THE LAW OF IDENTITY HARM

SARAH DADUSH*

ABSTRACT

Identity harm refers to the anguish experienced by consumers who learn that their efforts to consume in line with their personal values have been undermined by a company's false or exaggerated promises about its wares. When broken, other-regarding "virtuous promises" about products (e.g., eco-friendly, responsible, fair-trade, cruelty free, conflict free) give rise to identity harm by making consumers unwittingly complicit in hurting others. A leading example is the Volkswagen emissions scandal: when environmentally-conscious purchasers of Volkswagen's "clean diesel" cars learned that the vehicles were in fact hyper-polluting, they experienced identity harm because of their complicity in a scheme that hurt the planet and the health of their communities.

As more people become sensitized to environmental and social (labor and human rights) sustainability challenges, they are also becoming increasingly concerned about their role in aggravating these challenges through their individual consumption. Identity harm surfaces against the backdrop of an under-regulated market for virtuous goods that is expanding to meet the demands of conscious consumers. Troublingly, those who experience identity harm currently have little recourse in private law, which reveals a serious deficit in our legal regime. This Article, one in a series, recommends correcting this protective deficit by operationalizing identity harm under tort, contract, and state consumer law, with a particular focus on the latter.

* Sarah Dadush, Associate Professor of Law, Rutgers Law School. I am deeply grateful to Deepa Badrinarayana, Omri Ben Shahar, Kevin Davis, Mihailis Diamantis, Steve Gold, Marco Jimenez, Robin Kar, Donald Kochan, Chris Odinet, Dee Pridgen, Peggy Radin, Louis Raveson, Jodi Short, Andrew Verstein, Lauren Willis, Joseph Yockey, and the participants of the KCON XIII conference (2018), the Iowa College of Law Faculty Seminar Presentation (2018), and the Chapman Junior Faculty Works in Progress Conference (2018), for their invaluable insights on this project. Thanks also to Jessica Lomia, Timothy Machat, and Tara Richelo for their outstanding research assistance.

TABLE OF CONTENTS

INTRODUCTION

What happens when a consumer is sold halal meat that is not halal? Or when someone buys a "clean diesel" car that is actually hyper-polluting? Or a bar of chocolate that, unbeknownst to the consumer, was made using forced child labor? Does this give rise to any legally cognizable harm? Does the law provide any relief? This Article provides a name for the harm suffered in these kinds of cases, identity harm, and outlines legal mechanisms for addressing it.

Identity harm is the anguish experienced by a consumer who learns that her efforts to consume in line with her personal values have been undermined by a company's exaggerated or false promises about its wares. More specifically, identity harm arises when a consumer discovers that a company failed to honor the "virtuous promises" it had made concerning its wares (e.g., green, eco-friendly, fair-trade, cruelty free, conflict free, Made In America, and Kosher). Virtuous promises are currently under-policed by government regulators and, as a result, consumers are often over-exposed to "virtuous duperies" that can make them act contrary to their own values. Furthermore, consumers who try to bring legal claims against promise-breaking companies are ill-equipped to do so, revealing serious shortcomings in private law, whether under tort, contract, or state consumer

law. This Article, one in a series, seeks to address these shortcomings by operationalizing identity harm as a new consumer protection tool.[1]

I describe virtuous promises as those that are designed to resonate with consumers' moral values, their standards for what constitutes acceptable or unacceptable behavior in the world. Because they possess a moral quality, virtuous promises are sensitive in a way that more technical promises—e.g., price, ingredients, and performance—are not. A particularly sensitive category of virtuous promises are those that are *other-regarding*, meaning that they contain an altruistic element or have implications for the well-being of others, besides the consumer. For example, virtuous promises about a product's social sustainability (labor and human rights) are other-regarding in that they have implications for the well-being of the people involved in the production process.

The other-regarding quality of some types of virtuous promises makes them particularly sensitive for a few reasons. First, as should be immediately apparent, the sense of personal responsibility involved with questions such as "Who do I want to be vis-à-vis other humans and the planet?" is an order of magnitude more profound than that involved with questions like "What image of myself do I want to project today?" or "Do I feel like savory or sweet?" or even "What brand of butter is best, given my cholesterol problems?" Second, when an other-regarding virtuous promise is broken, there is a real possibility that someone else, besides the consumer, suffers. For example, as a result of Volkswagen's (VW) deception concerning its "clean diesels" that were actually illegally dirty, car owners were harmed, but so was the planet and the health of the communities where the cars were being driven. Third, the psychic effects of a broken other-regarding virtuous promise can be quite severe, especially for "conscious consumers" who actively seek out sustainable products.[2] It is this combined distress that identity harm seeks to capture and address.

Today, a growing number of people are making big and small purchases that do some good or, more accurately, less harm in the world.[3] Consumers

1. Sarah Dadush, *Why You Should Be Unsettled by the Biggest Automotive Settlement in History*, 89 U. COLO. L. REV. F. 1 (2018) [hereinafter Dadush, *Why You Should Be Unsettled*]; Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863 (2018) [hereinafter Dadush, *Identity Harm*].

2. Many terms exist to describe this type of consumption, including "conscientious," "ethical," and "responsible"; for consistency, I adopt "conscious consumption."

3. Complaint at 34, Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075 (N.D. Cal. 2017) (No. 15-cv-03783) [hereinafter Sud Complaint] (quoting KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE, at i (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf [https://perma.cc/Q2QW-5U5C]) ("In recent years, California consumers have demanded that producers provide greater transparency about goods brought to market. Consumers utilize this additional information to drive their purchasing decisions, and

increasingly consider the effects of their purchases on the health of the planet and the well-being of the humans who participate in (or are otherwise affected by) the production process. And the market is responding. More and more goods, from coffee to cleaning products to cosmetics to cars, are being promoted as "better for the world" through direct advertising and labeling, but also less directly, for example on company websites, in annual corporate social responsibility (CSR) reports, supplier agreements, and industry codes of conduct.[4]

In theory, having access to more sustainability information should help consumers make better choices based on a product's mix of price, functionality, and virtuous attributes. In practice, however, the quantity and quality of information that consumers are exposed to is often inadequate or

various indicators suggest that Californians are not alone. A recent survey of western consumers revealed that people would be willing to pay extra for products they could identify as being made under good working conditions."); *see also* WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., SUSTAINABLE CONSUMPTION FACTS AND TRENDS FROM A BUSINESS PERSPECTIVE 6 (2008), http://www.saiplatform.org/uploads/Modules/Library/WBCSD_Sustainable_Consumption_web.pdf [https://perma.cc/R8VL-WEA6] ("Consumers are increasingly concerned about environmental, social and economic issues, and increasingly willing to act on those concerns."); FISHWISE, TRAFFICKED II: AN UPDATED SUMMARY OF HUMAN RIGHTS ABUSES IN THE SEAFOOD INDUSTRY 6 (2014), https://www.oceanfdn.org/sites/default/files/Trafficked_II_FishWise_2014%20%281%29.compressed.pdf [https://perma.cc/S82Z-HWQ7] (revealing that 88% of consumers would stop buying a product if it was associated with human rights abuses and 70% of consumers would pay a premium for a product certified to be free of human rights abuses); *Doing Well by Doing Good*, NIELSEN (June 17, 2014), http://www.nielsen.com/us/en/insights/reports/2014/doing-well-by-doing-good.html [https://perma.cc/QU67-RC2E] ("More than half (55%) of global respondents in Nielsen's corporate social responsibility survey say they are willing to pay extra for products and services from companies that are committed to positive social and environmental impact—an increase from 50 percent in 2012 and 45 percent in 2011.").

4. *See* Sud Complaint, *supra* note 3; *Doing Well by Doing Good*, *supra* note 3; FISHWISE, *supra* note 3; WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., *supra* note 3; Lucy Atkinson, *The Wild West of Eco-Labels: Sustainability Claims Are Confusing Consumers*, GUARDIAN, (July 4, 2014), https://www.theguardian.com/sustainable-business/eco-labels-sustainability-trust-corporate-government [https://perma.cc/S7CZ-7QDZ] ("Today's consumer is faced with an estimated 455 eco-labels across 25 industry categories, from energy and clothing to food and household cleaners. But very few of these labels give people meaningful guidance in choosing environmentally superior products."); Klaus G. Grunert et al., *Sustainability Labels on Food Products: Consumer Motivation, Understanding and Use*, 44 FOOD POL'Y 177, 177 (2014) ("While the growth in labels and accompanying communication initiatives may be interpreted as a sign of success . . . label overload and gaps in the understanding of both the general concept of sustainability and of specific sustainability labels may result in consumer confusion and limit the use of such labels."); Marcy Nicks Moody, Note, *Warning: May Cause Warming: Potential Trade Challenges to Private Environmental Labels*, 65 VAND. L. REV. 1401, 1402 (2012) ("Many of these products bear labels that are administered by private standards and certification systems, such as MSC-certified seafood, UTZ-certified tea, Fairtrade coffee, or Rainforest Alliance chocolate. Demand has prompted firms, nongovernmental organizations ('NGOs'), and private foundations to invest hundreds of millions of dollars to support the creation and implementation of such systems."); David Vogel, *The Private Regulation of Global Corporate Conduct*, 49 BUS. & SOC'Y 68, 77 (2010) [hereinafter Vogel, *Private Regulation of Corporate Conduct*] ("[T]he proliferation of industry codes of conduct and 'ethical' or 'green' labels has added to the confusion of those consumers who want to consume 'responsibly.'").

overwhelming (or both), which leads to consumer confusion.[5] With more companies entering what David Vogel calls the "market for virtue,"[6] it is becoming increasingly difficult to compare virtuous promises across products and to tell apart truly sustainable products from those that only claim to be. This state of affairs creates too much room for virtuous duperies that exploit consumers' expectations and give rise to identity harm.

Although different kinds of broken virtuous promises can elicit identity harm, this Article focuses on promises pertaining to sustainability for two reasons. First, by definition, sustainability-related virtuous promises are other-regarding as they pertain to the planet and the people involved in a good's production; as such, if they are broken, these promises implicate the consumer in causing injury to others. This dynamic produces some of the more egregious instances of identity harm. Second, with respect to sustainability, transnational corporations (TNCs) operate within something akin to a regulatory vacuum, a reality that undermines the protection of labor and human rights globally and threatens the survival of our planet.[7] Here, consumers have significant—if untapped—authority as "civil regulators" who can vote with their dollars to express support for, or objection to, certain types of corporate conduct and so wield their purchasing power to influence TNCs' sustainability performance.[8] Of course, consumers are not the only protagonists acting on the sustainability stage, nor should they be. Nevertheless, conceiving of consumers as (co)regulators and better outfitting them to serve this function is important for achieving sustainability objectives. Operationalizing identity harm would equip consumers to serve more effectively as civil regulators and supply them with the means for safeguarding their own personal values. Put differently, identity harm can be a tool for acting locally—geographically, but also at an individual level—in order to effect change globally.

---

5. Atkinson, *supra* note 4; Grunert et al., *supra* note 4, at 177; Vogel, *Private Regulation of Corporate Conduct*, *supra* note 4, at 77.

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

7. *See* discussion *infra*, note 56.

8. VOGEL, MARKET FOR VIRTUE, *supra* note 6, at 9 ("Civil regulation [is] an effort to fill the governance gap between the law and the market. . . . [It] constitutes a 'soft' form of regulation in that it does not impose legally enforceable standards for corporate conduct. By applying pressure directly to companies, activists and organizations seek to foster changes in business practices that national governments and international law are unlikely or unwilling to bring about."); Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 607–08 (2004) [hereinafter Kysar, *Preferences for Processes*] (referring to the "utility that consumers might derive from participating in a marketplace that affords the opportunity to 'vote' through private consumption on important matters of public policy.").

In an earlier article, I discussed several cases dealing with broken sustainability-related promises that perfectly described identity harm, even if the actual term was not used.[9] The leading case is the VW emissions scandal known as "Dieselgate" where the automaker's line of aggressively advertised clean diesel vehicles turned out to be anything but environmentally friendly, emitting up to forty times the legal limit of polluting nitrogen oxides.[10] The complaints filed in the multi-district litigation repeatedly reference the distress experienced by car owners who learned that their vehicles were in fact hyper-polluting.[11] I explained that, had the cars not been *illegal* as a result of being equipped with software designed to cheat emissions testing equipment in violation of the Clean Air Act and because they produced emissions in excess of national standards, the identity harm experienced by the Dieselgate victims, no matter how profound, would not have been adequately addressed.[12] This troubling conclusion can be explained as follows: First, the revelation of the cars' illegality effectively drove their market value down to zero dollars, resulting in a huge economic loss for car owners and, consequently, the largest settlement in automotive history.[13] Absent the illegality, however, the drop in the cars' market value would likely have been far less dramatic, which would have substantially reduced the amount of compensation awarded to Dieselgate victims.[14] In this alternate reality, those who had selected the car for its environmental friendliness and for whom the prospect of driving a dirty car—even a *legally* dirty car—is morally abhorrent would have been under-compensated. Second, absent illegality, the Environmental Protection Agency (EPA) would not have become involved in the litigation and would not have required VW to place billions of dollars into a climate fund to offset the excess emissions produced by Dieselgate.[15] Yet reparatory

9. Dadush, *Identity Harm*, *supra* note 1, at 888–915.

10. Guilbert Gates et al., *How Volkswagen's 'Defeat Devices' Worked*, N.Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html?mcubz=0&_r=0; *VW Scandal: Company Warned over Test Cheating Years Ago*, BBC (Sept. 27, 2015), http://www.bbc.com/news/business-34373637 [https://perma.cc/2NLB-NKWD].

11. Nemet v. Volkswagen Grp. of Am., No. 3:17-cv-04372 (N.D. Cal. Aug. 2, 2017); Class Action Complaint at 2, Nemet v. Volkswagen Grp. of Am., Inc., No. 3:17-cv-04372 (N.D. Cal. Aug. 2, 2017) [hereinafter Nemet Complaint] (representing the "tens of thousands" of dirty-diesel owners who, because they sold their cars *before* VW's deception was exposed, received nothing from the settlement).

12. Dadush, *Identity Harm*, *supra* note 1, at 919–25.

13. Jacob Bogage, *Volkswagen Agrees to Pay Consumers Biggest Auto Settlement in History*, WASH. POST (June 27, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/06/27/volkswagen-agrees-to-pay-consumers-biggest-auto-settlement-in-history/.

14. With no environmental illegality, the cars' market value would likely have diminished only by the amount of the clean premium, meaning the dollar difference between a conventional and a clean diesel car. *See* discussion *infra* Part V.

15. Bogage, *supra* note 13.

remedies are key for addressing the grievances of identity-harmed consumers as they redress the injuries (to planet or people) enabled by an unvirtuous-in-fact purchase. Otherwise put, reparatory remedies are necessary for undoing a consumer's unwitting participation in an abusive scheme. Without them, it becomes very difficult to restore a consumer's values-integrity, which is crucial for addressing identity harm.

Other recent identity harm cases concern labor abuses in global supply chains. These cases protested the use of forced child labor in the chocolate supply chain and of adult slaves in the frozen seafood and pet food supply chains.[16] In class actions brought against each of Mars,[17] Nestlé,[18] and Hershey[19] (collectively, the *Chocolate Cases*), the plaintiffs brought claims under state consumer laws arguing that they would not have bought the chocolate had they known it was made with forced child labor because they did not want to support abusive practices.[20] In *Sud v. Costco Wholesale Corp.*, the wholesaler was sued for inducing consumers to buy its frozen prawns when it knew its supply chain was contaminated by "slavery, human trafficking and other illegal labor abuses."[21] So far, none of these cases have been successful.

Importantly, in *Sud* and in the *Chocolate Cases*, the companies had made various public statements, including in their CSR reports, supplier codes of conduct, and disclosures on their website affirming firm-wide commitment to eradicating labor and human rights abuses in their supply chains.[22] I argue that although such statements are not displayed directly on product packaging, they nevertheless generate loud "sustainability noise" that lulls consumers into a false sense of comfort that they are buying sustainably, even if the reality is vastly different.[23] Moreover, companies strategically surround-sound themselves in sustainability noise to attract and retain

16. *See, e.g.*, Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075 (N.D. Cal. 2017); Dana v. Hershey Co., 180 F. Supp. 3d 652 (N.D. Cal. 2016); Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016 (N.D. Cal. 2016); McCoy v. Nestlé USA, Inc., 173 F. Supp. 3d 954 (N.D. Cal. 2016); Wirth v. Mars Inc., No. SA CV 15-1470-DOC (KESx), 2016 WL 471234 (C.D. Cal. Feb. 5, 2016).

17. *Hodsdon*, 162 F. Supp. 3d at 1016.

18. *McCoy*, 173 F. Supp. 3d at 954.

19. *Dana*, 180 F. Supp. 3d at 652.

20. *See, e.g.*, Complaint for Violation of California Consumer Protection Laws at 1, *Dana*, 180 F. Supp. 3d at 652 (No. 3:15-cv-04453) ("[W]hen . . . food companies fail to disclose the use of child and slave labor in their supply chains to consumers, they are deceived into buying products they would not have otherwise and thereby unwittingly supporting child and slave labor themselves through their product purchases.").

21. Sud Complaint, *supra* note 3, at 1–2.

22. *Id.* at 4–5; *Dana*, 180 F. Supp. 3d at 655; *Hodsdon*, 162 F. Supp. 3d at 1020; *McCoy*, 173 F. Supp. 3d at 956–57.

23. Dadush, *Identity Harm*, *supra* note 1, at 900–08.

customers, but also to shield themselves from liability. And so far, this strategy has been successful: the *Sud* and *Chocolate Cases* plaintiffs all failed because they could not establish that the companies had a duty to disclose that their products are sourced through tainted supply chains.[24] These cases offer a few examples of how identity harm is inadequately recognized and addressed by the courts. That these claims are being litigated demonstrates that identity harm is real, that consumers care about the social and environmental effects of their purchases, and that they want TNCs to improve their sustainability performance. Yet consumers are failing because of under-protective interpretations and applications of tort, contract, and state consumer law. Identity harm can help equip consumers to wage these legal battles more effectively.

This Article develops identity harm as a legal tool for enhancing the protection of consumers' other-regarding expectations and improving the sustainability performance of TNCs. Part I explains the rise of virtuous expectations against the backdrop of an ever-more intertwined relationship between consumption and citizenship. It argues for a fuller recognition of consumers as co-regulators of corporations' sustainability performance and advocates for erring on the side of over-protecting consumers' virtuous expectations. Part II isolates the "psychic safety defect" of identity-harming products and proposes situating identity harm among other intangible harms recognized in tort, specifically by treating it as a modern-day equivalent of defamation. Part III explains how contract law, the "law of broken promises," can and should be adapted to enforce broken *virtuous* promises, specifically by making actionable the social and environmental claims that are shrouded in sustainability noise. Part IV proposes operationalizing identity harm through upgraded interpretation and application of state consumer law statutes. It focuses on California as the identity harm "laboratory state" because that state has yielded the most significant identity harm cases to date. Lastly, Part V explains why money damages are inadequate for making identity-harmed consumers whole and offers examples of reparatory remedies that would be far more effective for undoing the harm-in-the-world caused by virtuous dupery and for restoring consumers' values-integrity.

24. Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075, 1087, 1090 (N.D. Cal. 2017) (concluding that, because there was no safety risk to consumers, Costco had no duty to disclose omitted information on its packaging, and therefore, that plaintiff failed to state a claim); *Dana*, 180 F. Supp. 3d at 668–69 (holding that an omission of material facts does not violate California's False Advertising Law unless the company has exclusive control over the information); *Hodsdon*, 162 F. Supp. 3d at 1027 ("Such information is, in fact, readily available to consumers on Mars's website."); *McCoy*, 173 F. Supp. 3d at 968 ("declin[ing] to make [the] leap" to establish that failure to disclose bad labor practices on a label is "unfair").

I. WHY IDENTITY HARM MATTERS

This Part situates identity harm as a byproduct of the ever-more intertwined relationship between consumption and citizenship. It explains how consumption is, perhaps today more than ever, a central vehicle for the expression of civic, political, and personal values. In a political climate that is more protective of business interests than consumer interests and in which anti-regulation sentiments run high, it is becoming urgent to equip consumers with better tools for protecting their own interests, especially when those interests are bound up in the well-being of others. This Part responds to some of the challenges levelled against identity harm while explaining why this new concept offers a promising avenue for moving forward.

A. Consumer Identity(ies)

For some, identity harm is a problematic term. At the outset, though it may sound like identity theft, identity harm bears no relation to that concept. Identity harm refers to a deeper notion of identity than the data-based identity theft, which is focused on a person's private identifying information, such as social security numbers, bank account information, credit card numbers, and contacts information. By contrast, the type of identity involved with identity harm relates to our sense of ourselves as beings who interact in the world, with other humans and other species, often across great distances and only indirectly, in near-total anonymity. In this setting, identity refers not to personal information, but rather to personal values, to our rules of spiritual, social, ethical, and environmental engagement. Identity harm does not occur through theft but rather through a virtuous perversion that makes us break our rules of engagement with the world and act against our values. The type of disappointment that accompanies identity harm can arise in any number of settings; however, for purposes of this project, identity harm is cabined to the transactional realm and, more specifically, to the realm of consumer transactions.

Some readers may find the notion that an individual's identity is intertwined with her consumption habits to be distasteful, reductive, or counterintuitive. Yet, for better or worse, especially in richer countries, much of our identity is wrapped up in the question of what and how we choose to consume.[25] Indeed, consumers are not merely "economic beings"

25. Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1758 (2003) [hereinafter Kysar, *Expectations of Consumers*] (In a globalized world where "much of productive labor

fulfilling utilitarian needs in the marketplace.[26] When an individual walks into a (physical or virtual) shop, she does not check her personality or humanness at the door, nor does she become a mindless utility-maximizing machine. Rather, she remains a textured, nuanced human who carries with her all kinds of preferences and values and history that come to bear on her purchasing decisions. These same preferences, values, and histories are the subject of much targeting by marketing and advertising. Likewise, consumer goods are more than mere "vehicles for satisfying individual, unspecified desires"[27] as they too carry a history, this time a history of production and marketing.[28]

Douglas Kysar describes consumer habits as "the product of an ongoing dialogue between and among consumers and the multitude of manufacturers and other entities who have an interest in helping to shape the identities and aspirations signified by particular modes of consumption."[29] He views consumption not as a neutral, needs-driven exchange, but rather as a "messy communicative act that combines pleasure seeking with elements of self-definition and social expression."[30] Our individual consumption habits therefore provide a source of self-identification within what can seem like a frighteningly impersonal marketplace. On this view, consumer habits reveal "an insatiable desire, not for objects, but for the meanings, implications, and values that objects import."[31] This perspective offers a rich account of consumer identity(ies), where individuals develop *as* individuals in part through their consumption choices. It also sets the stage for understanding the dual rise of the "heroic consumer"[32] and conscious consumerism.

As Kysar observes, American consumers are increasingly expected to be heroic, to be good patriots who sustain the economy with their purchases *and* good citizens who vote with their purchasing dollars in favor of—or against—market behaviors that they view as good or bad.[33] Consumers are

---

has become anonymous and devoid of distinction," individuals have come to "define their values, aspirations, and identities by reference to the goods they consume, the leisure activities they undertake, and the locations which they travel.").

26. *Id.* at 1757.

27. *Id.*

28. As Eric Freyfogle expresses, "To buy a product is inevitably to become tied to its history and to accept a level of responsibility for its future." Kysar, *Preferences for Processes*, *supra* note 8, at 617 (quoting ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 194 (2003)).

29. Kysar, *Expectations of Consumers*, *supra* note 25, at 1759.

30. *Id.* at 1757.

31. *Id.*

32. Kysar, *Preferences for Processes*, *supra* note 8, at 533.

33. *Id.* at 632–40.

thus expected to spend money in order to grease the wheels of commerce, but also to assume a share of government's norm-setting and regulatory functions.[34] Such heroism is readily observed in the sustainability context where consumers play an important part in normalizing, monitoring, and enforcing environmental and labor standards by engaging in boycotts, *buy*cotts, naming and shaming, and by bringing legal claims.[35] Consumers who activate this way are described as "citizen-consumers,"[36] engaged in what Vogel calls "civil regulation."[37] Civil regulation is distinct from—and pursued in response to the shortfalls of—public or official market regulation.[38] It is a form of global governance that draws its power and legitimacy not from government but from civil society, in particular from public interest-focused non-governmental organizations (NGOs) and consumer groups.[39] A central argument in this Article is that consumers should be better equipped to serve as civil regulators through enhanced legal protection of their virtuous expectations from exploitation.[40]

---

34. *Id.* at 636 ("Because consumption is now a principal vehicle by which individuals are connected to a globalized world that includes social injustice and ecological fragility, it is also through consumption that those individuals' hesitancies and objections are becoming most apparent."); *id.* at 619 ("[P]roponents of cost-benefit analysis are urging regulators to rely on individual market behavior in order to infer the determinants of public policy.")

35. Vogel, *Private Regulation of Corporate Conduct*, *supra* note 4, at 76–78 (explaining that most civil regulations began as citizen campaigns directed against companies or industries around working conditions and wages, child labor, and unsustainable forestry practices, and describing naming and shaming campaigns and boycotts as civil regulatory strategies); Anand Ghiridharadas, *Boycotts Minus the Pain*, N.Y. TIMES (Oct. 10, 2009), http://www.nytimes.com/2009/10/11/weekinreview/11gir idharadas.html ("Political consumption is not new . . . . What is new is that boycotting is surrendering to buycotting, the sending of positive, not just negative, signals; and that it is practiced increasingly by mainstream shoppers, not just die-hard activists.").

36. Josée Johnston, *The Citizen-Consumer Hybrid: Ideological Tensions and the Case of Whole Foods Market*, 37 THEORY & SOC'Y 229, 232 (2008) (unpacking the concept of the "citizen-consumer" as "a social practice" that can theoretically "satisfy competing ideologies of consumerism (an ideal rooted in individual self-interest) and citizenship (an ideal rooted in collective responsibility to a social and ecological commons).").

37. *See* Vogel, *Private Regulation of Corporate Conduct supra* note 4, at 69 ("Civil regulations employ private, nonstate, or market-based regulatory frameworks to govern multinational firms and global supply networks. A defining feature of civil regulations is that their legitimacy, governance, and implementation is not rooted in public authority."). Vogel explains that globalization has "undermined both the willingness and capacity of governments to make global firms politically accountable" and that civil regulation serves to fill the "governance deficit." *Id.* at 73, 80.

38. *Id.* at 80.

39. *Id.* at 77–78.

40. In a recent paper, Kevin Kolben develops the idea of the "consumer imaginary" or the narratives that consumers develop about the social origins of products to "narrow the social distance" between themselves and producers; he describes the consumer imaginary as an underutilized tool for governing global supply chains and proposes avenues for activating it. Kevin Kolben, *Consumer Citizenship and the Consumer Imaginary* (Feb. 5, 2018) (unpublished manuscript) (on file with author). Operationalizing identity harm would advance this project by making TNCs liable for exploiting consumer imaginaries.

Conscious consumerism is an important component of civil regulation. Kysar identifies three accounts that explain consumers' deepening interest in the social-environmental dimensions of their purchases: the "instrumental account," the "expressive account," and the "ethical account." The first stipulates that, when consumers demand goods that they believe to have been manufactured without causing harm to workers, animals, or the environment, they are seeking to "improve the welfare of individual producers or otherwise influence manufacturing processes."[41] Here, the utility derived from conscious consumption is achieved through a belief that one is, even in a small way, *effecting positive change* in the world.[42]

The expressive account begins from the observation that consumers are willing to pay more for sustainable goods, even if these goods are identical to their conventional counterparts in terms of physical, safety, and performance-related characteristics.[43] This account suggests that consumers view their purchasing decisions as a chance to express their values and political views, to *participate in a process* "whereby one is able to express a 'vote' in favor of . . . change, whether or not it actually occurs."[44] Here, the "demand for process-labeled goods reflects in part the value that individuals place on the ability to express their moral and political views."[45] Kysar suggests that, for some, conscious consumption could actually offer a better outlet for engaging in public debate than traditional modes of political participation, such as voting: "[I]n coming years, rising levels of affluence, combined with the continued overshadowing of civic life by market life, may lead individuals to view purposeful consumption as their surest, if not their only, means for public expression and engagement."[46]

41. Kysar, *Preferences for Processes*, *supra* note 8, at 604.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 533 (footnote omitted); *id.* at 535 ("[I]ndividuals may well come to view such [process] preferences as their most appropriate mechanism for influencing the policies and conditions of a globalized world."). Kysar does not celebrate market-primacy; rather, he considers the normative implications of market-primacy for consumers, manufacturers, and policy makers. Commentators such as Anand Ghiridharadas express the concern that this trend could go too far, with consumer activism supplanting political activism, neglecting traditional fora for expressing civic values and replacing the collective-interest-focused ideal of democratic participation with the self-interested ideal of consumer choice. Ghiridharadas, *supra* note 35. Shopping to "refine the world" could also lessen the pressure on government to do its job: "Public goods like health systems should be publicly provided, [critics] say. If organic vegetables are better, then we should all eat them, instead of just the elite. And privatizing compassion may tempt the state to neglect problems; then, when a recession slows shopping, AIDS orphans languish waiting for you to buy sunglasses." *Id.* Ghiridharadas asks whether consumption is "an exciting new form of citizenship? Or . . . a sign of how corroded citizenship has become that shopping is the closest many of us are willing to come to worrying about labor laws, trade agreements, agricultural policy—about good old-fashioned politics?" *Id.*

With the ethical account, Kysar identifies consumers' preferences for *avoiding products that they associate with immoral practices*.[47] Here, conscious consumers "accept that their actions . . . can exert only limited influence in a world of six billion [7.6 billion in 2018] individuals, but nevertheless seek resigned solace in the knowledge that they are not complicit with practices that they regard as immoral."[48] The ethical account is different from the other two in that it embodies a negative, "do no harm" principle, rather than a positive, "do good" principle. It recognizes the limited powers of individual consumers to influence the market, but also the importance of individuals' autonomy to *choose not to be complicit* in bad practices.[49] On this account, consumer utility is derived from stepping outside the zone of complicity[50] and into a curated space where the consumer is (perhaps) shielded from aspects of global production that she finds morally problematic.

Each of these accounts highlights important protection-worthy consumer interests, interests that are deeply personal and that reach our sense of dignity and virtue. These interests go to the heart of identity harm: the desire to approach consumption as an opportunity to effect change and make the world a better, safer place for generations to come; the desire to merge the personal (shopping, something we do almost every day) and the political (voting, something we do only occasionally) by engaging in consumerism as one would a formal political process, using it as a platform to express one's views on matters of public concern such as labor rights and environmental protection; and, lastly, the desire to do no harm, to avoid purchases that would make us complicit in hurting others. Each of these accounts reveals different shades of identity harm, the short version of

---

As Vogel and others argue, however, consumer and political citizenship can be complements rather than substitutes. Vogel, *Private Regulation of Corporate Conduct*, *supra* note 4, at 76–78; Sarah Dadush, *Profiting in (RED): The Need for Enhanced Transparency in Cause-Related Marketing*, 42 N.Y.U. J. INT'L L. & POL. 1269, 1303–10 (2010) (discussing the potential for consumer citizenship to improve the world). For Jeremy Youde, conscious consumerism affords an opportunity to express values that consumers may not be able to express politically: "Citizens may not have the time, energy, or skills necessary to engage in . . . lobbying and more overt political actions. However, nearly everyone goes shopping." Jeremy Youde, *Ethical Consumerism or Reified Neoliberalism? Product (RED) and Private Funding for Public Goods*, 31 NEW POL. SCI. 201, 215 (2009).

47. *Id.* at 615–24.

48. *Id.* at 616 (citing Robert Howse & Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. 249, 275 (2000) ("Some people do not want to benefit from or be associated with what they regard as wickedness even if they are unable to prevent it.").

49. *Id.* at 615–24.

50. This phrase adapts the tort law concept, "zone of danger," which refers to situations where someone experiences fear of injury. Robert L. Rabin, *Intangible Damages in American Tort Law: A Roadmap*, 14 (Stanford Pub. Law & Legal Theory, Working Paper No. 2727885, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727885.

which is, "I believed I was being good when in fact I was being bad." Together, they reveal how much is at stake with protecting consumers' virtuous expectations and their autonomy to make values-aligned choices.

B. Over-Protection Versus Under-Protection

Some may hold the view that individual consumption habits say less about who we want to be in the world than who we want *other people* to think we are. From this perspective, identity harm is rooted in a shallow sense of identity that is not protection-worthy as it revolves only around personal image, not personal values. Thus, if someone learns that a purchase they had believed to be virtuous was in fact unvirtuous (e.g., harmful to people or the planet), it is not their identity that is harmed, but rather their image, their personal brand. This view presumes that individuals who invest in burnishing their conscious consumer brand would not experience real disappointment upon discovering that their investment had actually produced a negative virtuous return. But it is easy to see how these individuals could experience identity harm, too. Imagine someone who purchased a VW clean diesel as a status symbol intended primarily to signal to the world that they are a good person who cares about the environment—even if they don't really care; upon learning the truth about the cars, that individual could well feel that their identity as "good" has been grossly undermined, even if goodness was not their true (or sole) motivation.

This example illustrates how identity harm can arise regardless of the purity of consumers' motivations. As such, it is not necessary, practical, or desirable to exclude image-centric (versus values-centric) claims from the identity harm umbrella. That said, it is important to distinguish between fake and sincere identity harm claims for liability purposes.[51] Indeed, if it comes to serve as a basis for liability, identity harm could be exploited by opportunistic claimants to obtain compensation, even if they were not harmed by a broken virtuous promise. That would be problematic. As discussed in Part V, however, sincerity should be evaluated for purposes of assessing remedies, rather than the validity of the claim. At the claim-making stage, my view is that the risk of over-protecting opportunistic claimants is less concerning than under-protecting sincere claimants who experienced identity harm.

There are at least three reasons to err on the side of more rather than less protection for consumers' other-regarding, sustainability-related

51. Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law*, 118 COLUM. L. REV. 1901 (2018) (developing an innovative model for remedying emotional harms through a restorations-based framework designed to sort sincere claimants from fakers).

expectations—even accounting for the risk of insincerity. First, it would help to advance the achievement of sustainability commitments that are beneficial to global society, such as the Sustainable Development Goals.[52] This is especially important at a time when the United States has, to the dismay of many, opted to withdraw from sustainability initiatives, such as the Paris Agreement on Climate Change.[53] Thickening the legal protections for individuals who buy (or are interested in buying) sustainably would empower consumers to serve more effectively as change agents and to counter some of government's more regressive maneuvers. Otherwise stated, as the public hand of sustainability regulation weakens, it is becoming increasingly vital to bring more (even insincere) private hands onto the sustainability deck.[54]

---

52. The seventeen Sustainable Development Goals, including "Decent Work and Economic Growth," "Responsible Consumption and Production," and "Climate Action" are supported by the United States, United States Agency for International Development. *Sustainable Development*, USAID, https://www.usaid.gov/GlobalGoals [https://perma.cc/89GW-4R8V]; *About the Sustainable Development Goals*, U.N., https://www.un.org/sustainabledevelopment/sustainable-development-goals/ [https://perma.cc/J5C8-3K6Y].

53. Camila Domonoske & Colin Dwyer, *Trump Announces U.S. Withdrawal from Paris Climate Accord*, NPR (June 1, 2017, 10:54 AM), https://www.npr.org/sections/thetwo-way/2017/06/01/530748899/watch-live-trump-announces-decision-on-paris-climate-agreement [https://perma.cc/4R3B-KFF8] ("A wide chorus of voices had called for Trump to recommit to the Paris agreement: other world leaders and hundreds of scientists, of course, but also CEOs of major energy companies and other big U.S. corporations."); Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html; *The Paris Agreement*, U.N. CLIMATE CHANGE, http://unfccc.int/paris_agreement/items/9485.php [https://perma.cc/G5JX-GR3B] ("The Paris Agreement['s] central aim is to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.").

54. The lacuna of national and international law for regulating TNC behavior is well known, particularly with respect to sustainability. Under U.S. law, plaintiffs seeking to bring foreign corporations (or their subsidiaries) into court face increasingly difficult jurisdictional challenges. Daimler AG v. Bauman, 571 U.S. 117, 142 (2014) (holding that there was no personal jurisdiction over a foreign subsidiary that caused injuries outside of the country); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 887 (2011) (finding no personal jurisdiction in a products liability case where a foreign manufacturer's machine injured someone in New Jersey). Additionally, with the revival of the presumption against extraterritoriality, we have witnessed the near-total evisceration of the Alien Tort Statute (ATS) as a tool for holding human rights violators (public or private) accountable for actions overseas. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1474 (2014); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 119 (2013) (holding that Nigerian nationals could not sue foreign corporations under the ATS because Congress did not intend to provide a cause of action for conduct occurring in foreign nations).

Furthermore, efforts to negotiate a binding international treaty to increase nation states' responsibility for their corporations' human rights performance are compromised. *See* Beth Stephens, *Making Remedies Work: Envisioning a Treaty-Based System of Effective Remedies*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS 408, 409 (Surya Deva & David Bilchitz eds., 2017) ("The UN Human Rights Council decision in 2014 to begin discussion of a legally binding instrument governing [business and human rights] offers an opportunity to envision a system that could actually

A second reason to err on the side of over-protection is that the alternative breeds distrust in the marketplace, in particular within the market for virtue, which is bad for business and for sustainability.[55] Intuitively, the less confidence consumers have that their sustainable choices will be protected through enforcement of companies' virtuous promises and accountability for promise breakers, the less likely they will be to make such choices; conversely, the more confidence consumers have that their choices will be protected, the more likely they will be to make—and pay premiums

offer effective remedies for corporate human rights violations. . . . Neither corporations nor states have demonstrated any interest in such radical change. Widespread ratification and enforcement . . . . would require a political will that seems nowhere in evidence at the moment."). And international bodies tasked with protecting labor rights lack the legislative or adjudicatory powers to do so. BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 25–67 (2005) (noting that UN organizations like the International Labor Organization have almost no enforcement power).

Mandated disclosure initiatives embodied in the Dodd-Frank Conflict Minerals provisions, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1502, 124 Stat. 1376, 2213 (2010) (codified at 15 U.S.C. § 78m(p)), and the California Transparency in Supply Chains Act, S.B. 657, 2009-10 Reg. Sess., § 3, (Cal. 2010) ask companies only to disclose information about their supply chains, such as whether they have a process in place for conducting human rights due diligence, *not* to meet minimum human rights standards or disclose whether abuses exist. Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L L. 1, 10 (2017) ("[I]nternational law is currently an ineffective mechanism for regulating corporate human rights abuses abroad. Existing standards have the status of voluntary soft law and lack independent monitoring and enforcement mechanisms.").

Regarding environmental regulation, the EPA under the Trump presidency has adopted an anti-regulation stance and rolled back regulations instituted by President Obama. Michael Greshko et al., *A Running List of How President Trump Is Changing Environmental Policy*, NAT'L GEOGRAPHIC, https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/ [https://perma.cc/QM38-9PNL] (last updated Oct. 1, 2018) ("Many of the [Trump Administration's] actions roll back Obama-era policies that aimed to curb climate change and limit environmental pollution, while others threaten to limit federal funding for science and the environment."); Nadja Popovich et al., *76 Environmental Rules on the Way out Under Trump*, N.Y. TIMES, https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html (last updated July 6, 2018). The Trump Administration's regressive policy decisions include proposing cuts to clean energy programs, loosening regulations on toxic air pollution, and dropping climate change from the list of national security threats. Greshko et al., *supra*; Brady Dennis, *Trump Budget Seeks 23 Percent Cut at EPA, Eliminating Dozens of Programs*, WASH. POST (Feb. 12 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/02/12/trump-budget-seeks-23-percent-cut-at-epa-would-eliminate-dozens-of-programs/?utm_term=.605ad2ece8db ("The White House is seeking to cut more than $2.5 billion from the annual budget of the Environmental Protection Agency—an overall reduction of more than 23 percent."). The withdrawal from the Paris Agreement further evidences the demotion of environmental concerns at the federal level. Domonoske & Dwyer, *supra* note 53.

Lastly, regulatory agencies that could require social or environmental labeling for U.S. consumer goods have their hands tied because of challenges from industry, combined with international trade law restrictions that limit nation states' autonomy to implement regulations that could be "veiled barriers to trade." Moody, *supra* note 4, at 1415.

55. *FTC Cracks Down on Misleading and Unsubstantiated Environmental Marketing Claims*, FED. TRADE COMM'N (Oct. 29, 2013), https://www.ftc.gov/news-events/press-releases/2013/10/ftc-cracks-down-misleading-unsubstantiated-environmental [https://perma.cc/4K94-XLCN] ("[C]onsumers want products that are environmentally friendly, and . . . companies are trying to meet that need . . . . But companies that don't have evidence to support the environmental claims they make about their products erode consumer confidence and undermine those companies that are playing by the rules.").

for—them. Kysar describes the problem of consumer distrust while at the same time offering a compelling response to the challenge that more policing of "process representations"[56] would chill TNCs' sustainability commitments:

> This chilling argument . . . must be weighed against the complementary chilling of consumer demand that would occur if individuals no longer could depend on the veracity of process representations in a heavily manipulated marketplace. If individuals came to regard the process representations of manufacturers with substantial cynicism and distrust, such that their willingness to pay premiums for process-labeled goods diminished, then the economic motivation for manufacturers . . . to disclose process information would diminish as well. In that sense, it is not merely a question whether the threat of deceptive advertising liability would deter manufacturer disclosure of process information, but whether the threat of liability would have a more pronounced effect than the drying-up of consumer demand that would be wrought by a marketplace rife with false and deceptive process claims.[57]

Third, the data on conscious consumption indicates that a growing number of people, in particular millennials, are ready to pay more for products that they believe to be socially and/or environmentally sustainable (in their production and use).[58] Increased willingness to pay premiums for

56. Kysar uses "process representations" and "process information" to describe information pertaining to "the labor conditions of workers who produce a consumer good, the environmental effects of a good's production, the use of controversial engineering techniques such as genetic modification to create a good, or any number of other social, economic, or environmental circumstances that are related causally to a consumer product, but that do not necessarily manifest themselves in the product itself." Kysar, *Preferences for Processes*, *supra* note 8, at 529. He clarifies that "although such factors generally do not bear on the functioning, performance, or safety of the product, they nevertheless can, and often do, influence the willingness of consumers to purchase the product." *Id.*

57. *Id.* at 613–14 (footnote omitted).

58. *See supra* note 3; *see also* RAPHAEL BEMPORAD & MITCH BARANOWSKI, BBMG, CONSCIOUS CONSUMERS ARE CHANGING THE RULES OF MARKETING. ARE YOU READY? (2007), https://www.fmi.org/docs/sustainability/BBMG_Conscious_Consumer_White_Paper.pdf [https://perma.cc/HWJ9-DEFK] ("[N]early nine in ten Americans say the words 'conscious consumer' describe them well and are more likely to buy from companies that manufacture energy efficient products (90%), promote health and safety benefits (88%), support fair labor and trade practices (87%) and commit to environmentally-friendly practices (87%), if products are of equal quality and price."); Sarah Landrum, *Millennials Driving Brands to Practice Socially Responsible Marketing*, FORBES (Mar. 17, 2017) https://www.forbes.com/sites/sarahlandrum/2017/03/17/millennials-driving-brands-to-practice-socially-responsible-marketing/#675196194990 [https://perma.cc/J2D9-CWGR] (explaining that "[m]illennials prefer to do business with corporations and brands with pro-social messages, sustainable manufacturing methods and ethical business standards" and that while "66% of consumers are willing

otherwise equivalent products indicates a readiness to sacrifice financially in order to avoid sacrificing morally.[59] That consumers increasingly seek out sustainable brands and products is reflected in the vastly increased supply of sustainable goods that are now available for purchase.[60] The last fifteen years have seen a remarkable rise in the quantity and variety of sustainable consumer goods,[61] and in the use of product labels that attest to the goods' sustainability-related virtues.[62] All of this suggests that sustainability is big business, one that rides on the coattails of protection-worthy consumer expectations.

For better or worse, we live in a consumerist society that reproduces and constantly creates new "schemes of want."[63] With few exceptions,[64] the message to consumers is not "buy less"; it is always "buy more, and buy more of this." In this wants-making machine, there is too much room for sellers to exploit consumers' virtuous expectations with exaggerated, false,

---

to spend more on a product if it comes from a sustainable brand," millennials "gave an even more impressive showing, with 73%").

59. Kimberly Ann Elliott & Richard B. Freeman, *White Hats or Don Quixotes? Human Rights Vigilantes in the Global Economy*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 47, 51 (Richard B. Freeman et al. eds., 2005) (finding consumers would pay 28% more for a $10 ethical good and 15% more for a $100 ethical good); Patrick De Pelsmacker et al., *Do Consumers Care About Ethics? Willingness to Pay For Fair-Trade Coffee*, 39 J. CONSUMER AFF. 363 (2005) (finding consumer willingness to pay a 10% premium for fair trade goods).

60. *Our Takeaway from Natural Products Expo West 2017: The Rise of "Edible Ethics,"* HARTMAN GRP. (May 2, 2017) https://www.hartman-group.com/hartbeat/693/our-takeaway-from-natural-products-expo-west-2017-the-rise-of-edible-ethics- [https://perma.cc/49ZY-5UHP] [hereinafter *The Rise of "Edible Ethics"*] ("[P]roducts (and the companies that produce them) are increasingly under a spotlight that values transparency, clean ingredients and convincing narratives of production — all reflecting . . . a rising interest in . . . '*edible ethics*.'"); *Unilever's Sustainable Living Brands Continue to Drive Higher Rates of Growth*, UNILEVER (May 18, 2017), https://www.unilever.com/news/Press-releases/2017/unilevers-sustainable-living-brands-continue-to-drive-higher-rates-of-growth.html [https://perma.cc/43R8-U88V] ("Unilever's brands continue to lead the way on sustainable living.").

61. *See* FAIRTRADE INT'L, SCOPE AND BENEFITS OF FAIRTRADE 8, 37 (7th ed. 2015), https://www.fairtrade.net/impact-research/monitoring-impact-reports.html [https://perma.cc/WT5W-CT87] (noting that by the end of 2014, 1,226 organizations in 74 countries had been Fairtrade certified, representing a 35% increase from 2010); Johnston, *supra* note 36, at 241 (explaining that "ethical consumer products, like fair-trade commodities, generate a price premium"); Steve Stecklow & Erin White, *At Some Retailers, 'Fair Trade' Carries a Very High Cost*, WALL ST. J. (June 8, 2004, 12:01 AM), https://www.wsj.com/articles/SB108664921254731069 ("Supermarkets are taking advantage of the label to make more profit because they know that consumers are willing to pay a bit more because it's fair trade.").

62. *The Rise of "Edible Ethics," supra* note 60.

63. EDWARD HASTINGS CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 119–20 (7th ed. 1956).

64. Hunter Lovins & Colette Crouse, *Don't Buy This Jacket: Lessons in Successful Values Marketing*, SUSTAINABLE BRANDS (Dec. 18, 2012), http://www.sustainablebrands.com/news_and_views/articles/dont-buy-jacket-lessons-successful-values-marketing [https://perma.cc/ZUH7-WU4T] (describing Patagonia's "Buy Less Campaign" which included a full-page ad in the New York Times featuring the company's best-selling jacket and instructed consumers, "Don't buy this jacket" and instead protect the planet by reducing excess consumption).

or simply "noisy" representations about their wares. Furthermore, although they are at an informational deficit, consumers are expected to be heroic, to deploy their purchasing dollars to support the economy while at the same time communicating their views on public policy. This is a tall order. If consumers are to serve these heroic functions effectively, then their virtuous expectations must be better recognized and protected under the law. Building on Vogel and Kysar's (amongst others') insights about the under-tapped potential of consumers to serve as civil regulators, this Article proposes identity harm as a new tool for consumer protection and consumer empowerment.

II. THE PSYCHIC SAFETY DEFECT OF IDENTITY-HARMING PRODUCTS

The notion of defect comes from tort law and, more specifically, from products liability law. This Part considers the possibilities for seeing and tackling identity harm through a torts lens. First, it describes the special type of intangible harm at issue with identity-harming products as a "psychic safety defect" and proposes expanding the notion of product dangerosity to include this defect.[65] It then draws an analogy between identity harm and the dignitary tort of defamation and recommends understanding identity harm as a modern day incarnation of defamation, focused not on public reputation, but on one's notion of oneself in the world. The objective is to lay the foundation for more vigorous regulation of companies' virtuous promises via private consumer litigation.

A. "Virtuous Dupery" and the Problem of Psychic Safety

Identity harm is different from, say, the physical safety harm caused by a spontaneously combusting cell phone where the user is at risk of being physically injured.[66] It can also be distinguished from the distress that consumers experience when they learn that the "100% natural" food they ingested in fact contains genetically modified organisms because these kinds of statements typically target consumers' concerns about their own

65. I am grateful to Kevin Kolben for proposing this term.

66. *See* Eun-Young Jeong, *Samsung to Recall Galaxy Note 7 Smartphone over Reports of Fires*, WALL ST. J. (Sept. 2, 2016, 5:35 PM), https://www.wsj.com/articles/samsung-to-recall-galaxy-note-7-smartphone-1472805076; Daisuke Wakabayashi et al., *Samsung Halts Galaxy Note 7 Production as Battery Problems Linger*, N.Y. TIMES (Oct. 10, 2016), https://www.nytimes.com/2016/10/11/business/samsung-galaxy-note-fires.html?_r=0.

bodily health, rather than their sense of virtue.[67] In other words, with traditional safety defects, the primary injured or concerned-about-being-injured party is the consumer herself. By contrast, with identity harm, the injury is *derivative* in the sense that it is at least one step removed from the transaction. The virtuous promises that underlie identity-harming transactions tap into something beyond the consumer and her immediate self-interest, reaching her values and rules of engagement with the world. As a result, when a virtuous promise is broken, the injury unfolds somewhere beyond the consumer.

To illustrate, for virtuous duperies pertaining to sustainability, the physical injury is experienced not by the consumer but by the planet or the people involved in the production process.[68] The harm experienced by the consumer is psychic, rather than physical. It arises upon realizing one's unwitting participation in causing harm to another, of being made to act contrary to one's personal values. A chocolate bar that a consumer learns was made with forced child labor likely tastes no less sweet on her tongue, even though its moral taint on her conscience may be very bitter indeed.[69] Similarly, a pricier item such as a diamond engagement ring that is discovered to have been sourced from a "blood diamond" country may still shine brightly, but its moral brilliance may be greatly diminished for its owner. Moral bitterness or dullness are by-products of the derivative characteristic of identity harm, of realizing that one's purchase contributed to hurting others. Importantly, because it surfaces within the (noneconomic) moral sphere, the intensity of the harm is only loosely connected to product price. Identity harm is morally sensitive but price-neutral, in other words.

---

67. *See* Michele Simon, *ConAgra Sued Over GMO '100% Natural' Cooking Oils*, FOOD SAFETY NEWS (Aug. 24. 2011), http://www.foodsafetynews.com/2011/08/conagra-sued-over-gmo-100-natural-cooking-oils/#.WKeHvRSnWto [https://perma.cc/VD8K-6QGV] (describing a class action against ConAgra for labeling cooking oils "100% natural" to target health conscious consumers when the oils contain GMOs). Note that consumers who seek out "natural" and "organic" may also be concerned with other-regarding sustainability issues, such as soil-health and water pollution. *See Fairtrade and Organic Go Hand in Hand*, FAIRTRADE AM. (Sept. 6, 2016), http://fairtradeamerica.org/Media-Center/Blog/2016/September/fairtrade-and-organic [https://perma.cc/PYJ4-NLXZ] ("Some [buy organic] for environmental concerns while others believe it is healthier").

68. From the corporate supply side, sustainable practices

> provide a benefit primarily to someone other than the firms' patrons. Under this broad definition of altruism, all of these practices constitute the provision of altruism to such patrons. In that sense, commercial nonprofits and commercial for-profits are suppliers of altruism, even though they are primarily supported by fees paid by their customers.

Benjamin Moses Leff, *Some Implications of the Agency-Cost Theory of the Nonprofit Firm*, *in* THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 401 (Benjamin Means & Joseph W. Yockey eds., forthcoming Jan. 2019) (manuscript on file with author).

69. Sud Complaint, *supra* note 3, at 1 ("[C]onsumers do not expect the products that they purchase to be derived from, manufactured or otherwise created or made available through the use of slavery, human trafficking or other illegal labor practices.").

Within the sphere of broken sustainability promises, identity harm is experienced by the consumer but stems from injuries to others. Such injuries are supported by consumer purchases and can occur before the transaction, during production, or afterwards, when the product is used (e.g., driving the VW dirty-diesels). But identity harm can be triggered outside the sustainability sphere, as well. For example, it encompasses the type of "spiritual harm" that someone who observes the Jewish faith might experience upon learning that the food she ingested was falsely marketed as Kosher,[70] or an observer of Islam might experience upon learning that a meat product she consumed was not in fact Halal, or someone of the Jain or Hindu traditions might experience upon learning that the food she ordered was incorrectly described as vegetarian.[71] Here, the consumer suffers no direct physical harm as a result of the broken promise, but the integrity of her relationship to the divine may be undermined. In each instance, the consumer is in some way misled, pitted against her own religious values, and unwittingly made to break her own rules of engagement with the spiritual world.

The "ethical harm" that a vegan consumer might experience upon learning that a product she believed to be cruelty-free was in fact developed by experimenting on animals can also be brought under the identity harm umbrella. Here, the consumer's identity harm would be connected to the injury suffered, even only theoretically, by the animals.[72] Yet another type of identity harm could be described as "patriotic harm," referring to the psychic harm experienced by a consumer who purchases a product labeled "Made in the U.S.A." only to learn that the product was made in Taiwan and assembled in Mexico, for example.[73] Here, the consumer understood

70. *See* Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 956 n.43 (1997) (alteration in original) (quoting RABBI YACOV LIPSCHUTZ, KASHRUTH: A COMPREHENSIVE BACKGROUND AND REFERENCE GUIDE TO THE PRINCIPLES OF KASHRUTH 15 (1988)) ("[T]he consumption of forbidden foods defiles the holy spirit, and its sanctity is injured. This injury reduces the Jewish capacity to reap the full rewards of Torah and its fathomless depths.").

71. Gupta v. Asha Enters., 27 A.3d 953, 962–64 (N.J. Super. Ct. App. Div. 2011) (granting summary judgment in favor of a restaurant that erroneously served Hindu vegetarian patrons meat due to a lack of measurable damage for negligence claims, but denying the restaurant's motion for summary judgment based on express warranty claims). Plaintiffs argued that they suffered "spiritual injuries" based on the Hindu belief that "if they eat meat, they become involved in the sinful cycle of inflicting pain, injury and death on God's creatures, and that it affects the karma and dharma, or purity of the soul." *Id.* at 956.

72. Beltran v. Avon Products, Inc., 867 F. Supp. 2d 1068, 1073 (C.D. Cal. 2012) (class action claiming that if consumers had been aware that Avon tested on animals, they would not have purchased the company's cosmetics).

73. Kwikset Corp. v. Superior Court, 246 P.3d 877, 881 (Cal. 2011) (finding that plaintiffs had suffered an injury in fact when they purchased locksets falsely marked as Made In U.S.A.).

her purchase to be patriotic, a way to contribute to the U.S. economy and to the well-being of her fellow citizens.[74] Realizing her mistake, she might be upset for economic reasons, since she was duped into parting with her money, but also for psychic and emotional reasons, because she unwittingly acted against her values by supporting the wrong economy.

These examples of identity harm all highlight its derivative nature by illustrating how the underlying injury occurs beyond the transaction and the consumer. They show that identity harm is triggered when the integrity of a consumer's relationship(s) to the world (e.g., social, environmental, spiritual, ethical, patriotic) is undermined. They further show that identity-harming products are not defective in the traditional sense since they do not malfunction or put the consumer in physical danger. They do, however, possess a psychic safety defect: by undercutting an individual's autonomy to make values-aligned purchasing decisions—indeed, by making her act against her values—identity-harming products cause a special type of psychic distress. The distress is arguably most acute when other-regarding virtuous promises are at issue since the latter implicate the consumer in the well-being or, more aptly, the *ill*-being of others—e.g., the planet and people making the product.

B. Expanding Dangerosity

The psychic safety defect possessed by identity-harming products can be compared to the defect contained in a predatory loan that endangers not only the financial safety of the borrower, but also her sense of well-being.[75] Indeed, recognizing the financially and psychically abusive features of certain financial products (e.g., payday loans and subprime mortgages) is what led to the establishment of the Consumer Financial Protection Bureau (CFPB) in order to better police financial products providers, particularly

74. Second Amended Class Action Complaint at 7, Oxina v. Lands' End, Inc., No. 3:14-cv-2577-MMA (NLS), 2015 U.S. Dist. LEXIS 94847 (S.D. Cal. July 29, 2015) ("Plaintiff believed at the time she purchased . . . that she was purchasing a superior quality product, as well as supporting U.S. jobs and the U.S. economy."); Kwikset Corp. v. Superior Court, 90 Cal. Rptr. 3d 123, 132 (Cal. Ct. App. 2009) ("It is an injury we fully comprehend and condole: their patriotic desire to buy fully American-made products was frustrated."), *rev'd*, 246 P.3d 881 (Cal. 2011).

75. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 5 (2008) ("For families that get tangled up with truly dangerous financial products, the results can be wiped-out savings, lost homes, higher costs for car insurance, denial of jobs, troubled marriages, bleak retirements, and broken lives."); Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY (2007), http://democracyjournal.org/magazine/5/unsafe-at-any-rate/ [https://perma.cc/W932-DBE6] (explaining that the cost of debt cannot be measured only in dollars, and that "[a]nxiety and shame have become constant companions for Americans struggling with debt").

vis-à-vis financially vulnerable consumers.[76] The CFPB was founded on an expanded definition of product dangerosity, as proposed by (now) Senator Elizabeth Warren, who famously bemoaned,

> It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street—and the mortgage won't even carry a disclosure of that fact to the homeowner.[77]

This Section advocates for expanding dangerosity further to encompass the psychic safety issues created by identity-harming products. To be clear, the recommendation here is *not* to establish a new regulatory agency to deal with identity-harming goods and virtuous duperies, but rather to upgrade the legal tools we already have so that consumers can better fight their own legal battles.

Knives, cars, guns, pharmaceuticals, cigarettes, alcohol: these are all inherently dangerous items in that there is only so much manufacturers can do to make them safe for use. Goods that qualify as inherently dangerous invite closer regulation through, for example, disclosure and license and age requirements. Armed with dangerosity information, consumers can (in theory) decide how much risk to expose themselves to. But many goods are not considered dangerous even if they are *products of danger*. As a result, many dangerous-in-fact goods circulate beneath the regulatory radar. For example, a bar of chocolate made with forced child labor would not be viewed as dangerous even though it is a product of danger. How else to qualify the trafficking and abuse of tens of thousands of West African children and the injuries they sustain while wielding machetes to pry open cacao pods?[78] Or the deaths of thousands of women who have perished in

76. *Creating the Consumer Bureau*, CFPB, https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/ [https://perma.cc/U5EU-Z2N9] (noting that the CFPB was created to "address failures of consumer protection" because lenders were making bad loans and exploiting borrowers).

77. Warren, *supra* note 75. *See also* Bar-Gill & Warren, *supra* note 75, at 6 (arguing for tailored regulation of consumer financial products: "Credit products should be thought of as products, like toasters and lawnmowers, and their sale should meet minimum safety standards.").

78. TULANE UNIV. SCH. OF PUB. HEALTH & TROPICAL MED., 2013/14 SURVEY RESEARCH ON CHILD LABOR IN WEST AFRICAN COCOA GROWING AREAS 81 (2015), http://www.childlaborcocoa.org/images/Payson_Reports/Tulane%20University%20-%20Survey%20Research%20on%20Child%20Labor%20in%20the%20Cocoa%20Sector%20-%2030%20July%202015.pdf [https://perma.cc/U66B-BN8J] ("In the aggregate more than 2 million children between 5–17 years are estimated to be in hazardous work in cocoa in 2013/14, an 18% increase compared to 2008/09. The goal of the Harkin-Engel Protocol—removing large numbers of children from the [Worst Forms of Child Labor] in West African cocoa agriculture—has yet to be reached."); Alexandra Wexler, *Chocolate Makers Fight a Melting*

factory fires and building collapses while making clothes for rich-country consumers?[79] Or the illnesses and subsequent deaths of hundreds of cotton farmers in India due to the use of toxic pesticides that increase yields in order to meet the demands of the fast fashion industry?[80] Or the countless animals that have suffered to develop cosmetics, or whose fertility has dropped because of water and soil pollution caused by pesticides and clothing dye?[81]

Because manufacturers are only required to communicate safety information pertaining to consumers' physical safety, not social or environmental dangerosity information, conscious consumers must actively hunt that information down. But hunting for information can be inconvenient, time consuming, costly, and not terribly rewarding. As things stand, then, consumers are over-exposed to psychic safety risks, and though many may believe that they have the autonomy to make informed, values-aligned purchasing decisions, the reality is that this autonomy is severely undermined by the weak dangerosity-information systems at work. Once again we encounter the heroic consumer and find her to be spectacularly ill equipped to serve her heroic functions. For identity harm purposes, the question thus becomes, "Should consumers be expected to assume the risk that their consumptive desires are being met through practices that are abusive to humans, animals, and the planet?"

In our increasingly globalized world, consumers can generally satisfy their desires without knowing much, if anything, about the production history of their purchases. The social bonds that tie us to one another across

Supply of Cocoa, WALL ST. J. (Jan. 13, 2016, 9:30 PM), https://www.cocoalife.org/~/media/CocoaLife/en/download//article/Wsj_Chocolate%20makers%20supply%20chain.pdf [https://perma.cc/68XM-W2WN] (hazardous conditions include using dangerous instruments like machetes, "clearing land, carrying heavy loads, or [working] for long hours, at night or with exposure to agrochemicals").

79. CLEAN CLOTHES CAMPAIGN ET AL., EVALUATION OF H&M COMPLIANCE WITH SAFETY ACTION PLANS FOR STRATEGIC SUPPLIERS IN BANGLADESH 1 (2015), https://cleanclothes.org/resources/publications/hm-bangladesh-september-2015.pdf [https://perma.cc/3CUM-B4SE] ("[T]he Rana Plaza building collapsed, killing 1,138 garment workers and injuring 2,500 more. It was the deadliest disaster in the history of the global apparel industry."); *Bangladesh Factory Collapse Toll Passes 1,000*, BBC NEWS (May 10, 2013), http://www.bbc.com/news/world-asia-22476774 [https://perma.cc/SYV5-HWA4].

80. Kate Good, *How Pesticides Are Harming Animals*, ONE GREEN PLANET (Mar. 20, 2014), http://www.onegreenplanet.org/animalsandnature/how-pesticides-are-harming-animals/ [https://perma.cc/DZF7-Z2ZX] (noting that pesticides disorient bees, cause sexual abnormalities in frogs, decrease reproductive rates in birds, and increase cancer risks in dogs and cats); Jaideep Hardikar, *The Indian Farmers Falling Prey to Pesticide*, BBC NEWS (Oct. 5, 2017) http://www.bbc.com/news/world-asia-india-41510730 [https://perma.cc/JR3L-YZMR]; Patsy Perry, *The Environmental Costs of Fast Fashion*, INDEPENDENT (Jan. 8, 2018), http://www.independent.co.uk/life-style/fashion/environment-costs-fast-fashion-pollution-waste-sustainability-a8139386.html [https://perma.cc/X96E-8NHN].

81. *About Cosmetics Animal Testing*, HUMANE SOC'Y INT'L, http://www.hsi.org/issues/becruelty free/facts/about_cosmetics_animal_testing.html [https://perma.cc/U87A-NMM4] ("[A]pproximately 100,000–200,000 animals suffer and die just for cosmetics every year around the world.").

the globe are often obscured and anonymized by opaque supply chains; this allows for the perpetuation of a dynamic whereby rich-country consumers (unknowingly) contribute to the ill-being of poor-country producers and their communities. As Kysar urged over a decade ago, this disturbing state of affairs calls for revisiting the distinction between product safety and the safety of the production *process*.[82] More specifically, it calls for formal consideration of social-environmental dangerosity when analyzing product safety.

> [T]he world of universal utilitarianism has not yet arrived. Until it does, products liability law need not further the erosion of citizen risk values by giving effect only to technical, sterilized expectations of safety. Rather, the common law of products liability should reflect the culture within which it operates, and it should do so by acknowledging lay risk values to the extent that, and so long as, they exist.[83]

If products liability law is to serve as a "cultural mirror"[84] that faithfully reflects societal notions of safety/dangerosity or "lay risk values," then upgrades will be necessary. Safety analysis should look beyond the physical product to include the processes that made its making possible, as well as the environmental impact of its use. Such an upgrade would improve the responsiveness of products liability law to consumers' evolving expectations and increase the relevance and effectiveness of this crucial branch of consumer protection.

One shortcoming of products liability law is that defect claims are assessed by applying cost-utility analysis, where the risk created by product X is compared with that of an alternative design, without considering consumer expectations.[85] Thus, under the Restatement (Third) of Torts, product risk is assessed "only in relation to alternative product designs," and the "sphere of relevant variables becomes confined to expected harm, product functionality, and other manifest physical characteristics of the product and its proffered alternatives."[86] For example, a bullet that "severely

82. Kysar, *Preferences for Processes*, *supra* note 8.

83. Kysar, *Expectations of Consumers*, *supra* note 25, at 1788 (footnote omitted).

84. *Id.* at 1760 (citing Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 638, 664 (1995); Marshall S. Shapo, *Products Liability: The Next Act*, 26 HOFSTRA L. REV. 761, 771 (1998); and Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 NW. U. L. REV. 1567, 1577 (1995)).

85. *Id.* at 1766.

86. *Id.*

rip[s] through and mutilate[s] body parts" would not be considered defective because, *objectively*, such products "are designed to cause injuries and are thus not unfit for their intended purpose."[87] However, as Kysar observes, unlike experts, lay people "care a great deal about the manner in which a death occurs, particularly when it is accompanied by pain and suffering, terror, or some other dread-inducing characteristic."[88] Such subjective expectations should be taken seriously and not "dismissed as irrationalities . . . [to] be ignored in favor of more narrow instrumentalist balancing."[89]

If products liability law is to do its job, product safety/defect analysis should be upgraded to take consumer expectations regarding (un)acceptable levels of dangerosity into account. No doubt, this would lead to finding more products—e.g., slavery chocolate or blood diamonds or fast fashion apparel—defective, which will generate pushback from manufacturers. However, the output of such a regulatory upgrade would be additional disclosure of dangerosity information (e.g., through labeling or on company websites) and litigation only if the disclosures are inadequate or false, *not* prohibition from selling dangerous-in-fact items. Otherwise stated, upgraded products liability law would not proscribe abusive practices by companies; instead, it would expand the range of products considered to be unsafe and require that dangerosity be disclosed. Social-environmental dangerosity disclosures would make it easier for consumers to avoid purchases that pit them against their values and enhance their autonomy to make values-aligned choices.

Requiring additional disclosure, whether via direct regulation or litigation, is a complicated and costly proposition.[90] To assuage concerns about workability, Part IV offers some limiting principles for social-environmental dangerosity disclosure. For now, note that if companies actually improve their sustainability performance and their reporting practices, as they are instructed to do under international (voluntary) norms,

87. *Id.* at 1767 (quoting Leslie v. United States, 986 F. Supp. 900, 902, 909 (D.N.J. 1997)).

88. *Id.* (citing Cass R. Sunstein, *Bad Deaths*, 14 J. RISK & UNCERTAINTY 259, 268 (1997)).

89. *Id.*

90. *See, e.g.*, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011); Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 566, 578, 614 (2006) (offering a persuasive account of the complexities of information regulation and explaining that decisions about what and how to disclose "require balancing the costs and benefits of each incremental disclosure," including "the physical cost of printing extra words on the product's label, but also the potentially more serious cost of diluting the effectiveness of other warnings and disclosures.").

then disclosure costs should diminish over time.[91] Additionally, companies that offer safe-in-fact products "would have little to fear" and may even "flourish" if they come to face less competition from companies whose operations involve dangerous-in-fact processes and practices.[92] A last point about upgrading products liability law to include psychic safety is that dangerosity disclosures would help to mitigate consumer confusion generated by sustainability noise. As discussed below, consumers are overloaded with information about companies "doing good in the world." Having access to more and better dangerosity information would help consumers to home in on the true frequency of corporate do-goodery.

C. Identity Harm as Modern Day Defamation

To further flesh out the concept of psychic safety defect, this Section proposes that, alongside products liability, a good tort-fit for identity harm is defamation. Over the course of the twentieth century, Robert Rabin explains, "A more textured view of protecting individual autonomy came to be recognized, reflecting not only a higher regard for hurt feelings . . . but also a recognition that shock, fright, and other severe distress, even if caused by *accidental* misconduct . . . deserved qualified legal protection."[93] A renewed exploration of the terrain of autonomy-infringing harms would find identity harm comfortably nestled among already-recognized torts, such as intentional or negligent infliction of emotional distress, assault, and defamation.[94] Of these, identity harm bears the strongest resemblance to

91. ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 15–16 (2008), https://www.oecd.org/corporate/mne/1922428.pdf [https://perma.cc/EW9J-43SH]; U.N. HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011).

92. Warren, *supra* note 75 (making the same point about providers of "good" consumer financial products).

93. Rabin, *supra* note 50, at 16.

94. For example, intentional infliction of emotional distress (extreme and outrageous conduct that intentionally or recklessly causes severe emotional distress to another), RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965); negligent infliction of emotional distress (conduct that places another in "zone of danger" or fear of physical injury is subject to liability, though fear of future harm is generally not covered; eyewitness NIED cases involve recovery for distress resulting from directly observing the injury or fatality of a close relative, while in zone of danger), Rabin, *supra* note 50, at 15–16; battery ("harmful or offensive contact with the person" without actual or apparent consent), RESTATEMENT (SECOND) OF TORTS § 13, cmt. d (AM. LAW INST. 1965); assault (actor is subject to liability if acts intending to cause a harmful or offensive contact with the person of the other, or an imminent apprehension of such a contact and the other is put in such imminent apprehension), RESTATEMENT (SECOND) OF TORTS § 21 (AM. LAW INST. 1965); and pain and suffering (actor causing pain and suffering attached to physical injury is liable for such pain and suffering since the latter is "part and parcel of the actual injury"; though "the footing for a precise and accurate estimate of damages may not be quite as sure and fixed . . . the actual damage is no less substantial and real), Rabin, *supra* note 50, at 3 (quoting Morse v. Auburn & Syracuse R.R. Co., 10 Barb. 621, 623 (N.Y. Gen. Term 1851)).

defamation, which involves injury to reputation via a false statement of fact.[95]

Defamation is a "dignitary tort" that injures a plaintiff's reputation or honor, rather than her property or body.[96] The notion that an assault on dignity can cause cognizable harm helps firm our legal grasp on identity harm. Defamatory statements have classically been defined as those that expose a plaintiff to "hatred, contempt, or ridicule"; a more modern take is that they so harm the defamed individual's reputation "as to lower him in the estimation of the community."[97] Defamation claims can also allege "mental anguish" or injury flowing from the "anger, hurt, or outrage that the victim feels" because of the defamatory statement.[98] These concepts can easily be translated to describe the injury experienced by an identity-harmed consumer whose self-perception is undermined by a false virtuous promise. For example, although a Dieselgate victim is unlikely to be ridiculed or treated contemptuously by others, or to be lowered in public esteem, she may experience those sentiments privately, in regard to herself.

Common law slander (oral) and libel (written), the torts from which defamation stems, rest on the view that there is a societal interest in preventing and redressing attacks on reputation.[99] The importance that society has historically accorded to reputation can be traced in literature, including the work of Shakespeare who described a person's "good name" as the "immediate jewel of [the] soul[]."[100] In somewhat less artful language, the importance of reputation has also been articulated in legal opinions: "The right of a man to the protection of his own reputation from

95. David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 748 (1984) (discussing the presumption of harm in defamation cases and why it is hard to prove harm).

96. David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1047–48 (2006) (discussing possible changes to defamation law and questioning the need for a defamation restatement).

97. *Id.* (quoting Parmiter v. Coupland (1840) 151 Eng. Rep. 340, 342 (Exch.) and RESTATEMENT (SECOND) OF TORTS § 559).

98. Anderson, *supra* at note 95, at 771–72 (explaining that plaintiffs can prove mental anguish by testifying about their physical reactions to the occurrence, like sleepiness, nervousness, and depression).

99. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693 (1986) (discussing three concepts of reputation that defamation has been used to protect including reputation as honor, reputation as property, and reputation as dignity).

100. *Id.* at 692 (quoting WILLIAM SHAKESPEARE, OTHELLO, act III, sc. iii, ll. 155–61:

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis something, nothing,
'Twas mine 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.).

unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[101] The intrinsic value of reputation justifies presuming the injury caused by defamation:[102]

> [T]he plaintiff is relieved from the necessity of producing any proof whatsoever that he has been injured. . . . [D]amage to the plaintiff is said to be "presumed," and the jury, without any further data, is at liberty to assess substantial damages, upon the assumption that the plaintiff's reputation has been injured and his feelings wounded.[103]

Just as courts protect the right to be free from "unjustified invasion" of reputation and preserve our autonomy to shape our "public selves," so too should they protect the right to be free from the distortive effects of virtuous duperies and preserve our ever-more precious autonomy to shape our "market selves." Particularly today, when citizenship and consumption are so deeply intertwined, being protected from identity harm is as important as being protected from reputational harm. This is why I propose treating identity harm as a modern day incarnation of defamation.

In both the U.S. and the United Kingdom, defamation appears to have fallen by the wayside as a cause of action.[104] This can perhaps be explained by societal changes toward the sanctity of public reputation; indeed, ours is a time when, as reflected in the rise of social media, so little is *not* public. But even if reputation is less sacred than it once was, dignity and integrity remain important.[105] And one realm where dignity is currently under attack

---

101. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

102. Anderson, *supra* note 95, at 748 (justifying the presumption of harm and explaining how it differentiates defamation from other torts).

103. Charles T. McCormick, *The Measure of Damages for Defamation*, 12 N.C. L. REV. 120, 127 (1934). Until the 1960s, liability for false statements of fact about public officials that were harmful to reputation was strict, with no need to allege or prove negligence; the best recourse for defendants was to prove the statement's truth, or "establish one of a variety of common law privileges" (e.g., common interest and fair comment). Rabin, *supra* note 50, at 17 n.64.

104. *See* Roy Greenslade, *Privacy Claims Reach Record Level As Defamation Cases Fall Away*, THE GUARDIAN (June 13, 2016), https://www.theguardian.com/media/greenslade/2016/jun/13/privacy-claims-reach-record-level-as-defamation-cases-fall-away (discussing the increase in privacy actions as an alternative to defamation claims); Daniel J. Solove, *The Slow Demise of Defamation and the Privacy Torts*, HUFFPOST (Oct. 11, 2010), https://www.huffingtonpost.com/daniel-j-solove/the-slow-demise-of-defama_b_758570.html (attributing the decline in defamation lawsuits against the media in part to high litigation costs and increased information distribution via social media where originators lack deep pockets).

105. Rabin, *supra* note 50, at 19 ("[T]he dignitary interest seems the dominant theme in American defamation law—an intangible harm theme.").

is consumer transactions.[106] As discussed in Part I, consumer choices carry a great deal of personal, social, and political meaning; thus, the stakes involved in defining our market selves are high, especially today. Just as our public selves were once understood to be intimately bound up with our private selves, today the same can be said about our market selves—the distinction between our market selves and our private selves is becoming blurrier, in other words. Against this backdrop, it becomes possible to describe identity harm as a type of modern day defamation that is constituted by an attack on consumers' autonomy to shape their market selves as they see fit. Such attacks are particularly wounding when consumers become complicit in hurting others. Indeed, it is hard to imagine a deeper distortion of one's notion of oneself in the world than being made an (unwitting) participant in harming other beings.

To summarize, recognizing the psychic safety defect possessed by identity-harming products is crucial for mobilizing consumers as civil regulators. Psychic safety defects can harm consumers in ways that are at least comparable to the personal injuries brought about by traditional product defects. Likewise, the psychic wounds inflicted by attacks on consumers' autonomy to craft a values-aligned market self are at least comparable to those resulting from defamation. The protective principles at work in tort law should be extended to afford stronger protections for consumers' virtuous expectations, both to shield them from the painful effects of virtuous duperies and to empower them as civil regulators.

III. VIRTUOUS PROMISES AS CONTRACTUAL PROMISES

Contract law is often described as the law of broken promises.[107] This Part suggests some avenues for adapting contract law to serve as the law of broken virtuous promises, in order to better address identity harm. As explained, identity harm arises when a virtuous promise is broken and is perhaps most acute when the underlying promise is other-regarding since this implicates the consumer in hurting others. The previous Part discussed possibilities for addressing identity harm as a products liability or a dignitary tort. Here, we review possibilities for addressing identity harm as a contract law violation. One way to "contractualize" identity harm is to make it a promises problem. This begs the questions, What virtuous promises give rise to identity harm? And how far should the virtuous

106. For a persuasive account of how consumer autonomy is being undermined through contemporary contracting practices, see Margaret Jane Radin, BOILERPLATE (2014); particularly relevant is her discussion of "varieties of nonconsent" where she explains how duress, fraud, but also "sheer ignorance" and "uninformed consent" can eviscerate voluntariness and, by extension, the freedom to (and not to) contract. *Id.*, at 19–29.

107. Kevin E. Davis, *Promissory Fraud: A Cost-Benefit Analysis*, 2004 WIS. L. REV. 535.

promises net be cast? In addressing these questions, this Part explains the problem of sustainability noise as a generator of—largely non-actionable—virtuous promises; it argues for the promises net to be cast more widely in order to capture more virtuous promises and hold accountable those firms that are not as "good" as they claim to be. The discussion highlights key challenges involved with using contract law to tackle identity harm and carries over into the next Part, which explores the potential and challenges of relying on state consumer law to address identity harm grievances.

A. Sustainability Noise

An important measure of the rise of conscious consumerism and the market for virtue is the proliferation of certifications. Indeed, certifications appear on an expanding array of products—for example, clothing, food, cleaning products, and home appliances.[108] Certifications contain sustainability-related virtuous promises that speak directly to consumers' desire to be good (or simply better) global citizens. They communicate to consumers that item X meets certain sustainability standards that pertain to its production or use. Process-related standards and certifications tell a story about how a product (e.g., coffee, a cell phone, and apparel) was made, how workers and their communities were treated, and the environmental impacts of production. Use-related standards and certifications tell a story about the environmental impact of using the product (e.g., a washing machine or detergent).

Fairtrade International is perhaps the best known among the process-related certifications. It promises that certified products give farmers a better deal, affording them "the opportunity to improve their lives and plan for their future."[109] To see the other-regarding dimension of the fair-trade promise, consider that it is "based on a partnership between producers and consumers" that "offers consumers a powerful way to reduce poverty

108. Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 U.C. DAVIS L. REV. 935, 958 (2014) (quoting Doug Miller & Peter Williams, *What Price a Living Wage? Implementation Issues in the Quest for Decent Wages in the Global Apparel Sector*, 9 GLOBAL SOC. POL'Y 99, 438 (2009))("[L]abor standards certification programs are attempting to be more 'regulatory' than some other labeling efforts, although they clearly mix regulatory strategies with marketing ones."); Johnston, *supra* note 36, at 229 (noting that Whole Foods uses certifications to appeal to environmentally conscious consumers by combining consumerism with collective social responsibility); Peter Leigh Taylor, *In the Market but Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change*, 33 WORLD DEV. 129 (2005) ("Certification and labeling initiatives world-wide gain growing attention as promising market-based instruments which harness globalization's own mechanisms to address the very social injustice and environmental degradation globalization fosters.").

109. *What Is Fairtrade?*, FAIRTRADE INT'L, https://www.fairtrade.net/about-fairtrade/what-is-fair trade.html [https://perma.cc/Q73Z-RWNY].

through their every day shopping."[110] Fair-trade certifications (there are several aside from Fairtrade International) aim to strengthen the social bonds between consumers and producers, and succeed (or fail) depending on how effectively they nurture what Kevin Kolben refers to as the "consumer imaginary."[111] Josée Johnston explains that the fair-trade movement has stimulated conscious consumption for many types of goods (especially food) by drawing attention to the reality that "many of the worst abuses in the global system are associated with foods that are integrated into our everyday life through transnational commodity chains—sugar, bananas, coffee, chocolate—*magnifying consumers' complicity in social abuses associated with their production*."[112]

Certification and standards-based schemes are supposed to help consumers differentiate between products on the basis of their sustainability features and between products that truly are sustainable from those that merely claim to be—a practice referred to as "greenwashing"[113] for environmental claims, and sometimes as "redwashing" or "bluewashing" for social claims.[114] However, there are so many certifications and certifiers that even the most rigorously conscious consumers can quickly become overwhelmed and confused by the amount of information permeating the market for virtue.[115] Aggravating this problem, many sustainability-related virtuous promises are not made via logo-based certifications on product packaging, but rather through general marketing, including on company websites[116] and in company codes of conduct, annual CSR reports, and

110. *Id.*

111. *See* Kolben, *supra* note 40.

112. *See* Johnston, *supra* note 36, at 239 (emphasis added).

113. Greenwashing happens when a company seeks to boost sales by overstating its environmental achievements. For a detailed explanation and solutions, see Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 999–1009, 1025–38 (2011).

114. Wayne Visser, *Exposing the CSR Pretenders*, WAYNE VISSER BLOG BRIEFING (Oct. 27, 2011), http://www.waynevisser.com/wp-content/uploads/2012/06/blog_csr_pretenders_wvisser.pdf [https://perma.cc/C647-HTSC] (explaining that "bluewashing" refers to businesses that use their association with the United Nations, which has a blue logo, to appear more responsible than they really are).

115. Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 61 (2010) (noting the absence of legally mandated environmental, social, and governance disclosures); Roger D. Wynne, *The Emperor's New Eco-Logos?: A Critical Review of the Scientific Certification Systems Environmental Report Card and the Green Seal Certification Mark Programs*, 14 VA. ENVTL. L.J. 51, 54 (1994) (noting that vague and unverifiable sustainability claims that offer half-truths or no tangible environmental benefits overwhelm consumers' ability to "discern truly green products from those merely labeled as such").

116. For example, Everlane, the online clothing retailer, expresses its commitment to "Radical Transparency" and invites customers to "#KnowYourFactories" adding, "We spend months finding the best factories around the world . . . . Each factory is given a compliance audit to evaluate factors like fair wages, reasonable hours, and environment. Our goal? A score of 90 or above for every factory." *About Us*, EVERLANE, https://www.everlane.com/about (last visited Mar. 12, 2018).

supplier agreements.[117] Virtuous promises can also be generated when a company joins a sustainability-focused industry association, such as the International Cocoa Initiative, which is dedicated to promoting child safety in the cocoa sector,[118] or the Responsible Business Alliance (RBA), whose members comprise leading electronics companies committed to being "held accountable to a common Code of Conduct . . . to support continuous improvement in the social, environmental and ethical responsibility of their supply chains";[119] or by affiliation with international sustainability programs, such as the United Nations Global Compact,[120] or a multi-stakeholder initiative, such as the Sustainable Apparel Coalition.[121]

The multiplicity of sustainability-related virtuous promises creates a great deal of sustainability noise. Companies surround-sound themselves in this noise to attract consumers, but also to lull consumers into a false sense of comfort that the global supply chains they buy from are more socially and environmentally sound than they actually are. Another reason why sustainability noise is nefarious is that it often shields companies from liability when the truth about their *un*sustainability is revealed. Indeed, virtuous promises that are diffused by way of sustainability noise tend to be

117. For example, the mega-company, H&M, makes commitments in its 2016 Sustainability Report to collect 25,000 tonnes of garments per year by 2020, to use 100% sustainable cotton by 2020, to use 100% sustainably sourced or recycled materials by 2030, to achieve fair jobs for all and to serve as stewards for diversity and inclusivity. H&M, THE H&M GROUP SUSTAINABILITY REPORT 10–13 (2016), https://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/2016%20Sustainability%20report/HM_group_SustainabilityReport_2016_FullReport_en.pdf [https://perma.cc/KLW3-32W2].

118. *About Us*, INT'L COCOA INITIATIVE, http://www.cocoainitiative.org/about-ici/about-us/ [https://perma.cc/3EXJ-YM9T] (stating that ICI promotes "child protection in cocoa-growing communities" and "unites the forces of the cocoa and chocolate industry, civil society, farming communities and national governments in cocoa-producing countries to ensure a better future for children and to advance the elimination of child labour").

119. *About the RBA*, RESPONSIBLE BUS. ALL., http://www.responsiblebusiness.org/about [https://perma.cc/3H22-REUJ] ("[C]ommitted to supporting the rights and wellbeing of workers and communities worldwide affected by the global [electronics] supply chain.").

120. The U.N. Global Compact is a voluntary initiative that issues "[a] call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals." *What is the UN Global Compact*, U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc [https://perma.cc/7YM2-XKCZ].

121. The Sustainable Apparel Coalition is a multi-stakeholder initiative that brings together "[c]ompanies from every segment of fashion, manufacturing and retailing from all over the globe," as well as "academic research groups, NGOs dedicated to labor, trade and environmental issues, affiliated trade organizations and sustainability service providers." *Members*, SUSTAINABLE APPAREL COAL., http://apparelcoalition.org/members/ (last visited Feb. 18, 2017). Stakeholders share visions "of an apparel, footwear and home textiles industry that produces no unnecessary environmental harm and has a positive impact on the people and communities associated with its activities." *Our Vision*, SUSTAINABLE APPAREL COAL., https://apparelcoalition.org/our-vision/ [https://perma.cc/FU22-EAW8].

viewed by courts only as "aspirational" or non-actionable (mis)representations.[122] Such loose treatment of virtuous promises is highly problematic as it perpetuates the occurrence of identity harm and breeds distrust in the marketplace. A key challenge is therefore to find ways to make sustainability-related virtuous promises, whether direct or indirect, actionable. The following Section highlights the magnitude of this challenge, and suggests some openings for further exploration.[123]

B. The Challenge of Enforcing Virtuous Promises

The law of warranties helps identify what promises are included in contracts for the sale of goods. Understanding how warranties law applies to the *virtuous* promises made by corporations highlights some of the challenges involved with enforcing these promises, whether as a breach of warranty or a contractual misrepresentation.[124] Where a misrepresentation is fraudulent, as it was with Dieselgate, it is usually much easier to succeed on a breach of contract claim. However, before a court can even reach the question of whether a representation or assertion was fraudulent, it must establish that a representation or assertion was actually made. And that is where identity-harmed consumers seeking to use contract law to hold promise breaking corporations accountable run into difficulty. This Section shows how hard it is to include virtuous promises, particularly those contained in side communications such as CSR reports and company codes of conduct, within the realm of actionable promises.

Warranties come in two main varieties, express and implied. For purposes of making sustainability-related virtuous promises actionable, express warranties are the most relevant—although implied warranties also hold some promise, as I intend to explore in future writings.[125] Express

122. Hoffman, *infra* note 128, at 1403 (explaining that many statements are lumped into the puffery or aspirational category because "neither courts nor regulators consider empirical evidence about which claims imply facts" and which don't; otherwise put, courts know too little about how consumers actually process marketing information to carry out puffery analysis in a coherent fashion).

123. Craswell, *supra* note 90, at 606 (explaining that contract law is lacking "when it comes to determining what any given representation actually asserts").

124. The RESTATEMENT (SECOND) OF CONTRACTS § 159 (AM. LAW INST. 1981) defines misrepresentation as "an assertion that is not in accord with the facts" and § 161 distinguishes between misrepresentations made via direct assertions and those made via non-disclosure, while §162 distinguishes between fraudulent and negligent misrepresentations based on whether "the maker *intends* his assertion to induce a party to manifest his assent . . . ." (emphasis added).

125. U.C.C. § 2-313(1)(a) (AM. LAW INST. & UNIF. LAW COMM'N 1977) (express warranty is "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain"); U.C.C. § 2-714 (if an express warranty is established and the goods are found to be non-conforming, the buyer can obtain remedies including the difference in price between the product as promised and the product as delivered, as well as consequential damages.).

warranties are statements of fact about a product, made orally (e.g., in a television or radio advertisement or by a salesperson on a used car lot)[126] or in writing (e.g., on a label, in a print advertisement, a brochure or catalog, or on a website).[127] The more specific and verifiable the statement, the more likely it is to be treated as an express warranty.[128] Assertions such as "car X produces less emissions than car Y" or "this wireless mouse has a 300 hour battery life" would likely qualify as express warranties, while statements of opinion or puffery, such as "you'll love the smell" or "this is the best pizza, ever," likely would not.[129] For identity harm purposes, the question is whether virtuous promises, particularly those made in side communications (e.g., CSR reports, codes of conduct, and supplier agreements), rather than directly on product packaging, could be treated as express warranties. For example, would H&M's commitment in its CSR report to "source 100% sustainable cotton by 2020" be viewed as an express warranty? What about RBA's website statement that members commit to being "held accountable to a common Code of Conduct" that supports the rights and well-being of workers and communities affected by the global electronics supply chain? Or the assertion by online clothing retailer Everlane that its staff members

126. *See* U.C.C. 2-313(1)(a); *Marketing and Advertising: Express Warranty or Puffing?*, PARKER POE (Apr. 30, 2008), http://www.parkerpoe.com/newsevents/2008/04/marketing-and-advertising-express-warranty-or-puffing [https://perma.cc/FU22-EAW8] (explaining that photographs and statements on a company's website may qualify as express warranties).

127. *See, e.g.*, Cover v. Windsor Surry Co., No. 14-cv-05262-WHO, 2016 WL 3421361, at *6–7 (N.D. Cal. June 22, 2016); *In re* Frito-Lay N. Am., Inc. All Nat. Litig., No. 12-MD-2413, 2013 WL 4647512, at *26–27 (E.D.N.Y. Aug. 29, 2013) ("all natural" label is express warranty); Podobedov v. Living Essentials, L.L.C., No. CV 11-6408, 2012 WL 2513458, at *4 (C.D. Cal. Mar. 22, 2012) (advertisements regarding active ingredients in energy drink create express warranties); Forcellati v. Hyland's, Inc., 876 F. Supp. 2d 1155, 1162–63 (C.D. Cal. 2012) (statements on packaging create warranty); Stewart v. Smart Balance, Inc., No. 11-6174, 2012 WL 4168584, at *13 (D.N.J. June 26, 2012) ("fat free" label is express warranty); Snyder v. Farnam Cos., 792 F. Supp. 2d 712, 722 (D.N.J. 2011) (refusing to dismiss express warranty claim based on statements made on manufacturer's website); Hobbs v. Gen. Motors Corp., 134 F. Supp. 2d 1277, 1281 (M.D. Ala. 2001) (statements in owner's manual could create warranties); Carrau v. Marvin Lumber & Cedar Co., 112 Cal. Rptr. 2d 869, 874 (Cal. Ct. App. 2001) (assertion in advertisement, if read and relied on by buyer, may act as warranty); Mennonite Deaconess Home & Hosp., Inc. v. Gates Eng'g Co., 363 N.W.2d 155, 161–62 (Neb. 1985) (holding that representations made in brochures can create express warranties where the seller asserts a fact of which the buyer is ignorant or on which the seller expects the buyer to rely in making the purchase).

128. David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1397–98 (2006) (recalling that "[p]uffery is a 'vague statement' boosting the appeal of a service or product that, because of its vagueness and unreliability, is immunized from regulation" and explaining why this too-simple definition "leads authorities to overprotect commercial speech from liability"). Hoffman clarifies that, "[l]egally, the most significant characteristic of 'puffery' is that it is a *defense* to a charge of misleading purchasers . . . or to a charge that a promisor has made a legally cognizable promise." *Id.* at 1400.

129. *Marketing and Advertising: Express Warranty or Puffing?*, *supra* note 126 ("A salesperson's statement of her opinion of the product's value is known as 'puffing.'").

"spend months finding the best factories around the world" and that "[e]ach factory is given a compliance audit to evaluate factors like fair wages, reasonable hours, and environment"?[130] Would these virtuous promises be treated as actionable or merely as aspirational puffery?[131]

Though limited, the case law indicates that most sustainability-related promises would count only as aspirational statements, meaning that virtuous statements in side communications are likely to be non-actionable. For example, in *Bondali v. Yum! Brands, Inc.*, the company was sued for its failure to adhere to statements about its food safety standards contained in its code of conduct.[132] The court held that a company's "code of conduct is not a guarantee that a corporation will adhere to everything set forth" therein.[133] Rather, it contains only "a declaration of corporate aspirations."[134]

A somewhat more promising case is *Ruiz v. Darigold, Inc.*, where plaintiffs alleged that Darigold and the Northwest Dairy Association (NDA) used their CSR report to mislead consumers into thinking "'that the company's member dairies treated their workers and cows well' and/or that Darigold 'treat[ed] its workers and cows with respect and in compliance with the law.'"[135] The court found that "[e]ven if the Court considers the ten sentences or phrases on which plaintiff's claims of misrepresentation and omission rely, when read in context they reflect a nuanced assessment of the current situation, are aspirational statements, or have not been shown to be false in any material respect."[136] However, the court also suggested that the language regarding the NDA producers' adoption of "world-class husbandry" techniques *was* potentially actionable: if "a term like 'world-class' is capable of being proven or disproven," and if plaintiffs had alleged "any facts suggesting that Darigold's farmers *fall below that standard* or

130. *Supra* notes 116–119.

131. Hoffman, *supra* note 128, at 1396 ("We are constantly exposed to speech . . . encouraging us to buy goods, invest in stocks, and transact for services. This speech is often intentionally misleading, is usually vivid and memorable, and induces many of us to rely on it. But the law, which normally punishes lies for profit, encourages this speech by immunizing it as 'mere puffery.'"). Hoffman highlights the major problem that puffery "is assumed not to work" by regulators and courts, even though extensive empirical research shows that puffery *does* work; it convinces buyers to buy, because, ultimately, "positive emotional effect, and not rational choice, drives purchasing decisions." *Id.* at 1441–42. As a result, under the current doctrine, clever marketers are "able to have their cake (immunity) and eat it too (exploitation of a small class of consumers)." *Id.* at 1441.

132. Bondali v. Yum! Brands, Inc., 620 F. App'x 483, 487 (6th Cir. 2015). This is a securities class action but the court's treatment of CSR-related statements is nevertheless valuable.

133. *Id.* at 490.

134. *Id.* ("To treat a corporate code of conduct as a statement of what a corporation will do, rather than what a corporation aspires to do, would turn the purpose of a code of conduct on its head.").

135. Ruiz v. Darigold, Inc., No. 14-cv-1283, 2014 WL 5599989, at *4 (W.D. Wash. Nov. 3, 2014).

136. *Id.* at 6

have otherwise been deficient in animal husbandry," then their misrepresentation claims would have stood a better chance.[137] The implication is that company statements that make reference to industry standards and that describe company performance in relation to those standards could be treated as actionable promises, even when contained in a side communication. Since many corporations sign onto and advertise their membership in standards-based initiatives (e.g., the RBA, fair-trade certifications), *Ruiz* points to an important, albeit small, opening for some sustainability-related virtuous promises to become actionable.

Not long after *Ruiz*, the Superior Court of the District of Columbia issued an even more promising decision involving CSR statements published on company websites. In *National Consumers League v. Wal-Mart Stores, Inc.*, *J.C. Penney Corporation, and The Children's Place, Inc.*, (NCL), the court denied in part and granted in part the defendants' motion to dismiss where the League alleged that defendants had violated the D.C. Consumer Protection Procedures Act by not enforcing "their own Corporate Statements in dealing with suppliers, thereby violating their promises to the general public."[138] Each company had made statements expressing an expectation that (1) its suppliers comply with applicable laws and regulations; (2) its suppliers provide a safe and healthy working environment, free of child labor; *and* a commitment to (3) audit supplier compliance with its (buyer-company) standards.[139] The court granted defendant's motion for statements falling under (1) and (2) because they "are generally aspirational in nature" and, as such, cannot be "recast … into promises."[140] However, with respect to statements under (3), the court denied defendants' motion saying that those statements are "more specific and contain verifiable facts that may be material to a consumer's purchasing decisions."[141] In other words, because the auditing statements were specific and verifiable, they were sufficient for purposes of stating an actionable claim under D.C. consumer law. The court did not reach the merits of the allegations and the case eventually settled, but the recognition that CSR commitments can sometimes be actionable is a big precedential step in the right direction for identity-harmed claimants.

137. *Id.* at 6–7 (emphases added).

138. Nat'l Consumers League v. Wal-Mart Stores, Inc., J.C. Penney Corp., and The Children's Place, Inc., No. 2015- CA-007731, 2016 WL 4080541, at *1 (D.C. Super. Ct. July 22, 2016) (defendants had sourced supplies from Rana Plaza, a factory in Bangladesh that collapsed in 2013 killing over 1000 workers, including children; the League relied on the collapse to support the inference that defendants had failed to honor their CSR promises).

139. *Id.*

140. *Id.*

141. *Id.* at *7.

This brief attempt to employ contract law to address identity harm quickly reveals how easy it is for virtuous promises to slip through the enforceable promises net. Most virtuous promises will be treated as aspirational only. And while *Ruiz* and *NCL* open some doors for aggrieved consumers, those doors have yet to be successfully walked through. Moreover, both cases were decided under state consumer statutes, which, as discussed in Part IV, is more flexible about qualifying statements as misleading as compared with common contract law. Overall, claimants wanting to employ warranties or contractual misrepresentation to hold promise-breaking companies accountable will not have an easy go of it. Actionability challenges are even more acute under the tort of common law fraud since the latter requires a "blameworthy state of mind" and "deliberate deception that induces reliance."[142] In light of the continuing proliferation of noisy sustainability promises that not only shape consumers' virtuous expectations but also increase the likelihood that those expectations will be exploited, the current state of legal affairs is highly problematic. The challenge is to push on the law of broken promises to cast a wider net over virtuous promises so that more sustainability-related claims, including those made in side communications, can be treated as actionable.

IV. OPERATIONALIZING IDENTITY HARM IN STATE CONSUMER LAW

Consumer law provides a good legal home for identity-harmed consumers since it deals specifically with grievances ensuing from consumer transactions and, more particularly, with grievances attached to unfair or deceptive acts or practices (UDAP).[143] Importantly, consumer law adopts a relatively generous approach to determining what types of acts and practices qualify as deceptive. At the federal level, a deceptive act or practice refers to a "representation, omission, or practice that is *likely to mislead* the consumer acting reasonably under the circumstances as to a material fact."[144] This definition has been adopted at the state level by way of "little FTC Acts" or state UDAP statutes; for example, California's Consumer Legal Remedies Act (CLRA), Unfair Competition Law (UCL), and False Advertising Law (FAL) comprise that state's UDAP statutes and

142. Davis, *supra* note 107, at 535–36.

143. CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 18–21 (2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf [https://perma.cc/T8B3-CM9Q].

144. FED. TRADE COMM'N, POLICY STATEMENT ON DECEPTION (Oct. 14, 1983) (policy statement provides guidance for recognizing "deceptive acts or practices" as the FTC Act does not offer a single definition).

"prohibit promotional materials that misrepresent or omit facts in a way that is likely to mislead or deceive a reasonable consumer."[145]

The "likely to mislead" standard makes it easier for aggrieved consumers to bring claims under statutory consumer law than common law fraud, which requires showing intent to deceive. Additionally, consumer law has a more supple approach for establishing injury than tort or contract. To have standing to sue, plaintiffs in most states need only allege that they have suffered an "ascertainable loss,"[146] which does not necessarily require showing out-of-pocket loss (e.g., a drop in market value or lower resale price) and can include less tangible injuries, such as diminished subjective value.[147] Indeed, none of the identity harm cases discussed below failed for lack of standing. In each case, the drop in the product's subjective value following the revelation of its sustainability truth was sufficient. However, as discussed below, consumer law still demands too much of identity-harmed consumers, especially where claims are based on omission rather than affirmative misrepresentation.

This Part recommends avenues for strengthening the protective capacity of consumer law, with a primary focus on California's UDAP statutes. There are three reasons to choose California as the identity harm "laboratory state." First, most identity harm cases have emerged from California, including *Nike v. Kasky*;[148] the *Chocolate Cases*; *Wirth v. Mars*,[149] *Barber v. Nestlé*,[150] and *Sud v. Costco* (together, the *Seafood Cases*); and the Dieselgate multidistrict litigation, making California ideal for studying the legal treatment of identity harm. Second, although state UDAP statutes do differ, they also have much in common as they are modelled on the FTC Act. Analyzing the workings of California's UDAP statutes should therefore provide insights into the workings of state UDAP statutes, generally—or at least help identify relevant disparities. Third, California is

145. *Ruiz*, 2014 WL 5599989, at *3.

146. DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 5:9 (2018–2019).

147. *Id.* § 5:10.

148. Kasky v. Nike, Inc., 45 P.3d 243, 243–248 (Cal. 2002) (Marc Kasky sued Nike on behalf of California citizens for misrepresenting its labor practices—saying they were good, when in fact factories were plagued with human and labor rights violations—and making misleading statements to this effect in documents including press releases and letters to newspapers, university presidents, and athletic directors.).

149. Wirth v. Mars Inc., No. SA CV 15-1470-DOC (KESx), 2016 WL 471234 (C.D. Cal. Feb. 5, 2016). (Plaintiffs alleged violations of California UDAP statutes because Mars did not disclose that its pet food could contain seafood fished by slave labor in Thailand.).

150. Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 957 (C.D. Cal. 2015) (Plaintiffs' UDAP claims alleged that Nestlé had duty to disclose the use of forced labor in its Fancy Feast cat food supply chain.).

the only state to have adopted hard law on global supply chain governance: the California Transparency in Supply Chains Act of 2010 (CSCA).[151]

The CSCA requires large companies doing business in California to disclose information about their supply chains, such as whether they have a process in place for conducting human rights due diligence.[152] It does *not* require companies to make any adjustments to their due diligence process, or to meet minimum human rights standards, or even to disclose abuses within their supply chains.[153] The CSCA could help validate identity harm claims since it recognizes that consumers want more information about the social soundness of the companies they patronize; indeed, the purpose of the CSCA is to give consumers access to "basic" information to "aid their purchasing decisions."[154] Whether the CSCA is succeeding is highly questionable, but its very existence signals that the California legislature views at least some types of sustainability-related information as material.[155] On the flip side, the CSCA may actually be *hurting* California consumers. Recent identity harm cases have faced serious challenges because defendant companies argued that their duty to disclose is limited to the "basic" requirements of the CSCA and that the safe harbor doctrine shields them from any additional disclosure requirements coming from a "novel application of California consumer protection law."[156] Identity-harmed consumers will need to watch out for how the overlap-cum-conflict between the CSCA and California's UDAP statutes is managed by the courts. It may be necessary to return to the California legislature for clarification of (or amendment to) the CSCA's approach to the *non*disclosure of supply chain abuses.

151. CAL. CIV. CODE § 1714.43 (West 2018).

152. *Barber*, 154 F. Supp. 3d at 962 (The CSCA legislative history indicates that "companies are 'still completely free to do anything they want about their efforts to fight human trafficking and slavery,' including nothing at all, so long as they make the required disclosures.").

153. *Id.*

154. *Wirth*, 2016 WL 471234, at *7.

155. Chilton & Sarfaty, *supra* note 54, at 3–5.

156. *Barber*, 154 F. Supp. 3d at 962 (concluding that the safe harbor doctrine applies to bar the plaintiffs' UDAP claims because disclosure responsibilities "begin and end" with the CSCA requirements). *But see* Dana v. Hershey Co., 180 F. Supp. 3d 652, 670 (N.D. Cal. 2016) (noting that the CSCA requires website disclosures but does not address label disclosures and that "there is a difference between, on one hand, advertising the steps a company has taken to reduce slavery in its supply chain (as the statute requires), and on the other, disclosing that such slavery persists (as Dana seeks here). That the legislature mandated the former in certain instances does not necessarily indicate a conclusion that the latter could never be required under existing consumer protection laws.").

A. Dangerosity Omissions and Virtuous Misrepresentations

One advantage of bringing identity harm claims under consumer law is that either representations or omissions can be used as the basis for UDAP violations. However, plaintiffs alleging violations via the omissions of dangerosity information must overcome serious hurdles. Specifically, there is no standalone duty to disclose (even material) information (e.g., the use of child labor in the cacao supply chain).[157] Instead, the duty to disclose applies only when (1) the information presents a safety issue for consumers, or (2) disclosure is necessary to correct an affirmative misrepresentation, or (3) the defendant has exclusive control over the information that the plaintiff wants disclosed.[158] This Section attempts to make identity harm fit into each of these exceptions, in turn.

The *Chocolate* and *Seafood Cases* decisions refer to the rejection by California courts of "a broad obligation to disclose" in favor of a duty that is "limited to [defendant's] warranty obligations absent either an affirmative misrepresentation or a safety issue."[159] The limited disclosure standard was used to justify the dismissal of the *Chocolate* and the *Seafood Cases* because the plaintiffs failed to show that the companies had a duty to disclose the use of slave labor in their products. Had the companies actively "lied to consumers—by proclaiming there was no possibility that forced labor existed in their supply chain, for instance—then Plaintiffs would have actionable claims based on these misrepresentations."[160] At the outset, then, cases alleging UDAP violations via omissions of dangerosity information are less likely to survive as compared with cases alleging affirmative misrepresentations. As such, omissions claims need more "help" from identity harm.

Psychic safety disclosure: Perhaps the most direct way for identity harm to lend support to claimants in cases involving omissions would be to expand the notion of defect to include the psychic safety defect described in Part II. The *Chocolate* and *Seafood Cases* decisions found no duty to disclose the possible use of forced labor in the supply chain in part because none of the complaints alleged a safety or product defect issue. But what if the plaintiffs had tried to assert a psychic safety issue or defect? As discussed earlier, while products liability typically involves physical injury

157. *Dana*, 180 F. Supp. 3d at 664 ("[T]he weight of authority limits a duty to disclose under the CLRA to issues of product safety, unless disclosure is necessary to counter an affirmative misrepresentation.").

158. *Id.* at 664–65.

159. *Wirth*, 2016 WL 471234, at *3 (quoting Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1141 (9th Cir. 2012)).

160. *Id.* at *4

to person or property, a colorable argument can be made that the psychic safety issues created by identity-harming products constitute a type of personal injury that warrants protection. Moreover, tort law recognizes intangible harms, including standalone emotional distress, assault, and defamation as personal injury. The protective principle making such recognition(s) possible should be imported into state UDAP statutes, as this would better effectuate their purpose of protecting today's increasingly sustainability-conscious consumers.[161]

Now, to persuade courts even to consider expanding the notion of defect, it will be necessary to assuage the concern that a broader duty to disclose would be unworkable for companies and for courts because too many people care about too many different things. To illustrate this concern, consider *Hall v. Sea World Entertainment, Inc*., where plaintiffs alleged that had they known the omitted information concerning the health and living conditions of whales at SeaWorld, they would not have purchased tickets to enter the park.[162] Declining to find that SeaWorld had violated its duty to disclose, the court said that an alternative conclusion would "effectively require any company selling any product or service to affirmatively disclose every conceivable piece of information about that product or service (or even about the company generally) because inevitably some customer would find such information relevant to his or her purchase."[163] Adopting this view, the *Wirth* court declined to find that Mars had violated its duty to disclose when it did not include information pertaining to the use of slave labor in the cat food supply chain.[164] However, the court added that it was "troubled by [p]laintiffs' proposed interpretation of the duty to disclose under California law because [p]laintiffs offer *no meaningful limiting principle*."[165] This suggests that if the plaintiffs had provided a limiting principle, a different conclusion could have been reached.

I propose that identity harm can offer such a limiting principle by narrowing disclosure requirements in three ways. First, identity harm would expand the duty to disclose, but only for dangerosity information that safeguards consumers' autonomy to make values-aligned purchases and to steer clear of purchases that pit them against their values. Second, the to-be-disclosed dangerosity information should be other-regarding, meaning

161. CARTER, *supra* note 143, at 5–6 (explaining that UDAP statutes were passed in recognition of serious deficiencies in the protective tools available to consumers).

162. *Wirth*, 2016 WL 471234, at *4 (citing Hall v. Sea World Entm't, Inc., No. 3:15-CV-660-CAB-RBB, 2015 WL 9659911 (S.D. Cal. Dec. 23, 2015)).

163. *Id.* (quoting Hall v. Sea World Entm't, Inc., No. 3:15-CV-660-CAB-RBB, 2015 WL 9659911, at *7 (S.D. Cal. Dec. 23, 2015)).

164. *Id.*

165. *Id.* at *5 (emphasis added).

that it carries implications for the well-being (or ill-being) of others beyond the consumer—e.g., workers and the planet. Third, the information should pertain to the product (or service) at issue, not the company. Otherwise put, under an expanded duty to disclose, companies would not be required to reveal information about, for example, their contributions to political campaigns or charity or promotional and loyalty programs.[166] Instead, the information would need to be tied to the product at issue in the case, to its social, ethical, and environmental (production and use) story. Applying this three-part limiting principle for disclosing dangerosity information, the *Hall* plaintiffs would have succeeded in requiring SeaWorld to disclose information about orca health because that information (a) would preserve consumer autonomy to make values-aligned choices, (b) is other-regarding (concerned with the well-being of whales), and (c) is specific to the SeaWorld product/service (the experience of being in the world of the sea).

Disclosure to correct affirmative misrepresentation: Identity harm can also lend support in omissions cases by widening the warranties net to bring more virtuous promises under the actionability umbrella. California law limits the duty to disclose to a defendant's "warranty obligations absent either an affirmative misrepresentation or a safety issue."[167] If, as recommended in Part III, express warranties were expanded to include the virtuous promises contained in direct (label packaging and advertisements) and side communications (CSR reports, codes of conduct, supplier contracts, etc.), then companies would be required to disclose any dangerosity information that qualifies or cuts into their virtuous warranties. Put another way, if it turns out that the product is non-conforming, then the relevant dangerosity information should be disclosed to ensure that consumers remain apprised of the (correct) terms of the transaction. This would ensure that information asymmetries are continually corrected and preserve consumers' autonomy to make values-aligned purchases.

As mentioned, cases where the issue is a false virtuous promise—i.e., where the identity harm is borne out of an affirmative lie—should be easier to litigate. However, it will still be necessary to establish that the virtuous

166. An example is Delta's discounts for members of the National Rifle Association, which the airline suspended following the high school shootings in Parkland, Florida. Information regarding such promotional programs would not require disclosure under the proposed framework as it does not pertain to the services sold, namely, flying customers safely from one place to another. Bart Jansen, *The Number of Delta Air Lines Passengers Who Bought Tickets with NRA Discount: 13*, USA TODAY (Mar. 2, 2018), https://www.usatoday.com/story/news/2018/03/02/delta-reviews-all-fare-discount-prog rams-after-nra-dispute-costs-georgia-tax-break/388587002/ [https://perma.cc/VNK7-K62E].

167. *Wirth*, 2016 WL 471234, at *3 (quoting Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1141 (9th Cir. 2012)).

promise at issue is actionable. Part III explained that this can be challenging, particularly when the virtuous promises are contained in side communications. Indeed, the *Barber* court agreed with Nestlé that its Corporate Business Principles (adopting the U.N. Global Compact principles on human rights and labor), its Supplier Code of Conduct, and its Responsible Sourcing Guidelines contained only aspirational statements that do not qualify as affirmative misrepresentations.[168] Focusing on Nestlé's Supplier Code, the court found that the stipulated requirements "represent an ideal, and not necessarily a reality"; furthermore, "no reasonable consumer who reads the . . . documents . . . in context could conclude that Nestlé's suppliers comply with Nestlé's requirements in all circumstances." [169] Thus, the court concluded, Nestlé "does not mislead [consumers] into thinking that its suppliers abide by those rules and meet those expectations in every instance."[170]

This Article recommends that judges adopt a more aggressive attitude toward aspirational statements that shape and target consumers' other-regarding expectations. Such statements shroud sellers in sustainability noise so loud that it is too easy for them to say, "But we didn't actually promise anything." While a clear distinction between statements of fact and puffery remains necessary in most sale of goods cases, that distinction should be drawn less sharply with respect to companies' other-regarding virtuous promises because this is an area where information asymmetries are particularly problematic, morally. A more aggressive approach would mitigate the trust-costs of identity-harming incidents and allow consumers who participate in the market for virtue to do so more confidently, knowing that there will be consequences if their virtuous expectations are exploited.

Disclosure due to seller's exclusive control: Next we must question the theory that if consumers have access to dangerosity information, then that must mean that the seller does not have exclusive control over the truth about its operations. The *Dana* court said that even if a duty to disclose the use of forced child labor could be established, plaintiffs would still need to show that Hershey had "'exclusive knowledge of material facts not known or reasonably accessible to' its customers."[171] Because Hershey's CSR report acknowledged the child-slavery problem, and it had been recognized by the industry in the Harkin-Engel Protocol back in 2001, and a report commissioned by the U.S. Department of Labor had documented the persistence of the problem over the years, it made no sense to describe the

168. Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 962–64 (C.D. Cal. 2015).
169. *Id.*
170. *Id.*
171. Dana v. Hershey Co., 180 F. Supp. 3d 652, 665 (N.D. Cal. 2016).

child-slavery dangerosity information as being within Hershey's exclusive control.[172] In other words, the *Chocolate Cases* plaintiffs would have lost, even if they had established a duty to disclose. How can identity harm help?

While it may be true that consumers can access dangerosity information by hunting for it, it is also true that (a) hunting is onerous (if not punishing) for consumers seeking to avoid purchases that support human and environmental abuse;[173] (b) the volume of information and sustainability noise is such that it can be difficult to make values-aligned purchases with any real degree of confidence—unless one gives up making purchases altogether, which, while effective for avoiding identity harm, does not seem like a fair choice for consumers; and (c) the dangerosity information that is available can be inconsistent with the virtuous information that companies use to market themselves. For example, in 2012, Hershey issued a press release in which the company committed to sourcing "100 percent certified cocoa for its global chocolate product lines by 2020 and accelerat[ing] its programs to help eliminate child labor in the cocoa regions of West Africa."[174] How should consumers reconcile this with Hershey's CSR Report, which states without qualification that "Hershey has zero tolerance for the worst forms of child labor in its supply chain"?[175] And should consumers be expected to keep track of the fact that the 2012 press release once more extended the deadline for sourcing child-labor-free cocoa (a deadline originally set for 2005, then 2008, then 2010)?[176] Upon what representations should consumers rely to inform their purchasing decisions? At a minimum, it seems fair to conclude that Hershey retained superior (if not exclusive) control over the truth about the use of child labor in its supply chain given that the information to which consumers *do* have access is confusing and inconsistent.

---

172. *Id.*

173. With big brands (e.g., Hershey), consumers may assume that the product meets minimum humanitarian standards and so be less concerned with hunting. Hoffman, *supra* note 128, at 1429 ("Speakers that create robust brands encourage buyers to spend less money investigating subsidiary characteristics.").

174. Press Release, Hershey Co., Hershey to Source 100% Certified Cocoa by 2020 (Oct. 3, 2012), https://www.thehersheycompany.com/content/dam/corporate-us/documents/legal/source-100-certified-cocoa-2020.pdf [https://perma.cc/6YET-CJJT].

175. HERSHEY CO., CORPORATE SOCIAL RESPONSIBILITY REPORT 21 (2014), https://www.thehersheycompany.com/content/dam/corporate-us/documents/csr-reports/2014-hershey-csr-report.pdf [https://perma.cc/G26Z-CQTB] (The report references one of the many documents that enshrine Hershey's commitment to sustainability: "Our Supplier Code of Conduct . . . states that: Children should not be kept from school to work on the farm. Children should not carry heavy loads that harm their physical development. Children should not be present on the farm when farm chemicals are applied. Young children should not use sharp implements during farm work. Trafficking of children or forcing children to work are included among the Worst Forms of Child Labor.").

176. Brian O'Keefe, *Inside Big Chocolate's Child Labor Problem*, FORTUNE (Mar. 1, 2016), http://fortune.com/big-chocolate-child-labor [https://perma.cc/T9M3-NNHW].

As it stands, courts adjudicating identity harm claims ask too much of consumers. Consumers must effectively take full responsibility for policing their own exposure to identity harm. In the *Chocolate Cases* example, consumers must not only pierce through loud sustainability noise to obtain accurate dangerosity information—searching far beyond the narrow CSCA disclosures—to ensure that they aren't supporting child slavery, they must also keep track of companies' shifting sustainability commitments. This is flatly under-protective. If followed, the recommendations in this Part would better protect consumers from identity harm and better protect the market for virtue from the credibility attacks leveled upon it by broken virtuous promises. This would empower consumers to be more effective civil regulators of corporate (mis)conduct and, also very important, it would be beneficial for those whose interests are implicated by virtuous promises—e.g., the planet and people.

Granted, these recommendations require profound adjustments in the application and interpretation of state consumer laws, but the limiting principle offered herein should help to make the adjustments more palatable. With these upgrades, identity-harmed consumers would have a better chance of having their grievances recognized in court. As discussed, cases involving affirmative misrepresentations or lies (e.g., Dieselgate) are more likely to succeed than omissions cases. However, even if successful, both types of cases encounter obstacles at the remedies stage, when it comes to actually redressing identity harm. The next Part examines this problem.

V. REIMAGINING REMEDIES

Just as consumers can experience identity harm absent a physical injury, so too can they experience identity harm absent an economic injury or pecuniary loss. Particularly where the source of the harm is a virtuous dupery that makes the consumer complicit in hurting others, attempting to measure identity harm in money terms is a losing proposition. Put another way, where complicity is involved, as it is with virtually all sustainability-related virtuous promises, identity harm demands something beyond money damages to be remedied. What identity-harmed consumers need to be made whole is for the company to come through on its original promise and/or to repair the damage done. This Part explains why remedies must look beyond market value to redress identity harm and offers examples of the types of injunctive remedies that would restore identity-harmed consumers' sense of values-integrity. Such remedies would be beneficial for the consumer, but also for those injured by the broken virtuous promise—e.g., the planet or the people involved in making the identity-harming product.

A. Market Value Is Not the Only Value That Counts

Economic harm is often measured by looking at the drop in market value of a good after a defect or quality problem has been discovered. For example, the market value of the Dieselgate cars plummeted after the scandal broke because the cars were technically illegal to sell and drive in the United States. Because of the illegality, VW placed a stop-sale on the cars.[177] This effectively drove the market value of the cars down to zero dollars, generating sharp and obvious pecuniary loss for car owners. But what of those individuals who sold their dirty-diesels *before* the scandal broke and who received pre-scandal market value for their cars? Can it be said that they suffered no harm because they suffered no—or only limited—pecuniary loss? As I argued in *Identity Harm*, to answer this question in the affirmative would be grossly under-protective.[178] The plaintiffs in *Nemet v. Volkswagen Grp. Of Am., Inc.* were comprised precisely of individuals who sold their cars prior to the reveal of VW's deception.[179] Regardless of the resale price they obtained for their cars, these individuals should be treated as Dieselgate victims because they received and drove *dirty*-diesel vehicles, not the environmentally friendly vehicles they were promised. VW's virtuous dupery injured both categories of victims, those who sold pre-scandal and those who (absent the stop-sale order) would have sold post-scandal; it turned both groups "into some of the biggest polluters on the road."[180] This (defamation-like) conversion occurred for as long and for as many miles as the cars were on the road, regardless of when they were on the road.

Pecuniary loss is thus not the only dimension along which harm is experienced, nor is it the only dimension along which harm should be measured. While the *Nemet* complaint helpfully exposes some of the limitations of looking to resale value for loss, it does not go far enough in terms of asserting non-financial losses; it limits the recovery sought only to

177. For additional information regarding the settlement, see Dadush, *Why You Should Be Unsettled*, *supra* note 1; Alanis King, *Volkswagen Tells Dealers to Halt Sales of New TDI Cars amid Diesel Cheating Scandal*, JALOPNIK (Sept. 20, 2015), http://jalopnik.com/volkswagen-tells-dealers-to-halt-sales-of-new-tdi-cars-1731923302 [https://perma.cc/7CU2-T9XF] (although the EPA took no action to stop VW owners from driving their cars, it would not grant the "certificate of conformity" needed to sell them, "meaning they cannot be sold. . . . Meanwhile, whatever 2015 models remain on lots have also been ordered not to be sold").

178. Dadush, *Identity Harm*, *supra* note 1.

179. Nemet Complaint, *supra* note 11, at 1.

180. *Id.* at 3.

a share of the clean premium paid on the cars.[181] The premium is the wrong measure of harm for two reasons. First, it is difficult to calculate because the U.S. market for diesel cars is small, so reference points are limited.[182] Second, even if the clean premium could be determined, it would provide only a poor estimate of the harm. For some, the premium figure might be representative of the value they assign to cleanness or greenness; for others, it might be grossly inadequate and under-compensatory; and for others still, it might be over-compensatory.[183] This is a common problem with coming up with market prices that flatten people's individual preferences and lump divergent preferences together.[184] Here, however, the problem can be avoided by looking to a different measure of harm altogether.

For identity-harmed consumers, the right measure of damages is not the diminished resale value or the clean (or social) premium, but rather the lost greenness of the purchase.[185] And lost greenness can be measured at least as well as the clean premium. Returning to *Nemet* as a case example, a price could be attached to the above-advertised (and illegal) emissions generated by the dirty-diesels and multiplied by the number of miles driven by the plaintiffs while they still owned their vehicles.[186] Excess emissions would thus be converted into a lost greenness figure that could be used to calculate money damages, which could then be placed into a climate mitigation fund.[187] The recommendation in *Identity Harm*, as here, is to move away from premiums as the measure of damages and instead design remedies that address the actual harm-in-the-world created by broken virtuous promises.

B. Some Inspiration

To be made whole, identity-harmed consumers need the offending company to come through on its original virtuous promise and/or to repair

181. The *Nemet* plaintiffs allege that they paid too much for something that was worth less and equate their loss with the clean premium paid on the cars. *Id.* at 112–13.

182. *EarthTalk: More Fuel-efficient Diesel Cars Coming to the U.S.*, KANSAS CITY INFOZINE (Apr. 19, 2009), http://infozine.org/news/stories/op/storiesView/sid/35430/ (pointing to higher tax rates for diesel as compared with gasoline); *see also* Marcin Romaszewicz, Answer to *Why are there fewer diesel cars in the US than in Europe?*, QUORA (Dec. 19, 2012), https://www.quora.com/Why-are-there-fewer-diesel-cars-in-the-US-than-in-Europe (explaining that diesels often exceed state emissions regulations, making them "basically illegal"); Don Zcar, Answer to *Why are there fewer diesel cars in the US than in Europe?*, QUORA (July 22, 2017), https://www.quora.com/Why-are-there-fewer-diesel-cars-in-the-US-than-in-Europe (explaining why diesels historically have a bad reputation in the U.S.).

183. Dadush, *Identity Harm*, *supra* note 1, at 923.

184. Another problem with using (clean or social) premiums to measure harm is their failure to capture the social cost of increased distrust in the marketplace.

185. Dadush, *Identity Harm*, *supra* note 1, at 924.

186. *Id.*

187. *Id.*

any damage done. Identity harm thus demands injunctive relief. Yet, be it in contract or tort, remedies tend to steer clear of reparations, or what Omri Ben-Shahar and Ariel Porat refer to as "restoration remedies" that address "the *underlying interest* that was impaired and gave rise to the emotional harm."[188] Likewise, under consumer law, the most common remedy for successful UDAP claims is money damages, typically keyed off of the purchase price and sometimes enhanced with statutory or punitive damages.[189] To the extent that injunctive remedies are employed in the consumer law context, it is typically only to enjoin the company from continuing to engage in the bad practice at issue (e.g., false advertising or mispricing), not to fix the harm flowing from the bad practice (e.g., environmental degradation or labor rights violations).[190] As Lauren Willis observes, "Consumer-law enforcement today remains stuck in the twentieth century," and injunctive remedies are inadequate to the task of redressing consumer harms, being "too narrow, uniform, and static to counter twenty-first century fraud."[191]

Some legal innovation is therefore in order. To this end, Ben-Shahar and Porat have designed a novel framework for awarding and administering restorative remedies to redress emotional harms, and they explicitly include identity harm within their target harm-group.[192] They propose a "sorting mechanism" that separates sincere from faker claimants.[193] The mechanism operates by offering plaintiffs

> two remedial options . . . : (1) *restoration*, paid directly to repair in full the underlying interest of a Sincere; and (2) *money*, a "modest" unrestricted sum of cash paid to the plaintiff's pocket.
>
> A Sincere would choose Option One because she values restoration and because Option Two—with only a small sum of money in it—is not attractive enough relative to the value of restoration. A Faker would choose Option Two, no matter how small the sum of money in it, because Option One is worthless to her. In a sense, Option Two is designed as a bait for the sole purpose of smoking out the unharmed

188. Ben-Shahar & Porat, *supra* note 51, at 1904–15 (explaining why tort and contract law remedies are inadequate for addressing emotional harms stemming from an impaired underlying interest, meaning the "aggrieved party's plan, agenda, values, or set of preferences that the wrongdoer was obligated to promote or protect").

189. CARTER, *supra* note 143, at 18–21.

190. *Id.* at 6.

191. Lauren E. Willis, *Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud*, 80 L. & CONTEMP. PROBS. 7, 7–8 (2017).

192. Ben-Shahar & Porat, *supra* note 51, at 1934 n.105.

193. *Id.* at 1905.

> Fakers. By choosing the money damages, a Faker reveals her bluff and would be counted out from the restoration calculation. A Faker gets money for nothing—a modest amount of pecuniary recovery despite suffering no emotional harm. This is a standard inefficiency in any sorting equilibrium, a necessary evil to overcome the problem of incomplete information. But as long as the money damages in Option Two are small, this distortion is relatively benign.[194]

The proposed mechanism would fill a yawning remedial gap for addressing not-just-economic harms, like identity harm. Foremost, it would make restorative, reparations-oriented, remedies available to address identity harm.[195] Additionally, it would reduce the financial incentives for fakers to bring opportunistic law suits. Further, it would limit the amount of money damages flowing from broken virtuous promises, which should provide some comfort to companies concerned about financial liability. Indeed, were the mechanism to be applied to remedy the identity harms contemplated in this Article, successful claims would result, not in a financial fleecing of the promise-breaking company, but rather in a real push to improve its social-environmental performance. Equally important, the mechanism does not seek to "translate agony into dollars" by coming up with a money measure of plaintiffs' individual emotional harm; that would require peering into the souls of claimants and attempting to rank or rate their distress—a singularly complex and unappetizing prospect.[196] Instead, the authors propose directing restoration damages toward "the reparable underlying interest."[197] Thus, rather than being tacked to a hard-to-quantify emotional harm or to an under-representative purchase price, remedies would be tacked to the harm-in-the-world created by the broken virtuous

194. *Id.* at 1923. The authors also contemplate a third option whereby claimants can select a restoration/money damages hybrid, thereby creating a spectrum of remedies. *Id*. at 1923–26.

195. The restoration remedy "consists of an order to pay money not directly to the plaintiff but instead to finance the actual *in-kind reclamation* of a close replacement." *Id.* at 1915. (emphasis added.) Restorative remedies might include ordering a company like VW to engage in pollution offsetting activities, or, for a seller who falsely warranted their food as "vegetarian, kosher, or fairly traded," restoration could be achieved "by supporting animal welfare initiatives, paying for religious services, or contributing to fair trade causes." *Id.* at 1934.

This remedial framework bears resemblance to the *cy pres* system that pools and directs compensation toward third parties because that is more effective than directing small amounts of money into individual pockets. *See* Gaos v. Holyoak (In re Google Referrer Header Privacy Litig.), 869 F.3d 737, 742 (9th Cir. 2017) (where settlement funds were distributed to six institutional recipients instead of class members because the latter would receive only four cents each). The difference, in my view, is that where *cy pres* directs settlement funds to the "second best class" as an exception to the usual rule, the ultimate recipients of the benefit of restoration (e.g. the planet and producers who materialize the underlying interest) would be treated as the first best class at the outset. Restoration would also avoid the issue of courts awarding damages to third parties because the identity harm suffered by the consumer plaintiff *is* remedied by repairing the harm-in-the-world flowing from a broken virtuous promise.

196. *Id.* at 1905.

197. *Id.* at 1923.

promise. Ben-Shahar and Porat's approach is entirely consistent and complementary with my own emphasis on reparations over plaintiff compensation for addressing identity harm.

Since Ben-Shahar and Porat have already laid much of the groundwork for a mechanism that can administer restorative remedies, this Section focuses on the content of such remedies. The objective is to identify some substantive (rather than procedural) characteristics of restorative remedies. This Section reviews three examples of restoration-focused remedies for repairing environmental, labor, and human rights abuses, including the Dieselgate settlement, the *Nike v. Kasky* settlement, and decisions of the Inter-American Court of Human Rights.

Before launching into these examples, and to get a richer flavor for what identity-harmed consumers themselves say that they need in order to be made whole, it is worth revisiting the *Sud* case, as well as a case involving spiritual identity harm, *Gupta v. Asha Enterprises*, where a restaurant erroneously served Hindu vegetarian patrons meat-filled samosas.[198] Although both cases were dismissed, the content of the plaintiffs' remedies requests deserves consideration. To repair their spiritual harm, the *Gupta* plaintiffs sought moneys sufficient to cover their travel to the Ganges River in India where they could partake in a purifying bathing ceremony.[199] This shows that, to be made whole, identity-harmed consumers require something more profoundly restorative than simple money damages keyed off of the purchase price; they require remedies that will restore their sense of values-integrity. In a similar vein, the *Sud* plaintiffs sought both compensatory and injunctive remedies, including injunctions "against the non-disclosure of Defendants' tainted food supply chain," *and* injunctions prohibiting "Defendants' continued buying, distributing, and selling products that they know, should know, or suspect to be tainted by slave labor or human trafficking."[200] Had the court awarded these remedies, it would have allowed consumers to steer clear of purchases that pit them against their other-regarding values going forward. It would also have gone some distance toward repairing the bad practice (sourcing seafood from tainted supply chains) by putting an end to it, even if it would not have undone the harm-in-the-world already caused by that practice. The *Gupta* and *Sud* plaintiffs' requests offer powerful support for the proposition that remedies can be tailored to address identity harm without wading too far into the torturous waters of subjective value and personal preferences.

198. Gupta v. Asha Enters., 27 A.3d 953 (N.J Super. Ct. App. Div. 2011).
199. Complaint at 3–4, *Gupta*, 27 A.3d 953 (No. MIDL968109).
200. Sud Complaint, *supra* note 3, at 45.

The following examples offer a more detailed description of restorative remedies, as well as some guidelines for shaping restorative "asks" going forward.

The Dieselgate Settlement: The settlement presented Dieselgate victims with two options: either sell your car back to VW at pre-scandal prices with some extra (up to $10,000) money on top, or hold on to your car for two to three years while VW develops a fix for the emissions violations.[201] Should VW fail to develop an agency-approved fix, they will have to buy the cars back.[202] This is a generous financial compensation package, to be sure. However, on its own, it does little to undo the environmental harm—or restore the lost greenness—caused by Dieselgate. And that is where the EPA stepped in, requiring VW to pay approximately $2.7 billion into a trust fund "to fully mitigate the total, lifetime excess NOx emissions" from the Dieselgate cars.[203] The fifty U.S. states, the District of Columbia, Puerto Rico, and the Indian tribes were designated as eligible fund beneficiaries and invited to apply for allocations based on the intensity of their exposure to Dieselgate, as inferred from the number of registered dirty-diesels.[204] Awarded moneys are being used to finance "mitigation actions" that reduce NOx, including "replacing or repowering older engines" and "replacing older city transit buses with new electric-powered transit city buses."[205] The settlement further required VW to invest $2 billion in Zero Emission Vehicles (ZEV),[206] ZEV charging infrastructure for multi-unit dwellings, workplaces, and public sites, and ZEV promotion and awareness-raising campaigns through brand-neutral education and public outreach programs.[207] It also provided that VW must take measures to prevent future problems, including separating emissions-testing personnel from design

201. Partial Consent Decree at 3–4, *In Re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., MDL No. 2672 CRB (N.D. Cal. Sept. 30, 2016), https://www.epa.gov/sites/production/files/2016-10/documents/amended20lpartial-cd.pdf [https://perma.cc/W79K-TULS] [hereinafter First Consent Decree]; *Volkswagen Clean Air Act Civil Settlement*, EPA, https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement#mitigation [https://perma.cc/DQ6W-CZ5E]; Camila Domonoske & Bill Chappell, *Volkswagen Will Pay U.S. Diesel Car Owners up to $10 Billion*, NPR (June 28, 2016, 11:04 AM), http://www.npr.org/sections/thetwo-way/2016/06/28/483785166/volkswagen-will-pay-u-s-diesel-car-owners-up-to-10-billion [https://perma.cc/QK2F-QLKY].

202. *Volkswagen Clean Air Act Civil Settlement*, EPA (Oct. 3, 2017), https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement#main-content (last visited Jan. 8, 2019).

203. *Id.* at 5.

204. *Volkswagen Clean Air Act Civil Settlement*, *supra* note 201.

205. *Id.*

206. First Consent Decree, *supra* note 201, at 4.

207. *Volkswagen Clean Air Act Civil Settlement*, *supra* note 201.

personnel.[208] Finally, VW had to establish a steering committee to ensure compliance with the Clean Air Act and a whistleblower system.[209]

The settlement has something for everyone: compensatory damages plus, most important for identity harm, injunctive remedies that seek to repair the environmental harm caused by Dieselgate and prevent future occurrences. It offers an inspiring example of the types of restorative measures required to make identity-harmed consumers whole. However, the EPA's involvement was crucial for obtaining these remedies. Without that intervention—which came about because the agency *chose* to react to VW's Clean Air Act violations, something we should not assume would happen under the current EPA—it is unlikely that identity-harmed Dieselgate victims would have seen their grievances redressed.[210] On their own, identity-harmed consumers who engage in civil regulation via UDAP litigation have virtually no chance of obtaining the restorative remedies they need to be made whole. State consumer laws should therefore be upgraded to give private claimants more expansive access to restorative remedies.

The Nike v. Kasky settlement: For inspiration on restorative remedies designed to redress broken social promises pertaining to labor, perhaps the best place to look is private settlement agreements, rather than court decisions. This is unsurprising since settlements are privately negotiated and tailored to meet the particular needs of the parties. Unfortunately, most settlement agreements are confidential; as such, it is difficult to review their content, even if this would be invaluable for purposes of learning about innovative, beyond-money remedies. Fortunately, some parts of the *Nike v. Kasky* settlement have been made public, offering a useful reference for understanding restorative remediation.[211] Though much of it remains secret, we do know that the settlement included an agreement by Nike to pay $1.5 million to the Fair Labor Association, a multi-stakeholder initiative that is "dedicated to protecting workers' rights around the world."[212] These proceeds were earmarked for amelioration of factory working conditions, including factory infrastructure, and upgrading factory standards and

208. *Id.*

209. *Id.*

210. Dadush, *Identity Harm*, *supra* note 1, at 919.

211. Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002); Ronald K.L. Collins & David M. Skover, *The Landmark Free-Speech Case That Wasn't: The* Nike v. Kasky *Story*, 54 CASE W. RES. L. REV. 965, 1019–20 (2004).

212. *About Us*, FAIR LABOR ASS'N, http://www.fairlabor.org/about-us-0 [https://perma.cc/XJ6Q-JP9A] (FLA offers "[i]nnovative and sustainable strategies and resources to help companies improve compliance systems; Transparent and independent assessments, the results of which are published online; and A mechanism to address the most serious labor rights violations through the Third Party Complaint process.").

monitoring.[213] Additionally, the settlement included at least $500,000 per year to fund micro-loan programs in support of foreign employees' entrepreneurial ventures and educational programs in Nike's partner factories.[214]

While the first piece of the settlement was directed at improving Nike's factories overseas, the second was directed at supporting Nike factory employees (and their communities). Importantly, although the settlement did involve money, that money was not transferred into the pockets of Kasky or the California residents he represented. Instead, it was dedicated to repairing the harm-in-the-world, namely, the harm to Nike's factory workers, which is what motivated Kasky to bring his claim in the first place. This example also shows how identity harm can be redressed, even when it is not possible to undo the underlying injury. In contrast to Dieselgate, where it was possible to offset the excess emissions through a climate mitigation fund, no amount of money can erase Nike's labor rights violations or the injuries that its workers suffered as a result. However, measures can be taken to mitigate the effects of these violations and to avoid their recurrence.

Inter-American Court of Human Rights opinions: Tom Antkowiak explains that the Inter-American Court has a fascinating history of designing innovative reparatory remedies in cases involving human rights violations.[215] As with labor rights violations, human rights violations cannot be undone or erased; as such, remedies must focus on addressing (where possible) the effects of the violations and on preventing future violations. Reparatory measures thus include "restitution and cessation, rehabilitation, apologies, memorials, legislative reform, training programs, and community development schemes."[216] For example, in *Juvenile Reeducation Institute v. Paraguay*,[217] a case involving a juvenile detention center that was "extremely overcrowded, plagued by violence, and had been ravaged by three fires within eighteen months that led to several deaths and injuries,"[218] the Court required psychological treatment for the entire population of over 3000 victims, medical care for those children who had

213. Sandy Brown, *Nike, Kasky Reach Settlement*, ADWEEK (Sept. 12, 2003), http://www.adweek.com/brand-marketing/nike-kasky-reach-settlement-67001/ [https://perma.cc/4GCT-GGQB].

214. *See* Collins & Skover, *supra* note 211, at 1020 ("It remained unknown whether Nike paid any or all of the substantial litigation costs incurred by Kasky's lawyers or an award to Kasky himself.").

215. Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008).

216. *Id.* at 372.

217. Juvenile Reeducation Inst. v. Paraguay, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112 (Sept. 2, 2004).

218. Antkowiak, *supra* note 215, at 376–77.

suffered burns in the fires, and "the establishment of special education and vocational assistance programs for former detainees."[219]

The Court thus attempted to "reverse the damaging effects" of the human rights violations attached to the detention facility.[220] In other cases, the Court has ordered scholarships for higher education, professional skills courses, as well as funding for literacy programs.[221] This illustrates how human rights violations against the citizens of poor countries, whether committed by government or by TNCs, can be creatively remedied. Otherwise put, there exist ways to repair injuries that afflict humans and that cannot easily be monetized. Identity-harmed consumers seeking redress for their unwitting participation in labor and human rights abuses would do well to look to the Court for inspiration in crafting their prayers for relief.

In summary, identity-harmed consumers require something beyond financial compensation to be made whole. To the extent possible, remedies should seek to undo the harm-in-the-world brought about by a broken virtuous promise. This is the only sure avenue for restoring consumers' values-integrity. This Section discussed a possible mechanism for administering such restorative remedies, as proposed by Ben-Shahar and Porat, and offered some inspiration for developing the content of restoration, drawing on existing examples from the spheres of environmental protection and labor and human rights. The examples selected illustrate that it is absolutely possible to craft restorative remedies that are up to the task of redressing identity harm; all that is required is some innovative thinking, along with a deepened appreciation for the need to better equip consumers to defend their other-regarding expectations.

CONCLUSION

The choices we make about what and how to consume define some part of who we are and want to be in the world. As such, these choices are connected to our identity. When someone makes a purchase that they believe to be in line—or at least not grossly out of line—with their values, money is not the only thing that changes hands; something more morally intimate becomes entwined in the transaction. Should it turn out that the virtuous promise on which the purchase rested was false or empty, consumers can experience identity harm. As it stands, there is far too much room for corporations to cultivate and exploit consumers' other-regarding expectations, and far too little accountability if and when they are caught.

219. *Id.* at 377.
220. *Id.*
221. *Id.*

This Article reviewed the possibilities in tort, contract, and state consumer law for addressing identity harm and found each of these branches of our protective regime to be sorely lacking, both at the claim-making and at the remedies stage of litigation. These legal deficiencies must be corrected, particularly given the urgent sustainability challenges facing our world and the ever-more heroic expectations placed on consumers in today's America. This Article proposed a way forward by operationalizing identity harm as a new consumer protection tool. Consumers can use this tool to defend their own virtuous interests in court, but also to advance the interests of those affected by identity-harming transactions—the planet and the people involved in production. Implementing the recommendations made here would sharpen consumers' civil regulatory teeth, empowering them to better safeguard their own values while having greater influence on the social and environmental (mis)conduct of TNCs.