgery laws can be cited as evidence of criminalising identity thefts from the Shari’ah perspective. Forgery and fraud are usually part of the identity thieves and are also unlawful (*haram*) under the Shari’ah law and for that reason they can be used to combat identity theft. Interestingly, forgery and fraud are discretionary crimes which have no specific punishment and falls under *ta’zir* crimes. It means that the Shari’ah

gives courts or lawmakers the freedom to impose a suitable penalty for the crime.

Other Shari'ah laws such as rules on spying, disclosure of secrecy and protecting of property are relevant to identity theft, as explained above. Therefore, the Shari'ah approach can be adopted to combat identity theft in the digital age as the conventional approach seems to be ineffective in dealing with the phenomenon.

However, it is not the scope of this article to look at how these Shari'ah rules are being implemented in the courts of various jurisdictions, which is a natural follow-up that deserves another research of more empirical nature. Nevertheless, this article recommends that countries with a Muslim community adopt the Shari'ah approach in dealing with identity thefts as the Shari'ah establishes general and flexible rules that can be applied to various crimes related to information-related offences. For instance, the Shari'ah punishment is characterised by the ease of implementation and the power of deterrence (Ahmad al-Raisoni, 1999). With the correct understanding of Islam and the Shari'ah, it is strongly believed that adopting the Shari'ah approach to identity theft will help protect individuals in the society from becoming victims and deter potential criminals from committing the crime of identity theft.

Apart from that, steps can be taken to enact and create special laws (based on the Shari'ah) that deal with identity thefts and digital crimes in general. This recommendation was initially suggested by some researchers who urged for creation

of comprehensive identity crime offenses that cover identity theft and identity fraud (Commonwealth of Australia, 2008). It is believed that such specific laws are necessary particularly in countries that do not have computer crime acts. This special law can be a multipurpose tool. On one hand, it would enable law-enforcement bodies to prosecute identity criminals and on the other hand, it would help to create public awareness of identity crimes.

In addition, raising awareness among the legal fraternities and public about this type of crimes is also essential because there is a real need to sensitise the public to the problem of identity crime and its grave consequences. In the digital environment, people are willing to share everything including personal information and the criminals, as said, wait in ambush. Therefore, educating people about the consequences of identity crime and warning them that their personal interests could be in danger would lead them to be extra careful with their identity information and consequently protect themselves from identity theft.

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