

# WHY YOU SHOULD BE UNSETTLED BY THE BIGGEST AUTOMOTIVE SETTLEMENT IN HISTORY

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## INTRODUCTION<sup>†</sup>

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

Coverage of Dieselgate strongly suggests that affected car owners experienced both kinds of disappointment—economic and noneconomic—and in heavy doses at that.<sup>4</sup> But

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† Editor’s note: This short Essay, prepared specifically for the *University of Colorado Law Review Forum*, introduces topics and ideas addressed at greater length in Professor Dadush’s forthcoming article, *Identity Harm*, 89 U. COLO. L. REV. (forthcoming 2018).

1. Amended Partial Consent Decree, *In Re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2016 WL 6460404, (N.D. Cal. Sept. 30, 2016) (No. 1973-1), at 1–5, <https://www.epa.gov/sites/production/files/2016-10/documents/amended20lpartial-cd.pdf> [<https://perma.cc/G8FT-32U5>] [hereinafter First Consent Decree].

2. Guilbert Gates et. al, *How Volkswagen’s ‘Defeat Devices’ Worked*, N.Y. TIMES (Mar. 16, 2017), [https://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html?mcubz=0&\\_r=0](https://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html?mcubz=0&_r=0) [<https://perma.cc/JMW9-XRYL>].

3. *VW Scandal: Company Warned Over Test Cheating Years Ago*, BBC (Sept. 27, 2015), <http://www.bbc.com/news/business-34373637> [<https://perma.cc/D2EA-FZPF>].

4. Jad Mouawad & Christopher Jensen, *The Wrath of Volkswagen Drivers*, N.Y. TIMES (Sept. 21, 2015), <http://www.nytimes.com/2015/09/22/business/the-wrath-of-volkswagens-drivers.html> [<https://perma.cc/J72R-NB82>]; Jacob Bogage,

while the first kind of harm is relatively easy to recognize and address, our protective regime is ill-equipped to shield consumers from the second, a type of emotional harm that I refer to as “identity harm.” I define identity harm as the anguish experienced by a consumer who learns that her efforts to live in line with her personal values have been undermined by a seller’s exaggerated or false promises about their wares. While a range of promises can elicit identity harm (e.g., organic, animal cruelty-free, Kosher, Made in America, etc.), I focus on a particularly important and fast-growing category of promises pertaining to environmental and social sustainability. Here, identity harm arises when a consumer learns that her purchase has rendered her unwittingly complicit in causing injury to another human or the planet.

As explored in my first in a series of articles on this subject,<sup>5</sup> the law’s under-recognition of identity harm is problematic, particularly at a time when government agencies such as the Environmental Protection Agency (EPA) are actively retreating from interventionist regulation.<sup>6</sup> As the federal government recedes, consumers need additional tools to hold companies accountable for exaggerated or false claims of sustainability.

Enhanced protections are further warranted given that businesses increasingly incorporate environmental and social sustainability promises into their marketing campaigns specifically to target conscious consumers, who represent a growing share of the purchasing public.<sup>7</sup> Conscious consumers

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*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/> [<https://perma.cc/JJT7-V7JR>].

5. Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. (forthcoming 2018).

6. See, e.g., Juan Carlos Rodriguez, *New EPA Chief Pledges to Change Regulatory, Legal Practices*, LAW360 (Feb. 21, 2017, 3:53 PM), <https://www.law360.com/articles/893816/new-epa-chief-pledges-to-change-regulatory-legal-practices> [<https://perma.cc/SQL9-Q4F8>] (reporting on Pruitt’s commitments to reduce “regulation through litigation,” which exactly describes the EPA’s handling of Dieselgate, and to promote a “very robust” role for states in implementing environmental laws and diminishing the role of the federal government in climate regulation).

7. See, e.g., Howard Kimeldorf et al., *Consumers with a Conscience: Will They Pay More?*, CONTEXTS, Winter 2006, at 24, 26–27, [http://www.npr.org/documents/2013/may/consumer\\_conscience\\_study\\_ME\\_20130501.pdf](http://www.npr.org/documents/2013/may/consumer_conscience_study_ME_20130501.pdf) [<https://perma.cc/UR6C-7HZU>] (finding 30 percent of working-class consumers were willing to pay a 20 percent price premium for socks with a “Good Working Conditions” label); *Global Consumers are Willing to Put Their Money Where Their*

care not just about the physical or price attributes of a given good or service, but also its social and environmental impact.<sup>8</sup> They make purchases that reflect their environmental and social values, their personal principles of engagement with the world: their identity.<sup>9</sup>

Dieselgate is the perfect case study to illustrate identity harm since VW's clean diesel advertising campaign was expressly directed at environmentally conscious consumers. Given the campaign's target audience, it is safe to assume that a fair number of those who purchased the Dieselgate vehicles self-identify as conscious (or green).<sup>10</sup> These individuals likely believed VW's claims that the cars were better for the environment than conventional (non-electric) alternatives and that driving one would support, not undermine, their self-identification as conscious consumers.

The realization that one has become unwittingly complicit in harming another being—the planet (its atmosphere, oceans, rivers, animals, etc.) or fellow humans—can be painful, in particular for people who sought to avoid precisely that. It is in such instances that identity harm rears its head. Conceptually, identity harm bears resemblance to the tort of defamation, where one's reputation is publicly sullied by a false statement. The difference is that with identity harm, it is one's conception of oneself—of who one strives to be in the world—that has been distorted as a result of a false or exaggerated sustainability

*Heart is when it Comes to Goods and Services from Companies Committed to Social Responsibility*, NIELSEN (June 17, 2014), <http://www.nielsen.com/us/en/press-room/2014/global-consumers-are-willing-to-put-their-money-where-their-heart-is.html> [<https://perma.cc/79W7-UAH6>]; FISHWISE, TRAFFICKED II: AN UPDATED SUMMARY OF HUMAN RIGHTS ABUSES IN THE SEAFOOD INDUSTRY 6 (2014), [https://www.fishwise.org/images/pdfs/Trafficked\\_II\\_FishWise\\_2014.pdf](https://www.fishwise.org/images/pdfs/Trafficked_II_FishWise_2014.pdf) [<https://perma.cc/EB8F-HES8>] (revealing that eighty-eight percent of consumers would stop buying a product if it was associated with human rights abuses and seventy percent of consumers would pay a premium for a product certified to be free of human rights abuses).

8. Phillip Haid, *The Myths of Conscious Consumerism*, STRATEGY (Mar. 28, 2016), <http://strategyonline.ca/2016/03/28/the-myths-of-conscious-consumerism/> [<https://perma.cc/D5JD-GCZM>].

9. Josée Johnson, *The Citizen-Consumer Hybrid: Ideological Tensions and the Case of Whole Foods Market*, 37 THEORY & SOCY 229, 242 (2007) (“[C]hoice is . . . central to the meaning attached to modern consumption and a modern self who makes autonomous choices expressing a unique identity, and whose sense of freedom is intimately connected to consumer choice.”).

10. Press Release, Fed. Trade Comm'n, FTC Charges Volkswagen Deceived Consumers with Its “Clean Diesel” Campaign (Mar. 29 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-charges-volkswagen-deceived-consumers-its-clean-diesel> [<https://perma.cc/W742-KXH3>].

promise: I thought I was being good when in reality I was (unknowingly) being bad.

This Essay proceeds by exposing the unique circumstances that led to the Dieselgate settlement (the Settlement) to show that, even though it did address identity harm, this happened only collaterally, not deliberately. In fact, by “tweaking the facts” just a bit, it becomes apparent just how easily the identity harm caused by Dieselgate could have gone unaddressed, in particular with respect to remedies. The next section offers examples of broken sustainability promises in the social realm—labor and human rights—and explains that, while a growing number of consumers are taking identity harm grievances to court, they are under-equipped to do so effectively. This section further highlights the key characteristics of identity harm. Specifically, identity harm is noneconomic, emotional or psychic, and derivative in the sense that the injury to the consumer stems from an injury that is at least one step removed from the actual purchasing transaction—for example, to another human or the planet. The following section explains why identity harm is legally under-accounted for today and recommends a reparations-centered (rather than compensation-centered) approach for addressing the complaints of aggrieved consumers.

## I. THE VW SETTLEMENT REVEALS THE UNDER-RECOGNITION OF IDENTITY HARM

VW installed illegal cheat device software in all of its “clean diesel” vehicles, which had been advertised as green, fuel efficient, and high performing. Had the presence of the cheat device been known, VW would not have been allowed to sell the cars in the United States, both because cheat devices are illegal under the Clean Air Act (CAA) and because the cars themselves were illegally polluting. When the deception was revealed, a flurry of private class action lawsuits were filed, and these private lawsuits were complemented by aggressive action by the EPA (through the Department of Justice) and the Federal Trade Commission (FTC).

To settle the various claims stemming from its deception in the United States, VW agreed to pay approximately \$10 billion to the FTC to compensate affected car owners; it also agreed to pay \$4.7 billion to the EPA to finance green investments and

mitigate the environmental damage caused by Dieselgate.<sup>11</sup> The Settlement, the largest in the history of the auto industry, is being touted as a major victory for consumers.<sup>12</sup> However, the Settlement was the product of such peculiar and difficult-to-reproduce circumstances that its precedential value, especially for conscious consumers, should not be overstated.

The fact that VW was the largest automaker in the world,<sup>13</sup> that its criminal<sup>14</sup> deception affected so many cars (500,000 in the United States alone), and that *both* environmental and consumer law violations were involved,<sup>15</sup> all combined to make the Settlement particularly far-reaching. Furthermore, although the first class action claims were filed within hours after the scandal broke, it was the lawsuits brought by two government agencies—the EPA and FTC—that really put the pressure on VW to reach a large settlement.<sup>16</sup> Governmental intervention signaled that VW’s malfeasance could not only strip the Dieselgate cars of market value, but

11. First Consent Decree, *supra* note 1, at 1–5. VW must remove the tainted vehicles from commerce, either physically, by buying them back, or by fixing them to be standards-compliant. *Id.* Car owners therefore have the option to (1) accept a buyback offer based on pre-scandal prices and receive cash payments of up to \$10,000; or (2) keep the cars for VW to bring into compliance with environmental standards within two years, if/when it develops the (approved) technology and receive cash payments of up to \$10,000. *Id.* Additionally, VW must pay \$2.7 billion to a mitigation trust fund and invest \$2 billion in the promotion of zero emission vehicles and charging infrastructure. *Id.* at 4–5.

12. Reuters, *How Volkswagen Owners Can Get Compensation from the Emissions Scandal Settlement*, FORTUNE (June 28, 2016), <http://fortune.com/2016/06/28/vw-owners-compensation-scandal/> [<https://perma.cc/QCP5-MM6E>].

13. Bertel Schmitt, *Nice Try VW: Toyota Again Largest Automaker in the World*, FORBES (Jan. 27, 2016), <http://www.forbes.com/sites/bertelschmitt/2016/01/27/nice-try-vw-toyota-again-worlds-largest-automaker/#44d787912b65> [<https://perma.cc/5TDU-ZVCE>].

14. Aruna Viswanatha & Christina Rogers, *VW Engineer Pleads Guilty in Emissions Cheating Scandal*, CNN: MONEY (Sept. 9, 2016), <http://money.cnn.com/2016/09/09/news/companies/volkswagen-engineer-emissions-scandal-guilty-plea/index.html> [<https://perma.cc/ZG27-BQTE>].

15. Eur. Parliamentary Research Serv. (EPRS), Briefing on the “Lawsuits Triggered by the Volkswagen Emissions Case” (May 2016), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583793/EPRS\\_BRI\(2016\)583793\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583793/EPRS_BRI(2016)583793_EN.pdf) [<https://perma.cc/7XRT-ZSTY>] (noting that environmental violations included illegal defeat devices that concealed emissions of ten-to-forty times the allowed amount of nitrogen oxides, and that consumer law violations included false advertising claims about environmental-friendliness and high resale values that deceived consumers).

16. Bill Vlasic & Aaron M. Kessler, *It Took E.P.A. Pressure to Get VW to Admit Fault*, N.Y. TIMES (Sept. 21, 2015), <http://www.nytimes.com/2015/09/22/business/it-took-epa-pressure-to-get-vw-to-admit-fault.html?> [<https://perma.cc/FX4B-DTFJ>].

also jeopardize the automaker's access to the American market.<sup>17</sup> VW got the message(s) and settled accordingly.

Had Dieselgate involved a domestic company, a less sizeable foreign company, or fewer cars, the authorities might have been less politically motivated to take action. Likewise, had the scandal involved only one type of illegality—consumer or environmental—the outcome of the Settlement likely would have been much less sizable. We do not have environmental and consumer law rules to govern every type of corporate sustainability-related (mis)representation. As such, the fact that Dieselgate was doubly illegal is another crucially important peculiarity that serves to explain the magnitude of the Settlement.

These (combined) peculiarities reveal a number of gaps in our corporate accountability regime, in particular when it comes to broken sustainability promises and greenwashing. Greenwashing happens when a company seeks to boost its sales or its brand by overstating its environmental ambitions and achievements.<sup>18</sup> It is a main source of identity harm, along with “redwashing” or “bluewashing,” terms used to describe the overstating of social (e.g., labor and human rights) ambitions and achievements. When “color-washing” happens—and goes unpunished—consumers concerned about the effects of their purchases on the planet and on other humans can experience a special type of emotional anguish that results from having been made unwittingly complicit in causing harm.

For color-washing claims to be properly addressed, the market and the regulators need to hear them, and this is by no means guaranteed. The VW tree fell loudly because of its size (hundreds of thousands of cars), the broad scope of the illegalities involved, and the willingness of the government agencies to listen and dedicate resources to prosecuting a major (foreign) company. Its thump reverberated across both the market for conventional goods—particularly sensitive to changes in resale values—and the market for sustainable goods.<sup>19</sup> However, many broken environmental promises are

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

18. For analysis of greenwashing and an overview of possible solutions, see Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 999–1009, 1025–38 (2011).

19. Jack Ewing, *In the U.S., VW Owners Get Cash. In Europe, They Get Plastic Tubes.*, N.Y. TIMES (Aug. 15, 2016), <http://www.nytimes.com/2016/08/16/>

too small or fall too deep inside the sustainability forest to be heard by the conventional market or by regulators, even if they produce real harm for some consumers.

The point is that the Settlement likely would have been much smaller if the FTC and the EPA had not reacted to VW's deceit as strongly as they did.<sup>20</sup> Indeed, it is interesting to imagine how Dieselgate would have unfolded if the EPA had been headed by a climate change skeptic at the time the scandal broke.<sup>21</sup> The pressure on VW to reach a meaningful settlement would have been greatly diminished if only state attorneys general had responded, let alone if only consumers had responded.

To understand how close the Settlement came to producing a less satisfying outcome, consider the recent complaint filed by those dirty-diesel owners who (re)sold their vehicles *before* the scandal broke. The *Nemet v. Volkswagen Group Of America*<sup>22</sup> complaint refers to the "tens of thousands" of dirty-diesel owners who, because they sold their cars before VW's deception was exposed, received nothing under the Settlement.<sup>23</sup> For these plaintiffs, there was no problem of illegality to speak of; as a result, the resale value of their cars was not adversely affected by VW's deception, even though each mile driven in the car produced exponentially more polluting gases than the drivers had believed. Since they did not incur any economic loss on their resales (beyond ordinary depreciation), one might surmise that this group of Dieselgate victims experienced no harm even though they received "hyper polluting" vehicles instead of what they paid for—clean-diesel vehicles—and even though VW's false environmental promises "secretly turned the

business/international/vw-volkswagen-europe-us-lawsuit-settlement.html [https://perma.cc/X65T-ZE6A]. Currently, VW cannot bring the cars into compliance with national standards without compromising fuel efficiency and performance. *Id.* The cars'—sans settlement—market value therefore dropped. *Id.*

20. This is essentially what is happening in the European Union where car emissions standards are lower than in the United States, which makes it possible to bring the cars into compliance without affecting performance. To the lament and frustration of many car owners in Europe—where class action lawsuits are generally not permitted—regulators have not activated in Europe the way they have in the United States. *Id.*

21. Henry Fountain, *Trump's Climate Contrarian: Myron Ebell Takes on the E.P.A.*, N.Y. TIMES (Nov. 11, 2016), <http://www.nytimes.com/2016/11/12/science/myron-ebell-trump-epa.html> [https://perma.cc/H6ZJ-GKEV].

22. *Nemet v. Volkswagen Grp. Of Am., Inc.*, No. 3:17-cv-04372 (N.D. Cal. Aug. 2, 2017).

23. Class Action Complaint at 4, *Nemet*, No. 3:17-cv-04372 (N.D. Cal. Aug. 2, 2017).

most environmentally conscious consumers into some of the biggest polluters on the road.”<sup>24</sup>

Here lies the crux of the question: Is the fact that the resale value of the dirty-diesels was unaffected by the scandal enough to do away with the question of whether there was any harm at all? From the perspective of the *Nemet* plaintiffs, this question must surely be answered in the negative. To answer in the affirmative would not only be grossly under protective, but also shortsighted and antithetical to one of the driving objectives of consumer protection, which is to foster trust in a fair marketplace. Harm is more nuanced and layered than a simple change in market value. As claimed in *Nemet*, harm arises when consumers realize that they have become unknowingly complicit in a scheme to harm the planet, particularly when they had tried to avoid just that. Otherwise put, consumers can experience identity harm even without economic loss (diminished market value).

A related question pertains to remedies: Should remedies be measured by economic loss or according to another measure? Since they cannot recover lost resale value, the *Nemet* plaintiffs argue that they should receive some depreciation-adjusted share of the clean premium they had originally paid for the cars in order to recover the benefit of their bargain. However, based on the substance of the complaint, perhaps it would be more effective to measure remedies according to the *lost greenness* of the purchase.

This could be done by estimating the number of “dirty” miles driven by the *Nemet* plaintiffs and, based on that figure, calculating the amount of above-what-was-advertised and above-what-was-legally-permitted emissions. The extra emissions could be priced and converted into a measure of total lost greenness that could then be used as the benchmark for damages. Some (significant) share of this money could be placed into a climate fund dedicated to offsetting the emissions produced by the deception.

On this last point—and as another illustration of the Settlement’s unsettling features—consider that without the EPA’s active involvement, the Settlement likely would not have included the establishment of a climate fund. Yet the fund is a crucial piece of the remedial puzzle for the Dieselgate victims who want to undo the environmental harm they—unwittingly

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24. *Id.* at 6.

and unintentionally—contributed to. To summarize, economic loss is not the only dimension along which harm is experienced, just as it is not the only dimension along which remedies should be measured.

## II. BROKEN SOCIAL PROMISES MATTER, TOO

Identity harm afflicts the realm of social promises, as well. As examples, consider a “conflict free” diamond engagement ring or a purchase from any of the growing roster of companies that market themselves and their wares (e.g., clothing, coffee, chocolate, minerals, palm oil) as socially sustainable.<sup>25</sup> For the individuals buying such goods, the production backstory likely matters a great deal.<sup>26</sup> Should the sustainability promises that operate in the background of a purchasing decision be revealed to be hollow, buyers can experience an achingly intimate form of disappointment.

Imagine discovering that your “conflict free” engagement ring, a symbol of love and commitment, was in fact sourced from a country marred by diamond-fueled murder, rape, and slavery.<sup>27</sup> Would your experience of the ring be altered? Would your sense of its value change? For some, wearing the ring might elicit deep distress brought on by the constant reminder of one’s participation in another’s suffering. On a smaller but no less profound scale, learning that the chocolate treat they gave their child was made using forced child labor can make a parent sick to their stomach, literally and figuratively.<sup>28</sup>

25. Marc Bain, *Is H&M Misleading Customers with All Its Talk of Sustainability?* QUARTZ (Apr. 16, 2016), <http://qz.com/662031/is-hm-misleading-customers-with-all-its-talk-of-sustainability/> [https://perma.cc/7SYF-3HSN].

26. Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 640–642 (2004) (arguing that “process-information” pertaining to the production backstory of consumer goods should be (1) made more available to consumers and (2) better policed in order to properly protect the “many consumers [who] have come to view themselves as purchasing with their disposable dollars not only products, but also shares of responsibility in the moral and ecological economy that produces them”).

27. Jenni Avins, *How to Propose with an Engagement Ring As Rock Solid As Your Ethical Values*, QUARTZ (Apr. 14, 2016), <http://qz.com/657236/how-to-propose-with-an-engagement-diamond-as-rock-solid-as-your-ethical-values/> [https://perma.cc/SDJ4-5ND7].

28. Complaint for Violation of Consumer Protection Laws at 1, Dana v. Hershey Co., 180 F. Supp. 3d 652 (N.D. Cal. 2015) (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

Indeed, a series of—so far, unsuccessful—class actions have been filed against big chocolate companies such as Hershey, Nestle, and Mars on the grounds that the plaintiff consumers would not have bought the companies’ chocolate products had they known that their purchases were supporting forced child labor.<sup>29</sup>

In a similar vein, in *Sud v. Costco Wholesale Corp.*, the company was sued by a consumer because it “unlawfully induce[s] consumers to buy Costco farmed prawn products”<sup>30</sup> the supply chain for which is “tainted by the use of slave labor in Thailand” and contaminated by “documented slavery, human trafficking and other illegal labor abuses.”<sup>31</sup> At issue in *Sud* was the fact that Costco—much like the chocolate companies mentioned above—makes various disclosures and public statements that affirmatively represent to consumers that the company “makes efforts to monitor its suppliers to eradicate human rights abuses in its supply chain”<sup>32</sup> and that “it does not tolerate human trafficking and slavery in its supply chain.”<sup>33</sup>

In both the chocolate cases and in the Costco case, the plaintiffs failed because they could not establish that the companies had a duty to disclose that their goods were sourced through a tainted supply chain, or that the companies had exclusive knowledge of the labor and human rights problems affecting their supply chains, or that the plaintiffs had actually relied on the sustainability disclosures in making their purchasing decision.

These cases offer just a few examples of how consumers’ disappointed expectations of a company’s social conduct can lead to identity harm. That these claims are being litigated demonstrates that identity harm is real, that consumers care about corporations keeping their social promises, and, by extension, that consumers want corporations to improve their social performance. Yet, in spite of an upswing in sustainability-related legal claims, consumers are failing because of under-protective interpretations and applications of

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through their product purchases.”).

29. *Id.*

30. Class Action Complaint at 5, *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d. 1075 (N.D. Cal. 2017) (No. 15-cv-03783).

31. *Id.* at 12–13.

32. *Id.* at 18.

33. *Id.* at 19.

consumer law statutes. Identity harm can help equip consumers to wage these legal battles more effectively.

### III. WHY WE NEED BETTER PROTECTION FOR IDENTITY HARM AND WHY WE DON'T HAVE IT YET

As things stand, those aggrieved by identity harm have only limited recourse. This is so for several reasons. First, in spite of the growing number of conscious consumers, the market remains generally insensitive to sustainability promises—kept or broken.<sup>34</sup> Market prices represent the value of a good, security, or service for the average (marginal) buyer, rather than for the conscious (infra-marginal) buyer.<sup>35</sup> Thus, unless sustainability promises become more valued by average consumers, the economic loss produced when such promises are broken is likely to be limited.

The problem is that with minimal or no economic loss, the likelihood of market regulation is reduced, as is the likelihood of government intervention *and* the likelihood of success for claims brought directly by consumers against the offending company.<sup>36</sup> As explained above, economic loss is an inadequate and problematic proxy for assessing identity harm,<sup>37</sup> and overreliance on it allows bad corporate practices to proliferate with relative impunity.

A second reason why recourse is limited for aggrieved consumers is that government may be underequipped or unwilling to step in: there may be no law or regulation on point,<sup>38</sup> and even if there is, resource and political constraints may direct attention elsewhere.<sup>39</sup> This again highlights the

34. Cadesby Cooper, *Rule 10b-5 at the Intersection of Greenwash and Green Investment: The Problem of Economic Loss*, 42 B.C. ENVTL. AFF. L. REV. 405, 427–32 (2015) (explaining that ethical investors' disappointment is difficult to redress due to Rule 10b-5 requirements that plaintiffs suffer economic loss attributable to the issuer's misrepresentations).

35. *Id.*

36. Many states require consumers to show that they suffered an ascertainable financial loss and that they relied on the seller's (mis)representation in making their purchase. See 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://www.nclc.org/images/pdf/udap/report_50_states.pdf) [https://perma.cc/Z7P6-FPWH].

37. *Infra* Part I.

38. For example, the FTC Guides for the Use of Environmental Marketing Claims (16 CFR 260.1) offer sellers guidance for avoiding deceptive marketing, but there is no equivalent for social claims.

39. CARTER, *supra* note 36, at 18 (explaining that limited state enforcement

peculiarities of the Dieselgate Settlement. It is naïve to expect that the intensity of government agency intervention elicited by VW's wrongdoing will occur in cases where sustainability promises are broken less "loudly"—or where the agencies in charge of protecting the environment and consumers are headed by anti-interventionists.

Third, as illustrated by the fate of the chocolate cases and *Sud* (among others), there are serious consumer law obstacles to identifying an actionable misrepresentation or omission pertaining to sustainability. Consumer law statutes and the case law applying them tend to be demanding with respect to vindicating emotional grievances, especially when it comes to omissions. They can also place onerous demands on consumers with respect to establishing actual reliance on a particular statement at the time of purchase.

Fourth, it may be difficult to show how consumers are harmed by an inaccurate backstory when it is the planet and/or those making the goods that are injured, at least in the traditional sense. Indeed, identity harm is different from, say, the "safety harm" caused by a spontaneously combusting cell phone where users can experience direct personal injury.<sup>40</sup> It is also different from the distress that consumers experience when they learn that the "100% natural" food they ingested in fact contains genetically modified organisms (GMO)—partly because the health risks of consuming GMO foods remain uncertain and partly because these statements address consumers' concerns about their own bodily health.<sup>41</sup> In these scenarios, the primary injured party is the consumer herself. By contrast, with identity harm, the injury is, to a large extent, derivative. Identity harm affects individual consumers, but stems from an injury that is at least one step removed from the

budgets limit regulatory policing of the marketplace).

40. 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> [<https://perma.cc/G9VV-PBPM>]; 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](https://www.nytimes.com/2016/10/11/business/samsung-galaxy-note-fires.html?_r=0) [<https://perma.cc/G3R9-G6GV>].

41. 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/JA5R-7DSJ>] (describing a class action brought against ConAgra for labeling their Wesson-branded cooking oils as "100% natural" to target health conscious consumers when in fact the oils contain GMOs).

actual purchasing transaction. In the case of broken sustainability promises, the injury is experienced by the planet and/or fellow human beings. But other kinds of broken promises can trigger identity harm, as well.

For example, identity harm can encompass the type of “spiritual harm” that an observant Jewish person might experience upon learning that the food they ingested was falsely marketed as Kosher, or a Muslim might experience upon learning that a meat product they consumed was not in fact Halal, or a Jain might experience upon learning that the food they ordered was incorrectly described as vegetarian.<sup>42</sup> In such instances, the consumer suffers no direct (physical or economic) harm as a result of the transaction, but their faith in their relationship to the divine may be undermined.<sup>43</sup> The “ethical harm” that an animal rights activist might experience upon learning that a product they believed to be “cruelty free” was in fact developed by experimenting on animals can likewise be included under the identity harm umbrella as their injury is derivative of the injury to the animals.

In each of these instances, the injury occurs beyond the transaction and beyond the individual consumer. These examples illustrate how the “defect” of identity-harming products is not necessarily (if at all) economic—the issue is not about the product pricing. Nor is the defect related to the product’s physical attributes—consumers are not physically injured by the use of an identity-harming product. Rather, the defect is that the product undermines a consumer’s autonomy to make informed choices that will safeguard—not jeopardize—their values or their notion of who they want to be in the world.

The fact that identity harm is non-economic and derivative arguably complicates standing for those seeking to assert it.<sup>44</sup>

42. See, Stephen F. Rosenthal, *Food For Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 954 (1997) (offering a definition of spiritual harm based on an interview with commentator versed in Jewish law: “The 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”).

43. The argument for including spiritual harm under the identity harm umbrella is strengthened by recalling that many of the religious rules pertaining to meat consumption are borne of some concern for the well-being of the animal. As such, spiritual identity harm is partially derived from the injuries experienced by animals. I am grateful to Matthew Carey of the *University of Colorado Law Review* for this insight.

44. The Supreme Court’s decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016), suggests that standing challenges based on the non-concreteness of

More importantly, however, these features highlight a remedies problem. The most common remedy for consumer claims is monetary damages, which are typically limited to purchase price, sometimes enhanced with statutory or punitive damages.<sup>45</sup> However, in order for consumers to be made whole in the wake of a broken sustainability promise, what is needed is for the company to come through on its original promise and to *repair* the social or environmental damage done. Identity harm thus demands injunctive relief.

Injunctive remedies are occasionally employed to repair harm, particularly in cases involving the violation of environmental laws (e.g., the Settlement provides for billions of dollars to be paid into an EPA-administered climate fund)<sup>46</sup> and in cases involving the violation of international human rights laws.<sup>47</sup> In the consumer law context, however, the FTC and state attorneys general tend to steer clear of reparations-oriented remedies. To the extent that injunctive remedies are awarded, it is typically only to enjoin the seller from continuing to engage in the bad practice at issue, not to require them to repair the harm caused by the bad practice.<sup>48</sup> Typical consumer law remedies are therefore unlikely to make aggrieved consumers whole and should be combined with injunctive remedies intended to undo or repair the harm created by the injurious corporate practice at issue. An important additional advantage of developing a reparations-centered rather than compensation-centered remedies framework is that, properly designed,<sup>49</sup> it would reduce the risk of frivolous lawsuits.

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alleged harms are not insurmountable. *See also* Daniel Townsend, *Who Should Define Injuries For Article III Standing?*, 68 STAN. L. REV. ONLINE 76, 80 (2015) (“[N]ot all harms we care about are tangible. Many wrongs we care about do not lead to bodily damage, economic damage, [or] damage to property.”).

45. CARTER, *supra* note 36, at 18–21.

46. First Consent Decree, *supra* note 1, at 12–13.

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

48. *Id.* at 16; 15 U.S.C. §53 (1994); 15 U.S.C. §54 (1938); 15 U.S.C. §57b (1975).

49. Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law: A Novel Approach To Compensation For Emotional Harm* (U. Chi. L. Sch., Coase-Sandor Inst. for L. & Econ., Working Paper No. 819, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3058186](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058186) [https://perma.cc/5YK4-9AQ7] (developing a model for restorations-based remedies for emotional harms calibrated to tell apart sincere claimants from fakers).

## CONCLUSION

Limited notions of harm do little to deter companies from making and then breaking promises. This hurts consumers, but also society, by breeding distrust of the marketplace and the bodies that are supposed to regulate it. Identity harm completes the picture painted by economic loss, and providing legal recourse for it would empower consumers to be more effective agents of change—leveraging their voices to advance the interests of (often voiceless) third parties.

Identity harm expands our notions of what constitutes actionable consumer harm while also creating openings for the development of new remedies frameworks that look beyond financial compensation to include reparations. Such legal innovation gives rise to difficult questions of what harms to count and how to count them. While challenging, these questions are not novel. We already have mechanisms in place for dealing with intangible harms in the context of medical injuries (e.g., pain and suffering), emotional distress, and defamation. In these areas, the inadequacy of economic loss as a measure of harm is acknowledged, and a degree of subjective experience is recognized.<sup>50</sup> Such protective principles should be harnessed to address the harm produced by companies breaking their sustainability promises, compelling them to do more than simply claim they are making the world a better place.

Though still new, identity harm can enrich the consumer protection toolkit. Rather than create a new cause of action, the idea is to incorporate identity harm into existing consumer law statutes and equip judges to better recognize and address the grievances of consumers who feel that their efforts to live in line with their personal values have been undermined by a seller's empty promises. At a time when the government's protective capacity appears to be shrinking more with each passing day, it is becoming ever-more urgent to arm consumers

50. Robert L. Rabin, *Intangible Damages in American Tort Law: A Roadmap* (Stan. Pub. L., Working Paper No. 2727885, 2016), <https://www-cdn.law.stanford.edu/wp-content/uploads/2016/07/R.L.RABIN-SSRN-Rotterdam-Conf-paper-revised-for-ssrn-2727885-Intangible-Damages-in-American-Tort-Law.pdf> [https://perma.cc/S8R2-9EYV] (discussing intangible harms); JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 301, 309–14 (2003) (discussing the challenges of comparing intangible harms).

with the legal tools necessary for protecting their freedom to choose *not* to support abusive systems. Identity harm is one such tool.