

OFFSETTING AND THE CONSUMPTION OF SOCIAL RESPONSIBILITY

EZRA ROSSER*

ABSTRACT

This Article examines the relationship between individual consumption and consumption-based harms by focusing on the rise in consumption offsetting. Carbon offsets are but the leading edge of a rise in consumer options for offsetting externalities associated with consumption. Moving from examples of quasi offsetting to environmental offsetting and the possibility of poverty offset institutions, I argue that offsetting provides a valuable mechanism for individuals to correct for the harms associated with consumption. This Article makes two major contributions to how we understand the relationship between consumption and social responsibility. First, it identifies an emerging offsetting phenomenon in seemingly discrete market practices and gives suggestions for improving upon them. Second, it suggests that by taking seriously both consumption and externalities, progress can be made on everything from the environment to global poverty. Offsetting, while not getting at all moral or societal obligations, does root such obligations in the shared activity, and perhaps belief, of Americans: consumption.

TABLE OF CONTENTS

| | |
|--|----|
| INTRODUCTION..... | 28 |
| I. PRODUCTION AND CONSUMPTION EXTERNALITIES..... | 32 |
| A. Market Pricing | 33 |
| B. Market Failures..... | 36 |

* Associate Professor, American University Washington College of Law; Research Affiliate, National Poverty Center, University of Michigan; M.Phil in Land Economics, Cambridge; J.D. *magna cum laude*, Harvard Law School; B.A. in Economics and English, Yale University. For helpful comments and suggestions on earlier versions of this paper, I am grateful to Richard Delgado, Rashmi Dyal-Chand, Lee Fennell, Heather Hughes, Louise Trubek, Michael Vandenberg and participants in the Poor People’s Economic Human Rights Campaign and Social Welfare Action Alliance’s *Building the Unsettling Force* conference, American University’s *Poverty and Economic Mobility* conference, and the Glasgow *Critical Legal Conference*. I also thank Alex Bernshteyn, Geeta Dhingra, and Nickolas Milonas for excellent research assistance.

| | |
|---|-----|
| II. RESPONSIBLE CONSUMPTION AND OFFSETTING | 42 |
| A. <i>Quasi Offsetting</i> | 43 |
| 1. <i>Corporate Responsibility and Cause Marketing</i> | 45 |
| 2. <i>Hybrid Vehicles</i> | 54 |
| 3. <i>Fair Trade and Production Certifications</i> | 56 |
| B. <i>Environmental Offsets</i> | 61 |
| 1. <i>Factors Driving Environmental Offsetting</i> | 62 |
| 2. <i>Environmental Offsetting Mechanisms</i> | 71 |
| C. <i>Poverty Offsets</i> | 76 |
| 1. <i>Motivating Factors</i> | 79 |
| 2. <i>Institutional Improvements</i> | 86 |
| III. OFFSETTING AND STRUCTURAL CHANGE | 91 |
| A. <i>Capturing Guilty Wallets</i> | 92 |
| B. <i>Acceptance of Consumerism and Structural Change</i> | 95 |
| CONCLUSION | 100 |

INTRODUCTION

Consumers today routinely pair their consumption with charity or subject their consumption choices to their social commitments. Whether in the form of offset payments or post-consumption charitable giving, individuals are linking their consumption to their sense of social responsibility. To some extent this has always been true: beggars have probably concentrated outside of stores since time immemorial and there is a lengthy history of boycotts being used as a tool of social change. But the explosion of end-of-the-checkout-line charitable options, together with the increasing prevalence of social marketing, attests to the rise of a new phenomenon as well.¹

Americans are consuming social responsibility; that is, they are both attempting to ensure their consumption does not conflict with their sense of social responsibility and hoping consumption can be the means of

1. The term “social marketing” originated in 1971 and refers to the use of marketing techniques to advance social causes. Lawrence O. Gostin et al., *The Law and the Public’s Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 81 n.69 (1999) (quoting PHILIP KOTLER & EDUARDO L. ROBERTO, *SOCIAL MARKETING: STRATEGIES FOR CHANGING PUBLIC BEHAVIOR* 24 (1989)). Although not how the term is used here, the rise of social networking websites has introduced a competing definition of “social marketing” related to marketing done through such websites. See William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1105 (2009).

meeting their social responsibilities.² This Article is about what I call “consumption offsetting.” Although such language borrows from the environmental field, carbon credits and carbon offsetting are but examples on the leading edge of a larger trend.

This Article is part descriptive, part normative. The literature on offsetting to date focuses on environmental offsetting and has not explored offsetting in other contexts. As the first article to identify quasi offsetting behavior and consider consumer responsibility for other social harms, my conclusions are necessarily preliminary. Accordingly, although I argue that the consciousness-raising aspects of offsetting overwhelm the possibility that offsetting will crowd out other sorts of pro-social activity, my principal contributions do not depend upon answering such questions. Fully teasing out all the policy implications of the idea behind offsetting—that individuals should pay for their consumption externalities—is beyond the scope of this Article. Offsetting relies upon voluntary payments, but the underlying idea suggests that the law should work on the internalization of these externalities. Many readers will no doubt conclude that offsetting highlights the need for greater regulation and prevention of harmful production and consumption externalities.³ But the goal is not to provide an account of the externalities that should be prohibited. This Article’s ambitions are far more preliminary and modest: to introduce offsetting as a budding market phenomenon, to argue poverty is ripe for offsetting, and to suggest a few institutional improvements on current consumer offsetting practices.

I argue that there is a spectrum of offsetting, with pure consumption at one end and examples of institutional offsetting at the other. In the middle lie practices—most notably corporate social responsibility—that bridge consumption and social responsibility for the externalities of consumption. I resist a narrowing of the conception of offsetting because a reductionist account misses the richness of the current market phenomenon. The second half of the Article focuses just on institutional offsetting, but by first exploring quasi offsetting practices that occupy the gray area between

2. “Consumption” here means both physical consumption of goods and symbolic consumption of social values. See Douglas A. Kysar & Michael P. Vandenberg, *Introduction: Climate Change and Consumption*, 38 ENVTL. L. REP. 10825, 10829–32 (2008) (exploring competing definitions of consumption).

3. Offset institutions, like other private governance institutions, arguably “arise to meet an unmet public demand for governance.” Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions* 3 (Oct. 10, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1690831>.

consumption and third-party offsetting, we can better understand the origins and rise of institutional offsetting.

Part I focuses on market failures to help explain why consumers engage in consumption offsetting. After challenging the standard assumption that markets correctly price goods and introducing the idea of externalities, I focus on the role of governance vacuums and powerful commercial interests. There is a deep and rich literature on market failure and for those comfortable with the topic, Part I can be skimmed. For those who embrace the tenets of laissez-faire economics, Part I challenges blind faith in free markets. The central argument is that prices of goods do not reflect production externalities.

Part II tackles consumption offsetting. The defining characteristic of offsetting is the decision to make a supplemental payment that exceeds what the market demands in connection with consumption and to do so for charitable or socially responsible reasons. Parts on localism, corporate social responsibility, hybrid vehicles, and production certifications explore parts of the offsetting spectrum where the extra expense may or may not amount to offsetting. I then move to environmental offsetting. By decoupling offsetting from products and providing standalone offsetting institutions and options, the environmental field has taken the lead in developing mechanisms for consumptive offsetting. Environmental offsets are an example of an increasingly accepted and, in some circles, expected way to correct for consumptive externalities. And though the offset concept is more familiar in the environmental field, similar logic regarding externalities applies to the relationship between consumption and other social issues.

Part II ends by highlighting one particular social issue, poverty, where consumptive offsetting could be productively expanded and improved through unifying institutions.⁴ Blending charitable giving, guilt-inspired donations, and deliberate lifestyle adjustments, “poverty offsetting” describes a species of activity that recognizes the need to ameliorate some of the negative effects of consumption. Behind these supplemental payments is the understanding that individual consumption is not a discrete, isolated activity, but instead relates directly to local and especially global poverty.⁵

4. Additionally, I have written a follow-up article that further explores the idea of poverty offsetting introduced in this section. See Ezra Rosser, *Poverty Offsetting*, 6 HARV. L. & POL'Y REV. (forthcoming 2012) [hereinafter Rosser, *Poverty Offsetting*].

5. The connection consumers have to international poverty is different than their connection with domestic poverty, in no small part because domestically consumers are also citizens empowered

The idea that social responsibility is something to consume or is connected with consumption will strike many as inappropriate or even dangerous. In Part III, I respond to concerns about capturing people when they have their wallet or charge card in hand. Offsetting arguably serves to legitimize or support consumption and some people may treat offset expenses as the full extent of their societal obligations. An additional argument against consumption offsetting is that it reinforces capitalism's consumptive-driven structure, diminishing the possibility of radical change. According to this critique, offsetting sells cheap consumption licenses and co-opts the socially responsible who might otherwise demand more meaningful change.

I respond to such arguments by rejecting the necessity of radical change and assert instead that consumption offsetting can help individuals realize their obligations. Although offsetting is limited to righting consumption externalities, it does not displace non-consumption-based obligations. Structurally, offsetting accepts the important role consumption plays in our society but does so in a way that awakens the social consciousness to the costs of consumption. Just as the conservative assumption that the market consistently prices goods appropriately cannot survive close scrutiny, the leftist assumption that market mechanisms should not be used to help with social issues is also overly simplistic. Improving the norms and institutions of consumption offsetting will make it more likely, not less, that people will appreciate and act upon their many obligations—those tied to their consumption and those not.

This Article makes two major contributions to how we understand the relationship between consumption and social responsibility. First, it identifies an emerging offsetting phenomenon in seemingly discrete and isolated market practices and gives suggestions for improving upon them.⁶ Second, it suggests that by taking seriously both consumption and externalities, progress can be made on everything from the environment to global poverty. Offsetting, while not getting at all moral obligations, does root such obligations in the shared activity, and perhaps belief, of Americans: consumption.⁷

to determine everything from workplace protections to minimum wage requirements. In keeping with the preliminary nature of this work, and partly out of concern that drawing out these distinctions risks overemphasizing them, this Article tables further elaboration.

6. Identifying existing behavior currently operating below the cultural radar helps raise the visibility of such practices, which in turn can lead to increased enforcement of associated social norms. See Jed S. Elia, Comment, *Law and Norms in Collective Action: Maximizing Social Influence to Minimize Carbon Emissions*, 27 UCLA J. ENVTL. L. & POL'Y 93, 100 (2009).

7. In the wake of 9/11, for example, politicians told Americans that shopping was the way they

I. PRODUCTION AND CONSUMPTION EXTERNALITIES

When we enter a store, rows of products are on display, but the work involved in creating and bringing products to market is typically hidden from view. Our perspective on the production process is limited, with the only information readily available being what is presented by the nature of the product itself, by the packaging, and by the price. It is nearly impossible to know the conditions at factories where the products were produced, the wages paid to workers, or the amount of pollution created in the process. Given such ignorance, with a few exceptions, we simply pretend as if the production process does not matter.

Our indifference, or at least inattention, to production processes helps ensure that negative externalities accompany the production of many goods.⁸ Consumers tend to make purchasing decisions based on price; when sorting between near identical options, if a substitute good's price is low enough, we pick the substitute.⁹ Producers, faced with the downward price pressures of competition and consumer inattention to production, rationally respond by keeping production costs low. One way to do this is to pass along production costs—to neighbors, to employees, to society, to the environment, etc.—as much as possible. “Passing along costs” sounds evil or nefarious, but it need not be viewed that way. Instead, it simply means—because the law does not require it of them—that producers do not have to take into account all the costs of production, in terms of effects on others or the world.¹⁰

Economists call these costs “negative externalities.” To understand what constitutes an “externality,” it is worth quoting at length a classic formulation by Harold Demsetz:

Externality is an ambiguous concept. For the purposes of this paper, the concept includes external costs, external benefits, and

could help the U.S. recover from the attacks. Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 526–27 (2004) [hereinafter Kysar, *Preferences for Processes*]. “[T]his conflation of patriotism with consumption, of civic life with market life,” *id.* at 527, while reflecting a lost opportunity for an expanded notion of citizenship, captures the centrality of consumption in the United States.

8. *See id.* at 536 (noting that “[f]or the most part” consumers have “institutionalized ignorance” of production processes).

9. Price is paramount with luxury goods too, but inversely so—consumers look for high prices and manufacturers may insist upon high prices as a form of signaling. *See* Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices*, 50 ARIZ. L. REV. 261, 277 (2008).

10. In the environmental context, through the cumulative impact of producers who do not have to take pollution into account, pollution is overproduced. *See* Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 534–35 (2007).

pecuniary as well as nonpecuniary externalities. No harmful or beneficial effect is external to the world. Some person or persons always suffer or enjoy these effects. What converts a harmful or beneficial effect into an externality is that the cost of bringing the effect to bear on the decisions of one or more of the interacting persons is too high to make it worthwhile, and this is what the term shall mean here.¹¹

According to Demsetz, the reason there are externalities is that it is too costly to make actors take into account particular harmful or beneficial effects. Everything from diffused harm with multiple victims (think of the challenge society has had regulating greenhouse gas emissions) to an entrenched powerful interest group (the fishing industry, for example) can make it too costly to convert some effects into property rights. Externalities can be positive or negative, and most production activities generate both. Bob's Honey Farm, for example, may have many beehives. Bob sells the honey produced by the bees but the bees also serve as pollinators for neighboring apple farms. Notice the positive externality: the neighboring apple farmers need not pay Bob anything, yet they benefit from their proximity to Bob's bees.¹² On the other hand, Bob's Honey Farm may also be located near an elementary school where students suffer an unusually high number of bee stings. In the absence of laws to the contrary, Bob does not have to take bee stings into account as a cost of production. Such stings are negative externalities that allow Bob to sell his honey for less than he would if he had to pay to fully enclose his bees.

A. *Market Pricing*

"The price is right"—to borrow from the television game show—sums up a central assumption of both American consumers and neoclassical economists. While in other countries there exists a tradition of negotiating over price, in the United States haggling is almost nonexistent. And while consumers do comparison shop and bargain hunt, there is implicit acceptance that price corresponds to value and that price is market determined. Except in rare moments (after a hurricane) or for certain

11. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967). For alternative definitions of externalities, see ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 40–41 (3d ed. 2000); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 72 (7th ed. 2007).

12. See Steven N. S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 J.L. & ECON. 11 (1973).

important products (oil or gold), price is treated as a given, subject to little discussion. Adam Smith's "invisible hand" is considered just that, invisible and unchallenged by most Americans, and while product prices guide purchases, explanation for pricing is not usually sought by consumers.¹³

Neoclassical economists make the same assumption but do so under a protective layer of theory. For economists, price (and quantity) is determined by the intersection of the supply and demand curves.¹⁴ The beauty of the model conceals the simplifying assumptions economists rely upon in practice. Economists say that market exchanges occur when the buyer values the good at or above the price at which it is being offered. But economists tend to accept price as equivalent to value and to not spend much time on the decision-making processes of individuals.¹⁵ Perhaps the biggest assumption is that the buyer has perfect information about the product being offered; indeed, it is standard practice to treat buyers and sellers as if they have perfect information about the entire market. This assumption is critical to economic analysis because it allows purchasing decisions to be treated as revealed preferences. Yet, according to Ronald Coase, search and information costs are one of the three major categories of transaction costs.¹⁶ If transaction costs are small, they can be thought of as sand in the cogs of capitalism; if they are big, transaction costs can overwhelm pricing assumptions. As the economics profession has moved away from economic history and broader theory towards economics based on mathematical models—what Paul Krugman describes as "the rise of the equations guys"¹⁷—transaction costs have been assumed away. Though

13. ADAM SMITH, *THE WEALTH OF NATIONS* 572 (Bantam Classics 2003) (1776).

14. For a non-economist's explanation of this point of equilibrium, see Sinden, *supra* note 10, at 541–43.

15. Behavioral economics is the exception; not surprisingly, studies of behavior often reveal that humans do not act as the perfectly rational actors assumed by standard neo-classical economics. Stated differently, "[r]eal people aren't much like *Homo economicus*, so the latter makes a poor model for the former." Grant M. Hayden & Stephen E. Ellis, *Law and Economics After Behavioral Economics*, 55 U. KAN. L. REV. 629, 637 (2007). For this reason, many scholars have argued that the law and economics approach needs to become the law and behavioral science approach. See, e.g., Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 35–55 (1989); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000).

16. See RONALD COASE, *THE FIRM, THE MARKET, AND THE LAW* 6 (1990). The other two transaction cost categories, according to Coase, are (1) bargaining and decision costs and (2) policing and enforcement costs. *Id.*

17. Paul Krugman, *An Institutional Economics Prize*, NYTIMES.COM BLOG: THE CONSCIENCE OF A LIBERAL (Oct. 12, 2009, 8:12 AM), <http://krugman.blogs.nytimes.com/2009/10/12/an-institutional-economics-prize>.

economists are aware of the role transaction costs can play, generally their models do not include such complexity. The simplifying assumption of perfect information echoes the larger simplification that, except in rare circumstances, market equilibrium of supply and demand alone drives pricing.¹⁸ The role of the government in establishing the conditions and terms of the market is lost, as is the possibility that producers might take advantage of buyer ignorance of production processes.¹⁹

This is not to deny the dynamism of capitalistic competition, just to suggest that competition takes place within—indeed is made possible because of—a larger institutional structure and that this structure plays an important role in determining price.²⁰ In this Article, I provide an explanation for why some goods may be priced incorrectly and unpack a socially responsible way consumers can correct such pricing problems. To explain how products could cost too little, I focus on production and consumption externalities understood broadly. Governance shortcomings

18. Critical legal scholars, among others, argue convincingly that there is no such thing as “the market,” singular. Rather there are lots of markets, subject to different regulations and norms, occupying unique social space, and reaching efficient outcomes differently. *See, e.g.*, ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 203–04 (1998); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 963–67 (1985). The market that most closely approximates the efficient, zero transaction cost market assumed by economists is perhaps the New York Stock Exchange. After all, price moves from one second to the next, all buyers are supposed to have equal information (because of the prohibition on insider trading), and fees for changing positions in the market are *de minimus*. But even the stock market, like every other market, is subject to overarching regulation that raises questions about what the term “free market” means. *See, e.g.*, Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1053–54 (2009) (“[M]arkets are not states of nature; they are regulated by law, and the legal rules defining property rights are a major element of that regulation.”). Formal law, norms, and other forms of regulation play an important role in determining the nature of any particular market and product pricing. *See, e.g.*, Stuart Banner, *Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand*, 34 LAW & SOC’Y REV. 47, 53 (2000); Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 19–24 (1988).

19. Ironically, despite the prevalence of transaction costs and the information problems of buyers, the persuasive burden is on those who challenge the assumption of perfectly functioning markets. Oliver Williamson’s description of the general “neglect of transaction costs” by economists is worth highlighting:

Transaction costs are the economic equivalent of friction in physical systems. . . . But whereas physicists were quickly reminded by their laboratory instruments and the world around them that friction was pervasive and often needed to be taken expressly into account, economists did not have a corresponding appreciation for the costs of running the economic system.

OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 19 (1985).

20. The institutions of capitalism are as macro as formal laws that establish the terms of market competition and as micro as informal norms in the community and even at the family level. For more on the expansive scope of institutions and institutional analysis, see Douglass C. North, *Ideology and Political/Economic Institutions*, 8 CATO J. 15 (1988).

often allow companies to keep private cost per unit below the social cost of each unit. Once the linked assumptions of (1) efficient pricing, (2) a single market type, and (3) price-value equivalence are discarded, the focus shifts from economic modeling to the role of public and private institutions in establishing market conditions and production expectations.

B. Market Failures

Offset spending by consumers takes place because of awareness of, and desire to correct for, the harmful externalities associated with consumption. Such externalities reflect governance vacuums. Thinking of externalities in this way, while not contradicting Demsetz's definition of externalities as effects not associated with a corresponding property right, highlights the policy choices involved in permitting externalities.

To explain what I mean by "governance vacuums," it is worth revisiting externalities in a context familiar to most readers: the classroom. On the second day of Property, after students have signed the seating chart, I ask them if they have a property right in their seat. Debate ensues between students who think that they do because they can expect to be able to occupy it during class and students who think they do not because the professor can take away that expectation at any point. I then ask if any students would like to change seats. In large classrooms where every seat is occupied, students who arrived late the first day and did not get to pick their seats often raise their hands. The main reason students say they want to change seats is that they did not get a seat at what is their ideal distance from the professor: some students in the back rows would prefer to be front and center, some students in the front would prefer to hide in the back. But when class ends, students often tell me less neutral reasons such as: (1) someone in front of them plays solitaire on his computer during class and it is distracting or (2) the person next to them likes to smoke before class and they do not want to have to smell the lingering smoke all class. Both (1) and (2) are forms of externalities: the game player and the smoker have negative effects on those around them but typically do not take into account the harm they are causing when deciding to play computer games or smoke. These are also examples of governance vacuums. Policies could be instituted that would prevent such harms from occurring or that would compensate those harmed. I could follow the lead of some other professors and simply not allow the use of computers in

class.²¹ Or I could forbid students from playing games or surfing the web in class. By not instituting either rule, I have effectively chosen to allow the externality to exist.²² The same can be said of the smoking externality: if society or the school prohibited smoking, nonsmokers would not have to deal with lingering secondhand smoke. Less draconian measures could also be adopted: smokers could be allowed to smoke, but only if they did so in areas with sufficient ventilation,²³ or there could be a rule against entering the school within a half hour of smoking.²⁴ The absence of regulation that would force the harm-causing individuals to take into account the effect they have on others permits the externalities to exist and continue. And while regulation is not inherently preferable to non-regulation, it is the choice to leave a governance vacuum that allows for the externalities.

Recognition of governance vacuums *ex post*—after society has decided to disallow a particular activity through regulation filling the vacuum—is easier than *ex ante* recognition. Precisely because some consumers may see a governance vacuum while others see the acceptable workings of capitalism, there may be debate *ex ante* about whether regulation is appropriate. The line between allowed and disallowed practices changes over time, converting what was accepted by one generation to something not accepted by the next. Such change is partly based on increased understanding of the externalities of particular products or actions.²⁵ But increased knowledge is just part of the explanation; the pressures of population growth force additional emphasis on protecting against externalities. Perhaps most importantly, expanded expectations of behavior seem to accompany human progress. Although some will attribute causation to higher standards of living while others will emphasize the rise of human rights norms, for whatever reason people today have different understandings of what practices should be disallowed than did people in prior time periods.

21. See David Cole, *Laptops vs. Learning*, WASH. POST, Apr. 7, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/06/AR2007040601544.html> (discussing banning laptops in his law classes).

22. Personal note: I have not done so because I do not want to be a hypocrite, having played SimCity in my tax class as a law student.

23. Creation of nonsmoking zones in the United States during the 1980s and 1990s protected areas from secondhand smoke and, by creating an entitlement to smoke-free space, “empowered nonsmokers to complain about smoking.” Ela, *supra* note 6, at 108.

24. Smokers may disapprove, but having had students come to office hours reeking of smoke, I have contemplated implementing a similar rule for my office.

25. For example, with time, medical professionals may discover that a product (say lead-based paint) purchased for one purpose might harm children’s health.

Suppose there were workers with unique characteristics that made them best able to produce widgets. Suppose also that widgets were popular and producers could make the most money if they hired such workers to produce them. Standard economic theory might argue that in such cases the producer would offer wages high enough to attract such workers and that the market for widgets would guarantee the most efficient outcome. But what if the best employees for this particular type of work happen to be children? It was not until President Franklin D. Roosevelt signed the Fair Labor Standards Act in 1939 that the United States instituted firm restrictions on child labor. Until that time, child labor was an accepted practice, supported by arguments that prohibition would deny children an education and would raise the price of goods.²⁶ A similar story could be told about Freon, a chemical widely used in refrigeration and air conditioning systems. Freon's unique chemical characteristics made it the product of choice through the 1980s.²⁷ Unfortunately, Freon is also a chlorofluorocarbon (CFC), a chemical type with a particularly harmful impact on the ozone layer.²⁸ Awareness of the problems of CFCs preceded domestic and global efforts to effectively reduce the manufacturing of CFCs by decades, during which time consumption continued, as did growth of the hole in the ozone.²⁹ Another way to think about the continued harm is that pricing was artificially low because consumers were not paying for the damage to the ozone made possible by an environmental governance vacuum. The purpose of observing changing norms is not to celebrate the present—after all, future generations may look back on our allowed practices with scorn—but to highlight the inevitability, even when we do not fully appreciate their existence, of governance vacuums.

26. Child labor, it was argued, was a way for children to develop useful skills. Caroline G. Trinkley, Note, *Child Labor in America: An Historical Analysis*, 13 IN PUB. INTEREST 59, 77–78 (1993). Employers also argued that such labor was the only way employers could maintain “their competitive edge.” *Id.* at 79. See also Michele D’Avolio, *Child Labor and Cultural Relativism: From 19th Century America to 21st Century Nepal*, 16 PACE INT’L L. REV. 109, 116 (2004) (noting the fear among businesses that “they would not be able to survive” if they had to hire adults and pay the corresponding higher wages).

27. CFCs have a relatively low boiling point and are “essentially non-toxic, noncaustic, noncorrosive, and nonflammable,” which made them attractive for a number of commercial purposes. Jeffrey P. Cohn, *Chlorofluorocarbons and the Ozone Layer*, 37 BIOSCIENCE 647, 647 (1987).

28. See Nicholas A. Robinson, *Legal Systems, Decisionmaking, and the Science of Earth’s Systems: Procedural Missing Links*, 27 ECOLOGY L.Q. 1077, 1118–19 (2001).

29. For more on international and domestic delays in regulating CFCs, see Orval E. Nangle, *Stratospheric Ozone: United States Regulation of Chlorofluorocarbons*, 16 B.C. ENVTL. AFF. L. REV. 531 (1989).

Awareness of governance vacuums and related negative externalities associated with particular products does not necessarily lead to corrective regulation. Regulation can take many forms—norm-development, civil and/or criminal prohibition, fines, and so on—but I am going to focus on regulation through the establishment of property rights and markets.³⁰ Sometimes the cost of internalizing externalities through law, i.e., associating them with property rights, is greater than the cost of the harmful externalities themselves.³¹ Additionally, when the supply chain crosses national boundaries, a regulatory gap can be exploited by companies seeking to avoid countries with more stringent standards.³² Even where there seems to be general agreement that the activity or activities should not be allowed to continue, delays in enacting and enforcing corrective laws ensure a lag time between recognition of the problem and effective prevention of the action(s) causing harm.³³

During “the governance gap”—the time between recognition of the problem and the problem being addressed—consumers face a dilemma. They can purchase the good, suspending their knowledge of the production externalities for the sake of consumption. Mentally reverting to the assumptions that production processes do not matter to consumers or that through price the market takes care of production problems, consumers can choose to disregard known externalities.³⁴ Or they can

30. A focus on property-based regulation reflects the dominant—albeit arguably “misplaced”—view regarding the regulation of externalities and fits well with the issue, offsetting, being addressed in this article. See generally Eleanor Weston Brown, *A Common Morality: Toward a Framework for Designing Fiscal Instruments to Respond to Global Climate Change*, 15 WIDENER L. REV. 391, 397–400 (2010) (critiquing the dominance of law-and-economics-inspired market and privatization solutions to regulatory problems).

31. Costs include political costs. Problematically, powerful interest groups may succeed in blocking corrective regulation. The classic example is a monopoly, which can use market control to maintain high prices and block legal change. With the Supreme Court lifting caps on corporate campaign contributions and industry successfully pushing anti-consumer laws, scalar challenges are likely to increase. Such large entities can make the cost of change (at least for politicians) higher than the cost of the externalities. For more on the role powerful groups play in structuring institutions for their benefit, see JACK KNIGHT, *INSTITUTIONS AND SOCIAL CONFLICT* (1992).

Additionally, in some instances these costs will be high because of the demanding requirements for privatization of open-access resources to solve the problem of externalities. Ideally, privatization will ensure “each private property owner must bear the full social costs and benefits of her actions,” leaving “no remaining externalities or spillover effects.” Sinden, *supra* note 10, at 557.

32. See Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 919–20 (2007) (discussing the challenges of addressing this regulatory gap).

33. Gary Libecap argues that assignment of property rights—internalization of externalities—as a solution to open-access problems typically occurs after a period of delay marked by unnecessary waste. Gary D. Libecap, *Open-Access Losses and Delay in the Assignment of Property Rights*, 50 ARIZ. L. REV. 379, 380–82 (2008).

34. See Deborah L. Rhode & Lee D. Ross, *Environmental Values and Behaviors: Strategies to*

decide not to buy that particular product. The decision to boycott a particular product or service is not an easy one for many consumers who naturally question whether a single buyer can actually make a difference. Moreover, this choice, for the consumer who wanted that particular item, involves some self-sacrifice—suppressing their desires for the sake of preventing the known harm associated with the product.

Consumer response to known governance vacuums and associated negative externalities seems limited to a single “buy / don’t buy” decision. As an either/or choice, consumers who want a particular product usually opt for consumption unless the harm is egregious and beyond dispute. Generally the market does not offer consumers other options besides buy or not. By limiting the options in this way, the market operates to foreclose other avenues for consumer voice when confronted with the dilemma posed by known production harms.³⁵ Conceptualizing the role of the market during the governance gap is challenging. One could describe the continued sale of products at a price not reflecting the externalities of their production as an example of market failure.³⁶ The failure takes place not in the store, but up the supply chain, where producers do not have to pay for external effects of production. Those who suffer the negative externalities do not have a property right to be free from such harm, nor the ability to sell such a right.³⁷ Because there is no market for the externalities, goods come to market without that added cost, allowing the price to be lower than it would be without the market failure.

Encourage Public Support for Initiatives to Combat Global Warming, 26 VA. ENVTL. L.J. 161, 168 (2008) (“Individuals often adopt strategies of rational ignorance, or rather rational conservation, of time and attention.”).

35. Consumers essentially have the options of loyalty and exit, but not voice. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (discussing these response categories). *But see* Kysar, *Preferences for Processes*, *supra* note 7, at 610 (noting that “process-distinguished goods” such as “sweatshop-free clothing or cruelty-free cosmetics” offer “consumers a voice”).

36. An extensive body of literature treats externalities in this way. See, e.g., Kenneth J. Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market versus Non-Market Allocation*, in *PUBLIC EXPENDITURES AND POLICY ANALYSIS* 59 (Robert H. Haveman & Julius Margolis eds., 1970); Eric M. Zolt, *The Uneasy Case for Uniform Taxation*, 16 VA. TAX REV. 39, 69–70 (1996); Lloyd N. Cutler, *Regulatory Mismatch and Its Cure*, 96 HARV. L. REV. 545, 546–48 (1982) (reviewing STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982)) (summarizing Breyer’s views on externalities and market failure).

According to an allocation theory definition of market failure, “we mean the failure of a more or less idealized system of price-market institutions to sustain ‘desirable’ activities or to estop ‘undesirable’ activities.” Francis M. Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351, 351 (1958).

37. An individual with a right to clean air, for example, could charge a producer of a good for air pollution associated with production, but without that right, the ability to use another’s clean air is an “unpaid factor” of the good’s production. See Bator, *supra* note 36, at 364.

Perhaps a better way to characterize the continued sale of products during the governance gap is not as a market failure but as an institutional limitation. For while not pricing in externalities is a failure of the market to ensure consumers cover the full costs of production, those acting in the market—producers and consumers—are behaving exactly as hoped for in capitalist economies. Consumers are purchasing the products they want at the lowest price possible given competition and the applicable rules in place at the time. The market creates real value; both the value of lower prices and better products and the value consumers receive with the freedom to be market participants.³⁸ What it fails to do—police production externalities or even make sure prices are correct—is not something it is currently tasked with doing. The market's institutional form makes the decision to purchase a take-it-or-leave-it decision at the moment of purchase rather than a range of options. However natural this seems because U.S. markets customarily take this form, this institutional limitation on consumer choice and voice is not a requirement for functioning markets.

Consumers do not merely buy the end product; they also have indirect ownership over the process that created the product. If all I do is buy a pair of shoes produced through exploitation of workers or destruction of the environment, I am participating in the harm. But imagine if what was for sale was not merely the shoes, but a mechanism to offset the harm associated with my consumption. The take-it-or-leave-it institutional structure would be replaced by: (a) take it, (b) leave it, or (c) take and offset it. There are many practices that might be connected to particular products—unpaid employee overtime, sweatshops in developing countries with poor working conditions, and unregulated industrial pollution to name a few. With the additional institutional capability of an offset option, consumers can decide for themselves if they want to do something to correct for production practices they disapprove of or do not want associated with their purchase. Supplemental payments are not a perfect solution for any of these practices, but they are a step in the right direction compared to the norm of ignoring production processes when making purchasing decisions.

38. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

II. RESPONSIBLE CONSUMPTION AND OFFSETTING

The central characteristic of consumption offsetting is the making of a supplemental payment, above the market price of a good, to offset the harm associated with the production and consumption of that good. With “institutional offsetting,” the supplemental payment consists of a separate transaction, often paid to an independent organization. “Quasi offsetting,” in contrast, describes the situation where the supplemental payment is integrated in some way into the good itself and reflected in the final price. There are far more examples of quasi offsetting, but precisely because the price includes the supplement, it is harder to isolate the offsetting element. Institutional offsetting, in contrast, makes the supplemental payment amount readily apparent, but because this type is in a nascent stage, these offsetting options are fractionated and the related institutions of this more pure or true form of offsetting are not fully developed.

The partial nature of quasi offsetting draws attention to a gap between budding consumer interest in correcting for consumption harms and the level of institutional support to facilitate action by consumers with this desire. With institutional offsetting, consumer offsetting does not depend on the voluntary actions of producers—offsetting payments can be made to third-party providers without the producer even knowing about such a payment. In contrast, while quasi offsetting ideally involves a mutual decision by consumers and producers, more likely the level of corporate social responsibility or reduction in externalities reflects policies determined primarily by producers. Producers are selling a packaged good made up of social responsibility and their product.³⁹ Quasi offsetting, by expanding the options from the single buy / don’t buy decision to include a third option of buying this packaged good, starts to offer consumers a limited space not merely for exit and loyalty but for voice. Institutional offsetting liberates and amplifies such voice by allowing consumers to make payments independent of the packaging choices of producers.

In this Part, I argue for thickening the institutions and practices associated with consumption offsetting. Part II.A explores quasi offsetting, using a range of examples. From cases where it is unclear that a supplemental payment is being made to practices where companies more explicitly identify their products with supplemental payments, quasi offsetting examples abound. The purpose of discussing quasi offsetting is not to equate such haphazard practices with institutional offsetting but to

39. For product and social responsibility examples, see *infra* Part II.A.

provide a broader perspective on the preferences of consumers and the related potential for improving on offsetting institutions. Shifting gears to the heart of this article, Part II.B covers the origins and institutions of environmental offsetting. Attention to global warming and the increasing importance of economic approaches to the environment have pushed carbon dioxide (CO₂) emissions offsetting to the forefront of institutional offsetting. The prescriptive core of the Article, drawing upon the rise and lessons of environmental offsetting, is developed in Part II.C. I argue for extending the practice and institution of environmental offsetting to other social harms, particularly consumption-related poverty. The foundational idea behind both environmental and poverty offsetting is the recognition that through offset payments individuals can correct for or reduce the negative externalities often associated with production and consumption.

A. *Quasi Offsetting*

Quasi offsetting can be thought of as a particular form of socially responsible consumption. The two are not equivalent, however, because offsetting necessarily involves supplemental expenditure while socially responsible consumption may not. Critical to offsetting is a choice to pay more, not because of the nature of the product itself, but out of a desire to correct for consumption. There is, of course, room for substantial overlap: a company whose products appeal to buyers who self-identify as socially responsible may also market an offset tied to their products. With socially responsible consumption becoming increasingly the expectation in some circles, the range of products marketed as socially responsible, and often with an integrated offset, is exploding.

Observing the supplemental payment with quasi offsetting requires comparing the price of the good with the price of substitute goods that do not have the particular built-in offset. Where the two products being compared are the same but one costs more because of the offset, identifying the supplemental amount associated with the offset is easy.⁴⁰

40. Compare the price, for example, of regular, extra large eggs with the price of cage free, extra large eggs. Consumers are willing to pay up to twice as much to buy eggs not associated with caged chickens. See Dan Eggen, *Egg Industry Alarmed About Efforts to Limit Cage Sizes*, WASH. POST, Sept. 6, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/03/AR2010090302455.html>. Similarly, the supplemental amount is easily identified in the practice of some utility companies to offer “premium-priced, green-energy” programs, giving customers the choice of paying one amount for normally produced (dirty) energy and a higher amount for clean energy. Matthew J. Kotchen & Michael R. Moore, *Conservation: From Voluntary Restraint to a Voluntary Price Premium*, 40 ENVTL. & RESOURCE ECON. 195, 196 (2008). As another article observed of such programs, “customers are faced with the option of paying a price premium for green electricity or a

When the goods being compared are imperfect substitutes, it is impossible to say with certainty how much of the purchase price can be attributed to consumers' desires to offset versus that attributable to qualitative differences in the goods. Though an exact calculation of the supplemental payment amount in particular products is not necessarily possible, the key insight for our purposes is the recognition that quasi offsetting is a common aspect of consumption behavior.

Offsetting integrated into particular products is likely to be partial offsetting at best. Quasi offsetting options may be preferable to the standard consumption practice of indifference to consumption externalities, but many of these options merely *reduce* the level of associated harm. Such reductions are a net positive if the baseline includes standard consumption practices but still are harmful if the baseline is pre-consumption. When offsetting levels and degree of social responsibility is determined by the producer, consumer interest in reducing consumption harm may not align with the profit interest of producers. Consumers who hope for a one-to-one level of offsetting are unlikely to have this desire satisfied by producers. The incentives for producers are all wrong: producers do not want to call attention to the harms of buying their products. Even if harm associated with a particular form of consumption is generally acknowledged, the profit-motive will drive producers to claim to have corrected for, or sufficiently reduced, the associated harm. Companies that internalize all production externalities or, alternatively, pay to fully offset such harms will have to charge more for their products. As the case studies of quasi offsetting in this Part—(1) social awareness and cause marketing, (2) hybrid vehicles, and (3) fair trade and production certifications—show, quasi offsetting generally does not fully correct for production and consumption harms.

The case studies that follow explore the edges of offsetting. As such, the three case studies of quasi offsetting invite debate about whether they are examples of offsetting or merely examples of differentiated products or practices. My purpose in exploring these cases is not to reach definitive conclusions for these categories but to highlight underappreciated and under-theorized practices that collectively root offsetting in larger market phenomena. Moving from the edge of offsetting to the institutionalization of offsetting requires replacing the ad hoc forms of quasi offsetting evident

guilt premium for dirty electricity.” Joshua S. Gans & Vivienne Groves, *Carbon Offset Provision with Guilt-Ridden Consumers* 4 (Aug. 12, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=969494>.

in these case studies with expanded options that more closely parallel those being offered in the field of environmental consumption.

1. Corporate Responsibility and Cause Marketing

Nowadays you often are not just consuming, you are buying into causes at the same time. You buy a bucket of chicken from KFC and you are supporting Susan G. Komen for the Cure, a breast cancer charity.⁴¹ By drinking Pepsi while at KFC, you support everything from the clean up of the Deepwater Horizon disaster in the Gulf of Mexico to City Year, a national service organization.⁴² If you pay for your meal with a new Starbucks credit card, Starbucks will make a \$5 donation to Jumpstart, a children's tutoring program.⁴³ If instead you pay with a new Nature Conservancy credit card, Bank of America will plant ten trees.⁴⁴ And the opposite is true as well. With certain purchases you become, rightly or wrongly, branded by association as being anti-gay rights (eating Domino's Pizza), anti-environment (driving an SUV), opposed to a living wage (shopping at Wal-Mart), and so on.⁴⁵

Companies have discovered that their bottom line depends in part on convincing customers that they are good corporate citizens or that consumers can support a larger cause by buying their products.⁴⁶ American

41. See *KFC Presents to Susan G. Komen for the Cure® a Check for more than \$4.2 Million: Single Largest Donation in Organization's History*, SUSAN G. KOMEN FOR THE CURE, <http://ww5.komen.org/KomenNewsArticle.aspx?id=6442452377&terms=kfc> (last visited Aug. 26, 2011); see also Joe Waters, *Komen's Cause Marketing Program Isn't 'Finger-Lickin' Good'*, SELFISH GIVING (Apr. 20, 2010), <http://selfishgiving.com/causerants/komens-cause-marketing-program-isnt-fingerlickin-good>.

42. See *Funded Ideas*, PEPSI REFRESH PROJECT, <http://www.refresheverything.com/grant-recipients> (last visited Aug. 26, 2011).

43. See *Starbucks: A New Twist on Affinity Credit Cards*, CAUSE MARKETING FORUM, <http://ww2.causemarketingforum.com/page.asp?ID=205> (last visited Aug. 26, 2011).

44. See *Working with Companies*, THE NATURE CONSERVANCY, <http://www.nature.org/joinanddonate/corporatepartnerships/tccard> (last visited Aug. 26, 2011).

45. For more examples of products combining philanthropy and consumption, see Patricia M. Nickel & Angela M. Eikenberry, *A Critique of the Discourse of Marketized Philanthropy*, 52 AM. BEHAVIORAL SCIENTIST 974, 978-79 (2009).

46. Interestingly, companies may also need to convince investors: corporate social responsibility may positively impact analysts' investment recommendations for publicly traded companies. See Ioannis Ioannou & George Serafeim, *The Impact of Corporate Social Responsibility on Investment Recommendations* (Harvard Bus. Sch., Working Paper No. 11-017, 2010), available at <http://www.hbs.edu/research/pdf/11-017.pdf>. Investors can choose to invest in "good" companies or, in the expectation that a company is vulnerable to protests or boycotts based on "bad" behavior, they can short companies that do not take their corporate social responsibilities seriously. See Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2153 (2005) [hereinafter Kysar, *Sustainable Development and Private Global Governance*] (discussing a hedge fund that selects companies to short based on their environmental and social practices).

consumers, or at least certain segments of the consuming public, prefer to buy goods from companies they believe are good actors, based on environmental records, labor practices, or other metrics.⁴⁷ As a result, companies zealously create and guard their brand's image against bad publicity. They also try to associate the brand and particular products with charities or the common good. By partnering with charitable organizations, especially those with broad appeal, companies hope consumers will mentally link the company with the charity, carrying over the goodwill they have for the charity to how they feel about the company.⁴⁸

It is important to distinguish these two corporate practices. Corporate responsibility for internal practices involves, among other things, a company doing its best to minimize externalities and serve the larger community. Cause marketing, in contrast, involves companies partnering with external charities, which while it can be one aspect of corporate responsibility, is different in kind. Though at times companies deliberately blur the line between corporate responsibility and cause marketing—Newman's Own, for example, donates all of its profits to charity⁴⁹—the two are not offsetting equivalents.

The added expense of corporate responsibility can perhaps best be seen in examples of companies falling short of public expectations. In response to media reports of worker abuse at factories overseas, Nike established internal and external auditing procedures for its supply chain.⁵⁰ Although critics charge Nike with making largely symbolic or cosmetic changes, that Nike felt compelled to respond attests to the importance of consumer perception of corporate social responsibility.⁵¹ Consumers may be wrong

47. See, e.g., Robert B. White, Note, *Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions*, 85 IND. L.J. 325, 325 (2010) ("Surveys . . . have consistently found that most consumers are more likely to choose products that claim to be environmentally friendly over products that do not make such a claim.").

48. Cf. Terri Lynn, *The Taxation of Cause-Related Marketing*, 85 CHI.-KENT L. REV. 883, 886, 888 (2010). This mental linking has been called the "halo effect" to describe how individuals use limited information about corporate social responsibility at a particular company to attribute positive assumptions about the company, even for uncorrelated behavioral categories. See N. Craig Smith, Daniel Read & Sofía López-Rodríguez, *Consumer Perceptions of Corporate Social Responsibility: The CSR Halo Effect* (INSEAD, Working Paper No. 2010/16/ISIC, 2010).

49. See *\$300 Million for the Common Good*, NEWMAN'S OWN, <http://www.newmansown.com/commongood.aspx> (last visited Aug. 26, 2011).

50. See *Workers & Factories: Improving Conditions in Our Contract Factories.*, NIKEBIZ, http://www.nikebiz.com/responsibility/workers_and_factories.html (last visited Aug. 26, 2011). Other companies have established "praiseworthy" audit and enforcement processes. Jessica Karbowski, Note, *Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility*, 49 VA. J. INT'L L. 727, 741 (2009) (citing Levi-Strauss).

51. See Jim Keady, *When Will Nike "Just Do It" On the Sweatshop Issue?*, THE HUFFINGTON

about which companies are more socially responsible; nevertheless, public expectations of corporate behavior can impose added expense.⁵² As a result, companies that take corporate responsibility seriously may have to charge a higher price for their products than that charged by competitors.

Companies such as Ben & Jerry's exemplify the heightened level of corporate social responsibility that arguably rises to the level of quasi offsetting. Ben & Jerry's mission statement commits the company to "improve the quality of life locally, nationally and internationally," to use "business practices that respect the Earth and the Environment," and to expand "opportunities for development and career growth" for company employees.⁵³ In line with the mission statement, among other things, Ben & Jerry's pays its employees a living wage⁵⁴ and uses special non-global-warming refrigerators.⁵⁵ The company came up with its Rain Forest Crunch flavor of ice cream as a way to funnel money to indigenous people harvesting Brazil nuts and also prevent deforestation. The marketing director of Cultural Survival—an indigenous rights group that helped Ben & Jerry's with the idea—explained to National Public Radio, "What we want to do is let Americans do what they do best—consume. We want to show them a way that's actually going to help somebody and that is not going to be totally self-centered as it has been in the past."⁵⁶ Not

POST (Oct. 2, 2009, 8:58PM), http://www.huffingtonpost.com/jim-keady/when-will-nike-just-do-it_b_308448.html. Even an op-ed critiquing the idea of corporate social responsibility acknowledges the importance of consumer expectations: "The only sure way to influence corporate decision making is to impose an unacceptable cost—regulatory mandates, taxes, punitive fines, *public embarrassment*—on socially unacceptable behavior." Aneel Karnani, *The Case Against Corporate Social Responsibility*, WALL ST. J., Aug. 23, 2010 (emphasis added), available at <http://online.wsj.com/article/SB10001424052748703338004575230112664504890.html>.

52. Such expectations, besides adding expense, also suggest that people think that companies should do more than just increase shareholder value. MAX ANDERSON & PETER ESCHER, *THE MBA OATH: SETTING A HIGHER STANDARD FOR BUSINESS LEADERS* 75 (2010) (arguing, based on poll results, that "most people expect more of business than the law demands" and that the majority of people "want companies to go beyond their historical role of making a profit"). See also Henry Mintzberg, Robert Simons & Kunal Basu, *Beyond Selfishness*, 44 MIT SLOAN MGMT. REV. 67, 67–68 (2002) (arguing against a narrow focus on profits and in favor of corporate recognition of social responsibility); Aron Cramer, *WSJ Takes Aim at . . . Corporate Responsibility?*, HUFFINGTON POST (Aug. 23, 2010, 10:46 PM), http://www.huffingtonpost.com/aron-cramer/wsj-takes-aim-at-corporate_b_692003.html (same). But see MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

53. *Ben & Jerry's Mission*, BEN & JERRY'S, <http://www.benjerry.com/activism/mission-statement> (last visited Aug. 26, 2011).

54. See *Livable Wage*, BEN & JERRY'S, <http://www.benjerry.com/activism/peace-and-justice/livable-wage> (last visited Aug. 26, 2011) (noting that this is nearly twice the minimum wage).

55. See *Hydrocarbon◊The New Cool!*, BEN & JERRY'S, <http://www.benjerry.com/activism/environmental/hc-freezer> (last visited Aug. 26, 2011).

56. *Weekend Edition: Vanishing Homelands: "Rainforest Crunch"* (NPR radio broadcast July 26, 1992) (quoting Jason Clay of Cultural Survival).

surprisingly, Ben & Jerry's ice cream is not cheap, with customers in part supporting the company's expansive mission.

Similarly, SunChips is selling a combination of environmental corporate responsibility and "healthy" whole-grain chips.⁵⁷ Advertisements for SunChips proclaim: "Nurture Nature," "Who's Hungry for Change?" and "There Are Many Ways to Help the Planet. Harvest Cheddar Is One."⁵⁸ The smaller print explains that SunChips' bags are now made from plants and are fully compostable.⁵⁹ The company also insists that its investment in solar power and a related ad campaign are not examples of "greenwashing."⁶⁰ Again, consumers are purchasing both a product and the company's environmental policies.⁶¹

Does the purchase of goods from a company that goes beyond corporate social responsibility norms amount to an offset? Being responsible—to workers, the environment, etc.—often adds to production expenses and can be reflected in the good's price.⁶² The Knights Apparel Company, for example, has decided to open a factory in the Dominican Republic that pays a living wage, three times the country's minimum

57. The same can be said of many other companies; Patagonia, an outdoor clothing and equipment company, for example, has similarly "used its efforts to reduce its carbon footprint to distinguish itself from competitors." Andrea Giampetro-Meyer, *Captain Planet Takes on Hazard Transfer: Combining the Forces of Market, Legal and Ethical Decisionmaking to Reduce Toxic Exports*, 27 UCLA J. ENVTL. L. & POL'Y 71, 80 (2009).

58. SUNCHIPS, http://www.sunchips.com/healthier_planet.shtml (last visited Nov. 5, 2010).

59. For more on the SunChips' bags, see Kate Galbraith, *A Compostable Chips Bag Hits the Shelves*, NYTIMES.COM BLOG: GREEN (Mar. 16, 2010, 10:45 AM), <http://green.blogs.nytimes.com/2010/03/16/a-compostable-chips-bag-hits-the-shelves>; *Our Compostable Bag is Still Here*, SUNCHIPS, http://www.sunchips.com/healthier_planet.shtml?s=content_compostable_packaging (last visited Aug. 26, 2011).

60. Stuart Elliot, *Trumpeting a Move to Put the Sun in SunChips*, N.Y. TIMES, Mar. 27, 2008, available at <http://www.nytimes.com/2008/03/27/business/media/27adco.html>.

61. The challenge involved for companies can be seen in the flip-flopping of Frito-Lay. In October 2010, Frito-Lay announced it was discontinuing its use of biodegradable bags for the SunChips line because of customer complaints that the bags were too loud compared with standard bags. See Kate Sheppard, *Why We're Doomed*, MOTHER JONES BLOG: BLUE MARBLE (Oct. 5, 2010, 10:00 AM), <http://motherjones.com/blue-marble/2010/10/snack-attack-sunchips-cans-eco-bag>. But the bag is back, as the company's website explains, "We're all about making delicious snacks that are better for you and the environment . . . People raved about the chips, but thought the bag was a little noisy. Well, we heard you. We've created a new, quieter, fully compostable chip bag that's easy on the ears." *Our Compostable Bag Is Still Here*, SUNCHIPS, http://www.sunchips.com/healthier_planet.shtml?s=content_compostable_packaging (last visited Aug. 26, 2011).

62. A Heritage Foundation memo provocatively suggests that "corporations should voluntarily adopt disclosure standards similar to those used for nutrition labeling—prices for their products could be broken down to show consumers how much above world price they are paying to subsidize CSR [Corporate Social Responsibility] activities." James M. Roberts, "Socially Responsible" Corporations: *Whose Wealth Are They Spreading Around?*, HERITAGE FOUNDATION WEBMEMO, NO. 2720, at 3 (Dec. 4, 2009), http://s3.amazonaws.com/thf_media/2009/pdf/wm2720.pdf.

wage.⁶³ It remains to be seen, however, “whether students, alumni and sports fans will be willing to pay \$18 for the factory’s T-shirts—the same as premium brands like Nike and Adidas—to sustain the plant and its generous wages.”⁶⁴ United Students Against Sweatshops, a student activist group that deserves much of the credit for focusing attention on collegiate apparel, hopes that “educational institutions can become critical mass ‘no-sweat’ consumers.”⁶⁵ Similarly, if consumers are not willing to pay the extra amount for a SunChips brand chip, they end up polluting the earth with a non-compostable bag. They could offset this externality of consumption by making a supplemental payment to an environmental organization, or they could simply avoid the harm in the first place by paying more for a SunChips brand chip.⁶⁶ What if the company changes its practices to become more environmentally friendly and ends up *saving* production costs?⁶⁷ Environmentally-conscious consumers could pick the more responsible company and pay less than they would if they bought from a competitor. There would be no supplemental offset payment but they would have avoided consumption-related harm.

The case for cause marketing as quasi offsetting is stronger than that for corporate responsibility. American Express, with a campaign linking credit card usage and new card applications with donations towards the bicentennial restoration of the Statue of Liberty, is credited with inventing the term “cause-related marketing” and demonstrating its business value.⁶⁸ Since then, companies have increasingly linked consumption of their good

63. Steven Greenhouse, *Factory Defies Sweatshop Label, but Can It Thrive?*, N.Y. TIMES, July 17, 2010, available at <http://www.nytimes.com/2010/07/18/business/global/18shirt.html>.

64. *Id.*

65. Michele Micheletti & Dietlind Stolle, *Mobilizing Consumers to Take Responsibility for Global Social Justice*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 167 (2007).

66. In some contexts, economies of scale in delivering a social good may make it more efficient to pay more directly to a firm practicing corporate social responsibility than to make a side payment to a charity. See Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2063 (2007).

67. See DANIEL C. ESTY & ANDREW S. WINSTON, GREEN TO GOLD: HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE, AND BUILD COMPETITIVE ADVANTAGE 10–12 (2006) (giving reasons companies could save money); Roberts, *supra* note 3, at 9 (noting that the corporate social responsibility programs of firms generally involve “seeking a win-win situation,” such as “increas[ing] efficiency and firm profits . . . by reducing costs and waste”); Sindya N. Bhanoo, *Products That Are Earth-and-Profit Friendly*, N.Y. TIMES, June 11, 2010, available at <http://www.nytimes.com/2010/06/12/business/energy-environment/12sustain.html> (providing examples of corporations embracing green efficiency).

68. CONE LLC, PAST. PRESENT. FUTURE. THE 25TH ANNIVERSARY OF CAUSE MARKETING 2 (2008), available at <http://www.coneinc.com/news/request.php?id=1187>. American Express enjoyed a 28% increase in card usage the year of the campaign compared to the preceding year. Lynn, *supra* note 48, at 935.

or service with charities or other worthy causes in the hopes that such connections will lead consumers to choose their brand.⁶⁹ Whether the company promises to make a charitable payment automatically or in return for customers demonstrating brand loyalty,⁷⁰ cause marketing makes doing good easy.⁷¹ All people have to do is shop!

A recent print ad campaign that appeared in major magazines featured an attractive woman walking through a park, her arms laden down with Target shopping bags. But the ad was not about the products in the bags, it was about Target's support of education, social services, and the arts.⁷² The ad proclaimed in bold print that, because Target gives away 5 percent of the company's income, the shopper was a "Do Gooder!"⁷³ The cause ironically is Target itself, with customers asked to trust that the company's charitable giving choices reflect their own. The message: it is *good* to shop at Target.

The (RED) campaign, spearheaded by Bobby Shriver and Bono, channels money from purchases of products with the (RED) logo to The Global Fund to Fight AIDS, Tuberculosis and Malaria.⁷⁴ (RED) produces nothing, but pairs with a whole range of companies, including Nike, GAP, Apple, and Starbucks, to sell special products that have "(RED)" printed on them. In return for essentially licensing the logo, the partner company agrees to send 50 percent of the profit on the good sold to the Global Fund. See Figure 1 below:

69. See Michael Jay Polonsky & Greg Wood, *Can the Overcommercialization of Cause-Related Marketing Harm Society?*, 21 J. MACROMARKETING 8, 11–12 (2001) (giving an overview of cause marketing with product/charity examples); Michal Strahilevitz, *The Effects of Product Type and Donation Magnitude on Willingness to Pay More for a Charity-Linked Brand*, 8 J. CONSUMER PSYCHOL. 215, 216 (1999) (detailing the impacts of the increase in cause-related marketing).

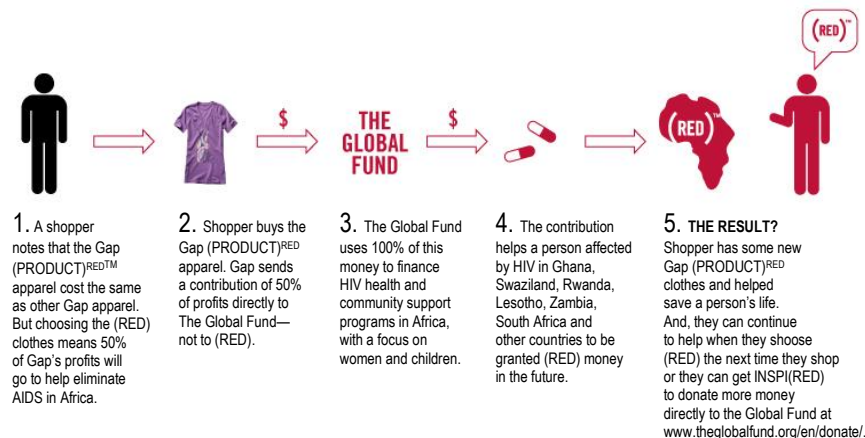
70. Susan G. Komen for the Cure, for example, receives 10 cents from every Yoplait yogurt lid mailed in by consumers as part of the company's "Yoplait Save Lids to Save Lives" campaign. David Hessekiel, *The Most Influential Cause Marketing Campaigns*, ADVERTISING AGE, Feb. 10, 2010, available at <http://adage.com/article/goodworks/influential-marketing-campaigns/142037>. See also *Save Lids to Save Lives*, YOPLAIT, <http://www.yoplait.com/sls1> (last visited Aug. 26, 2011).

71. Some charities support these programs because they "make it easier for people to donate because the transaction occurs as they go about their everyday business." Stephanie Strom, *Charity's Share from Shopping Raises Concern*, N.Y. TIMES, Dec. 13, 2007 [hereinafter Strom, *Charity's Share*], available at <http://www.nytimes.com/2007/12/13/us/13giving.html?ref=philanthropy>. But see Angela M. Eikenberry, *The Hidden Costs of Cause Marketing*, STAN. SOC. INNOVATION REV., Summer 2009, at 51, 53 (arguing that consumption philanthropy "is too easy" and "does not allow people to exercise their moral core").

72. See TARGET COMMUNITY OUTREACH WEBPAGE, <http://sites.target.com/site/en/corporate/page.jsp?contentId=PRD03-001811> (last visited Aug. 26, 2011).

73. See *id.*

74. See *The (RED) Idea*, (RED) CAMPAIGN, <http://www.joinred.com/aboutred> (last visited Aug. 26, 2011). For more on the Global Fund, see THE GLOBAL FUND, <http://www.theglobalfund.org/en/> (last visited Aug. 26, 2011).

FIGURE 1: (RED) CAUSE MARKETING⁷⁵

In four years, the (RED) campaign has raised \$170 million dollars for The Global Fund,⁷⁶ largely on the strength of (RED) tagged product sales many times that amount.⁷⁷ In the three years preceding the (RED) campaign, total private donations to The Global Fund had only been \$5 million.⁷⁸ The (RED) campaign is not without its detractors. For example, buylesscrap.org proclaims:

SHOPPING IS NOT A SOLUTION

Buy (Less). Give More.

Join us in rejecting the ti(red) notion that shopping is a reasonable response to human suffering.

75. Image taken from *How (RED) Works*, (RED) CAMPAIGN, http://www.joinred.com/aboutred/about_red (click on How (Red) Works) (last visited Aug. 26, 2011). Despite the attractiveness of this simplified model, in a great article, Sarah Dadush notes that the (RED) campaign was not being transparent about its finances or about the existence of another entity—an LLC tasked with brand development—that also was paid by partner companies. Sarah Dadush, *Profiting in (RED): The Need for Enhanced Transparency in Cause-Related Marketing*, 42 N.Y.U. J. INT'L L. & POL. 1269, 1271–74 (2010). See also Andrew F. Cooper, *Beyond Hollywood and the Boardroom: Celebrity Diplomacy*, 8 GEO. J. INT'L AFF. 125, 130 (2007) (noting controversies involving (RED)'s transparency).

76. (RED) CAMPAIGN, <http://www.joinred.com/red/#> (click on The Latest (RED) Results) (last visited Aug. 26, 2011).

77. *But see* Dadush, *supra* note 75, at 1295 (noting \$42 million of the total was raised in a single night at an art auction, not through product sales).

78. *Id.* at 1271.

We invite you to donate directly to the (RED) campaign's beneficiary *The Global Fund* and to these other charitable causes . . . without consuming.⁷⁹

The differing perspectives on the (RED) campaign attest to the challenge of categorizing and conceptualizing cause marketing.

According to the (RED) campaign, and a view implicitly shared by all companies with a cause marketing connection to charities, cause marketing allows consumers to support worthy causes without cost. The rosy view of cause marketing asserts that the purchase price is market-determined and that through cause marketing the consumer converts some of that amount into a charitable donation.⁸⁰ A realist perspective recognizes that companies are going to make up for the cause marketing's added expense—of donating 50 percent of the profits in the case of the (RED) campaign or 5 percent of income in the case of Target—in one way or another.⁸¹ If the cause marketing tie-in is successful enough, added sales might enable the company to make more money supporting the cause than not, even without raising product prices. But equally likely, the contribution to the cause is supported by higher prices (either for that particular product or for another of the company's products). Companies, in effect, are facilitating a charitable payment made by the consumer *or* if not by the consumer, then by shareholders.⁸²

79. BUY (LESS), <http://www.buylesscrap.org> (last visited Aug. 26, 2011) (ellipsis in original). Another similar website, www.whatididnotbuy.org, invites people to donate the amount they would have spent on consumption directly to a global non-profit's poverty empowerment programs. See WHAT I DID NOT BUY, <http://whatididnotbuy.org> (last visited Aug. 26, 2011). See also Stephanie Strom, *Site Diverts Shopping Money to Charities*, N.Y. TIMES, Dec. 12, 2009, available at <http://www.nytimes.com/2009/12/13/technology/internet/13charity.html>.

80. (RED)'s promise to consumers is that they do not have to pay more to give money to a worthy charity:

In fact, we have a “free” opportunity to save lives and change the world—we would buy shirts or shoes anyway, why not help at the same time? Coupled with the fact that (RED) appeals to our sense of morality and our wish to feel good about ourselves and our choices, it also appeals to a desire to make a difference without having to spend extra time or money. Perhaps anticipating complaints that we do not have the money to give more to charity or that we do not have time to save the world, (RED) assures us that it does not cost anything to save lives.

Norma Anderson, *Shoppers of the World Unite: (RED)'s Messaging and Morality in the Fight against African AIDS*, 2 J. PAN AFR. STUD. 32, 41 (2008).

81. Notably, in 2007, an advertising trade publication, *Ad Age*, “blasted” (RED), and indirectly (RED) partners who provided the advertising, “for having spent \$100 million on advertising and raising less than a fifth of that amount, \$18 million, for the Global Fund.” Dadush, *supra* note 75, at 1279–80.

82. The (RED) campaign asserts that by purchasing (RED) products, consumers are *not* making a charitable donation, simply facilitating one, but such “distinctions may not be conceptually or emotionally obvious to the average consumer.” Dadush, *supra* note 75, at 1291. The issue of who is

Is cause marketing an example of quasi offsetting? While a definite answer is impossible given the variety of practices that fall under the category's ambit, cause marketing can be thought of as involving a split purchase by consumers: one amount paid for the product or service, another (usually much smaller) amount paid to the associated charity. This would seem to satisfy the supplemental payment aspect of offsetting. Additionally, although not necessarily the case, there is often a connection between the product being sold and the associated charity, which adds to the idea that cause marketing is a form of offsetting.

But if it is offsetting, cause marketing seems somehow "unclean" and perhaps incomplete. Companies are using cause marketing to make a profit off of consumer sentiment towards particular charities.⁸³ Although some scholars have argued that corporate motives do not matter, only the resulting social benefits do,⁸⁴ such an argument does not seem to reflect consumer unease. Moreover, companies, rather than customers, determine the charities to be paid and define the terms of payments to offset consumption by customers, rather than the amount of the payment and the recipient of the payment being based upon consumers' understandings of how much they should pay, and towards what cause, to offset their consumption. Customers may also purchase goods without intending to offset their consumption; they may simply be consuming the product because they like it. Ben & Jerry's may be their favorite ice cream, Target their favorite store, and they may like having the (RED) logo on their GAP shirts without caring about whether The Global Fund gets money from their purchase. This is not to deny that cause marketing can bring charities needed funding or that it can make some consumers give more, albeit indirectly, to charity than they would have otherwise. But characterizing cause marketing, much less corporate responsibility, as quasi offsetting is problematic.

paying for the donation made through embedded giving forces the question, "Are these 'donations' add-ons to the price of the product—or a voluntary 'charitable tax'?" Paul Riede, *Embedded Giving: Manufacturers Promise Charitable Donations; Do They Always Deliver?*, SYRACUSE.COM: OPINION BLOG (Dec. 23, 2007, 5:02 AM), http://blog.syracuse.com/opinion/2007/12/embedded_giving_manufacturers.html.

83. Lisa Fairfax explained, "[T]here is always the cynical charge that corporate social responsibility is little more than a public relations ploy to curry favor." Lisa Fairfax, *American Express and Corporate Social Responsibility*, CONCURRING OPINIONS (Mar. 9, 2010, 6:56AM), <http://www.concurringopinions.com/archives/2010/03/american-express-and-corporate-social-responsibility.html>.

84. See, e.g., Malani & Posner, *supra* note 66, at 2064.

2. Hybrid Vehicles

Given the role hybrid vehicles play in popular understandings of offsetting, it is worth exploring this single product type. Although the Toyota Prius has become the symbol of hybrid vehicles and demonstrated consumer willingness-to-pay for hybrid technology, most car companies now sell hybrids and there are even hybrid SUVs.⁸⁵ By combining an electric motor with a standard gas motor, hybrids offer superior gas mileage to equivalent conventional gas engines. The rise of hybrids parallels a rising awareness of the problem of global warming and greenhouse gases. Hollywood celebrities were early adopters—as the celebrities arriving at events substituted the Prius for limousines—but the hybrid has become a vehicle of choice for the socially conscious upper middle class.⁸⁶

When consumers buy a hybrid, they pay more up front than they would for a “normal” vehicle, even given government subsidies tied to fuel efficiency. With high enough gas prices, hybrids could save consumers money in the long run because of their improved fuel efficiency, but generally buyers pay more over the life of the car.⁸⁷ Consumers pay for the gas-electric engine, the hybrid logo that, for some, says “responsible consumer,” and what *Motor Trend* magazine calls “the warm fuzzies.”⁸⁸ Hybrid owners may experience the warm fuzzies even if the vehicle they purchased has little to no fuel efficiency or environmental impact improvements over other vehicle options. The Prius has an impressive estimated 51 city/48 highway mpg engine,⁸⁹ but the hybrid category also

85. The eerily, “suspiciously,” similar silhouette of the 2010 Honda Insight to the Toyota Prius attests to the market leading position of the Toyota. Edward Loh, *Your Mileage May Vary: Honda’s All-New Hybrid is Great, Green Fun. Just Don’t Call it a Prius*, MOTOR TREND MAG., Mar. 2009, available at http://automobiles.honda.com/images/2010/insight-hybrid/downloads/motor_trend.pdf. Despite the rise in alternatives, non-Prius hybrids may not give drivers “who want to signal their green credentials” the same amount of happiness because they do not announce their hybrid nature to the same degree as a Prius. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 192 (2008).

86. Tellingly, even while the automotive industry was suffering through the current economic downturn in summer 2009, Toyota’s Prius plants and Prius component suppliers were operating around the clock to keep up with global demand for Toyota’s third-best-selling car. Hiroko Tabuchi, *Industry Slumps, but Prius Inspires Waiting List*, N.Y. TIMES, June 12, 2009, available at http://www.nytimes.com/2009/06/13/business/global/13prius.html?_r=2.

87. See Rhode & Ross, *supra* note 34, at 178–79 (“[S]ome [California hybrid] owners connected their choice to messages of frugality and intelligent consumerism, although none broke even financially [sic] because of the steep purchase price that offset any fuel savings.”).

88. Loh, *supra* note 85 (describing the “warm fuzzies” drivers feel when they see dash displays on battery usage as “what conspicuous hybrid motoring is all about”).

89. TOYOTA, <http://www.toyota.com/prius-hybrid/> (last visited Aug. 26, 2011).

includes the full-size GMC Yukon SUV, suburban two-wheel drive edition, with an estimated 21/22 mpg.⁹⁰ The Lexus LS sedan's gas mileage is 16/24 mpg while the Lexus LS Hybrid sedan's gas mileage is 20/22 mpg, actually worse on the highway than Lexus' conventional luxury car.⁹¹ What do consumers get for an extra \$40,000 and a hybrid engine? The hybrid logo and a lot more horsepower.⁹² For those truly concerned about their carbon footprint, buying a used car arguably can be more environmentally conscious than buying a new hybrid, even a Prius.⁹³ But a used car does not fit the costly, highly-visible, environmentalism offered by hybrids.⁹⁴

The argument that hybrid vehicles are an example of quasi offsetting requires that we imagine a *new* car buyer with two options. The person could buy a 2011 Toyota Corolla for approximately \$17,460 or a 2011 Toyota Prius for \$24,280.⁹⁵ Unless gas prices dramatically change, the added fuel economy of the Prius will not make up for its higher initial cost as far as overall cost of ownership. A buyer who wants to offset the carbon emissions of driving can pay a third-party offsetting institution based on the amount of fuel consumed. As there is still a need to offset the fuel

90. GMC, <http://www.gmc.com/yukonhybrid/index.jsp> (last visited Aug. 26, 2011).

91. *Compare* LEXUS, http://www.lexus.com/models/LSh/detailed_specifications.html (last visited Aug. 26, 2011) *with* LEXUS, http://www.lexus.com/models/LS/detailed_specifications.html (last visited Aug. 26, 2011).

92. *Compare* LEXUS, http://www.lexus.com/models/LSh/detailed_specifications.html (last visited Aug. 26, 2011) *with* LEXUS, http://www.lexus.com/models/LS/detailed_specifications.html (last visited Aug. 26, 2011).

93. An op-ed in TheAtlantic.com's *The Current* elaborates on this point:

Consider the eco-conscious automobile par excellence, the Toyota Prius. As it turns out, manufacturing the Prius's battery is extraordinarily carbon-intensive. Paying off this carbon debt through fuel savings will take 46,000 miles, according to *Wired*. Only after 100,000 miles would the Prius catch up with the carbon savings offered by a ten-year-old Toyota Tercel. And the Prius would never catch up with a 1994 Geo Metro XFi.

Reihan Salam, *Life on Planet Green*, THEATLANTIC.COM: THE CURRENT (June 9, 2008), <http://thecurrent.theatlantic.com/archives/2008/06/life-on-planet-green.php>. For more on the calculations behind the carbon debt, see Chuck Squatriglia, *Go Green—Buy a Used Car. It's Better Than a Hybrid*, WIRED MAG.: AUTOPIA (May 19, 2008, 5:00 PM), <http://www.wired.com/autopia/2008/05/the-ultimate-pr>.

94. See Ela, *supra* note 6, at 128 (listing installing solar panels, buying a hybrid, and riding a bicycle as high-visibility activities too costly—in time or money—for many people); cf. John C. Dermbach, *Harnessing Individual Behavior to Address Climate Change: Options for Congress*, 26 VA. ENVTL. L.J. 107, 127 (2008) (noting that “people with lesser means” may not be able to purchase more efficient vehicles).

95. These figures are based upon MSRP plus destination charge according to a Toyota.com model comparison of the base models of the 2010 Corolla and Prius. TOYOTA, http://www.toyota.com/compare/?modelCode=prius#h_overview (click “Add Competitor” hyperlink; then select “Make”, “Model”, “Year”, and “Trim” for Toyota Corolla from drop down bars) (last visited Aug. 26, 2011).

burned, hybrids are only relatively offsetting when it comes to the environmental harms of driving. If the buyer picks the Prius, less fuel will be consumed so the payment to the third-party offsetting institution can be that much less than it would be for the Corolla. The nature of the product itself provides consumers the opportunity to partially offset the harm of a normal vehicle by paying more for a vehicle with a built-in offset.⁹⁶

Separate discussion of hybrid vehicles is warranted because they have become the modern symbol of socially conscious consumption, not because they are intrinsically different from some of the products in a different category. Though a single product category, hybrids have assumed an important role in our collective consciousness and understanding of consumption. Positively, hybrids have opened up our eyes to the impact our choices have on the environment. Negatively, the single decision—buy hybrid or not—has displaced greater introspection or public debate about the responsibility people have for the externalities of consumption.⁹⁷

3. *Fair Trade and Production Certifications*

For people concerned that the goods they purchase might have been made by exploiting workers or using environmentally harmful practices, there is often little information available about each good's production history. Companies sometimes self-label products as "environmentally friendly" or "green," but absent regulatory standards, such labeling is only a marginal improvement on the information available to consumers.⁹⁸

96. From the limited perspective of correcting for carbon emissions, hybrids are not cost-effective considering how cheaply offsets can be purchased. See Note, *Uncommon Goods: On Environmental Virtues and Voluntary Carbon Offsets*, 123 HARV. L. REV. 2065, 2076 (2010) [hereinafter Note, *Uncommon Goods*].

97. See Andrew Green, *You Can't Pay Them Enough: Subsidies, Environmental Law, and Social Norms*, 30 HARV. ENVTL. L. REV. 407, 428–29 (2006) [hereinafter Green, *You Can't Pay Them Enough*] (noting that subsidies to purchase "green" cars may not lead consumers to make other pro-environment life changes).

98. The fecundity of such labels makes environmentally conscious consumption difficult, as a student comment explained: "Businesses sense the dissemination of 'green-mania' and correspondingly attempt to 'out-green their competition.' Unfortunately, the virtual inundation of 'environmentally friendly' products makes consumer confusion inevitable and environmental protection questionable." Kimberly C. Cavanagh, Comment, *It's A Lorax Kind Of Market! But Is It A Sneetches Kind Of Solution?: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. 133, 135 (1998). See also David F. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green"*, 81 CALIF. L. REV. 991, 993 (1993) ("The lack of clearly defined national standards has left consumers uncertain about what claims to believe. Less-than-honest manufacturers have the latitude to test the uncertain boundaries of existing regulations by making dubious claims.") (footnote omitted).

“Fair trade” and other forms of production certifications offer a degree of security and peace of mind for buyers. With some certifications, consumers can know, or at least reasonably believe, that the t-shirts they are buying were not manufactured in an abusive sweatshop or that the copy paper was not created using unsustainable forestry practices.⁹⁹ Although originally limited to specialty stores such as Ten Thousand Villages, fair trade certified products can now be found in a wide variety of commercial locations, including some stores whose focus on low prices would seem to preclude such goods.¹⁰⁰

Given the number and variety of fair trade and other, usually environmental, production certifications, consumers may not always be getting what they hope to when they see such labels.¹⁰¹ In coffee alone there are multiple forms of certifications from different certifying institutions. This can make it very hard for consumers to know what the particular certification really means or if the certification is given for production below the standards they desire.¹⁰² And what should consumers do when faced with the problem of competing social goods: given the choice, should they buy shade grown coffee (good for the environment) or fair trade coffee (good for coffee workers)? One way retailers attempt to get around these issues is by including descriptions or photographs of the workers or thriving environments so that buyers feel connected to the production process.¹⁰³ Such descriptions or photographs may also serve as supporting proof for the fair trade or production certification label.¹⁰⁴

99. In the clothing sector alone, the range of ethical labels—no-child labor, no-sweatshop, fair trade, fair price, no toxic substances, organic, et cetera—is dizzying. See Onno Kuik, *Fair Trade and Ethical Labeling in the Clothing, Textile, and Footwear Sector: The Case of Blue Jeans*, 11 ILSA J. INT'L & COMP. L. 619, 627 (2005) (collecting and explaining such labels).

100. See, e.g., Yan Q. Mui, *For Wal-Mart, Fair Trade May be More Than a Hill of Beans*, WASH. POST, June 12, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/11/AR2006061100813.html> (describing Wal-Mart's foray in to fair trade coffee).

101. See Michael P. Vandenbergh & Mark A. Cohen, *Climate Change Governance: Boundaries and Leakages* 46 (Res. for the Future, Discussion Paper No. 09-51, 2009), available at <http://www.rff.org/RFF/Documents/RFF-DP-09-51.pdf> (“[T]he profusion of labels has generated ‘label confusion’ and ‘label fatigue.’”); see also Kysar, *Sustainable Development and Private Global Governance*, *supra* note 46, at 2156–57 (listing the range of certifications that can be found).

102. See Karbowski, *supra* note 50, at 740–41.

103. In this respect, fair trade retailers operate in a manner similar to peer-to-peer lending organizations, most famously Kiva and Global Giving, which “provide enough information to make a personal connection between the donor and the recipient.” Raj M. Desai & Homi Kharas, *Democratizing Foreign Aid: Online Philanthropy and International Development Assistance*, 42 N.Y.U. J. INT'L L. & POL. 1111, 1117 (2010).

104. Through photography you are not buying a good made in El Salvador; you are buying something made by a particular family whose faces, perhaps even with a summary of their life, you see while shopping.

Even if there are no certification problems, perhaps consumers should not prefer fair trade or other certified products. A slight detour into economic theory can help explain why consumers may be wrong to insist upon such certification. American politicians, Democrats and Republicans alike, generally support trade liberalization and urge other countries to support free trade as well. They do so in part because of David Ricardo, a 19th century economist. According to Ricardo, countries (or firms or individuals) can have an absolute or a comparative advantage in trade for particular products.¹⁰⁵ Suppose there are only two products: t-shirts and umbrellas. Country *A* might be able to produce both t-shirts and umbrellas for less money than country *B*; that is, country *A* has an absolute advantage in both t-shirts and umbrellas. Does this mean that country *A* will produce everything and country *B* nothing? No. Ricardo showed that country *B* can still have a comparative advantage in whichever of these products it can produce at a lower opportunity cost than country *A*. If umbrellas and t-shirts can be made for the same amount of money in country *A*, but umbrellas sell for double, it makes sense for country *A* to specialize in umbrellas because there is a high opportunity cost of producing t-shirts. Country *B*, therefore, has a comparative advantage in t-shirts and can trade t-shirts to country *A* for umbrellas. Ricardo showed that, through trade, both countries end up benefiting even though one country has an absolute production advantage.¹⁰⁶

For personal reasons, I spend a lot of time in El Salvador.¹⁰⁷ A major export of El Salvador, besides people,¹⁰⁸ is clothing produced in *maquilas*. Upon seeing these factories, Americans tend to instinctively call them *sweatshops* and to mentally impose upon them all the negative connotations associated with that term.¹⁰⁹ Such factories seem on first

105. See DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (3d ed. 1821), available at <http://www.econlib.org/library/Ricardo/ricP.html>.

106. For another elaboration of Ricardo's idea of comparative advantage emphasizing the limitations of free trade, see Kysar, *Sustainable Development and Private Global Governance*, *supra* note 46, at 2136–37.

If the concept of comparative advantage still seems confusing, do not worry, you are not alone. Paul Krugman has written an entire essay trying to explain why intellectuals, “people who do value ideas, . . . somehow find this particular idea impossible to grasp.” Paul Krugman, *Ricardo's Difficult Idea: Why Intellectuals Don't Understand Comparative Advantage*, in THE ECONOMICS AND POLITICS OF INTERNATIONAL TRADE: FREEDOM AND TRADE VOLUME TWO 22 (Gary Cook ed. 1998), available at <http://web.mit.edu/krugman/www/ricardo.htm>.

107. See Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 1, 6 n.10 (2008) (explaining why).

108. *Id.* at 6–11.

109. See Micheletti & Stolle, *supra* note 65, at 161–65 (providing a history of the “sweatshop” metaphor and of anti-sweatshop activism).

encounter the antithesis of the sort of working conditions U.S. consumers hope are taken into account through fair trade certifications. Without defending the working conditions in El Salvador's *maquilas*, socially responsible consumers should probably ask not only about the conditions, but also about the alternatives available to workers.¹¹⁰ It can be impolitic to think about trade in this way; Lawrence Summers' suggestion that Africa be turned into a dumping ground for the developed world's trash is a good case in point.¹¹¹ Brazil's Secretary of the Environment's response to Summers captured the near universal rejection of the memo's argument: "Your reasoning is perfectly logical but totally insane. . ."¹¹² For our purposes, I am similarly rejecting the argument that, because of trade gains made possible by comparative advantage, American consumers should be indifferent to working and environmental conditions.¹¹³ Fair trade and other product certifications exist because some consumers' sense of social responsibility extends to the production process of the goods they buy, even when those goods are produced in foreign countries.

When consumers buy a product certified according to fair trade or environmentally responsible standards, they are paying for three things:

110. Consumers who fail to appreciate the context of production risk being "morally naïve" by insisting upon utopian values. Kysar, *Preferences for Processes*, *supra* note 7, at 597 (giving this explanation as part of a presentation of arguments made by developing countries against "process-based trade measures"). See also *id.* at 621 ("One frequent . . . concern holds that, by seeking to avoid the fruits of exploited labor, consumers may contribute to market dynamics that ultimately leave developing world workers with an even worse fate than they currently endure."); Kuik, *supra* note 99, at 635 (arguing that increased reliance on production certifications in the blue jean industry would shift production to industrialized countries and "leave many informal workers, many of them women and children, in the cold").

111. The suggestion was made in a memo signed by Summers when he was chief economist for the World Bank. Summers wrote, "I think the economic logic behind dumping a load of toxic waste in the lowest-wage country is impeccable and we should face up to that. . . . I've always thought that under-populated countries in Africa are vastly *under* polluted." Jay Johnson et al., *Potential Gains from Trade in Dirty Industries: Revisiting Lawrence Summers' Memo*, 27 CATO J. 397, 398 (2007) (quoting from the Summers memo).

112. Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1574 (2002) (quoting Jose Lutzenburger) (ellipsis in original). See also Noam Chomsky, *What We Know: On the Universals of Language and Rights*, BOSTON REV., Summer 2005, available at <http://bostonreview.net/BR30.3/chomsky.php> ("[There is] virtual unanimity of the moral judgment that the reasoning is insane, even if logical."); James A. Swaney, *So What's Wrong with Dumping on Africa?*, 28 J. ECON. ISSUES 367 (1994) (deconstructing Summers' memo).

113. Andrea Giampetro-Meyer argues that a better alternative to relying upon comparative advantage alone when deciding on allowable externalities in poor countries is to use a "fortif[ied]" version of the following test: "The practice is permissible if and only if the members of the home country would, under conditions of economic development similar to those of the host country, regard the practice as permissible." Giampetro-Meyer, *supra* note 57, at 85–86 (quoting Thomas Donaldson, *Moral Minimums for Multinationals*, in *ETHICS & INTERNATIONAL AFFAIRS: A READER* 455, 472 (Joel H. Rosenthal ed. 1999)).

the product, the certification expenses, and the added production expense associated with the good.¹¹⁴ The certification expenses—establishing the system, visiting factories, hiring independent inspectors, covering administrative overhead—can be thought of as the transaction costs required for meaningful fair trade or other certification labeling.¹¹⁵ The additional production expense, paid for by consumers through higher prices (or taxes if government sponsored), arguably serves as a form of quasi offsetting.¹¹⁶ Similar to the added expense of a hybrid vehicle, consumption of fair trade or other certified products involves consumers spending more money to avoid the externalities associated with the production of the goods they purchase. Paying less, they could have bought a substitute product or competitive good, but without the knowledge of the product's origins that certifications provide. Or, they could have bought the competitive good and then paid a third party—say a workers' rights organization—to offset poor working conditions associated with their purchase. By paying more for certified goods, consumers avoid the production harm(s) in a single transaction that they would otherwise correct for with an offset payment.

Quasi offsetting is not deliberate offsetting; making the existence of the category, the types of market practices that fit within the category, and the value added by such practices debatable.¹¹⁷ When you buy a product because it is connected to a particular company or cause, or it has a production certification, there is often an offsetting aspect to the product relative to alternative purchases you could have made. But the aspect that is arguably a form of offsetting also changes the nature of the product in ways that are not captured when you simply compare it to similar goods. When I eat Ben & Jerry's, it somehow tastes better than other premium ice cream; my belief that the company is socially responsible and gives to

114. Certification expenses include third party audits, necessary to protect against “unsubstantiated and sometimes false claims” regarding environmental or social impacts. Roberts, *supra* note 3, at 21–22.

115. *Cf.* Kuik, *supra* note 99, at 630 (identifying the certification industry as a winner in the rise of certification).

116. For a rich discussion of the costs of a government-backed human rights labeling of products program and such a certification scheme's relationship to global free trade, see Karbowski, *supra* note 50.

117. As Dadush observed in her recent article on the (RED) campaign, “[t]he question of where profit ends and philanthropy begins is of crucial importance because it cuts deeply into public trust in philanthropy. Where the line between profit and charity is difficult to discern, both consumer protection and philanthropy step onto shaky ground.” Dadush, *supra* note 75, at 1292. *But see* Malani & Posner, *supra* note 66 (arguing in favor of blurring the line); Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619 (2010) (discussing how the boundary between for-profit and nonprofit has already been blurred).

worthy causes makes me happier when I buy their overpriced ice cream pints. Although as a driver of a used Toyota I cannot say with certainty, I imagine that drivers of hybrids get a thrill or a sense of contentment when the Prius silently pulls out of a parking space.¹¹⁸ And even if a handmade fair trade rug looks exactly the same as a mass-manufactured rug for sale at IKEA, consumers experience ownership of the fair trade rug differently.¹¹⁹ Although the above are generalizations, integrating an offset into products has the effect on consumers of making them into different products.

Quasi offsetting is likely to be incomplete offsetting. Buying the fair trade coffee might protect against worker exploitation but does nothing to offset the carbon emissions required to bring the coffee to market. A hybrid diminishes, but does not eliminate, the harmful effects of driving. These observations are not meant as criticism of socially aware consumption, but instead reflect the limitations of quasi offsetting as currently offered to consumers by retailers and producers.¹²⁰ Quasi offsetting practices provide the experiential foundation—by familiarizing consumers with the idea of production externalities and acculturating them to the possibility of correcting for such harms—necessary for independent institutional offsetting.

B. Environmental Offsets

Offsetting is most fully institutionalized in the environmental context. Consumers can make supplemental payments to a wide range of third-party institutions to offset everything from airline travel to electricity usage. The many available options and the separation of purchase and offsetting decisions force consumers to take a more active role with institutional offsetting. Rather than simply buying something with a built-in offset, individuals must elect post-consumption to make a separate

118. The electric motor of the Prius is quiet relative to gas motors and the gas engine does not kick in until the vehicle is accelerating sufficiently. See Richard S. Chang, *Are Hybrids Too Quiet?*, N.Y. TIMES, Apr. 27, 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9F06E2D81339F934A15757C0A96E9C8B63> (discussing the danger this can pose to pedestrians).

119. See Kysar, *Preferences for Processes*, *supra* note 7, at 532 (“[C]onsumer products—even when physically indistinguishable—are not perfect substitutes to the extent that they are produced using different processes about which consumers have strong feelings.”).

120. Although it is theoretically possible for retailers or producers to offer consumers payment choices (pay one amount if consumers want the producer to pay a living wage to employees, another amount if consumers want the producer to limit pollution, and a third amount if consumers want both) or to offer a fully offset product, so far the choices have been take-it-or-leave-it limited certifications. Offering a range of prices and offset options may signal to consumers the presence of production harms in a way that most companies would rather avoid.

payment to a third-party offset institution. The advantage of institutional offsetting is that it permits consumers to fully offset purchases as defined by either their conscience or externally established parameters. This is also institutional offsetting's biggest weakness. Relying upon consumers to actively decide to offset their consumption and to determine the appropriate manner and level of payment risks the possibility that consumers will remain the passive consumers they generally are today. Making offsetting a standard part of the consumption routine involves strengthening both formal institutions and the norms that surround offsetting. People can and do change their behavior in response to institutional development, technological change, and evolving customs. For offsetting to become commonplace, consumer behavior and society's expectations must change to reflect the understanding that consumption is often associated with harmful externalities.

1. Factors Driving Environmental Offsetting

Driven by increasing awareness of global warming and the harmful effects of fossil fuel consumption, the leading edge of change is occurring in environment-related offsetting behavior. The environmental field perhaps was uniquely ready to embrace offsetting because of the insistence by environmental economists that environmental harms and goods were tradable. Additionally, while economists rely upon money as a simplifying proxy for welfare, environmental harm, in some ways, is more calculable than other social harms. Finally, besides having great mascots—polar bears—for the cause, there is a greater degree of self-interest present in righting global warming and environmental harm than is true for many other consumption offset categories.¹²¹ These factors have pushed environmental offsetting ahead of poverty and inequality offsetting in terms of institutional development and behavioral modification by consumers.

There is no longer *serious* scientific debate about the existence of climate change or about the human causes of potentially devastating global warming.¹²² Scientists are in near universal agreement about climate change, the causes, and even steps that can be taken to reduce

121. A note about human rights labels argues for taking a page from the environmental movement by using “images of child slaves or female sweatshop workers” to “stir similar sentiments in the American market” as was done with animal imagery. Karbowski, *supra* note 50, at 746.

122. See, e.g., Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 879 (2008) (“Climate change is a global problem, and there is little doubt about its seriousness and the challenges it poses for our society.”).

global warming.¹²³ That has not stopped naysayers from casting doubt on the underlying science in order to inspire political debate and protect business interests.¹²⁴ What uncertainty does exist regarding climate change similarly is exploited by politicians to obfuscate the voters.¹²⁵ The reports of the Intergovernmental Panel on Climate Change (IPCC) capture the scientific community's consensus on climate change.¹²⁶ According to the IPCC's Third Assessment Report, "most of the observed warming over the last 50 years is likely to have been due to the increase in greenhouse gas concentrations."¹²⁷ Without taking steps to reign in greenhouse gas emissions, temperatures will continue to rise, causing "grave and disastrous" impacts on human civilization.¹²⁸ The American public's awareness of the human causes and dangers of climate change has significantly improved since President George W. Bush made the United

123. Eric Posner and Cass Sunstein, for example, note that "a strong consensus supports the view that the world would benefit from significant steps to control greenhouse gas emissions," and continue by arguing that there is also "a consensus" that the solution involves either an emissions tax or a cap-and-trade system. Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1574 (2008).

124. As Paul Krugman argues, "If you want to understand opposition to climate action, follow the money." Paul Krugman, *Who Cooked the Planet?*, N.Y. TIMES, July 25, 2010, available at <http://www.nytimes.com/2010/07/26/opinion/26krugman.html>. Oil-company-funded efforts succeeded in raising climate change doubt for two decades, but despite these "distracting side shows," Sarah Krakoff argues, "we are largely over the narrative of scientific doubt, at least in most mainstream circles." Sarah Krakoff, *Parenting the Planet*, in THE ETHICS OF GLOBAL CLIMATE CHANGE 160 (Denis G. Arnold ed. forthcoming) (manuscript at 168–69), available at <http://ssrn.com/abstract=1548658>. See also Letter to the Editor, *Climate Change and the Integrity of Science*, SCI. MAG., May 7, 2010, at 689, available at <http://www.sciencemag.org/cgi/content/full/328/5979/689> (signed by all members of the U.S. National Academy of Sciences) ("Many recent assaults on climate science and, more disturbingly, on climate scientists by climate change deniers are typically driven by special interests or dogma, not by an honest effort to provide an alternative theory that credibly satisfies the evidence.").

125. See Libecap, *supra* note 33, at 406; Perry E. Wallace, *Climate Change, Fiduciary Duty, and Corporate Disclosure: Are Things Heating Up in the Boardroom?*, 26 VA. ENVTL. L.J. 293, 296 (2008).

126. See, e.g., David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 10 (2003) (noting that the IPCC Third Assessment Report "manifested" the "overwhelming scientific consensus").

127. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS 10 (2001) (part of the IPCC Third Assessment Report), available at http://www.grida.no/climate/ipcc_tar/wg1/pdf/WG1_TAR-FRONT.pdf. The IPCC's Fourth Assessment Report similarly notes, "Anthropogenic warming over the last three decades has likely had a discernible influence at the global scale on observed changes in many physical and biological systems." INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 41 (2007) (part of the IPCC Fourth Assessment Report) (italics in original, bold emphasis of the entire text removed), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

128. Rajendra K Pachauri, Chairman, IPC, Acceptance Speech for the Nobel Peace Prize Awarded to the Intergovernmental Panel on Climate Change (IPCC) (Dec. 10, 2007) at 8–9, available at <http://www.ipcc.ch/graphics/speeches/nobel-peace-prize-oslo-10-december-2007.pdf> (describing the effects of a 5°C rise in global temperatures relative to pre-industrial temperatures).

States an international environmental outlier by rejecting the Kyoto Protocol in 2001.¹²⁹ Acceptance of the science of global warming, combined with appreciation of the role of individual consumption, is an important factor in the growth of environmental offset options.

The responses to global warming currently on the political negotiating table are all based upon environmental economics' approaches.¹³⁰ Since poor environmental resource allocation and resulting destruction can be attributed largely to ubiquitous market failures, the irony of turning to market solutions should not be lost.¹³¹ Environmental economists advocate a market approach to environmental goods. For perhaps most environmental economists, the problem of environmental degradation, including that causing global warming, is inadequate ownership or property rights in the environment.¹³² They argue that the costs of allowing unregulated pollution are higher than the costs, per Demsetz's definition of externalities,¹³³ of internalizing pollution externalities. Prior to the rise of environmental economics, environmental governance was almost entirely in the form of command-and-control regulation.¹³⁴ Whether prohibiting

129. There is, of course, room for improvement; the American public, for example, "underestimates the degree of scientific consensus over global climate change." Rhode & Ross, *supra* note 34, at 163 (based on 2004 survey data). The "losing" candidate for President in 2000, Al Gore, deserves some of the credit for informing the public about climate change through his documentary *An Inconvenient Truth* (2006), but attention to the issue has also been generated by events such as Hurricane Katrina and the efforts of environmental non-profits. See Andrew Green, *Self Control, Individual Choice, and Climate Change*, 26 VA. ENVTL. L.J. 77, 80 (2008) [hereinafter Green, *Self Control*] (highlighting the connection between a "spike" in climate change interest and both *An Inconvenient Truth* and Katrina).

130. Victor B. Flatt, *Taking the Legislative Temperature: Which Federal Climate Change Legislative Proposal is "Best"?*, 102 NW. U. L. REV. COLLOQUY 123, 135 (2007); Carol M. Rose, *Hot Spots in the Legislative Climate Change Proposals*, 102 NW. U. L. REV. COLLOQUY 189, 189 (2008).

131. Blumm, for example, argues "Markets persistently fail to produce the ecological and health information necessary to allocate efficiently environmental resources. . . . [and therefore] markets cannot supplant government intervention to correct environmental market failure." Michael C. Blumm, *The Fallacies of Free Market Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 371, 388 (1992). See also Brown, *supra* note 30, at 397 ("Global climate change is often viewed as the result of the failure of the free market to apportion optimal allocations of resources in the society."). But Blumm goes on to support studies of "how markets can be used to *implement* environmental policy, not establish it." Blumm, *supra* note 131, at 389.

132. Economists who believe in market-driven environmental policies argue that "[o]nce property is privatized, the free market will operate efficiently to optimize the utility of the good." Brown, *supra* note 30, at 397. But it should be acknowledged that for the market to operate, political and collective decisions have to be made about how the market will function and how rights will be distributed. *Id.* at 403-04. See also Sinden, *supra* note 10, at 570-71 (highlighting the role of the government establishing the limits in pollution markets).

133. See *supra* note 11 and accompanying text.

134. "Command and control rules impose detailed, legally enforceable limits, conditions, and affirmative requirements on industrial operations, generally controlling sources that generate pollution

certain forms of pollution or prescribing a particular technology, command-and-control regulation allowed companies little flexibility to determine for themselves how to meet their environmental obligations and failed to reward pollution reduction.¹³⁵ More importantly, command-and-control regulation made it difficult for economies to reorient and change priorities among different firms or industries. Environmental economists showed, under their assumptions regarding the market, that by making pollution, specifically the right to pollute, something that could be owned, societies could reduce their total pollution at less cost than through command-and-control regulation.¹³⁶ Firms' environmental quality becomes subject to market pressure: firms with lower pollution per good would have a competitive advantage over "dirty" firms.¹³⁷ The same holds for entire industries; "dirty" industries have to compete with "clean" industries, but society can continue consuming "dirty" products if people were willing to pay enough for them.¹³⁸

Environmental economics offered something for everyone.¹³⁹ For conservatives, environmental economics offered an escape from command-and-control (read "communist"), state-driven regulation. Progressives—at that point still called liberals—and regulators were attracted to the idea that an upper limit could be placed on pollution: the limit being defined by the total amount of pollution rights that society

on an individual basis." Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 104 (1998).

135. See Richard L. Sandor et al., *An Overview of a Free-Market Approach to Climate Change and Conservation*, 360 PHIL. TRANS. R. SOC. LOND. A 1607, 1609 (2002).

136. As Kenneth Richards observes, "One consistent message from the environmental economics literature is that incentive-based instruments are a more cost-effective means to achieve environmental goals than alternative policy instruments such as technology-based standards." Kenneth R. Richards, *Framing Environmental Policy Instrument Choice*, 10 DUKE ENVTL. L. & POL'Y F. 221, 222 (2000).

137. Firms that hit pollution targets would not have to purchase the right to pollute and firms that further reduce pollution could sell the rights to pollute they are not using. See Joanna D. Malaczynski & Timothy P. Duane, *Reducing Greenhouse Gas Emissions from Vehicle Miles Traveled: Integrating the California Environmental Quality Act with the California Global Warming Solutions Act*, 36 ECOLOGY L.Q. 71, 89 (2009).

138. Payment would come through both higher prices, so that the dirty industry could purchase enough pollution rights to continue production, and foregone consumption of other products produced by firms unable to purchase the pollution rights necessary for their manufacturing process.

139. This point should not be oversold: liberals and now progressive scholars have written trenchant critiques of the problems of reducing environmental decision making to an economic framework and in applying economic tools to environmental protection. See, e.g., Blumm, *supra* note 131; Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1394 (1981); Sinden, *supra* note 10; see also Wallace E. Oates, *From Research to Policy: The Case of Environmental Economics*, 2000 U. ILL. L. REV. 135, 138–39 (2000) (explaining the initial resistance to environmental economics approaches by both environmentalists and polluters).

would permit to be owned.¹⁴⁰ It is worth quoting at length Amy Sinden's critical description of the dominant approach to environmental problems today:

Thus, as academics and policymakers clamor to distance themselves from the now dowdy and stilted fashions of 1970s-style "command-and-control regulation" and to embrace the virtues of the free market, privatization has replaced government intervention as the preferred solution to the tragedy of the commons. Right wing ideologues pump out books, articles, and monographs touting the virtues of "free-market environmentalism" and claiming that all environmental problems can eventually be solved by simply defining and enforcing private property rights and allowing the free market to function. But even more moderate voices, who point out the obvious impracticality of privatizing many natural resources, still hurry to agree that privatization is often superior to government regulation and should therefore be pursued wherever practicable. Thus, extremists and moderates alike tout any environmental policy that looks or smells anything like private property or a market as either an example of the privatization solution or an "intermediate" or "hybrid" scheme that is moving us in that direction.¹⁴¹

The only qualification to Sinden's explanation is to note that the description of those advocating property, market, and/or economic approaches includes academics and policy makers across the entire political spectrum—conservatives, moderates, and progressives. Environmental economics has become the preferred solution to most environmental "bads."

A critical assumption of environmental economics is the fungibility of environmental goods *and* of environmental bads. A major effort within the field is to establish the value of environmental goods, even environmental goods that non-economists might think of as priceless.¹⁴² Studies attempt

140. Cf. Oates, *supra* note 139, at 144 (noting that a tax or fee scheme does not allow government to set the total quantity of pollution, but tradable permits do).

141. Sinden, *supra* note 10, at 537 (footnotes omitted). For more on the rise of environmental economics, see Oates, *supra* note 139.

142. Economists do this by using surveys or other proxies that attempt to price things for which a market does not exist such as "the 'intangible' or 'symbolic-moralistic' utility that wilderness areas provide." Sagoff, *supra* note 139, at 1408. See also Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 852–53 (2009). Of course many legal scholars have argued that "the value of some things cannot be translated into a monetary figure, and these things should not be traded, at least with complete freedom, on the open market." Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 341 (2008) (describing Margaret Jane Radin's "personhood" theory of

to answer not only questions such as how much would people pay to have clean air, but also what is the non-use value of the existence of gorillas or panda bears.¹⁴³ The idea that something should not be monetized is largely rejected by environmental economists, allowing the explicit trade-off of one environmental good for another.¹⁴⁴ Moreover, by putting a dollar figure on environmental harm based on revealed preferences, societies can compare environmental harm against non-environmental goods, particularly economic growth. This comparison allows decisions to be made based on dollar amounts that supposedly capture how much people value the environment. Some scholars find this decision-making process dangerous or impossible,¹⁴⁵ but environmental economics seems to allow decisions—such as whether it is better to have air pollution and 3 percent growth or cleaner air and only 2 percent growth—to be made using a single, dollar-denominated, framework. Similarly, a single, market-type framework has the added benefit of allowing seemingly incomparable and distinct environmental harms—for example, destruction of the Florida Everglades and overfishing of tuna—to be treated as fungible.¹⁴⁶

Environmental economists recognize that there is no such thing as perfect fungibility of different environmental harm types, but the threat of climate change excuses a certain narrowing of focus that supports the fungibility assumption. A person in Colorado who lives near Bureau of Land Management land will experience excessive logging harm and may not even know about equally destructive chemical pollution in Maryland.

property). *See also* Ackerman & Heinzerling, *supra* note 112, at 1584 (“Cost-benefit analysis cannot overcome its fatal flaw: it is completely reliant on the impossible attempt to price the priceless values of life, health, nature, and the future.”).

143. Researcher calculations include such things as: the “[v]alue of waste management services provided by dung beetles to U.S. cattle ranchers” (\$380 million/year); the “[v]alue of pollination services provided to the state’s sunflower seed production industry by California’s wild bees” (\$11.1 million/year); and even the “[v]alue to human beings of all the services provided by Earth’s natural capital” (\$33 trillion/year). David Wolman, *How to Get Wall Street to Hug a Tree*, L.A. TIMES, Feb. 11, 2007, available at <http://articles.latimes.com/2007/feb/11/magazine/tm-greenies06>. *See also* Ackerman & Heinzerling, *supra* note 112, at 1557–59 (providing a brief overview of valuation methods in environmental economics).

144. Many scholars and environmentalists disfavor both market-based conservation methods and describing environmental goods in terms of economic values. *See, e.g.*, Douglas J. McCauley, *Commentary: Selling Out on Nature*, NATURE, Sept. 7, 2006, at 27.

145. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 204–34 (2004); Brown, *supra* note 30, at 406; Sagoff, *supra* note 139, at 1412–18.

146. The U.S. EPA facilitates the treatment of different wetland areas as fungible through its mitigation bank that allows those who cause negative impacts on aquatic resources to correct for such harm by restoring a different wetland. For more on mitigation banking, see *Mitigation Banking Factsheet*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/owow/wetlands/facts/fact16.html> (last visited Aug. 26, 2011).

Local harms are not fungible for the individual.¹⁴⁷ Besides location, there is also imperfect fungibility of types of harm. Nuclear energy is a good case in point. The extreme period of time that nuclear waste remains harmful, the possibility of nuclear disasters, and our continued inability to find a long-term storage solution for nuclear waste inspired lengthy debates among environmentalists about the desirability of nuclear energy development.¹⁴⁸ When nuclear and fossil fuel generated electricity were compared, environmentalists ran into the problem of competing “bads,” with the different types of harm associated with the alternative energy options making it hard to break the impasse. While the downsides of nuclear energy have not changed, climate change is forcing even environmentalists long opposed to nuclear power plants to change their position.¹⁴⁹ As a recent law review article notes, “Climate change threatens to be the externality that ate the world.”¹⁵⁰ Global warming is forcing former nuclear detractors to support nuclear power as part of the strategy to transition from fossil fuels to alternative energy sources. Although environmental issues are far more expansive than climate change alone (endangered species, clean water, loss of habitat, non-greenhouse-gas pollution, and many other challenges are all important environmental issues), a narrowing of popular environmental concern to global warming adds a certain credibility to the idea that environmental harms are fungible.

A narrow focus on greenhouse gas emissions lends itself to a reductionist understanding of environmental harm and to greater space for environmental offsetting. It does not matter whether harmful greenhouse gases are emitted from a factory in China or one in Michigan, the net environmental effect is the same.¹⁵¹ This is also true of things that reduce greenhouse gases or greenhouse gas emissions; location is unimportant, what matters is the overall state of the atmosphere. Consumers who buy a good whose production is associated with *X* amount of greenhouse emissions can pay to prevent that amount of pollution from being created

147. More generally, Eduardo Peñalver argues that what he calls “land’s memory” may make land an often infungible resource. Peñalver, *supra* note 142, at 829–32, 847.

148. For more on the problem of storing radioactive waste produced by nuclear power, see Charles de Saillan, *Disposal of Spent Nuclear Fuel in the United States and Europe: A Persistent Environmental Problem*, 34 HARV. ENVTL. L. REV. 461 (2010).

149. Amanda Leiter, *The Perils of a Half-Built Bridge: Risk Perception, Shifting Majorities, and the Nuclear Power Debate*, 35 ECOLOGY L.Q. 31, 48–49 (2008).

150. Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1132 (2010) [hereinafter Purdy, *The Politics of Nature*].

151. See Rose, *supra* note 130, at 190 (“CO₂ floats to the upper atmosphere and mixes around . . . creating no hotspots or any other kind of nonfungibility. . . . it does not even matter *when* it is produced”).

somewhere else or to otherwise trap those emissions. Through fungibility of environmental harms and environmental benefits, the emissions can occur at one factory, the consumption take place somewhere else, and the corrective offset be implemented in yet another part of the world. The rise of environmental economics approaches, together with the assumption of interchangeable environmental harms and services, is the second factor driving the environmental field's lead when it comes to the institutionalization of consumption offsetting.

A third factor that helps explain the rise of environmental offsetting is that environmental harms may lend themselves to greater calculability than non-environmental harms. Making an offsetting payment for environmental harms helps others just as a similar payment to ensure workers get paid a living wage helps others. But for reasons that will be explored in Part II.C, a consumer may not believe that direct or indirect aid to underpaid employees will reduce poverty, make the world a better place, or right a harm associated with his or her consumption. Environmental offsetting, in contrast, seems to offer calculable benefits.¹⁵² Finding a regulatory response to global environmental harm has been hard, in part, because a healthy atmosphere is the ultimate public good, and hence there are frequent opportunities for countries to block cooperative solutions by being free-riders or hold-outs.¹⁵³ The pollution of a single country is not a localized harm; instead it goes into the atmosphere and harms the entire planet. The country's contribution to global warming is calculable, but getting countries to agree on a plan to reduce emissions has been hampered by conflict between high wealth/high emission developed nations and low wealth/low emission nations.¹⁵⁴ But this conflict need not paralyze environmental offsetting. Since consumption harm can be

152. To the extent carbon offsetting leads to increases in consumption or is accomplished through projects that do not offset in the long-term—for example, reforestation without protection against subsequent logging of the same forest—these benefits will be illusory.

153. Stated differently, “In addressing a global problem, a national public must absorb the full cost of any measure it adopts, but will receive only a fraction of the globally distributed benefit.” Purdy, *The Politics of Nature*, *supra* note 150, at 1132.

154. The conflict revolves around whether poorer nations should be allowed to catch up economically through more lenient emission standards or bear additional burdens because they have not yet become the hyper-consuming societies of the West. These conflicting ideas about how to share the sacrifices involved in changing global consumption patterns have blocked progress towards both domestic and international greenhouse gas solutions. For more on the roots of the stalemate, see Ian Ayres & Doug Kysar, *Adam Smith Meets Climate Change*, SLATE (Sept. 25, 2008, 11:53 AM), <http://www.slate.com/id/2200911>. See also Libecap, *supra* note 33, at 386–87 (providing a theoretical explanation for the international negotiation challenges surrounding open-access goods). For an argument that distributive and corrective justice claims do *not* justify heightened obligations on the United States to reduce greenhouse gas emissions, see Posner & Sunstein, *supra* note 123.

calculated, individual consumers can diminish the global environmental harm through offsetting. Moreover, for consumers, the amount of the offset payment can be tailored to their level of consumption and associated level of harm.

The final, and I believe most important, factor explaining environmental offsetting's uniquely strong growth and institutional development is the self-interested nature of environmental offsetting.¹⁵⁵ People are aware of the collective responsibility for, and enjoyment of, a healthy planet. The benefits of nature reach individual consumers, and some of those individually experienced benefits are threatened by global warming.¹⁵⁶

It is no coincidence that the image of global warming has become the polar bear, and often a very isolated polar bear floating on a small chunk of ice or swimming far removed from the ice shelf.¹⁵⁷ Why have polar bears become so ubiquitous? Most of us will never see a polar bear in its natural environment and, though they look cuddly, they can be vicious carnivores. Yet there is something in us as humans that can get pleasure out of simply knowing that polar bears exist. Polar bears are representative of the many species and aspects of nature threatened by global warming, some of which Americans have first-hand experience with and some of which are more removed. Unlike the poor, who we blame for their poverty, we do not think of nature or animals as sharing fault for harms caused by our consumption. Changing direction on climate change, and

155. See Dernbach, *supra* note 94, at 124 (listing self-interest as among the three concerns—"self-interest or self-preservation, the impact of climate change on other humans, and the impact of climate change on all life"—that surround the "norms" that can "motivate[] appropriate individual behavior" regarding the environment).

156. The extreme free-rider problem associated with global environmental problems puts a natural limit on the extent self-interest alone can explain environmental offsetting. Individuals considering reducing their personal contribution to global warming "face large costs but receive little benefit, given their negligible personal impact on climate change." Green, *You Can't Pay Them Enough*, *supra* note 97, at 411. See also Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 130 (2009) (arguing that the free-rider problem is raised when individuals compare their pollution to industrial sources). Jeremiah Purdy makes a similar observation about municipal adaptation of the Kyoto protocol, which "makes little sense through the lens of narrow self-interest." Purdy, *The Politics of Nature*, *supra* note 150, at 1193 (emphasis added).

157. The major environmental groups all began highlighting the threatened polar bear around the same time; the most heart-rending segment of the Discovery Channel's epic television mini-series "Earth" is on the effect global warming is having on the polar bear's quest for food, and the 2005 NRDC gift membership card featured "a photograph of two polar bears stranded on a small floating ice cap, the caption reading: '[a]s the polar bear's future literally melts away, the Bush Administration refuses to act.'" Rhode & Ross, *supra* note 34, at 172. See also *id.* at 168 (explaining that "[c]ompelling visual images" are a way to "overcome complacency").

saving the polar bear, is a classic collective action problem, but as the Center for Biological Diversity and others insist, it is “not too late to save the polar bear.”¹⁵⁸ Environmental offsetting responds to the possibility that humans can and will choose to “address the causes of climate change, including the unrestrained burning of fossil fuels.”¹⁵⁹ Doing so will help ensure that this and future generations get the benefits of a healthy planet, which is both a collective and an individual benefit of fighting climate change. Although the risk that others will not contribute their share is present with environmental offsetting, such payments are tied to an individual’s personal benefits from offsetting and are still a form of self-interested behavior.

2. *Environmental Offsetting Mechanisms*

What the Toyota Prius is to responsible consumption and quasi offsetting, TerraPass is to environmental and institutional offsetting.¹⁶⁰ Expedia, the online travel website, should be credited alongside TerraPass with introducing consumers to the idea that they can pay a third-party to offset the environmental harm associated with their travel.¹⁶¹ When consumers buy a plane ticket on Expedia, they are first told the price, including applicable taxes, of various flight options. Having selected the flight(s) they want, they are given the option of various upgrades or packages they can buy in addition to the flight, from city tours to theater tickets. One option they are given is to pay TerraPass, a *for-profit company* wholly independent of Expedia, to offset the environmental harm associated with their travel.¹⁶² The amount they pay is dependent upon

158. CENTER FOR BIOLOGICAL DIVERSITY, NOT TOO LATE TO SAVE THE POLAR BEAR: A RAPID ACTION PLAN TO ADDRESS THE ARCTIC MELTDOWN (2007), available at <http://www.biologicaldiversity.org/publications/papers/ArcticMeltdown.pdf>; see also *The Arctic*, WORLD WILDLIFE FUND, http://wwf.panda.org/what_we_do/where_we_work/arctic (last visited Aug. 26, 2011) (“It’s not too late . . . [to] preserve the [Arctic] region’s rich biodiversity”).

159. Letter to the Editor, *Climate Change and the Integrity of Science*, *supra* note 124, at 689.

160. Tellingly, a recent article arguing for standardization in the carbon offset market begins, “Anyone who has booked online an airline flight, a hotel room, or rented a car in the last few years has had the opportunity to ‘offset’ the greenhouse gas (GHG) pollution generated through their activities by investing in a carbon offset.” Maria Savasta-Kennedy, *The Newest Hybrid: Notes Toward Standardized Certification of Carbon Offsets*, 34 N.C. J. INT’L L. & COM. REG. 851, 851–52 (2009).

161. See Douglas McGray, *SUV Redemption Sticker*, WIRED MAG., July 2005, available at http://www.newamerica.net/publications/articles/2005/suv_redemption_sticker (“If you think about your own personal impact on CO₂, and you find out you can offset it for a reasonable amount of money, it makes you think differently about the problem. TerraPass is mind opening.” (quoting Ned Ford, a member of the Sierra Club’s Global Warming and Energy Committee)).

162. As a Los Angeles Times story explains, TerraPass makes an “investment in a carbon-reducing enterprise, such as a wind farm” for the customer, “and in the process makes a little money

how long their flight is; the longer the flight, the more they pay. By putting an easily accessible offsetting option directly before consumers, Expedia and TerraPass expose consumers to the possibility of offsetting their consumption and have started the work of making the option of offsetting a customary part of consumption.

The main service TerraPass offers is a customer-friendly way of offsetting individual and family consumption.¹⁶³ But the simplicity of the company's calculations raises numerous concerns related to whether the company is properly accounting for both the full extent of its customers' consumption and the effectiveness of company-funded offsetting projects. Some of these concerns are self-evident when a customer buys an offset tied to an Expedia flight. The amount a customer pays is based only on the distance of the flight and does not take into account other important factors, such as how full the flight is, how long the flight has to circle before landing, or how long the plane is stuck on the tarmac prior to flying. While taking such factors into account would require delaying final payment until after the flight, doing so would more accurately reflect the harm associated with an individual's travel. The TerraPass solution is perhaps the best available—the amount consumers pay for their offsets is based on averages, which avoids the complications of particularized accounting. The TerraPass website operates much the same way: products include the “4-person family annual carbon offsets” for \$369.00, “Average-sized car carbon offsets—one year” for \$71.40, or “Hybrid or efficient car—one year” offsets for \$35.70.¹⁶⁴ Customers can choose from among similar average-based offsets, or they can use the company's carbon footprint calculator to figure out a partially individualized account

for itself too.” Wolman, *supra* note 143. As of December 2008, the majority of carbon offset providers were for-profit companies. Matthew J. Kotchen, *Offsetting Green Guilt*, 7 STAN. SOC. INNOVATION REV., Spring 2009, at 26, 29 [hereinafter Kotchen, *Offsetting Green Guilt*].

163. The focus here is on individual offsetting, but offsetting is also being done by companies, cities, and even countries. See Savasta-Kennedy, *supra* note 160, at 854–55 (discussing offsetting by Dell Computer Company); Joe Palca, *Abu Dhabi Aims to Build First Carbon-Neutral City*, NPR MORNING EDITION, May 6, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=90042092> (reporting on the planned development of Masdar City as a carbon-neutral city of 50,000 people); Elisabeth Rosenthal, *Vatican Penance: Forgive Us Our Carbon Output*, N.Y. TIMES, Sept. 17, 2007, available at <http://www.nytimes.com/2007/09/17/world/europe/17carbon.html> (reporting on the Vatican becoming the “world's first carbon-neutral state” through a reforestation project in Hungary).

164. *Carbon Offsets*, TERRAPASS, <http://store.terrapass.com/store/c/18-Carbon-offsets.html> (last visited Aug. 26, 2011).

of their carbon consumption and the corresponding offset amount.¹⁶⁵ They can even offset the carbon footprint associated with their wedding.¹⁶⁶

The idea behind carbon offsetting is relatively simple. Customers consume a set amount of carbon dioxide (CO₂) or carbon dioxide equivalents (CO₂e) and make a payment that will prevent that same amount of CO₂ from being consumed elsewhere. TerraPass accomplishes this by directing customer payments towards landfill gas-to-energy projects, wind farms, and agriculture methane recovery facilities.¹⁶⁷ The projects of a TerraPass competitor, Carbonfund.org, are similar but also include truck stop electrification, forest conservation, and hydroelectric projects.¹⁶⁸ Independent non-profit auditors are used to verify that offsetting companies accomplish the carbon reductions paid for by consumers.¹⁶⁹ The decision to pay TerraPass to accomplish an individual's offsetting is largely a matter of convenience for the consumer.¹⁷⁰ However, this convenience comes at some cost to the consumer with a sincere desire to offset. Perhaps a preferable option would be to buy rights to pollute with CO₂ from emission exchanges such as the European Climate

165. The TerraPass calculator uses the following information: automobile year, make, model, and miles driven/year; either a user-created list of individual flights/year or the number of short, medium, or long flights/year; and home location and utility bill amount. *Carbon Footprint Calculator*, TERRAPASS, <http://www.terrapass.com/carbon-footprint-calculator> (last visited Aug. 26, 2011). Consumers do need to use caution when relying upon carbon calculators, as different calculators generate different carbon emission estimates. J. Paul Padgett et al., *A Comparison of Carbon Calculators*, 28 ENVTL. IMPACT ASSESSMENT REV. 106, 106–07 (2008). Dernbach has suggested that the government “publish information on the energy or carbon footprint of individuals.” Dernbach, *supra* note 94, at 148.

166. The TerraPass wedding calculator includes guest airline and automobile emissions, hotel energy use, and energy connected to the actual wedding. *Wedding Carbon Footprint Calculator*, TERRAPASS, <http://www.terrapass.com/wedding> (last visited Aug. 26, 2011). See also Jura Koncius, *Wedded to Green*, WASH. POST, June 21, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/20/AR2007062000519.html?nav=emailpage> (including information about a couple using TerraPass to offset their wedding guests' travel).

167. For a complete listing of TerraPass projects, see *TerraPass Emissions Reduction Projects*, TERRAPASS, <http://www.terrapass.com/projects/listing.html> (last visited Aug. 26, 2011). TerraPass, with its heavy reliance on methane capture, is taking advantage of the cheaper reduction possibilities of “Super-Pollutants.” Cf. Andrew Schatz, Note, *Discounting the Clean Development Mechanisms*, 20 GEO. INT'L ENVTL. L. REV. 703, 719–20 (2008).

168. For a complete listing of Carbonfund.org projects, see *Support Renewable Energy and Conservation Projects*, CARBONFUND, <http://www.carbonfund.org/projects> (last visited Aug. 26, 2011).

169. Eilene Zimmerman, *Undoing Your Daily Damage to the Earth, for a Price*, N.Y. TIMES, Nov. 11, 2007, available at <http://www.nytimes.com/2007/11/11/business/yourmoney/11carbon.html>; cf. Savasta-Kennedy, *supra* note 160 (arguing that there is a need for standardization and government oversight of the carbon offset market).

170. At some point, convenience becomes practicality, for while an individual could try to directly offset their contribution to global warming by planting enough trees, for most people it makes sense to pay a third party.

Exchange or the Chicago Climate Exchange.¹⁷¹ Ian Ayres and Barry Nalebuff explain:

When you buy CO₂ offsets via TerraPass, it invests in renewable energy resources such as wind farms. But it isn't clear that the money you spend there really leads to lower pollution. While they are investing in clean-energy projects, those projects might have proceeded even without your investment.

If you truly want to be serious about reducing CO₂, you can buy permits on the European exchange. Buying a permit to emit a ton of CO₂ and then parking it unused is a more powerful way to make sure that your substitute is having an incremental impact. But for your purchase, a corporation would have emitted an extra ton of greenhouse gases.¹⁷²

Ayres and Nalebuff continue by noting that buying an offset for driving a Hummer on the European exchange costs 50 percent more than TerraPass charges, which they attribute to the exchange's greater effectiveness.¹⁷³ For projects to be classified as offsetting projects, they should both permanently reduce or sequester emissions and be of the sort that would not take place without the offset.¹⁷⁴ Though the average American may find it complicated to enter these exchanges, through Carbonfund.org and similar intermediaries, consumers can purchase and retire CO₂ emissions allowances from the Chicago Climate Exchange.¹⁷⁵

171. See INTERCONTINENTALEXCHANGE, INC., <http://www.ecx.eu> (last visited Aug. 26, 2011); CHICAGO CLIMATE EXCHANGE, <http://www.chicagoclimatex.com> (last visited Aug. 26, 2011).

172. Ian Ayres & Barry Nalebuff, *Environmental Atonement*, FORBES MAG., Dec. 25, 2006 [hereinafter Ayres & Nalebuff, *Environmental Atonement*], available at <http://www.law.yale.edu/news/3954.htm>.

173. *Id.*

174. The "additionality" requirement prevents actors from claiming to be accomplishing offsets that they could sell for actions they were already doing and planning on doing. Offsets have to be tied to "projects that do something new," which in the forestry context, "require landowners to prove trees are about to be razed." Margaret Newkirk, *Tree-Saving Plan Has Credibility Questions*, ATLANTA JOURNAL-CONSTITUTION, May 24, 2009, available at <http://www.ajc.com/news/tree-saving-plan-has-53515.html> (listing requirements proposed by environmental advocates and some existing regional standards).

For discussion of the "additionality" requirement under Europe's Clean Development Mechanism, see Dwyer Gunn, *Are Carbon Offsets Too Good to Be True?*, FREAKONOMICS: BLOG (Apr. 29, 2009, 2:40 PM), <http://freakonomics.blogs.nytimes.com/2009/04/29/are-carbon-offsets-too-good-to-be-true>. See also Ben Elgin, *Another Inconvenient Truth: Behind the Feel-Good Hype of Carbon-Offsets, Some of the Deals Don't Deliver*, BUSINESSWEEK, Mar. 26, 2007, available at http://www.businessweek.com/magazine/content/07_13/b4027057.htm (raising questions about whether several TerraPass projects meet the additionality requirement).

175. See *The Chicago Climate Exchange (CCX)*, CARBONFUND, <http://www.carbonfund.org/site/>

TerraPass, Carbonfund.org, and direct purchase of pollution permits from climate exchanges are but a sampling of the hundreds of offsetting mechanisms that exist.¹⁷⁶ In 2008, the U.S. Government Accountability Office found more than 600 offsetting entities operating in the United States involving “a wide range of participants, prices, transaction types, and projects.”¹⁷⁷ The carbon offset market is unusual because “while most markets involve tangible goods or services, the carbon market involves a product that represents the absence of something—in this case, an offset equals the absence of one ton of carbon dioxide emissions.”¹⁷⁸ In theory, individuals could even sell their own offsets by promising to reduce their personal emissions.¹⁷⁹ That this is not taking place attests to perhaps the biggest lesson from the rise of voluntary environmental offsetting, that institutional context and institutional development matters.¹⁸⁰ The existence of a variety of user-friendly mechanisms for individuals to offset environmental harm associated with their consumption itself creates and supports the “emerging” individual offsetting norms.¹⁸¹ Offsetting institutions—in tandem with greater public awareness of the threat of global warming and the role individuals play—help redefine consumption. People’s outlook changes from apathy and indifference regarding the

projects/profile/ccx (last visited Aug. 26, 2011). As a GAO report explains, “The term ‘retirement’ refers to the permanent recorded disposition of an offset after which it cannot be resold or otherwise used by any entity to facilitate, enable, or offset any past, present, or future greenhouse gas emission.” U.S. GOV’T ACCOUNTABILITY OFFICE, CARBON OFFSETS: THE U.S. VOLUNTARY MARKET IS GROWING, BUT QUALITY ASSURANCE POSES CHALLENGES FOR MARKET PARTICIPANTS 5 n.6 (GAO-08-1048, 2008).

Even when customers are hoping to retire pollution allowances, care is needed to ensure the exchange they use is not “manipulated in ways that artificially reduce the cost of carbon credits.” Juliet Howland, Comment, *Not All Carbon Credits Are Created Equal: The Constitution and the Cost of Regional Cap-and-Trade Market Linkage*, 27 UCLA J. ENVTL. L. & POL’Y 413, 430 (2009).

176. For a list of carbon offset providers and worldwide projects, see CARBON CATALOG, <http://www.carboncatalog.org> (last visited Aug. 26, 2011).

177. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 175, at 7. For more on the price variability observed across carbon offset providers and projects, see Marc. N. Conte & Matthew J. Kotchen, *Explaining the Price of Voluntary Carbon Offsets*, 1 CLIMATE CHANGE ECON. 93 (2010).

178. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 175, at 37.

179. A voluntary household level offsetting scheme in fact has been proposed by Ayres and Nalebuff. See Ian Ayres & Barry Nalebuff, *Your Personal Climate Exchange*, FORBES MAG., Nov. 24, 2008, available at <http://www.forbes.com/forbes/2008/1124/148.html>. Similarly, Vandenberg and Ackerly raise the possibility of both individual-to-individual and community-to-community offsetting. Michael P. Vandenberg & Brooke A. Ackerly, *Climate Change: The Equity Problem*, 26 VA. ENVTL. L.J. 55, 72–73 (2008).

180. For more on the possibilities and challenges of creating an individual-based offset market, see Dernbach, *supra* note 94, at 154–55.

181. Michael P. Vandenberg & Anne C. Steinemann, *The Carbon-Neutral Individual*, 82 N.Y.U. L. REV. 1673, 1675 (2007) (arguing law can help activate an emerging individual carbon-neutral norm).

environmental impact of individual consumption to interest in correcting for consumption externalities.

Global warming and the problem of over-consumption of fossil fuels cannot be solved by relatively wealthy American consumers voluntarily making offsetting payments. More is demanded at both the global and individual levels.¹⁸² A global commitment, with the buy-in of both developed and developing nations, is seemingly a prerequisite for solving the common problems of greenhouse gas emissions.¹⁸³ Offsetting is an imperfect substitute for consumption reductions and changes in behavior that avoid causing harm to begin with. In other words, making a voluntary offset payment may be just one of many obligations or sacrifices that should be asked of individuals in the fight against climate change.¹⁸⁴ The limitations of offsetting must be acknowledged, but the recognition that offsetting institutions provide a way for individuals to mitigate harm tied to their lifestyle and consumption choices is equally important.

C. Poverty Offsets

Given that most of us will not take a vow of poverty, how should we take into account the relationship between our spending and global poverty? The proposal developed in this Part applies the concept and practice of environmental offsetting to the relationship between individual consumption and poverty.¹⁸⁵ There are many observable examples of

182. Between 30 and 40 percent of U.S. CO₂ emissions are under individuals' direct control—"a total equal to 8 percent of global emissions and greater than the emissions of Africa, Central America and South America combined." Ela, *supra* note 6, at 98. As such, much more should be demanded of Americans in particular. Part of the problem is that "the U.S. carbon footprint is simply too big to offset." Savasta-Kennedy, *supra* note 160, at 854. But individual and household behavioral changes could fairly result in significant emission reductions with little adverse lifestyle effects. Thomas Deitz et al., *Household Actions Can Provide a Behavioral Wedge to Rapidly Reduce US Carbon Emissions*, 106 PROC. NAT'L ACAD. SCI. 18452, 18452 (2009).

183. William Nordhaus has appropriately called the greenhouse effect "the granddaddy of public goods problems." William D. Nordhaus, *Reflections on the Economics of Climate Change*, J. ECON. PERSP., Autumn 1993, at 11, 18.

184. Getting Americans to sacrifice consumption for the sake of the environment is likely to be challenging, for survey data shows that "while individuals express concern about climate change, they display a reluctance to support policies that will impose significant costs upon them unless there is a significant impact upon their daily lives." Green, *Self Control*, *supra* note 129, at 78.

185. These categories are not mutually exclusive. Some forms of offsetting could benefit both the environment and the poor; most notably those supporting payments for environmental services. *See, e.g.*, Stefano Pagiola et al., *Can Payments for Environmental Services Help Reduce Poverty? An Exploration of the Issues and the Evidence to Date from Latin America*, 33 WORLD DEV. 237 (2005); Daniel P. Schramm, "Do I Care?" *Yes!: How the U.S. Carbon Offset Market Can Save Rural Communities*, 44 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 241 (2010). An additional way to combine these forms of offsetting is through carbon market offerings that "factor in social justice

consumers practicing forms of partial offsetting to help the poor. These practices amount to an emerging custom of people voluntarily making charitable donations following consumption, often to third-party institutions that relate in some way to their consumption.¹⁸⁶ However, these donations are only examples of partial, and not full, offsetting because the connection between consumption and the voluntary payment is neither institutionally linked nor defined proportionally. The donation made by the consumer does not necessarily relate to the goods purchased and the amount donated is seemingly independent of the amount consumed. Developing and strengthening institutions that facilitate and direct this observed behavior holds the promise of helping establish obligations to the poor connected with consumption. Just as offsetting companies derive their utility from consumer awareness of the externalities of energy consumption, a similar rationale exists for recognizing, and correcting, the poverty-related externalities of consumption.

Although not yet categorized as such, some variations on the poverty offset concept can already be found. Customers walking through the checkout line at any number of businesses will find an expectation, not only to pay for their purchases, but also that they contribute towards a charity.¹⁸⁷ While sometimes subtle—Whole Foods, for example, at one

considerations when developing carbon credits” and which tellingly command a price premium over other voluntary carbon offset options. Michael P. Vandenbergh, Brooke A. Ackerly & Fred E. Foster, *Micro-Offsets and Macro-Transformation: An Inconvenient View of Climate Change Justice*, 33 HARV. ENVTL. L. REV. 303, 339 (2009). For more on developing such “[e]quity [m]icro-[o]ffset projects,” see *id.* at 341–44. To the extent that “support for environmental protection has grown in recent decades while support for progressive incomes [sic] policies, welfare, and other social support programs has considerably waned,” a strategy focusing on areas of overlap may be more successful than a narrow emphasis on poverty. Kristen A. Sheeran, *Ecological Economics: A Progressive Paradigm?*, 17 BERKELEY LA RAZA L.J. 21, 37 (2006).

186. For examples of such practices, see *infra* notes 187–90 and accompanying text.

187. The manner of facilitating charitable donations by the Healthy Spot Pet Store in Santa Monica, California provides a good example of how checkout line requests work. At Healthy Spot, when consumers are told their final bill, they are asked if they would like to give the amount needed to round up to the nearest dollar to the Best Friend Animal Rescue. See Amanda Dyer, *Pros and Cons of Checkout Line Donations*, NPR: MORNING ED. (Aug. 19, 2009), <http://www.npr.org/templates/story/story.php?storyId=112014803>. Amanda Dyer explained, “Healthy Spot customers care about their dogs, so co-owners Andrew Kim and Mark Boonnark didn’t think it was too far of a stretch to ask them to donate to dogs a little less fortunate than their own.” *Id.*

The options available to the customer following such a request are limited, as captured by one blogger’s sarcastic observations regarding a request to add a dollar for the Make-A-Wish Foundation: “What can I say? No way. I am a monster. I hate dying children. I also worship the devil and kick babies for fun.” Laura Gunderson, *Safeway Fund-Raising: Need Change?*, OREGONLIVE.COM: COMPLAINT DESK (July 25, 2008, 11:14 AM), available at http://blog.oregonlive.com/complaintdesk/2008/07/safeway_fundraising_need_chang.html (quoting an anonymous blogger). Moreover, the checkout clerk may not act appropriately should you refuse to donate. See Strom, *Charity’s Share*,

point had a small placard with one, two, and five dollar pull away coupons good towards a worthy cause like feeding the homeless or global food aid—the request is usually placed in such a way that all customers will have to choose whether to ignore the request or add a contribution to their purchase.¹⁸⁸ Whether they are paying for a coupon with a bar code, a sticker, or a small mock bag of wheat, the end-of-the-aisle donation is a call to conscience that the checkout employee sometimes will even ask customers about directly.¹⁸⁹ And the same sort of charitable giving is being requested beyond the checkout line: some monthly utility bills now urge customers to donate money through the utility company so that the poor may receive water or electric assistance.¹⁹⁰ The common denominator of these practices is that the poverty-related charitable cause chosen usually relates to the purchases being made and supports a cause with broad appeal.

Poverty offsetting responds to growing consumer awareness that consumption cannot be seen as an isolated event and instead can reflect both exploitive production processes and, arguably, societal inequality. Unlike environmental offsetting where the market has developed a range of options with formally established offsetting brokers and facilitators, poverty offsetting as it currently exists is haphazard and cannot yet be easily identified as offsetting. The first half of this Part is an explanation of why consumers are—or should be—motivated to make poverty offsetting payments in connection with their consumption. The second half argues that the discrete practices of post-consumption poverty offsetting should be better institutionalized. What is now an ad hoc phenomenon of businesses and consumers should be strengthened by drawing upon

supra note 71 (reporting on a customer whose bananas were treated roughly by a Whole Foods clerk after the customer refused to make a donation to a breast cancer charity).

188. Another example is a Staples campaign to take advantage of the start of the school year to get “better-off” students to donate 11 “most needed” school supplies” to help poor American schoolchildren. Stuart Elliot, *Giving Back, by Backpack*, N.Y. TIMES, July 13, 2009, available at <http://www.nytimes.com/2009/07/13/business/media/13adnewsletter1.html>.

189. For example, Randalls Supermarket in Austin, Texas supports a local food bank by having tellers ask customers if they would like to donate. Michael May, *Overwhelmed by Check-Out-Line Charity*, MARKETPLACE MONEY (Jan. 1, 2010), <http://marketplace.publicradio.org/display/web/2010/01/01/mm-checkoutcharity>. Randalls offers three giving choices; give a dollar, give five dollars, or pay for a bag of groceries to be delivered to the food bank. *Id.* It is worth noting the degree to which the final option is self-serving; the grocery store presumably is not selling the groceries at cost.

190. Although slightly removed from the checkout-line request, online giving in some instances might reflect individual offsetting as well by people who first make an online purchase or by those who return home and feel the need to make a donation following their consumption. For more on the rise of online donations and international aid contributed by individuals, see Desai & Kharas, *supra* note 103.

consumer knowledge of consumption harms and providing consumers the opportunity to effectively offset those harms. I argue for the creation of an offsetting mechanism that would facilitate payments and help inculcate the custom of making poverty offset payments following consumption.

1. Motivating Factors

Underlying poverty offsetting behavior is a desire by consumers to correct for production and consumption externalities. By placing the opportunity to donate at the end of checkout lines or on routine invoices, charities make acting upon this corrective inclination easy. But while ease of payment increases the probability people will donate, ease alone does not translate into donations unless people already want to give money. Before considering the existing mechanisms and potential institutions for poverty offsetting, we need to understand what consumers are correcting for and why they are willing to pay a certain amount for a product and then make a separate donation on top of that amount.

Individuals' willingness-to-offset is informed by a number of generally overlapping intuitions and behaviors. First, consumers have some knowledge of market failures and governance vacuums associated with their consumption. Second, charitable donations following consumption, at times, are examples of individuals voluntarily relinquishing a portion of their consumer surplus. Finally, individual offsetting payments reflect social pressure at a moment where inequality and ability-to-pay are particularly evident.

First, knowledge of market failures, especially those caused by governance vacuums, perhaps best explains why consumers are—and should be—motivated to make poverty offsetting payments. Individuals feel the need to make environmental offset payments in part because the atmospheric costs of greenhouse gas emissions are not priced into goods or services. The price of an airline ticket reflects the fact that there is no ownership, collective or individual, over environmental goods or harms—a classic governance vacuum. The same can be said of poverty-related harms permitted by governance vacuums. If an individual wants to be carbon neutral or at least reduce harm associated with airline travel, an offset payment can be made. An individual who disapproves of a good's production process because it fails to take into account a social harm connected to poverty or inequality similarly can use an offset payment to correct or reduce the harm of his or her consumption. Because offsetting is a voluntary activity, consumer perceptions and knowledge of social harm caused by governance vacuums or other market failures can be

determinative even if there is not general acceptance of either the harm or that a particular production process is to blame.

True-believers in the idea and benefits of the free market will recoil at the possibility that consumption can be causally related to social harms, in particular poverty. Proponents of laissez-faire capitalism generally acknowledge the harms of slavery and other forms of forced labor, but do not extend such recognition to cases where workers are formally empowered but subject to nearly impossible choices. Once participation in global capitalism is premised on free-labor standards that include the right of workers to voluntarily enter into, and exit, employment contracts, how can we say they have been harmed by consumption? For reasons discussed elsewhere in this paper, consumption-driven capitalism deserves tremendous praise and credit as an anti-poverty tool.¹⁹¹ But such welfare gains do not diminish the hardships encountered by those with formal freedom but without meaningful opportunities to choose their own path.¹⁹² For socially conscious consumers, the solution is not to opt out of the market but to correct as much as possible for social harms that continue to be associated with consumption of particular goods.

Perhaps counterintuitively, the connection between consumption and social harms is less accepted than environmental harms. The scientific community has struggled to bring about a certain cursory awareness among consumers about the connection between consumption and environmental degradation. The same cannot be said as easily of poverty-related social harms, where causal connections between consumption and harm are blurred by class and societal distance. When an anti-sweatshop campaign produces a report documenting abusive working conditions and inadequate compensation, the impact is dulled by the life space between consumers and workers. Consumers, particularly those with faith in markets, can easily rationalize the working conditions: *maybe relative to other options in that country, work in the factory is good; somebody will solve this problem, it isn't my concern; and/or I couldn't live like that, but maybe they are happy*. All of these rationalizations may have an element of truth, but they overlook the possibility of absolute deprivations of human rights or absolute social harms that should not be subject to discounting based on relative experiences. Additionally, perceptions of worker happiness, lack of better alternatives, and corrective actions by

191. See *infra* note 213 and accompanying text.

192. See JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION 124–25 (2010) (discussing Amartya Sen's distinction between formal "process freedom" and the "opportunity aspect of freedom").

others need not be based on consumer knowledge to have a rationalizing effect. Assumptions that rely upon stereotypes of foreign societies or the developing world can satisfy the mental need to excuse one's indifference to poor working conditions.

Consumer hesitation to recognize social harms tied to poverty reflects a general propensity of Americans to blame the poor for their poverty. Endangered animals are by their nature "innocent," but the idea that through hard work people can lift themselves out of poverty makes the poor "guilty" or at least complicit in their hardships. If the poor only studied, worked, or saved more, the thinking goes for many Americans, they would not be so poor.¹⁹³ Put differently, the iconic American hero, the self-made man of Horatio Alger mythology, requires its antithesis. The lift-yourself-up-by-your-bootstraps ideology is mentally contrasted with a stereotyped example of the undeserving individual, often female, whose laziness, welfare reliance, and minority racial status make him or her unworthy of charity or sympathy.¹⁹⁴ The structural causes of poverty, though acknowledged by Europeans, are brushed over by Americans, who instead attribute poverty to individual failings.¹⁹⁵ Finally, opportunities to question the notion that the poor deserve to be poor are limited by the disconnect between consumers with disposable income and the poor. Increasing inequality and separation of classes—whether in the absence of cross-class social capital or in the physical separation of lived space made possible by the withdrawal of the rich into private enclaves—reinforces the idea that poverty reflects individual choices not structural impediments.¹⁹⁶ Given American societal faith in the possibility of upward mobility through hard work and belief in the undeserving nature of the poor, recognizing social harms connecting consumption to poverty arguably requires more of consumers than does recognition of consumption's environmental harms.

193. See, e.g., Ezra Rosser, *Getting to Know the Poor*, 144 (unpublished manuscript) (forthcoming 14 YALE HUM. RTS. & DEV. L.J. 2011) [hereinafter Rosser, *Getting to Know the Poor*] (highlighting anti-poor rhetoric used in a debate about welfare reform).

194. See, e.g., Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1502–08 (1991).

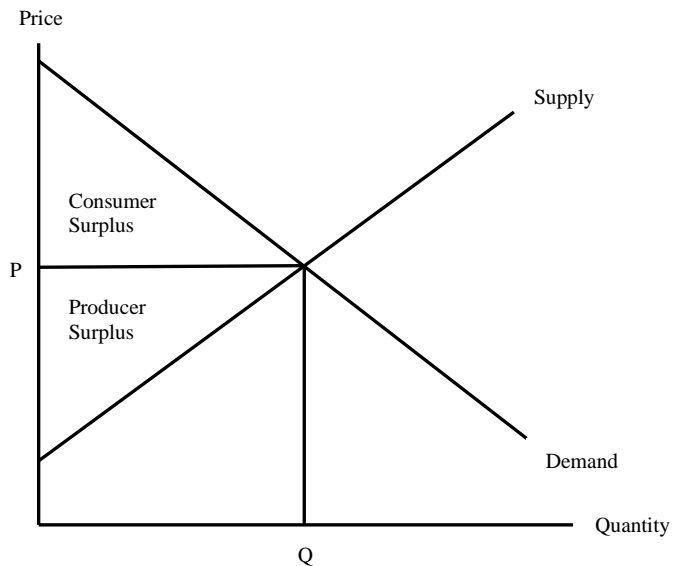
195. See WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 149–82 (1996).

196. For more on characterizations of the poor as undeserving and the structural causes of poverty, see HERBERT J. GANS, THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY (1995). See also Amy L. Wax, *Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century*, 34 FORDHAM URB. L.J. 1363 (2007) (providing a great overview of the structure/undeserving debates that surround welfare policy); Rosser, *Getting to Know the Poor*, *supra* note 193, at 127–36.

Consumer recognition of social harms connected with consumption nevertheless seems to transcend the many rationalizations for indifference and the idea that the poor are undeserving. The second motivation for poverty offsetting, the willingness of consumers to voluntarily relinquish a portion of the consumer surplus, perhaps helps explain the practice of making charitable donations connected with consumption. For while narratives rationalizing separation and blaming the poor are powerful *demotivators*, consumers may still want to hedge against the possibility that their consumption is harm-inducing. In the context of uncertainty regarding production processes and structural origins of poverty, the consumer surplus makes a precautionary approach to harm possible. I am going start with an economic explanation of the consumer surplus followed by an unconventional way to understand the surplus.

In any market transaction, price is determined by the mutual agreement of seller and buyer. Aggregating the amount buyers are willing to pay for a particular product and the amount producers are willing to sell at particular price points generates the typical intersection of demand and supply. See Figure 2 below:

FIGURE 2: CONSUMER SURPLUS



A consumer surplus exists because of the inability of sellers to effectively engage in price discrimination. The person who most wants the product, understood in terms of willingness-to-pay, would have paid an amount in excess of the market-determined price. (The corresponding producer surplus captures the willingness of some suppliers to sell the good at an amount below the market price.) Legal limitations and the transaction costs involved in individually negotiating the price for each unit sold prevent producers from fully capturing consumer willingness-to-pay. The welfare gain experienced through the consumer surplus can be thought of as an unpaid-for benefit of the market structure. This benefit is captured in FIGURE 2 above by the space where demand exceeds price.

The economic description of consumer surplus, despite the advantage of a nice model, fails to capture the emotional response of consumers to the consumer surplus. For small items the welfare gain may go unnoticed. If my sweet tooth makes me willing to pay 75¢ for a candy bar but I am only charged 50 cents, my savings relative to my willingness-to-pay is high as a percentage but may not be something I think about for too long. On the other hand, if I really want a particular pair of shoes and would have paid \$100 for them but find them at an outlet for \$30, I will probably leave the store noticeably happier. The same can be said of baskets of goods. If a new discount grocery store opens, as I pick out individual items I may not fully appreciate the savings, but when I check out and see a much-reduced total bill, I may experience similar happiness based on the aggregate benefit. The happiness connected to the consumer surplus can reflect consumption emotions associated with particular purchases—“wow, what a great deal” or “what a steal!” But these feelings can also be experienced in the aggregate, where perhaps the offsetting motive can best be connected to charitable giving.

Paradoxically, just as the idea that the poor are undeserving may mute offsetting, the sense that consumers are themselves undeserving of their privilege may inspire offsetting. Introspection or guilty feelings can make consumers question their good fortune and societal support for their consumption.¹⁹⁷ Such emotions can be positively translated into action through charitable giving or other ways of “giving back,” but it would be wrong to discount the unease generated by a substantial aggregate consumer surplus. As an activity, consumption provides individuals an opportunity to recognize relative privilege and good fortune. For, despite

197. In an earlier article, I explored the relationship between societal support for income, which implicitly includes consumption, and obligations to the poor. See Ezra Rosser, *Obligations of Privilege*, 32 N.Y.U. REV. L. & SOC. CHANGE 1 (2007).

American society's celebration of high incomes as reflective of individuals' non-economic worth, in a world of scarcity the ability to consume not enjoyed by all raises the linked possibilities that the consumer is enjoying too great a surplus and that surplus is undeserved. Offsetting enables consumers to voluntarily relinquish a portion of their consumer surplus. Making an offset pushes the amount paid closer to the amount of consumers' individualized willingness-to-pay and lessens the feelings that a purchase is undeserved. Consumers in a sense engage in voluntary price discrimination, with the offset portion going towards charity rather than the producer. The consumer surplus can explain in part a willingness to make an offset payment, but should not be confused for the reason offsetting is warranted in the first place. When consumption is not linked to negative externalities, there is nothing to be offset, regardless of whether the consumer enjoys a large surplus. On the flip side, consumers are not excused from an obligation to correct for consumption harms just because the consumer surplus is small for a particular purchase.

Social pressure to give to charity, the third offset motivator, operates indirectly to inspire offset payments. Social pressure in the context of consumption offsetting works because of our need to be viewed as contributing members of society and to avoid feelings of shame. The response of one Safeway shopper to a checkout-line-request highlights this pressure: "They ask you—in a loud voice, often, in front of a whole line of people—and if you don't give, you sound like a doofus."¹⁹⁸ After a big purchase or payment, inequality and good fortune is apparent to others; consequently, consumers may bow to pressure to make a donation. A small donation may be preferable to revealing indifference to a particular cause and larger donations can buy esteem. Fundraisers routinely employ social pressure to increase charitable giving, and public attention to levels of giving can increase giving.¹⁹⁹ Though caving to social pressure does not seem as worthy of celebration as pure altruism or even knowledge of production governance vacuums, the transformative potential of social

198. Laura Gunderson, *Safeway Fund-Raising: Need Change?*, OREGONLIVE.COM: COMPLAINT DESK (July 25, 2008, 11:14 AM), available at http://blog.oregonlive.com/complaintdesk/2008/07/safeway_fundraising_need_chang.html (quoting Benni Copelin, a Safeway shopper upset about embedded giving).

199. Warren Buffett and Bill and Melinda Gates, for example, created The Giving Pledge, <http://givingpledge.org>, a listing of billionaires who have promised to give away more than half of their wealth. The public nature of the pledges, complete with testimonials, calls attention to the good deeds of those making the pledge and arguably puts social pressure on those billionaires who are notably absent from the list. For more on The Giving Pledge, see Paul Sullivan, *Pledging Fortunes Takes Extra Effort in Shaky Recovery*, N.Y. TIMES, Aug. 13, 2010, available at <http://www.nytimes.com/2010/08/14/your-money/14wealth.html>.

pressure should not be denied.²⁰⁰ Guilt, coupled with knowledge of what others are doing, may be the most effective motivator.²⁰¹ What begins as a generalized consumer response to social pressure can morph into social expectations internalized by consumers.²⁰² Simply asking for charitable donations following consumption can help generate the norm of making such contributions.

Pressure to give following consumption might be particularly effective because it catches people with their wallet open. Depending on the goods purchased—if luxury goods are purchased compared to basic necessities—the pressure is also applied immediately following a public demonstration that the individual has disposable income that could go towards charitable causes, occurring at the moment of purchase. The practice of the indigent to proposition shoppers as they exit stores reflects the “vulnerability” or “susceptibility” of consumers to requests for charity immediately following a purchase. At the post-consumption moment, consumers may be receptive even to automated requests.²⁰³ Where the request is made for giving that corrects for consumption or production externalities, an

200. Social pressure can be felt indirectly. In a study of energy conservation, customers who “learned that the vast majority of their neighbors were conserving” ended up conserving more than they did “when they were told about environmental benefits or about personal cost savings.” Rhode & Ross, *supra* note 34, at 179. This can be explained in part by aversion to “extremeness”: people “prefer to behave as others behave and to believe as others believe.” Ela, *supra* note 6, at 105. Social pressure to conserve energy can even make people reduce the time they spend in the shower. See Sara Rimer, *How Green Is the College? Time the Showers*, N.Y. TIMES, May 26, 2008 at A1, available at <http://www.nytimes.com/2008/05/26/education/26green.html>.

201. See Stephanie Simon, *The Secret to Turning Consumers Green: It Isn't Financial Incentives. It Isn't More Information. It's Guilt.*, WALL ST. J., Oct. 18, 2010, available at <http://online.wsj.com/article/SB10001424052748704575304575296243891721972.html> (discussing environmental campaigns using information on the practices of others to inspire lifestyle changes).

202. Tipping is the classic case of individuals making payments that do not make sense according to narrowly defined self-interest. As anyone who has traveled knows, tipping expectations vary by location, but the question remains, why do people tip? When you go to your favorite local restaurant, tipping makes logical sense—your repeated interactions at the restaurant police your tipping, adequate tipping helps guarantee good food and good service in the future. When traveling to a place where you expect to return infrequently, if at all, these incentives to tip disappear, yet studies show people continue to tip. The travel-tipping phenomenon seems to reflect both social pressure felt even from strangers and the internalization of such pressures. For more on tipping and how tipping relates to offsetting, see Rosser, *Poverty Offsetting*, *supra* note 4, at 6–8.

203. The susceptibility to charitable requests, even ones made by a machine, following purchases is captured by the following commentary:

On my recent trip to the grocery store, I swiped my card and the *machine* asked me if I'd like to make a donation to People With Disabilities. It's a smart way for charities to solicit donations because people are already spending money, and adding an extra \$5 to the bill doesn't seem like much when you're already shelling out \$100.

Have You Made a Donation at the Grocery Store Checkout?, SAVVYSUGAR (Apr. 29, 2009, 4:30 AM), <http://www.savvysugar.com/Have-You-Made-Donation-Grocery-Store-Checkout-3090853> (emphasis added).

offsetting norm can emerge or be strengthened by such social pressure, even if at first the consumer experiences the pressure as discomfort.

The reasons why consumers make offset payments inform how offsetting institutions could be improved. As with any complex behavior, clean lines and perfect separation of these motivations—knowledge of market failures and governance vacuums, available consumer surplus, and social pressure—is probably impossible and not particularly useful. The central insight is the observation that just as some consumers are inspired to offset environmental harms, consumers often recognize, or should recognize, reasons to offset poverty-related social harms of consumption.

2. *Institutional Improvements*

Despite the good reasons for individuals to practice poverty offsetting and the options currently available for doing so—particularly the checkout-line-request—more is needed. For offsetting to play a meaningful role in having the privileged act upon obligations to the poor, ad hoc poverty offsetting must make way for a more comprehensive consumption offset scheme. An offsetting scheme signals to consumers both the possibility that they wrongly benefited from the poverty of others through their consumption—most notably individual producers not paid a living wage—and that they should offset the harms of their consumption. Such offsets would thus establish a floor, a minimum level of individual obligation based on personal spending habits, for alleviating global poverty and hardships. In this Part, I sketch out—in the hopes that this outline will generate discussion—answers to the central questions of any poverty offset scheme: what sort of consumption would be offset and how would the offset be accomplished?

Poverty offsetting should correct for situations where there is a causal relationship between an individual's consumption and poverty. In establishing what would be covered by an offsetting scheme, it is important to identify what would fall outside of the offsetting framework. Offsetting would be limited to payments of the amount needed to correct for production externalities and governance vacuums. Developing a culture of offsetting would involve significant norm changes among consumers who would have to become aware of, and voluntarily accept, additional responsibilities for the consequences of consumption.²⁰⁴ Given

204. Providing information about the connection between consumption and harm is an important first step in these norm changes. See Vandenberg & Steinemann, *supra* note 181, at 1709 (“Studies suggest that individuals respond to information not just about the harms arising from their specific

the nascent and ad hoc state of offsetting today, establishing a vision for the direction of institutional change is more important than defending a particular set of offsetting institutional rules.

Offsetting asks that consumers correct for known externalities and governance vacuums that result in the price of a good or service being falsely discounted. Production externalities and governance vacuums can leave individuals to live in poverty, a fact that forces consumers with a conscience to consider making voluntary corrective payments. Poverty-related production externalities and governance vacuum examples abound: (1) when a company pollutes an area, decimating the local economy and leaving workers without a way to earn a living;²⁰⁵ (2) when a company employing people of lower socioeconomic status routinely engages in wage theft;²⁰⁶ (3) when a country allows the creation of a class of workers and denies them basic securities and legal protections;²⁰⁷ (4) when a company's staunch anti-union practices block employee efforts to engage in collective bargaining;²⁰⁸ and (5) when producers, at home or abroad, fail to provide workers with humane working conditions or a living wage.²⁰⁹ The list goes on and on, with examples that are at once both particular and

activities but also about the harms arising from the aggregate activities of all individuals.”).

205. This example was suggested by the British Petroleum Deepwater Horizon oil spill in the Gulf of Mexico during summer 2010 and the effect the spill could and did have on local fisherman. *See generally* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT (2011), available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf.

206. *See, e.g.*, KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID – AND WHAT WE CAN DO ABOUT IT (2009); Julien Ross, *A Fair Day's Pay: The Problem of Unpaid Workers in Central Texas*, 10 TEX. HISP. J.L. & POL'Y 117, 119–22 (2004). For a recent multi-district case involving claims of wage theft against Wal-Mart that shows the challenges of holding companies accountable, see *In re Wal-Mart Wage & Hour Employment Practices Litigation*, 490 F. Supp. 2d 1091 (D. Nev. 2007), and subsequent history.

207. The literature on the problems of U.S. immigration policy is massive and beyond the scope of this Article, but President Obama's recent speech on immigration provides a useful overview of the issues. President Barack Obama, Remarks by the President on Comprehensive Immigration Reform (July 1, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform>.

208. Wal-Mart is particularly notable because of the company's importance in the economy and its success fighting union activity. *See* Nelson Lichtenstein, *How Wal-Mart Fights Unions*, 92 MINN. L. REV. 1462 (2008). Not surprisingly, Wal-Mart also indirectly harms unionization efforts in competitor stores as well. *See* Merritt Quisumbing, *Corporate Responsibility and Labor: Choosing Where to Buy Groceries: The High Price of Wal-Mart's "Always Low Prices. Always."*, 7 J.L. & SOC. CHALLENGES 111 (2005).

209. Donna Karen International, Inc., for example, was sued by sweatshop workers who “were paid below minimum wage and worked long hours under difficult conditions.” Orly Lobel, *Big-Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions*, 39 CONN. L. REV. 1685, 1689 (2007).

universal, as global capitalism pushes prices down.²¹⁰ Consumers with knowledge of these practices that deny people a life free of poverty have a choice. They can ignore the connection between their consumption and the poverty of others or they can choose to act.

But why make an offsetting payment? Why not put one's efforts into political solutions? Almost by definition, governance vacuums that relegate individuals to poverty could be fixed by politics. We could better police environmental catastrophes and require compensation to those harmed, enforce wage theft laws, recognize the contributions of immigrants through legalization of status, protect the rights of workers to unionize, and require goods sold in the U.S. be produced with fair working conditions and with minimum wages set at a living wage rate, not a poverty wage rate. That all of these things are possible through politics, however, does not address the individual's personal benefit from existing rules that keep prices low by consigning people to poverty. It is not either/or—either make an offset payment or seek political change. Rather, offsetting asks that consumers recognize the unjust enrichment aspect of their consumption made possible by governance vacuums and make an offsetting payment.²¹¹

Not all purchases require a poverty offset; goods produced and sold in ways that do not cause or perpetuate poverty would be outside of any poverty offset scheme. This standard for exclusion is demanding. So far, I have focused largely on production and producers, but consumers should also be concerned about the practices of middlemen who sell goods produced by others. Just because a consumer buys a shoe, for example, that is made in a factory with good working conditions and pay for employees does not mean the price that consumer pays is a fair one if the store that sells the shoes pays employees a pittance. The area of concern includes everything from suppliers of raw materials to producers to

210. Karbowski, *supra* note 50, at 734 (“Globalization has created new opportunities for human rights abuses to occur. . . . as the pressure to keep production prices low has impacted producers’ willingness to expend more resources by providing adequate protections for their workers.”); Roberts, *supra* note 3, at 10 (“[B]ecause consumers seek goods for lower prices, market competition incentivizes firms to deliver goods and services for lower prices to retain those customers. To reduce their costs, firms must either become less wasteful or shift those costs to others. When countries lack labor regulation or the means to enforce the regulation, firms may use their market power to lower wages, refuse to pay wages, pay discount wages to child laborers or extend working hours and requirements.”).

211. The relationship between individual consumers and regulation of large emitters provides a useful analogy. The possibility that major reductions in emissions could be accomplished through regulation of large emitters does not excuse individuals from their responsibility to reduce emissions, and vice versa. *Cf.* Dernbach, *supra* note 94, at 127–28. Similarly, political possibilities do not excuse consumers of their other individual consumption-based responsibilities.

commercial vendors. If offsetting was linked to individual products, an independently verified labeling scheme regarding production to final sale would help establish which purchases should be excluded from offsetting.

On the other hand, aggregating poverty offsetting based on average product harm and overall consumption level offers a practical way of facilitating offset payments. Building off of the environmental offsetting model of using flight distance or car type to calculate carbon emissions, using average harm tied to particular consumption levels will make it easier for consumers to make meaningful offsetting payments.²¹² As discussed in Part I, it is almost impossible for consumers to have full knowledge of production processes, but such ignorance on the individual product level need not block offsetting. A basket approach that takes into account where products are produced, the regulatory environment, and the treatment of workers could serve as a proxy for perfect information. Using an average harm of consumption measure, a baseline level of offsetting could be established that would be adjusted upward for individuals as consumption increased. Although the reasons for offsetting—to correct for harms associated with consumption—should not be lost, there is real value in making offsetting easier to accomplish and in not having the wheels of capitalism be ground to a halt by offset calculations. A well-designed offset scheme should build upon the transformative power of capitalism, strengthening capitalism's role as an important mechanism in the fight against poverty.²¹³ Simplifying offsetting from a product-by-product

212. An entrant in the 2009 International Council on Shopping Centers convention's Future Image Architecture Competition included consumption level offsetting as part of a mall design. Colman Architects' Retail Galleries concept features the "One World Desk" to facilitate customer donating "a percentage of their purchase price to charity." Allison Arieff, *Rethinking the Mall*, NYTIMES.COM: OPINIONATOR (June 1, 2009, 10:25 PM), <http://opinionator.blogs.nytimes.com/2009/06/01/rethinking-the-mall>.

213. The complex relationship between capitalism and global poverty was captured by Bill Gates, who began a *Time Magazine* contribution by noting, "Capitalism has improved the lives of billions of people—something that's easy to forget at a time of great economic uncertainty. But it has left out billions more." Bill Gates, *Making Capitalism More Creative*, TIME MAG., July 31, 2008, available at <http://www.time.com/time/business/article/0,8599,1828069,00.html>. Gates argues that private companies and private enterprise, by either reaching the market at the bottom of the class pyramid or through targeted government incentives, can solve many of the most pressing social problems. *Id.* For Gates, "[c]reative capitalism . . . is a way to answer a vital question: How can we most effectively spread the benefits of capitalism and the huge improvements in quality of life it can provide to people who have been left out?" *Id.* Gates' vision includes space for government and non-profits, but seeks to bring the dynamism and work of entrepreneurs to bear on the problems faced by those excluded from the system. *Id.* For a less qualified celebration of capitalism's role in reducing global poverty, see Jeffrey D. Sachs, *Twentieth-Century Political Economy: A Brief History of Global Capitalism*, 15 OXFORD REV. ECON. POL'Y 90 (1999) (strenuously arguing that a capitalist orientation helps countries develop and communism amounted to a costly detour for countries that went that direction).

approach to an average-based approach allows consumers to become accustomed to offsetting and improves offsetting's institutional efficiency.

The connection between purchase and the charitable solicitation following purchase shares the general ad hoc nature of poverty offsetting's current form. The charity often, but not always, relates in some way to the type of store; the money raised often, but not always, benefits people whose livelihood is connected to the products purchased; and the solicitation materials often, but not always, describe how the money raised will be spent. It is time for the establishment of an overarching poverty offsetting institution that collects a single annual offset payment and distributes funds systematically.²¹⁴ Such an institution would provide consumers assurance that funds collected were used to correct for consumptive harms.²¹⁵ Institutional scale would increase transparency and protect against both duplicative efforts and populations of disadvantaged workers being overlooked. Poverty-related harms do not enjoy the same fungibility as is found in the carbon context, yet establishing and operating an offset scheme tying every purchase to its particular related harms would be prohibitively expensive. The uniqueness of poverty harm provides further justification for a basket approach organized by an umbrella institution. As with any institution, there are dangers—that administrative expenses would be too high, that funds would not be used appropriately, that there will be mission drift—but such downside risks do not diminish the promise of establishing a poverty offsetting institution.²¹⁶

Local and global poverty imposes seemingly boundless, unworkable obligations on individuals with financial resources.²¹⁷ The idea behind

214. The flexibility and donor-funded nature of such an institution does not mean that there is no need for regulatory oversight protective of consumer expectations when paying for offsets. Just as the expansive growth and newness of peer-to-peer development finance organizations should be coupled with an appropriate regulatory framework, see Kevin E. Davis & Anna Gelpern, *Peer-to-Peer Financing for Development: Regulating the Intermediaries*, 42 N.Y.U. J. INT'L L. & POL. 1209 (2010) (providing regulatory recommendations for peer-to-peer institutions such as Kiva), so too an umbrella offset institution should be regulated.

215. Additionally, a single institution would make it easier for individuals to claim charitable tax deductions. See also THALER & SUNSTEIN, *supra* note 85, at 230 (proposing a "Charity Debit Card" to make accounting for charitable giving easier).

216. Following successful institutional development and norm adaptation to standard poverty offsetting, there might be space for a more robust version of offsetting that takes into account indirect impacts of consumption. Standard offsetting is qualitatively limited to the harm caused by market failures and governance vacuums in the production and sale process. Missing from such offsetting are the indirect harms that result from societal inequality, which individuals participate in through their consumption. For an argument that individual participation in such inequality is an economic crime, see Note, *A Look Inward: Blurring the Moral Line Between the Wealthy Professional and the Typical Criminal*, 119 HARV. L. REV. 2165 (2006).

217. The expansive argument of a recent *Harvard Law Review* Note—controversial for the idea

poverty offsetting suggests that at the very least we should attempt to correct for the poverty-causing or poverty-perpetuating aspects of our consumption. Though poverty offsetting behavior and the options available to consumers are both still in a nascent stage, work building on the emerging norm of donating to charity immediately following purchase holds the promise of connecting poverty alleviation to our consumption. Environmental offsetting deserves credit for exposing consumers to the ideas of externalities, consumption harm, and the possibility of making offsetting payments. Ironically, there is the danger that poverty offsetting could diminish environmental offsetting if consumers respond to an expansion in the scope of offsetting alternatives by choosing to offset poverty instead of environmental harms. But this need not be a case of competing social goods, for poverty and environmental offsetting can complement each other. Poverty offsetting asks that individuals recognize the poor as deserving the same acknowledgment of harm connected to consumption as is given the environment.

III. OFFSETTING AND STRUCTURAL CHANGE

Offsetting can be thought of as a consumption indulgence, a payment for the forgiveness of sin.²¹⁸ By its nature, such an analogy is suggestive of the criticisms and limitations of offsetting. This Part considers the downsides and objections to consumption offsets for environmental and poverty-related harms. Offsetting generates resources to offset or correct consumption-related harm. But the dangers exist that offsetting will be equated with innocence or that offset consumption indulgences will be sold on the cheap. More fundamentally, offsetting seems to amount to an embrace of consumerism that could amount to a sell-out of more radical ideas and the co-option of the socially responsible. I consider these objections but ultimately reject the notion that structural change must necessarily involve a tearing down of market exchange and a rejection of market mechanisms. Offsetting, I argue, can help awaken the social

that the wealthy have to give far more to help the poor, the factual errors it contained, and its highly derivative character—highlights the possibly boundless nature of poverty-related obligations. *See* Note, *Never Again Should a People Starve in a World of Plenty*, 121 HARV. L. REV. 1886 (2008). The Note drew heavily upon the work of Peter Singer, even using a nearly identical hypothetical tailored to the law student population. *See* Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229 (1972). For more on the controversy, see David Lat, *A Few More Tidbits About the Harvard Law Review Note Controversy*, ABOVE THE LAW (June 4, 2008, 4:28 PM), <http://abovethelaw.com/2008/06/a-few-more-tidbits-about-the-harvard-law-review-note-controversy> (collecting sources).

218. *See, e.g.*, Savasta-Kennedy, *supra* note 160, at 854 (“Offsets have been labeled by some as papal indulgences . . .”).

consciousness and develop norms that will lead to increased recognition of non-consumption-based obligations.

A. *Capturing Guilty Wallets*

Offsetting should not be equated with innocence. Consumption-associated harms do not cease to exist simply because an offset payment is made. A payment corrects for the initial harm related to consumption but does not prevent the infliction of harm. If I ignore my wife when she is talking to me, harm is inflicted even if I subsequently purchase flowers to make up for my insensitivity.²¹⁹ Similarly, while one could pay TerraPass to offset the environmental harms of driving a low-gas-mileage SUV around the suburbs, the owner of the car is still consuming excessive gasoline and pumping large amounts of CO₂ into the atmosphere. Offsetting schemes work by convincing people to voluntarily give money at the post-purchase moment when they might feel a particularly strong willingness-to-contribute. But just as my willingness to apologize to my wife does not mean the initial harm never occurred, it is inaccurate to equate offsetting with innocence.

Offsetting is a way to correct for externalities and consumption harms but should not be thought of as a license to consume. I should not be allowed to litter by throwing empty soda cans out of my car simply because I make it a point to pick up the same number of littered empty cans.²²⁰ This relatively simple observation, unfortunately, has been lost on a number of politicians and Hollywood celebrities who have tried to use offsetting to excuse exorbitant levels of consumption.²²¹ Popular attention

219. Cheatneutral.com makes this point in dramatic fashion. Cheatneutral.com, a parody website, pretends to sell an infidelity offset, offering cheaters the ability to offset their bad behavior by paying to support “monogamy-boosting offset projects,” such as loving couples and single people. *Offset Your Cheating*, CHEATNEUTRAL, http://www.cheatneutral.com/offset_your_cheating/ (last visited Aug. 26, 2011).

220. This example is a version of a littering example found in Ayres & Nalebuff, *Environmental Atonement*, *supra* note 172.

221. *Cf.* Note, *Uncommon Goods*, *supra* note 96, at 2086 (“One can achieve carbon neutrality despite living a life of excessive consumption; it does not matter if one is offsetting the minimal carbon produced by a hybrid car, or the substantial carbon produced by a private plane. In this way, the carbon market obscures the idea that the environmental ethic against wastefulness is not just about outcomes, but about an ethos—a type of character.”).

to the hypocritical aspects of calling for protection of the environment or the poor while living a life marked by a high level of consumption, attests to the limits of offsetting.²²² Some might write off public reactions against offsetting by the rich and famous, even for high levels of consumption, as merely reflecting the conceptual distance offsetting still needs to span until Americans accept and appreciate the practice. But popular rejections of the idea that, by paying for an offset, consumers can be forgiven for excessive harm-causing consumption highlight an important limitation on offsetting practices. Making an offsetting payment following consumption may be better than simply consuming without making a payment, but socially conscious consumers arguably ought to avoid consumption associated with harm as much as possible, regardless of the availability of offsetting options.²²³ Otherwise, offsetting would facilitate excessive consumption and wastefulness.²²⁴

222. Al Gore, John Travolta, and John Edwards stand out in this respect. The former Vice President “uses 20 times as much electricity and natural gas at his Tennessee house than the national average.” Gregg Easterbrook, *Al Gore’s Outsourcing Solution*, N.Y. TIMES, Mar. 9, 2007, at A23, available at <http://www.nytimes.com/2007/03/09/opinion/09easterbrook.html>. Easterbrook argues that Gore is not guilty of hypocrisy because he purchases offsets, but many other commentators disagree. Fox News, in particular, was not surprisingly particularly incensed, accusing Gore of “sanctimoniously tut-tutting about how the average American’s energy use is greedily off the charts” while simultaneously consuming far more energy and not actually purchasing his own carbon offsets, which are purchased for him by a company Gore co-founded. Steven Milloy, *Al Gore’s Inconvenient Electric Bill*, FOXNEWS (Mar. 12, 2007), <http://www.foxnews.com/story/0,2933,257958,00.html>.

Even when not directly discussing offsetting, reporting that highlights excessive consumption is suggestive of offsetting’s limitations. John Travolta’s “eco-hypocrisy” was chronicled, along with that of other celebrities, by London’s *The Sunday Times*:

John Travolta notoriously encouraged the British public to do its bit to fight global warming—after flying into London on one of his five, yes, five private jets (one of which is a Boeing 707). In 2006 his piloting hobby produced an estimated 800 tons of carbon emissions, more than a hundred times the output of the average Briton, according to the Carbon Trust.

Jonathan Foreman, *Taking the Private Jet to Copenhagen*, THE SUNDAY TIMES, Nov. 29, 2009, available at http://women.timesonline.co.uk/tol/life_and_style/women/celebrity/article6931572.ece. Similarly, a *New York Times* article on John Edwards that begins by discussing his efforts to rebuild New Orleans post-Katrina goes on to note Edwards’ opulent lifestyle:

Whenever you wrap yourself in the mantle of morality and conviction, however, even the smallest hypocrisy can leave an indelible stain. Edwards is, after all, a very wealthy man, given to some of the excesses that wealth allows. While Edwards was denouncing inequality across the land, he was also building, near Chapel Hill, the largest home in the county, a 28,000-square-foot mansion with its own indoor basketball and squash courts.

Matt Bai, *The Poverty Platform*, N.Y. TIMES, June 10, 2007, available at <http://www.nytimes.com/2007/06/10/magazine/10edwards-t.html?pagewanted=1>.

223. A Salon.com article notes that “the best way to fight emissions is to prevent them in the first place, not offset them after they’ve occurred.” Katharine Mieszkowski, *Paying Off Our Global Warming Sins*, SALON.COM (May 26, 2006, 8:10 PM), <http://www.salon.com/news/feature/2006/05/26/offsets>. The article, however, also quotes Robert Day, a TerraPass customer, who calls offset purchases a “small gesture” but goes on to explain that it is “certainly better to do this than to do

A related danger of offsetting is that the indulgence will be sold too cheap or make relief too easy. Competition within the offset industry, for example, could incentivize offset providers to offer offsets at a falsely low price. Ideally, competition will lead offset providers towards more efficient ways to correct for the harmful effects of consumption and such efficiency gains can be passed along to consumers in the form of lower prices. For example, if it costs less to capture agricultural methane than to plant trees, an offset to a company using the more efficient carbon capture technology should cost less. The risk, however, is that rather than being based on more efficient offsetting technologies or processes to correct for environmental or poverty-related harms, providers will compete on price alone. Consumers would be paying for what they thought was an offset but would be getting “offset light.”

Moreover, changes in the level of global economic activity can reduce the corrective impact of some forms of offsetting. The relationship between the current global recession and carbon emissions highlights the danger that offsets will be sold on the cheap or for services that do not have the desired effect. A consumer who bought an allowance for a ton of CO₂ pollution and retired the permit is not offsetting their pollution unless there is unmet industrial demand to pollute. If the cap underlying the CO₂ allowance is initially set too high—above demand—purchasing carbon allowances will not necessarily change the amount emitted.²²⁵ Similarly, when there is a global economic downturn, as we are in the midst of now, factories do not produce as much and they consequently do not pollute as much.²²⁶ The downturn therefore reduces demand for CO₂ allowances and may mean that the permit-based offset does not reduce global levels of pollution beyond what they would have been but for the offset payment. Conversely, a superheated level of global economic activity may make it

nothing.” *Id.* As these quotes suggest, the challenge when considering offsetting versus non-consumption is establishing the appropriate baseline.

224. See Nina Mazar & Chen-Bo Zhong, *Do Green Products Make Us Better People?*, 21 PSYCHOL. SCI. 494 (2010) (reporting on a study finding purchasers of green products subsequently are more likely to cheat and steal); Note, *Uncommon Goods*, *supra* note 96 (critiquing offsetting on this ground). *But see* Kotchen, *Offsetting Green Guilt*, *supra* note 162, at 31 (“[T]he existing evidence suggests that people do not indulge in carbon emissions as a result of purchasing offsets.”).

225. The market for tradable pollution rights “is a function of where the government has set the overall cap,” and a high cap will allow companies to easily continue production. Sinden, *supra* note 10, at 571.

226. Decreased pollution is not the end of the story; recessions can have a countervailing effect on environmental concern that may lead to political backtracking on environmental matters. See Matthew E. Kahn & Matthew J. Kotchen, *Environmental Concern and the Business Cycle: The Chilling Effect of Recession* (Nat’l Bureau of Econ. Research, Working Paper No. 16241, 2010), available at <http://www.nber.org/papers/w16241>.

harder to observe poverty-related consumption harms. Economic gains may allow offset providers to seemingly offset harms and to take credit for welfare gains that actually were caused by improvements in the general economic condition, not by the particular offset program.

Reducing the risk that offsets will allow consumers to purchase relief too easily or too cheaply requires reaffirmation that the roots of offsetting lie in morality and in voluntary payments. The focus of offset providers and of consumers who feel the need to correct for their consumption-related harms must be on actually accomplishing offsetting. Information on the programs of providers, coupled with independent auditing, can help consumers select among competing offset mechanisms.²²⁷ But to safeguard against the paired risks of falsely low offset prices and the acceptance of offsetting's equivalence to innocence, individuals perhaps should offset an amount *greater* than the definite harm connected to their consumption.²²⁸ Doing so would protect the offset's effectiveness against excessive diminishment because of changed levels of economic activity. More importantly, a norm of paying some amount above recognized harm would serve as a signal that offsetting should not be considered a consumption indulgence.

B. Acceptance of Consumerism and Structural Change

The most damaging criticism of offsetting is that it amounts to acceptance of consumerism and implicitly a reduced role for the state. People are more than just consumers; yet, offsetting locates an obligation to the environment and the poor only in this singular aspect of personality.²²⁹ Rather than advocating for global citizenship and the concomitant obligations that come when we recognize our shared responsibility for the Earth and for other humans, offsetting seems to embrace consumerism and consumer identity.²³⁰ Such an embrace not only

227. Independent audits reduce the possibility that “unscrupulous providers” will take advantage of the “asymmetric information” problem that besets offset schemes. Kotchen, *Offsetting Green Guilt*, *supra* note 162, at 30 (focusing on carbon markets).

228. See Ayres & Nalebuff, *Environmental Atonement*, *supra* note 172 (suggesting “a two-for-one norm is a good rule of thumb” for offsetting one’s own pollution).

229. See Sagoff, *supra* note 139, at 1394 (“[W]e are not simply a group of consumers, nor are we bent on satisfying only self-regarding preferences.”).

230. This embrace of a diminished form of citizenship was captured by a *New York Times* article on “boycotting”—the deliberate consumption of goods produced ethically or with an associated offset payment—that asked, “[I]s 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?” Anand Giridharadas, *Boycotts Minus the Pain*, N.Y. TIMES, Oct 10, 2009, available at

seems to excuse indifference to matters beyond consumption externalities, but also to accept a secondary role of the state in societal organization.²³¹ According to this skeptical view, offsetting is nothing but a sugar-coated version of capitalism; in the long run, the “compassionate consumption” of offsetting prevents more meaningful change from occurring.²³²

Consumption has become a unifying belief and shared experience of Americans. The rise of consumerism narrows identity, replacing who we are or what we do to the more limited matter of what we own.²³³ Offsetting proposals arguably amount to a form of selling out to consumerism, asking little more of people than that they correct for the direct harms of their consumption. By making even this stripped down level of responsibility into nothing more than another good to be purchased, offsetting proponents seem to be surrendering to consumerism.²³⁴ This criticism cannot be entirely refuted, but I think that rather than thinking of offsetting as selling out, it should be thought of as using the strengths of capitalism to correct for consumption harms. Rather than treating the role consumption plays in our lives dismissively, offsetting takes consumption seriously and attempts to improve upon current practices. Institutions that permit individuals to easily access a simplified payment system to correct for production and consumption externalities can work in part because they build upon existing market transaction mechanisms and are tied to particular purchases. Individuals making offset payments are both

<http://www.nytimes.com/2009/10/11/weekinreview/11giridharadas.html>. See also Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377, 380–86 (1998) (reviewing the literature on the consumer/citizen distinction).

231. See Dadush, *supra* note 75, at 1335.

232. This argument is similar to critiques that President George Bush’s “compassionate conservatism” was just disguised conservatism. See, e.g., Thomas W. Ross, *The Faith-Based Initiative: Anti-Poverty or Anti-Poor?*, 9 GEO. J. ON POVERTY L. & POL’Y 167 (2002). But see Michael Gerson, *Compassionate to the End*, WASH. POST, Jan. 30, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/29/AR2008012902212.html> (“President Bush . . . [did not] cast aside compassion and become the ‘same kind of Republican[.]’”).

233. Even if “replacing” is too strong a word, consumerism has become integral to our politics and is acknowledged even by those who highlight the positive aspects of this change. See LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 408 (2003) (“Increasingly over this century, the economic behavior of consumption has become entwined with the rights and obligations of citizenship.”). For a rich discussion of U.S. consumerist law framed as a comparison with Europe’s relatively more robust producerist orientation, see James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340, 354–64 (2007). See also Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 28–34 (1998) (highlighting the problems of a consumer orientation to city services).

234. See Kysar & Vandenbergh, *supra* note 2, at 10833 (“[D]oes green consumption serve as a gateway to more direct political activity or as a commodified palliative to ensure the continuation of business as usual?”); see also Eikenberry, *supra* note 71, at 54 (making the same point about consumption philanthropy generally).

consuming and, within the market framework, expressing their preferences in a way that can aspire towards collective voice.²³⁵ More importantly, while some people may conclude that their responsibilities to the environment or the poor extend no further than making offset payments, there is nothing about offsetting that supports such a conclusion.²³⁶ Offsetting rests on a responsibility floor—you should correct for harms associated with your consumption—but allows for recognition of heightened obligations tied to other criteria.²³⁷

The emerging norm of offsetting carbon consumption provides an opportunity to expand awareness of consumption harms and use that knowledge to convince people to act. Offsetting accordingly can be thought of as a pragmatic response to the problems of global warming and poverty. Pragmatism lacks the drama and ideological purity of unifying political theories espoused by Marxists or laissez-faire economists, but it offers the possibility to make progress on social problems that are being allowed to fester. The response—“What about the state?”—is not satisfying in a world without a *deus ex machina*.²³⁸ While state solutions are needed on local and global levels, individuals cannot take comfort in the theoretical possibility of state solutions when it comes to their own consumption-related harms.²³⁹ Beyond the individual level, offsetting provides an institutional mechanism for correcting for harm without asking all solutions come from politics or, more radically, the complete abandonment of capitalism.²⁴⁰ Offsetting reflects the common experience

235. See also Kysar, *Sustainable Development and Private Global Governance*, *supra* note 46, at 2160 (arguing that responsible consumption accepts the centrality of individual choice but not market liberalism’s separation of efficiency from other values).

236. *But see* Note, *Uncommon Goods*, *supra* note 96, at 2075 (arguing that offsetting’s focus on efficient consumption could displace environmental virtues).

237. Vandenbergh and Steinemann, for example, argue that environmental offsetting “squares well with the abstract personal-responsibility norm: it enables individuals to be confident that regardless of others’ behavior, they are not contributing to the harm.” Vandenbergh & Steinemann, *supra* note 181, at 1720. But they also note the possibility of a “carbon negative” norm in developed countries “to account for the needs of the developing world.” *Id.* (emphasis in original).

238. Or as stated differently, market opponents often rely upon what William Easterly calls “Immaculate Government Intervention.” William Easterly, *A High-Five for the Invisible Hand*, N.Y. TIMES, June 11, 2010, available at <http://www.nytimes.com/2010/06/13/books/review/Easterly-t.html>.

239. One theoretical approach to consumption-related harm, not being advocated here, mixes the state and consumers by creating a legal mechanism for individuals to enter into self-restriction contracts with the state. Individuals would pre-commit to limit consumption or make offsetting payments and these voluntary commitments would be enforced by the state. For more on state enforcement of self-restriction contracts, see Cecil VanDevender, Note, *How Self-Restriction Laws Can Influence Societal Norms and Address Problems of Bounded Rationality*, 96 GEO. L.J. 1775 (2008).

240. Norms, including offsetting norms, may allow for progress to be made where “transaction costs or political realities render other regulatory techniques . . . ineffective or politically unpalatable.”

that when one is driving towards a goal, sometimes it is best to find the gap in the traffic.²⁴¹

A related critique of offsetting is that the phenomenon will delay popular enlightenment to the disastrous consequences of capitalism, the dominant global meta-structure. According to this view, offset payments delay or prevent recognition of the harms associated with our culture of consumption.²⁴² More radical theorists may hope for a collapse or implosion of the larger structure; offset-type tinkering may smooth out capitalism's rough edges and so block revolutionary change.²⁴³ The trouble with this argument is that it does not admit the possibility of alternative paths of change other than through crisis. By drawing attention to the harms associated with consumption and how prices are currently below what they would be if producers had to internalize these externalities, offsetting forces consumers to reconsider their place in the market.²⁴⁴ Offsetting can therefore be a small step in awakening the social

Ela, *supra* note 6, at 95.

241. This point extends from consumerism to the choice to use the terms and framework provided for by the current "cultural exaltation of the market." Kysar, *Sustainable Development and Private Global Governance*, *supra* note 46, at 2116. It is my belief that by using a market-centered form of argument in this paper, there might be more traction to the offsetting idea than there would be using more critical forms of argument. This paper's market-based framework hopefully will broaden and engage a wider audience. As Henry Smith observes, "One can talk like a utilitarian without being one." Henry E. Smith, Response, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 974 (2009) (highlighting the advantages of adopting law and economics' simplifying style and theory).

242. Although written about the broader category, this structural critique against both consumption philanthropy and offsetting amounts to a claim that "in its subordination of benevolence to the market, marketized philanthropy stabilizes the very system that results in poverty, disease, and environmental destruction." Nickel & Eikenberry, *supra* note 45, at 975. The article continues, "Philanthropy reflected in, distributed by, and used in the service of capitalism can only be the voice of capitalism and the complete destruction of imagination of alternatives." *Id.* at 986.

243. Although narrowly focused on the (RED) campaign's integrated offsetting, a critique labeled "A Capitalist Manifesto" highlights the direction of this objection to offsetting: "In a striking diversion from Marx's well-known manifesto, the (RED) Manifesto is not a call to collectively rise up against the oppressive forces of capitalism, but rather a call to collectively rise up and support behemoths of capitalist production." Anderson, *supra* note 80, at 40. See also Dadush, *supra* note 75, at 1290 ("Red expands choices and preserves Western consumption and lifestyle habits, while simultaneously creating the possibility of alleviating suffering in a different part of the world.").

244. For many people, re-examination of consumption as a moral activity will bring non-economic values to bear on consumption choices. Even though "[l]aw's most influential model of the consumer takes the form of a rational economic actor," the model is incomplete. Kysar & Vandenbergh, *supra* note 2, at 10829. As Michael Blumm asks, "How many of us know only rational, wealth-maximizing, rent-seeking individuals; know no individuals whose moral compass includes non-economic values?" Blumm, *supra* note 131, at 372-73. See also Kysar, *Preferences for Processes*, *supra* note 7, at 617 ("[C]onsumption often is an intensely personal activity with significant moral consequences.").

consciousness of individuals, as consumers and as global citizens.²⁴⁵ The false imperative of radical change as the only path towards structural change must be rejected.²⁴⁶ Though theorists often critique smaller projects such as offsetting as not going far enough, once the possibility of incremental change is acknowledged, such critiques ring hollow.

Offsetting does risk co-opting the socially responsible. By offering a way for individuals to act upon their inclination for social or environmental responsibility, effort that would have gone towards other activities may be channeled into offsetting.²⁴⁷ Such channeling is not necessarily a bad thing unless it also tempers people's broader commitments to social responsibility. Offsetting is relatively easy—you do not have to engage in public protest, volunteer your time, or even be politically active—and such ease may make offsetting *too* attractive.²⁴⁸ The hedge against co-option is to continually highlight the limited ambition—to provide a mechanism to voluntarily correct for consumption-related harms—of offsetting.²⁴⁹ Consumers are benefiting from a pricing scheme that, because of externalities and governance vacuums, does not reflect the true environmental and social costs of production. Consumers desiring not to be “complicit with practices that they regard as immoral”²⁵⁰ or destructive are given a viable option to diminish their degree of complicity through offsetting. But there remains plenty of space and need for those who see themselves as socially responsible to do more. Offsetting provides opportunities to correct for consumption-based harms but does not foreclose recognition of non-consumption-based obligations.

245. Mechanisms allowing for consumption of social responsibility may be uniquely able to reach more people than pure politics can. Eric Arnould, for example, argues, “[S]uccessful, progressive practices of citizenship ‘should’ take place through market-mediated forms in our culture because these are the templates for action and understanding available to most people.” Eric J. Arnould, *Should Consumer Citizens Escape the Market?*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 96, 105 (2007).

246. See UNGER, *supra* note 18, at 19–20, 74–76.

247. See Savasta-Kennedy, *supra* note 160, at 854 (noting that carbon offsetting “may siphon off dollars and political will” from emission reduction efforts).

248. See also Dadush, *supra* note 75, at 132 (making the same point about cause related marketing and the (RED) campaign).

249. An environmental offsetting article argues that because offsetting is voluntary, offset schemes “bypass[] the need to engage in the theoretical debates about whether individuals *should* be morally responsible for their emissions.” Brooke Ackerly & Michael P. Vandenberg, *Climate Change Justice: The Challenge for Global Governance*, 20 GEO. INT’L ENVTL. L. REV. 553, 568 (2008) (emphasis in original). But the moral obligation to correct for consumption harms, although tempered by offsetting’s voluntary nature, is implicit in that article and explicit here.

250. Kysar, *Preferences for Processes*, *supra* note 7, at 616.

CONCLUSION

Only a subset of American consumers will consider making offset payments. For a sizeable percentage of the poor and working class, rising inequality has made it hard for families to access the American dream, much less make voluntary charitable donations to offset their consumption.²⁵¹ Even among the social classes for whom offsetting is an option, belief in market pricing and indifference to production processes will block many individuals from seriously considering offsetting their consumption. But, as environmental offsetting demonstrates, there is an emerging awareness that consumption can be associated with harms that are not priced into products and services. Our understanding of consumption and social responsibility is improved when we expand offsetting's scope to include non-environmental social harms, particularly those driven by the relationship between production, consumption, and poverty.²⁵²

Although still in a nascent stage, offsetting practices and opportunities can be found for a range of products and with time are likely to be further institutionalized. Offsetting's current ad hoc nature invites entrepreneurs, policy makers, and global citizens to imagine institutions and norms that build upon the emerging offsetting practices of consumers.²⁵³ As consumption offsetting visibility increases, there is the possibility of change occurring rapidly through a cascading or bandwagon effect on the

251. The post-WWII period can be divided roughly in half. The first half, lasting until 1973, witnessed broad-based wage gains and rising productivity; in contrast, the second half has been marked by stagnant wages for the many classes of lower educated workers. Frank Levy & Thomas Kochan, *Addressing the Problem of Stagnant Wages* 1-4 (Emp't Pol'y Research Network, Working Paper, 2011), available at http://www.employmentpolicy.org/files/field-content-file/pdf/Mike%20Lillich/EPRN%20WagesMay%2020%20-%20FL%20Edits_0.pdf; ECONOMIC POLICY INSTITUTE, STATE OF WORKING AMERICA *Income Inequality Feature* (2011), available at <http://www.stateofworkingamerica.org/articles/view/7>. See also ISABEL V. SAWHILL & JOHN E. MORTON, ECONOMIC MOBILITY: IS THE AMERICAN DREAM ALIVE AND WELL? 13 (2007), available at http://www.economic-mobility.org/assets/pdfs/PEW_EMP_AMERICAN_DREAM.pdf ("While belief in this American Dream remains a unifying tie for an increasingly diverse populace, it is showing signs of wear, with both public perceptions and concrete data suggesting that the nation is a less mobile society than once believed.").

252. For more on this possibility, see Rosser, *Poverty Offsetting*, *supra* note 4.

253. Numerous scholars have highlighted the role "norm entrepreneurs" can play in bringing about societal change. See, e.g., Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929-30 (1996) (coining the term); Babcock, *supra* note 156, at 143-55; Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 10-17 (2001). For more on law and social norms, see Geoffrey P. Miller, *Norms and Interests*, 32 HOFSTRA L. REV. 637, 637 n.1 (2003) (collecting sources). Borrowing from Douglas Kysar, norm entrepreneurs can use offsetting to open up "pockets of progressive activity... within the 'ascendant market ideology' itself." Kysar, *Sustainable Development and Private Global Governance*, *supra* note 46, at 2149.

practices and norms surrounding consumption.²⁵⁴ Improving the institutions of offsetting will strengthen the freedom- and welfare-enhancing aspects of market transactions. While there is no single solution to global environmental- and poverty-related problems, consumption offsetting by individuals can, and should, be an important part of a multi-pronged approach.

254. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 686 n.4 (1999) (collecting sources on the bandwagon effect); see also Ackerly & Vandenberg, *supra* note 249, at 571 (“Equity offsets . . . [can help] lay[] the ground work for global public governance solutions.”).