Social Media Campaigns as an Emerging Alternative to Litigation

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ABSTRACT:

Private litigation has a prominent place in modern America. For plaintiffs in particular, however, it is probably inaccurate to say that Americans like to litigate. The process of litigating a claim for relief is generally drawn-out, costly, and unsatisfying for parties that file suit. It is no wonder then that legal commentators often speculate as to potential alternative avenues for relief.

This paper contends that social media might represent just such an alternative. Although the technology is still in its relative infancy, social media has already had a transformative impact on the relationship between disaffected individuals and one-time defendants. The ability of individuals to voice their complaints on a platform that is easily accessible and broadly impactful has given new strength to allegations of indignity and injustice. And because social media campaigns threaten the very reputation upon which modern corporations depend, these efforts are generating a response from their targets in a way that single suits for relief rarely can.

While it is unlikely that plaintiffs or legal commentators will decide to abandon the litigation avenue any time soon, the aim of this paper is to present both groups with an emerging alternative to consider. By exploring the impact of social media campaigns on two areas of law in which litigation has long been deemed invaluable, this paper seeks to demonstrate that the Internet might soon overhaul the way we think about legal rights and legal remedies.

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INTRODUCTION

Every day in this country, thousands of people go public with allegations of wrongdoing. These allegations generally spotlight conduct that caused a perceived injury and an actor alleged to be responsible for that injury. Frequently, the allegations are accompanied by an explicit request for remedy. In many ways, these allegations closely track the components of a traditional legal complaint. A full decade into the twenty-first century, however, they are increasingly put forth not in a court of law, but instead in the court of public opinion. Driven largely by advances in technology, one-time plaintiffs now publicize harms and pursue remedies without ever appearing before a judge or jury. For individuals that believe that they been wrongly harmed, producing a negative YouTube video or coordinating a critical blogging campaign increasingly appears as an attractive alternative to an extended battle for legal relief. Not only do social media strategies allow citizens to avoid the costs and delays that generally accompany litigation, they also appear to be getting the attention of major corporate defendants in a way that isolated private suits rarely are able to do.

This paper reflects on the role of litigation in an age in which the channels of social media often provide citizens with the most realistic and direct avenue for remedying perceived wrongs. In particular, the paper analyzes the extent to which online social media technologies may well supplement or supplant traditional avenues for attaining legal relief. The underlying question that the paper seeks to address is this: if citizens no longer had access to litigation as a vehicle for remedying perceived wrongdoing, would online social media technologies nonetheless make it possible for these individuals to make themselves whole?
The paper proceeds in two main parts. Part I provides a general look at the place of litigation and social media in society. After considering the prominent role of litigation in structuring modern America, this section questions litigation’s effectiveness in securing relief for disaffected plaintiffs. The second part of the section outlines the emerging power of the Internet and the particular force of social media channels such as Facebook, Twitter, YouTube and the blogosphere. This section argues that social media has provided both established groups and isolated individuals a powerful weapon in their efforts to vindicate particular interests. Because major corporate entities—frequent adversaries in many of these contexts—are increasingly concerned with threats to their reputation, negative web-based campaigns have emerged as a viable mechanism for pressuring one-time defendants to change their existing practices.

Part II considers social media campaigns as an alternative to private litigation. This section argues that the general empowerment of disaffected individuals through social media has implications for our evaluation of existing legal rights and remedies. In order to illustrate this claim, this section considers the comparative benefit of social media strategies in two areas where litigation has traditionally been a dominant remedy: consumer protection law and employment discrimination. In the context of consumer protection, this analysis involves identifying a number of ways in which the Internet is already overhauling the relationship between consumers and corporations. With respect to employment discrimination claims, on the other hand, a more speculative but no less impactful role for social media campaigns is considered.
I. THE ROLES OF LITIGATION AND SOCIAL MEDIA IN SOCIETY

To stake out a claim regarding the frequency of private lawsuits in the United States is to invite controversy. Individuals in the legal community and beyond often disagree sharply regarding the frequency of these suits—both overall and relative to previous periods in American history. On one side are those who contend that the U.S. is witnessing a litigation explosion. Advocates of this position cite the widening scope of subjects for litigation and the seemingly unending presence of frivolous suits as evidence for their position.1 On the other hand are those who contend that the litigation explosion is a myth and that few individuals actually take their claims to court.2 For advocates of this position, the real problem with modern civil litigation is that it too often fails to compensate individuals with meritorious claims.3

One need not come down on any particular side of this debate, however, in order to appreciate a claim that is more frequently agreed upon: the United States is a uniquely litigious society.4 More than any other nation, the United States depends heavily on lawyers and courts for the day-to-day operation of its society.5 Even critics of the litigation explosion hypothesis acknowledge that litigation influences the resolution of more issues in modern America than it has in any other place and time.6

While many explanations have been set forth in an effort to explain this development, one interesting theory has gained particular attention. The increased dependence of modern Americans on courts, the argument goes, is explained by a

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3 See id. at 459.
4 See Kagan, supra note 1, at 3.
6 See Kagan, supra note 1, at 7; Rhode, supra note 2, at 456-60.
breakdown in informal institutions of dispute resolution. More specifically, “courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.” According to this school of thought, “[t]he law that used to control everyday life was . . . enforced almost exclusively through community control.” Most importantly, “[i]n a world of closely-knit communities, in which everyone knew what everyone else was up to, this kind of pressure was surprisingly effective.”

At a very basic level, this paper is about the emergence of an informal network of (online) community control that might effectively compete with the formal mechanisms for resolving disputes. In some sense then, the paper is about the possibility that something new—the Internet—might allow us to restore something old—meaningful informal alternatives to private civil suits. In a world of social media, the world itself has begun to shrink. Information over any and every topic has become widely accessible and quickly deliverable. It may be incorrect to say that we are entering a time in which “everyone knew what everyone else was up to”, but that fate is no longer unthinkable.

What remains to be seen is whether participants in this ever-shrinking world face the same behavioral pressures that faced members of the closely-knit communities of old. If so, then social media may come to resemble the informal institutions of yesteryear as an important competitor to the formal mechanisms of civil litigation.

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8 Ibid.
10 Ibid.
12 Ibid.
In order to effectively analyze this possibility, it is first necessary to more broadly define the terms of this discussion. Before we assess how social media stacks up against civil litigation as a mechanism for organizing society, it is useful to flush out what we are talking about when we discuss litigation and social media.

**A. Civil Litigation**

Civil litigation is generally thought to advance three primary objectives: resolving disputes, compensating victims, and deterring violations of legal standards.\(^{13}\) In many instances, litigation undoubtedly helps advance these objectives. For a typical American who is subject to injury or harm, however, the prospect that filing a lawsuit will provide fully satisfying relief is questionable at best. In the large majority of circumstances, the road to recovery – to the extent that there is any realistic road at all – is long and difficult. Broadly, there are two primary characteristics of the civil litigation system that make life difficult for individual plaintiffs.

First, litigation is expensive.\(^{14}\) In the United States, individuals often turn to courts in cases where other countries would provide a remedy through less costly administrative or social service channels.\(^{15}\) Individuals are forced to hire attorneys to handle claims that might otherwise be addressed directly by a government employee.\(^{16}\) Because the quality of counsel often dictates the likely success of a claim, individuals are often compelled to make a substantial, upfront monetary investment.\(^{17}\) In reality, these expenses often mean that most cases are simply never litigated in the first place.\(^{18}\) It has

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\(^{13}\) See Rhode, *supra* note 2 at 460.  
\(^{14}\) See *id.* at 464.  
\(^{15}\) See *id.* at 460.  
\(^{16}\) *Ibid.*  
\(^{17}\) *Id.* at 468-70.  
\(^{18}\) *Id.* at 459-60.
been estimated that the general cutoff point is $150,000; claims that are perceived to be worth less than this are typically priced out of the court system.19

Even when litigants bring meritorious claims that result in successful recoveries, a significant portion of their recovery is often consumed by attorneys’ fees or other costs.20 In a typical tort case, for instance, it is estimated that these transaction costs consume roughly 60 percent of money recovered.21 Overall, a number of financial considerations make it difficult for plaintiffs to recover compensation that matches the scope of their injuries.

Second, individual suits produce highly inconsistent outcomes for litigants.22 The success of a claim generally depends on factors that include whether the case is filed in a “plaintiff-friendly” region, the assignment of the judge, and the skill of the respective attorneys.23 The likelihood of recovery may be further impacted if the defendant is perceived to have deep pockets or if a similarly-situated plaintiff has bankrupted the defendant by getting to the courtroom first.24 In general, the quality of a plaintiff’s claim is often not a reliable indicator for their likelihood of recovery. Indeed, “[m]any studies find a poor correlation between juries’ and experts’ evaluations of the same claims.”25

In sum, “the system for compensating victims is inefficient, inconsistent, and inequitable.”26 Although plaintiffs do occasionally hit jackpot-sized judgments – judgments that often attract disproportionate media coverage – these recoveries are

19 Id. at 460.
21 See Rhode, supra note 2 at 464.
22 See Brunet, supra note 25 at 316.
23 See Rhode, supra note 2 at 468.
24 Ibid.
25 Id. at 469.
26 Id. at 471.
relatively rare.\textsuperscript{27} Without question, astronomical recoveries are dwarfed by the non-suits or unsuccessful suits that regularly occur with meritorious claims.\textsuperscript{28} For instance, recent estimates indicate that the tort system reimburses only about four percent of victims’ direct losses from accidental injuries.\textsuperscript{29}

Although these deficiencies most directly address the compensation aim of the litigation system, they call into question the whole lot of goals for individual suits. To the extent that plaintiffs with meritorious claims do not file suit or are systematically unsuccessful in their claims, the ability of civil litigation to deliver on its institutional promise is compromised. Much debate certainly exists regarding the merits of this critique. It may ultimately be that civil litigation is the worst option for plaintiffs except in comparison to all of the possible alternatives. Given the serious questions that exist, however, regarding the inefficiencies and inconsistencies that are produced by this arrangement, it is useful to consider alternative mechanisms for advancing the just compensation of injured parties.

\textbf{B. Social Media}

\textit{1. What is Social Media?}

The term social media broadly refers to online channels through which individuals are empowered to exchange information as both content consumers and content producers.\textsuperscript{30} Social media is distinguished by its ability to provide individuals with highly accessible publishing techniques that enable them to communicate directly

\textsuperscript{27} \textit{Id.} at 463-64.
\textsuperscript{28} \textit{Id.} at 460-61.
\textsuperscript{29} \textit{Id.} at 460.
with an online audience.\textsuperscript{31} In the public imagination, the term social media is most often associated with sites like Facebook, YouTube, and Twitter.\textsuperscript{32} And indeed, each of these sites has an enormous online presence. Respectively, they have been ranked as the second, third, and tenth most trafficked destinations on the Internet.\textsuperscript{33} If Facebook were a country, it would be the eighth most populated in the world.\textsuperscript{34}

The range of social media, however, extends beyond these high-profile online giants. Properly viewed, social media “is broad, ever shifting, and ever growing. It encompasses blogs and wikis; podcasts and YouTube; and consumers who rate products, buy and sell from each other, write their own news, and find their own deals.”\textsuperscript{35}

In the United States, nearly 50 percent of Americans over the age of 12 are now active participants in some social networking site.\textsuperscript{36} Increasingly, “[t]he time we once devoted to pastimes such as bowling or bridge is . . . spent producing information—that is, writing a blog, writing reviews on a food site such as Chowhound.com, or adding to the message boards on Lost.com. . . .”\textsuperscript{37} Just recently, the amount of time that web users spend on these sites eclipsed the time that they spend on personal email.\textsuperscript{38} Given the

\begin{flushleft}
\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid.
\textsuperscript{33} See Today’s Most Popular Websites on the Internet, \url{http://mostpopularwebsites.net} (last visited Sept. 22, 2010).
\textsuperscript{34} Mark Zuckerberg, \textit{A Great Start to 2009}, \textit{Facebook} (January 7, 2009), \url{http://blog.facebook.com/blog.php?post=46881667130}; See also Edison Research, \textit{The Infinite Dial 2010: Digital Platforms and the Future of Radio}, (Apr. 8, 2010), \url{http://www.edisonresearch.com/home/archives/2010/04/the_infinite_dial_2010_digital_platforms_and_the_future_of_r.php} (finding that 48% of Americans over the age of twelve maintain a personal profile on Facebook or a similar platform.).
\textsuperscript{35} Charlene Li and Josh Bernoff, \textit{Groundswell: Winning in a World Transformed by Social Technologies} X (2008).
\textsuperscript{36} See Edison Research, supra note 34.
\textsuperscript{37} Jeff Howe, \textit{Crowdsourcing: Why the Power of the Crowd is Driving the Future of Business} 29 (2008).
\textsuperscript{38} Nielsenwire, \textit{Social Networking’s New Global Footprint}, (March 9, 2009), \url{http://blog.nielsen.com/nielsenwire/global/social-networking-new-global-footprint/}.
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remarkable growth rates of online social networks in recent years, it is reasonable to assume that these numbers will continue to rise.\(^{39}\)

In light of these developments, it is appropriate that the emerging relationship between people and social media is often now described as a groundswell. As explained in a 2008 book that carries this one-word title, the groundswell is “a spontaneous movement of people using online tools to connect, take charge of their own experience, and get what they need—information, support, ideas, products, and bargaining power—from each other.”\(^{40}\) The groundswell, these authors explain, is “not a flash in the pan. The technologies that make it work are evolving at an ever-increasing pace, but the phenomenon itself is based on people acting on their eternal desire to connect. It has created a permanent, long-lasting shift in the way the world works.”\(^{41}\)

2. How Does Social Media Advance Individual and Collective Interests?

To fully illustrate the impact of social media, it is useful to look at the actors that have gained the most from its emerging presence. In particular, two broad sets of actors are worth mentioning. First, there are interest groups who were already organized in a pre-Internet era, but who have gained a newfound ability to communicate in the social media age. Second, there are groups that probably would not exist without the Internet.

First, consider the interest groups that have simply integrated social media into their existing operations. The organizational mission of these groups is generally to advocate on behalf of a cause or a collection of causes.\(^{42}\) Traditionally, their primary aim

\(^{39}\) Randy L. Dryer, Advising Your Clients (and You!) in the New World of Social Media: What Every Lawyer Should Know About Twitter, Facebook, Youtube, & Wikis, 23-JUN UTAH B.J. 16, 16 (2010).

\(^{40}\) See Li and Bernoff, supra note 35 at x.

\(^{41}\) Ibid.

\(^{42}\) See TOM PRICE, ACTIVISTS IN THE BOARDROOM: HOW ADVOCACY GROUPS SEEK TO SHAPE CORPORATE BEHAVIOR 2-3 (Foundation for Public Affairs, 2006) available at thepriceswrite.com/Activists%20in%20Boardroom.pdf.
has been to lobby governments to make public policy decisions that favor their interests. Today, these groups largely retain their core organizational goals. Social media, however, has enabled them to rethink their basic strategies for achieving these goals.\textsuperscript{43} In large part, the strategies that have emerged are more efficient and more effective than their predecessors.\textsuperscript{44}

At a basic level, social media benefits interest groups because it allows them to reach out to large groups quickly at a very low cost.\textsuperscript{45} Traditionally, these groups could communicate their message only to the extent that “telephones, postage stamps, and shoe leather” allowed them to do so.\textsuperscript{46} Often, interest groups relied on direct mail services that took six weeks to reach their intended audience.\textsuperscript{47} Now, says one group chairman, “we can get to 3 million people in . . . eight hours and we can document everything we say. We can give phone numbers and addresses and everything.”\textsuperscript{48} Unsurprisingly, this arrangement not only saves organizations’ time, it also saves money.\textsuperscript{49}

In specific terms, social media provides interest groups with a number of benefits. First, it allows them to provide an organizing location for supporters that is always only one click away.\textsuperscript{50} Supporters can not only stay up-to-date on happenings within the organization, they can also communicate directly with leaders of the group and with each other. This central meeting space is useful in building a community among supporters, something that can be useful in sustaining participation rates but also in raising funds for

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\textsuperscript{43} \textit{Ibid.} \\
\textsuperscript{44} \textit{Ibid.} \\
\textsuperscript{45} \textit{Id.} at 20. \\
\textsuperscript{46} \textsc{Tom Price, Cyber Activism: Advocacy Groups and Internet}, 5 (Foundation for Public Affairs, 2006) available at thepriceswrite.com/cyberactivism.pdf. \\
\textsuperscript{47} See Price, \textit{supra} note 42 at 20. \\
\textsuperscript{48} \textit{Ibid.} (quoting American Family Association Chairman Donald Wildmon). \\
\textsuperscript{49} \textit{Ibid.} \\
\textsuperscript{50} \textit{Ibid.}
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Second, social media allows interest groups to quickly turn their organizational capacities outward. In situations where a crucial legislative vote or an important corporate decision becomes imminent with very little advance notice, social media is often the only tool that can disseminate an influential message in time.

It is no surprise that well-functioning interest groups would adapt powerful Internet technologies to help accomplish their aims. However, a second set of actors provides a more unexpected and more interesting illustration of the impact of social media. This group is difficult to identify outside out of the Internet context because the Internet is credited with making their very existence possible. The basic idea is that the Internet has formed pockets of community among people who share longstanding interests and aims but who would have lacked a stable outlet for collaboration in a pre-Internet age. The byproduct of this newfound collaboration is called crowdsourcing and the concept was best explained by Jeff Howe in his 2008 book: *Crowdsourcing: Why the Power of the Crowd is Driving the Future of Business*. Crowdsourcing, Howe explains, arose “out of the uncoordinated actions of thousands of people, who were doing things that people like to do, especially in the companionship of other people. The Internet provided a way for them to pursue their interests—photography, fan fiction, organic chemistry, politics, comedy . . . together.”

What is interesting about these online communities is that although they generally arose as a vehicle for entertainment and engagement among members, they very quickly began producing things that were valuable for individuals outside of the community.

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52 See Price, *supra* note 42 at 20.
53 *Ibid*.
54 Howe, *supra* note 37 at 13.
Specifically, as these niche groups began sharing and refining their interests and expertise amongst one another, “these people incidentally created information, a commodity of no little value in an information economy.”55 Thus, for example, the online dialogue among wine enthusiasts not only elevated the knowledge of participants in that dialogue, it also created a previously inaccessible database of information for members of society at large. Similarly, San Francisco tourists now can engage with a dynamic community of local experts when planning a travel itinerary, in lieu of relying on often-outdated guidebooks.

At some level, these “recreational” benefits are the ones that people often think of when they think of social media. However, the value added by online communities and their information-creation capacities plainly extends much further. The niche enthusiasts that collectively run the world’s largest real-time encyclopedia—Wikipedia—are the most obvious example.56 In a variety of other areas, one finds similar developments. Many companies, for instance, have largely moved their tech support operations to user forums. In these forums, volunteers happily walk individuals through troubleshooting exercises in order to correct their problem.57 In the news business, notable entities like Reuters and the BBC have started to depend on web volunteers to drive investigations of government malfeasance and to provide coverage of local events in a manner that was long reserved for professional journalists.58

It would be an understatement to say that many social media analysts expect online communities to become more important as society more fully adapts itself to

55 Ibid.
57 Howe, supra note 37 at 16-17.
58 Id. at 17.
emerging technologies. Jeff Howe argues that we are witnessing “the potential of the Internet to weave the mass of humanity into a thriving infinitely powerful organism.”

Although there is likely broad agreement regarding the sheer impact of the Internet on society, many might question the idea that the medium is naturally conducive to sustained collaboration that is productive for humanity generally. Three primary insights, however, support Howe’s conclusion that social media will be effectively marshaled in support of individual and collective interests.

First, social media allows people to gravitate towards the tasks that interest them. The Internet is expanding constantly, both in terms of total access and in terms of its number of niche communities. A primary benefit of this dynamic is that it ensures that, with respect to online communities, there is generally something for everyone. When people participate in these communities they generally do so not out of a sense of burdensome obligation, but instead out of a sense of belonging. As people participate in collective endeavors with partners they respect, they not only take on an increased attachment to the aims of the community, but also an expanded willingness to work in pursuit of those aims.

Second, the work that people contribute when they participate in online collaborations frequently maximizes both individual and collective talents. A fundamental premise of crowdsourcing is that everybody is an expert at something. The problem is that society has often had a difficult time matching people’s talents with

59 Id. at 11.
60 Id. at 16.
61 Ibid.
62 Id. at 14-15.
63 Ibid.
64 Id. at 16.
65 Id. at 14.
their contributions. As Howe states it: “[t]he amount of knowledge and talent dispersed among the numerous members of our species has always vastly outstripped our capacity to harness those invaluable qualities.” To the extent that social media allows individuals to gravitate towards areas of interest and to determine their role in the community in partnership with other participants, the medium seems well designed to produce a better fit between individual’s interests and their ultimate contributions.

Finally, the nature of the online community is conducive to producing value. As has been demonstrated time and again in the Internet age, “labor can often be organized more efficiently in the context of community than it can in the context of a corporation.” As individuals take on tasks for which they are well-suited in partnership with participants that share common interests and common aims, the opportunities to cultivate and refine flourish. Whatever the aim of any particular online community, crowdsourcing tends to push aside hierarchy and to place value primarily on the quality of the contributions that are made by group participants. Perhaps more importantly, the sheer size of many of these online communities makes seemingly insurmountable tasks manageable. Fittingly, these attributes were well stated by a contributor to the open source software movement—perhaps the most longstanding reflection of crowdsourcing’s value—who stated: “Given enough eyeballs, all bugs are shallow.”

In sum, when individuals and collective entities set goals in areas where the dissemination of knowledge and information is of value, the Internet is likely to prove

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66 Id. at 38.
67 Id. at 18.
68 Id. at 14.
69 Id. at 8.
70 Id. at 13.
71 Id. at 38.
72 Id. at 54.
immensely helpful to their efforts. To the extent that people seek to advance outcomes that are contrary to society’s collective interests, nothing about the structure of social media ensures protection against these efforts. Nonetheless, the single point of relevance for this paper remains: the structure of social media, on balance, magnifies the value of work that is performed by participants in our modern informational economy. Whether or not society deems the substantive aims of these efforts generally beneficial is a separate question that will appropriately be evaluated in context. In this sense, social media can be viewed as a value-neutral medium for enhanced informational exchange.

One final caveat is appropriate. Much of the discussion surrounding social media’s future, specifically in the context of crowdsourcing, is framed in the context of so-called online communities. The online community is undoubtedly a useful marker when describing the nature of information exchange and collaboration on the Internet. However, it is important not to forget that the defining characteristics of these communities are often a fluid membership and an absence of hierarchy. It would be inaccurate to view these communities as fixed operations working towards fixed goals. In this way, online communities most clearly distinguish themselves from the interest groups referenced above. In the online context, the existence of a defined collection of collaborative partners may be a useful part of a productive social media campaign, but it is by no means a necessary requirement. The two case studies that follow make this reality clear.
i. **Dell Hell**

In June 2005, Jeff Jarvis purchased a Dell laptop and an accompanying four-year, in-home warranty.\(^{73}\) Almost immediately, the laptop malfunctioned.\(^{74}\) Although Jarvis had purchased the in-home warranty, Dell told him to send his laptop in for repair because a technician could not bring the necessary parts to his house.\(^{75}\) Instead of simply resigning himself to a prolonged and disappointing customer service experience with this Fortune 50 company, Jarvis decided to voice his frustrations. After concluding that his blog, “The Buzz Machine”, was a good forum for articulating his concerns, Jarvis published an initial post, titled: “Dell lies. Dell sucks”. Jarvis wrote:

> I just got a new Dell laptop and paid a fortune for the four-year, in-home service. The machine is a lemon and the service is a lie. I’m having all kinds of trouble with the hardware: overheats, network doesn’t work, maxes out on CPU usage. It’s a lemon.”\(^{76}\)

Within a short period of time, this initial post received 253 comments; all from customers who were also dissatisfied with their Dell customer service experience.\(^{77}\) After receiving his laptop back, and discovering that it was still not properly functioning, Jarvis continued his negative blog campaign. He began a follow-up post: “Well my Dell Hell continues . . .”\(^{78}\)

Little could Jarvis have known that this “Dell Hell” label would come to describe one of the most difficult periods in Dell’s corporate history. At the time of Jarvis’s experience with Dell, the company was starting to discover that recent changes to its customer service policies had set off a wave of resentment. In response to newly

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\(^{74}\) Ibid.

\(^{75}\) Ibid.

\(^{76}\) See Li and Bernoff, *supra* note 35, at 205.

\(^{77}\) Williams, *supra* note 73.

\(^{78}\) Ibid.
outsourced and streamlined customer service procedures, Dell consumers were increasingly disgruntled.\(^79\) Jarvis’s blog campaign served as a gathering point for consumers who wished to make their criticisms visible.\(^80\) His “widely circulated criticism . . . triggered dozens of other bloggers and hundreds of commenters to publicly complain about service they [had] received from Dell’s technical support.”\(^81\) This campaign quickly gained broader traction as the mainstream media took interest in the story. Only two days after Jarvis used the phrase “Dell Hell” in one of his initial blog posts, the New York Times took attention to Dell’s emerging customer service issues.\(^82\) The next issue of Business Week also addressed the topic.\(^83\)

What started as a simple case of consumer frustration thus became a powerful attack on one of America’s most iconic corporations. Jarvis’s commentary “[struck] at the heart of the company: the product, the service, marketing, pricing, and, most critically, the Dell brand.”\(^84\) For this reason, it should be unsurprising that Jarvis’s writings – which engendered “open warfare” between Dell and a sizable online community – had a material impact on the well-being of the company.\(^85\) What is clear is that the “Dell Hell” campaign had a direct, negative effect on both the reputation and sales of the computer giant.\(^86\) Some even argue that the controversy is responsible for a


\(^{83}\) Ibid.

\(^{84}\) Ibid.


\(^{86}\) Williams, *supra* note 73.
tangible drop in the company’s stock price that occurred around the time of the blog campaign.\textsuperscript{87}

Jeff Jarvis’s blog campaign was one of the first to truly ripple through a major corporate boardroom. In many ways, “Dell was the test dummy of companies bearing the impact of one customer’s experience in the new socially-networked world.”\textsuperscript{88} Jarvis’s simple web campaign demonstrated that, given the right circumstances, a blogged complaint could do as much damage as a traditional negative advertising campaign.\textsuperscript{89}

As Dell officials now admit, the “Dell Hell” campaign “was a true wake up call for the company.”\textsuperscript{90} To their credit, Dell responded to the Jarvis-driven firestorm by implementing a host of reforms, both in terms of their structural approach to customer service and in terms of their online relationships with consumers.\textsuperscript{91} In this sense, the “Dell Hell” story provides an important tale in the history of a major American company. Perhaps more important, however, is what this story shows about the power of social media to turn isolated, individual complaints into serious threats to the corporate bottom-line. As is now clear, the “Dell Hell” experience has become “a go-to case study” for illustrating the emerging force of online social-media technologies.\textsuperscript{92}

“Dell Hell” is interesting in part because it was the first incident of its kind in the Internet era. At the time of the controversy, the blogosphere was still a specialized pocket of the web environment. Social media had not yet become a fully integrated part

\textsuperscript{87} See generally Lawrence Buchanan, \textit{Lies, Lies, and Damned Statistics – Do Social Media Storms Really Affect a Stock Price?} (Aug. 15, 2010), http://www.customerthink.com/blog/lies_lies_and_dammed_statistics_do_social_media_storms_really_affect_a_stock_price. (addressing this thesis regarding “Dell Hell” before concluding that stock drops after are potentially attributable to structural issues, as opposed to social-media campaigns).

\textsuperscript{88} Fung, \textit{supra} note 82.

\textsuperscript{89} Gupta, \textit{supra} note 81.

\textsuperscript{90} Israel, \textit{supra} note 80.

\textsuperscript{91} Williams, \textit{supra} note 73.

\textsuperscript{92} Ziegler, \textit{supra} note 85.
of the American vocabulary. Thus, independent of the particular impact that Jarvis’s writings had on Dell, his web campaign was interesting simply because it made innovative use of emerging technologies. The social media strategy employed in the second case study was equally innovative, but it took place in a more established web environment. Here, the surprise was not that someone turned to social media to air a grievance, but how successful they were in drawing attention to their efforts.

ii. United Breaks Guitars

Dave Carroll is musician.93 For years, Carroll and his band – Sons of Maxwell – made a modest living performing pop-folk music for a select group of fans across North America. In March of 2008, the band was traveling from their hometown of Halifax, Canada for a week of shows in Omaha, Nebraska. During a layover in Chicago, passengers on the band’s flight noticed that baggage handlers from United Airlines were roughly transporting the plane’s cargo. Of most interest for members of the band, these handlers were visibly mistreating Carroll’s $3500 guitar.

Alerting a flight attendant, however, was little help. In what would become a theme of Carroll’s early interactions with United employees, Carroll was told that he would have to direct his concerns elsewhere. Upon arriving in Omaha, Carroll discovered a broken guitar but could not locate the ground crew that was supposed to handle his complaint. His phone calls in the aftermath of this discovery were no more fruitful. Omaha employees told him to talk to Halifax, who directed him to a call center in India, who directed him to baggage offices in Chicago, who recommended that he go

through the central baggage center in New York. By the time that a United official reviewed his file and contacted him directly, it had been seven months since his guitar was damaged. Even worse, the official told him that – because he had not formally filed a complaint within 24 hours of the incident – his claim was going to be denied. Carroll’s offer to accept flight vouchers in the amount of his repair costs - $1200 – was rejected.

At this moment, Carroll experienced a frustration that is shared by legions of individuals every year. Although he had a claim that he believed to be meritorious, the taxing hurdles imposed by the traditional avenues for relief made it difficult for him – as an isolated individual – to prevail against the well-established entity that inflicted his injury. As Carroll noted: “it occurred to me that I had been fighting a losing battle . . . the system is designed to frustrate affected customers into giving up their claims and United is very good at it.”94 Although Carroll had not yet contacted a lawyer or entered a courtroom during his dispute with United, his frustrations would certainly ring true to many who have navigated that path under similar circumstances.

Unlike many in this position, however, Carroll decided not to throw in the towel, and he selected a non-traditional path for keeping up his fight. At the conclusion of his last initial conversation with United, Carroll told the representative that he planned to write three songs with video about United Airlines. His plan, he said, was to post the videos on YouTube in hopes of receiving one million views in one year.

By any measure, Carroll’s plan turned out to be a resounding success. With a budget of $150 and support from friends, Carroll produced the first song with an accompanying music video. On Monday July 6, 2009, “United Breaks Guitars” was placed on YouTube. In the hours after it was posted, a small group of friends used

94 Id. at 3.
Twitter to introduce the video to their followers and to other customers who had recently complained of bad experiences with United Airlines. They also posted the video to a number of social news sites, like Digg, which allow people to submit stories.

On Tuesday afternoon, the story was picked up by Consumerist.com, a leading consumer advocacy organization that is affiliated with Consumer Reports magazine. That night, the story made its first mainstream media appearance. A story in the travel section of the Los Angeles Times noted that the video had already received 24,000 views and 461 comments, most of them critical of United. By Wednesday, sites like the Huffington Post began relaying the story and mainstream networks, including CNN and the CBS Morning Show, began calling for interviews.

By Friday, the YouTube video had been viewed 1.7 million times. This made “United Breaks Guitars” YouTube’s number one rated music video of all time and number three in any category of video. By the end of July, the video had been watched 4.6 million times.

All of this was not lost on United. Within 24 hours of the video’s debut, members of the airline were working to prepare a response. Almost immediately, United made a phone call to Carroll in an unsuccessful attempt to communicate with him directly. In addition, the airline sent this message to approximately 18,000 followers on Twitter: “This has struck a chord w/ us and we’ve contacted him directly to make it right.” This notion that the video had “struck a chord” with United formed the centerpiece of the airline’s communication strategy as it monitored and responded to its escalating public relations crisis.
On July 8, United finally reached Carroll directly. The airline’s managing
director of customer solutions told Carroll that United wished to “make right” the damage
they had done to his property.\textsuperscript{95} The airline offered Carroll $1,200 – the amount that he
had spent on repairs and the amount that originally requested – plus $1,200 in flight
vouchers. Although Carroll declined the offer, United made a $3,000 donation to a music
school as its gesture of goodwill. The airline also went further in its efforts to address
Carroll’s complaints. First, they reached an agreement with Carroll to let them use his
video in future customer-service training sessions. Second, the airline arranged for two
senior vice presidents and a vice president to meet directly with Carroll. During a tour of
the baggage-handling facilities at Chicago O’Hare, these executives acknowledged that
Carroll’s claim was wrongly denied. They also informed Carroll of the changes that the
airline had implemented to customer service practices in response to his incident.

\textbf{iii. Why Do These Companies Care About Social Media Campaigns?}

All things considered, the “United Breaks Guitars” incident is a remarkable
illustration of the power of social media. In the span of one week, Dave Carroll went
from an anonymous victim of bad baggage handling to an Internet sensation that was
causing chaos for one of America’s most iconic corporations. Within days of posting his
innovative complaint regarding United’s business practices, Carroll had been directly
offered a compensatory sum that exceeded his own request for relief.

Needless to say, this is not a typical outcome for individuals that square off with
entities of United’s stature. It would be difficult to locate even a single recent plaintiff
whose legal complaint was so quickly succeeded in accomplishing their intended aims. It
would be essentially unthinkable to locate a plaintiff who had secured parallel relief for

\textsuperscript{95} Id. at 1.
the cost of $150 dollars. Unquestionably, this story reflects a perfect storm of conditions—specifically, the entertainment value of the video and the lingering consumer frustration regarding United Airlines—that made Carroll’s successes possible. But, Carroll’s story nonetheless illustrates that social media can have a major impact on the business practices of major corporate entities. The question then becomes why these entities are concerned with social media happenings in the first place.

The answer is provided by two important modern realities. First, in a globalized and increasingly competitive marketplace, the success of a company often depends on the strength of its reputation. Indeed, many companies’ reputations have become their “largest uninsured asset.”96 The better a company’s reputation, the greater their ability to turn a profit, maintain a quality staff, and generally outcompete their market rivals.97 It is thus unsurprising that reputational threats have become “the number-one risk facing corporations today.”98 Second, social media has made it easier than ever to attack a company’s reputation. As many Internet users have discovered, “[t]he viral energy of the blogosphere, social network sites, and wikis constitutes a new flow of incessantly circulating publicity in which reputations are enhanced and destroyed, messages debated and discarded, rumors floated and tested.”99

As a result of these dynamics, companies are discovering that their disputes are increasingly battles to preserve their reputation.100 Even when these disputes reflect classically legal issues, they are today tried as least as frequently in the court of public

97 Alex Harris, Reputation, LAWYER’S WEEKLY, Jan. 29, 2001.
98 Ibid.
100 See Beardslee, supra note 96 at 1259, 1262.
opinion as in the court of law.\textsuperscript{101} In part, this is simply because companies’ behavior comes under scrutiny much sooner than it ever has before. Individuals now have the ability to both discover and disseminate potentially damaging information nearly instantaneously. As one American corporate General Counsel noted: “The house could be burned down before you even smell smoke.”\textsuperscript{102}

An additional complicating factor for corporations is that individuals are simply more aware of corporate behavior in the age of social media. In the modern era, there are more disclosures compelled by an increasingly complex regulatory environment, more avenues through which to broadcast those disclosures, and more stakeholders interested in the scope of these informational releases.\textsuperscript{103} In the age of nonstop media, “the corporation constantly is engaged in activity that could have legal implications, and thus is engaged in a continuous proactive process of trying to affect public opinion long before any legal problems or proceedings are on the horizon.”\textsuperscript{104} In support of the contention that even small mistakes now often attract escalating public attention, one General Counsel said, “it’s freaky. I mean we’re a high profile enough company that \textit{everything}, \textit{every} filing, gets picked up.”\textsuperscript{105}

Of course, companies are generally concerned with this public scrutiny not simply because it constitutes negative press, but because it often threatens the corporate bottom-line. A final participant in a comprehensive survey of general counsels explained, “If I’m painted as a bad company . . . and the stock prices drop precipitously, I’m gonna be in a

\textsuperscript{101} \textit{See ibid.}
\textsuperscript{102} \textit{Id.} at 1269.
\textsuperscript{103} \textit{Ibid.}
\textsuperscript{104} \textit{Id.} at 1295.
\textsuperscript{105} \textit{Id.} at 1269.
lawsuit.”106 In turn, these lawsuits – and the negative publicity they engender – can have further detrimental business consequences.107

The best illustration of social media’s ability to set these events in motion is “United Breaks Guitars.” The most startling figure to emerge out of this whole incident is $180 million. That is the bottom-line monetary impact most often attributed to Dave Carroll’s video. At the time of the incident, The Times of London reported that the “gathering thunderclouds of bad PR” caused United’s stock price to plunge $180 million dollars, nearly 10 percent of its overall value.108 In the wake of this story: “[h]undreds of news reports repeated the story that a single poorly handled customer complaint had, thanks to the power of social media, cost the company $180 million.”109 Although there has been subsequent pushback against this astronomical figure,110 it is clear that “United Breaks Guitars” constituted a full-blown, bottom-line crisis for this major corporate entity. Episodes such as this give real force to claims that “[o]ne poor customer interaction can have a very significant impact on a public impression of a brand.”111

Although United provides perhaps the most instructing illustration of these emerging dynamics, the impact of social-media-driven scrutiny is by no means limited to United or similar high-profile corporations. Instead, the groundswell of online media communication is “global. It’s unstoppable. [And] it affects every industry – those that sell to consumers and those that sell to businesses – in media, retail, financial services,

106 Id. at 1268.  
107 See ibid.  
108 See Deighton, supra note 93 at 1.  
109 Ibid.  
110 See Buchanan, supra note 87.  
111 Kim Harrison, People Trust Social Media More Than Advertising, CUTTING EDGE PR, http://www.cuttingedgepr.com/articles/people-trust-media.asp (last visited November 1, 2010)).
technology, and health care.” The question for citizens and consumers is how, and to what extent, these newfound vulnerabilities are likely to work towards their benefit.

II. SOCIAL MEDIA STRATEGIES AS AN ALTERNATIVE TO LEGAL REMEDIES

In describing the persistent criticisms of legal remedies and the emerging benefits of social media, the section above begins to set forth a comparison between these two potential avenues for addressing injurious activity. However, to more fully assess the ability of social media strategies to supplement or supplant legal strategies for relief, it is useful to look at particular areas where the law’s presence is often deemed most invaluable. Looking at areas where a strong case traditionally has been made for a robust legal presence helps put in perspective the actual impact of emerging online technologies.

The following section explores the impact that social media strategies might have in two such areas: consumer protection and employment discrimination. These areas are a useful focal point for two reasons. First, in each area, the law traditionally has been of immense importance in determining the outcome of disputes. Specifically, the ability of individuals to address harmful activity has long been dependent on the governing state of law with respect to that activity. Second, despite this core commonality, the consumer protection and employment discrimination contexts have thus far received disparate levels of attention from social media analysts. In the context of consumer protection, commentators have already begun exploring the use of social media as an alternative to legal remedies and much has been written about these innovations. In the context of employment discrimination, on the other hand, the impact of social media has gone relatively unexplored. Thus, these two areas provide an interesting contrast for study.

While the consumer protection section explores a number of existing social media

112 Li and Bernoff, supra note 35 at x.
strategies and a handful of suggested social media innovations, the employment
discrimination section largely begins the exploration of social media from scratch. In
analyzing these two areas, the goal is to give teeth to the suggestion that social media
strategies might play an important role in the actual lives of prospective litigants.

**Consumer Protection**

**A. The General Architecture of Consumer Protection Law**

Consumer protection law governs the relationship between actors in the
marketplace of exchange. In practice, it generally addresses the interactions between
sophisticated market players and less sophisticated market participants. Although there
are many circumstances in which these labels properly require qualification or
adjustment, there is a general consensus that this description helps conceptualize the
operation of consumer protection law.\(^{113}\)

Once you attempt to define consumer protection law with any greater degree of
precision, however, this consensus begins to break down.\(^{114}\) Indeed, those who set out to
bring greater clarity to this label are instead likely to conclude that “[t]he public law of
consumer protection in the United States is a mess.”\(^{115}\) This reality is less surprising
when one considers that the effort to provide a coherent set of legal protections for

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\(^{113}\) See Kurt Eggert, *Striking a Balance: Basic Questions About Consumer Protection Law*, 7 *Chap. L. Rev.* 1, 2 (2004) (noting that the “normally stated rationales for consumer protection” are “information asymmetry and unequal bargaining power between seller and consumer.”)

\(^{114}\) Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 *Chap. L. Rev.* 155, 157 (2004) (arguing that efforts to bring precision to this area “prove either too much or too little to define the discrete field of “consumer law.”)

consumers is a relatively recent phenomenon.\textsuperscript{116} Indeed, some legal observers argue that the very notion of consumer rights did not develop until the Kennedy Administration.\textsuperscript{117}

Nonetheless, the fact remains that consumer protection – as both a label and a doctrine – remains a mess. This is true for two primary reasons. First, consumer protection law covers a broad and diffuse bundle of market relationships.\textsuperscript{118} The consumer protection label gets stretched to include matters involving credit card transactions, home mortgage loans, and the everyday contractual relationships that are established between buyers and sellers.\textsuperscript{119} Unsurprisingly then, “there is great variation among consumer protection laws . . . because each law deals with a specific matter, and deals with it in its own somewhat unique way.”\textsuperscript{120} Indeed, it seems fair to say that “[t]here is no uniformity and no consistency among the various consumer protection laws and how they are enforced because there is no national consensus on what laws are necessary to protect consumers and who should enforce those laws.”\textsuperscript{121}

The previous passage highlights the second primary reason why consumer protection law remains perpetually in flux: there is no fixed agreement behind specific mechanisms or actors that should lead the way in implementing consumer protections. Indeed, once policymakers agree on the appropriate substantive consumer protections in different areas, they “must still decide whether the dominant means to enforce that law should be governmental regulatory enforcement, either their agency litigation, or

\begin{footnotesize}
\begin{enumerate}
\item See Geraint Howells and Rhoda James, \textit{Litigation in the Consumer Interest}, 9 ILSA J. INT’L & COMP. L. 1, 2 (2002) (“The identification of the consumer as a discrete party, entitled to specific legal rights, is a product of the latter half of the twentieth century.”)
\item Ibid.
\item See id. at 633; Budnitz supra note 115, at 664.
\item Budnitz supra note 115 at 664.
\item Ibid.
\end{enumerate}
\end{footnotesize}
otherwise, or private litigation.”

As it is, policymakers have been unable to coalesce around any consistent answer to this question. As a result, with respect to existing enforcement in the United States, no single model of enforcement predominates.123

Difficulty in arriving at a precise conception of consumer protection law, however, should not obscure the importance of these legal protections and it should not distract from efforts to understand their effectiveness. This paper, of course, seeks to analyze the efficacy of existing consumer protection laws against a prospective regime in which consumers instead depend on social media channels in order to stake their claims for relief. In order to properly draw these comparisons, it is useful to look at a particular context for consumer injury in order to evaluate the impact that differing remedies might have on consumers. This paper makes two choices in order to allow a more effective comparison between existing consumer protection laws and social media possibilities.

First, it focuses on private litigation as a consumer remedy in order to assess the general effectiveness of consumer protection laws. In part, this is simply because the paper itself focuses primarily on litigation – rather than agency enforcement – as the alternative to a social-media driven regime of consumer protection. In addition, however, this choice is based on an assessment of the general state of consumer protection laws. Although it is accurate to say that there has been no definitive winner in the dispute between advocates of agency enforcement and advocates of private litigation, there has been movement in recent years towards litigation. Specifically, “[t]he trend in the United States since the 1980s has been to rely less on statutes and regulations to protect

123 See Waller, supra note 118 at 633.
consumers and increasingly on litigation to enforce the laws enacted in the 1960s and 1970s . . . .” 124

Second, this section uses injuries arising out of standard form contracts as a lens through which to analyze the typical plight of a disaffected consumer. Standard form contracts generally set the terms for transactions between a sophisticated, repeat seller on one side and an individual consumer on the other. 125 In a modern economy that is structured around mass production, these contracts are both necessary and prolific. 126 Because these contracts define the rights and responsibilities of the buyer and seller, it would be unsurprising to find that consumers turn to these agreements when disputes emerge out of particular transactions. And indeed, consumers typically take great comfort in assuming that these agreements ensure a mutually acceptable resolution of potential disputes. 127 The problem, of course, is that these contracts very rarely produce any such thing. Instead, to the extent that they provide any consumer protections at all, these protections are frequently “almost impossible to legally enforce.” 128

Despite consumers’ persistent disappointment in these situations, the response of consumer advocates thus far has not been to counsel a turn away from contractual terms as a source of legal protection. Instead, advocates typically argue that what is needed is to make the governing contractual terms more equitable. It is this well-worn path of consumer advocacy that this section seeks to call into question. Instead of rehashing

124 Budnitz, supra note 115 at 664-65.
125 See Omri Ben-Shahar, One-Way Contracts: Consumer Protection Without Law, 6 EUR. REV. CONT. LAW 221, 241 (2010). These contracts are also sometimes referred to as “Business-to-Consumer contracts”. Id.
127 See Ben-Shahar, supra note 114 at 245 (stating that many consumers “maintain a potentially false sense of security in the knowledge that they are contractually protected.”)
128 Id. at 245.
unsuccessful strategies for addressing market inequality, consumers and consumer advocates should consider the merits of a social-media alternative.

B. Present and Potential Strategies for Securing Consumer Protections

Consumer advocates typically accept the contractual terrain as the appropriate battleground for negotiating the interests of buyers and sellers. Although attention is paid to alternate avenues of enforcement – for instance, regulatory scrutiny or non-contractual judicial remedies – the bulk of consumer advocacy efforts seek to directly address the terms that define a typical modern marketplace transaction. Indeed, “the stated goal of the consumer protection movement” is to “augment[] the legal remedies that consumers have under contract law.”

In their pursuit of this goal, consumer advocates typically focus on pursuing two closely related but distinct strategies: (1) improving the particular terms of standard form contracts and (2) increasing the requirements on sellers to disclose information alongside these terms. Social media arguably enables consumers to better accomplish the aims of each of these respective strategies. By analyzing the shortfalls of these two traditional approaches, this possibility becomes apparent.

1. Why Do Traditional Consumer Protection Strategies Fail to Protect Most Consumers?

For two overarching reasons, existing legal strategies are largely unable to protect consumers in their disputes with sophisticated marketplace actors. First, consumers frequently bargain away most of their meaningful legal protections by agreeing to standard form contracts. Second, to the extent that legal remedies remain as part of these agreements between buyers and sellers, the burdens of litigation generally dissuade consumers from pursuing their claims for relief.

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129 Id. at 223 (noting that “the stated goal of the consumer protection movement” is to “augment[] the legal remedies that consumers have under contract law.”)
130 Id. at 247.
The first of these reasons simply reflects the nature of the relationship between consumers and repeat market players. In general, “[c]onsumers participate in market transactions on terms defined by the large enterprises on which they depend for the products [and services] they need to exist.”\textsuperscript{131} Although consumers exercise market power in the sense that they can choose between different products and services, they generally possess little ability to bargain over the rights and responsibilities that govern their everyday transactions.\textsuperscript{132} Instead, the competition that occurs between market actors tends to address specifics of the relevant products and services, rather than the legal rights and responsibilities that govern prospective transactions. This is particularly true in a modern economy in which transactions are increasingly arms-length agreements between unfamiliar parties.\textsuperscript{133} In this sense, the legal enforcement of standard form agreements is largely the enforcement of the seller’s preferred terms. It is thus unsurprising that these agreements generally allocate most of the risk of transaction-failure to the consumer.\textsuperscript{134} Specifically, these agreements are often full of disclaimers, limitations of rights, and definitions that are self-serving for the business.\textsuperscript{135}

The typical response to this concern is to argue for limits on the ability of sellers to dictate contractual terms. This approach, however, will generally produce little more than pyrrhic victories. Major marketplace actors will always be sophisticated, well-counseled parties that are a step ahead of these limitations.\textsuperscript{136} Almost any time the law sets forth new legal protections, these businesses will be able to draft their way out of

\textsuperscript{131} Bates, supra note 126 at 1.
\textsuperscript{132} See ibid.
\textsuperscript{133} Id. at 3-4.
\textsuperscript{134} See id. at 4.
\textsuperscript{135} See Ben-Shahar, supra note 125 at 226.
\textsuperscript{136} Id. at 226-27.
these obligations. Therefore, “as long as the law is unwilling to fully regulate the contract through mandatory terms, there is no clear solution.” And it should be clear that, given our legal system’s strong belief in the freedom to contract, perhaps now more than ever, there is little prospect that mandatory terms will become a dominant part of consumer protection law anytime soon.

The second reason why existing consumer protection strategies fail to protect consumers is that they often depend on litigation as the mechanism for attaining relief. Legal observers broadly point to this fact, as much as any, when explaining why consumers struggle to protect their interests. As one scholar has argued: “[i]f the consumer is given rights and remedies that must be asserted in court – any court within the framework of the present legal system – we might just as well do nothing.”

Another commentator claims that, “consumer protection programs based on litigation provide protection in theory only.”

The primary basis for this contention is that litigation is expensive while the value of most consumer claims is small. Although it may make a major impact on a consumer’s life when their laptop malfunctions or an airline loses their luggage, the pure economic value of this injury is often minimal. This is particularly true when compared to the economic costs of litigating for relief. For many Americans, the simple fact that filing suit takes time and money is often enough to force them to forfeit their potential claim. These individuals often have no choice but to conclude that it is “[b]etter to cut

137 Ibid.
138 Id. at 7.
140 Bates, supra note 126 at 6.
141 See e.g. id. at 20-21.
142 Note, Consumers Lose Another One, 3 UCC L.J. 349, 350 (1971).
your losses and take your beating than throw your good money after bad.”

Remedies designed to address these cost concerns are not particularly effective. Consumer claims often are not well suited for class action suits because the claims are highly particularized rather than systematic. And the public is generally unaware of, and disinterested in pursuing, small claims court remedies even when they are available.

In addition to the cost concern, litigation is also an ineffective vehicle for consumer protection because particular suits often do not impact the relative market actors beyond the confines of the particular dispute. Private suits do not effectively deter business practices because even successful outcomes generally produce small verdicts that receive little public attention. As a result, in rare cases where companies are actually forced to litigate particular consumer claims, the impact of plaintiff victories is often minimal. Although the law succeeds in providing compensation in these cases, it fails to exert any meaningful deterrent effect on market participants.

Disclosure requirements have not fared much better in protecting consumer interests. In many ways, this results from the same characteristics of the business-consumer relationship that undercut the effectiveness of the litigation strategies discussed above. In general, the law often imposes expectations on consumers that are unrealistic and unhelpful for the actual advancement of their interests. Just as consumer advocates often fight to preserve a right to suit that will rarely ever be exercised, they are equally committed to requiring the disclosure of information that consumers will rarely actually obtain.

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143 Ibid.
144 See Ben-Shahar, supra note 125 at 226.
145 See Howells, supra note 116 at 21.
146 See Bates, supra note 126 at 6-7.
147 Ibid.
read.\textsuperscript{148} Although “[i]nformation disclosure has been the workhorse of American consumer protection legislation for most of the twentieth century,”\textsuperscript{149} there is little evidence that it actually helps consumers understand and address the transactions that they enter. For one, the terms that are generally disclosed in compliance with these requirements often reflect complex legalese that means little to the typical consumer.\textsuperscript{150} To the extent that these terms are comprehensible, there are simply too many of them to reasonably expect consumers to both read these terms and to use them to improve their bargaining position.\textsuperscript{151} To the contrary, these compelled disclosure requirements have generally produced little more than “information overload.”\textsuperscript{152} Indeed, observers now estimate that improving consumers’ access to – and understanding of – further disclosures benefits “far less than 1\%” of the population of consumers.\textsuperscript{153}

In short, traditional legal strategies for protecting consumer interests have been far from a resounding success. At a minimum, it seems worthwhile to explore whether there is a better way for consumers to vindicate their claims for relief.

2. Social Media is an Alternative Avenue for Consumer Protection

The shortfalls inherent in existing legal mechanisms for consumer protection are substantial. The general inability of consumers to agree to, or subsequently enforce, terms that protect them in the case of transaction failure has unsurprisingly prompted

\textsuperscript{148} See Ben-Shahar, \textit{supra} note 125 at 247 (noting that “much of the consumer advocacy effort is directed at improving the legal terms associated with contract, the opportunity of consumers to read the fine print in contracts, the access of consumers to courts, and the legal remedies available against a breaching business.”)


\textsuperscript{150} See \textit{id.} at 39.

\textsuperscript{151} See \textit{ibid.}

\textsuperscript{152} \textit{Ibid.}

calls to reconsider our attachment to existing avenues for relief. What is surprising, however, is that some legal commentators have proposed jettisoning these existing mechanisms altogether.

This position has been most clearly articulated by Professor Omri Ben-Shahar in his article: “One-Way Contracts: Consumer Protection without Law.” Professor Ben-Shahar’s argument is of interest here for two primary reasons. First, he suggests that the best way for consumer advocates to actually protect consumers is to focus on non-legal protection strategies. The boldness of Ben-Shahar’s position is that he argues that these non-legal strategies should supplant, rather than supplement, existing legal protections. Indeed, Ben-Shahar argues that consumers would benefit, “if their legal rights, which are almost impossible to enforce in court anyway, would be stripped altogether.” More specifically, he suggests that consumers would benefit from the elimination of the contract enforcement device, and the accompanying reduction in consumer advocates’ efforts to alter the terms of these contractual agreements.

The second interesting part of Ben-Shahar’s argument is that he suggests that this radical reduction in legal protections is desirable, in part, because of the presence of social media. Specifically, he claims that the absence of illusory legal protections would prompt consumers to increasingly rely on online feedback mechanisms in order to judge the safety and security of their impending transactions. Although Ben-Shahar suggests that these sites are already an important weapon in the consumer protection arsenal, he

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154 Ben-Shahar, supra note 125.
155 Id. at 249.
156 Id. at 224.
157 Id. at 248.
158 Id. at 224 (“Further elimination of legal protections would necessarily breed more of these reputation devices.”)
argues that the absence of law in this area would make these web destinations a magnitude more effective in protecting consumer interests.\textsuperscript{159}

Professor Ben-Shahar does not presume that social media alone would carry out the responsibilities previously vested in consumer protection law. Indeed, he identifies a handful of other protective mechanisms that would likely gain increased attention in a world without legal remedies. For instance, he suggests that third-party insurers might, for a price, take on a larger role in protecting consumers against transaction failure.\textsuperscript{160} These accompanying alternative remedies aside, however, it is clear that the strength of online feedback mechanisms is an important part of Ben-Shahar’s argument. The boldness of his faith in these channels provides an opportunity to identify the specific role that social media can and should play in the area of consumer protection.

As a class, consumers participate in social media both as active content producers and passive content recipients. Certain consumers tend to play the content production role more than others, often in areas where they have a particular interest or attachment, but almost every web-savvy consumer plays some role in the dissemination of information about products and services. To say that consumers are content producers in the realm of consumer affairs simply means that these individuals occasionally share their assessments – whether positive or negative – of market actors with other members of a social network. The possibilities for the particular shape in which this information dissemination occurs is as broad as the concept of social media itself. The Dell Hell and United Breaks Guitars case studies, for instance, are examples of individuals producing

\textsuperscript{159} \textit{Ibid.}
\textsuperscript{160} \textit{Id.} at 223-24. Ben-Shahar also suggests that consumers might seek to minimize their up-front financial commitments through pay-as-you-go arrangements and that companies might voluntarily create assurance funds to compensate consumers when transaction failures occur. \textit{Ibid.}
content using the blogosphere and YouTube, respectively. But the types of social media that are available are much more extensive.

Two forms of content production have become typical in the consumer context. First, consumers often contribute reviews of a business or a market transaction on sites that are designed to aggregate such reviews. The best example of a general website that occupies this role is Yelp. Second, consumers sometimes go the extra step of creating a specific website to criticize a certain company. These sites are often referred to as “gripe sites” and the process of filtering consumer complaints through these sites is called “cybergriping.” The names of these websites generally make clear the single message that they are intended to convey. Two examples, for instance, of gripe sites that gained some attention are www.HomeDepotsucks.com and U-Hell, a U-Haul-targeted site that has since been taken down.

The complaints that appear on both these general and specific websites reflect a sustained dissatisfaction from consumers regarding their marketplace experiences. Across a broad set of industries, customer satisfaction rates have declined substantially in recent years. In part, these declines are attributable to certain characteristics of the modern marketplace – for instance, trends towards greater standardization, mass production, and outsourcing. But it is also certain that the growing dissatisfaction that is visible on the Internet is in part attributable to the Internet itself. As consumers have grown increasingly able to voice their own complaints and to discover the complaints of

162 Other examples of general complaint sites are Ecomplaints.com, UGetHeard.com, and Complain.com. Id. at 69.
163 Id. at 66-67.
164 Id. at 65-66, 77.
165 See id. at 66.
166 Ibid.
others, their dissatisfaction with industry has grown.\textsuperscript{167} This should come as little surprise: “[t]hroughout history, technological developments, such as the portable phonograph and the television, have brought consumer activism to new levels.”\textsuperscript{168}

One need not look far to find observers who contextualize the Internet’s emerging impact on consumer affairs. One such observer declared that the Internet has “become the soapbox or street corner of the early 21st Century, empowering consumers not only to communicate with the companies responsible for their dissatisfaction, but also with other disgruntled consumers.”\textsuperscript{169} Unlike a soapbox or street corner, however, the message that a single consumer disseminates on the Internet may be read by consumers across the globe.\textsuperscript{170}

Social media campaigns transform the power of consumers not simply because they broaden the reach of individual complaints, but also because they can provide a remarkable return on minimal consumer effort. The Internet allows consumers to voice their complaints “at a minimum of time and cost.”\textsuperscript{171} In order to participate in online conversations and campaigns, individuals must of course have some access to technology and some ability to operate that technology. Although these characteristics are by no means universal – particularly on an international scale – it is increasingly rare to find consumers that do not meet this profile. For consumers that meet these basic technological requirements, “the barriers to speech are minimal and the effects of

\textsuperscript{167} Ibid.
\textsuperscript{168} Id. at 67.
\textsuperscript{169} Id. at 69.
\textsuperscript{170} See id at 70 (noting that the Internet “provides a medium for consumers to ‘think globally’ by sharing their experiences with a global audience.”)
\textsuperscript{171} Id. at 68.
communication immense.”\textsuperscript{172} Any individual can participate in online feedback regarding a particular company or create their own website to escalate such feedback.\textsuperscript{173}

Of course, not every comment or gripe site will produce a response from the target company. And in fact, consumers would probably prefer that many of their comments not produce such a response. Websites like Yelp are useful first and foremost because they allow consumers to share information with other consumers and with the subjects of their reviews. Many times, consumers and businesses will benefit from these reviews without having to enter an adversarial or compensatory exchange. But, when consumers experience transaction failure that they believe creates a serious, cognizable injury they may sometimes wish to apply serious leverage to a target business. In this case, the Internet also provides an interesting avenue for relief. For evidence of this proposition, one need look no further than the Dell and United examples discussed above. The same reputational concerns that shook these corporate giants are present across almost every industry in the modern economy.\textsuperscript{174} Indeed, “with the potential to destroy reputations ‘with the speed and ferocity of a devastating hurricane’ gripe sites pose a significant threat to targeted corporations.”\textsuperscript{175} On a day-to-day level, the ability of modern businesses to attract customers and charge profitable prices is increasingly dependent on the feedback scores, ratings, and watchdog reports that the Internet has made prolific.\textsuperscript{176} Without question, “the power of each consumer to post a negative feedback provides powerful deterrence” for individual market participants.\textsuperscript{177}

\textsuperscript{172} Id. at 69
\textsuperscript{173} Ibid.
\textsuperscript{174} See Li and Bernoff, supra note 35 at x.
\textsuperscript{175} Schwarz, supra note 161 at 69.
\textsuperscript{176} See Ben-Shahar, supra note 125 at 243. Ben-Shahar argues that the importance of these online mechanisms would be even greater if consumer legal protections were reduced. Ibid.
\textsuperscript{177} Id. at 244.
It is certainly premature to say that social media channels are ready to carry the load in protecting consumers in the coming decades. Even now, however, it is apparent that these emerging networks are providing increasing avenues for consumers to protect their own interests and to generate support for the codification of broader protections. The examples of Dell Hell and United Breaks Guitars demonstrate that even for seemingly mundane transaction failures, the Internet has given consumers a platform that is making their collective voice heard.

Of course, not everyone who has a laptop malfunction or a broken guitar gains the same level of Internet fame as the subjects of those two case studies. In this sense, the inconsistency of treatment that plagues consumers who channel their claims for relief through legal settings is also a continuing difficulty in the social media context. Specifically, the ability for consumers to recover compensation often depends on the attention that their efforts generate from an online audience. While one would hope that Internet attention would generally correlate with the merits of a consumers underlying claim, this correlation will obviously never be perfect. For now, it may just be worth celebrating that compensatory relief is at all possible for consumers that take to the Web. Increasingly, consumers that pursue web campaigns or start gripe sites are receiving compensation in response to their complaints.\textsuperscript{178} To the extent that this trend towards compensation continues, social media strategies will have come a long way in supplanting a core rationale for consumer legal protections.

At some level, the growth of social media in the realm of consumer protection is inevitable. Internet commerce requires consumers to interact frequently with

\textsuperscript{178} See Schwarz, \textit{supra} note 161 at 77-78 (noting that after a consumer started a website complaining that Dunkin Donuts did not carry a particular low-fat coffee creamer, the chain apologized, offered coupons, started carrying the creamer, and eventually bought the website.)
marketplace participants that are often unfamiliar in name and opaque in their practices. In the eyes of many, the growth in online feedback mechanisms is a natural byproduct of the growth of online commerce. Major online businesses, such as eBay, Amazon, and Expedia, have been at the forefront of the growth of these feedback mechanisms. As these businesses – and online commerce generally – continue to grow, we can expect further refinements to the existing ratings and reputation platforms. Professor Ben-Shahar, for instance, suggests that these sites will grow to specifically address the aspects of transactions that are often the subject of legal interest. Future ratings, he speculates, will provide information about the quality of a contract and the overall legal experience with sellers. Sections of these websites could address the warranty and repair service or the actual burdens that businesses place on returning goods. In so doing, these sites would provide the practical knowledge that compelled disclosure requirements have thus far been unable to effectively reveal.

Finally, whatever one thinks about the existing efficacy of social media channels in protecting consumers, it is clear that social media will be better equipped to advance these aims in the coming years. While consumer advocates have been working to sharpen and improve consumer protection laws for decades, the very medium through which social media activism occurs is still in its infancy. Undoubtedly, challenges lie ahead. Valid concerns, for instance, exist regarding the reliability of information that enters social media channels and regarding the prospect of disinformation campaigns that

179 See Ben-Shahar, supra note 125 at 243-44.
180 Id. at 23.
181 Ibid.
182 Ibid.
183 Ibid.
184 Ibid.
185 See Rubin, supra note 149 at 49-52.
186 See Ben-Shahar, supra note 128 at 243.
unfairly target corporate entities. It seems unlikely, however, that these concerns will ultimately persist as valid objections to a social media approach to consumer protection. As the crowdsourcing discussion above reveals, social media communities are unusually effective in protecting important web channels from this type of disinformation. One need look no further than Wikipedia, of course, to understand the success that motivated online communities can have in guarding against these concerns. Consumers are undoubtedly a motivated community. As their presence and comfort online grows, it does not seem unrealistic to expect that consumers will have similar successes in protecting the integrity of their online activities.

**Employment Discrimination**

Analyzing the utility of social media strategies in the context of employment discrimination is both easier and more difficult than conducting the same inquiry in the context of consumer protection. It is more straightforward in the sense that the body of employment discrimination law and its mechanisms for pursuing legal relief are relatively well-defined. In comparison to consumer protection law, there is much greater ease in identifying the existing strategies available to prospective plaintiffs. This makes it easier to draws comparisons with available social media alternatives. The inquiry is more difficult, however, because the impact of social media on the employment discrimination context has thus far been undertheorized. In particular, scholars have not yet thoroughly considered whether the general empowerment of individuals through

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188 See generally Tapscott, *supra* note 56.
social media meaningfully benefits victims of employment discrimination. As such, more speculation and prediction is required when thinking through this relationship.

A. How Effective Are Existing Legal Channels in Resolving Individuals’ Employment Discrimination Claims?

Employment discrimination claims are among the most frequently litigated in the American court system. In a recent year, the federal administrative body that receives initial charges of employment discrimination received 84,442 such claims.\(^{189}\) While not all of these claims wind up in court, many of them do. On an annual basis, nearly ten percent of the federal courts’ total docket now consists of employment discrimination cases.\(^{190}\) These lawsuits have become much more frequent in recent years,\(^{191}\) and the expectation is that this trend will only increase in the near future.\(^{192}\)

Federal law provides a relatively well-defined structure for addressing employment discrimination claims. Federal protections are primarily set forth in a handful of statutes – of which, Title VII of the Civil Rights Act of 1964 is the most well-known.\(^{193}\) These statutes generally follow a similar approach: they prohibit employers from taking action to harm an employee when the action is either motivated by the employee’s status as a member of a protected group or disproportionately impacts members of a protected group.\(^{194}\) In addition, these statutes generally prohibit employers


\(^{192}\) See Hayley Buckridge, *Merging Without Purging: Incentivizing Boards of Directors to Promote Diversity Through M & A*, 20 ST. JOHN’S J. LEGAL COMMENT. 443, 460 (2006) (arguing that these lawsuits will “increase exponentially” in number in the coming years).


\(^{194}\) *Ibid.*
from retaliating against employees who seek relief from employment discrimination.\textsuperscript{195} If an employee succeeds on a claim under these statutes, they are potentially entitled to damages, equitable relief, and attorneys fees.\textsuperscript{196}

Before they even get into court, however, plaintiffs in employment discrimination cases must generally satisfy a number of administrative obligations.\textsuperscript{197} With respect to all but one of the relevant federal statutes, plaintiffs are required to first bring their charges before the Equal Employment Opportunity Commission (EEOC).\textsuperscript{198} Specifically, employees must file a charge of discrimination within 180 days of its occurrence, or they will not be able to bring a court action.\textsuperscript{199} Depending on the EEOC’s evaluation of the claim, the agency may attempt to produce a settlement between the parties or it may itself bring suit against an employer.\textsuperscript{200} Because of limited time and resources, however, the EEOC “relies primarily on private parties.”\textsuperscript{201} As a result, “the bulk of actions brought in court to enforce the antidiscrimination laws are brought by private parties.”\textsuperscript{202}

Thus, despite broad statutory protections and a comprehensive regime for enforcing those protections, the ability of victims of employment discrimination to attain legal relief for their injuries still frequently turns on an ability to succeed in litigation.\textsuperscript{203} Over the life of modern employment discrimination law, there have been many occasions on which plaintiffs have done quite well by following this path to relief.\textsuperscript{204} On these

\begin{footnotes}
\item [195] Ibid.
\item [196] Id. at 201-02.
\item [197] Id. at 202-03.
\item [198] Ibid.
\item [199] Ibid.
\item [200] Id. at 203-04.
\item [201] Id. at 205.
\item [202] Ibid.
\item [203] See id. at 207-08 (noting that enforcement of employment discrimination law depends primarily on private litigation and the uneven practices of state attorney generals).
\item [204] See Sternlight, supra note 189 at 1422.
\end{footnotes}
occasions, plaintiffs have succeeded in both securing large monetary recovery sums and in establishing important precedents in the fight against discrimination.\textsuperscript{205} Insofar as these litigation victories symbolize the vindication of important national interests, they should be celebrated. They should not, however, be seen as typical in the experience of an American employment discrimination victim.

Instead, there is general consensus that the existing, litigation-dependent system for resolving employment discrimination claims does not work well.\textsuperscript{206} This system “is subject to harsh criticism from all sides for its inability to provide just solutions, its high cost, slow speed, failure to adequately reward worthy complainants, and its subjection of innocent defendants to expensive and lengthy processes.”\textsuperscript{207}

For employees, litigation rarely offers a satisfying avenue for attaining relief. A number of hurdles that are specific to this employment context will be further explored below. For now, however, it is appropriate to note that the core problems that plaintiffs have with litigation generally are present in this area of law. In particular, litigation is expensive, slow, and rarely rewarding for victims of employment discrimination.\textsuperscript{208}

First, litigating employment discrimination claims is often cost-prohibitive for employees.\textsuperscript{209} These claims are often complex, discovery-intensive struggles against well-resourced corporate entities.\textsuperscript{210} Although governing statutes generally require defendants to pay the legal fees of prevailing plaintiffs, discrimination victims are often unable to afford the initial financial investment necessary to get to a verdict. To the

\textsuperscript{205} Ibid.
\textsuperscript{206} Ibid.
\textsuperscript{207} Id. at 1430.
\textsuperscript{208} Id. at 1422-23.
\textsuperscript{209} Id. at 1422.
\textsuperscript{210} See McCormick, supra note 193 at 209.
extent that these victims are unemployed as a result of the initial incident, these
difficulties are exacerbated.\footnote{See Sternlight, supra note 189 at 1481.}

Second, litigation is slow.\footnote{Id. at 1422.} Most obviously, these delays exacerbate plaintiffs’
resource limitations. Separately, however, there is a heightened reason why delays
burden employment discrimination victims. Often these victims bring claims against
their existing employers.\footnote{Id. at 1480.} These claims often produce an uneasy relationship between
employers and employees. Employers during the period before a suit has concluded may
reduce an employee’s workload or attempt to compile a record showing incompetence.\footnote{Ibid.}
In these settings, the employee’s primary interest is in restoring her workplace setting to
normal as quickly as possible.\footnote{Ibid.} Delays inherent to the litigation process instead only
drag out uneasy workplace tensions.\footnote{Ibid.}

Finally, even when plaintiffs successfully file an employment discrimination
claim, they rarely prevail on the merits.\footnote{Id. at 1423; McCormick, supra note 193 at 213. See generally Kevin M. Clermont et al., How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals, 7 EMP. RTS & EMP. POL’Y J. 547 (2003); Michael Selmi, Why Are Employment Discrimination Claims So Hard to Win?, 61 L.A. L. REV. 555 (2001).} Generally plaintiffs lack “smoking gun”
evidence.\footnote{See Sternlight, supra note 189 at 1423.} In the absence of such evidence, judges and juries are often reluctant to
second-guess the personnel judgments of employers.\footnote{See ibid.} Increasingly, judges have been
willing to dismiss employment discrimination claims at the summary judgment stage.\footnote{Ibid.}
Given the sheer number of these cases that come before federal judges, this trend is
perhaps unsurprising. The net result, however, is that employment discrimination victims are increasingly unable to even present their claims to a jury of their peers.

In sum, federal law provides well-defined procedures for litigating employment discrimination claims. Employees are following these procedures to file suits in record numbers against employers. However, despite the high-volume of suits, the rates of success for plaintiffs are quite low. Problems inherent to the litigation process and specific to the employment context render the existing system of litigation-driven remedies a poor source of relief for American employment discrimination victims.

B. Do Social Media Campaigns Present a Viable Alternative Path Towards Relief for Victims of Employment Discrimination?

In order to evaluate the potential effectiveness of social media campaigns in addressing employment discrimination claims, it is useful to think through the typical context in which these claims arise. Although the particular settings in which employment discrimination occurs are too numerous to measure, we can imagine that certain similarities manifest themselves across a large number of these cases.

As a sample case, we can imagine an African-American employee of a midsize employer. This employee has experienced a pattern of perceived mistreatment over a period of time that she believes has been motivated, at least substantially, by her race. Specifically, this employee has seen her employment responsibilities scaled down in recent months – even as her fellow employees have had their responsibilities remain stable – and she has been denied a number of promotions for which she is objectively qualified. The employee’s belief that race is the motivating factor for these adverse employment decisions is based in part on the stable employment situation of her white co-workers over the same period of time. In addition, however, the employee also counts
as evidence a number of periodic, discriminatory remarks that have been made during this time by employees at various levels of the corporate ladder. These remarks demonstrate a degree of racial animosity among various individual members of the company but they probably do not provide any “smoking gun” evidence.

When legal observers are confronted with this hypothetical set of facts, their instincts are likely to vary. For most, the natural impulse will be to conclude either that the employee has no meritorious claim or that, alternatively, she has a claim that should be pursued under the established channels of Title VII. Either of these conclusions would be perfectly reasonable. For those who believe the employee to have a potentially valid claim, it only makes sense to assume that litigation is the appropriate path moving forward. Title VII, after all, has long been the overwhelming guide towards remedies for victims of employment discrimination. The only problem, of course, is that individuals who proceed under this approach are successful in attaining relief.

Thus, it seems worthwhile to explore whether this employee might instead turn to social media in an effort to address the actions of her employer. Facialy, this inquiry might seem too unwieldy to answer. While Title VII provides a sense of certainty about the elements of a meritorious claim and the pathway towards having that claim vindicated, social media is still an emerging arrangement whose characteristics are almost perpetually in flux. Once one gets past the initial unease that is prompted by comparing established legal pathways with the uncertainties of the Internet age, however, the value of exploring social media alternatives becomes more identifiable.

Two guiding principles are most important in establishing this point. First, social media has transformed the ability of ordinary individuals to assert their interests in the
face of more powerful and more established organizational entities. Indeed, the Internet has been called “contemporary society’s great equalizer of social, economical, and political power.”

Unlike any other period in history, the Internet has provided a broadly accessible platform for individuals to assert broadly accessible messages. Although many of these messages fizzle before finding an audience, many of them do not. As the Dell and United incidents illustrate, even the largest corporations can no longer take for granted their ability to ignore individual complaints.

The second principle is that the simple act of publicizing discrimination has historically been quite valuable in the struggle for equality. Few need to be reminded of the importance of the television coverage in Birmingham or Selma to the cause of civil rights. At the time, few would have predicted that the advances produced by these individual episodes would rival the gains made by any judicial decision. Certainly, it is premature to say that the Internet will produce victories of this magnitude for modern anti-discrimination advocates. Indeed, given the advances in racial equality that have occurred in recent decades, it is not even clear that victories of this magnitude are possible. These episodes are worth noting, however, because they demonstrate that important civil rights gains often emerge from public relations episodes rather than a courtroom. This, of course, comes as little surprise to most modern legal scholars.

Indeed, if these scholars were asked whether individuals should simply take to the media or a public relations specialist with their claims of discrimination, many legal scholars – cognizant of litigation shortfalls – might very well support such a strategy. A core

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221 Schwarz, supra note 164 at 69.
222 See generally Michael Klarman, How Brown Changed Race Relations: The Backlash Thesis, 81 J. AM. HIST. 81, (1994) (arguing that events like Selma and Birmingham were more important than judicial action in securing civil rights gains.)
principle of this section is that social media provides a more accessible, more effective path for pursuing such a strategy.

The question remains, however, how the employee in the hypothetical above would go about vindicating her claim. How does she turn the possibilities that social media provides into a practical pathway for relief? In essence, this presents two practical questions. First, how can she effectively publicize her discrimination claim? Second, is it realistic to expect her to navigate social media in pursuing such publicity?

With respect to the first question, it is important to acknowledge that there is no predefined path for seeking or recovering relief using social media. On the one hand, this is likely to be the factor that is most concerning for critics of a social media approach. In comparison to the comprehensive process for litigating employment discrimination claims, this uncertainty might reasonably look risky. On the other hand, we know that individuals have had remarkable success in using social media to vindicate their interests. It would have been remarkable to find a legal commentator capable of suggesting to Dave Carroll that a song about his guitar would be the most impactful way for him to resolve his dispute with United. It would have seemed equally strange if such a commentator had suggested that Dell’s primary vulnerability was a handful of blog posts about their customer service. And yet, each of these incidents had a near-immediate, immense impact on the operation of two of America’s largest corporations. While these big-ticket successes occur rarely in either the court of law or the court of public opinion, the ease with which they can be pursued online makes them increasingly attractive.

Although we cannot sketch out the YouTube video or the blog campaign that the hypothetical employee might use to advance her cause, we do know that issues of racial
discrimination have a history of attracting attention in online social media circles.\textsuperscript{223} Employees, in particular, have begun successfully taking advantage of the platform in order to publicize discrimination claims against their employers.\textsuperscript{224} As a practical matter, this publicity matters. The reputational concerns that increasingly drive corporations to respond to individual complaints are particularly apparent in the context of employment discrimination claims.\textsuperscript{225} If left unaddressed, these claims can hurt employer morale, damage productivity, and threaten the corporate bottom line.\textsuperscript{226} It is no wonder then that companies are particularly likely to act in response to publicity surrounding employment discrimination claims.\textsuperscript{227} Of particular interest to individuals seeking compensation, companies faced with such publicity have shown an increased willingness to reach a financial settlement with the purported victims.\textsuperscript{228}

The second practical question is largely related. It asks whether it is realistic to expect an average citizen to be savvy enough to utilize social media in pursuit of their own interests. To the extent that this is simply an issue of access it is important, but

\textsuperscript{223} Two recent examples come to mind. In the first, a former secretary from the Jones Day law firm saw her employment discrimination claim gain national attention once the allegations reached a popular national legal blog. See David Lat, \textit{Lawsuit of the Day: Ex-Jones Day Secretary Alleges Racial Slurs, Sex Scandals, and More}, \textsc{Abo}\textit{ve The Law} (Nov. 9, 2010, 7:39 PM), \url{http://abovethelaw.com/2010/11/lawsuit-of-the-day-ex-jones-day-secretary-alleges-racial-slurs-sex-scandals-and-more/}; David Lat, \textit{Nelson v. Jones Day, Another Side to the Story}, \textsc{Abo}\textit{ve The Law} (Nov. 11, 2010, 8:59 PM), \url{http://abovethelaw.com/2010/11/nelson-v-jones-day-another-side-to-the-story/}. In the other case, a United States postal worker received national attention after posting cell phone evidence of a racist diatribe from a mail recipient in support of his wrongful termination claim. See Adrian Chen, \textit{Postal Worker Secretly Films Customer’s Racist Rant}, \textsc{Gawker} (Nov. 19, 2010, 6:11 PM) \url{http://gawker.com/5688054/postal-worker-secretly-films-customers-racist-rant?skyline=true&s=i}.\textsuperscript{224} Ibid.\textsuperscript{225} See Ford Rowan, Address to the National Institute of the American Bar Association’s Center for Continuing Legal Education, \textit{Communications Challenges in Sexual Harassment Litigation} 1 (Oct. 15-18, 1997).\textsuperscript{226} Ibid.\textsuperscript{227} See Beardslee, \textit{supra} note 96 at 1273.\textsuperscript{228} Ibid. (quoting one General Counsel’s statement that, “if you are facing a firestorm of negative public opinion, even if you think you could win the case on the merits in a courtroom two years or three years down the road, there is a very substantial incentive to resolve the matter quickly, in order to stop the negative reputation impact.”)
increasingly less so. The availability of the Internet has skyrocketed at remarkable rates in recent years. The expectation is that this trend will continue in the years ahead.

With respect to social media, a similar evaluation is appropriate. Recall that the sheer number of people who use sites like Facebook, YouTube, or Twitter has already become overwhelming. As access to these social media channels increases, the ability of users to successfully navigate and utilize these platforms can be expected to increase as well.

Nothing about what Dave Carroll or Jeff Jarvis did was difficult – at least from a technological perspective. To the extent that individuals like our hypothetical employee continue to have technological problems, assistance is easily available. Whether one turns towards crowdsourced advice from online communities or professional advice from social media experts, the time and money that goes into this process will be far lower than what is required in pursuing a legal claim.

Beyond these two initial considerations, a host of other objections could undoubtedly arise in response to the suggestion to consider social media alternatives. This is particularly true among legal scholars who are predisposed to treat existing legal enforcement mechanisms as an appropriate path for relief. The important thing to consider when evaluating these objections is that the ideas advanced in this paper should not be viewed as a referendum of the viability of social media campaigns. Instead, this paper presents an opportunity to consider the relative merits of existing private litigation

strategies in comparison to social media alternatives. To the extent that the bottom line

230 See McCormick, supra note 193 at 209 (noting the resource commitments required to litigate an employment discrimination claim).
success rates of plaintiffs in the existing arrangement are minimal, the case for considering these emerging alternatives gains strength.

Briefly consider two further objections to a social media strategy. On their face, each objection seems powerful. In comparison to private litigation, however, the power of these objections becomes less clear.

The first objection is that a social media strategy leaves victims of employment discrimination too dependent on the whims of public opinion. There is merit to this objection. There is little question that “the odds of prevailing in the court of public opinion can be difficult to predict.” What is not clear, however, is that this objection is a reason to discount social media in particular. In two ways, public opinion is already an important predictor of a plaintiff’s likelihood of success in the employment discrimination context. First, much of the battle between lawyers in existing discrimination cases occurs in the court of public opinion. Plaintiffs’ lawyers frequently attempt to secure settlements by threatening or bringing negative publicity against an employer. Defense lawyers are sometimes forced into settlement based on this publicity, but this only occurs when public opinion is clearly on the side of the employee. Second, cases that actually go to trial are also impacted by public opinion. One of the main reasons that plaintiffs are often unsuccessful in these cases is because judges and jurors have certain biases against their complaints. In this sense, one might say that public opinion exerts an equally impactful force on litigated claims, it just does so at the back end rather than the front end of the process.

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232 See Rowan, supra note 225 at 13.
233 Id. at 4.
234 See Beardslee, supra note 96 at 1273.
The second objection is more particularized to the employment discrimination context and Title VII in particular. According to this objection, Title VII is necessary to protect employees against retaliatory action from employers that would arise if their complaints were channeled through an alternate avenue like social media. Again, this objection has some merit. One of the positive attributes of Title VII is that it prohibits employers from taking retaliatory actions against employees who bring a claim under the statute.\footnote{Id. at 201.} If this provision was largely effective in protecting employees from retaliation, this would be a potentially decisive argument in favor of existing remedies. Title VII, however, is not so successful. Although there are a number of issues that complicate the effectiveness of Title VII’s retaliation provision, the primary problem is that retaliation is very difficult to prove.\footnote{Id. at 211-212.} This provision requires proof of the employer’s state of mind, which is notoriously difficult to establish.\footnote{Ibid.} To the extent that a judge or jury is likely to conclude that retaliation existed, it is likely to do so on the basis of the underlying discrimination claim.\footnote{Id. at 212.} Thus, it is difficult to identify many settings in which the retaliation provision provides independent protection for employees. There is no clear way for social media to avoid the risks of retaliation. In some cases, blog campaigns or YouTube presentations might enable an employee to remain anonymous for a longer period than would be the case during litigation. Ultimately, however, employees who wished to recover compensation or confront their employer directly would need to reveal their identities. In this way, however, employees would experience roughly the same level of vulnerability as they would face after filing a suit in a court of law.
In sum, victims of employment discrimination in the United States have a well-defined, comprehensive system for pursuing claims for relief. Unfortunately, this system is complex, expensive to navigate, and rarely satisfying for plaintiffs. To the extent that this arrangement does provide beneficial outcomes for victims of discrimination, it often does so based on publicity that precedes judgment in a court of law. The empowerment of individuals through social media, however, opens up the possibility of a more accessible and more effective avenue for achieving such publicity. Given the struggles of plaintiffs in this area of law, it is useful to consider a future that includes social media alternatives to our existing avenues of private litigation.

CONCLUSION

The consumer protection section of this paper spotlighted the work of Professor Omri Ben-Shahar, who boldly argues for the weakening of consumer protection law in order to more effectively protect consumers. In contextualizing his argument, Ben-Shahar makes an interesting claim about the methodology of his approach. The function of his argument, he says, is not to provide a blueprint for reform but instead to serve as a challenge to mainstream views, which aim to strengthen the legal remedies available to consumers.\(^\text{240}\) In this sense, Ben-Shahar says, his argument “can be regarded as a ideal type, which may not be legally implementable but may nevertheless expose desirable directions for development and reform in the law.”\(^\text{241}\)

This paper takes a similar methodological approach. Individual American litigants face high costs and long odds in their efforts to litigate most claims. It is no wonder that legal commentators often speculate as to potential alternative avenues for

\(^{240}\) Ben-Shahar, supra note 125 at 233.

\(^{241}\) Ibid.
relief. This paper argues that social media campaigns are an alternative worth exploring. Although the technology is still in its relative infancy, social media has already had a transformative impact on the relationship between disaffected individuals and one-time defendants. The ability of individuals to voice their complaints on a platform that is easily accessible and broadly impactful has given new strength to allegations of indignity and injustice. And because social media campaigns threaten the very reputation upon which modern corporations depend, these efforts are generating a response from their targets in a way that single suits for relief rarely can.

While it is unlikely that plaintiffs or legal commentators will decide to abandon the litigation avenue any time soon, the aim of this paper is to present both groups with an emerging alternative to consider. By exploring the impact of social media campaigns on two areas of law in which litigation has long been deemed invaluable, this paper seeks to demonstrate that the Internet might soon overhaul the way we think about legal rights and legal remedies.