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Amy J. Schmitz

University of Missouri School of Law, SCHMITZAJ@MISSOURI.EDU

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INTRODUCING THE “NEW HANDSHAKE” TO EXPAND REMEDIES AND REVIVE RESPONSIBILITY IN ECOMMERCE

AMY J. SCHMITZ*

I. INTRODUCTION

There was a time when individuals would meet in person to make purchases and do deals. They would discuss the terms, assess the trustworthiness and character of their contracting partners, and conclude the deal with a handshake. The handshake was more than a kind gesture. It helped ensure the enforcement of the deal without need for the rule of law or legal power. Reputations and respect were at stake because individuals worked in the same community and knew each other’s friends and business partners. That handshake was one’s bond—it was a personal trust mark.

Those days are gone. We do not do deals on a handshake any more. We seem to have lost interest in face-to-face meetings in our digitized society. We text; we Skype; we FaceTime; we send e-mails. We do not connect in person because we conclude contracts in virtual spaces. The physical handshake is dying, especially in business-to-consumer (“B2C”) contexts. “Buying local” may be in vogue for farmers’ markets and limited purchases, but it makes little economic sense for a growing body of consumer commerce. Instead, consumers increasingly turn to the internet for buying needs and make any in-person purchases at big box stores where they rarely have any personal connections.

Along with this growth of eCommerce have come both connections and disconnections. The internet empowers companies and consumers. It gives companies access to multitudes of customers and connects consumers with companies they would never otherwise encounter in the physical world. The internet has become a gateway to an ever-expanding and globalized eMarketplace for consumer goods and services. Nonetheless, the internet has created disconnections in B2C exchanges by allowing

* Amy J. Schmitz, Professor of Law, University of Colorado School of Law. I thank Chelsea Carr, Laura Drees, and Mary Sue Greenleaf for their research assistance, and Colin Rule for his comments and collaborations in creating ODR systems.

companies to easily hide from responsibility behind the anonymity and depth of the internet. Customer service representatives operating wholly online do not have to look online customers in the eye when denying remedies, and feel less beholden to customers that are replaceable by a seemingly bottomless barrel of consumers who shop online.

These disconnections also fuel the inequities of the "squeaky wheel system" ("SWS") in B2C exchanges.¹ This conception of the SWS builds on the notion that the "squeaky wheels"—who are proactive in pursuing their needs and complaints—are most likely to get the assistance, remedies, and other benefits they seek.² Meanwhile, those who remain silent because they lack the knowledge, experience, and/or resources to artfully and actively pursue their interests usually do not receive the same benefits. This means that the individuals who already enjoy disproportionate power due to social or economic status are usually the "squeaky wheels" that receive the disproportionate benefits—thus perpetuating the divide between the consumer "haves" and "have-nots."

The SWS in B2C contracts has allowed merchants to cut costs by rationing remedies for purchase complaints.³ Merchants know that the bulk of consumers are unaware of available remedies and only a very small handful have the requisite confidence and resources to become squeaky wheels.⁴ Merchants may therefore maximize their profits by providing remedies to only those very few who are sufficiently persistent in pursuing their complaints. Furthermore, the especially pushy consumers may manipulate the SWS to essentially "bully" companies into providing them with special benefits that they may not deserve.

Meanwhile, companies avoid legitimate complaints of the less vocal customers who tend to be those with the least power and resources. This

1. Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279 (2012).

2. *Squeaky wheels get the grease (sometimes)* . . . , QUOTECOUNTERQUOTE.COM, (Aug. 23, 2010), <http://www.quotecounterquote.com/2010/08/squeaky-wheels-get-grease-sometimes.html>, [<http://perma.cc/4ZMG-GGLV>]. "The squeaky wheel gets the grease" is generally "[a]ttributed to American humorist Josh Billings (1818–1885) [f]rom a poem titled 'The Kicker,' although the poem reportedly "does not appear in Billings' own published works." *Id.* "In the 1800s, the term 'kicker' meant someone who was a constant complainer." *Id.* However, "[t]he idea that a complainer is like a squeaky wheel who stops making noise when he gets 'greased' or 'oiled' (i.e., is given what he's yammering to get) may predate Billings." *Id.*

3. See Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 L. & SOC'Y REV. 701, 702 (1977) (noting that sellers choose to use "less stringent quality control practices" and simply compensate those that complain about defective products).

4. See *id.* at 711–12 (finding that only 39.7% of consumers who experience purchase problems complain to the company, report it to a third party, or take any sort of action).

perpetuates a system of status-based treatment.⁵ It also allows companies to impose fees and one-sided contract terms on the consumer masses that remain uninformed about their rights or the availability of benefits.⁶ The one-sided contract terms often limit or disclaim remedies, thus diminishing consumers' remedies.

This SWS also prevents economists' proposed "informed minority" from policing the fairness of contract terms and business practices.⁷ Economists posit that regardless of whether most consumers ignore contract terms, a minority of consumers will police fairness for the good of all consumers by informing the majority of unfair practices and threatening to go elsewhere if companies do not make appropriate changes.⁸ In reality, however, it is doubtful that there are enough "informed" consumers who read or shop for purchase terms beyond price and a few other provisions particular to their needs.⁹ Furthermore, the informed minority often lack the resources or savvy necessary to obtain remedies in the SWS. Moreover, those who obtain the remedies may be unaware that others have not received the same benefits, and have little to no incentive to share information about rationed benefits with the uninformed masses who subsidize the SWS through their inaction.¹⁰ This is especially problematic when it involves health and safety information regarding merchants' products.¹¹

5. See, e.g., R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 672-76 (1996) (discussing how sellers differentiate among buyers by providing contract changes and adjustments to only the most sophisticated consumers who complain).

6. See *id.* at 674-75 (noting that sellers often provide repairs for complaining customers to stop them from creating "bad will for sellers," while they continue to deny such repairs for the "uninformed masses who simply bear the loss").

7. See Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 714-16 (1992) (explaining the informed minority argument).

8. See Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 637-39 (1979) (explaining the theory that competition among firms for searchers should tend to protect all consumers).

9. See Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 3 (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 09-40, 2009), available at <http://ssrn.com/abstract=1443256>, [<http://pepma.cc/FHF2-QDNN>] (studying the internet browsing of 45,091 households and finding that only one or two out of every thousand shoppers studied online software merchants or accessed their websites); see also LARRY A. DIMATTEO ET AL., VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION 28-30 (2007).

10. See Peter A. Alces & Jason M. Hopkins, Symposium, *Carrying a Good Joke Too Far*, 83 CHI.-KENT L. REV. 879, 895-96 (2008) (discussing how businesses may discriminate in favor of sophisticated consumers).

11. See *Many miss out*, CONSUMERREPORTS.ORG, (Feb. 2011),

In sum, the SWS in B2C exchanges allows businesses to relinquish responsibility to consumers, ration remedies, and thwart consumer protection enforcement to the detriment of those with the least resources and information.¹² This creates a need for expanded and equalized access to remedies in order to address the broken market and revive companies’ sense of responsibility underlying the “handshake” of yore.¹³ Furthermore, consumers must be aware of remedy systems for them to be meaningful.¹⁴ Here is where the internet’s connection potential shines. It opens doors to online dispute resolution (“ODR”) systems that utilize cost-effective negotiation, mediation, and arbitration processes for resolving complaints—and thus creates a “New Handshake.”

ODR can be especially effective and satisfying for low dollar claims such as those in most B2C contexts because of its efficiencies. ODR systems help address the SWS by lowering the costs and burdens of pursuing purchase complaints so that all consumers, regardless of power and resources, feel comfortable and able to seek assistance. Online complaint systems also create transparency around seller behavior and give voice to common consumers who may then police market fairness and empower others to “vote with their feet.” This could help address power imbalances that have hindered market regulation in B2C commerce.

Accordingly, this essay discusses how use of ODR systems may help address the problematic results of the SWS in B2C exchanges. Part II of the essay discusses possible reasons why the SWS has flourished in the consumer marketplace and provides some of the applicable behavioral, social, and empirical research.¹⁵ Part III then uncovers problematic consequences of the SWS in B2C exchanges,¹⁶ and Part IV proposes the “New Handshake” through tailored ODR systems that offer consumers efficient and fair means for accessing remedies with respect to their

<http://www.consumerreports.org/cro/magazine-archive/2011/february/home-garden/bad-products/recall-notifications/index.htm>, [<http://perma.cc/7VNL-5FA9>] (highlighting 2010 survey findings indicating that “[o]nly a fifth of U.S. adults were aware of having purchased food, medication, or a product (other than a car) that was recalled in the past three years,” and the reasons for this lack of information).

12. See discussion *infra* Parts II.A, III.

13. See discussion *infra* Part V.

14. See, e.g., *Servicemembers Civil Relief Act: Information on Mortgage Protections and Related Education Efforts*, GAO-14-221, U.S. GOV’T ACCOUNTABILITY OFF., (Jan. 2014), <http://www.gao.gov/assets/670/660397.pdf>, [<http://perma.cc/7PTS-RXNC>] (finding that service members were not taking advantage of special mortgage protections due to lack of information and education regarding these remedies).

15. See discussion *infra* Part II.

16. See discussion *infra* Part III.

purchases.¹⁷ Part V concludes with an invitation to continue the development of such ODR systems in an effort to foster revived corporate responsibility and bridge the growing gap between the consumer “haves” and “have-nots.”¹⁸

II. WHY THE SWS THRIVES IN B2C EXCHANGES

Individuals who persistently pursue their needs are usually those most likely to get what they want. This may be fair when it rewards individuals for exerting time and resources to pursue their needs.¹⁹ It is problematic, however, when it perpetuates contract discrimination, curbs consumer rights, and allows companies to hide contract and product improprieties from the majority.

A. BUSINESS BENEFITS OF APPEASING COMPLAINERS

Businesses benefit from using the SWS to curb costs by rationing remedies and limiting customer assistance. Merchants therefore tend to provide assistance only for the few squeaky wheel consumers who are persistent in pursuing their needs.²⁰ Businesses also have cut costs by shrinking or eliminating telephone assistance, causing consumers to give up on seeking assistance after long hold times on the telephone.²¹ Consumers also have become frustrated with companies’ lack of replies to their e-mails.

This rationing of remedies and assistance also allows businesses to monopolize complaint resolution to their benefit, knowing that consumers very rarely take complaints to the courts, federal regulators, or third parties such as their local chamber of commerce or the Better Business Bureau (“BBB”).²² Studies show that buyers never voice two-thirds of the problems they perceive, and very few of the remaining one-third go further to report their complaints to third parties.²³ Furthermore, reported complaints are only the “tip-of-the-iceberg” to the extent that many consumers—especially those of lower socioeconomic status—do not even

17. See discussion *infra* Part IV.

18. See discussion *infra* Part V.

19. See, e.g., Cruz & Hinck, *supra* note 5, at 673–75.

20. Best & Andreasen, *supra* note 3, at 701, 727 (noting study findings showing that satisfaction rates for complaint resolution for frequently purchased products were higher than those for infrequently purchased goods, although rates for products generally were higher than those for services).

21. See generally *id.* at 713–15.

22. *Id.* at 713–14.

23. *Id.* at 709–12, 727–30 (distilling consumers’ responses to perceived problems).

realize their rights to complain.²⁴ Consumers have come to expect poor products and services. Nonetheless, they also have become savvier in seeking out trustworthy merchants, which ultimately disadvantages the shortsighted poor performing companies.

It also is economically wise for businesses to appease squeaky wheels because their loyalty boosts bottom lines.²⁵ It pays to appease complainers in order to retain their loyalty, especially considering the additional costs of seeking to attract new customers. For example, marketing analysis indicates that it is roughly five times harder to attract new customers than to retain current ones, which translates into 25 to 85 percent higher profits merely by retaining 5 percent more current customers.²⁶ Furthermore, appeased complainers are even more loyal than customers who never had complaints regarding their purchases.²⁷ Appeased complainers also are more likely than others to recommend a business to friends and family.²⁸

However, dissatisfied complainers may significantly damage companies' reputations and goodwill. This is because they are usually the type of proactive individuals prone to share their negative experiences, which is particularly troubling for companies considering the growth of social media and complaint sites like Yelp.²⁹ Customers unhappy with companies' products or services have a broad range of venues for complaints that directly impact sales. Companies and consumers are now well aware of reviews on Amazon.com, for example. As another example, eBay's "Top Rated Plus" pushes the merchants with the best reviews and

24. *Id.* at 701–03, 706–08 (noting divergent perception rates based on socioeconomic status and race).

25. See WOLF J. RINKE, DON'T OIL THE SQUEAKY WHEEL: AND 19 OTHER CONTRARIAN WAYS TO IMPROVE YOUR LEADERSHIP EFFECTIVENESS 133–38 (2004) (discussing the importance of "wowing" customers, even if it is in response to complaints).

26. *Id.* at 138.

27. See Tibbett L. Speer, *They Complain Because They Care*, 18 AM. DEMOGRAPHICS 13 (1996) (noting "grouzers are likely to remain loyal" if they are happy with resolution of their complaints); Lenden Webb, *Brainstorming Meets Online Dispute Resolution*, 15 AM. REV. INT'L ARB. 337, 357–58 (2004) (citing studies).

28. See Speer, *supra* note 27 (describing "secure customers" as "those who feel great satisfaction with a store [and] would recommend it to others"); RINKE, *supra* note 25, at 138.

29. See generally PETE BLACKSHAW, SATISFIED CUSTOMERS TELL THREE FRIENDS, ANGRY CUSTOMERS TELL 3,000: RUNNING A BUSINESS IN TODAY'S CONSUMER-DRIVEN WORLD 4–6 (2008) (noting how an upset customer posted a recording of his negative experience seeking to cancel AOL service on the Internet, thereby spreading his complaint to at least 62,827 others); *New ways to complain*, CONSUMERREPORTS.ORG, <http://www.consumerreports.org/cro/money/consumer-protection/new-ways-to-complain/overview/index.htm>, [<http://perma.cc/W78T-W352>] (last visited Jan. 12, 2014) (illustrating examples of consumers who used social media to complain or praise a company and its effects on the company).

track records to the top of its ratings for all shoppers to see when making purchasing decisions on the popular sales site.³⁰

That said, businesses have become less generous in providing contract changes in B2C contracts, and many companies include unilateral amendment provisions in their form contracts that hinder consumers' incentive to shop for or negotiate form contracts.³¹ It is rational for consumers to forego the investment of time to negotiate terms *ex ante* knowing that companies can change the terms *ex post*.³² Furthermore, companies use mass mailings or confusing online presentations (aka "shrouding") to slip provisions into form contracts, thereby leaving consumers without notice of onerous provisions they rationally should seek to avoid or change.³³

Businesses also have begun to cut off assistance to overly squeaky wheels. They may track customer complaints or product returns in order to build lists of those they deem unworthy of future assistance.³⁴ This is fair to the extent it prevents fraud, but it is problematic when it results in denial of legitimate complaints.³⁵ Furthermore, companies have become reluctant to help consumers for fear that they will waive future insistence on warranty and other remedy limitations.³⁶

Still, businesses overall have incentive to assist only the squeakiest wheels. As noted, appeased customers often are the most loyal and dissatisfied complainers are usually the most vocal on social media.³⁷ Furthermore, the squeaky wheels tend to be the same individuals who already harness the greatest power and resources. This, in turn, perpetuates

30. See *Look For This New Seal to find items from sellers with the best services*, EBAY, <http://pages.ebay.com/topratedplus/index.html>, [<http://perma.cc/T98H-X54K>] (last visited Jan. 20, 2014) (illustrating the criteria for finding the top rated sellers on eBay).

31. See David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 478–80 (2009).

32. David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 648–52 (2010) (explaining the inefficiency and anti-bargaining effects of unilateral amendment provisions).

33. See generally Alces & Hopkins, *supra* note 10, at 889–903 (discussing "shrouding").

34. See RICHARD K. MILLER & KELLI WASHINGTON, *CONSUMER MARKETING* 160–62 (2009).

35. See Press Release, National Retail Federation, *Retailers Find Balance As Return Policies Assist Honest Shoppers, Fight Fraud* (Oct. 29, 2009), available at https://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=814, [<http://perma.cc/8UNF-UABS>] (stating that return policy fraud have cost retailers an estimated \$9.6 billion in 2009 alone).

36. See, e.g., *Buffalo Molded Plastics, Inc. v. Omega Tool Corp.*, 344 B.R. 394, 407 (Bankr. W.D. Pa. 2006) (finding company could not rely on payment terms in the applicable contract because they were not followed in the industry).

37. Speer, *supra* note 27, at 13 (noting how complaining customers are those most likely to remain loyal and recommend a business to others if it satisfies the complaints).

contractual discrimination and widens the gap between the consumer "haves" and "have-nots."

B. CONSUMERS' RELUCTANCE TO PURSUE REMEDIES FOR PURCHASE COMPLAINTS

Consumers suffer from irrationality and inertia in the marketplace. They do not necessarily make purchases based on considered economic cost/benefit comparisons, and are prone to ignore contract terms when reading them would require action such as clicking a link on a website or sifting through fine print stuffed in a mailing. They also are susceptible to confusing or erroneous marketing, which companies may use to shroud onerous terms. These contracting realities are contrary to classical economists' assumptions that individuals make rational purchases based on perfect information about those purchases.³⁸

Real world contracting is messy. Indeed, most individuals do not read or digest the often long and complex form contracts that have become the norm in B2C exchanges.³⁹ Consumers also may make economically irrational contract choices due to over-optimism, sunk-cost effect, cognitive dissonance, and confirmation bias.⁴⁰ Deeper discussion of these behavioral and psychological tendencies is beyond the scope of this essay, but essentially such tendencies work in concert to blind consumers from potential problems with their contracts. This is because consumers are optimistic at the time they make purchases, and they do not want to believe they made bad decisions when problems arise. Individuals also are prone to overlook red flags and continue with contracts after investing time and

38. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–22 (discussing how cognitive biases can lead to the dismissal of information); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204–06, 1222–25, 1243–44 (2003) (discussing law-and-economics' assumptions regarding consumer rationality).

39. See Debra Fogrund Star & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL'Y & L. 85, 98–99 (2010) (noting examples of certain normally overlooked terms, including adjustable rates versus fixed rates on loan agreements).

40. See *id.* at 100–01 (discussing "anchoring effects"); see also Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 122–24 (2007) (explaining behavioral law and economics basics); Russell Korobkin, Symposium, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1605–09, 1627 (1998) (noting individuals' "tunnel vision" skewed by their biases). But see Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1559–75 (1998) (critiquing behavioral law and economics as merely a psychological and sociological account of human behavior that "confuse[s] explanation and prediction" and lacks "theoretical ambition").

resources in making a purchasing decision.⁴¹ For example, car salespersons know that consumers are prone to buy a car after taking a test drive and beginning the notoriously exhausting negotiating process that often accompanies such purchases. It is tough to walk away.

Humans also are lazy, or inert, when it comes to contracting. This means that individuals are prone to accept preprinted terms and skim contracts merely to confirm assumptions or salespersons' promises instead of carefully considering contract terms.⁴² Similarly, this means that consumers are slow to assert complaints if it requires efforts such as hiring an attorney and filing a claim in court or with an arbitration association. Consumers also are hindered by remedy limitations and arbitration procedures that require them to deposit high filing and administrative fees.⁴³ It is quite rational for consumers to forgo filing a claim when the costs of filing such a claim outweigh any potential remedy.

Individuals also lack the time, money, knowledge, and patience to pursue complex or difficult remedy processes. People busy with work and family obligations are likely to give up in pursuing complaints when companies ignore their initial requests for assistance.⁴⁴ Anger may fuel a consumer's initial e-mail or phone call regarding a purchase problem, but consumers generally do not follow up after receiving no reply or lingering on hold with customer service phone lines.⁴⁵ Customer service representatives also may make it very unpleasant or stressful for consumers to obtain redress.

For example, one law student reported that when he called customer support to contest charges for a "free" credit report from www.freecreditreport.com, the representative insisted that he signed up for a paid subscription for credit monitoring when he submitted his information to obtain an ostensibly free report.⁴⁶ The law student was quite persistent and withstood a lengthy "tug-of-war." Nonetheless, his

41. See generally Best & Andreasen, *supra* note 3, at 703–10 (noting possible responses to perceived purchase problems).

42. See generally Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211 (1987) (discussing confirmation bias).

43. See Cruz & Hinck, *supra* note 5, at 674–76.

44. See Best & Andreasen, *supra* note 3, at 715 (commenting on how complexity in the consumer complaint process is related to the likelihood that a consumer will complain).

45. See *id.*

46. Memorandum from Nathan E. Vassar, Graduate, University of Texas School of Law, to author (Apr. 26, 2010) (on file with author) (documenting his experience with <http://www.freecreditreport.com>, [<http://perma.cc/HUK5-D9NS>]); see also E-mail from David Horton, Assoc. Professor, Loyola Law School, Los Angeles, to author (Sept. 3, 2010, 16:46 MST) (on file with author) (reporting a similar story).

persistence only earned cancellation, leaving him liable for the initial subscription charge to avoid additional hassle.⁴⁷ Although he felt defrauded, he knew that it would not be worth it to endure the costs of filing a court or arbitration action for such a small dollar claim, both in terms of time and money.

Societal influences also quell consumer complaints and abilities to get remedies on their claims. Although we hear in the media that Americans are adversarial or litigious, that is generally not true among the general public. Instead, culture teaches individuals to maintain a stiff upper lip.⁴⁸ Furthermore, women may be especially reluctant to assert complaints or pursue their economic interests, especially when they fear appearing "pushy."⁴⁹ Women also are much less likely than men to recognize opportunities to negotiate and usually use less assertive language than men when they do pursue negotiations.⁵⁰ This may contribute to women's less lucrative outcomes in negotiations.⁵¹

Similarly, research shows that black consumers are less likely than white consumers to realize opportunities to complain or negotiate regarding products and services.⁵² One study suggested that black consumers generally have lower expectations regarding their purchases and thus do not receive the same purchase benefits as white consumers.⁵³ Furthermore, conscious or subconscious biases may lead company representatives to offer the least advantageous prices to racial minorities.⁵⁴

47. Memorandum from Nathan E. Vasser to author, *supra* note 46 (consumer concluding: "I ended up hassled and frustrated by the entire experience, as I had to pay for one month's subscription, and endured a lengthy and difficult phone conversation in order to release myself from the automatic monthly charge.").

48. See Alice F. Stuhlmacher & Amy E. Walters, *Gender Differences in Negotiation Outcome: A Meta-Analysis*, 52 PERSONNEL PSYCHOL. 653, 656 (1999).

49. See Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 309–10 (1999) (discussing gender in negotiations); Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. OF PERSONALITY & SOC. PSYCHOL. 629, 629–30 (1998) (explaining societal expectations that women should remain more relational and less confrontational).

50. LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 20 (2003) (noting how women were 45% more likely to score low on a rating scale assessing whether people saw their situations as open to change via negotiations); Stuhlmacher & Walters, *supra* note 48, at 653–77 (reviewing findings from studies on gender in negotiations).

51. See Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 117–21, 124–26 (2008) (discussing research regarding gender in negotiations).

52. Best & Andreasen, *supra* note 3, at 707, 723–24 (reporting study findings).

53. *Id.* at 707.

54. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car*

Research in lending contexts also indicates that company representatives provide the best deals to white male consumers.⁵⁵ In December 2013, the Consumer Financial Protection Bureau (“CFPB”) and the Department of Justice (“DOJ”) ordered Ally Financial Inc., to pay \$80 million in damages as part of a settlement for claims of discriminatory lending from the bank’s indirect auto lending program.⁵⁶ Evidence indicated that Ally’s indirect financing program—involving more than 12,000 car dealerships around the country—charged approximately 235,000 African-American, Hispanic, and Asian/Pacific Islander borrowers higher interest rates than non-Hispanic white borrowers.⁵⁷ CFPB Director Richard Cordray said, “[d]iscrimination is a serious issue across every consumer credit market.”⁵⁸

Companies also tailor their contract offerings and practices based on “worthiness” predictions and consumer ratings. Data brokers gather not only consumers’ spending and debt histories, but also further details of their financial, personal, and social networking behaviors. They even track whether an individual uses a pen or pencil to fill out forms.⁵⁹

These data brokers then may combine this information with assumptions based on theory and predictions in order to create logarithmic consumer “scores” or ratings, which they sell to companies in order to drive how the companies treat different consumers. A consumer’s “score” may inform how a company will treat that individual when he or she calls customer service or asks about the company’s products and services.⁶⁰

Negotiations, 104 HARV. L. REV. 817, 819, 822–43 (1991) (noting others’ animus-based theories of discrimination and providing further detail regarding the research methodology and findings). Professor Ayres found in his study of Chicago car sales that black consumers had to pay over twice the markup paid by all other customers, regardless of market competition that should have eliminated such discrimination. *Id.* at 819. Surprisingly, this was true although the car dealerships steered the tester-buyers to salespersons who shared the buyers’ gender and race characteristics. *Id.*

55. See generally Press Release, Consumer Financial Protection Bureau, *CFPB and DOJ Order Ally to Pay \$80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing*, (Dec. 20, 2013) available at <http://www.consumerfinance.gov/newsroom/cfpb-and-doj-order-all-y-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing>, [<http://perma.cc/D5YM-5MQQ>] (noting that the Equal Credit Opportunity Act prohibits “creditors from discriminating against loan applicants in credit transactions on the basis of characteristics such as race and national origin”).

56. *Id.*

57. *Id.*

58. *Id.*

59. Nathalie Martin, *Hey Dude, What’s Your E-score*, CREDIT SLIPS, <http://www.creditslips.org/creditslips/2012/08/hey-dude-whats-your-e-score.html>, [<http://perma.cc/S9YC-TJ46>] (last visited Jan. 20, 2014).

60. Natasha Singer, *Secret E-Scores Chart Consumers’ Buying Power*, N.Y. TIMES (Aug. 18,

What's more, these scores are largely secret and not regulated by the Fair Credit Reporting Act (FCRA).⁶¹ This means that companies may treat consumers differently based on criteria and information that is unknown and unappealable.

These scores are powerful and impossible to decode due to their complex algorithms. Company representatives may use them in essentially discriminating against consumers they deem less valuable. A New York Times reporter observed:

A growing number of companies, including banks, credit and debit card providers, insurers and online educational institutions are using these scores to choose whom to woo on the Web. These scores can determine whether someone is pitched a platinum credit card or a plain one, a full-service cable plan or none at all. They can determine whether a customer is routed promptly to an attentive service agent or relegated to an overflow call center.⁶²

These consumer scores thus augment the inequities of the SWS, and create another discriminatory hurdle to obtaining remedies regarding B2C purchases.

In sum, there is a confluence of corporate and consumer propensities that work in concert to narrow access to remedies. Companies understandably aim to satisfy the sophisticated customers who persistently pursue their complaints, while consumers with the least time and resources to learn about or advance their rights are left without remedies. At the same time, behavioral tendencies and biases add to remedy rationing along with new consumer scores that again work to the disadvantage of consumers with lower status and less resources.

III. THE NEED FOR A "NEW HANDSHAKE" OPENING AVENUES TO CONSUMER REMEDIES

Consumer remedy systems are faulty and skewed. The SWS impedes market regulation by preventing informed consumers from alerting the majority about purchase problems, and this converges with consumer ratings to perpetuate contractual discrimination to the detriment of the least informed and most vulnerable consumers. Lack of consumer information

2012), http://www.nytimes.com/2012/08/19/business/electronic-scores-rank-consumers-by-potential-value.html?pagewanted=all&_r=0, [<http://perma.cc/D4P5-KNC2>]

61. Ed Mierzwinski & Jeff Chester, Symposium *Selling Consumers, Not Lists: The New World of Digital Decision-making and the Role of the Fair Credit Reporting Act*, 46 SUFFOLK U. L. REV. 845, 845–856 (2013).

62. Singer, *supra* note 60.

about available rights and remedies also impedes regulators' awareness of company improprieties, and thus thwarts consumer protections.

A. BROKEN MARKET

Classical and economic theories posit that strict contract enforcement results in optimal allocation of resources, assuming that rational consumers will buy the optimal quality and quantity of goods and services under competitive terms.⁶³ In reality, however, most consumers do not have perfect information about the market and do not read or understand the complicated terms commonly in form contracts. Consumers therefore fail to purchase optimal quantities or bargain for competitive and efficient terms.⁶⁴ This, in turn, leaves companies free to take advantage of consumers' lack of information and bargaining power. The market therefore fails to police the fairness or efficiency of consumer contracts.⁶⁵

Furthermore, evidence does not indicate that theorists' so-called "informed minority" is policing the fairness of contracts for the uninformed majority in the B2C market. Market defenders argue that regardless of whether most consumers read or bargain for efficient terms, a sufficiently knowledgeable and noisy "informed minority" will force companies to cater their contracts to appease those consumers who read contracts and spread negative information about company practices.⁶⁶ Accordingly, the informed minority of consumers will speak up for the uninformed masses to police merchants' contract terms.

Data nonetheless casts doubt on the existence of this "informed minority." For example, researchers who studied consumers' internet browsing behavior on sixty-six online software companies' websites found that only one or two out of one thousand shoppers on these sites actually accessed the companies' standard form contracts (referred to as end-user software license agreements, or "EULAs").⁶⁷ Furthermore, they found that shoppers rarely accessed product reviews or other substitute information sources.⁶⁸

63. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3–28 (4th ed. 1992) (explaining the economic model and the usefulness of economic theory in analyzing law).

64. See generally Cruz & Hinck, *supra* note 5, at 635–71 (explaining the various arguments).

65. See generally *id.* at 646–71.

66. Schwartz & Wilde, *supra* note 8, at 637–39 (discussing this theory); see Cruz & Hinck, *supra* note 5, at 646.

67. See Bakos et al., *supra* note 9, at 15–17, 33–37.

68. *Id.* at 34.

Similarly, research suggests the unlikelihood that a sufficient number of proactive consumers will regulate merchant practices by spreading information and taking action *ex post* regarding purchase problems.⁶⁹ One European study found that only 7% of consumer cases ended with a resolution in court or an alternative proceeding.⁷⁰ The researchers also found that 45% of launched complaints ended with no agreement or decision, suggesting that consumers who took initial action on their complaints nonetheless gave up their pursuits along the way.⁷¹ Of course, some complaints lack merit. Still, this seems to indicate that even initially proactive consumers are prone to "give up the fight."

Furthermore, most consumers remain uninformed regarding their contract rights due to the high costs of obtaining information and pursuing contract claims.⁷² In addition, advertising and disclosure laws generally fail to correct for imperfect information, and even well-meaning disclosure rules may backfire by adding to the information overload that already clouds consumers' comprehension of their contracts.⁷³ In a *Consumer Reports* survey, only 16% of the nearly two-thirds of respondents who claimed that they read all of the disclosures regarding a new loan or credit card said they found the disclosures understandable.⁷⁴ A typical consumer may have to spend nearly three hours weeding through lengthy terms and conditions in a car purchase agreement.⁷⁵

Companies also have become notorious for using especially complicated fine print in their form contracts and teaser promotions to "shroud," or mask, the true costs of contracts.⁷⁶ For example, lenders may sneak add-ons for credit insurance into loan documents in ways that elude

69. See Marco B.M. Loos, *Individual Private Enforcement of Consumer Rights in Civil Courts in Europe*, 5–14 (Ctr. for the Study of Eur. Contract Law Working Paper Series, Paper No. 2010/01), available at <http://ssrn.com/abstract=1535819>, [<http://perma.cc/96BX-6XJM>] (discussing the need for reform to increase consumers' private enforcement of European contract regulations).

70. *Id.* at 4.

71. *Id.*

72. See *id.* at 3.

73. See Star & Choplin, *supra* note 39, at 86–95, 113–26 (discussing the inability of disclosure laws to protect consumers from predatory lending).

74. *No more fine-print surprises*, CONSUMER REPS.: MONEY ADVISER, Feb. 2011, at 2 (noting survey results).

75. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure* 7–20, 40–55 (Chi. Law Sch. John M. Olin Law & Econ. Working Paper, 2d Series, Paper No. 516, 2010), available at <http://www.law.uchicago.edu/files/file/516-obs-disclosure.pdf>, [<http://perma.cc/ZVW7-UKAW>].

76. See Alces & Hopkins, *supra* note 10, at 889–893 (discussing "shrouding").

even the most educated consumers.⁷⁷ In addition, some companies use the SWS to manipulate more formal complaint resolution processes and keep the majority of consumers unaware of their potential rights. This also allows merchants to keep claims out of the public eye and further limit their provision of remedies.⁷⁸ For example, one credit card issuer that inexplicably raised all of its customers' interest rates by two percent apologized and rescinded the rate increase for only the few customers who complained, while the rest of the consumers continued to pay the increased rates.⁷⁹

Complaints systems therefore become skewed in favor of the most sophisticated consumers who know how to artfully submit complaints and get what they want. These consumers then have little to no incentive to alert the majority about available remedies. They may be "complicit in the exploitation of the myopic because the welfare loss that is born by the myopic redounds to the benefit of the sophisticated."⁸⁰ This is because companies have more resources for assisting the sophisticated consumers when they continue to profit from imposing onerous terms on the consumer masses.

At the same time, there is no reason to believe that any sort of informed minority has the same purchase interests and needs as the majority. Indeed, consumers have different needs and complaints.⁸¹ Accordingly, remedy systems must be contextualized to account for consumers' differences.

B. CONTRACTUAL DISCRIMINATION

Most consumers feel powerless when seeking remedies regarding their purchases.⁸² For example, this is true in the cellular service market,

77. See also Star & Choplin, *supra* note 39, at 90–95 (explaining the various predatory practices that are difficult for consumers to understand or digest).

78. See Best & Andreasen, *supra* note 3, at 710–17; Cruz & Hinck, *supra* note 5, at 673–75.

79. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 22 (2008) (discussing how companies appease only those who complain, while leaving the masses in the dark regarding their potential rights).

80. Alces & Hopkins, *supra* note 10, at 890.

81. See generally Morris B. Holbrook & Elizabeth C. Hirschman, *The Experiential Aspects of Consumption: Consumer Fantasies, Feelings, and Fun*, 9 J. CONSUMER RES. 132 (1982) (discussing the many factors that affect buyer behavior and calling for more research of those considerations); William H. Redmond, *Consumer Rationality and Consumer Sovereignty*, 58 REV. SOC. ECON. 177 (2000) (discussing how consumer choice is a prime example of suboptimal decision-making).

82. See Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 29–33 (2002).

which is dominated by relatively few companies.⁸³ In addition, sellers may use their power to capitalize on consumers' over-confidence regarding their purchases and failures to properly weigh and consider contract risks and information.⁸⁴ They also may manipulate the SWS to suppress information sharing among consumers and hinder consumers' pursuit of contract claims. They quiet the sophisticated squeaky wheels, and they usually are especially successful in curbing complaints from consumers with low socioeconomic status or claims that involve personal judgment or low-cost items.⁸⁵

Consumers with higher incomes and more education thus end up on top in a consumer caste system. The squeaky wheels tend to have higher quality and service expectations.⁸⁶ They also generally are more confident and thus more successful in pursuing remedies when dissatisfied with their purchases.⁸⁷ One study indicated that "for every 1,000 purchases, households in the highest status category voice complaints concerning 98.9 purchases, while households in the lowest status category voice complaints concerning 60.7 purchases."⁸⁸

This differential may be due to lack of educations and resources, along with lower expectations regarding their purchases. Consumers who are most vulnerable to feelings of powerlessness often become accustomed to poor treatment and have lower expectations regarding purchases.⁸⁹ Lower status consumers also are likely to have less confidence and fewer resources with which to assert their complaints. They also often lack financial education and may face hurdles created by limited English proficiency.⁹⁰

83. See Adi Ayal, *Harmful Freedom of Choice: Lessons from the Cellphone Market*, 74 LAW & CONTEMP. PROBS. 91, 91–100 (2011) (discussing how cell phone companies use complexity to take advantage of the consumer); Oren Bar-Gill & Rebecca Stone, *Mobile Misperceptions*, 23 HARV. J.L. & TECH. 49, 118 (2009) (noting how power plays a role in cellular service contracts "designed to exploit the cognitive biases of many consumers").

84. Becher, *supra* note 40, at 136–78 (discussing consumers' failure to properly assess low-probability risks and the likelihood of future incidents).

85. Best & Andreasen, *supra* note 3, at 730.

86. See Bård Tronvoll, *Complainer Characteristics When Exit is Closed*, 18 INT'L J. OF SERVICE INDUSTRY MGMT 25, 25–51 (2007), available at www.emeraldinsight.com/0956-4233.htm, [http://perma.cc/3MDX-89P4] (discussing research regarding characteristics of consumers who complain about their purchases).

87. See *id.* at 32–33.

88. Amy J. Schmitz, *supra* note 1 at 213 (quoting Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 L. & SOC'Y REV. 701, 723 (1977)).

89. Tronvoll, *supra* note 86, at 25–36.

90. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-518, FACTORS AFFECTING THE FINANCIAL LITERACY OF INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY I, 9–10 (2010),

To be fair, no assumptions or research applies for all consumers. Indeed, there are studies suggesting that the price of the purchase, the probability of winning the complaint, and the frequency of the purchase type overshadow demographics in predicting the likelihood of complaints.⁹¹ Nonetheless, data suggests a growing divide between the high-power “haves” and low-power “have-nots” based on income, education, and age.

Furthermore, stereotypes and biases may augment this divide. As noted, customer service associates’ conscious and subconscious biases may affect how they treat consumers, and lead them to offer the worst deals to minorities and women.⁹² Consumers also may perpetuate their low-power status by assuming that they will be unfairly judged or brushed aside.⁹³ The more concerned a consumer is about affirming negative labels, the greater the likelihood that she will feel constrained in her communications.⁹⁴

Contractual discrimination also may result from data brokers’ valuations or consumer scoring.⁹⁵ These scores and ratings favor higher-income consumers with more education, and thus the same class of sophisticated consumers who are more likely to pursue their complaints and obtain remedies in the SWS. This again deepens the divide between consumer “haves” and “have-nots.”⁹⁶

C. REGULATION AVOIDANCE

Very few consumers take their complaints to court or to public regulators. This is due in part to companies’ use of the SWS to control complaint resolution and quiet the squeaky wheels who have the requisite resources and confidence to pursue such processes.⁹⁷ Some companies strategically offer settlements and remedies to would-be plaintiffs to

available at <http://www.gao.gov/new.items/d10518.pdf>, [<http://perma.cc/KJZ7-G7GZ>] (reporting the extent to which limited English proficiency—along with income and education—impact financial education, and the ability to make informed judgments and take effective actions regarding contracts and money management).

91. See Speer, *supra* note 27, at 13–14 (noting mixed evidence).

92. See DiMATTEO ET AL., *supra* note 9, at 237–40 (noting biases and discrimination).

93. Cf. Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103, 108–10 (2000) (discussing how minority employees may refrain from complaining due to stereotype concerns).

94. Cf. *id.* at 109–22, 133–39.

95. See Martin, *supra* note 59 (discussing consumer scoring).

96. See Horton, *supra* note 32, at 605–09 (noting how contract adherents have no reason to expend time and resources shopping for terms that companies may unilaterally change, while companies feel no pressure to change form procedural terms to suit adherents’ preferences).

97. Best & Andreasen, *supra* note 3, at 728–29.

preclude class actions.⁹⁸ Furthermore, class action waivers and arbitration clauses increasingly cut off consumers' access to class relief. These forces work in concert to stifle enforcement of consumer protections, especially with respect to small claims that consumers cannot economically assert through individual actions.⁹⁹

A somewhat notorious example is *Hill v. Gateway 2000, Inc.*¹⁰⁰ In that case, Gateway offered to waive a contractual thirty-day return limit and give the Hills a full refund as a means for stopping the Hills from leading a class action regarding Gateway computer problems. Furthermore, the court ordered the Hills to arbitrate their claims individually due to an arbitration clause. Accordingly, the SWS and an arbitration clause were at play to thwart the Hill's public lawsuits on the merits of the warranty dispute, thereby hindering development of the law and leaving most consumers uninformed and perhaps without redress regarding computer defects.¹⁰¹

Both the SWS and arbitration privatize dispute resolution and limit public access to information regarding faulty products and company improprieties.¹⁰²

Although private settlements can be beneficial, public action or reporting often is necessary to uncover product recalls and inform the masses about companies' malfeasance.¹⁰³ *Consumer Reports* found in its 2010 survey that less than a quarter of the respondents said they researched product recalls, and only a fifth of the respondents were aware of recalls

98. Eugene J. Kelley, Jr. et al., *Offers of Judgment in Class Action Cases: Do Defendants Have a Secret Weapon?*, 54 CONSUMER FIN. L. Q. REP. 283, 283 (2000); David Hill Koysza, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 789 (2003).

99. See Jeffrey I. Shinder, *In Praise of Class Actions*, NAT'L L.J., Apr. 5, 2010, at 39 (highlighting how class actions give voice to "little guy" consumers who have been wronged).

100. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 707 (discussing the *Hill v. Gateway*).

101. *Hill*, 105 F.3d at 1150–51.

102. See Geraldine Szott Moohr, *Opting In or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L.Q. 1087, 1093–97 (1999) (noting how public litigation can stimulate legal development and public debate through recorded opinions).

103. *Iffy Product? Now a Way to Tell*, CONSUMERREPORTS.ORG (Feb. 2011), <http://www.consumerreports.org/cro/magazine-archive/2011/february/recalls-and-safety-alerts/iffy-product/index.htm>, [<http://perma.cc/H72X-QJ2Q>] [hereinafter *Iffy Product*] (highlighting the difficulties of obtaining information regarding complaints and companies' power in blocking information); *Trouble with Recalls*, CONSUMERREPORTS.ORG (Feb. 2011), <http://www.consumerreports.org/cro/magazine-archive/2011/february/home-garden/bad-products/recalls/index.htm>, [<http://perma.cc/RQ9G-5SBU>] (advising consumers to register products to receive recall information).

regarding products they had purchased in the past three years.¹⁰⁴ Furthermore, “an additional 15 percent simply threw the product in the trash rather than returning it for a refund, an exchange, or a free repair.”¹⁰⁵ Hopefully, online processes through the Consumer Product Safety Commission (“CPSC”) database that launched in March 2011 will help consumers with product problems—but even such a database may prove ineffective if consumers do not know of its existence or the processes do not provide concrete remedies.¹⁰⁶

IV. A “NEW HANDSHAKE” TO OPEN AVENUES TO CONSUMER REMEDIES

Ad hoc management of squeaky wheels, data brokers’ consumer scoring, class action waivers, and onerous arbitration clauses have all contributed to narrowed access to consumer remedies in B2C transactions. At the same time, traditional face-to-face (“F2F”) dispute resolution processes are generally too expensive and time-consuming for typical consumer disputes. This is especially true for low status consumers and small claims. Nonetheless, computer-mediated communication (“CMC”) creates new ways to connect. Individuals date online, so it seems rational to resolve disputes online.¹⁰⁷ Indeed, the efficiencies of ODR open avenues for affordable access to justice that the F2F legal system cannot provide. ODR has the potential to hold companies accountable and create the “New Handshake” of the digital age if it is efficient and fair for companies and all consumers—regardless of wealth, education, race, or age.¹⁰⁸

104. See *Many miss out*, *supra* note 11.

105. *Id.*

106. *Iffy Product*, *supra* note 103 (discussing the new database and other technology upgrades contemplated by the CPSC).

107. See Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 180–240 (2010); see also Llewellyn Joseph Gibbons, *Creating a Market for Justice: a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT’L L. & BUS. 1, 3 (2002).

108. See Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. DISP. RESOL. 301, 308–10 (2008); Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 328 (2008); Schmitz, *supra* note 107, at 239–42.

A. MOTIVATIONS FOR MOVING CONSUMER COMPLAINT PROCESSES ONLINE

CMC and virtual communications mechanisms have created new means for individuals to connect.¹⁰⁹ Young and old alike now communicate through text messages instead of telephone calls, and socialize through chat rooms, blogs, and networks like Facebook and Twitter.¹¹⁰ Handwritten letters and personal phone calls are rare. Nonetheless, online communication can also breed relational isolation, diminished creativity, and increased deception.¹¹¹ Accordingly, ODR designed to provide a "New Handshake" online must carefully draw on the best attributes of online communications while seeking to minimize the concerning consequences of lost F2F intimacy.

1. Drawbacks of CMC

Consumers increasingly lament the increasing lack of customer service and inability to reach live representatives with respect to their purchase problems. We all know how frustrating it can be to call companies' "customer service" numbers. Companies place us on endless telephone holds, drop our calls, and transfer us to numerous departments before ultimately connecting our phone calls with representatives who may not even have capacity or power to handle our concerns.¹¹² It is no wonder that most consumers give up on complaints and do not become the squeaky wheels who obtain remedies.

Companies nonetheless suggest that consumers should reach them online by e-mail or live chat in order to obtain redress. Such processes can be beneficial when they work, but some companies ignore e-mails or send automated replies that again lead consumers to give up pursuit of their complaints.¹¹³ Furthermore, companies also may use e-contracting to impose form contracts that preserve their power to change contract provisions, and then continually modify the terms *ex post* through e-mails

109. See generally Nicole Gabrielle Kravec, *Dogmas of Online Dispute Resolution*, 38 U. TOL. L. REV. 125 (2006).

110. See Betsy Israel, *The Overconnecteds*, N.Y. TIMES BLOG (Nov. 5, 2006), <http://www.nytimes.com/2006/11/05/education/edlife/connect.html?scp=1&sq=The+Overconnecteds&st=nyt>, [<http://perma.cc/UH3M-2EWJ>].

111. Kravec, *supra* note 109, at 125–140 (discussing internet communications for ODR).

112. See Sheri Carder & Larry Gunter, *Can You Hear Me? Corporate America's Communication with Dissatisfied Customers*, 24 J. AM. & COMP. CULTURES 109, 110 (2001) (noting lack of adequate customer assistance through telephone calls).

113. *Id.*

and website postings.¹¹⁴

Online communications also can be especially nasty or offensive due to the lack of intimacy and the relative anonymity of communicating through a computer, cell phone, or other device.¹¹⁵ This anonymity also allows for “cyber bullying” and use of abusive or combative language one would not feel comfortable using in person or on the phone.¹¹⁶ Negotiations online may become overly aggressive due to the social and physical distance created through CMC.¹¹⁷ CMC also may diminish empathy and foster misinterpretations.¹¹⁸ That said, individuals have become increasingly adept at expressing themselves through standardized textual cues and emotive characters and short-hands over time.¹¹⁹

2. Overriding Benefits of CMC for Consumer Claims Resolution

Despite CMC’s drawbacks, there is no question that it is here to stay. Most agree that its pros outweigh its cons. Companies enjoy efficiencies of online contracting and communications in B2C commerce, and they may pass on savings to consumers through lower prices and higher quality goods and services.¹²⁰ Consumers also enjoy managing accounts, paying bills, and communicating with companies online with relatively little cost or time. Many companies also are more responsive to complaints posted on social media and requests sent through e-mails or website chat systems than they are to phone calls or letters.¹²¹ Online case management enables

114. See Mark E. Budnitz, *The Development of Consumer Protection Law, The Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1169–81 (2010) (discussing dangers of online contracts subject to modification).

115. See Kravec, *supra* note 109, at 125–30 (noting loss of social connections and contextual cues online).

116. Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES (June 27, 2010), <http://www.nytimes.com/2010/06/28/style/28bully.html?emc+etal&pagewanted=print>, [http://perma.cc/38G9-36Y4] (“It’s easier to fight online, because you feel more brave and in control . . .”).

117. JARON LANIER, *YOU ARE NOT A GADGET: A MANIFESTO* 60–63 (2010) (noting the anti-human approach fostered by the expansion of internet life).

118. *Id.* (discussing dehumanizing impacts of the internet). For example, “LOL” can be interpreted as “lots of love” or “lots of laughs”—which could make for awkward interactions if used in reply to news that a friend’s loved one passed away.

119. See, e.g., Robert M. Bastress & Joseph D. Harbaugh, *Taking the Lawyer’s Craft into Virtual Space: Computer-Mediated Interviewing, Counseling, and Negotiating*, 10 CLINICAL L. REV. 115, 118–26 (2003) (detailing the trends of increased use of CMC).

120. See Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 309–10 (2008) (noting ways that online standard form contracts save time and money).

121. See Judy Strauss & Donna J. Hill, *Consumer Complaints by E-mail: An Exploratory Investigation of Corporate Responses and Customer Reactions*, 15 J. INTERACTIVE MKTG. 63,

merchants to prioritize cases and respond en masse to certain issues, thereby significantly improving communication efficiencies.

The relative anonymity and comfort of communicating through a computer or smartphone also may ease some of the social and power pressures of F2F communications.¹²² This is especially true for consumers who fear stereotypes or biases based on appearance.¹²³ In addition, some individuals are less adversarial online than in-person when the asynchronous nature gives them space to "take a deep breath" and dissipate anger before replying. Individuals also may be more cautious in composing e-mails due to awareness that their messages are easily retrievable.¹²⁴ At the same time, CMC has become less sterile as individuals have developed means for virtually building rapport over the internet.¹²⁵

The internet also provides a treasure trove for consumers to research purchases and share information about products and services.¹²⁶ Online forums allow consumers to share information not only about the quality of what they purchased, but also about means for reaching customer service and obtaining remedies. For example, Utility Consumers Action Network ("UCAN") provides an online forum for consumers to alert others regarding contract dangers and to offer suggestions for avoiding or responding to consumer issues.¹²⁷ Websites also have become portals for

63–64 (2001); *Customer Complaint Behaviour*, QUEENSLAND GOV'T, <http://www.business.qld.gov.au/business/running/customer-service/managing-customer-complaints/customer-complaint-behaviour>, [<http://perma.cc/P3TP-KC7P>] (last visited Jan. 12, 2014).

122. See Paul Stylianou, *Online Dispute Resolution: The Case for a Treaty Between the United States and the European Union in Resolving Cross-Border E-Commerce Disputes*, 36 SYRACUSE J. INT'L L. & COM. 117, 125 (2008) (recognizing emotion involved with F2F communications).

123. See *id.* at 125–26 (noting benefits and drawbacks of online dispute resolution processes).

124. See Susan C. Herring, *Computer-Mediated Communication on the Internet*, 36 ANN. REV. INFO. SCI. & TECH. 109, 144–45 (2002); David Allen Larson & Paula Gajewski Mickelson, *Technology Mediated Dispute Resolution Can Improve the Registry of Interpreters for the Deaf Ethical Practices System: The Deaf Community Is Well Prepared and Can Lead by Example*, 10 CARDOZO J. CONFLICT RESOL. 131, 140–41 (2008) (explaining evidence that less bullying occurs through online communication than F2F).

125. David Allen Larson & Paula Gajewski Mickelson, *Technology Mediated Dispute Resolution and the Deaf Community*, 3 HEALTH L. & POL'Y BRIEF 15, 18 (2009), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1091&context=hlp>, [<http://perma.cc/HC43-9R5A>] (noting how "[t]echnology can protect parties from uncomfortable or threatening face-to-face confrontations and offer vulnerable individuals a place where their communications can appear as forceful as the statements of someone who is physically much larger and louder," although it also creates risks for cyber bullying).

126. See Budnitz, *supra* note 114, at 1180; Gibbons, *supra* note 107, at 3.

127. See UCAN: UTILITY CONSUMERS' ACTION NETWORK, <http://www.ucan.org>, [<http://perma.cc/69DB-73PP>] (last visited Jan. 1, 2014).

formalized ODR, such as online mediation, arbitration, and other settlement processes that utilize messaging systems, e-mails, and other CMC.¹²⁸ They also enable consumers to share information around how to get their claims heard, which merchants are responsive and which are not, and share data around product defects and solutions.

Key benefits of ODR systems include their speed, low costs, and allowance for both asynchronous communications and real-time dialogue.¹²⁹ These systems also are more convenient than F2F dispute resolution processes.¹³⁰ Furthermore, ODR is expanding globally due to its ability to transcend borders and escape the legal constraints of other processes for resolution of international disputes.¹³¹

Given ODR's benefits, why has it not become the norm? This is perplexing as the European Union and other international communities embrace ODR. The problem is that many distrust online systems in the wake of rampant internet security breaches, and most consumers are unaware of the ODR processes currently in existence. For example, the social networking website Facebook has implemented an ODR mechanism through TRUSTe for resolution of consumers' privacy disputes.¹³² However, unscientific polling suggests that consumers generally know nothing about these ODR rules or other remedies regarding privacy rights on Facebook.¹³³ This is due in part to the fact that information about their

128. Am. Bar Ass'n's Task Force on Elec. Commerce & Alt. Dispute Resolution, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. L. 415, 419 (2002) [hereinafter *ABA 2002 Report*] (defining ODR broadly).

129. See Gilliéron, *supra* note 108, at 312–15.

130. See generally Public Roundtable on Dispute Resolution for Online Business-to-Consumer Contracts, 66 Fed. Reg. 7491-03, 7491-92 (2001); Public Workshop: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, 65 Fed. Reg. 7831-01, 7831-32 (2000).

131. See, e.g., *More More More: CPR Meeting Highlights*, 27 ALTERNATIVES TO HIGH COST LITIG. 125, 127–28 (2009) (highlighting technology and ODR as key elements in the future of dispute resolution).

132. See John Gamble, *Facebook & TRUSTe*, TRUSTE BLOG (May 12, 2010), <http://www.truste.com/blog/2010/05/12/facebook-truste/>, [<http://perma.cc/Y98U-33DH>] (noting Facebook and TRUSTe's business relationship); see also *Privacy Program Requirements*, TRUSTE, <http://www.truste.com/privacy-program-requirements/>, [<http://perma.cc/ZXW3-CDRG>] (last visited Mar. 1, 2014); *TRUSTe Dispute Resolution Services*, TRUSTE, <http://www.truste.com/products-and-services/dispute-resolution-services/>, [<http://perma.cc/LY6L-S5HR>] (last visited Mar. 1, 2014); *TRUSTe Feedback and Resolution System*, TRUSTE, <https://feedback-form.truste.com/watchdog/request>, [<http://perma.cc/4YNR-DMC9>] (last visited Mar. 1, 2014).

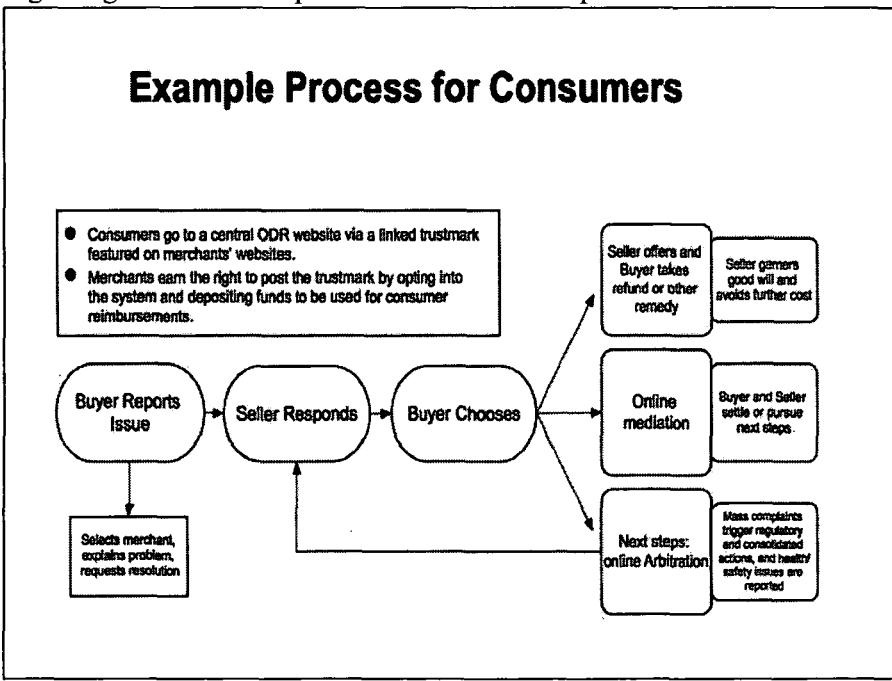
133. See Memorandum from Heather Park, Research Assistant, to author (May 25, 2010) (on file with author) (documenting and reporting an informal poll of users indicating that they did not know about the eTrust online process for resolving privacy disputes against Facebook). Admittedly, this was not a scientific or thorough survey, but it nonetheless shed light on common Facebook users' awareness regarding this ODR process.

rights is buried in fine print among the links on Facebook’s site. Legal workarounds and obfuscations create incentives for merchants to continue to avoid creating effective redress processes.

B. SUGGESTED BEST PRACTICES FOR CONSUMER ODR

This proposal for a “New Handshake” does not advocate for “any old” ODR. Instead, ODR processes must be designed to revive corporate responsibility and consumer trust in their purchases. Processes therefore must be transparent, user-friendly, and worth their costs in light of the complexity and possible payout on the claims at issue.¹³⁴ They also must be secure and widely accessible, and consumers must have adequate information about the ODR processes so that they know how to pursue their rights online. Furthermore, satisfying ODR processes should be backed by an enforcement mechanism to prevent promulgation of meaningless awards.

Creation of such ODR processes could begin with creation of a simple template that can be contextualized to meet needs of particular types of disputes. For example, the template for resolution of consumers’ claims regarding online purchases could proceed as follows:



134. See Geoffrey Davies, *Can Dispute Resolution Be Made Generally Available?*, 12 OTAGO L. REV. 305, 308–16 (2010).

Consumers using this process could gain companies' attention on their claims, and obtain remedies through a range of processes depending on how a seller responds to an initial complaint. This tiered process may be more satisfactory and productive than other traditional dispute resolution procedures because it provides consumers with choices and systems options on the way toward a final determination. It keeps the consumers in control of their own solutions.

The process should nonetheless culminate with a binding award (online arbitration, or what I term "OArb") if the parties do not reach a settlement through online negotiations or mediation and voluntarily agree to submit resulting disputes to an online arbitrator.¹³⁵ Allowing for OArb as the "last stop" in the process helps prevent parties from using delay tactics to waylay resolution and thus access to remedies. Neither companies nor consumers benefit from wasteful discussions, and they may not take nonbinding processes seriously if the process will not end the dispute.¹³⁶

This template also is unique because it adds a "trigger mechanism" that allows for regulatory and consolidated actions where a sufficient number of similar complaints are filed. This would be especially important where multiple complaints indicate that health or safety issues are at stake. For example, the trigger could alert the Federal Trade Commission ("FTC") when there is an inordinate amount of claims filed against one manufacturer regarding a particular product that has caused multiple injuries. Such a trigger would alert the public of the danger that may otherwise remain private due to the SWS and would help address current complaints regarding the privatization of statutory and other public policy claims through traditional arbitration and class waivers.

Regulators also would benefit from notice through the trigger mechanism regarding consumer protection issues because it would help them determine when to pursue enforcement actions. For example,

135. See Schmitz, *supra* note 107, at 181–200 (discussing OArb). OArb differs from other ODR because it results in a final third-party determination without the cost and stress of traditional litigation. *Id.*

136. *Id.* at 193–94. See generally Colin Rule et al., *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments*, 42 UCC L.J. 221 (2010), available at <http://colinrule.com/writing/ucclj.pdf>, [<http://perma.cc/SEV4-SDHD>] (discussing how to create a global system for resolving consumer disputes and highlighting the United States' proposal for an ODR system). Full discussion of ODR and OArb and means for expanding them in a measured manner is beyond the scope of this essay but further discussion may be found in Schmitz, *supra* note 107 at 178–244 (proposing prudent expansion).

consumers have benefitted from the Federal Communications Commission ("FCC") learning about, and thus targeting, telecommunications companies' adding third party charges to customers' bills, or "cramming." This is especially true because these charges usually go unnoticed due to consumers' lack of vigilance to their bill details and use of automatic and online payments systems.¹³⁷ A trigger mechanism would alert the FCC when there are an inordinate number of complaints against a company for imposing these fees, thus providing fuel for the FCC to notify a company to change its ways or face an enforcement action.

It seems at first blush that no company would agree to such a trigger mechanism that could arouse regulatory action. However, the process would greatly ease companies' dispute resolution costs and the allure of a trustmark, as discussed below, would provide marketing benefits for companies that agree to the process. Furthermore, companies' interest in gaining goodwill and warding off full-blown enforcement actions and class claims could foster companies' support for the process. Leaders of companies may not even be aware of improprieties within their companies. Moreover, it is far better for companies in terms of social, marketing, and economic costs to receive regulatory notice and change corporate practices than to endure enforcement actions, class actions, and multiple lawsuits.

Nonetheless, commitment to any ODR process must be voluntary and properly regulated to ensure fairness and foster open-minded use of the process.¹³⁸ F2F arbitration has earned a poor reputation for curbing consumer rights due to pro-business procedures and administration.¹³⁹ "New Handshake" ODR must instead be balanced, fair, and efficient.¹⁴⁰ The online forms for filing claims should be user-friendly and guide

137. Press Release, Federal Communications Commission (FCC), FCC Proposes \$5.2 Million Fine Against U.S. Telecom Long Distance, Inc. for Deceptive Slamming, Cramming, and Billing Practices (Jan. 24, 2014), available at <http://www.fcc.gov/document/fcc-proposes-52-m-fine-against-us-telecom-long-distance-inc>, [<http://perma.cc/6XJV-D9LA>] (highlighting the FCC's action against a telecommunications company for changing consumers' long distance carriers and adding charges without proper authorization of consent).

138. See David J. Bilinsky, *10 Collaborative Principles for Leading a Successful ODR System Initiative*, ODR & CONSUMERS 2010 (Sept. 1, 2010), <http://www.odrandconsumers2010.org/2010/09/01/10-collaborative-principles-for-leading-a-successful-odr-system-initiative>, [<http://perma.cc/N4JT-RT5X>] (guest post by Ben Ziegler) (providing tips for increasing confidence in e-commerce through ODR systems); see also Schmitz, *supra* note 107, at 235–40 (discussing need for regulation and safety measures for ODR).

139. See Peter B. Rutledge & Anna W. Howard, *Arbitrating Disputes Between Companies and Individuals: Lessons from Abroad*, 65 DISP. RESOL. J. 30, 33 (2010) (noting concerns regarding arbitration and European law's protection of consumers from unfair arbitration provisions).

140. See Schmitz, *supra* note 107, at 226 (proposing regulated ODR for consumer complaint resolution).

consumers on how to structure complaints and upload information supporting their claims. Forms should ease or eliminate the need for the expensive legal assistance required for filing complaints in litigation and traditional F2F arbitration.¹⁴¹ The online system also should be geared for consumers of all education levels and provide means for translations to assist non-English speakers. Such online guidance could provide for e-contract claims; a simplified version of what TurboTax provides for tax filings.¹⁴²

As mentioned above, companies that provide for such user-friendly ODR could post a trustmark or seal on their websites similar to the BBB's seal indicating that companies comply with prescribed rules. The trustmark and a central portal for posting companies' ODR policies and commitments could be linked to a non-profit institution like the BBB or to the Consumer Financial Protection Bureau ("CFPB") established under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").¹⁴³ Oversight is important to ensure these systems do not become kangaroo courts.

The CFPB or another neutral institution could cheaply post information regarding the ODR system on this central portal in a simple and straightforward chart stating who to contact regarding complaints and how the complaint process works. In addition, this portal could be searchable and include information about legitimate complaints asserted against companies and the remedies provided. Such transparency should spark companies to improve their complaint handling processes, and help empower consumers to pursue legitimate complaints and protect consumers' rights regardless of status.¹⁴⁴

141. See Stuhlmacher & Walters, *supra* note 48, at 657–59 (noting how communication modes may reduce gender bias).

142. See *Tax Tips Guides & Videos*, TURBOTAX, <https://turbotax.intuit.com/tax-tools/all-articles-and-videos/>, [http://perma.cc/8UGQ-VGZ8] (last visited Feb. 9, 2014) (listing all tax advice by category); *TurboTax Basic*, TURBOTAX, <https://turbotax.intuit.com/personal-taxes/online/basic.jsp>, [http://perma.cc/5H2H-HY8C] (last visited Feb. 9, 2014) (discussing step-by-step guidance and tax tips provided during the online filing process).

143. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code); see also Consumer Financial Protection Agency Act, H.R. 3126, 111th Cong. §§ 111(a), 134(a) (2009) (proposed bill to establish an agency to regulate consumer financial products and services and authorize the agency to approve pilot programs for effective disclosure of consumer contract terms); *About us*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/>, [http://perma.cc/FYB2-CPJ9] (last visited Jan. 1, 2014).

144. See Sharane Gott, *BBB offers tips on when and how to file a complaint*, BETTER BUS. BUREAU (Apr. 24, 2013), <http://www.bbb.org/blog/2013/04/bbb-offers-tips-on-when-and-how-to-file-a-complaint/>, [http://perma.cc/6K8F-P4SX]. The BBB already utilizes ODR for consumers'

Again, some companies may resist expansion of remedies for consumers and any such regulations. However, most should see the benefits of lower dispute resolution costs and avoiding more costly litigation. Furthermore, the trustmark could obtain government and community support. This would garner consumer trust in the ODR process, and thus consumer confidence in the companies that commit to the process. These companies would benefit when consumers choose to buy from those companies due to assurance that they would have means for obtaining a remedy if a purchase goes awry.

Nonetheless, it is essential that the online mediators and arbitrators who serve as neutrals in the ODR processes be truly neutral and properly trained. ODR rules should require these individuals to go through training and obtain a certification. The rules also should provide for a mechanism to gather user feedback in order to foster continual system improvements.

In addition, the system should include an enforcement mechanism to prevent meaningless awards. An ODR process is worthless if companies can avoid paying awards. There are various possibilities for such a mechanism. For example, companies that use the ODR system and benefit from the trustmark and dispute resolution cost savings could fund an escrow account that that would only be used to pay awards in the event that the company fails to comply with awards within thirty days. Of course, policymakers and companies would need to work out the details and this is just one idea open for discussion. Enforcement also could mimic the credit card charge-back system that provides consumers with charge reversals for contested purchases using a credit card.¹⁴⁵

Again, these are only initial ideas for discussion and fostering creative brainstorming for creation of a "New Handshake" for resolution of consumers' purchase claims. More discussion and research should follow. The SWS and hurdles to obtaining remedies have harmed consumers' confidence in the market, and have fostered contractual discrimination to the detriment of those with the least resources. ODR nonetheless provides promise for easing cost, time, and bias concerns that have hindered most

complaints. *Id.* These processes are non-binding unless the parties agree that the result will be final, but companies' reputational concerns often prompt them to provide remedies on claims that the BBB determines valid and supported by adequate information to be worthy of response. *Id.*

145. Matt Brownell, *Credit Card Chargebacks: Your Secret Weapon in Merchant Disputes*, DAILY FINANCE (Jul. 31, 2012, 1:10 PM), <http://www.dailyfinance.com/2012/07/31/credit-card-chargeback-merchant-disputes/>, [<http://perma.cc/C5DJ-5Z9Q>] (discussing Fair Credit Billing Act definitions of "billing errors" as being distinct from product complaints, and noting the minimum sixty day timeframe for contacting credit card issuers, and suggesting contacting the retailer before initiating chargeback proceedings).

consumers from seeking remedies through traditional F2F dispute resolution mechanisms.¹⁴⁶ Well-crafted online processes also help dispel the stresses of seeking assistance by providing a structured, text-based means for communicating needs.¹⁴⁷ They also may help revive companies' commitments to consumers by making it easier for consumers to hold companies accountable and providing companies with better information regarding their products—which, in turn, may fuel product improvements.

V. CONCLUSION

The SWS and hurdles to obtaining remedies in B2C exchanges have allowed businesses to relinquish responsibility to consumers and quiet information about improprieties. These forces also have fostered contractual discrimination in favor of the relatively few sophisticated consumers with the requisite information and resources to protect their interests and pursue purchase complaints. This creates a need for expanded and equalized access to remedies through ODR in order to revive companies' sense of responsibility—a need for a “New Handshake” to provide consumer protections that the broken market has failed to deliver.¹⁴⁸ Such an ODR system would lower costs and burdens of pursuing purchase complaints so that all consumers, regardless of power and resources, would feel comfortable and able to seek needed assistance.

Indeed, ODR systems are expanding worldwide and will eventually be on every website and required by every user agreement. However, it is essential that these systems be fair, transparent, and efficient. As such, enforcement mechanisms and consumer education should support well-crafted ODR systems that balance company and consumer needs. Policymakers should develop these systems with careful eyes toward facilitating satisfying and safe processes tailored for particular contexts. Companies, consumers, and regulators must be forward thinking in embracing ODR or they will be left behind.

146. Stuhlmacher & Walters, *supra* note 48, at 659 (noting studies showing that CMC eases communication bias by reducing social cues and subconscious propensities present in F2F communications).

147. See Jelle van Veenen, *From :- (to :-): Using Online Communication to Improve Dispute Resolution* (Tilburg Inst. for Interdisciplinary Studies of Civil Law & Conflict Resolution Sys., Working Paper No. 002/2010, 2010), available at <http://ssrn.com/abstract=1618719>, [<http://perm.a.cc/AH37-J9Y2>] (noting how online communications can improve dispute resolution).

148. See *supra* Part III–IV.