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## Identity Harm

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# IDENTITY HARM

SARAH DADUSH\*

*In September 2015, the world learned that Volkswagen had rigged millions of its “clean diesel” vehicles with illegal software designed to cheat emissions tests. Contrary to what had been advertised, the vehicles are anything but clean. When affected owners learned that their cars were toxic, what were they most upset about? Was it that their cars were now worth fewer dollars? Or that they had been deceived into being hyperpolluting drivers, when they thought they were being green? Coverage of the emissions scandal strongly suggests that affected car owners experienced both kinds of disappointment, economic and noneconomic, and in heavy doses at that. But while the first kind of harm is relatively easy to recognize and address, this Article shows that our protective regime is ill-equipped to shield consumers from the second, a kind of “identity harm.” Identity harm refers to the anguish experienced by a consumer who learns that her efforts to consume in line with her personal values have been undermined by a business’s exaggerated or false promises about its wares. While a range of (broken) promises can elicit identity harm, this Article focuses on a particularly important and fast-growing category of promises pertaining to environmental and social sustainability. As the first in a series on the subject, this Article introduces identity harm and argues for its deeper legal recognition.*

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\* Associate Professor, Rutgers Law School. I am deeply grateful to Afra Afsharipour, Julian Arato, Kevin Davis, Erika George, Steve Gold, Alan Hyde, David Noll, Kish Parella, Dennis Patterson, James Pope, Pamela Quinn, Louis Raveson, Jacob Russel, Anthony Sebok, Jodi Short, David Troutt, Charles Yablon, Ekow Yanka, the participants of the Business and Human Rights Scholars’ Conference (2016 and 2017), and the participants of Brooklyn Law School’s International Business Law Scholars Roundtable (2016) for their invaluable comments and insights. Thanks also to Alyssa Conn and Timothy Machat for their outstanding research assistance.

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## INTRODUCTION

In September 2015, the world learned that Volkswagen had rigged millions of its “clean diesel” vehicles with illegal software designed to cheat emissions tests.<sup>1</sup> Tests carried out without the cheat device revealed that the cars emit up to forty times the legal limit of polluting nitrogen oxides.<sup>2</sup> The fraud, which some have taken to calling “Dieselgate,” lasted for over seven years.<sup>3</sup> When affected owners learned that their cars were much more toxic than advertised, what were they most upset about? Was it that their cars were now worth fewer dollars? Or was it that they had been deceived into being bad

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1. Partial Consent Decree at 1–5, *In Re Volkswagen “Clean Diesel” Mktg., Sales & Prod. Liab. Litig.*, MDL No. 2672 CRB (N.D. Cal. Sept. 30, 2016), <https://www.epa.gov/sites/production/files/2016-10/documents/amended201partial-cd.pdf> [<https://perma.cc/WH52-ER8G>] [hereinafter First Consent Decree].

2. Guilbert Gates et al., *How Volkswagen’s ‘Defeat Devices’ Worked*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html?mcubz=0&r=0> [<https://perma.cc/6EX7-24JD>].

3. *VW Scandal: Company Warned Over Test Cheating Years Ago*, BBC (Sept. 27, 2015), <http://www.bbc.com/news/business-34373637> [<https://perma.cc/2VPV-KSEN>].

global citizens, when they thought they were being good?

News coverage of the scandal and the resulting litigation strongly suggest that affected car owners experienced both kinds of disappointment, economic and noneconomic, and in heavy doses at that. But while the first kind of harm is relatively easy to recognize and address, our protective regime is ill-equipped to shield consumers from the second, a kind of “identity harm.” I define identity harm as the anguish experienced by a consumer who learns that her efforts to consume in line with her personal values have been undermined by a business’s exaggerated or false promises about its wares. While a range of promises can elicit identity harm (e.g., organic, animal cruelty-free, Kosher, Made in the U.S.A., etc.), I focus on a particularly important and fast-growing category of promises pertaining to environmental and social sustainability. Here, identity harm arises when a consumer learns that a purchase made her unwittingly complicit in hurting another human being or the planet.

Dieselgate draws attention to the hybrid harm that can be experienced by consumers whose product expectations extend beyond price and safety to include concern for the well-being of the planet and its inhabitants. Conscious consumers are those who care not just about the physical or price attributes of a product but also its environmental and social impact. They make purchases that reflect their sustainability values, their idea of who they want to be in the world, their identity. Given their hybrid expectations, conscious consumers are particularly vulnerable to identity harm brought about by false or overstated sustainability claims. This Article argues for upgrading our protective regime to more fully recognize and address identity harm.

Identity harm is situated against the backdrop of an ever-expanding “market for virtue.”<sup>4</sup> Here, increased conscious consumer demand is met by a dizzying uptick in the provision and marketing of sustainable goods. Today, walking down a supermarket aisle, consumers are virtually assaulted by environmental and social sustainability claims. These claims—or promises—deliberately target conscious consumers and attach to an ever-widening array of products, including coffee,

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4. DAVID VOGEL, *THE MARKET FOR VIRTUE* (2005) [hereinafter VOGEL, *MARKET FOR VIRTUE*].

chocolate, apparel, house cleaning appliances, cell phones, diamonds, and cars.

In principle, greater consumer interest in and demand for sustainable goods should generate higher financial returns for responsive companies, and, down the line, improve the prospects for a greener, better world. The problem is that, as the market for virtue expands, so too does the temptation for companies to make and then break sustainability promises. Such dynamics greatly increase the risk that conscious consumers' expectations will be exploited and that they will be exposed to identity harm.

As things stand, businesses have too much discretion to make and profit from unverifiable claims about their sustainability performance and too little accountability if their claims turn out to be false or exaggerated. This carries a real cost for society as it breeds distrust in the marketplace and in the bodies charged with regulating it. When trust is shaken, as it was with Dieselgate, disappointed consumers can be deterred either from entering or remaining in the market for virtue; this in turn reduces the pressure on corporations to improve their sustainability performance and dampens the prospect for achieving global sustainability objectives.

Because most consumers remain generally indifferent to sustainability promises—kept or broken—the market cannot be expected to police these promises. In such situations, government should pick up the regulatory slack. However, official sustainability-related legislation and regulation are often lacking, particularly with respect to the conduct of transnational corporations overseas. Furthermore, domestic protective bodies such as the Federal Trade Commission (FTC), the Environmental Protection Agency (EPA), and the offices of state attorneys general face serious political and resource restrictions that limit their capacity to intervene in all but the most extreme cases of corporate misconduct—e.g., Dieselgate.<sup>5</sup>

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5. The EPA in particular is seeing its intervention capacity restricted under the Trump administration, a development that only increases the onus on consumers (and investors) to activate. Brady Dennis, *Trump Budget Seeks 23 Percent Cut at EPA, Eliminating Dozens of Programs*, WASH. POST (Feb. 12, 2018), [https://www.washingtonpost.com/news/energy-environment/wp/2018/02/12/trump-budget-seeks-23-percent-cut-at-epa-would-eliminate-dozens-of-programs/?utm\\_term=.b07de7a989f7](https://www.washingtonpost.com/news/energy-environment/wp/2018/02/12/trump-budget-seeks-23-percent-cut-at-epa-would-eliminate-dozens-of-programs/?utm_term=.b07de7a989f7) [<https://perma.cc/JL9P-5EXL>]; Coral Davenport & Hiroko Tabuchi, *E.P.A. Prepares to Roll Back Rules Requiring Cars to Be Cleaner and More Efficient*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com>

There is also reason to be skeptical about the effectiveness of self-regulation since corporate and industry commitments to sustainability tend only to be voluntary, and so not legally enforceable.<sup>6</sup> Indeed, while soft commitments have significant normative power, they leave a lot to be desired with respect to accountability.<sup>7</sup> Given that government regulation and company self-regulation inadequately address the environmental and social-humanitarian issues arising in “industrial life,”<sup>8</sup> other sources of accountability must be developed. Consumers have an important role to play here: their demand can fuel the supply of sustainable goods, and they can bring legal claims against promise-breaking companies. By empowering consumers to act more effectively as “civil regulators”<sup>9</sup> of corporate sustainability promises, identity harm can help to close some of the protective gaps left open by public law and self-regulation.

This Article, the first in a series, proposes adding identity harm to the consumer protection arsenal by equipping aggrieved consumers with a clearer vocabulary with which to formulate and assert legal claims. Rather than create a new cause of action or advocate for statutory reform, the idea at this

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/2018/03/29/climate/epa-cafe-auto-pollution-rollback.html [https://perma.cc/B9SB-RNEJ]; Hiroko Tabuchi, *Calling Car Pollution Standards Too High, E.P.A. Sets Up Fight with California*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/climate/trump-auto-emissions-rules.html> [https://perma.cc/LAW7-X4BU]

6. Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 L. & POL'Y 363, 405–06 (1997) (showing that, while self-regulation can go far to reduce the negative externalities of “industrial life,” it is most successful when paired with responsive public regulation).

7. See, e.g., Kenneth Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. OF INT'L L. 501, 503–13 (2009); Natalie Bridgeman & David Hunter, *Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism*, 20 GEO. INT'L ENVTL. L. REV. 187, 188–92 (2008).

8. Gunningham & Rees, *supra* note 6.

9. VOGEL, MARKET FOR VIRTUE, *supra* note 4, at 9 (“[Civil regulation is] an effort to fill the governance gap between the law and the market. . . . [It] constitutes a ‘soft’ form of regulation in that it does not impose legally enforceable standards for corporate conduct. By applying pressure directly to companies, activists and organizations seek to foster changes in business practices that national governments and international law are unlikely or unwilling to bring about.”). And, to the extent that the expansion of public authority appears unlikely or not politically feasible, civil regulation “represents a second-best alternative.” *Id.*

stage is to incorporate identity harm into existing statutes and bodies of law, including consumer, contract, and tort law. Specifically, identity harm can be used to expand the range of corporate practices considered to be unfair or deceptive, and create openings for remedies that look beyond financial compensation to include reparations. Identity harm offers a conceptual container for a special type of noneconomic injury that is currently too easy for courts to miss. Having this container should make it easier for plaintiffs and judges to recognize and redress identity harm, which will eventually thicken corporations' commitments to sustainability.

There are several obstacles to pursuing a consumer-led corporate accountability path. These obstacles can be mapped onto two key characteristics of identity harm. First, identity harm is *psychic*, which makes it difficult to detect and measure. Second, identity harm is *derivative* in that it stems from injuries suffered by other humans or the planet, injuries in which the consumer became implicated transactionally, through her purchase. The problem with identity-harming products is therefore not only, or even necessarily, economic. Furthermore, the depth of identity harm can bear little to no correlation to the price paid for the offending product. Rather, it depends on the not easily monetized gap between what was promised or expected, and what was delivered. The psychic and derivative characteristics of identity harm make it challenging to recognize and redress. Nevertheless, identity harm is real and, as such, deserving of legal attention.

Identity harm is generated by a special type of commercial betrayal that undermines consumers' freedom to choose to do no (or less) harm in the world. This freedom is precious in today's America, and deserves to be vigorously protected. Full legal recognition of identity harm would bolster consumers' autonomy to shape their commercial selves in accordance with their personal values and protect their freedom to choose not to be implicated in social-environmental abuses.

The analysis proceeds in three Parts. Part I describes the rise of conscious consumerism and the emergence of the market for virtue in order to provide context for identity harm. It also discusses some of the concerns with relying on privileged Western consumers to advance global sustainability objectives. Through a discussion of the relevant caselaw, Part II sets out the key characteristics of identity harm and draws attention to

some of the challenges involved with recognizing and redressing it. These challenges are discussed in greater detail in Part III, which also offers an initial sketch of a remedies framework for identity-harmed consumers. To be made whole, aggrieved consumers need offending companies to make good on their sustainability promises. Remedies should therefore center on injunctive and equitable relief, rather than compensatory damages. Focusing on reparations-oriented remedies can also assuage concerns that identity harm will generate frivolous lawsuits.

## I. CONTEXTUALIZING IDENTITY HARM

This Part provides a context for identity harm, situating it within the expansion of what David Vogel refers to as the market for virtue. It is against this backdrop that the risk to conscious consumers of exposure to identity harm is magnified. This Part also responds to the “citizen-consumer” critique, which is concerned with the antidemocratic effects of expressing one’s values through shopping decisions, rather than through more political (or creative) modes of self-expression. It further seeks to address concerns about counting on affluent Western consumers to serve as a stand-in for the planet and for the voices of exploited workers in poorer parts of the world.

### A. *Conscious Consumerism and the Market for Virtue*

The rise of conscious consumerism is essential for understanding identity harm.<sup>10</sup> The phenomenon is traced through a large volume of academic scholarship, market surveys, and investments trend reports.<sup>11</sup> It can also be traced

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10. The terms “conscious” and “ethical” consumption are often used interchangeably in the literature; however, as the latter tends to have religious overtones, I opt for the former. Johnston explains the distinction between consumption and consumerism as follows: “While ‘consumption’ refers fairly straightforwardly to ‘using up’ goods and services, consumerism refers to an ideology suggesting a way of life dedicated to the possession and use of consumer goods.” José Johnstone, *The Citizen-Consumer Hybrid: Ideological Tensions and the Case of Whole Foods Market*, 37 *THEORY & SOC’Y* 229, 242 (2007).

11. *Id.* at 236–39 (explaining the history of conscious and ethical consumerism, from the first recorded boycott in Ireland, which occurred when peasants refused to harvest the oats of Captain Boycott and demanded better



through the litigation pursued by disappointed consumers, as discussed in greater detail in Part II. Studies consistently find that consumers are increasingly willing to pay a premium for goods sold by companies whose sustainability values align with their own. For example, a Harvard University study found that shoppers on eBay, on average, paid a 23 percent premium for coffee labeled as Fair Trade.<sup>12</sup> A study by the University of Michigan that examined sock purchases among working-class consumers in the Detroit area found that about one-third of those surveyed were willing to pay 20 percent more for socks with a “Good Working Conditions” label than for socks without the label.<sup>13</sup>

Similarly, market surveys show that consumers are increasingly supportive of and willing to purchase goods from companies that adopt sustainable values and practices.<sup>14</sup> A year-over-year analysis found that sales of goods marketed as promoting socially conscious business practices outpaced sales of brands without such claims by a factor of five.<sup>15</sup> Consumer marketing research surveys show that sixty-eight million Americans bring their personal, social, and environmental

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wages and working conditions).

12. Michael J. Hiscox et al., *Consumer Demand for Fair Trade: New Evidence From A Field Experiment Using eBay Auctions of Fresh Roasted Coffee* 3, 23 (Mar. 16, 2011) (unpublished manuscript), [https://scholar.harvard.edu/files/hiscox/files/consumer\\_demand\\_fair\\_trade.pdf](https://scholar.harvard.edu/files/hiscox/files/consumer_demand_fair_trade.pdf) [<https://perma.cc/FWW2-TLXX>] [hereinafter Hiscox et al., *Consumer Demand for Fair Trade*] (highlighting that even price-sensitive consumers exhibited a tendency of supporting ethically labeled brands during the heart of the economic downturn); see also Michael J. Hiscox et al., *Consumer Demand for Fair Labor Standards: Evidence from a Field Experiment on eBay* 3, 22 (Apr. 2011) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1811788](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811788) [<https://perma.cc/42E9-FABB>] [hereinafter Hiscox et al., *Consumer Demand for Fair Labor Standards*] (finding that eBay shoppers paid a premium of 45 percent for shirts containing a certification of ethical practices).

13. Hiscox et al., *Consumer Demand for Fair Labor Standards*, *supra* note 12, at 9, 26–27 (explaining that consumers were informed that socks labeled “Good Working Condition” were not produced with child labor, in an unsafe environment, or under sweatshop conditions).

14. *Global Consumers Are Willing to Put Their Money Where Their Heart Is When It Comes to Goods and Services From Companies Committed to Social Responsibility*, NIELSEN (June 17, 2014), <http://www.nielsen.com/us/en/press-room/2014/global-consumers-are-willing-to-put-their-money-where-their-heart-is.html> [<https://perma.cc/M8Y2-EHKK>] (“Consumers around the world are saying loud and clear that a brand’s social purpose is among the factors that influence purchase decisions.”).

15. *Id.* (showing sales of sustainable brands rising five percent compared to the one percent growth of brands without sustainability claims).

values to bear on their purchasing decisions.<sup>16</sup> Further, 49 percent of surveyed consumers have boycotted companies that they feel harm society,<sup>17</sup> and 83 percent of consumers “wish” that the companies from which they purchase goods and services would support causes.<sup>18</sup> In response to increasing consumer preference for companies that contribute positively to social welfare, the fair trade industry has grown significantly in the last decade.<sup>19</sup> By the end of 2014, 1,226 organizations in seventy-four countries had been Fair Trade<sup>20</sup> certified, representing a 35 percent increase from 2010.<sup>21</sup> Fair trade goods have proven attractive to consumers, with studies showing that the certification makes consumers feel “positive” or “very positive” about the product and that it increases their interest in the product.<sup>22</sup>

The total aggregate premium paid by consumers for Fair Trade goods has eclipsed \$100 million.<sup>23</sup> Premium refers to the price difference between a sustainable good and its

16. *Benefits of Becoming a Sustainable Business*, ECO-OFFICIENCY, [http://www.eco-officiency.com/benefits\\_becoming\\_sustainable\\_business.html](http://www.eco-officiency.com/benefits_becoming_sustainable_business.html) (last visited Feb. 16, 2017) [<https://perma.cc/QMS7-M663>] (knowing a company's awareness of its social and environmental impact makes consumers 58 percent more likely to engage in purchasing); see, e.g., GIBBS RBB STRATEGIC COMMUNICATIONS, 2014 CONSCIOUS CONSUMER STUDY 6 (2014) (“Americans are willing to spend [31 percent] extra per week on safe and sustainably produced grocery food.”).

17. Sheila M. J. Bonini et al., *The Trust Gap Between Consumers and Corporations*, 2 MCKINSEY Q. 7, 10 (2007).

18. CONE LLC, 2010 CONE CAUSE EVOLUTION AND ENVIRONMENTAL SURVEY, 4 (2010), [http://ppqty.com/2010\\_Cone\\_Study.pdf](http://ppqty.com/2010_Cone_Study.pdf) [<https://perma.cc/49AE-5DMY>]. Additionally, 90 percent of Americans want to know about companies supporting causes. *Id.*

19. See Caroline Thompson, *Ethical Consumerism as a Human Rights Enforcement Mechanism: The Coffee Cultivation Model*, 24 TRANSNAT'L L. & CONTEMP. PROBS. 161, 182–84 (2014).

20. Fair trade certified goods comply with standards defined to promote fairer trading conditions for disadvantaged producers of consumer goods. *Our Standards*, FAIRTRADE INT'L, <https://www.fairtrade.net/standards/our-standards.html> (last visited Feb. 16, 2017) [<https://perma.cc/M8PX-S3YZ>].

21. See FAIRTRADE INT'L, SCOPE AND BENEFITS OF FAIRTRADE 8, 37 (7th ed. 2015), <https://www.fairtrade.net/impact-research/monitoring-impact-reports.html> [<https://perma.cc/U63Y-K2K9>].

22. Press Release, Fair Trade USA, Research Reveals Increased Consumer Demand for Fair Trade Certified-Labeled Products (Apr. 25, 2011), <https://www.prnewswire.com/news-releases/research-reveals-increased-consumer-demand-for-fair-trade-certified-labeled-products-120618239.html> [<https://perma.cc/7J69-KC8B>].

23. See FAIRTRADE INT'L, *supra* note 21, at 64.

conventional counterpart.<sup>24</sup> For example, the price difference between dishwashing soap that was made using “eco” ingredients and green production and packaging techniques and its conventional counterpart could be around three dollars;<sup>25</sup> the difference between a bar of conventional chocolate and one that is fair-trade certified (paying cocoa growers above world market prices and not using child labor) could be as much as eight dollars; going further up the price ladder, the premium paid on a green or hybrid car could be in the thousands of dollars. One grocery chain has quadrupled the price of Fair Trade bananas, and another has charged an additional \$3.46 per pound for Fair Trade coffee.<sup>26</sup> The concept of premiums is useful to bear in mind because it is a quantitative tool for differentiating conventional from sustainable goods, but also for capturing the *market* valuation of that difference, which does not always map onto the *subjective* valuation of that difference.

Companies now cater to conscious consumers in ways that reach beyond fair trade. The mega transnational consumer goods company Unilever found that 54 percent of consumers are seeking sustainable products and factoring environmental and social issues significantly into their purchasing decisions.<sup>27</sup>

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24. Wayne Cunningham, *The Hybrid Premium: How Much More Does a Hybrid Cost?*, ROAD SHOW (Apr. 30, 2012), <https://www.cnet.com/roadshow/news/the-hybrid-premium-how-much-more-does-a-hybrid-car-cost/> [<https://perma.cc/MR8U-TBZH>]; Elizabeth MacBride, *Will Consumers Actually Pay for Fair Trade*, STAN. BUS. INSIGHTS (Apr. 8, 2015), <https://www.gsb.stanford.edu/insights/jens-hainmueller-will-consumers-actually-pay-fair-trade> [<https://perma.cc/U2B5-ZQGQ>].

25. Freya Williams, *Charge Less, Sell More: How to Price Green Products*, GREENBIZ (May 10, 2011), <https://www.greenbiz.com/blog/2011/05/10/charge-less-sell-more-how-to-price-green-products> [<https://perma.cc/B6MH-VHUM>] (explaining that in a study analyzing conscious consumption, price “came up as the number one barrier to taking more green actions across our respondent groups”). The study continued, recommending that we “kill the sustainability tax” that deters conscious consumers from actually buying consciously. *Id.*

26. Steve Stecklow & Erin White, *At Some Retailers, ‘Fair Trade’ Carries a Very High Cost*, WALL ST. J. (June 8, 2004, 12:01 AM), <https://www.wsj.com/articles/SB108664921254731069> [<https://perma.cc/6FTW-NEJ5>] (“‘Supermarkets are taking advantage of the label to make more profit because they know that consumers are willing to pay a bit more because it’s fair trade,’ says Emily Dardaine, fruit-product manager at Fairtrade Labelling Organizations International.”).

27. *Commitment to Sustainability Delivers Even Faster Growth for Unilever*, UNILEVER (May 16, 2016), <https://www.unilever.com/news/press-releases/2016/Commitment-to-sustainability-delivers-even-faster-growth-for-Unilever.html>

In 2015, the company's Sustainable Living brands delivered nearly half of its growth and expanded 30 percent faster than the rest of its portfolio.<sup>28</sup> Unilever and others recognize that “[c]onsumers expect more of brands and businesses now – and they reward those that deliver a wider social benefit in addition to the traditional product performance at an affordable price.”<sup>29</sup>

A further indication of the shift toward conscious consumerism<sup>30</sup> is the rise of socially responsible investing (SRI)<sup>31</sup> and, more recently, biblically responsible investing.<sup>32</sup>

[<https://perma.cc/TK2L-T2WM>].

28. *Id.*

29. *Id.* (“Consumers want it all - high performing products, the right price and with a purpose that they can connect with.”).

30. This Article focuses primarily on retail goods sold to consumers, but identity harm is a problem in the investment realm as well, in particular for ethical and social impact investors who have become influential in the last decade. Michael Chamberlain, *Socially Responsible Investing: What You Need to Know*, FORBES (Apr. 24, 2013, 3:31 PM), <http://www.forbes.com/sites/feeonlyplanner/2013/04/24/socially-responsible-investing-what-you-need-to-know/#7d184f145863> [<https://perma.cc/4CNE-34QM>] (explaining that one out of every nine dollars of professionally invested funds in the United States uses a socially responsible investment option); William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 822–23 (2012) (“SRI investors use screens to avoid ‘sin’ (e.g., tobacco, alcohol, gaming) and weapons stocks or to reward social or environmental ‘best in class’ companies.”); Cadesby Cooper, *Rule 10b-5 at the Intersection of Greenwash and Green Investment: The Problem of Economic Loss*, 42 B.C. ENVTL. AFF. L. REV. 405, 427–32 (2015) (explaining that ethical investors’ disappointment is difficult to redress due to 10b-5 requirements that plaintiffs suffer economic loss attributable to the issuer’s misrepresentations); Sarah Dadush, *Regulating Social Finance: Can Social Stock Exchanges Meet the Challenge?*, 37 U. PA. J. INT’L L. 139 (2015) (providing a primer on social finance and explaining the risk to investors of seeing investee companies drift from their social mission); Delwin Lau, *Fixing International Labor Law: Corporate Social Responsibility, A Means or an End?*, 24 S. CAL. INTERDISC. L.J. 725, 761 (2015) (“Today, socially responsible investing is no longer a phenomenon reserved only for the quirky investor.”); Suzanne L. Shier, *Line of Sight: Responsible Investing for the Modern Fiduciary – Aligning Goals, Duties, Investments, and Impact*, SY003 ALI-ABA 17 (July 2016) (“[E]nvironmental, social and governance (ESG) oriented investments increased from \$32 trillion in 2012 to more than \$59 trillion by 2015—roughly 25% of all the world’s financial holdings.”).

31. *US Sustainable, Responsible and Impact Investing Trends*, USSIF (2016), <http://www.ussif.org/files/Trends/US%20SIF%202016%20Trends%20Overview.pdf> [<https://perma.cc/CD3V-5EFL>] (citing 33 percent growth in sustainable investing since 2014 and a 14-fold increase since 1995).

32. “*Biblically Responsible*” *Exchange-Traded Funds (ETF) Debut*, ETF.COM (Feb. 28, 2017), <http://www.etf.com/sections/daily-etf-watch/etf-watch-biblically-responsible-etfs-debut> [<https://perma.cc/R3QD-LLBY>] (describing a new firm that launched exchange-traded funds “designed to appeal to conservative Christian investors” and that “offer a twist on the usual environmental, social and

The goal of SRI is to reconcile investors' economic goals with their sustainability values by including consideration of environmental, social, and corporate governance (ESG) criteria in their investment decisions.<sup>33</sup> SRI, which comes in an ever-growing array of flavors, works by identifying investments that produce both positive financial returns *and* positive social impact.<sup>34</sup> Currently, more than 20 percent of professionally managed investment dollars are allocated using SRI strategies, totaling over \$8.72 trillion.<sup>35</sup> SRI investors employ both positive and negative screens when making investment decisions: while the majority of SRI investors seek to avoid "sin" stocks, such as alcohol, tobacco, and gambling, others actively seek out institutions like community banks and green-tech businesses that have a positive social impact.<sup>36</sup> Some also engage in shareholder activism to promote socially conscious objectives.<sup>37</sup>

An important measure of the rise of conscious consumerism and the market for virtue is the proliferation of certifications. Indeed, certifications appear on an expanding array of products—for example, clothing, food, cleaning products, and home appliances.<sup>38</sup> Certifications contain

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governance (ESG) framework, with a 'biblically responsible' version designed to match conservative evangelical Christian values. . . . Companies with 'any degree of participation in activities that do not align with biblical values' are removed from the investment universe, according to the prospectus. That includes generally accepted ESG no-go zones such as alcohol, gambling and human rights violations, but also abortion, pornography and LGBT lifestyle.").

33. *SRI Basics*, USSIF, <http://www.ussif.org/sribasics> (last visited Feb. 16, 2017) [<https://perma.cc/5WGB-T8TP>]. SRI investing strategies encompass a litany of labels including "community investing," "ethical investing," "green investing," "impact investing," "mission-related investing," "responsible investing," "socially responsible investing," "sustainable investing," and "values-based investing." *Id.*; see also Dadush, *supra* note 30, at 150–51 (distinguishing SRI from social impact investing; the latter represents a deliberate shift away from the social responsibility mind-set where societal issues are at the periphery, not the core. *Id.*).

34. See Dadush, *supra* note 30, at 150–51.

35. *SRI Basics*, *supra* note 33.

36. See Clark & Babson, *supra* note 30, at 822–23.

37. *Id.*; *Shareholder Resolutions*, USSIF, <http://www.ussif.org/resolutions> (last visited Feb. 16, 2017) [<https://perma.cc/3W5X-GD97>] ("Shareholder resolutions are a meaningful way for shareholders to encourage corporate responsibility and discourage company practices that are unsustainable or unethical.").

38. Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 U.C. DAVIS L. REV. 935, 958 (2014) ("[L]abor standards certification programs are attempting to be more 'regulatory' than some other labeling efforts, although they clearly mix regulatory strategies with marketing ones."); Johnston, *supra*

sustainability promises that target conscious consumers, speaking directly to their desire to be good (or simply better) global citizens. Certification promises can be made directly on product packaging or less directly on company websites. They can be expressed in prose or, as is increasingly common, by logos that signal that the product (or company) has been certified by a third party (e.g., Fairtrade International, UTZ, Rainforest Alliance Certified, Forest Stewardship International, Marine Stewardship Council, Responsible Jewellery Council, B Lab).

Certifications indicate that products meet certain sustainability specifications and standards and that related marketing claims accurately convey product attributes.<sup>39</sup> They can speak either to the sustainability of the *production process*, meaning the production backstory of a particular good (this matters for items like food products and apparel), or to the sustainability of its *use* (this matters for appliances like washing machines and toilets, for example). Process-related standards and certifications tell a story about how a particular good was made—the treatment of workers and the environmental and social impact of production on the surrounding land and communities. Use-related standards and certifications tell a story about how using a particular good will affect (primarily) the environment.

For conscious consumers, a good's production backstory can matter a great deal.<sup>40</sup> Fairtrade International is perhaps the best known among these certifications. The website describes Fairtrade as

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note 10, at 229 (noting that Whole Foods uses certifications to appeal to environmentally conscious consumers by combining consumerism with collective social responsibility); Peter Leigh Taylor, *In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change*, 33 *WORLD DEV.* 129 (2004) ("Certification and labeling initiatives worldwide gain growing attention as promising market-based instruments which harness globalization's own mechanisms to address the very social injustice and environmental degradation globalization fosters.").

39. Stephanie Vierra, *Green Building Standards and Certification Systems*, WBDG (Dec. 9, 2016), <https://www.wbdg.org/resources/green-building-standards-and-certification-systems> [<https://perma.cc/29X2-7TJH>].

40. Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 *HARV. L. REV.* 525, 576–79 (2004) (discussing the court's acknowledgement of the importance of process information for consumer decision-making in *Kasky v. Nike*, 45 P.3d 243 (Cal. 2002)).

an alternative approach to conventional trade . . . based on a partnership between producers and consumers. When farmers can sell on Fairtrade terms, it provides them with a better deal and improved terms of trade. This allows them the opportunity to improve their lives and plan for their future. Fairtrade offers consumers a powerful way to reduce poverty through their every day shopping.<sup>41</sup>

The focus is on promoting fair—in terms of remuneration—and safe working conditions to improve the well-being of producer communities. Additionally, and this is important for grasping identity harm, the focus is on connecting consumers to producers by aligning their interests, so that what is good for the producer is good for the consumer, and vice-versa. As Josée Johnston explains in her study of Whole Foods, the fair-trade movement has been quite successful as a stimulator of conscious consumption for many types of goods, especially food.<sup>42</sup> Indeed, this privately-led initiative has helped draw attention to the reality that “many of the worst abuses in the global system are associated with foods that are integrated into our everyday life through transnational commodity chains—sugar, bananas, coffee, chocolate—*magnifying consumers’ complicity in social abuses associated with their production.*”<sup>43</sup> Activists have “used these everyday foods as leverage points” for “encouraging consumers to think critically, buy more selectively, and seek out information on the environmental and social costs involved in their daily meals.”<sup>44</sup>

Certification and standards-based schemes are designed to help differentiate between products on the basis of their sustainability features and to tell apart products that truly are sustainable from those that merely claim to be sustainable—a practice referred to as “greenwashing”<sup>45</sup> for environmental

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41. *What is Fairtrade?*, FAIRTRADE INT’L, <https://www.fairtrade.net/about-fairtrade/what-is-fairtrade.html> (last visited Nov. 16, 2017) [<https://perma.cc/UL6M-6H8P>]. Note however, that there is not one single definition of fair-trade or one fair-trade certifier. *What is Fair Trade?*, FAIR TRADE USA, <http://fairtradeusa.org/what-is-fair-trade> (last visited Mar. 6, 2017) [<https://perma.cc/W3ZC-778G>].

42. See Johnston, *supra* note 10, at 239.

43. *Id.* (emphasis added).

44. *Id.*

45. Greenwashing happens when a company seeks to boost its sales or brand

claims and sometimes as “redwashing” or “bluewashing” for social claims.<sup>46</sup> As sustainability filters, certifications and standards-based schemes are useful informational devices.

However, there are so many certifications and certifiers that even the most conscious consumers can become overwhelmed and confused by the amount of information generated.<sup>47</sup> For example, I have three bars of chocolate in front of me as I write this, and each one makes a variation on what seems to be the same fair-trade promise: one, Green&Black’s, bears the Fairtrade International logo;<sup>48</sup>

by overstating its environmental ambitions and achievements. For a detailed explanation and an overview of possible solutions, see Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 999–1009, 1025–38 (2011).

46. *Bluewashing*, N.Y. TIMES: SCHOTT’S VOCAB (Feb. 4, 2010), <https://schott.blogs.nytimes.com/2010/02/04/bluewashing/?mcubz=0&r=0> [<https://perma.cc/7HW7-AJWN>] (“The term bluewash(ing) has been used to criticize the corporate partnerships formed under the United Nations Global Compact initiative (some say this association with the UN helps to improve the corporations’ reputations.)”); Wayne Visser, *Exposing the CSR Pretenders*, WAYNE VISSER BLOG BRIEFING (Oct. 27, 2011), [http://www.waynevisser.com/wp-content/uploads/2012/06/blog\\_csr\\_pretenders\\_wvisser.pdf](http://www.waynevisser.com/wp-content/uploads/2012/06/blog_csr_pretenders_wvisser.pdf) [<https://perma.cc/C2VF-GEU8>] (explaining that the term “bluewashing” is a reference to businesses who use their association with the United Nations—whose logo is blue—to appear more responsible than they really are).

47. Virginia Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 IOWA J. CORP. L. 59, 61 (2010) (noting the absence of legally mandated environmental, social, and governance disclosures); Roger D. Wynne, *The Emperor’s New Eco-Logos?: A Critical Review of the Scientific Certification Systems Environmental Report Card and the Green Seal Certification Mark Programs*, 14 VA. ENVTL. L.J. 51, 54 (noting that vague and unverifiable sustainability claims that offer half-truths or no tangible environmental benefits overwhelm consumer’s ability to “discern truly green products from those merely labeled as such”).

48. *Organic 85% Dark Cacao Bar*, GREEN&BLACK’S, <http://us.greenandblacks.com/organic-85-dark-cacao-bar.html> (last visited Oct. 5, 2017) [<https://perma.cc/TL3K-94AE>]. On the “Responsibility” section of its website, Green&Black’s writes:

Green&Black’s is committed to creating great tasting, ethically sourced chocolate. Green&Black’s cocoa beans in our new signature Pure Dark and Pure Milk Chocolates are sourced through Cocoa Life, a holistic, third party verified cocoa sustainability program.

Launched in 2012, Cocoa Life will invest \$400 million by 2022 to empower 200,000 cocoa farmers and reach one million community members in six key cocoa growing regions: Ghana, Cote d’Ivoire, Indonesia, the Dominican Republic, India and Brazil. Farming communities working with Cocoa Life gain knowledge and skills that improve their livelihoods, strengthen their communities, empower women, and inspire the new generation of cocoa farmers.



another, Chocolove, bears the “for life” logo with the following language just below, “78% For Life Certified Content;”<sup>49</sup> the third, Theo, has the “Fair for Life” logo (with no qualifying language).<sup>50</sup> How is a consumer to know or appreciate the distinction between these three? And there are other logos on the packaging, as well, including Non GMO Project verified,<sup>51</sup> USDA Organic,<sup>52</sup> and the company-specific Chocolove.com/social.<sup>53</sup>

Certifications are thus informative to a degree, but their informational power is diluted because of the multiplicity of certification schemes and sustainability claims at play. Efforts are underway to standardize certification schemes;<sup>54</sup> however, the simple chocolate bar example relayed just above should

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For more information, visit us at [cocoalife.org](http://cocoalife.org).

*Responsibility*, GREEN&BLACK'S, <http://us.greenandblacks.com/responsibility> (last visited Oct. 5, 2017) [<https://perma.cc/4FLQ-GQX8>].

49. *Almonds & Sea Salt in Dark Chocolate*, CHOCOLOVE, <https://www.chocolove.com/chocolate/3-2-oz-bars/dark-chocolate/almonds-and-sea-salt-in-dark-chocolate.html> (last visited Oct. 5, 2017) [<https://perma.cc/UUN4-KZAZ>]. Chocolove highlights the potential for consumer confusion on its “Social Responsibility” page:

Chocolove engages in several layers of sustainability and social responsibility, and works with several organizations. We do this because we have learned over the years and through a detailed study that not any one approach holds the entire solution. The subjects of corporate ethics and morality, social responsibility, and cocoa supply chain sustainability are all interrelated, but cannot be answered by one logo or name that you recognize. While you may not have heard or know about some of these organizations, they are in fact doing truly sustainable work.

*Sustainability & Social Responsibility*, CHOCOLOVE, <https://www.chocolove.com/social-intro/> (last visited Oct. 5, 2017) [<https://perma.cc/55ZV-448H>].

50. *Mint 70% Dark Chocolate*, THEO, <https://www.theochocolate.com/product/mint/> (last visited Oct. 5, 2017) [<https://perma.cc/ZE4F-M8GY>].

51. *Organic 85% Dark Cacao Bar*, GREEN&BLACK'S, <http://us.greenandblacks.com/organic-85-dark-cacao-bar.html> (last visited Oct. 5, 2017) [<https://perma.cc/DZ4K-M2ZQ>].

52. *Almonds & Sea Salt in Dark Chocolate*, CHOCOLOVE, <https://www.chocolove.com/chocolate/3-2-oz-bars/dark-chocolate/almonds-and-sea-salt-in-dark-chocolate.html> (last visited Oct. 5, 2017) [<https://perma.cc/DY2Y-VKGC>].

53. *Id.*

54. ISEAL provides a comprehensive list of vetted sustainability certification systems and “represents the movement of credible and innovative sustainability standards” with a mission “to strengthen sustainability standards for the benefit of people and the environment” and support “a unified movement of sustainability standards.” *About Us*, ISEAL ALLIANCE, <http://www.isealalliance.org/about-us> (last visited Feb. 15, 2017) [<https://perma.cc/MFJ7-C8UN>].

persuade readers that comparing sustainability attributes—even for a single criterion like fair trade—across products and brands remains a steep challenge. And this problem is aggravated by the reality that many sustainability claims are not certified or “logo-fied.” Indeed, sustainability claims can be made directly on product packaging, less directly through advertisements, or in prose on company websites.<sup>55</sup> They can appear in company codes of conduct and annual corporate social responsibility (CSR) reports.<sup>56</sup> They can also be inferred from a company’s membership to an industry association, such as the Responsible Business Alliance (RBA), whose members comprise leading electronics companies that subscribe to the RBA code of conduct for improving labor and environmental sustainability throughout the global supply chain;<sup>57</sup> or by affiliation with an international sustainability program, such as the United Nations Global Compact;<sup>58</sup> or by a multi-

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55. For example, Everlane, the online clothing retailer, expresses its commitment to “Radical Transparency” and invites customers to “#Know Your Factories.” The website indicates, “We spend months finding the best factories around the world . . . Each factory is given a compliance audit to evaluate factors like fair wages, reasonable hours, and environment. Our goal? A score of 90 or above for every factory.” *About Us*, EVERLANE, <https://www.everlane.com/about> (last visited Nov. 6, 2017) [<https://perma.cc/P9K5-9NGV>].

56. For example, the mega fashion company, H&M, makes several commitments in its 2016 Sustainability Report, including to collect 25,000 tonnes of garments per year by 2020, to use 100% sustainable cotton by 2020, for 100% of its materials to be sustainably sourced or recycled by 2030, to achieve fair jobs for all and to serve as stewards for diversity and inclusivity. H&M, *THE H&M GROUP SUSTAINABILITY REPORT 10–13* (2016), [https://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/2016%20Sustainability%20report/HM\\_group\\_SustainabilityReport\\_2016\\_FullReport\\_en.pdf](https://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/2016%20Sustainability%20report/HM_group_SustainabilityReport_2016_FullReport_en.pdf) [<https://perma.cc/X5MK-SGRZ>]. The Report contains additional language that goes to the *industry’s* obligation to monitor human rights within its supply chain:

Over 1.6 million people work in the factories of our business partners, 65 percent of whom are women. Social security, wages, freedom of association and collective bargaining, health and safety, and working hours are all salient human rights issues. Our industry must ensure fair living wages, reductions in overtime and workplace safety to become socially sustainable.

*Id.* at 21.

57. *About the RBA*, RESPONSIBLE BUS. ALL., <http://www.responsiblebusiness.org/about> (last visited Feb. 15, 2017) [<https://perma.cc/ZCN7-SVEQ>] (“[T]he Responsible Business Alliance . . . is . . . committed to supporting the rights and well-being of workers and communities worldwide affected by the global electronics supply chain. . . . [M]embers . . . are held accountable to a common Code of Conduct . . . to support continuous improvement in the social, environmental and ethical responsibility of their supply chains.”).

58. The United Nations Global Compact is a voluntary initiative that issues

stakeholder initiative, such as the Sustainable Apparel Coalition.<sup>59</sup>

I describe the multiplication of (potentially confusing) sustainability claims as generating a kind of “sustainability noise” that can foster unrealistic expectations among consumers. This problem is discussed in more detail in Part II, when we examine some of the challenges that identity-harmed claimants can face in trying to hook their claim to a seller’s (mis)representation. From a legal perspective, a key question is whether sustainability claims (direct or indirect, certified or uncertified) should be discounted as mere non-actionable puffery or as material representations that shape consumer expectations.

The shift toward conscious consumerism reveals a deepening reluctance among consumers to support companies and products that negatively impact the planet or other human beings. Businesses respond to these evolving consumer preferences by expanding the supply of sustainable goods and by providing consumers with product and brand-related sustainability information.<sup>60</sup> In theory, this information equips

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“[a] call to companies to align their strategies and operations with universal principles on human rights, labor, environment and anti-corruption, and take actions that advance societal goals.” UN GLOB. COMPACT, <https://www.unglobalcompact.org/what-is-gc> (last visited Feb. 15, 2017) [<https://perma.cc/WSP8-TVPX>].

59. The Sustainable Apparel Coalition is a multi-stakeholder initiative that brings together “[c]ompanies from every segment of fashion, manufacturing and retailing from all over the globe,” as well as “academic research groups, NGOs dedicated to labor, trade and environmental issues, affiliated trade organizations and sustainability service providers.” *Our Members*, SUSTAINABLE APPAREL COALITION, <http://apparelcoalition.org/members/> (last visited Feb. 18, 2017) [<https://perma.cc/VZM7-LLK6>]. These stakeholders share in a vision “of an apparel, footwear, and home textiles industry that produces no unnecessary environmental harm and has a positive impact on the people and communities associated with its activities.” *The Coalition*, SUSTAINABLE APPAREL COALITION, <https://apparelcoalition.org/our-vision/> (last visited Dec. 20, 2017) [<https://perma.cc/WXC8-4LFQ>].

60. Megan S. Houston, *Ecolabel Programs and Green Consumerism: Preserving a Hybrid Approach*, 7 BROOK. J. CORP. FIN. & COM. L. 225 (2012) (explaining that even the most well-known eco-labeling schemes such as United States Department of Agriculture (USDA) Organic for agricultural products, ENERGY STAR for appliances, and Leadership in Energy & Environmental Design (LEED) for buildings create problems of consumer misconception and confusion); Lucy Atkinson, *The Wild West of Eco-Labels: Sustainability Claims Are Confusing Consumers*, GUARDIAN (July 4, 2014), <https://www.theguardian.com/sustainable-business/eco-labels-sustainability-trust-corporate-government> [<https://perma.cc/8WFZ-4XM9>] (“Today’s consumer is faced with an estimated 455 eco-labels across 25 industry categories, from energy and clothing to food and

consumers to make selections based on a mix of economic, physical, utility, and sustainability-related attributes. In practice, however, the amount and the substance of information to which consumers are exposed can be quite dizzying and confusing.<sup>61</sup>

As more companies enter the market for virtue, it is likely that informational disorientation will only deepen. This makes it increasingly difficult, not only to compare sustainability claims across products, but also to tell apart truly sustainable brands and products from those that only claim to be. As a result, even the most conscious of consumers can struggle to navigate the sustainability noise that permeates the market for virtue. Ultimately, this creates the possibility that even highly selective conscious consumers could end up aggravating the very problem they had hoped to help cure. Such a state of affairs creates room for the exploitation of consumer expectations.

### B. *The (Problematic) Citizen-Consumer*

The rise of conscious consumerism has been met with—and reinforced by—a growing supply of goods marketed in whole or in part on the basis of their environmental and social sustainability attributes. Conscious consumer demand is thus the fuel powering the market for virtue. It is within this market that individuals have an opportunity to express their values through their purchasing decisions. Vogel explains that consumers who vote their social preferences through their purchases help to politicize the market<sup>62</sup> and to counter the notion that the market is a politically-neutral feature of our

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household cleaners. But very few of these labels give people meaningful guidance in choosing environmentally superior products.”); Klaus G. Grunert et al., *Sustainability Labels On Food Products: Consumer Motivation, Understanding and Use*, FOOD POLY 44, 177–89 (2014) (“While the growth in labels and accompanying communication initiatives may be interpreted as a sign of success . . . label overload and gaps in the understanding of both the general concept of sustainability and of specific sustainability labels may result in consumer confusion and limit the use of such labels.”); David Vogel, *The Private Regulation of Global Corporate Conduct*, 49:1 BUS. & SOC’Y, 68, 76–78 (Mar. 2010) (“[T]he proliferation of industry codes of conduct and ‘ethical’ or ‘green’ labels has added to the confusion of those consumers who want to consumer ‘responsibly.’”) [hereinafter Vogel, *Private Regulation of Corporate Conduct*].

61. Vogel, *Private Regulation of Corporate Conduct*, *supra* note 60.

62. VOGEL, MARKET FOR VIRTUE, *supra* note 4, at 3–4.

society, a product not only of supply and demand, but of (unequal) economic, social, and ecological relationships.<sup>63</sup> When consumers employ tools from the civil regulation toolkit to express and enforce their preferences, they strengthen the ties between the market and society, making the relationship more synergistic.<sup>64</sup> These tools include boycotting, *buycotting*, naming and shaming and, perhaps most relevant for purposes of this Article, bringing legal claims.<sup>65</sup>

When consumers activate in this way, they become “citizen-consumers,” who vote with their dollars to regulate the

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63. Making a similar point with respect to food, Johnston highlights how “[f]ood shopping is not simply a banal, private concern, but represents a key private/public nexus, as well as a potential entry-point to political engagement . . . food choices are not neutral, private matters, but rather represent a politicized, gendered, and globalized terrain where gendered labor and households intersect with states, capital, and civil society in varying balances.” Johnston, *supra* note 10, at 239.

64. Civil regulation has become increasingly prevalent as consumers band together to send an aggregated economic message to companies whose practices do not align with their values. Consumers have been “threatening” the large banks funding the Dakota Access Pipeline with divestment if the banks continue to support the pipeline’s intrusion on Native American land. Stephen Foley et al., *Big Investors Press Banks Over Dakota Access Pipeline*, FIN. TIMES (Feb. 17, 2017), <https://www.ft.com/content/f4487916-f4ab-11e6-95ee-f14e55513608> [<https://perma.cc/8S6V-Q859>]. Already, the Seattle City Council severed business ties with pipeline financier Wells Fargo, and New York City Mayor Bill de Blasio has expressed support for a bank boycott. *Id.* The “#DeleteUber” movement is another example. See Ron Lieber, *Uber and Starbucks Boycotts Show Boycotts Need More Than a Hashtag*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/your-money/uber-and-starbucks-protests-show-boycotts-need-more-than-a-hashtag.html> [<https://perma.cc/F6VY-666D>]. The mere threat of a boycott resulted in Uber founder Travis Kalanick’s resignation from the Economic Advisory Council, to calm users who felt that Uber had taken advantage of Trump’s travel ban. *Id.* (“In the race to find someone—anyone—to lash out at over the immigration and travel restrictions ordered by President Trump last Friday, many consumers settled on an odd target: Uber. It had, supposedly, undercut prices for non-Uber taxis just as protesting taxi drivers went back to work. A boycott brigade formed almost immediately.”).

65. Vogel, *Private Regulation of Corporate Conduct*, *supra* note 60, at 77 (explaining that most civil regulations began as citizen campaigns directed against particular companies or industries, in particular around working conditions and wages, child labor, unsustainable forestry practices, investments that support corrupt governments, and describing naming and shaming campaigns and boycotts as civil regulatory strategies); Anand Ghiridharadas, *Boycotts Minus the Pain*, N.Y. TIMES (Oct. 10, 2009), <http://www.nytimes.com/2009/10/11/weekinreview/11ghiridharadas.html> [<https://perma.cc/YSS7-BLX9>] (“Political consumption is not new . . . . What is new is that boycotting is surrendering to buycotting, the sending of positive, not just negative, signals; and that it is practiced increasingly by mainstream shoppers, not just die-hard activists.”).

market.<sup>66</sup> In Vogel's construct, activated consumers (alongside a range of non-state actors) can serve as civil regulators of the marketplace.<sup>67</sup> Civil regulation is distinct from—and indeed is pursued in response to the shortfalls of—public or official market regulation.<sup>68</sup> Through their actions, consumers communicate that they can and will take matters into their own hands (or wallets) if the official regulatory system fails to protect them, the planet, and other humans from the effects of bad corporate practices.<sup>69</sup> Vogel explains that globalization has had a large role to play here, not only by generating the need for and interest in civil regulation, but also in giving it “bite.”<sup>70</sup> He recounts how globalization created reputationally-sensitive global brands and explains how, as a result, large multinational firms are “more vulnerable than ever to pressures from consumers and activists throughout the world.”<sup>71</sup>

While the rise of the citizen-consumer as a civil regulator holds great appeal, many express concern with respect to the desirability of relying on conscious consumers to effect positive change in the world. Some argue that consumers already make excessive use of their wallets to express their civic values, and that, rather than using the marketplace as a site for self-expression, they should increase their engagement in the political sphere.<sup>72</sup> This critique goes further to say that if the

66. See Johnston, *supra* note 10, at 229 (unpacking the concept of the “citizen-consumer,” describing it as “a social practice” that can in theory “satisfy competing ideologies of consumerism (an idea rooted in individual self-interest) and citizenship (an ideal rooted in collective responsibility to a social and ecological commons).”) Johnston questions the feasibility of keeping both sides in balance.

67. Vogel, *Private Regulation of Corporate Conduct*, *supra* note 60, at 76 (“Most civil regulations have their origin in citizen campaigns . . .”).

68. *Id.* at 69 (“Civil regulations employ private, nonstate, or market-based regulatory frameworks to govern multinational firms and global supply networks. A defining feature of civil regulations is that the legitimacy, governance, and implementation is not rooted in public authority.”).

69. *Id.* at 73–74 (explaining that globalization has “undermined both the willingness and capacity of governments to make global firms politically accountable” and that civil regulation serves to fill the “governance deficit” by extending “regulation to a wide range of . . . business practices”).

70. *Id.* at 77 (noting that particularly well-known large retail firms’ positive response to public criticisms can be attributed to concern about their reputation and about “criticisms that might adversely affect the value of their brands”).

71. VOGEL, MARKET FOR VIRTUE, *supra* note 4, at 9.

72. Ghiridharadas, *supra* note 65 (describing the debate “over the political meaning of boycotting” and explaining that for critics, citizenship “is about voting,

end goal is sustainability, then the answer is not to buy more, or even better “stuff,” but rather to buy and consume less because that is what will reduce the burden on the earth’s resources and on workers in developing countries to satisfy the bottomless appetite among (rich country) consumers for more and faster.<sup>73</sup>

Others express the concern that consumers who engage in selective values-based purchasing do so without sufficient regard for the consequences of their decisions, particularly in other parts of the world.<sup>74</sup> Here the argument is that, from a sustainability standpoint, a first order objective is to create economic opportunities for workers in developing countries, even if this means violating international labor norms, environmental norms, or some (rich) countries’ moral norms.<sup>75</sup> Thus, to boycott or otherwise punish companies that for whatever reason do not comply with particular norms is to work *against* sustainability as it diminishes rather than stimulates economic opportunity. This critique speaks to a deep

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marching, writing — about being involved. In the modern age, they say, we have begun to turn inward, bowl alone, shirk our public duties. And now comes this cheap (in the moral, if not economic, sense) way to participate just a little, assuage guilt just a little, involve ourselves just a little in AIDS and trade, feel just a little of activism’s thrill.”).

73. See Johnston, *supra* note 10, at 237–39 (describing “a radical message seeking to challenge consumer society and reduce consumption” and counter, “more popular ameliorative message encouraging consumers to consume carefully or differently—buying hybrid cars, energy efficient appliances, and organic strawberries”); Annamma Joy et al., *Fast Fashion, Sustainability, and the Ethical Appeal of Luxury Brands*, 16 FASHION THEORY 273 (2012), <http://www3.nd.edu/~jsherry/pdf/2012/FastFashionSustainability.pdf> [<https://perma.cc/Y8H3-UB4U>] (examining the social costs of “fast fashion”); Katarina Gustafsson, *H&M Wants Your Fashion Discards by Offering Discounts*, BLOOMBERG (June 20, 2013, 8:11 AM), <https://www.bloomberg.com/news/articles/2013-06-19/h-m-wants-your-fashion-discards-by-offering-discounts> [<https://perma.cc/9SVT-V3N5>] (discussing H&M’s garment recycling program, which rewards recyclers with discount vouchers to encourage more consumption and quoting a spokesperson from a chain of second-hand stores, “[t]here is a risk that the benefit to the environment will disappear’ when the reward is tied to buying more”).

74. LISA ANN RICHEY & STEFANO PONTE, BRAND AID: SHOPPING WELL TO SAVE THE WORLD 151–62 (2011) (noting the skepticism surrounding “causer culture,” which subscribes to the notion that consumers can do good by shopping, even “without knowing much about the social and environmental relations behind the products on offer”). Sustainability labels, for example, for food, “include some beneficiaries and exclude others” and can “marginalize smaller producers and producers in poorer countries . . . even though they were designed with the best intentions.” *Id.*

75. *Id.*

discomfort with the idea of the citizen-consumer, which is amplified by a sense that conscious consumption is imbued with the scent of *noblesse oblige* since not everyone can afford to pay sustainability premiums. In other words, although the notion that “consumers can shop to satisfy their desires while producing an optimal social outcome”<sup>76</sup> is compelling, its appeal is diminished because conscious consumption remains the privilege of a few, rather than a choice for all.

Yet another concern is that consumer activism could supplant political activism. This would mean politicizing the market so much that activist consumers become deluded into thinking that the best place to express one’s civic values is the marketplace, rather than the voting booth. From this perspective, consumer-citizens embody the worst of neoliberalism because they replace the (collective interest-focused) ideal of democratic participation with the (self-interested) ideal of consumer choice.<sup>77</sup> Some express the concern that using shopping to “refine the world” can lessen the pressure on government to do its job:

Public goods like health systems should be publicly provided, [critics] say. If organic vegetables are better, then we should all eat them, instead of just the elite. And privatizing compassion may tempt the state to neglect problems; then, when a recession slows shopping, AIDS orphans languish waiting for you to buy sunglasses.<sup>78</sup>

However, as Vogel and others argue, this is not a foregone conclusion: consumer and political citizenship need not be substitutes for one another; they can be complements, and powerful ones, at that.<sup>79</sup> The key is to ensure that the market

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76. Johnston, *supra* note 10, at 241.

77. *Id.* at 246.

78. Ghiridharadas, *supra* note 65.

79. Sarah Dadush, *Profiting in (RED): The Need for Enhanced Transparency in Cause-Related Marketing*, 42 N.Y.U. J. INT’L. L. & POL. 1269, 1303–10 (2010) (explaining the debate concerning citizen-consumers). To some, “buycotting” is problematic because, as compared with boycotting, it involves no sacrifice; as such, it extends the realm of political consumption from activists to mainstream shoppers, raising the question, is consumption “an exciting new form of citizenship? Or is it a sign of how corroded citizenship has become that shopping is the closest many of us are willing to come to worrying about labor laws, trade agreements, agricultural policy—about good old-fashioned politics?” *Id.* (citing Ghiridharadas, *supra* note 65).



for virtue is efficient and that requires reinforcing the market's legal and normative infrastructure so that corporations can better be held to account for poor social-environmental conduct and also rewarded for good conduct.<sup>80</sup>

Although the concerns and critiques described above are valid, they are insufficient to justify setting aside the civil regulation opportunity presented by conscious consumerism. Vogel offers many illustrations of civil regulation and its positive effects; for example, consumers' divestments from and boycotting of companies with connections to the Apartheid regime in South Africa had a profound effect on corporate conduct, as well as on public policy.<sup>81</sup> Certainly, conscious consumerism is limited as a lever for change, and, as such, it should not be the only avenue through which sustainability pressures are brought to bear on corporations. However, it also

For Jeremy Youde, conscious consumerism affords consumer-citizens an opportunity to express values that they may not be able to express politically: "[C]itizens may not have the time, energy, or skills necessary to engage in such lobbying and more overt political actions. However, nearly everyone goes shopping." Jeremy Youde, *Ethical Consumerism or Reified Neoliberalism? Product (RED) and Private Funding for Public Goods*, 31 NEW POL. SCI. 203, 215 (2009). In his view, "[p]olitical consumerism focuses on a sense of social and political global responsibility exercised by consumers who recognize that the material goods they purchase are more than mere objects; instead, consumer choices" "send a message to policy-makers by demonstrating that people believe in a particular issue so much that they are willing to put their dollars behind it. It can also build bridges across different groups of people and bond likeminded individuals together, just as more traditional social movements do." *Id.* at 203–04.

80. Vogel, *Private Regulation of Corporate Conduct*, *supra* note 60, at 81–83 (explaining that to make civil regulation more effective, (a) the business case for compliance with civil regulation must be strengthened by linking good conduct to financial rewards and, conversely, bad conduct to financial loss; (b) the take-up of civil regulation by governments into domestic regulatory policies should increase; also important, citizens must be better able to "define and defend their own social, political, and environmental interests vis-à-vis business firms;" and (c) the behavior of global firms must be improved by enhancing official global reporting requirements and procurement policies to give priority to more responsible firms; additionally, "voluntary but legally enforceable labeling requirements and certification standards" should be established).

81. VOGEL, MARKET FOR VIRTUE, *supra* note 4, at 51–53 ("Since the early 1990s, scores of firms have been the target of protests against their policies and products. Nike's labor practices made the giant sporting goods company a target of boycotts . . . . Some consumers boycotted Shell to protest its human rights policies in Nigeria and its plans to sink the Brent Spar oil platform in the Atlantic. . . . The Gap, Disney, Mattel, Ikea, Sainsbury (a British food retailer), Carrefour (a French global retailer), Starbucks, McDonald's, Shell, Unilever, Staples, Home Depot, Mars, Hershey, and C&A (a European clothing retailer) all have made policy changes in response to NGO and media criticisms of their social or environmental practices.").

has important benefits, particularly since the regulation of corporations' social-environmental conduct is generally lacking.<sup>82</sup>

Consumers are (too often) already “where the buck stops” with respect to determining what is or is not acceptable on the sustainability front; this is so even though consumers are generally ill-equipped to serve a policing role. Regardless of one's views on the question whether conscious consumers are or are not the right agents for promoting positive change in the way that business does business, there should at least be agreement that those who *do* engage in conscious consumption deserve to be protected from abuse and deception. Identity harm can be useful here, as a shield and a sword.

As Johnston eloquently explains, consumers' *freedom to choose* is perhaps more fundamental today than ever before:

[c]hoice is not only central to what consumers do in the marketplace (e.g., they must choose between literally thousands of commodities in a grocery store), but it is also central to the meaning attached to modern consumption and a modern self who makes autonomous choices expressing a

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82. One way to ensure the adoption of better sustainability practices by corporations—and, by extension, shield consumers from identity harm—is to upgrade official regulation. Tailored rules would allow consumers to make their purchases with the same assurance about a product's sustainability as about physical safety. On the environmental front, this has happened incrementally through the FTC's issuance of the Green Guides and the regulation of labels like USDA Organic. On the social front, shifting the burden for monitoring corporate compliance with international social and human rights onto domestic regulators has always been a difficult proposition. For discussions on the resistance to binding international norms pertaining to corporations' human rights compliance, see Beth Stephens, *Making Remedies Work: Envisioning a Treaty-Based System of Effective Remedies*, in BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS (Surya Deva & David Bilchitz eds., forthcoming 2017) (tracing the stunted United Nations efforts to articulate governing norms for corporations with respect to human rights); see also, Kishanthi Parella, *Treaty Penumbra*, 38 U. PA. J. INT'L L. 101, 138 (forthcoming 2017) (recounting how privates like industry associations have repeatedly “insisted that the primary duty-bearers of human rights are governments, not corporations”).

As concerns official regulatory innovation, a shining example is the California Transparency In Supply Chains Act; however, California is the only state to have passed such a statute, and the statute's requirements are limited to disclosure. See Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 430 (2015) (“The CTSCA requires applicable companies to disclose their efforts to ensure that their supply chains are free from slavery and human trafficking. It outlines activities that companies must report on their websites, including supply chain verifications, audits, and training.”).

unique identity, and whose sense of freedom is intimately connected to consumer choice. Put differently, modern consumption changed not just what people purchased, but the ideas and *meanings* around consumption, with a particular focus on the construction of identity through autonomous consumer choice.<sup>83</sup>

The freedom to make consumer choices that, in addition to meeting material needs and desires, are in line with one's values, is interwoven with intimate questions about one's identity. How one chooses, what one chooses, and why one chooses says a great deal about who one is or wants to be in the world. Identity harm shines the spotlight on one very important layer of the freedom of choice: the freedom to choose *not* to be complicit in social and environmental abuses associated with the making and/or use of commercial products.

Importantly, the freedom to choose not to be implicated in an abusive system must be protected even if that system is legal—that is, even if the laws on the books do not officially sanction a particular form of corporate social-environmental (mis)conduct. When the autonomy to make such choices is compromised, in other words, when choices are based on false or exaggerated sustainability promises, the consequences can be severe, both personally and societally. At a minimum, our confidence in the belief that we are free—equipped and protected—to choose one product over another can be undermined; more intimately, our confidence in the belief that we are free to choose and determine our commercial selves can be undermined.

For better or worse, in today's world—especially in the United States—the autonomy to determine the shape and content of one's relationship to the material world is a pillar of freedom. Irrespective of how one views the social utility of consumer activism as distinct from political activism, the freedom to make consumer choices in line with one's personal values deserves protection.

## II. IDENTIFYING IDENTITY HARM

The rise of conscious consumerism provides a context for

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83. Johnston, *supra* note 10, at 242 (emphasis in original) (citations omitted).

identity harm, the risk of which has increased dramatically as the market for virtue has expanded. Identity harm afflicts both the realms of environmental and social promises. This Part offers examples of identity harm as it relates to both types of promises through an overview of relevant case law and some hypotheticals. The examples pertain to different industries, including the automotive, precious minerals, food, and apparel industries. Working through them serves to identify some of the key characteristics of identity harm, as well as some of the challenges involved with recognizing identity harm legally.

### A. *Broken Environmental Promises: Dieselgate*

Dieselgate is the leading example illustrating how identity harm can be generated by broken environmental promises. To begin, consider the complaints filed by the FTC, the EPA (through the Department of Justice), and the class action plaintiffs against VW. They all reference the same advertising campaign, a campaign that included both televised and print advertisements, and affirmatively targeted environmentally conscious consumers.<sup>84</sup> For instance, in a commercial for the Audi TDI that aired during the 2010 Super Bowl, the fictional “Green Police” go around arresting people who choose plastic over paper bags at the supermarket, drink water from plastic bottles, throw away batteries, neglect to compost orange rinds, install incandescent light bulbs, soak in overheated Jacuzzi water, and drink from Styrofoam cups.<sup>85</sup> As they make their arrests—to the tune of their very own green police soundtrack—the officers say things like, “you chose the wrong day to mess with the ecosystem, plastic boy!” and “what do you guys think about plastic bottles now?”<sup>86</sup> In one of the ad’s final scenes, an Audi driver slows down at an “Eco Check” roadblock

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84. Complaint at 5, *FTC v. Volkswagen Grp. of Am., Inc.*, No. 3:16-cv-01534 (No. 162 3006) (N.D. Cal. Mar. 29, 2016) [hereinafter *FTC Complaint*] (“Volkswagen USA targeted much of its ‘Clean Diesel’ advertising at ‘progressive’ and ‘environmentally-conscious’ consumers. Volkswagen USA’s marketers studied their targets’ psychology, concluding that such consumers ‘rationalize themselves out of their aspirations and justify buying lesser cars under the guise of being responsible.’”).

85. See *Green Police: Audi Super Bowl Ad*, YOUTUBE (Mar. 6, 2017), <https://www.youtube.com/watch?v=Ml54UuAoLS0> [<https://perma.cc/KH72-SXTK>]; *FTC Complaint*, *supra* note 84.

86. *Green Police: Audi Super Bowl Ad*, *supra* note 85.

where his car is looked over by several officers; one officer says to another, “You’ve got a TDI here,” which the other officer, now addressing the driver, follows up with, “Clean Diesel? You’re good to go, sir.”<sup>87</sup> The ad concludes with the tagline, “Green has never felt so right.”<sup>88</sup>

Another advertisement, titled, “Three Old Wives Talk Dirty,” features three elderly women debating whether or not diesel cars are dirty; the debate is settled when one of the women holds her white scarf to the exhaust for a few seconds, and then displays it, still totally white, to her friends, saying, “see how clean it is?”<sup>89</sup> Promotional mailers proclaimed, “[w]ith the new Jetta TDI Clean Diesel, you get a great car that’s low on emissions,” and “[c]lean as a whistle” while other print advertisements boasted, “[d]iesel—It’s No Longer a Dirty Word.”<sup>90</sup> They conveyed that the vehicles reduced the emissions of harmful nitrogen oxide gases by 95 percent.<sup>91</sup> Meanwhile, VW’s website fawned, “[t]his ain’t your daddy’s diesel. . . . Enter TDI ‘clean’ diesel. Ultra-low-sulfur fuel, direct injection technology, and extreme efficiency. We’ve ushered in a new era of diesel.”<sup>92</sup>

Given that VW’s clean diesel advertising campaign actively targeted environmentally conscious consumers, it is safe to assume that a fair number of those who purchased the Dieseltgate vehicles self-identified as such.<sup>93</sup> It is further safe to assume that these individuals not only believed VW’s claims that the cars were better for the environment than (at least some of) the alternatives, but also, that by purchasing one of these cars, they would be safeguarding their environmentally conscious consumer identity, not compromising it.

Upon learning the truth that the cars had secretly been

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87. *See id.*; FTC Complaint, *supra* note 84.

88. FTC Complaint, *supra* note 84, at 9.

89. Complaint at 146, *Brook v. Volkswagen Grp. of Am., Inc.*, No. MDL 2672 CRB (N.D. Cal. Feb. 22, 2016) [hereinafter *Brook Complaint*] (“Like others in VW’s ‘clean’ diesel campaign, this ad falsely or misleadingly portrayed the exhaust emissions from the Class Vehicles as clean and safe. In reality, the Class Vehicles actually emitted invisible and extremely hazardous levels of NOx.”).

90. FTC Complaint, *supra* note 84, at 6.

91. *Id.*

92. *Brook Complaint*, *supra* note 89, at 146.

93. Press Release, Fed. Trade Comm’n, *FTC Charges Volkswagen Deceived Consumers with Its “Clean Diesel” Campaign* (June 28 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-charges-volkswagen-deceived-consumers-its-clean-diesel> [<https://perma.cc/WEQ6-V3VN>].

outfitted with software designed to cheat emissions testing equipment and emitted between ten to forty times the amount of allowable nitrogen oxide pollution, affected car owners were understandably very upset.<sup>94</sup> Since the reveal of the cars' dirtiness had no effect on their performance or fuel efficiency, and since the cars had no defects (e.g., faulty brakes, exploding air-bags) that made them unsafe to drive, that could not be the source of the Dieselpate victims' disappointment. Their disappointment was owed instead to a combination of factors. On the one hand, realizing that they had been deceived into buying cars that were not only much dirtier than advertised, but also much dirtier than is legally allowed under national emissions standards. And, on the other hand, realizing that, technically, the cars' resale value had dropped to something approaching zero dollars as a result of the illegality of the cheat device software, which made the cars illegal to sell or buy on the U.S. market.<sup>95</sup> Otherwise stated, there were both psychic and economic aspects to the disappointment.

Identity harm is concerned with the first flavor of disappointment experienced by the Dieselpate victims who realized that they had become unwittingly complicit in a scheme that harmed the environment, when they had believed

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94. Jeff S. Bartlett et al., *Guide to the Volkswagen Emissions Recall*, CONSUMER REP., <http://www.consumerreports.org/cro/cars/guide-to-the-volkswagen-dieselpate-emissions-recall> (last updated Jan. 6, 2017) [<https://perma.cc/YC5M-UJYT>] ("NO<sub>x</sub> contributes to ground-level ozone and fine particulate matter. According to the EPA, 'Exposure to these pollutants has been linked with a range of serious health effects, including increased asthma attacks and other respiratory illnesses that can be serious enough to send people to the hospital. Exposure to ozone and particulate matter have also been associated with premature death due to respiratory-related or cardiovascular-related effects. Children, the elderly, and people with pre-existing respiratory disease are particularly at risk for health effects of these pollutants.'").

95. Sudhin Thanawala & Tom Krisher, *Anger Still Flares After Judge Oks Volkswagen Emissions Deal* (Oct. 25, 2016), <https://phys.org/news/2016-10-billion-volkswagen-emissions-settlement.html> [<https://perma.cc/4DMD-VN23>] (showing a photo of a woman holding a sign that reads: MY VW TDI: INVESTED \$30,000 WORTH \$00,000 ENVIRONMENTALLY & FINANCIALLY, BUY IT BACK!). Concern about the cars' market value was exacerbated by VW's decision to stop selling the TDI cars in the United States soon after the reveal. Alanis King, *Volkswagen Tells Dealers to Halt Sales of New TDI Cars*, JALOPNIK (Sept. 20, 2015), <http://jalopnik.com/volkswagen-tells-dealers-to-halt-sales-of-new-tdi-cars-1731923302> [<https://perma.cc/5GXV-8LGF>]. Although the EPA would "not take action to stop VW owners from driving their personal cars," the government would *not* grant VW a "certificate of conformity" to sell the 2016 TDI models, making them unsellable. *Id.*

they were being environmentally friendly.<sup>96</sup> However many miles they had driven during the seven-plus years that VW's deception unfolded could now be translated into toxicity, rather than responsibility. As expressed by one Dieselgate victim, "[t]hat we were all unknowingly 'rolling coal,' spewing exponentially more emissions into the atmosphere than we realized, and that Volkswagen was fully aware of its deception, carries a potent sting."<sup>97</sup> This particular "sting" describes identity harm and hones in on a few of its key characteristics.

First, identity harm is distinct and independent from economic loss. In the case of Dieselgate, environmentally conscious car owners would have experienced identity harm even if the cars' resale value had remained unchanged, and even if the resale value had somehow *increased*. Indeed, the next Part discusses a recent complaint filed by Dieselgate victims who sold their dirty diesels *before* the scandal broke—meaning before the resale value of their cars could have been affected by the reveal of VW's scheme. Second, identity harm is derivative in the sense that it stems not (only) from a direct injury to the consumer, but (primarily) from an injury to a third party—here, the planet and the health of Dieselgate-affected communities—in which the consumer became complicit by their purchase. Third, identity harm can be ongoing, rather than limited to a particular point in time. Some conscious consumers would never buy a dirty car, no matter how fuel efficient. Upon realizing that they had been driving a dirty car for years, these victims might experience a form of

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96. A class-action complaint filed on behalf of dirty-diesel car owners who sold their vehicles *before* the scandal broke describes the deception thus: "[VW] secretly turned the most environmentally-conscious consumers into some of the biggest polluters on the road—and charged them a premium in the process." Complaint at 6, *Nemet v. Volkswagen Grp. of Am., Inc.*, No. 010549-11 (N.D. Cal. Aug. 2, 2017) [hereinafter *Nemet Complaint*]. The plaintiffs were thus "used . . . as unwitting puppets in a scheme that jeopardized the safety of the American [people]." *Id.* at 14. This complaint is discussed in greater detail in Section III.A.

97. Andrew Story, *Why VW's Betrayal with Diesel Engines Is Different*, AUTO. NEWS (Sept. 21, 2015), <http://www.autonews.com/article/20150921/BLOG06/150929989/why-vws-betrayal-with-diesel-engines-is-different> [<https://perma.cc/UDM6-4V5S>] ("There's nothing wrong with the engines or their drivability; rather, they emit vastly more pollution than advertised to either the public or the EPA. The only reason they were ever approved for sale in America is due to a software trick known as a 'defeat device' that VW engineers deliberately designed to mislead emissions testers. Selling a crappy car is one thing. Lying to customers is another entirely. Which ends up being the more egregious offense in the eyes of the buying public remains to be seen.").

nauseating disutility that is reactivated every time they get behind the wheel—until VW either takes the car off their hands or fixes it, as provided in the settlement.

Dieselgate clearly illustrates how broken environmental promises attached to the *greenness* of a product can produce both economic harm and noneconomic (identity) harm. We return to the relationship between these two dimensions of harm, and the difficulty of distinguishing them legally, in Part III. Here, we continue to explore the workings and articulations of identity harm.

### B. Broken Social Promises

The previous section offered an example of identity harm occurring in the realm of broken environmental promises. This section offers examples of identity harm occurring in the realm of broken social or humanitarian promises.

#### 1. All That Shines

To enter this new realm, imagine purchasing your gold wedding band, a symbol of love and commitment, from a retailer affiliated with a voluntary (not legally mandated) sustainable jewelry initiative, such as the Responsible Jewellery Council<sup>98</sup> or the No Dirty Gold campaign.<sup>99</sup> Members

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98. *About*, RESPONSIBLE JEWELLERY COUNCIL, <http://www.responsiblejewellery.com/> (last visited Feb. 22, 2017) [<https://perma.cc/QYV3-7UZU>]. The RJC is a not-for-profit, standard setting and certification organization that has more than 900 member companies that span the jewelry supply chain from mine to retail. *Id.* RJC Members commit to and are independently audited against the RJC Code of Practices—an international standard on responsible business practices for diamonds, gold, and platinum group metals. *Id.* The Code of Practices addresses human rights, labour rights, environmental impact, mining practices, product disclosure and many more important topics in the jewelry supply chain. *Id.*

99. *Retailers*, NO DIRTY GOLD CAMPAIGN, [http://nodirtygold.earthworksaction.org/retailers/the\\_gold\\_star\\_list#.WKyOqBIrKV4](http://nodirtygold.earthworksaction.org/retailers/the_gold_star_list#.WKyOqBIrKV4) (last visited Feb. 21, 2017) [<https://perma.cc/6C48-HQCW>]. Members include jewelry retailers (e.g. Target, Walmart, Cartier, Tiffany & Co) and around 100 others who endorse the Golden Rules, “a set of criteria for more responsible mining” that were developed “based on broadly accepted international human rights laws and basic principles of sustainable development.” *Id.* *The Golden Rules*, NO DIRTY GOLD CAMPAIGN, [http://nodirtygold.earthworksaction.org/retailers/golden\\_rules#.WgzeWrQ-fdQ](http://nodirtygold.earthworksaction.org/retailers/golden_rules#.WgzeWrQ-fdQ) (last visited Feb. 21, 2017) [<https://perma.cc/J73K-Y4L4>] (“The Golden Rules hold that mining companies and operations must: 1. Respect basic human rights outlined in international conventions and law; 2. Obtain the free, prior, and



of these initiatives pledge to observe human and labor rights, as well as environmental standards. Now imagine discovering that the gold in your ring was actually sourced from a mine that grossly mistreats its workers, or that has so contaminated the local water supply that surrounding lands are no longer arable or able to sustain the livelihoods of local indigenous communities—assuming they had not been forcefully displaced when the mine was opened.<sup>100</sup>

Alternatively, imagine learning that the diamond in your engagement ring, which you had believed to be “conflict-free,” was in fact sourced from a country marred by diamond-fueled murder, rape, and slavery.<sup>101</sup> This is far from impossible, as

informed consent of affected communities; 3. Respect workers’ rights and labor standards, including safe working conditions; 4. Ensure that operations are not located in areas of armed or militarized conflict; 5. Ensure that projects do not force communities off their lands; 6. Ensure that projects are not located in protected areas, fragile ecosystems, or other areas of high conservation or ecological value; 7. Refrain from dumping mine wastes into the ocean, rivers, lakes, or streams; 8. Ensure that projects do not contaminate water, soil, or air with sulfuric acid drainage or other toxic chemicals; 9. Cover all costs of closing down and cleaning up mine sites; 10. Fully disclose information about social and environmental effects of projects; 11. Allow independent verification of the above.”).

100. These initiatives exist because

[g]old mining is without doubt one of the world’s dirtiest industries: it uses cyanide, generates heaps of waste, and leaves a long-lasting scar on landscapes and communities . . . gold mining operations have displaced people from their homelands against their will, destroyed traditional livelihoods, and damaged ecosystems. Indigenous people in particular disproportionately suffer the negative effects of gold mining, adding to the injustices they already endure. More than half of all gold comes from indigenous peoples’ lands.

*About Us*, NO DIRTY GOLD CAMPAIGN, [http://nodirtygold.earthworksaction.org/about\\_us#.WKYw4RIrKV4](http://nodirtygold.earthworksaction.org/about_us#.WKYw4RIrKV4) (last visited Feb. 21, 2017) [<https://perma.cc/68U5-4T3D>]. They also exist to stymie the mining of conflict or blood-diamonds. See GLOBAL WITNESS, ROUGH TRADE (1998), <https://www.globalwitness.org/en/campaigns/conflict-diamonds/rough-trade/> [<https://perma.cc/DE5Z-RVZY>] (seminal report on blood-diamonds).

101. Michael Allen, *The Blood Diamond ‘Resurfaces’*, WALL ST. J. (June 19, 2010), <https://www.wsj.com/articles/SB10001424052748704198004575311282588959188> [<https://perma.cc/54XG-V2TV>]. While international pressure had helped “end a vicious civil war a decade ago by strangling the ability of rebels to trade diamonds for weapons” problems persist:

[A] visit to Angola’s diamond heartland reveals that plenty of blood still spills over those precious stones . . . a violent economy prevails in which thousands of peasant miners eke out a living searching for diamonds with shovels and sieves. Because they lack government permits, miners and their families say they are routinely beaten and shaken down for bribes by soldiers and private security guards—and, in extreme cases,

reporter Jenni Avins explains:

Most jewelers and diamond dealers will say their diamonds are ‘conflict-free,’ citing their Kimberley Process certification, an international protocol designed to keep conflict diamonds (also known as blood diamonds) off the market. The truth is, the Kimberley Process protects diamond dealers and consumers from discomfort far more effectively than it protects the residents of diamond-rich, war-torn countries.<sup>102</sup>

This is because the definition of a “conflict diamond” is “outrageously narrow: ‘rough diamonds used by rebel movements to finance wars against legitimate governments’ . . . that means that diamonds from mines in Zimbabwe, where the army massacred more than 200 workers, were not ‘conflict diamonds,’ as defined by the Kimberley Process.”<sup>103</sup>

In such a situation, would your experience of the ring be altered? Would your sense of its value change? Would the diamond suddenly appear less brilliant? If the value did diminish in your eyes, would you be able to express this in dollar terms, or would you need a different kind of currency or vocabulary to describe your sense of loss? And what would it take for you to be made whole? Would getting the dollar difference between your ring and a truly conflict-free ring do the trick? How about getting the entire purchase price back? Or would your injury require a different kind of remedy, one more focused on addressing the injury—in part facilitated through your purchase—experienced by other human beings?

For some, wearing the ring might elicit a deep form of emotional distress brought on by the constant reminder of one’s unwitting participation in another’s—or many others’—suffering. This again points to the (sometimes) ongoing nature of identity harm, and to its independence from pure economic loss. Indeed, a ring’s resale value could well increase over time;

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killed.

*Id.*

102. Jenni Avins, *How to Propose with an Engagement Ring as Rock Solid as Your Ethical Values*, QUARTZ (Apr. 14, 2016), <http://qz.com/657236/how-to-propose-with-an-engagement-diamond-as-rock-solid-as-your-ethical-values/> [<https://perma.cc/8NSN-FYTU>].

103. *Id.*

however, that could have little to no bearing on its subjective value.

## 2. Chocolate

Jewelry and cars tend to be relatively big ticket items. On a smaller—but no less profound—scale, we need look no further than chocolate, perhaps “the most beloved confectionary ingredient in the world.”<sup>104</sup> Learning that the chocolate treat they gave their child was made using forced child labor could make parents sick to their stomach, literally and figuratively. A recent case makes the point.<sup>105</sup> In 2015, Laura Dana brought an action on behalf of herself and others similarly situated against Hershey Chocolate alleging that the company had failed to disclose “the use of child and slave labor in their supply chains to consumers.”<sup>106</sup> As seen from the below excerpt from the complaint, though it does not employ exactly the same language, the claim contains a strong identity harm element:

America’s largest and most profitable food companies should not tolerate child labor, much less child slave labor, anywhere in their supply chains. These companies should not turn a blind eye to known human rights abuses or shirk from investigating and preventing potential human rights abuses by their suppliers, *especially when the companies consistently and affirmatively represent that they act in a socially and ethically responsible manner*. When these food companies fail to uphold their responsibility for ensuring the absence of child and slave labor in their supply chains, *their misconduct has the profound consequence of supporting and encouraging such labor*. And when these food companies fail to disclose the use of child and slave labor in their supply chains to consumers, they are deceived into buying products they would not have otherwise and thereby *unwittingly supporting child and slave labor themselves*

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104. Complaint at 1, *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. Sept. 28, 2015) (No. 3:15-cv-04453) [hereinafter *Dana Complaint*].

105. *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016).

106. *Dana Complaint*, *supra* note 104, at 1.

*through their product purchases.*<sup>107</sup>

To illustrate the moral magnitude of the child slavery problem that plagues the global supply chain for “big chocolate” companies,<sup>108</sup> the Complaint references an interview with a young boy called Drissa, “a recently freed slave who had never even tasted chocolate,” and who reported being beaten and forced to work long hours without pay.<sup>109</sup> When Drissa was asked what he would tell people who eat chocolate made from slave labor, he responded, “[t]hey [are] enjoy[ing] something that [I] suffered to make. . . . [T]hey are eating my flesh.”<sup>110</sup>

As these excerpts suggest, deep psychic harm can attach to discovering that one’s purchase is linked to human, social, and labor rights abuses. It is bad enough that purchasing certain brands of chocolate—of all things—provides support to companies that know about, but have so far failed to eradicate, the use of forced child labor in their supply chains. But what is worse is realizing that one’s purchase helped to perpetuate a system whereby children in poor countries are forced into slavery in order to satisfy the desires of children (and adults) in wealthy countries. Such realizations can expose a distressing disconnect between who one is in the world and who one wants to be in the world. And the *Dana* plaintiffs are not alone. They are joined by plaintiffs in two class actions brought against other big chocolate companies, Nestle<sup>111</sup> and Mars<sup>112</sup> (together with *Dana*, the “*Chocolate Cases*”).

Before discussing the outcome of the *Chocolate Cases*, I want to explain how they are useful for purposes of identifying identity harm. First, they show that identity harm does not attach only to big ticket items like cars or diamond rings; rather, it can attach to much cheaper items like chocolate bars, ground coffee, or a pair of trousers. The experience of identity harm is therefore not necessarily correlated to the dollar

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107. *Id.* (emphases added).

108. The big chocolate industry is made up of large companies, including Hershey, Nestle, Mars, and Mondelez-Kraft; it is distinct from the craft or “small” chocolate industry.

109. Brian O’Keefe, *Inside Big Chocolate’s Child Labor Problem*, FORTUNE (Mar. 1, 2016), <http://fortune.com/big-chocolate-child-labor/?loginfailure=true> [<https://perma.cc/W4QF-MREA>].

110. *Dana* Complaint, *supra* note 104, at 8.

111. *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954 (N.D. Cal. 2016).

112. *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016 (N.D. Cal. 2016).

amount paid for the offending product. The mere fact that one has been unwittingly implicated in an abusive system—even if only by paying \$1.30 for a candy bar—can be sufficient to activate identity harm. That said, we can fairly expect that the intensity of identity harm is correlated to the severity of the injury to the planet or to other human beings. As an example, learning that a bar of chocolate was made using underpaid labor might produce a lower intensity of identity harm than learning that it was made using forced child labor.

I highlight this not to suggest that we should attempt to rank identity harm(s)—we shouldn't. Rather, I want to show that, unlike most consumer claims, which typically center on injuries (economic or physical) experienced directly by the consumer, identity harm is both inward- and outward-looking: it affects us individually, but also as global citizens, as individuals who are part of a greater whole. It is 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.<sup>113</sup> As such, 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.

The *Chocolate Cases* also show that identity harm does not only attach to injuries that occur nearby—e.g., harming the health of your community by driving a polluting vehicle; it can also attach to injuries that occur far away—in the case of chocolate, particularly in Ivory Coast. The fact that those tangibly injured reside at the other end of the global supply chain from rich country consumers does not change the reality that we—consumers and producers—are connected. This connectedness is easy to forget, but important to remember, and this is what identity harm (building on the work of the fair-trade movement) can help with.

Yet another reason why the *Chocolate Cases* are useful is that they show that identity harm does not require an affirmative lie to be activated. Indeed, and this is a challenging

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113. In this sense, identity harm bears a strong resemblance to defamation, where, because of a false statement, one's reputation is damaged. This facet of identity harm will be discussed in a subsequent article. Sarah Dadush, *The Law of Identity Harm*, 96 WASH. L. REV. (forthcoming 2019).

legal point to make, identity harm can result from disappointed *general* expectations about a product and/or the company selling it. This is why the sentence in the *Dana* Complaint, “especially when the companies consistently and affirmatively represent that they act in a socially and ethically responsible manner,”<sup>114</sup> is important: it draws attention to the reality that consumer expectations are shaped by far more than the information displayed on product labels or in advertisements. Indeed, consumer expectations are shaped by a vast informational web of direct and indirect statements about the sustainability attributes of a company’s products or its brand. As indicated in Part I, sustainability commitments can be expressed in any number of ways, including directly, through labeling and advertising, but also indirectly, in company codes of conduct and annual reports, or by endorsing voluntary sustainability standards and principles or by becoming formally affiliated with voluntary sustainability initiatives.

For example, Hershey and Mars are members of sustainable supply chain programs, such as the International Cocoa Initiative,<sup>115</sup> and sustainability-focused industry associations, such as the World Cocoa Foundation.<sup>116</sup> Their codes of conduct are replete with sustainability commitments, in particular with respect to complying with human and labor rights. They are also signatories to the 2001 *Protocol For The Growing And Processing Of Cocoa Beans And Their Derivative Products In A Manner That Complies With [International Labor Organization] Convention 182 Concerning The Prohibition And Immediate Action For The Elimination Of The Worst Forms Of Child Labor* (the Protocol).<sup>117</sup> The Protocol was

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114. *Dana* Complaint, *supra* note 104, at 1. The complaint notes that Hershey asserted in its 2014 Corporate Responsibility Report that “[it] has zero tolerance for the worst forms of child labor in its supply chain.” *Id.* at 4.

115. *About Us*, INT’L COCOA INITIATIVE, <http://www.cocoainitiative.org/about-ici/about-us/> (last visited Feb. 20, 2017) [<https://perma.cc/E5J3-MX9F>] (stating that the ICI promotes “child protection in cocoa-growing communities” and “works with the cocoa industry, civil society, farmers’ organisations, communities and national governments in cocoa-producing countries to ensure a better future for children and contribute to the elimination of child labour”).

116. The World Cocoa Foundation (WCF) is an international membership organization that promotes sustainability in the cocoa sector. *History & Mission*, WORLD COCOA FOUND., <http://www.worldcocoafoundation.org/about-wcf/history-mission/> (last visited Feb. 23, 2017) [<https://perma.cc/5PSR-FN8H>].

117. *The Harkin-Engel Protocol*, SLAVE FREE CHOCOLATE, <http://www.slavefreechocolate.org/harkin-engel-protocol/> (last visited Feb. 8, 2017) [<https://perma.cc/5PSR-FN8H>].

the brainchild of New York Representative Eliot Engel and then-Iowa Senator Tom Harkin; it came into being when the forced child labor problem came to the attention of the U.S. public in 2001. Initially, Engel had introduced a legislative amendment to fund the development of a “No Child Slavery” label for chocolate products sold in the United States, but that idea was dropped in favor of the voluntary Protocol.<sup>118</sup> Signatories committed to developing standards to certify cocoa produced without the “worst forms of child labor.”<sup>119</sup>

The point is that today more than ever, consumer expectations are shaped by a much bigger informational world than can be contained on a simple label. This world generates a great deal of “sustainability noise” that companies have incentives to amplify, in order to increase consumer trust—and, ultimately, sales. Once we recognize that consumers derive their expectations from multiple sources, that they are often drowning in a sea of sustainability noise, and that companies stand to benefit financially from amplifying this noise, we can consider the possibility that identity harm occurs, even in the absence of an outright misrepresentation. Legally, this raises a thorny issue because of the understandable resistance to hold companies accountable for breaking promises that they did not actually make. But, what counts as a promise? What type and volume of information can be treated as a part of the bargain? Only the information contained on the label and in factual representations made in advertisements? Or also the promises made around the good that effectively serve to drown it in a sea of sustainability noise?

Coming back now to the *Chocolate Cases*, all of which shared the same general facts, and so far also the same (disappointing) fate. The plaintiffs asserted damages based on their purchase of chocolate products, arguing that they would not have bought the chocolate, or paid as much for it, had they known about the poor treatment of cacao growers and the use of child labor in the chocolate supply chain.<sup>120</sup> In contrast to

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cc/29EC-W5Z3].

118. *Id.*

119. *Id.*

120. Abuse of worker and children’s rights is particularly prevalent in Ivory Coast, which produces over 40 percent of the world’s cacao and is the primary sourcing country for the chocolate confections made by Hershey, Nestle, and Mars. Dana Complaint, *supra* note 104, at 6. “The lives of the people who harvest cocoa are nothing short of terrible. The labor in harvesting cocoa is performed by

Dieselgate, therefore, the issue for the chocolate case plaintiffs was not that the chocolate companies had affirmatively advertised their products as child labor free, but that they had neglected to disclose the possibility that their products could have been made using forced child labor.

The *Chocolate Cases* were all filed following the release of a report by the Payson Center for International Development at Tulane University. That report found that many of the commitments undertaken under the Protocol have yet to be met, even fifteen years after the Protocol was signed, and even after the deadline for certifying their product as child labor free has been extended multiple times—it is now set to 2020.<sup>121</sup> Even more troubling, the Tulane Report found that the child labor problem has only worsened over the years; between 2008 and 2014, the number of children working on Ivorian and Ghanaian cocoa farms under hazardous conditions has risen by almost 20 percent.<sup>122</sup> The *Chocolate Cases* were filed in protest of the ongoing failure of big chocolate companies to address the

slave laborers – often children. Many of these children are taken from poor countries like Mali. Some of these children are abducted, and there are countless missing children claims.” *Id.* at 4.

121. TULANE U. SCH. OF PUB. HEALTH & TROPICAL MED., 2013/14 SURVEY RESEARCH ON CHILD LABOR IN WEST AFRICAN COCOA GROWING AREAS 86 (2015), [http://www.childlaborcocoa.org/images/Payson\\_Reports/Tulane%20University%20-%20Survey%20Research%20on%20Child%20Labor%20in%20the%20Cocoa%20Sector%20-%2030%20July%202015.pdf](http://www.childlaborcocoa.org/images/Payson_Reports/Tulane%20University%20-%20Survey%20Research%20on%20Child%20Labor%20in%20the%20Cocoa%20Sector%20-%2030%20July%202015.pdf) [https://perma.cc/48SE-FDCS] [hereinafter TULANE REPORT] (finding that, while some progress has been made, a major reduction of child labor used in cocoa production has not been realized, and that increased global demand for cocoa will exacerbate the difficulty of reaching this goal); Brian O’Keefe, *Bitter Sweets*, FORTUNE (Mar. 1, 2016), <http://fortune.com/big-chocolate-child-labor/> [https://perma.cc/5G63-KF4D]. Senator Tom Harkin and Representative Eliot Engel originally pushed for the eradication of the worst forms of child labor in chocolate production by July 1, 2005. *Id.* However, this deadline was extended to 2008, and then again to 2010, until the industry most recently agreed to cut child labor in Ivory Coast and Ghana by 70 percent by 2020. *Id.*

122. TULANE REPORT, *supra* note 121, at 81 (“In the aggregate more than 2 million children between 5-17 years are estimated to be in hazardous work in cocoa in 2013/14, an 18% increase compared to 2008/09. The goal of the Harkin-Engel Protocol – removing large numbers of children from the [Worst Forms of Child Labor] in West African cocoa agriculture – has yet to be reached.”); Alexandra Wexler, *Chocolate Makers Fight a Melting Supply of Cocoa*, WALL STREET J. (Jan. 13, 2016), [https://www.cocoalife.org/~media/CocoaLife/en/download/article/Wsj\\_Chocolate%20makers%20supply%20chain.pdf](https://www.cocoalife.org/~media/CocoaLife/en/download/article/Wsj_Chocolate%20makers%20supply%20chain.pdf) [https://perma.cc/2P7D-B376] (explaining that hazardous conditions include clearing land, using dangerous instruments like machetes, carrying heavy loads, or for long hours, at night or with exposure to agrochemicals).



child (and adult) labor issues; they also called the companies out on the sincerity of their sustainability commitments. Such consumer actions are a clear instance of civil regulation; they would be less likely or necessary if government were policing corporate conduct more aggressively.

The plaintiffs argue that knowing that chocolate products are “likely the product of the Worst Forms of Child Labor is material to consumers not wishing to support such labor with their purchasing power.”<sup>123</sup> Thus, failure to disclose this information on product packaging constitutes a material omission; one that is all the more problematic and “shameful” given that each of the companies at issue “continues to profit from the child and forced labor that is used to make its Chocolate Products.”<sup>124</sup> The complaints are based solely on the companies’ respective omissions, rather than any affirmative statements made.<sup>125</sup>

The *Chocolate Cases* were brought to the Northern District of California under California’s Unfair Competition Law (UCL),<sup>126</sup> Consumers Legal Remedies Act (CLRA),<sup>127</sup> and False Advertising Law (FAL).<sup>128</sup> Although in each case the court held that the plaintiffs had standing under the California statutes and under Article III,<sup>129</sup> the court ultimately dismissed each case for failure to state a claim on which relief could be granted. On standing, the court concluded that the fact that

123. Dana Complaint, *supra* note 104, at 4.

124. *Id.*; see *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 655 (N.D. Cal. 2016); see also *Hodson v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1020 (N.D. Cal. 2016); see also *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954, 957 (N.D. Cal. 2016). Although, certain Nestle products also advertise that Nestle “works with [a certification program that does not permit child labor] to help improve the lives of cocoa farmers,” *McCoy*, 173 F. Supp. 3d at 957, and Dove, a Mars brand, offers a label describing its fair trade practices. *Hodson*, 162 F. Supp. 3d at 1020.

125. *Dana*, 180 F. Supp. 3d at 655, 667 (“The crux of Dana’s claim, however, is not that Hershey utilized slave labor or the worst forms of child labor, but rather that Hershey does not disclose the existence of those labor abuses in its supply chain on the packaging of its products. Dana has not identified any legislatively declared policy requiring such disclosure, nor does she cite any authority for the proposition that where some of a manufacturer’s suppliers contravene a legislatively established policy, it is ‘unfair’ within the meaning of the UCL for the manufacturer to fail to disclose those violations on its product packaging.”); *Hodson*, 162 F. Supp. 3d at 1020; *McCoy*, 173 F. Supp. 3d at 957.

126. CAL. BUS. & PROF. CODE §§ 17200–17210 (2017).

127. CAL. CIV. CODE §§ 1750–1784 (2017).

128. CAL. BUS. & PROF. CODE §§ 17500–17509 (2017).

129. *Dana*, 180 F. Supp. 3d at 661; *McCoy*, 173 F. Supp. 3d at 964; *Hodson*, 162 F. Supp. 3d at 1022.

plaintiffs had “paid more for [a product] than they otherwise would have paid, or bought it when they otherwise would not have done so,” is sufficient to qualify as an injury in fact.<sup>130</sup> Additionally, under the California statutes, the plaintiffs met the burden of showing that they had paid more for the chocolate products than the value they assigned to them and that the use of unfair labor practices caused them to devalue the goods.<sup>131</sup>

The primary reason for dismissal was that the chocolate companies did not have an affirmative duty to disclose any information pertaining to their supply chain labor practices.<sup>132</sup> The plaintiffs failed to make out their CLRA claims because the duty to disclose does not extend to all information that *may* influence a decision to purchase.<sup>133</sup> Additionally, “[the] weight of authority limits a duty to disclose under the CLRA to issues of product safety, unless disclosure is necessary to counter an affirmative misrepresentation.”<sup>134</sup> Given the plaintiffs’ failures to assert any dangers or safety concerns they faced as consumers, their CLRA claims were dismissed.<sup>135</sup>

The plaintiffs’ UCL claims also failed under both the “fraudulent” prong and “unfair” prong of the statute.<sup>136</sup> The

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130. *Dana*, 180 F. Supp. 3d at 661.

131. *Id.* at 658 (“[P]laintiff had standing because: (1) ‘California law permits litigants to pursue claims under the UCL, CLRA, and FAL if they show . . . that “the consumer paid more than he or she actually valued the product”; (2) the plaintiff adequately alleged that the use of forced labor in the supply chain caused him to devalue the product even if he could not prove that forced labor was used to produce the specific chocolate products that he purchased; and (3) the plaintiff adequately alleged that he saw the product labels before he purchased the products.” (citing *Hodsdon*, 162 F. Supp. 3d at 1022)); *McCoy*, 173 F. Supp. 3d at 964 (“The Court agrees with McCoy that, at least for the purpose of Article III standing, McCoy adequately pleads reliance by alleging that she saw the product labeling and would not have purchased the products if labor abuses in the supply chain had been disclosed.”).

132. *Dana*, 180 F. Supp. 3d at 666.

133. *Hodsdon*, 162 F. Supp. 3d at 1026; *McCoy*, 173 F. Supp. 3d at 967 (“Because . . . Nestle did not have a duty to disclose labor abuses in its supply chain on its product labels, the Court declines to resolve whether misrepresentations regarding labor practices can fall within the scope of the CLRA.”).

134. *Dana*, 180 F. Supp. 3d at 664.

135. *Id.* at 665; *Hodsdon*, 162 F. Supp. 3d at 1026; *McCoy*, 173 F. Supp. 3d at 958.

136. *See Hodsdon*, 162 F. Supp. 3d at 1024 (“The UCL prohibits ‘unfair competition’ defined as ‘any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising.’” (citing CAL. BUS. & PROF. CODE § 17200)); *see also Dana*, 180 F. Supp. 3d at 659; *McCoy*, 173

court held that the “unfair” prong of the UCL could only be satisfied in situations where nondisclosure was “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,” and that this standard was not met, *given the availability of this information on the companies’ websites*.<sup>137</sup> Addressing the “fraudulent” prong of the UCL, the court held that plaintiffs also came up short because, absent a duty to disclose, the nondisclosure of labor practices on a food label is insufficient to bring a UCL claim.<sup>138</sup> Under the FAL, persons or entities are prohibited from “mak[ing] or disseminat[ing] or caus[ing] to be made or disseminated before the public . . . any statement . . . which is untrue or misleading.”<sup>139</sup> The FAL claims in each of these cases failed because no statement was made.<sup>140</sup> Since these cases asserted an omission, rather than a misrepresentation, plaintiffs have no recourse under FAL, despite the materiality of the information omitted. Consequently, the *Chocolate Cases* were all dismissed without remedy.<sup>141</sup>

In sum, the *Chocolate Cases* failed because the court found that the chocolate companies had no duty to disclose the use of child labor in their supply chain. A principal reason for this conclusion was that consumers have access to information pertaining to the companies’ tainted supply chains, meaning that this knowledge is not exclusively in company hands. The court stated:

[I]t is difficult to see how any definition of “exclusive knowledge” could include a case where, by Dana’s own allegations: “Hershey acknowledges as it must, the child and slave labor in its Ivorian supply chain” in its

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F. Supp. 3d at 961.

137. *Dana*, 180 F. Supp. 3d at 659; *Hodsdon*, 162 F. Supp. 3d at 1027 (“Such information is, in fact, readily available to consumers on Mars’s website.”); *McCoy*, 173 F. Supp. at 968 (“declin[ing] to make [the] leap” that failing to disclose labor practices on a label is “unfair”).

138. *Dana*, 180 F. Supp. 3d at 665; *Hodsdon*, 162 F. Supp. 3d at 1026; *McCoy*, 173 F. Supp. at 967.

139. *McCoy*, 173 F. Supp. 3d at 969 (citing CAL. BUS. & PROF. CODE § 17500).

140. *Dana*, 180 F. Supp. 3d at 668 (“There can be no FAL claim where there is no “statement” at all—or in other words that an omission, even of material facts, does not violate the FAL.”); *Hodsdon*, 162 F. Supp. 3d at 1023; *McCoy*, 173 F. Supp. at 969.

141. *Dana*, 180 F. Supp. 3d at 670–71; *Hodsdon*, 162 F. Supp. 3d at 1029; *McCoy*, 173 F. Supp. at 972.

Corporate Social Responsibility Report . . . ; the industry acknowledged the issue in the Harkin-Engel Protocol in 2001 . . . and has repeatedly admitted its failure to even develop a comprehensive certification system in the years since . . . ; and in 2006 the United States Department of Labor commissioned Tulane University to publish reports detailing labor abuses in the chocolate industry supply chain . . . ; among other public disclosures detailed in the Complaint.<sup>142</sup>

This reasoning is problematic for a few reasons. First, the court recognizes the companies' affirmative statements for purposes of showing that the plaintiffs knew or could have known about the child labor problem, but declines to treat those same statements as actionable (deceitful or confusing) in their own right. Indeed, it is unclear why the companies' repeated, and at times inconsistent, statements pertaining to their child labor eradication efforts were not viewed—at a minimum—as partial misrepresentations capable of triggering the duty to disclose.<sup>143</sup>

Second, the court expects too much of conscious consumers, even the most diligent among them. It effectively asks that consumers take full responsibility for policing their own exposure to omission-related identity harms. Not only must consumers carry out their own research of global supply chains to ensure that they are not supporting child slavery, but they must also keep track of the companies' shifting deadlines for meeting their sustainability commitments. In short, the court expects consumers who wish *not* to be complicit in human and labor rights violations to sift through a great deal of sustainability noise. This is a lot to ask, particularly when there is so much information to sort through and the information is itself confusing, and even inconsistent.

For example, in 2012, Hershey issued a press release in which the company committed to sourcing "100 percent

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142. *Dana*, 180 F. Supp. 3d at 665.

143. To support the view that Hershey has a duty to disclose, *Dana* would need to show one of the following: "(1) a fiduciary relationship between Hershey and Dana; (2) that Hershey had 'exclusive knowledge of material facts not known or reasonably accessible to' its customers; (3) that Hershey actively concealed a material fact; or (4) that *Hershey had made misleading partial representations*." *Id.* (emphasis added).

certified cocoa for its global chocolate product lines by 2020” and to “accelerate its programs to help eliminate child labor in the cocoa regions of West Africa.”<sup>144</sup> How are consumers to reconcile this with Hershey’s CSR Report, which states without qualification that “Hershey has zero tolerance for the worst forms of child labor in its supply chain”?<sup>145</sup> Furthermore, how are consumers expected to keep track of the fact that the 2012 press release once more extended the deadline for sourcing only child-labor-free cocoa (a deadline originally set for 2005, then 2008, then 2010)?<sup>146</sup> Upon which of these representations should consumers rely to inform their purchasing decisions? When representations are hard to reconcile, could it make sense to speak of concealment, which is tantamount to fraudulent misrepresentation? At a minimum, it seems fair to question the conclusion that Hershey did not have exclusive control over the relevant knowledge given that the information to which consumers *do* have access is confusing and inconsistent. In such cases, could an argument be made that the company has effectively retained exclusive control over the truth?

Distinguishing what a company says it does or will do from what it actually does can be challenging in the best of circumstances. But this is even more true when commitments are expressed through multiple channels. Having many expressions of commitment that are sometimes contradictory creates loud and scrambled sustainability noise that is difficult to parse, even for the most dedicated conscious consumers.

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144. Press Release, Hershey Co., Hershey to Source 100% Certified Cocoa by 2020 (Oct. 3, 2012), <https://www.thehersheycompany.com/content/dam/corporate-us/documents/legal/source-100-certified-cocoa-2020.pdf> [https://perma.cc/5KU2-HB77].

145. HERSHEY CO., CORPORATE SOCIAL RESPONSIBILITY REPORT 21 (2014), <https://www.thehersheycompany.com/content/dam/corporate-us/documents/csr-reports/2014-hershey-csr-report.pdf> [https://perma.cc/G26Z-CQTB]. The report references one of the many documents that enshrine Hershey’s commitment to sustainability:

Our Supplier Code of Conduct . . . states that: Children should not be kept from school to work on the farm; Children should not carry heavy loads that harm their physical development; Children should not be present on the farm when farm chemicals are applied; Young children should not use sharp implements during farm work; Trafficking of children or forcing children to work are included among the Worst Forms of Child Labor.

*Id.*

146. O’Keefe, *supra* note 109.

Concluding that companies have no duty to disclose the serious sustainability issues that affect their supply chains—to distinguish truth from noise—is highly problematic. Not only does it create room for companies to make and then break sustainability promises without fear of liability, it also places too large a burden on consumers to research and reconcile inconsistent sustainability commitments in order to avoid becoming complicit in abusive schemes.

The line between affirmative statements (or representations) and *non*-statements can be blurry, particularly in the sustainability context. This is because statements pertaining to sustainability operate differently on consumer expectations than more traditional consumer marketing statements. We expect some degree of puffery from conventional marketing statements, especially since companies spend enormous resources crafting visions for their products, their brand, and their customers (e.g., X product will increase your sex appeal, convey your professionalism, make you a better home-maker, signal your more-sincere-than-others' love of the outdoors). When promises pertaining to our "fantasy selves" fail to materialize, however, we generally do not expect to be able to bring a lawsuit against the fantasy maker. We were seduced by a vision, yes, but it was only a vision, and it was only a vision about us.

Sustainability-related marketing is different in this regard. Rather than building a fantasy self, the vision conveyed through sustainability promises connects to real world dynamics—the product's relationship to the people who made it and to the planet that made its making possible—and draws consumers into these dynamics. Within the realm of sustainability promises, the visioned consumer is one who "does no harm." Such altruism-targeting brings a different force to bear on consumer expectations as compared with the vanity-targeting puffery that we expect from conventional marketing. Moreover, the stakes are higher for sustainability promises because, should they be empty, it is not just one's self-image that is affected, it is also the other beings implicated in the promise—the planet and/or fellow humans. The resulting disappointment therefore exceeds the bruising of our fantasy selves by extending harm to others and making us unwitting violators of our personal rules of engagement with the world.

Given that official regulation of corporations' sustainability

conduct is often lacking—and under the Trump administration, regressing—consumers are, perhaps now more than ever “where the buck stops” for holding companies accountable for making and then breaking their promises.<sup>147</sup> Consumer law and the courts tasked with adjudicating consumer claims should therefore be more protective of consumers’ sustainability-related expectations. This will likely require greater flexibility with respect to identifying different types of company representations as affirmative statements. As things stand, consumers are insufficiently shielded from identity harm, and the attending risk of injury to the planet and its inhabitants remains too elevated. In short, it seems both under-protective and short-sighted to put the onus on consumers to distinguish between sincere and insincere sustainability promises, particularly given the loudness of the sustainability noise in which companies strategically surround-sound themselves.

### 3. Apparel

*Kasky v. Nike*,<sup>148</sup> an older case from 2002, offers a fairer approach to recognizing and addressing identity harm. As should quickly become clear, the circumstances in *Kasky v. Nike* bear striking resemblance to those in the *Chocolate Cases*, though the latter came a decade later. *Kasky* is often remembered as a free speech case because the central issue was whether the public statements made by company officers constituted commercial speech deserving of limited constitutional protection, or noncommercial (political or public concern) speech deserving of greater protection and subject

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147. See *supra* notes 69–71 and accompanying text; see also, Juan Carlos Rodriguez, *New EPA Chief Pledges to Change Regulatory, Legal Practices*, LAW360 (Feb. 21, 2017), <https://www.law360.com/articles/893816/new-epa-chief-pledges-to-change-regulatory-legal-practices> [https://perma.cc/3A7T-9H2T] (describing Scott Pruitt’s commitment to reduce the practice of “regulation through litigation,” which exactly describes the EPA’s handling of Dieselgate, and to promote a “very robust” role for states in the implementation of environmental laws while diminishing the role of the federal government in climate regulation); Alan Rappeport & Glenn Thrush, *Pentagon Grows, While E.P.A. and State Dept. Shrink in Trump’s Budget*, N.Y. TIMES (Mar. 16, 2017), [https://www.nytimes.com/2017/03/16/us/politics/trump-budget-spending-cuts.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news&\\_r=0](https://www.nytimes.com/2017/03/16/us/politics/trump-budget-spending-cuts.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news&_r=0) [https://perma.cc/3KXY-J7GP].

148. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

only to limited, if any, regulation. But it was also about identity harm.

Starting in the 1990's, Nike came under attack for allowing its Asian factories to operate as sweat shops and reacted by carrying out an extensive public relations campaign designed to portray the company as socially responsible.<sup>149</sup> Marc Kasky was an activist, environmentalist, and an avid runner who, "at one time in his life" had bought and worn Nike shoes.<sup>150</sup> He became incensed upon reading a *New York Times* article in which a Nike spokesperson misrepresented the working conditions in the company's Asian factories, saying that "Nike workers earn superior wages and manufacture product under superior conditions."<sup>151</sup> In reality, Nike's factories continued to be plagued by countless instances of human rights and labor violations.<sup>152</sup>

Like the companies involved in the *Chocolate Cases*, Nike made all kinds of public commitments to address its factory issues,<sup>153</sup> but those commitments remained unfulfilled when the spokesperson made his statements. And, like the plaintiffs in the *Chocolate Cases*, Kasky was distressed by the notion that California consumers could be unwittingly supporting an abusive production regime. Acting under a provision of California law that allowed individuals to prosecute businesses on behalf of the public, Kasky sued Nike for misrepresenting its labor practices and for making false and misleading statements in press releases, in letters to newspapers, university presidents, and athletic directors, and in other documents distributed for public relations purposes.<sup>154</sup> When it learned of Kasky's allegations, Nike endeavored to counter the bad reputational buzz by joining a voluntary multi-stakeholder initiative, the Apparel Industry Partnership, and subscribing to a firm-wide code of conduct on improved foreign factory

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149. *Id.*

150. Ronald Collins & David Skover, *The Landmark Free-Speech Case That Wasn't: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 971 (2004).

151. *Id.*; Steven Greenhouse, *Nike Shoe Plant in Vietnam is Called Unsafe for Workers*, N.Y. TIMES (Nov. 8, 1997), <http://www.nytimes.com/1997/11/08/business/nike-shoe-plant-in-vietnam-is-called-unsafe-for-workers.html> [<https://perma.cc/8QZL-YAR6>] ("We believe that we look after the interests of our workers.").

152. Collins & Skover, *supra* note 150.

153. *Id.*

154. *Kasky*, 45 P.3d at 246.



conditions.<sup>155</sup>

In assessing whether Nike's speech was commercial, the court considered whether the statements were made (1) by a commercial speaker, (2) to a commercial audience, and (3) to make representations of a commercial nature.<sup>156</sup> The first element was satisfied, since Nike officers had made the statements.<sup>157</sup> The second element was also satisfied because some of the statements had been addressed to university athletic departments who represented existing and potential buyers of Nike products.<sup>158</sup> Additionally, a letter published in a newspaper in which Nike sought to reiterate its commitment to improving its factories established that the statements were directed at a range of consumers.<sup>159</sup> Finally, the third element of commercial speech was satisfied because Nike's purpose in making the statements was to increase the sales of its products and was therefore commercial rather than political.<sup>160</sup> Since the court found that Nike's statements constituted commercial speech, Kasky could move forward with his claim and seek remedies under the UCL and FAL.<sup>161</sup>

*Kasky* was settled over ten years ago, and we might query why Mike Kasky was more successful than the *Chocolate Cases* plaintiffs have been so far. One possibility is that Kasky's allegations were based on actual company statements in the form of news articles that expressly misrepresented factory working conditions, rather than on omissions.<sup>162</sup> As argued above, however, the line between statements and non-statements can be uncomfortably blurry. This is particularly true in the sustainability context when more and more companies issue CSR reports, join sustainability initiatives, and use social media to publicize their commitments. This explains why it is problematic that the opinions in the

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155. Collins & Skover, *supra* note 150, at 975 ("It joined President Clinton's task force, the Apparel Industry Partnership, and signed on to its Workplace Code of Conduct to ameliorate substandard conditions in foreign factories.").

156. *Kasky*, 45 P.3d at 258.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 257-58; Collins & Skover, *supra* note 150, at 1040-41 (noting their concern that "permitting Marc Kasky to regulate such expression . . . virtually denies the possibility of *any* corporate speech being characterized as political") (emphasis in original).

161. *Kasky*, 45 P.3d at 249-50.

162. *Id.* at 247-48.

*Chocolate Cases*<sup>163</sup> referenced the companies' aggregated social commitments only for purposes of showing that the child labor information was available to the plaintiffs,<sup>164</sup> rather than treating those same statements as actionable in their own right—as happened in *Kasky*.

Indeed, the chocolate companies' commitment statements (through the Protocol, their websites, supplier codes of conduct, CSR reports, etc.) are remarkably similar to those made by Nike. In other words, the *Kasky* court *did* treat the company's representations as actionable (even though they were not contained in any kind of product label), in contrast to the *Chocolate Cases*.<sup>165</sup> This is perhaps due to a statutory change since *Kasky* whereby individuals seeking to make use of private attorney general authority must now show a tighter nexus between company statements and their specific (financial) loss.<sup>166</sup> Even bearing this change in mind, however, a colorable argument could still be made that the chocolate companies' sustainability commitments should be treated as misrepresentations or as partial misrepresentations. Perhaps this avenue will be explored as the *Chocolate Cases* go up on appeal.

A last point about *Kasky* pertains to remedies. Because Nike opted to settle, not all of the legal issues were fully addressed in court.<sup>167</sup> However, the settlement is of great interest because it offers insight into what is required for an identity-harmed claimant such as Marc Kasky to be made whole. Though much of the settlement remains secret, we do know some of the terms. For starters, Nike agreed to pay \$1.5 million to the Fair Labor Association, a multi-stakeholder initiative launched under President Clinton that is “dedicated

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163. *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 669 (N.D. Cal. 2016); *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1027 (N.D. Cal. 2016); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954, 969 (N.D. Cal. 2016).

164. *See Dana*, 180 F. Supp. 3d at 665; *see also supra* notes 142–146 and accompanying text.

165. *Kasky*, 45 P.3d at 262–63.

166. *California Proposition 64, Unfair Business Competition Lawsuits* (2004), BALLOTPEdia, [https://ballotpedia.org/California\\_Proposition\\_64\\_Unfair\\_Business\\_Competition\\_Lawsuits\\_\(2004\)](https://ballotpedia.org/California_Proposition_64_Unfair_Business_Competition_Lawsuits_(2004)) (last visited Nov. 15, 2017) [<https://perma.cc/PQ7K-ERUU>]. Proposition 64 was devised to limit the California Uniform Competition Law (“UCL”) and curtail frivolous lawsuits by requiring plaintiffs in private suits to demonstrate actual financial loss resulting from “unfair, unlawful, or fraudulent business practice.” *Id.*

167. *See Collins & Skover, supra* note 150, at 1019–20.

to protecting workers' rights around the world."<sup>168</sup> Thus, a share of the settlement proceeds went toward ameliorating factory working conditions, improving factory infrastructure, and upgrading factory standards and monitoring.<sup>169</sup> Additionally, the settlement included at least \$500,000 a year in funding for microloan programs to subsidize the entrepreneurial ventures of aspiring foreign employees, as well as to cover the costs of educational programs in Nike's partner factories.<sup>170</sup>

While the first piece of the settlement was directed at improving Nike's factories, the second was directed at supporting the Nike factory employees and their communities. This second piece reflects a broad perspective on the role of business in society, in particular transnational companies operating in poor parts of the world. Importantly, although the settlement did involve financial outlays, the payments were not designed to compensate Kasky; rather, they were designed to repair the harm that Kasky was concerned with, namely the harm to factory workers—and their communities—who make goods for rich country consumers. As such, the settlement resembles the reparations-oriented remedies issued in human rights cases. As explained further in a subsequent article,<sup>171</sup> reparations are superior to consumer compensation for remedying sincere, non-frivolous, identity harm claims.

We have yet to see another apparel-related lawsuit, but it is easy to imagine a *Kasky*-like claim against a retailer like H&M, the Gap, or Walmart for failing to live up to the sustainability commitments they made after the Rana Plaza

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168. *About Us*, FAIR LAB. ASS'N, <http://www.fairlabor.org/about-us-0> (last visited Nov. 15, 2017) [<https://perma.cc/AS5Q-3QBC>] ("FLA places the onus on companies to voluntarily meet internationally recognized labor standards wherever their products are made. We offer: A collaborative approach allowing civil society organizations, universities and socially responsible companies to sit at the same table and find effective solutions to labor issues; Innovative and sustainable strategies and resources to help companies improve compliance systems; Transparent and independent assessments, the results of which are published online; and A mechanism to address the most serious labor rights violations through the Third Party Complaint process.").

169. Sandy Brown, *Nike, Kasky Reach Settlement*, ADWEEK (Sept. 12, 2003), <http://www.adweek.com/brand-marketing/nike-kasky-reach-settlement-67001/> [<https://perma.cc/TVA2-CL9H>].

170. See Collins & Skover, *supra* note 150, at 1020 ("It remained unknown whether Nike paid any or all of the substantial litigation costs incurred by Kasky's lawyers or an award to Kasky himself.").

171. See Dadush, *supra* note 113.

factory collapse in Bangladesh—the tragic and utterly avoidable disaster in which 1,100 (mostly female) workers perished.<sup>172</sup> Through press releases, binding and non-binding undertakings such as the Alliance for Bangladesh Worker Safety and the Accord on Fire and Building Code Safety,<sup>173</sup> internal codes of conduct, the adoption of external sustainability standards, and membership in voluntary sustainability initiatives like the United Nations Global Compact and the Sustainable Apparel Coalition,<sup>174</sup> these companies (and many others) have made repeated express commitments to improving the sustainability of their global supply chains. To date, however, the supply chains for apparel, especially “fast fashion” apparel, remain plagued with major issues, including restrictions on workers’ right to unionize and associate, non-payment or late payment of wages and benefits, discrimination against pregnant women, physical and verbal abuse, forced overtime, and unsafe and unsanitary facilities.<sup>175</sup> Some describe the various remediation schemes as cursory and superficial, just enough to “look good on paper.”<sup>176</sup>

As with Nike and the *Chocolate Cases* companies, the commitments of leading apparel companies to improve labor conditions have yet to fully translate into real improvements for factory workers. Once more, sustainability noise seems to be drowning out the stories and the facts pertaining to lack of progress and ongoing abuses.<sup>177</sup> It is not difficult to conceive of a lawsuit alleging, as Marc Kasky did, that certain fast fashion retailers are misrepresenting their commitments to sustainability, and that, as a result, they continue to draw in consumers who would take their business elsewhere if they knew the truth.<sup>178</sup>

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172. HUMAN RIGHTS WATCH, “WHOEVER RAISES THEIR HEAD SUFFERS THE MOST”: WORKERS’ RIGHTS IN BANGLADESH’S GARMENT FACTORIES 3–13 (Apr. 2015) (chronicling the Rana Plaza disaster).

173. *Id.* at 20 (“[T]he Accord on Fire and Building Safety, is being run on behalf of 175 retailers, most of which are based in Europe. The signatories of this legally binding agreement are responsible for inspecting and overseeing improvements in 1,611 factories.”).

174. *Supra* notes 58 and 59.

175. HUMAN RIGHTS WATCH, *supra* note 172, at 13–14, 22–29.

176. *Id.* at 13.

177. *Id.* at 14 (“[S]everal brands expressed their commitment to worker safety and welfare in Bangladesh, but that should be evidenced by tangible changes on the ground.”).

178. Reporter Marc Bain suggests that a similar type of claim could be made

This Part offered a vocabulary and a grammar for recognizing the type of identity harm that stems from empty sustainability promises. It highlighted some key characteristics of identity harm: (1) it can activate independently of economic loss or changes in market value; (2) it is derivative, stemming in large part from injuries experienced outside the transaction (e.g., by the planet or other humans); (3) it can attach to big and small ticket items and to production processes near and far; and, (4) it can be ongoing, rather than confined to a particular place and time. These characteristics were explored through an overview of some of the relevant cases, all of which describe the experience of identity harm without actually using the term. In each case, harm arose when consumers learned that they had been unwittingly made complicit in abusive schemes and stripped of their autonomy to choose *not* to participate in such schemes.

This Part also highlighted some of the challenges that identity-harmed consumers can face in trying to bring legal claims under state consumer law statutes. The challenge is particularly acute with respect to sustainability statements that are not made directly on product packaging, for example, statements that pertain to the company and its brand, generally, rather than to a specific product. Identity harm can be asserted more clearly in situations, such as Dieselgate, where a company lies about specific sustainability features of its products. As discussed in Part III, however, even with an outright lie or fraud, success is not assured—identity harm can easily be missed or go un-remedied. Still, chances of success are higher when there is an affirmative lie, rather than when a company exaggerates its sustainability performance or makes—even numerous and inconsistent—commitments to “try” to do better.

This Part also described the problem of sustainability noise and the incentives that companies have to surround-sound themselves in this noise. It explained how sustainability noise can have powerful effects on consumer expectations, in particular because it connects not only to fantasies about

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with respect to H&M’s environmental sustainability claims, which continue to attract customers even though they grossly overstate the company’s sustainability performance. Marc Bain, *Is H&M Misleading Consumers with All Its Talk of Sustainability?*, QUARTZ (Apr. 16, 2016), <https://qz.com/662031/is-hm-misleading-customers-with-all-its-talk-of-sustainability/> [http://perma.cc/2PWC-D4ZP].

individual selves, but also to the desire to do no (or less) harm in the world. Sustainability marketing is thus substantially different from conventional marketing, which generally caters only to consumers' fantasy selves; as such, sustainability marketing should be regulated more aggressively than conventional marketing. Furthermore, company messages can become scrambled and confusing, making it difficult for consumers actually to be or stay informed, and so to make informed choices. For these reasons, sustainability noise should be given more weight by courts adjudicating sustainability-related consumer law claims. Deploying the concept of identity harm in this context should help to steer courts' analyses in a more protective direction.

### III. THE CHALLENGES OF LEGALIZING IDENTITY HARM

This Part delves more deeply into some of the challenges involved with making identity harm actionable as part of a consumer law claim. It shows that, while identity harm is relatively easy to grasp conceptually, it can be difficult to recognize and address legally. It also calls for drawing distinctions between companies' sustainability promises and their assertions pertaining to political values.

#### A. *Why the VW Settlement is Unsettling*

In this section, I return to the Dieselgate litigation and specifically to the settlement, which has been celebrated as a major victory for U.S. consumers. The objective is to show that while the settlement *did* recognize and even remedy the identity harm experienced by Dieselgate victims, this happened only inadvertently or collaterally. Working through two related thought experiments, I explain how, even when there is an affirmative lie or fraud at issue, detecting and remedying identity harm can be challenging. To see this, we first need to understand the Dieselgate settlement and the circumstances that made it possible.

To settle the various claims stemming from its misconduct in the United States, Volkswagen agreed to remove the Dieselgate vehicles from commerce.<sup>179</sup> The automaker can

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179. First Consent Decree, *supra* note 1, at 1–5.

achieve this either by buying the cars back, thus physically removing them from the U.S. market, or by fixing the cars, which entails removing the cheat device software and lowering the cars' emissions to be in line with national standards—something that VW currently lacks the technology to do.<sup>180</sup> Additionally, affected car owners can receive up to \$10,000 in compensatory cash payments.<sup>181</sup> Affected car owners therefore have two options: resell their cars at pre-scandal value to VW, or keep them—and presumably keep driving them—until VW develops an appropriate fix. Should VW fail to come up with a suitable fix by early 2018, the automaker will have to buy back any vehicles remaining on the market.<sup>182</sup>

On top of the compensation to consumers, the settlement requires VW to pay approximately \$2.7 billion to a climate mitigation trust fund, which is “intended to fully mitigate the total, lifetime excess NO<sub>x</sub> emissions from the 2.0 liter vehicles.”<sup>183</sup> The idea behind the trust is to *repair* the environmental damage created by Dieseltgate.<sup>184</sup> U.S. states are the intended beneficiaries of the trust, and any state can apply to receive funds; however, allocations will depend on the intensity of the state applicant's exposure to Dieseltgate, which can be inferred “based on the number of registered illegal Volkswagen vehicles within the boundaries of the beneficiary.”<sup>185</sup> Funds will be used to finance “mitigation actions” that reduce NO<sub>x</sub>, including “replacing or repowering older engines . . . replacing older city transit buses with new electric-powered transit city buses . . . [and] charging infrastructure for light duty zero emission passenger vehicles.”<sup>186</sup>

The settlement further requires VW to invest \$2 billion in Zero Emission Vehicles (ZEV).<sup>187</sup> Those funds will finance

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180. *Id.*

181. Camila Domonoske & Bill Chappell, *Volkswagen Will Pay U.S. Diesel Car Owners Up To \$10 Billion*, NPR (June 28, 2016, 11:04 AM), <http://www.npr.org/sections/thetwo-way/2016/06/28/483785166/volkswagen-will-pay-u-s-diesel-car-owners-up-to-10-billion> [<http://perma.cc/R69L-Z2TC>].

182. *Volkswagen Clean Air Act Civil Settlement*, EPA, <https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement#mitigation> (last visited Oct. 5, 2017) [<http://perma.cc/9QMS-3TGZ>].

183. *Id.*

184. See Domonoske & Chappell, *supra* note 181.

185. *Volkswagen Clean Air Act Civil Settlement*, *supra* note 182.

186. *Id.*

187. First Consent Decree, *supra* note 1, at 4.

investments in ZEV charging infrastructure for multi-unit dwellings, workplaces, and public sites, and also finance ZEV promotion and awareness-raising campaigns through brand-neutral education and public outreach programs.<sup>188</sup> Finally, the settlement provides that VW will take various measures to prevent future problems, including the separation of the personnel who test their vehicles for emissions compliance from the personnel who design their vehicles.<sup>189</sup> VW must also establish a steering committee to ensure compliance with the Clean Air Act, as well as a whistleblower system.<sup>190</sup> Lastly, an independent auditor must assess VW's compliance with the settlement.<sup>191</sup>

As should be clear from the above, the Dieselgate settlement is massive and comprehensive. It has something for everyone: not only does it provide for serious compensatory damages, but also, and this is important for thinking about the best way to remedy identity harm, it provides for elaborate and meaningful injunctive remedies that go to repairing the environmental harm caused by VW's toxic deception. As the largest automotive settlement to date, it is rightly being celebrated as a major victory for Dieselgate victims in the United States.<sup>192</sup> However, the settlement's precedential value, in particular for conscious consumers, should not be overstated because it was the product of unique circumstances. As a result, it ultimately tells us very little about the degree of legal protection that identity-harmed consumers can expect to receive through federal and/or state agencies, and through the courts.

A number of circumstances combine to explain why the

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188. *Volkswagen Clean Air Act Civil Settlement: Zero Emission Vehicle (ZEV) Investment*, EPA, <https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement#investment> (last visited Mar. 8, 2017) [<https://perma.cc/2JP3-99YF>].

189. *Volkswagen Clean Air Act Civil Settlement: Actions To Prevent Future Violations*, EPA, <https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement#actions> (last visited Mar. 8, 2017) [<https://perma.cc/D2VY-XFK3>].

190. *Id.*

191. *Id.*

192. See Bartlett et al., *supra* note 94 (explaining that Dieselgate has resulted in a \$14.7 billion settlement to compensate car owners and address environmental harm and describing the deal as tough, strong, consumer-oriented, and much bigger than other automotive settlements); see also Reuters, *How Volkswagen Owners Can Get Compensation from the Emissions Scandal Settlement*, FORTUNE (June 28, 2016), <http://fortune.com/2016/06/28/vw-owners-compensation-scandal/> [<https://perma.cc/4YYU-8LHC>] (detailing the settlement options).



Dieselgate settlement was so far-reaching: VW was the largest automaker in the world at the time the scandal broke;<sup>193</sup> the criminal<sup>194</sup> deception affected a large number of cars (500,000 in the United States and at least 11 million worldwide);<sup>195</sup> the fraud lasted for over seven years, which means that the resulting damage to the atmosphere, and by extension to public health, was and will continue to be severe; and, last but not least, VW violated *both* environmental and consumer protection laws.<sup>196</sup> Additionally, although the first private class action claims were filed within hours of the scandal breaking, it was the lawsuits brought by two government agencies—the EPA (with the DOJ) and the FTC—that really put the pressure on VW to come to a meaningful settlement agreement.<sup>197</sup>

The government's intervention signaled to VW that its malfeasance could not only strip the Dieselgate cars of market value, but also jeopardize the automaker's access to the U.S. market.<sup>198</sup> VW got the message and settled accordingly. In all likelihood, the outcome would have been very different—and much less satisfying—had the FTC and the EPA not reacted as strongly as they did. Indeed, it is interesting to consider how Dieselgate would have unfolded if the EPA had been headed by an anti-market-interventionist climate denier when the

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193. Bertel Schmitt, *Nice Try VW: Toyota Again World's Largest Automaker*, FORBES (Jan. 27, 2016), <http://www.forbes.com/sites/bertelschmitt/2016/01/27/nice-try-vw-toyota-again-worlds-largest-automaker/#44d787912b65> [https://perma.cc/PCE9-SVBF].

194. Aruna Viswanatha & Christina Rogers, *VW Engineer Pleads Guilty in Emissions Cheating Scandal*, WALL ST. J. (Sept. 9, 2016), <http://money.cnn.com/2016/09/09/news/companies/volkswagen-engineer-emissions-scandal-guilty-plea/index.html> [http://perma.cc/DEY7-WBQB].

195. Jack Ewing, *Volkswagen Says 11 Million Cars Worldwide Are Affected in Diesel Deception*, N.Y. TIMES (Sept. 22, 2015), [https://www.nytimes.com/2015/09/23/business/international/volkswagen-diesel-car-scandal.html?mtrref=en.wikipedia.org&assetType=nyt\\_now](https://www.nytimes.com/2015/09/23/business/international/volkswagen-diesel-car-scandal.html?mtrref=en.wikipedia.org&assetType=nyt_now) [http://perma.cc/LSK3-FWMJ].

196. European Parliamentary Research Serv. Briefing PE 583.793, *Lawsuits Triggered by the Volkswagen Emissions Case* (May 2016), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583793/EPRS\\_BRI\(2016\)583793\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583793/EPRS_BRI(2016)583793_EN.pdf) [http://perma.cc/GJ7J-EQ2W] (describing the environmental violations—illegal defeat devices that concealed emissions of ten to forty times the allowed amount of nitrogen oxides—and consumer law violations—false advertising about the cars' environmental cleanness and about high resale values).

197. Bill Vlasic & Aaron M. Kessler, *It Took E.P.A. Pressure to Get VW to Admit Fault*, N.Y. TIMES (Sept. 21, 2015), [http://www.nytimes.com/2015/09/22/business/it-took-epa-pressure-to-get-vw-to-admit-fault.html?\\_r=0](http://www.nytimes.com/2015/09/22/business/it-took-epa-pressure-to-get-vw-to-admit-fault.html?_r=0) [https://perma.cc/EJD4-N6JT].

198. First Consent Decree, *supra* note 1, at 3–5, 38–40.

scandal broke.<sup>199</sup> Below we engage in two thought experiments to consider how the case might have turned out differently.

1. Thought Experiment One: What If There Were No Clean Air Act?

Imagine a United States with no Clean Air Act (CAA) and no national emissions standards. In that world, VW's deception would constitute a violation of consumer law only, not environmental law.<sup>200</sup> The only problem with the cars would be how they were advertised, not that they were equipped with cheat devices that made their very commercialization in the United States illegal, and not that they exceeded national emissions standards, which made them technically illegal to drive.<sup>201</sup> In a CAA-free United States, the market value of the cars would still drop upon discovering that the cars were not as clean as advertised. However, the market value would not drop nearly as much in reality, where the cars' environmental illegality effectively drove their resale value down to zero dollars.<sup>202</sup>

In all probability, in a CAA-free scenario, the dirty-diesels' resale value would drop only by the amount of the clean premium included in the cars' original purchase price. In other words, the cars' value would diminish only by an amount equivalent to the difference between the price of a conventional diesel car and the price of the Dieselgate cars. Alternatively, the drop could be measured by the difference of value between a dirty diesel car and a truly clean diesel car. This second formula could produce a bigger economic loss than the clean premium alone because a truly clean diesel car would be very expensive—certainly much more expensive than a dirty-diesel car that is falsely advertised as clean and is equipped with cheat-device software.<sup>203</sup> Even with the second approach, however, where we subtract the value of dirty-diesels from the value of a truly-clean diesel to measure financial loss, car

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199. *Supra* note 147 and accompanying text.

200. 42 U.S.C. § 7401 (2012).

201. *Id.*; see *NAAQS Table*, EPA, <https://www.epa.gov/criteria-air-pollutants/naqs-table> (last visited Oct. 5, 2017) [<https://perma.cc/WK3G-NNMY>].

202. *Supra* note 95 and accompanying text.

203. This is why the cheat device software was installed in the first place: VW could not develop the technology to make truly clean diesel cars at a price point attractive to consumers.

owners would still see limited remedies in a CAA-free scenario because, absent illegality, the value of the dirty-diesels would remain relatively stable—diminished only by the amount of the clean premium paid at the time of purchase.

In short, (il)legality, as defined in federal and state legislation, matters a great deal for determining market value, and, importantly, for fully recognizing the harms experienced by conscious (and other niche types of) consumers. In a CAA-free America, the Dieselgate settlement would have been much smaller. Two recent developments serve to support this expectation. One is the lived reality for owners of the dirty-diesels in Europe, and the other is a recent lawsuit brought by owners of Dieselgate vehicles who sold their cars *before* the emissions scandal broke.

The approximately nine million owners of Dieselgate vehicles in Europe have little to no recourse because the cars do not infringe applicable environmental laws.<sup>204</sup> As a result, the cars' market value has remained relatively stable and VW is not recognizing any financial liability. Instead, VW is responding to car owners' outrage with a "quick fix" to remove the cheat devices. A spokesman for VW stated:

Volkswagen has repeatedly said that it sees no reason to compensate European customers because of differences in U.S. and European law and environmental standards. Under EU rules, the company has said, Volkswagen's diesel vehicles don't violate emissions standards. It also has said that the vehicles containing the illegal software can be more easily repaired in Europe.<sup>205</sup>

The "fix" to the European Union cars is not expected to have an impact on performance or fuel efficiency, so their market value should remain stable, further eviscerating arguments for compensating the European Dieselgate victims. Indeed, speaking before the Environment, Food and Rural Affairs Committee, the Managing Director of Volkswagen Group UK said, "To pay compensation there has to be a loss,

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204. William Boston, *Volkswagen's European Customers May Miss Out on Emissions Settlement*, WALL ST. J. (June 28, 2016), <https://www.wsj.com/articles/volkswagen-set-for-near-14-7-billion-emissions-settlement-1467109376> [<https://perma.cc/W8Z6-3YUA>].

205. *Id.*

and at this stage I see no reason for there to be a loss. Our engineers tell us there will be no difference in fuel consumption or drivability.”<sup>206</sup>

Thus, because there was no environmental illegality at issue in Europe, the cars’ market value was not affected and so car owners experienced little-to-no economic loss.<sup>207</sup> VW’s response to claims for compensation was simple: no economic loss, no compensation. But does the fact that the cars’ market value remained stable mean that the European victims of Dieselgate did not experience (identity) harm? Of course not. In fact, considerable ire has been generated by the disparity of treatment of the European Union Dieselgate victims as compared with their American counterparts: “Consumers have been massively misled by Volkswagen and this settlement in the U.S. recognizes the damage suffered by car drivers,” said the General Director of the European Consumer Organization; she added, “[i]t is inconceivable that consumers in the EU get treated differently.”<sup>208</sup>

Moving now to the case filed by dirty-diesel owners who sold their cars before the scandal broke, *Nemet v. Volkswagen Group of America, Inc.*<sup>209</sup> The complaint, which was filed in August of 2017, perfectly sets up the problem addressed in this Part, although the framing and the proposed solutions are different from those recommended in this Article:

Those [multi-district litigation] settlements and the Department of Justice and Federal Trade Commission actions provided substantial benefits to many consumers, including buyback remedies that will relieve current owners and lessees from being forced to continue to drive the

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206. *No Compensation for UK Owners Affected by VW Emissions Scandal*, GREENFLEET (Jan. 15, 2016), <http://www.greenfleet.net/news/15012016/no-compensation-uk-owners-affected-vw-emissions-scandal> [<https://perma.cc/P3S5-4ACS>] [hereinafter *No Compensation for UK Owners*].

207. Note that there are major impediments to mounting anything resembling class actions in Europe, but some affected car owners are trying to combine their individual claims to put pressure on VW. In a phone conversation with one of the leading attorneys working on this matter, Michael Hausfeld, he explained that the amount they hope to recover from VW is around \$5,000, which reflects an estimate of the clean premium paid on the vehicles. Telephone Interview with Michael Hausfeld, Hausfeld Global Litigation Solutions (Aug. 17, 2016) (notes on file with author).

208. *No Compensation for UK Owners*, *supra* note 206.

209. No. 010549-11 (N.D. Cal. Aug. 2, 2017).

polluting vehicles. However, the settlements did not compensate some of the front-line victims of Defendants' scheme—owners who credited Defendants' clean-diesel lies, *unwittingly drove hyper-polluting cars for years*, but had disposed of the cars before the scheme imploded on September 18, 2015. *Although those owners might have escaped the additional injury of lost resale value, they bore the same primary harm as those compensated by the settlement because they never received the clean emissions performance Defendants' promised during their period of ownership—for some as long as six years.* This injury is tangible, quantifiable, and equally deserving of compensation. In lauding the 2.0 liter settlement at the final approval hearing, a lawyer for the Federal Trade Commission observed that the settlement appropriately compensated owners "for the lost opportunity to drive a clean car." But all three consumer settlements excluded tens of thousands of owners deprived of that same opportunity."<sup>210</sup>

The situation for the "tens of thousands" of dirty-diesel owners who sold their cars before Dieselpgate broke in the United States is comparable to that of the owners of the European dirty-diesels. Clearly, before the scandal broke there was no problem of legality to speak of, so the resale value of the *Nemet* plaintiffs' cars was not affected by VW's deception, though the fraud was in full swing at the time. Since the pre-scandal owners did not incur any financial loss on their resales (beyond ordinary depreciation), one might surmise that they experienced no harm. This even though they received "hyper polluting" vehicles instead of what they paid for—clean-diesel vehicles—and even though VW's false promises of environmental friendliness "secretly turned the most environmentally-conscious consumers into some of the biggest polluters on the road—and charged them a premium in the process."<sup>211</sup>

Once again we ask, is the fact that there was no financial loss enough to do away with the question of whether there was any harm at all? And again, I would answer, of course not.

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210. *Nemet* Complaint, *supra* note 96, at 2 (emphases added).

211. *Id.* at 3.

Financial loss is not the only dimension along which harm is experienced, nor is it the only dimension along which harm should be measured. The *Nemet* complaint helpfully exposes some of the limitations of looking only to resale value for loss; however, it does not go far enough in terms of identifying non-financial losses. I propose going even further and drawing a wider net to include additional harms that are not captured by resale value figures, in particular the psychic identity harm that arises upon discovering one's unwitting complicity in a scheme that hurts other beings.

The complaint's focus on the clean premium both as the source of the plaintiff's loss and as the reference figure for remedies is also problematic. To clarify, the *Nemet* plaintiffs allege that while they may not have suffered any financial loss as a result of deception, they did incur a financial loss when they paid too much for something that was worth less. Specifically, the complaint equates the plaintiffs' financial loss with the amount of the clean premium paid on the cars.

The clean premium is the wrong measure for a couple of reasons. First, it is difficult to calculate in large part because there are very few conventional diesel cars sold in the United States, so identifying a reference price point is challenging. It would also be difficult to use the market price of the Dieselgate cars in the immediate aftermath of the scandal because VW quickly stopped selling and banned dealerships from selling or reselling the cars. Second, even if the clean premium could be determined, it would reflect only some of the harm experienced by car owners as a result of the deception. While for some the clean premium figure might be representative of their personal monetized valuation of cleanness or greenness, for others, the figure might be completely inadequate and under-compensatory; for others still, it might be over-compensatory.

Of course this is a common drawback of coming up with market prices, as the process necessarily involves flattening people's individual preferences.<sup>212</sup> Here, however, that problem

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212. In addition to over-compensating some consumers and under-compensating others, another problem with using clean (and social) premiums as the measure of harm is that premiums do not account for the social cost of breeding distrust in the marketplace. If we took the social costs of deception into account from an efficiency standpoint, we might find that the costs of under-addressing the identity harm of conscious consumers exceeds the cost of over-compensating conventional consumers.

can be avoided by looking to a different measure of harm altogether. Indeed, the clean premium—and for that matter any figure related to the purchase or resale price—may be measuring the wrong thing from the point of view of identity-harmed plaintiffs. For these individuals, the right measure is not (or not only) the diminished resale value or the lost clean-premium, but rather the lost *greenness* of the purchase. And this is something that can be measured at least as well (or as poorly) as the clean-premium by looking at, for example, how many miles the *Nemet* plaintiffs drove and calculating the above-advertised and the above-legally-permitted (under appropriate state law) emissions. A price could then be attached to these extra emissions and converted into a lost greenness figure. That figure could then be used as the benchmark for damages that would eventually be placed into a climate mitigation fund, for example.

Thus, while the *Nemet* case represents a step in the right direction in terms of recognizing harms that occur even outside of diminished resale values, it remains too focused on the financial losses attached to the transaction, as opposed to the greenness losses. I would recommend looking beyond the clean premium to design a remedy that actually measures and addresses the harm created when a company breaks its sustainability promises. Such a remedy would focus not on recovering (clean/social) premiums, but rather on repairing the harm that resulted during the production or use of the good. In the case of the *Nemet* plaintiffs, remedies would focus on restoring the greenness of VW's promises, rather than the premium attached to those promises. Some may worry that measuring harm by looking beyond the purchase and resale price will open the door to frivolous lawsuits, but a well-designed reparations-over-compensation-focused remedies framework should allay their concerns.

This first thought experiment reveals the importance of illegality, on the one hand, and the inadequacy of market value as a proxy for harm, on the other. Without illegality, the depreciation effects produced when misrepresentations are revealed as such is greatly diminished, as are any remedies. But, as the experience of the European Union and the *Nemet* Dieselgate victims makes clear, consumers can still experience identity harm, even without a drop in market value. The problem is that there will not always be a law on point to affect

the market value. In a CAA-free America, Dieselgate would not have triggered EPA or DOJ engagement. This would have left the FTC to “go it alone” on a case involving only limited economic loss. Under such alternative circumstances, VW would have experienced much less pressure to settle than it did. Innovative legal and economic thinking is needed to operationalize an alternative and more appropriate measurement of harm.

## 2. Thought Experiment Two: What If There Were No EPA?

As a second thought experiment, imagine the VW scandal breaking in a United States with a CAA (so we retain the illegality issue), but no EPA.<sup>213</sup> How much could the FTC do on its own? While I am somewhat skeptical that the FTC acting alone would have been able to secure the same level of compensatory damages as obtained in reality,<sup>214</sup> the agency would at least have been able to recover the clean premiums paid on the cars; alternatively, it might have been able to recover benefit of the bargain damages, which could be significant if measured to reflect the difference between an illegally dirty car—worth very little—and a truly clean diesel car—worth a great deal. In addition, since VW’s deception was fraudulent, willful, and malicious, some measure of punitive damages would also have been within the FTC’s reach.

While it is difficult to predict what the compensation would have looked like for individual car owners in an EPA-free United States, one thing we do know is that the FTC would not have been able to make VW pay billions of dollars into a climate mitigation fund. That is because the injunctive remedies available to the FTC are circumscribed to addressing the injuries (that were or could be) suffered directly by consumers.<sup>215</sup> This excludes injuries to the atmosphere, such as

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213. As explained above, this is not a far reach, given that the EPA’s intervention capacity is already being severely curtailed under the Trump administration. *Supra* note 147 and accompanying text; *see also* sources cited *supra* note 5.

214. Domonoske & Chappell, *supra* note 181 (discussing how the FTC obtained full buy-backs at pre-scandal values, plus cash compensation up to \$10,000).

215. *See* Federal Trade Commission Act, 15 U.S.C. § 53(b) (2012). As stated in the FTC complaint:

[This statute] empowers this Court to grant injunctive and such other



those caused by Dieselgate. While the FTC exists to protect consumers, the EPA exists to protect the environment; in a United States with no EPA, therefore, even successful consumer claims would be unlikely to yield environmental remedies.

This distinction is important because identity harm is not only about the injury experienced by consumers; it is also about the injury experienced by the planet and/or by other humans. In other words, in order for consumers who experience identity harm to be made whole, their complicity in the infliction of injuries on the environment or other humans must be unwound, and the best way to do that is to focus remedies on repairing the injuries. In the VW case, the only way to undo the harm to the environment created by driving hundreds of thousands (in the United States alone) of illegally polluting vehicles was to create an emissions-offset program such as that established by the EPA. Without that piece, identity-harmed consumers would be left to contend with the sickening realization that their “clean” purchase did the exact opposite of what they had expected—irreversibly dirty the atmosphere even more than a conventional car.

This second thought experiment highlights a key feature of identity harm, namely, that it possesses a strong subjective and psychic or emotional component that money damages alone cannot fully address. Indeed, as already suggested, to be properly remedied, identity harm requires positive injunctive remedies that center less on the consumer than on correcting injuries experienced by the planet and/or other humans— injuries that were enabled by unfulfilled sustainability promises.<sup>216</sup> Identity harm is intersectional in the sense that it

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relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

FTC Complaint, *supra* note 84, at 16.

216. Once more, innovative legal solutions will need to be developed in order to make it financially viable for motivated consumers to bring identity harm grievances through consumer law claims. One possibility would be for class action plaintiffs to elect injunctive remedies at the outset and for a share of the monetized injunctive remedies to go toward attorneys' fees. Another would be to establish an impact litigation fund for this purpose. A recent article explores some of these possibilities in detail, laying out a model for differentiating sincere from

crosses over from the realm of individual consumers into other spheres that require protection. As such, identity harm reveals some problematic “underlaps” or gaps in the protective coverage provided by agencies such as the FTC and the EPA—as well as the DOJ and the FDA.

To summarize, between the buy-backs, the extra compensation, and the climate mitigation fund, the VW settlement *did* address identity harm. However, by “tweaking the facts” as I have tried to do, it becomes apparent that the coverage was collateral or incidental, rather than deliberate or specifically responsive to identity harm. Conscious consumers should therefore be wary of viewing the VW settlement as setting a meaningful precedent for claims based on broken sustainability promises. Dieselgate was at the epicenter of a perfect storm of illegality, depreciated market value, political will, and regulatory attention—coming from multiple and differently-equipped protective agencies. Move any of those pieces around, and we could easily be living the deeply unsatisfying reality of the European Dieselgate victims.

The takeaway is that, even when there are laws on point, our protective regimes are less robust than we might like to believe. Should the protective capacity of federal agencies such as the FTC or the EPA be restricted—via budget cuts, the narrowing of interventionist mandates, or by changing the laws or the interpretation of the laws implemented by these agencies—the regulatory burden will fall onto state AGs and aggrieved consumers. And to the extent that AGs decline to intervene for political reasons, or because they are insufficiently resourced to pursue legal investigations and actions pertaining to corporate sustainability misconduct, consumers will have no recourse other than bringing lawsuits directly. As one moves down the intervention ladder, so too does the intensity of the deterrence effects for corporations. The sharper the regulator’s teeth, in other words, the more likely it is that corporations will be deterred from making sustainability promises that they are not committed to keeping.

The peculiarities of the VW settlement reveal why identity

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fake claims about emotional harm: Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law: A Novel Approach To Compensation For Emotional Harm* (U. Chi. L. Sch., Coase-Sandor Inst. for L. & Econ., Working Paper No. 819, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3058186](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058186) [<https://perma.cc/5YK4-9AQ7>].

harm, although relatively easy to grasp conceptually, is quite difficult to detect legally. Working through the two thought experiments detailed above illustrates just how easily corporate greenwashing or redwashing can go undetected and under-remedied. For “color-washing” claims to be properly addressed, the market and the regulators need to hear them. The VW tree fell loudly because of its size and the broad scope of the illegalities involved. Its thump reverberated across the market for conventional goods (as distinct from the market for virtue), and that market is highly sensitive to changes in resale value, diminished performance, and illegality.<sup>217</sup> However, many broken sustainability promises are too small or fall too deep inside the sustainability forest to be heard by the conventional market or to resonate politically with regulators even though they produce real harm. This means that consumers can be left to fend for themselves if they want to hold corporations accountable for breaking their sustainability promises. At a minimum, consumers should be equipped with better legal tools for taking on this civil regulation challenge. Identity harm is one such tool.

### *B. Drawing Identity Lines*

At this early stage in its conceptual development, identity harm remains a relatively blunt tool. My aim here has been to flesh out the concept enough to engage in discussion about its utility and about ways to fine-tune and operationalize it going forward. In that vein, this final section seeks to address the concern that identity harm is perhaps too broad to be useful because it covers too many different types of promises and too many different consumer identities. What follows is an initial attempt to respond to this line-drawing challenge: I propose narrowing the application of identity harm to direct and indirect promises that pertain to a product or service. Otherwise put, statements that go to a company’s institutional identity but have no bearing on the actual goods sold by that

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217. Jack Ewing, *In the US, VW Owners Get Cash, In Europe, They Get Plastic Tubes*, N.Y. TIMES (Aug. 15, 2016), <http://www.nytimes.com/2016/08/16/business/international/vw-volkswagen-europe-us-lawsuit-settlement.html> [<https://perma.cc/96P9-SWXE>] (stating that, currently, VW cannot bring the cars into compliance with national standards without compromising fuel efficiency and performance and that the cars’ presettlement market value therefore dropped).

company would not be treated as identity harming under (identity-harm-upgraded) consumer law.

Identity harm attaches to consumer goods and—in this Article—to promises made about a good’s sustainability, how sustainably it was made or how sustainable it is to use. Sustainability promises are made through a company’s direct and indirect statements about its products. These statements inform consumer expectations, allowing them to curate their purchases in line with their personal (sustainability, ethical, or spiritual) values. From here, different curation approaches can be adopted: consumers can select one *product* over another on the basis of its sustainability, ethical, or spiritual attributes—e.g., green, conflict-free, fair-trade, vegetarian, animal-cruelty free, Kosher, Halal, etc.; or, consumers can select one *company* over another. When we enter the domain of institutions (companies and brands), however, the landscape of expectations becomes more complicated in part because we wade into territory that has traditionally been viewed as political—touching on matters of race, gender, sexual orientation, national origin, and religion.

Thus, shifting the focus from a particular product to a particular company opens up a more expansive world of consumer expectations that includes companies’ political identities. And, from consumers’ point of view, a seller’s political identity can matter a great deal. Indeed, company politicization explains the anti-Trump “#grabyourwallet” movement that launched after the election,<sup>218</sup> the “delete Uber” campaign to punish Uber for continuing to drive while taxi drivers went on strike to protest the President’s travel ban,<sup>219</sup> and also the Nordstrom boycott, which came after the retailer dropped Ivanka Trump’s clothing line.<sup>220</sup> Journalist Kate Taylor persuasively describes the pressure on businesses to take a stance on political issues: “[i]n 2017, companies don’t have the option to take a stance or not. As seen in the case of

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218. Eric Westervelt, *#GrabYourWallet’s Anti-Trump Boycott Looks to Expand Its Reach*, NPR (Apr. 16, 2017, 8:12 AM), <http://www.npr.org/2017/04/16/523960521/-grabyourwallets-anti-trump-boycott-looks-to-expand-its-reach> [https://perma.cc/YB6K-3W3F].

219. Exec. Order No. 13,780, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

220. Kate Taylor, *Trump Spurred a ‘Consumer Awakening’ That Is Pushing Businesses Into Uncharted Territory*, BUS. INSIDER (Feb. 26, 2017), <http://www.businessinsider.com/trump-forces-companies-to-get-political-2017-2> [https://perma.cc/9MKU-TJX5].

Uber, silence, or attempts at partial neutrality, can have political repercussions because *customers are no longer satisfied with neutrality.*"<sup>221</sup> In a similar vein, Harvard Business School historian Nancy Koehn recently explained that, while big public company CEOs "don't walk out onto the plank of social and political leadership by default . . . today, to keep silent is to jeopardize the reputation of the company."<sup>222</sup>

As the above examples suggest, consumers' dissatisfaction with political neutrality is not about products, it is about companies. Does identity harm fit here, and if so, how? I would say it does, if somewhat uncomfortably. It could fit in situations where companies are "caught" expressing their values opportunistically. For example, in 2012, the fast-food chain Chick-fil-A became embroiled in a political maelstrom because of its donations to anti-LGBT groups. LGBT supporters organized protests in the form of "kiss-ins" and boycotts, but the news also sparked buycotts, with supporters pledging "to eat more Chick-fil-A than ever before."<sup>223</sup> As a result, the company strengthened its reputation among conservative groups, and is today No. 1 on the Harris Poll's ranking of the reputations of the 100 most visible—to conservatives—companies in the U.S."<sup>224</sup> This suggests that even though Chick-fil-A's political views were not designed to increase sales, the company nevertheless derived financial benefit from taking a stance on a politically charged issue.

So far, so good on the identity harm front. But, as Taylor explains, there is a potential problem:

Republicans' elevated appreciation for Chick-fil-A wasn't a problem—and [was] perhaps even a bonus—when locations were primarily in red states. However, in the last few years, the chain has expanded its presence in the Northeast, including New York City. Simultaneously, the chain has attempted to move away from its conservative image. "We are not a political organization. We are not a social-change

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221. *Id.* (emphasis added).

222. David Gelles, *The Moral Voice of Corporate America*, N.Y. TIMES (Aug. 19, 2017), <https://www.nytimes.com/2017/08/19/business/moral-voice-ceos.html> [<https://perma.cc/QC2H-GN45>].

223. Taylor, *supra* note 220.

224. *Id.*

organization. We are a restaurant.”<sup>225</sup>

Seeing the company pivot on—or try to neutralize—its political stance, a conservative Chick-fil-A patron might feel betrayed in a similar way to the identity-harmed consumers discussed in earlier sections of this paper. They could experience deep resentment upon realizing that their dollars had supported a company whose values did not in fact align with their own, despite appearances to the contrary. What would be such a customer’s chances of success in a consumer lawsuit? Probably slim because of the First Amendment, which sets strict limits on the regulation of political expression. And there can be little doubt that Chick-fil-A’s donations to anti-LGBT groups would be viewed as political, not commercial, speech. Although the Chick-fil-A patron’s claim would likely fail, their experience of betrayal could fairly be described as a kind of identity harm.

Thus identity harm could arise in the context of an unfulfilled political promise. However, particularly from a consumer law perspective, there is a crucial difference between a company’s expression of its political commitment and its commitment to sustainability. To clarify, while institutional sustainability claims (e.g., “We, company X, care about the health of the planet”) are not product-specific, they nevertheless convey something—even if only generally—about the company’s products. By contrast, a company’s statements with respect to its political views (e.g., immigration, abortion, transgender rights, etc.) tell consumers nothing about that company’s products. There is no link between the representation and the product, in other words. The consumer expectations generated by political claims are therefore substantially different from those generated by sustainability (or ethical or spiritual) claims.

For this reason, consumer law redress for identity harm is best suited to situations where there is a tight connection between a company’s claims and its products. The more political the claim, the looser the connection to the product, the less justified the pursuit of consumer law claims. Additionally, trying to make political promises actionable through consumer lawsuits raises many of the concerns outlined in Part I about

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225. *Id.*

citizen-consumers. Not only would it open the floodgates to overly-politicizing the commercial arena, it would also weaken the conventional political arena, which is ultimately the best place to express (dis)satisfaction with policy matters. Otherwise put, for purely political battles, individual corporations are poor targets, and treating them as stand-ins for elected officials triggers precisely the concerns expressed by citizen-consumer critics. By narrowing the consumer law protection of identity harm to the realm of product-related promises, we can maintain the integrity of both the political and the commercial spheres.

This does not mean that consumer activism à la “delete Uber” or the Nordstrom boycott is somehow bad or not useful. On the contrary, such civil regulation is absolutely appropriate as a way to express one’s political views. However, I do see an issue with using consumer law to wage political battles that have little or nothing to do with actual consumer products. After all, identity harm does not arise because of a disagreement. It arises because a promise was broken.

A last point on the difference between companies’ political promises and their sustainability promises pertains to remedies. Developing a remedies framework to redress identity harms resulting from broken sustainability promises is challenging. However, it is perhaps even more challenging to conceive of a remedies framework for addressing the identity harm resulting from broken political promises. Ask yourself, what would it take to make a disappointed political consumer whole? In the case of Chick-fil-A, for example, would conservative patrons want to enjoin the company to issue a statement saying that it no longer promotes conservative values? Or would they want the company to “double down” on those values somehow, perhaps by increasing their contributions to anti-LGBT groups? Such remedies seem problematic because they are designed to force compliance with a political *view*, in contrast to remedies designed to force a company to honor its more standardized, measurable, and monitor-able sustainability commitments.

As concerns cabining identity harm, claims are best suited to situations where there is a tight connection between a company’s inconsistent or misleading statements (broadly defined) about its product and the actual product. Where the connection is weak, other civil regulation tools should be used,

such as boycotting and buycotting, or deepening one's engagement in the traditional political sphere.

In closing, I briefly set out a research agenda for my next article. That piece will draw on the protective principles embodied in contract law (the law of broken promises) and tort law (the law of civil wrongs that cause harm) to propose a framework for obtaining redress for identity harm. It will explain why consumer law is the best "home" for identity harm grievances and recommend upgrades to the consumer law regime to better accommodate such grievances. In their current forms, none of these bodies of law is perfectly configured for purposes of recognizing and redressing identity harm. For example, the most common remedy for consumer claims is money damages, which are typically keyed off of the purchase price and sometimes enhanced with statutory or punitive damages. But, as argued throughout this Article, what identity-harmed consumers need to be made whole is for the company to come through on its original promise and/or to repair the damage done.

Identity harm thus demands injunctive relief—similar to the types of remedies included in the *Kasky* and VW settlements discussed earlier. Yet, be it in contract, tort, or consumer law, remedies largely steer clear of reparations or restoration. Recall that specific performance is only rarely awarded for contract claims, while in the consumer law context, when injunctive remedies are employed, it is typically only to enjoin the company from continuing to engage in the bad practice at issue (e.g. false advertising or mispricing), not to require fixing the harm associated with the bad practice. By themselves, then, the types of remedies provided through existing bodies of law are unlikely to make identity-harmed consumers whole. Some legal innovation is therefore in order.<sup>226</sup>

Thankfully, legal tools already exist for dealing with intangible harms like identity harm. For example, we have mechanisms for addressing pain and suffering (in the context of medical injuries), emotional distress, and defamation. These are areas where the inadequacy of economic loss as a measure of harm is acknowledged, and a degree of subjectivity is

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226. A recent paper illustrates precisely this type of innovative thinking. See Ben-Shahar & Porat, *supra* note 216.



recognized.<sup>227</sup> Such protective principles must be harnessed to tackle identity harm. They must also be enhanced to emphasize reparations and injunctive relief for identity-harmed consumers, rather than compensation. This should assuage concerns about the potential for identity harm to generate frivolous lawsuits by opportunistic consumers.

## CONCLUSION

Identity harm is real and demands fuller legal recognition and protection. Changing consumer demographics marked by increased millennial engagement, the expansion of the market for virtue, and the proliferation of corporate sustainability statements all heighten the risk of exposure to identity harm. This Article showed that it is all too easy for companies strategically to surround-sound themselves with scrambled sustainability noise in order to attract conscious consumers while shielding themselves from liability. Even the most diligent consumers can find it challenging to distinguish companies that do good from those that simply say they do good. This is highly problematic, particularly given the importance of protecting consumers' autonomy to choose *not* to participate in commercial systems that they consider abusive.

The under-recognition of identity harm hurts consumers, but also society, by breeding distrust in the marketplace and the bodies charged with regulating it. It also makes possible the perpetuation of corporate practices that hurt the planet and its inhabitants. Finally, under protecting consumers' social-environmental expectations is a missed opportunity to harness the power of the market to achieve global sustainability objectives.

In a regulatory context where the government's protective capacity appears to be shrinking more each day, it is becoming increasingly urgent to equip consumers with better tools to protect their autonomy to consume in line with their personal values. Though still new and imperfect, identity harm has the

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227. JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 *BUFF. L. REV.* 251, 301, 309–14 (2003) (discussing the challenges of comparing intangible harms); Robert L. Rabin, *Intangible Damages in American Tort Law: A Roadmap* (Stan. Pub. L. & Legal Theory, Working Paper No. 2727885, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2727885](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727885) [<https://perma.cc/2XBK-BUJB>] (discussing intangible harms).

potential to be such a tool. It completes the harm picture painted by economic loss alone and better depicts the types of disappointment that consumers actually experience; it also provides a more ample view of the types of representations that matter to consumers; lastly, it creates pathways for imagining remedies that are more responsive to consumer grievances. As analyzed more fully in a subsequent article,<sup>228</sup> operationalizing identity harm in tort, contract, and state consumer law can empower consumers to serve more effectively as agents of change, leveraging their own voices to advance the interests of (often voiceless) third parties.

Deeper legal recognition of identity harm would push promise-making corporations to improve their sustainability performance and give truly sustainable companies a chance to compete more fairly and show up their less-than counterparts. Increased judicial sensitivity to identity harm would therefore cultivate a sounder marketplace that protects consumers' freedom to make values-aligned choices and supports a better, safer world.

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228. See Dadush, *supra* note 113.

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