

The Value of Identity

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Sarah Dadush, *Identity Harm*, 89 **U. Col. L. Rev.** __ (forthcoming, 2018), available at [SSRN](#).

You're the kind of person who cares about protecting the environment, improving working conditions for the poor, and achieving sustainable growth. Indeed, your identity as a socially-conscious consumer is so important to you that you are often willing to pay more for a product if it is sold by a company who claims to share your values, to reflect the kind of person you want to be in this world. Attracted by this premium, more and more companies are making sustainability promises to target such consumers through commercials, print and electronic advertisements, and product labeling (often employing third-party certifications) to signal to the consumer that its products align with the consumer's values and identity as a socially- and environmentally-conscious global citizen.

So what should happen when you find out that you were duped—that the “clean diesel” car you bought because it was advertised as being “low on emissions” actually pumped into the environment 10-40 times the nitrogen oxide pollution allowed by law (as in Volkswagen's “Dieselgate” scandal), or where the clothes you purchased at a premium because they came affixed with a “Good Working Conditions” label were actually made in sweat shops, or where the expensive “Fair-trade” chocolate you bought for your daughter was made with the labor of beaten and enslaved children? What harm have you suffered, and what remedies, if any, should be available for your unintentional support of a system of production that polluted the environment, exploited workers, and enslaved children—practices that go against your very identity as a person?

The traditional answer is simple and straightforward: if the wrongdoer's broken promise caused you economic harm, the wrongdoer should compensate you for that harm by putting you in the position you would have occupied but for the wrong. So, for example, if the \$25,000 car you were driving yesterday is practically worthless today (which is what happened in the United States when Volkswagen's fraudulent “Dieselgate” scheme was revealed), a court would require the wrongdoer to pay compensatory damages of \$25,000. But is this the only type of harm you have suffered? Have you not also suffered from a sense that your identity as a socially-responsible consumer has been compromised when you were induced, through another party's promises, lies, and misrepresentations, to buy or use a product that harms the environment or other human beings against your will?

According to Professor [Sarah Dadush](#) in her wonderful article *Identity Harm*, the answer is a resounding “yes.” (“Financial loss is not the only dimension along which harm is experienced, nor is it the only dimension along which harm should be measured.”) In this important and timely article, which is the first in a proposed series, Professor Dadush makes a significant contribution to remedies by introducing the concept of identity harm, along with a conceptual framework for recognizing such harm where it occurs. Indeed, I was fortunate to have been at a conference recently in which Professor Dadush argued persuasively that courts should be more willing to recognize identity harm, a type of non-economic harm that may be “generated when, as a result of a company's unsubstantiated or broken sustainability promises, a disconnect materializes between a person's idea of who they want—and try—to be in the world, and who they have unwittingly been made to be in the world.” These harms, which are felt most

acutely by socially-conscious consumers (i.e., “those who care not just about the physical or price attributes of a given product, but also its environmental and social-humanitarian impact”), may “arise[] upon discovering one’s unwitting complicity in a scheme that hurts other beings” or harms the planet in a way that is contrary to one’s own values—contrary, in short, to the consumer’s identity, to the way in which the consumer sees itself situated in the world as a socially-conscious and responsible person.

Professor Dadush is no mere idealist, however. She recognizes that, unlike economic harm, which can easily be measured by the market (as in the Volkswagen example discussed above), identity harm is non-economic and subjective by nature, which makes it difficult to measure in practice. Further complicating the picture are two additional factors: first, that identity harm is “intimately connected to the injury experienced by a *third* party—a fellow human being or the planet, as a result of poor (or outright bad) corporate sustainability practices,” and second, that the amount of harm suffered is “not necessarily correlated to the dollar amount paid for the offending product.” Therefore, when it comes to measuring identity harm, the *economic* harm suffered by the *consumer* is but a poor proxy (at best) for estimating such damages. Indeed, it is conceivable (perhaps even likely) that a consumer may experience more identity harm upon learning that the \$1.30 she spent on a chocolate bar helped support a system of child slave labor than she would have experienced upon learning that the \$25,000 car she purchased polluted the environment.

The difficulty in measuring this type of harm, of course, makes it no less real, although it does pose some practical problems. How can we measure the victim’s harm if it is subjective by nature? What if the victim is faking his or her harm? These concerns, though real, are far from fatal. Courts have dealt with these types of problems before, and have developed a number of tools for measuring non-economic harm in a whole host of circumstances, ranging from pain and suffering to dignitary harms to emotional distress to harm to one’s reputation. The problem of measuring identity harm, though challenging, is no different. For instance, Professor Dadush cleverly proposes that the identity harm suffered by “Dieselgate” victims might best be captured not by the diminished resale value of their cars, but by “the lost greenness” of their purchases. This harm, in turn, could be measured by looking at how many miles each car owner drove, “calculating the above-what-was advertised and the above-what-was legally-permitted-in-their-state emissions,” and then attaching a price to these additional emissions, which “could then be used as the benchmark for damages that would eventually be placed into a climate mitigation fund.” (P. 57.)

Indeed, Professor Dadush makes a persuasive case that courts are already identifying and measuring such harm, albeit in a poorly-conceptualized, haphazard manner (my words, not hers). To show this, Professor Dadush engages in a thoughtful discussion of several recent cases in which courts have struggled with this concept. Although she concedes that [some courts](#), for dubious reasons, have [refused to allow](#) actions for such harms to proceed (see her discussion of the [Chocolate](#) cases (pp. 31, 33)), other courts have been more receptive to such claims (see her discussions of *Kaksy v. Nike* and the “Dieselgate” victims, both of which resulted in settlements that recognized and remedied such harm, although only “collateral[ly] and incidental[ly]”), a trend that seems well-positioned to grow in the future (see her fascinating discussion of *Nemet v. Volkswagen Grp. Of Am., Inc.*, a case currently pending in the Northern District of California filed by plaintiffs who sold their polluting VWs *before* the scandal broke, thereby suffering only indirect, non-economic losses.) As courts and litigants continue to struggle with this rather new but important concept, they will find Professor Dadush’s thoughtful conceptualization and analysis of identity harm to be indispensable. I know I have.

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