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### Consumer Activism: From the Informed Minority to the Crusading Minority

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# CONSUMER ACTIVISM: FROM THE INFORMED MINORITY TO THE CRUSADING MINORITY

Yonathan A. Arbel and Roy Shapira\*

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*Legal scholars have long recognized that market norms are respected not only because of consumer protection laws, but also because of internal market dynamics. Consumers, the argument goes, fend for themselves and hold sellers accountable. But how exactly do consumers discipline sellers? The most influential model has been the informed minority theory, according to which a critical mass of informed consumers reads and negotiates contracts in advance, thereby pressuring sellers to offer better contracts to all consumers. Recent empirical studies, however, cast doubt on the existence of such a mass, leading many to view the informed minority theory as unrealistic. What,*

\* The University of Alabama, School of Law; Interdisciplinary Center (IDC). We thank participants at the Clifford Symposium *Rising Stars: A New Generation of Scholars Looks at Civil Justice*, as well as Lisa Bernstein, Eric Goldman, Stephen Laandsman, Ben McMichael, Tony Sebok, Catherine Sharkey, Steve Shavell, and Rory Van Loo for helpful comments and discussions. Cade McGavin Brown provided invaluable research assistance.

*then, may explain bottom-up governance in a world where consumers do not read contracts?*

*In this contribution to the Clifford Symposium, we aim at exposing a different mechanism of market discipline: one that works not through ex ante reading and negotiating, but rather through ex post pressures to meet buyers' expectations. We specifically emphasize the role of a small subset of consumers that we dub "nudniks." Nudniks are those consumers who call in to complain, fill out satisfaction surveys, post online reviews, and file lawsuits. Driven by an innate sense of justice and atypical motivations, these nudniks act as crusading consumers against underperforming sellers. Through their actions, nudniks direct attention to seller failure, leading to a variety of formal and informal sanctions, thus presenting a more realistic form of consumer activism in today's overwhelming information environment.*

#### INTRODUCTION

Market discipline comes not only from legal protections, but also from consumers themselves. Understanding the effectiveness of consumer-driven market discipline mechanisms is key, as it dictates the scope and design of legal interventions.

The leading theory of market-based discipline has traditionally been the informed minority theory.<sup>1</sup> The theory concedes that most consumers lack sophistication or time to read their contracts and shop for better terms.<sup>2</sup> Yet, it suggests that consumer-based governance of market discipline can be powerful.<sup>3</sup> As long as a minority of consumers are engaged with these aspects of the transaction, one could still expect sellers to provide favorable terms. Sellers would compete over who wins the segment of informed buyers, and in the process will have to modify their standard form contracts in ways that benefit the entire consumer body, or so the theory goes. While enjoying large influence, over the years, the informed minority theory has encountered increasing opposition. Perhaps most critically, recent empirical evidence suggests that the number of consumers that actually read and understand contracts is too low to justify a change in sellers' behavior.<sup>4</sup> Even the

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1. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 655 (1979).

2. *Id.* at 642.

3. We use the term "consumer governance" in ways that bear similarities to the more oft-used "corporate governance" term: denoting the set of formal and informal rules that govern the interactions between sellers and buyers.

4. Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1, 2 (2014) (providing empirical data that few consumers

theory's progenitors now seem to question its practicality.<sup>5</sup> This has left a gap in our understanding of market discipline through consumer governance: If market discipline does not come from a critical mass of informed readers, where does it come from?

This Essay suggests looking elsewhere: Instead of focusing on buyers who read and negotiate before the purchase, focus on buyers who feel compelled to respond strongly whenever sellers disappoint. Instead of focusing on avid readers, focus on avid “enforcers”—those consumers who demand to speak with the manager, fill out satisfaction surveys, post online reviews, and file lawsuits. We dub these consumers “nudniks.”<sup>6</sup> Nudniks do not operate like most of us. They possess an innate sense of justice, atypical motivations, and an idiosyncratic cost structure, which lead them to fight sellers who disappoint—even in situations where most of us would not notice, or notice and stay passive. Nudniks are often perceived as petty and vindictive. Yet, through their actions, nudniks provide an important public service: directing attention to failures in the market, thus leading to a variety of formal and informal sanctions against misbehaving firms. In other words, nudniks generate underappreciated spillover effects that reverberate throughout the economy. This Essay explores the role of nudniks in the enforcement of market norms and consumer governance, evaluates their social contribution, and suggests this “crusading minority” of nudniks as a missing piece in theories of consumer market governance.

This Essay argues that consumer activism predicated on a crusading minority of nudniks, who notice seller misbehavior and respond to it through legal-reputational channels, is a more realistic depiction of how market discipline works than the informed minority theory.<sup>7</sup> Nudniks complain and fight sellers publicly regardless of whether they read the contract in advance. They often complain based on their transactional expectations from the seller. And transactional expecta-

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read End Users License Agreements); Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 206 (2010) (providing empirical data that most consumers are not likely to read contracts ex ante); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 680 (2004) (“[C]ommentators agree that buyers, or the vast majority of them, do not read the terms presented to them by sellers.”). We note that most of the evidence is focused on online contracts and in specific domains; more work is needed in other areas.

5. See *infra* note 35.

6. The word derives from Yiddish and can be loosely translated to “a busybody.” See *infra* Part II.A.

7. Consumer activism here denotes activism with respect to the properties of the good, service, contract, or transaction. We do not deal here with consumer activism with respect to social or political goals.

tions are a function not only of the explicit terms in the contract, but also of sellers' oral representations, advertisements, market norms, fairness standards, and so on.<sup>8</sup> Even if the seller is contractually protected by a disclaimer nestled in the fine print, she will anticipate the potential risk that comes from entering a public battle with nudniks and may find it best to deliver better service *ex ante*.

Such a nudnik-driven mode of consumer activism creates positive spillovers, but also comes with social costs. Some nudniks pursue narrow interests that do not benefit the rest of the consumer body and impose unnecessary costs on sellers. While we do not venture to offer a conclusive quantification of the net effect of nudniks, we do offer here a synthesis of findings from the consumer complaining behavior literature, suggesting that many nudniks positively contribute to the market. At the minimum, our analysis suggests that legal scholars and policymakers should pay more attention to nudniks' effects.

The nudniks are a response to the problems with the informed minority theory. This theory essentially rests on two assumptions, regarding the what and the how of seller behavior. First, what sellers do: The theory assumes that sellers compete over a small segment of consumers who read the contract and care about its terms. Second, how they do it: To win the segment of readers, sellers have to offer better terms to all consumers across the board. Sellers operate through standard-form contracts, and cannot tell which consumer is a reader and which is not before the fact; therefore, they are forced to offer better terms for all. In this Essay, we respond to the first premise. Many have taken the recent empirical evidence of low readership rates to as undermining the possibility of internal market discipline. This Essay suggests that market discipline does not have to be predicated on consumers reading the contract before purchasing; it can also come from consumers noticing and complaining publicly about sellers who fail to meet consumers' transactional expectations, regardless of the contract. In a separate paper, we confront the second assumption of the informed minority theory: the premise that sellers cannot distinguish between active and passive consumers.<sup>9</sup> In today's world, we argue there, sellers can, and to a growing extent already do, employ big

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8. Contract law, and in particular, the Uniform Commercial Code, is sensitive to background expectations, which form the penumbra of the rights and obligations the parties owe each other. See RESTATEMENT (SECOND) OF CONTRACTS §§ 203(B), 211(A), (C), 220–23; U.C.C. §§ 1-303, 2-208(2).

9. See Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, VAND. L. REV. (forthcoming 2020) [hereinafter Arbel & Shapira, *Theory of the Nudnik*]. Another important contribution of this paper is the classification of the nudnik and the identification of its role within theories of consumer law.

data tools to tell which consumer is most likely to be nudnik, and then cater to these consumers personally.

This Essay proceeds in three parts. Part I explores the leading theories of market-based, consumer governance mechanisms and their shortcomings. Part II suggests a new direction for thinking of market-based consumer governance. Instead of counting how many consumers read contracts, we need to shift attention to consumer dissatisfaction behavior: How many consumers complain after the purchase? How do other potential consumers react to these complaints? What impact do such complaints have on sellers? We emphasize the rise of the internet and social media as factors that greatly empowered nudniks and increased their potential reach. As long as sellers are unable to spot nudniks in advance,<sup>10</sup> they are incentivized to provide higher-quality service to all consumers *ex ante*, so as not to risk the reputation and legal risk that comes with nudniks. Part III evaluates the shortcomings of nudnik-based activism. We conclude that while not all nudnik-activity is socially beneficial, overall there is reason to believe that nudniks are the unsung heroes of market governance.

#### I. CONSUMER GOVERNANCE VIA INFORMED MINORITY AND REPUTATIONAL SANCTIONS

When parties enter into a contract, they assumedly select the terms that advance their mutual goals.<sup>11</sup> Yet in the context of consumer contracts, this standard assumption too often does not apply: For a variety of reasons, consumers are limited in their negotiation, enforcement, and monitoring of contract terms, thus creating an opportunity for sellers to offer inferior, one-sided terms. Do sellers take advantage of this opportunity? If not, why? This Part provides a quick overview of the extant literature on consumer governance. We start by noting the factors that limit consumers' ability to monitor sellers' behavior directly. We then detail the two most influential theories of how consumers can nevertheless discipline sellers—the informed minority theory and the reputational discipline theory.

##### A. *The Limits of Consumer Governance*

We use the term “consumer governance” here to denote the idea that consumers can exert pressure on sellers who “misbehave,”

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10. For an exploration of how firms respond to the challenge posed by the nudnik based on big-data and predictive algorithms, see *id.*

11. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* 8 (1981); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 293 (2004).

thereby disciplining sellers' behavior and participating in the governance of market norms. Thus defined, consumer governance runs into several well-known issues that ostensibly limit its effectiveness.

First, consumers often *lack the necessary sophistication* to understand the terms of their contracts.<sup>12</sup> The contractual language is complex, the grammar is convoluted, the vocabulary is full of legalese, and even the format tends to be quite jarring.<sup>13</sup> The substance itself can also be difficult to grasp, given the complex nature of some common transactions (think, e.g., about the number of the parties involved in a typical home purchase agreement). These difficulties present a challenge to many consumers, especially in groups that suffer from low rates of financial and legal literacy.<sup>14</sup>

Second, many consumers are *apathetic* about the terms of their contracts.<sup>15</sup> Apathy is said to be rational if the costs of being engaged outweigh the benefits. For many consumers, this is indeed the case: The costs of reading contracts are immediate and certain, namely one's time and effort. The benefits of reading, by contrast, are remote and uncertain. Even if a consumer identifies an unfavorable choice-of-law clause, the odds of this clause mattering is quite low for any individual consumer.<sup>16</sup> Moreover, the consumer will often lack the bargaining power necessary to negotiate any of the terms in contracts that are mostly based on standard forms. This makes reading the contract a losing proposition from the consumer's standpoint in many cases.<sup>17</sup> In

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12. Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 598–99 (1990) (noting consumer inability to discern legal meaning of contractual terms, even those in plain language, due to high costs).

13. See Yonathan A. Arbel & Andrew Toler, *All-Caps* (U. of Ala. Legal Studies, Research Paper No. 3519630, Jan. 15, 2020) (finding that all-caps blocks of text in contracts fail to improve the quality of consumer consent and make it worse for older readers), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3519630](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519630); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019).

14. See generally Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy: An Overview*, 10 J. PENSION ECON. & FIN. 297 (2011). See also Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Retirement Planning in the United States*, 10 J. PENSION ECON. & FIN. 509, 512 (2011) (finding, in a survey of American adults, that only 30% could answer correctly three basic questions of financial literacy); Judy T. Lin et al., *The State of U.S. Financial Capability: The 2018 National Financial Capability Study*, [https://www.usfinancialcapability.org/downloads/NF-CS\\_2018\\_Report\\_Natl\\_Findings.pdf](https://www.usfinancialcapability.org/downloads/NF-CS_2018_Report_Natl_Findings.pdf) (finding lower rates of financial literacy among minorities).

15. See generally William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 33 (1975); Roger Van Den Bergh & Louis Visscher, *The Preventive Function of Collective Actions for Damages in Consumer Law*, 1 ERASMUS L. REV. 5, 6 (2008).

16. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995). For the consumer, a 1-in-100 chance of litigation is a remote possibility. For a firm serving 100 consumers, it is a high likelihood.

17. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 445 (2002).

other cases, consumers can suffer from the other side, namely, *irrational apathy*. That is, even if it is worthwhile for them to read and negotiate terms, they are bound by a variety of cognitive limitations and biases that would prevent them from reading. For example, consumers may act myopically, by failing to consider future possibilities or overly discount future events.<sup>18</sup>

Finally, consumers often ignore and tend to remain *passive when sellers disappoint*. That is, consumers are not just passive pre-purchase, in reading and negotiating, but also passive post-purchase. Part of the reason for this passivity is that consumers are often unaware that their contractual rights were violated.<sup>19</sup> Even when consumers are sophisticated and sufficiently aware, they may opt to do nothing, simply because they consider taking action to be too costly. This is especially true for bringing lawsuits and waging a legal battle. The costs of bringing a lawsuit, the risk of losing the case, and the difficulty of collecting judgments if you have won, all lead consumers to frequently abandon the pursuit of rights that they know were not met.<sup>20</sup> In fact, recent work suggests that reading the contract after the consumer experienced a breach may actually make the consumer less likely to complain, as sellers include unenforceable and otherwise misleading terms in their contracts, which cause buyers to give up.<sup>21</sup>

On paper, sellers would be aware of the confluence of these problems and offer buyers inferior terms in their contracts *ex ante*, and fail to deliver on obligations *ex post*. Such seller behavior may easily lead to an eventual breakdown of consumer trust—akin to a “lemons problem,” whereby deep mistrust prevents many desirable transactions.<sup>22</sup> What stops this supposed race to the bottom? How do consumer markets function given all these inherent problems? The legal literature has offered several theories in response. The next two Sections elaborate.

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18. See, e.g., Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 755 (2008); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–80 (1998).

19. From experience teaching this subject (Arbel), even most law students are unaware of the implied warranty of fitness for a particular purpose before it is covered in class. See U.C.C. § 2-315 (AM. LAW INST. & UNIF. LAW COMM’N, amended 2011).

20. For a concrete example from the most common type of consumer cases—debt collection cases—see generally Yonathan A. Arbel, *Adminization: Gatekeeping Consumer Contracts*, 71 VAND. L. REV. 121, 130–42 (2018).

21. Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 3 (2017).

22. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).



*B. The Informed Minority Theory and Its Limits*

The most influential response to the abovementioned concerns has been Schwartz & Wilde's informed minority theory.<sup>23</sup> The informed minority theory readily concedes that the majority of consumers are unsophisticated and do not engage with the contracts before they purchase. Still, the theory argues that a minority of consumers *are* sophisticated and *do* read their contracts carefully and negotiate the terms before purchasing. This informed minority diligently compares the product and its terms to those offered by competitors. The efforts of the minority create demand-side pressure on firms to offer better contractual terms, as doing so will allow firms to win this segment of the market. Now, either because many consumer contracts are standard-form agreements or because firms cannot distinguish between consumers on the basis of their sophistication and tendency to read,<sup>24</sup> the way a firm can win the hearts of the informed minority is by offering better terms across the board.<sup>25</sup> Consequently, competitive pressures created by an informed minority push the entire market towards a more consumer-friendly equilibrium where firms are competing not only on price, but also on the quality of their contracts.

The informed minority theory thus explains why despite the lack of sophistication on the part of many consumers, contractual terms are not the worst possible terms conceivable. The diligence of the informed minority is a bulwark against sellers' tendency to grossly favor themselves.

While highly influential, the informed minority theory runs into theoretical and empirical problems.<sup>26</sup> For the theory to work, there must be a sufficiently sizable minority, a critical mass of readers (after all,

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23. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979). For a review of its influence, see generally Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077 (2014) (reviewing DOUGLAS G. BAIRD, *RECONSTRUCTING CONTRACTS* (2013)); BRIAN H. BIX, *CONTRACT LAW: RULES, THEORY, AND CONTEXT* (2012)); R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 U.C. HASTINGS L. J. 635 (1996).

24. Elsewhere we focus on the ways the assumption of inability to screen consumers might break, given big data and predictive analytics, and detail the alarming consequences. Arbel & Shapira, *Theory of the Nudnik*, *supra* note 9.

25. See also George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1347 (1981) ("If a small group of consumers reads warranties and selects among products according to warranty content, manufacturers may be forced to draft warranties responsive to the group's preferences, even though the large majority of consumers generally neglect warranty terms.").

26. For examples of notable objections, see Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 735-54 (2008); Cruz & Hinck, *supra* note 23; Zamir, *supra* note 23; Jeff Sovern, *Toward a New Model of Con-*

why should sellers alter their form contracts in order to win the business of only a handful of reading consumers?). But consumers generally dislike reading contracts,<sup>27</sup> and the private gains from reading can be quite marginal—there is limited opportunity to negotiate terms, competitors might not offer significantly better terms, and there is a good chance that the covered provision will never materialize.<sup>28</sup> While the costs are real and private, the benefits of reading are more remote and public—leading each individual consumer to attempt to free-ride the efforts of others.<sup>29</sup> Some recent empirical work now documents the theoretical prediction: The number of people who actually read contracts is too small to reach the critical mass needed for the informed minority mechanism to work.<sup>30</sup>

Even if the informed minority theory was plausible when Schwartz and Wilde first developed it in the 1970s, the increase in length and complexity of consumer contracts occasioned by the rise of the digital age has gradually rendered the theory less and less fit for today's world.<sup>31</sup> Contracts nowadays are also encumbered by the rise of ever-increasing disclosures, which compete over, and overload, limited consumer attention.<sup>32</sup> And while the non-law-and-economics scholars have long been skeptical of the theory,<sup>33</sup> nowadays even the law and economics community loses faith.<sup>34</sup> Exhibit A: Schwartz himself seems to believe that nobody reads contracts these days.<sup>35</sup>

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*sumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 166–72 (2006).

27. See, e.g., Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law* (Coase-Sander Working Paper Series in L. & ECON. No. 415, 2008), [https://chicagounbound.uchicago.edu/law\\_and\\_economics/549/](https://chicagounbound.uchicago.edu/law_and_economics/549/). For a review of the literature on the no-reading problem, see Arbel & Toler, *supra* note 13.

28. See *supra* notes 15–18 and accompanying text.

29. *Id.*

30. Bakos et al., *supra* note 4, at 4 (“We find that the fraction of consumers who read such contracts is so small that it is unlikely that an informed minority alone is shaping software license terms.”).

31. See Todd D. Rakoff, *Contracts of Adhesion, An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 n.22 (1983); Zamir, *supra* note 23, at 2102–03; Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 448 (2002).

32. See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 94–101 (2014).

33. See Rakoff, *supra* note 31; Zamir, *supra* note 23; Hillman & Rachlinski, *supra* note 31.

34. Cruz & Hinck, *supra* note 23.

35. Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 552 (2014) (“[T]he state should jettison the disclosure project of making *all* terms accessible to consumers with the expectation that consumers can read the entire document.”). See also Ian Ayres & Eyal Zamir, *Mandatory Rules* 12 n.54 (Hebrew Univ. of Jerusalem Legal Res. Paper No. 19-12), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3420179](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420179) (noting the absence of the informed minority theory from Schwartz' recent work).

*C. Reputational Discipline Theory and Its Limits*

Other theories of bottom-up market discipline usually invoke the concept of reputational sanctions.<sup>36</sup> Legal scholars and economists have suggested that reputational forces play an increasingly important role in today's consumer markets, given the rise of the internet and social media.<sup>37</sup> The idea is that a seller who underperforms can expect buyers to post negative online reviews, thereby causing other potential buyers to avoid purchasing from the seller in the future. The prospect of negative reputational information deters such seller misbehavior *ex ante*, or so the argument goes.

The appeal of the reputational discipline theory is quite clear. And indeed, there exists evidence that both negative and positive reputational information affect business revenues.<sup>38</sup> However, theories that invoke reputational discipline are usually underspecified and rely too much on strong assumptions. Sure, reputation matters. But how exactly is reputation produced? Who disseminates details of private interactions between a seller and a buyer? Is the information considered credible? Do other buyers act on it? Existing accounts do not develop satisfying answers to these questions. They implicitly assume that dissatisfied consumers put in motion meaningful reputational sanctions by transparently and mechanically sharing details of their dissatisfaction with others online. But given that accurate reputational information is a public good, why would an individual consumer find it worthwhile to share this information with others? And why would other consumers read, believe, and decide to act based on such information from another buyer (who, in all likelihood, they never met)?

Writing reviews comes with certain costs—the time it takes to write the review, the legal risk involved in defamation lawsuits,<sup>39</sup> the social

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36. On reputational sanctions more generally see Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL'Y REV. 1 (2015); Roy Shapira, *Reputation through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193 (2016); Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, WAKE FOREST L. REV., 2019 (Univ. of Ala. Legal Stud. Res. Paper No. 3239995), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3239995](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239995) [hereinafter Arbel, *Reputation Failure*].

37. See, e.g., Alex Tabarrok & Tyler Cowen, *The End of Asymmetric Information*, CATO UNBOUND (2015); Adam Thierer et al., *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the "Lemons Problem,"* 70 UNIV. MIAMI L. REV. 830, 830 (2016).

38. Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com* 10, 12 (Harv. Bus. Sch. Working Paper No. 12-016, 2016), [https://www.hbs.edu/faculty/Publication%20Files/12-016\\_a7e4a5a2-03f9-490d-b093-8f951238dba2.pdf](https://www.hbs.edu/faculty/Publication%20Files/12-016_a7e4a5a2-03f9-490d-b093-8f951238dba2.pdf).

39. See Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239 (2019) (noting how consumer reviews can lead to litigation), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3239995](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239995).

pressure to conform, and so on.<sup>40</sup> Indeed, evidence shows that few consumers actually write reviews, and among those who choose to do so, there is a strong self-selection that might bias reputational information in unpredictable ways.<sup>41</sup> The fast-growing body of evidence on online reviews suggests that consumer-sourced reputational information can be an unreliable guide to future consumers, and therefore a weaker restraint on firm behavior than proponents admit.<sup>42</sup>

To emphasize, we do not claim here that reputational forces are unimportant or insufficiently potent. Both of us have written extensively on the important role that reputation plays in market discipline.<sup>43</sup> Our point here is that too often consumer governance theories that invoke reputation are under-specified. This gap calls for an explanation that current theories fail to provide.

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For bottom-up market governance to emerge, consumers must wield sufficient power. Yet most consumers remain uninformed and unengaged. The public good nature of market discipline makes it susceptible to free riding and consumer collective action problems. Where does effective consumer activism come from, then? One influential theory suggested that a critical mass of consumers who do read contracts make sellers change their behavior toward all other consumers. Yet the accumulated evidence suggests that in many markets such a critical mass does not exist. Another influential theory suggests that dissatisfied consumers will complain online, thereby creating a reputational risk for sellers. However, this reputational theory fails to explain who invests in creating and diffusing credible information that leads other consumers to stop purchasing from a given seller, why they do so, and how. Accordingly, there is a gap in our understanding of how consumer governance works. The next Part suggests a way to narrow this gap by examining the role of a small subset of consumers who notice and fight back whenever sellers underperform.

## II. THE CRUSADING MINORITY THEORY

Bottom-up market discipline relies on the work of a small subset of active consumers. Among those activists, we focus here on a specific type that we call nudniks. Part II.A offers a typology of different types of consumers to explain what exactly we mean by nudniks. Part II.B

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40. Arbel, *Reputation Failure*, *supra* note 36.

41. *Id.* at 6.

42. *Id.* at 14–15, 33.

43. *Id.*; ROY SHAPIRA, *LAW AND REPUTATION* (forthcoming 2020).

offers a few motivating examples of nudniks in action. Part II.C explains why consumer activism driven by nudniks is a more realistic possibility in today's world than consumer activism driven by an informed minority. Finally, Part II.D elaborates on how nudniks bring change in seller behavior.

*A. The Nudnik and Other Types of Consumers*

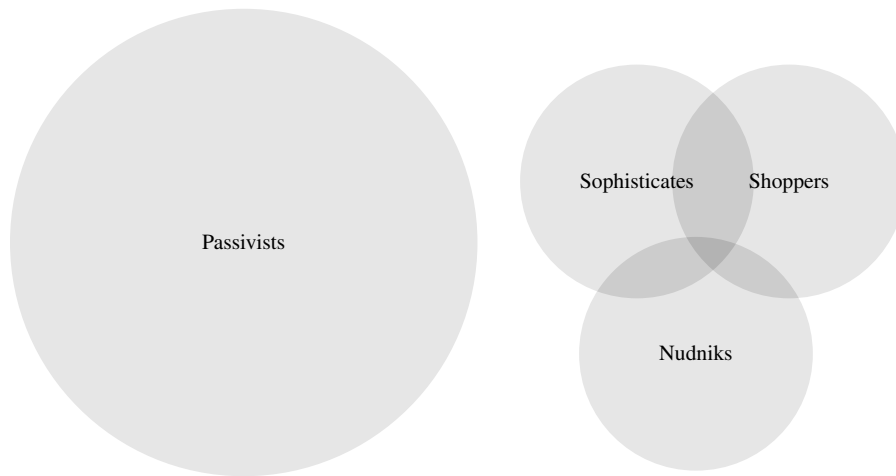
Originally deriving from Yiddish, “nudnik” can be translated as “a bore, a nag, a jerk”<sup>44</sup> or a “busybody.” While all these terms carry negative connotations, we use the relatively unfamiliar nudnik term in a neutral way.<sup>45</sup> A nudnik, in our framework, denotes a consumer who is likely to vindicate her transactional rights. When she feels that her rights were breached, she will not “let it go” until she has addressed the issue, even if most other consumers will not do so. The nudnik is the type of consumer who will demand to speak with the manager, write an angry letter to the editor, or bring a lawsuit over a torn pair of pants that cost \$40.

To understand the attributes and the role that nudniks play in consumer markets, it is useful to consider nudniks alongside various prototypes of consumers. We can roughly separate the different types of consumers into four categories: “Passivists,” “Shoppers,” “Sophisticates,” and “Nudniks.” A caveat is in order at the outset: Each of the categories inevitably generalizes, and the lines are murky. Still, for our modest purposes here—understanding what makes nudniks unique—the rough categorization works. Figure 1 schematically illustrates this classification.

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44. *Nudnik*, <https://en.wiktionary.org/wiki/nudnik> (last updated Oct. 14, 2019).

45. Internet jokes, while ephemeral, capture public sentiment, and so it is telling of wider public reaction that a common recent ‘meme’ involves nudniks, and derides them for being privileged and entitled. See, e.g., “*Speak to the Manager*” *Haircut*, KNOWYOURMEME (2015), <https://know-yourmeme.com/memes/speak-to-the-manager-haircut> (last visited Nov. 27, 2019). For the maltreatment of nudniks in the marketing literature and more generally, see LEON G. SCHIFFMAN & JOSEPH L. WISENBLIT, CONSUMER BEHAVIOR 44 (11th ed. 2015).

FIGURE 1: Species in the *Homo Consumerus* Genus

Passivists are the largest group of consumers—these are those consumers who tend to engage with products only at a basic level, taking minimal action both when shopping for products and when problems arise. In selecting products, passivists engage in a rudimentary price and term comparison. When problems with the product arise (e.g., a small overcharge, late shipping), they will not always notice, or note the problem but do little about it. The most action a passivist would take in response to service failure is refraining from purchasing the product again or complaining in a way that does not entail much effort, such as asking the service representative about the issue.

The marketing literature has long documented that most consumers are passivists.<sup>46</sup> Marketing scholar Professor Richard Oliver summarizes the typical consumer behavior by stating that “[c]onsumers do not do anything, in the main, in response to consumption.”<sup>47</sup> The 2006 Retail Customer Dissatisfaction Study indeed found that only six per-

46. SCHIFFMAN & WISENBLIT, *supra* note 45, at 421 (“Research indicates that only a few unsatisfied customers actually complain.”); Jean-Charles Chebat et al., *Silent Voices: Why Some Dissatisfied Consumers Fail to Complain*, 7 J. SERV. RES. 328 (2005); Clay M. Voorhees et al., *A Voice From the Silent Masses: An Exploratory and Comparative Analysis of Noncomplainers*, 34 J. ACAD. MARK. SCI. 514, 514 (2006) (“The majority of dissatisfied customers fail to complain . . . .”); TECH. ASSISTANCE RESEARCH PROGRAM INST. & U.S. OFFICE OF CONSUMER AFFAIRS, CONSUMER COMPLAINT HANDLING IN AMERICA: AN UPDATE STUDY (1979) (finding that 96% do not complain); Stephen S. Tax & Stephen W. Brown, *Recovering and Learning From Service Failure*, 40 MGMT. REV. 75, 75–88 (1998) (finding that 90% do not complain).

47. RICHARD L. OLIVER, *SATISFACTION: A BEHAVIORAL PERSPECTIVE ON THE CONSUMER* 385 (2d ed. 2015).

cent of consumers who experienced a problem voiced it to the firm.<sup>48</sup> These rates increased somewhat when the value of the good was higher, but the base rates of consumers who take action rarely exceeded ten percent.<sup>49</sup>

The paucity of active consumers is not surprising.<sup>50</sup> Standing up for one's rights comes at an immediate cost. It involves social discord and may require a considerable investment of time and effort.<sup>51</sup> Activism may be followed by social opprobrium. The time involved in complaining can also be quite substantial; we leave it as an exercise for the reader to estimate how long it would take to resolve a technical issue with her cable company. The benefits of taking such action, by contrast, are uncertain: The seller may not yield to the consumer's demands, and even if the seller relents, the value of such remedial action may not be significant. On net, the value of an uncertain replacement of a faulty product can be easily outweighed by the certain investment of time and effort.<sup>52</sup> In a study of 149 dissatisfied consumers who did not complain, the consumers explained their inaction as follows: shortage of time was the leading reason (~21%), followed by lack of responsiveness on part of sellers (~20%), and consumer personality factors (some simply do not like the confrontation involved in complaining) (~17%).<sup>53</sup>

Nudniks, in contrast, are active. They become "crusading consumers" whenever their transactional expectations are defied, even when most others would have decided that the costs of fighting sellers are not worth the expected benefits. It may be time to interject with a note on terminology. While consumer passivism is often labelled "rational," we wish to avoid labeling consumer complaining as "irrational." A nudnik who serially complains does not necessarily act irrationally. A consumer suing for a small overcharge can be cast as irrational if one reduces rationality to the pursuit of material cost-ben-

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48. *Beware of Dissatisfied Consumers: They Like to Blab*, MARKETING (Mar. 8, 2006), <https://knowledge.wharton.upenn.edu/article/beware-of-dissatisfied-consumers-they-like-to-blab/> (citing WHARTON BUS. SCH. & VERDE GRP., RETAIL CUSTOMER DISSATISFACTION STUDY (2006)).

49. John Goodman, *Basic Facts on Customer Complaint Behavior and the Impact of Service on the Bottom Line*, 8 COMPETITIVE ADVANTAGE 1, 1-5 (1999).

50. John W. Huppertz, *Firms' Complaint Handling Policies and Consumer Complaint Voicing*, 24 J. CONSUMER MARKETING 428, 428 (2007).

51. See generally Robin M. Kowalski, *Complaints and Complaining: Functions, Antecedents, and Consequences*, 119 PSYCHOL. BULL. 179 (1996) (examining how different personality types experience the lodging of complaints); Marsha L. Richins, *A Multivariate Analysis of Responses to Dissatisfaction*, 15 J. ACAD. MARKETING SCI. 24 (1987).

52. For a review of the marketing literature on the costs and benefits of complaints, see Huppertz, *supra* note 50, at 429-30.

53. Voorhees et al., *supra* note 46, at 519.

efit analysis. But if one sees the nudnik's preferences as consisting of broader concerns, from spite to altruism to all other human motivations that are in-between, then labeling his actions irrational no longer fits. For our purposes, it is immaterial what label one gives to their behavior, so long as it is clear that nudniks defy the standard account of rational apathy.

Nudniks are not the only type of active consumers. "Shoppers" present another category:<sup>54</sup> those consumers that the informed minority theory envisions, who shop around, read contracts, and compare among products based on price, quality, and the terms of the consumer agreement. A shopper, for example, will not fly with a certain airline if she reads on the website that this airline is not willing to offer compensation for delays; avoid a car dealership if the contract does not provide warranties; or will not sign up for a credit card if the agreement shows cash advance fees that are too high. In other words, for the shopper, the terms of the contract *are* the product. Nudniks, in contrast, are not necessarily committed to studiously comparing among sellers. A nudnik can form her transactional expectations based on the same sources that most other consumers use—negotiations with the seller, representations, advertisements, market norms, and so on.<sup>55</sup>

Shoppers exert pressure *ex ante*, before the purchase; nudniks exert pressures *ex post*, after the purchase. If a seller includes an unfavorable term in the fine print, such as denying refunds for defective products, this term may end up costing the seller consumers who are shoppers, as they will switch to a more consumer-friendly competitor. Nudniks (like passivists) may not be as sensitive to the inclusion of such terms, if only because they may not read the fine print. On the other hand, a seller who actually enforces the term—e.g., denying the nudnik a refund for a broken printer—risks invoking the nudnik's wrath. Herein lies another distinction. The shoppers' mode of action is *exit*: they do not engage with sellers who offer inferior terms. By contrast, the nudnik's mode of action is more elaborate, and consists of a variety of *voice* strategies, both private and public.<sup>56</sup>

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54. Economic theories of search behavior focus on shoppers. Sara Fisher Ellison, *Price Search and Obfuscation: An Overview of the Theory and Empirics*, in HANDBOOK ON THE ECONOMICS OF RETAILING AND DISTRIBUTION 287 (2016).

55. These broader transactional expectations may sometimes become part of the contract itself—through tools of interpretation that focus on oral representations, trade customs, past dealings, etc. See *supra* note 8. But that is not always the case (think, for example, of the effect of the parol evidence rule). See RESTATEMENT (SECOND) OF CONTRACTS § 213; U.C.C. §1-303.

56. We elaborate on nudniks' different modes of activism in Arbel & Shapira, *Theory of the Nudnik*, *supra* note 9.



The last category of consumers is sophisticates. These are the consumers who take advantage of the most favorable terms of the transaction, strategize their use of the product to derive the most value, and file lawsuits when they expect a large judgment.<sup>57</sup> The sophisticates are typified by higher levels of literacy, a better understanding of legal concepts, and easier access to legal representation. The sophisticate is one to know which credit card to use in each transaction when choosing among a dozen that are tightly packed in her wallet, when to make a claim on her insurance policy, and how to maximize the value of her miles.<sup>58</sup> Sophisticates are not just better at consuming, they are also better at identifying profitable lawsuits. The sophisticate can tell when her contractual rights are violated, the value of filing a lawsuit or a complaint, and the most effective route to use.

The sophisticates are like nudniks, in a sense that they are “private enforcers” in the market. But, unlike nudniks, sophisticates enforce only when a cold cost-benefit calculation says it pays to do so. In their enforcement actions, sophisticates are in a sense like bounty hunters. They seek personal profit from vindicating their legal rights. A classic example is the serial class action plaintiff who actively seeks wrongs so as to file profitable lawsuits. In China, consumer protection laws gave birth to “counterfeit hunters”, who purchase counterfeits just so that they can file a complaint to the regulator and collect a reward under the rules there.<sup>59</sup> Indeed, policy makers sometimes leverage bounty hunters to help with private enforcement of issues of public import—think, for example, on the use of private rewards in *qui tam* claims.<sup>60</sup>

Sophisticates and nudniks are therefore birds of a different feather. Sophisticates will complain or sue only when they are within their legal right to do so and when it *pays* to complain. Nudniks complain because it is in their blood. They do not like to be treated unfairly. They believe that sellers should keep promises and will not stop until the issue is rectified, regardless of a cold cost-benefit analysis of what it would take to keep fighting. Sophisticates focus on the product or

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57. A famous example is John Leonard, a consumer of Pepsi who found an apparent loophole in their promotion offering—a harrier jet estimated at \$22 million for anyone who could collect 700,000 points. As points were purchasable at a rate of cent/point, that meant that an investment of \$700,000 would net a profit of \$21.3 million. *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116, (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

58. For example, the authors have, on average, 20 credit cards. One of the authors only has one card.

59. Sui-Lee Wee, *Though Awash in Fakes, China Rethinks Counterfeit Hunters*, N.Y. TIMES, Nov. 30, 2016.

60. See David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. L. REV. 1689, 1690 (2013) (noting the shift “toward private lawsuits as a regulatory tools”).

contract: They will use the product optimally, as in using balance transfers to roll payments and avoid interest payments, and will file class actions when they think a favorable settlement or judgment is likely. The nudniks, on the other hand, are more likely to take action vis-à-vis the seller; when they feel the seller mistreated them, they will complain, bring a lawsuit, report to the regulator, and so on.

Another way to put it: Sophisticates operate based on the fine print, while nudniks do just fine without the print. The sophisticates act upon contractual rights they know they have; nudniks upon broad transactional expectations.<sup>61</sup> To illustrate, think about a restaurant that notes in its terms and conditions a disclaimer that the chef holds full discretion over how to cook the meat and will not replace a dish. If the restaurant serves an overcooked steak, the irate nudnik will demand to have it replaced and it will comfort her little even if the restaurant's general counsel reads her the contractual disclaimer. Meanwhile, the sophisticate will sit and angrily chew, recalling the exclusion in Article 7, subsection (3).

An important distinction for our purposes is that the nudnik's actions are more likely to generate positive spillovers than the sophisticate's actions. When sophisticates use products optimally, they tend to extract private benefits. In fact, sophistication often leads to *negative* spillovers and cross-subsidies from less sophisticated consumers.<sup>62</sup> Even when sophisticates file lawsuits, or even class-actions, the private profit motive suggests that they internalize a larger share of the value of their activities. An even more important distinction stems from the sophisticates' dependence on the exogenous cost-benefit of private enforcement. To illustrate, consider the example of the class action plaintiff. Recent developments in American law, and specifically the wave of mandatory arbitration clauses, severely limit the scope of collective action, making it extremely difficult to benefit from bringing them.<sup>63</sup> In this environment, the bounty hunters who face an insur-

61. The idea that consumers make choices based on background knowledge, not deriving directly from the contract, was recently advanced by Ayres and Schwartz: "Consumers also learn about the deals they make from visiting firms, their experience with similar deals, discussions with friends, their observation of other consumers' purchasing choices, and reading consumer reports." Ayres & Schwartz, *supra* note 35, at 550–51.

62. See, e.g., Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505, 519 (2006) (analyzing cross-subsidies between sophisticated and unsophisticated consumers).

63. See *AT&T Mobility v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that the Federal Arbitration Act preempts state power to limit class-action waivers); Zachary D. Clopton, *Class Actions and Executive Power*, 92 N.Y.U. L. REV. 878, 880 (2017) ("The private-enforcement class action faces strong 'headwinds' in the form of class certification, subject-matter jurisdiction, and arbitration."); Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U.

mountable hurdle in collecting their bounty will stop hunting. By contrast, nudniks may still be irritated enough and have a strong sense of commitment to make things right that they will file an individual lawsuit, attempt to enlist the help of journalists or report to the regulator. In such scenarios, the positive spillovers from nudnik actions are even more impactful.

To be sure, the distinction between sophisticates and nudniks is not always clear. Consider for example the case of “gripe sites.”<sup>64</sup> When the Partingtons ran into issues with their contractor, Stantons and Sons Contracting, they opened a blog hosted under danstantonissue.com, where they detailed their negative experiences.<sup>65</sup> Similarly, a disappointed customer who bought an improperly installed fence from Lowes opened the blog Lowes-Sucks.com.<sup>66</sup> In both examples, the gripe sites share key features of nudnik-based activism: a small consumer resisting seller misbehavior and instead of doing nothing about it (as most consumers would), going to great lengths to fight the misbehavior seller publicly.<sup>67</sup> Yet many other gripe sites exist,<sup>68</sup> and some of them are used to blackmail companies and do not represent authentic consumer sentiments.<sup>69</sup> The operator of the website may be solely motivated by the desire to receive payment from the company to take down the website. Operators of the latter type of gripe sites can be perceived as “trolls”; or, in our framework, and given that the profit-motive seemingly drives them, as cynical sophisticates.

### B. Nudniks in Action: Motivating Examples

We illustrate nudniks’ modes of activism and the role they play in consumer markets with a few motivating examples.<sup>70</sup> The examples

L. REV. 873 (2019) (arguing that the rise of mandatory arbitration clauses dilutes the effectiveness of market discipline).

64. See generally Rachael Braswell, *Consumer Gripe Sites, Intellectual Property Law, and the Use of Cease-and-Desist Letters to Chill Protected Speech on the Internet*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1241 (2007).

65. Dan Stanton, *Contractor Issue*, BLOGSPOT, <http://danstantonissue.blogspot.com/>; see also Bruce Mohl, *Constructive Criticism*, BOSTON GLOBE (Sept. 9, 2007), [http://archive.boston.com/business/technology/articles/2007/09/09/constructive\\_criticism/](http://archive.boston.com/business/technology/articles/2007/09/09/constructive_criticism/).

66. Jacqui Cheng, *Intellectual Property Laws Abused in Question to Shutdown Lowes-sucks.com*, ARS TECHNICA (Sept. 26, 2007). In many of the gripe site cases, the seller claims trademark infringement, but such claims are rarely successful.

67. See Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 306 (2011) (noting the public-service orientation of gripe sites).

68. See Peter Johnson, *Can You Quote Donald Duck?: Intellectual Property in Cyberculture*, 13 YALE J.L. & HUMAN. 451, 478 (2001).

69. Wu, *supra* note 67, at 304.

70. We discuss some of these examples in greater detail in Arbel & Shapira, *Theory of the Nudnik*. We also include some graphics and other illustrations in the companion website.

we use here are admittedly representative of only a small segment of nudnik activities in the real world: we use examples that become publicly salient, while most of nudnik activities happens away from the limelight. Think for example about the consumer who consistently writes detailed negative Yelp reviews whenever the seller disappoints, posting rants on products' Facebook pages, submitting letters to the Better Business Bureau or complaints to the regulator, and so on.<sup>71</sup> In most cases, we will not hear about this nudnik's activities. Still, the publicly-salient examples we use are helpful in a sense that they tease out certain recurring themes in nudnik-based activism.

A classic example of a nudnik in action comes from Harvard Business School Professor Ben Edelman. In 2014, Professor Edelman ordered takeout from a local restaurant, Sichuan Garden.<sup>72</sup> When he reviewed the check, he found that he was overcharged \$1 for each of the four items ordered.<sup>73</sup> Edelman wrote a message on the restaurant's website and followed up with a detailed email, noting the \$4 overcharge and asking for a clarification.<sup>74</sup> The owner responded by noting that the website prices have "been out of date" for quite some time relative to the restaurant menu.<sup>75</sup> Edelman then sought a compensation of \$12 for the overcharge, citing the Massachusetts Unfair and Deceptive Trade Practices Act, which permits treble damages in certain cases.<sup>76</sup> The owner refused, Edelman reported the incident to the regulator and the parties continued corresponding until the story leaked to the media. The public response was highly negative, but the

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Yonathan Arbel, *Theory of the Nudnik—Battle of the Forms*, BLOG (Feb. 1, 2019), <http://battleoftheforms.com/theory-of-the-nudnik/> [hereinafter Arbel, *Battle of the Forms*].

71. To clarify: the emphasis here is on "consistently." The reader who wonders if she would be considered a nudnik in our framework because she once posted a review on Yelp or TripAdvisor can ask herself this simple question: how often do I fight sellers when I am dissatisfied with the product or service. If I frequently take action when sellers disappoint, I am a nudnik (nothing wrong with it!). If I once wrote a negative review because I was so upset and needed to air out the frustration, chances are I am not really a serial consumer crusader.

72. See Hilary Sargent, *Ben Edelman, Harvard Business Professor, Goes to War over \$4 Worth of Chinese Food*, BOSTON.COM (Dec. 9, 2014), <https://www.boston.com/culture/restaurants/2014/12/09/ben-edelman-harvard-business-school-professor-goes-to-war-over-4-worth-of-chinese-food>.

73. *Id.*

74. *Id.*

75. *Id.* For some other examples on a companion website, see Arbel, *Battle of the Forms*, *supra* note 70.

76. MASS. GEN. LAWS. ch. 93A, § 11, *declared unconstitutional by Rev-Lyn Contracting Co. v. Patriot Marine, LLC*, 760 F. Supp. 2d 162 (D. Mass. 2010).

negativity was directed at Edelman and not at the overcharging restaurant. His behavior was portrayed as petty and privileged.<sup>77</sup>

The overwhelmingly negative public response fails to appreciate the essential public service Edelman provided—namely, deterring overcharging. Anecdotally, when we called the restaurant, five years after the story broke and replicated the original order, we found the pricing to be accurate: The online menu matched the actual prices down to the penny. Edelman's insistence here may strike some as "irrational," as the opportunity cost of the time Edelman—a well-paid Harvard Business Professor and a sought-after consultant—spent on fighting the overcharge easily dwarfed the \$12 he was ostensibly after. Yet if it were not for people like Edelman who go through the trouble, restaurants would have a much easier time systematically overcharging the rest of us.<sup>78</sup>

Another example came in 2011, when Molly Katchpole, a 22-year-old customer of Bank of America noticed an upcoming change in the bank's fee structure.<sup>79</sup> The bank was about to add a \$5 charge to certain debit-card users, a right the bank had under its contract with its customers.<sup>80</sup> Molly not only noticed the upcoming change, she decided to fight back against it.<sup>81</sup> She started an online petition, where she wrote: "[T]his change will hit low income customers the worst - including people like me, a recent college graduate working two part-time jobs . . . . At some point, we've got to say enough is enough."<sup>82</sup> To promote her petition, she used social media in combination with traditional media—she reached out to an ABC reporter who filmed a segment about her petition.<sup>83</sup> Her call resonated with many others and the petition quickly garnered over 300,000 signatures.<sup>84</sup> Soon after, the bank announced that it would abandon its plan to add this charge. The Katchpole example illustrates how nudniks pay attention to aspects of the seller behavior that many do not see; how they become active when they feel wronged even when most of us would remain

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77. Elizabeth Barber, *A Harvard Professor Launched an Epic Rant Over an Extra \$4 on his Chinese Takeout Bill*, TIME (Dec. 10, 2014), <http://time.com/3627282/harvard-professor-chinese-takeout-ben-edelman/>.

78. Telephone Conversation with Victoria Moffa, Research Assistant (Mar. 1, 2019).

79. Molly Katchpole, *Tell Bank of America: No \$5 Debit Card Fees*, CHANGE.ORG (Nov. 1, 2011), <https://www.change.org/p/tell-bank-of-america-no-5-debit-card-fees>.

80. *Id.*

81. *Id.*

82. *Id.*

83. Matt Gutman & Susanna Kim, *BofA Site Problems Persist; Customers Petition Company*, ABC NEWS (Oct. 5, 2011), <https://abcnews.go.com/Business/bank-america-customers-launch-petition-debit-card-fee/story?id=14665531>.

84. See Katchpole, *supra* note 79.

passive; and how the nudnik's activism can draw others, normally passive consumers, into action and bring change in market behavior.

Another example of a high impact strategy is that of the Canadian country singer, Dave Carroll. On his flight with United Airlines, his favorite 710 Taylor guitar was broken due to mishandling by the ground crew.<sup>85</sup> Upset with the company's indifference, he posted a song on YouTube called "United Breaks Guitars," which quickly went viral with over 19 million views.<sup>86</sup> The story was soon reported by the mass media as well.<sup>87</sup> By one estimate, the incident led to a decline of over ten percent in the company's stock price.<sup>88</sup> Consequently, United backed down and offered monetary compensation.<sup>89</sup>

In 2017, British Airways lost Hasan Syed's father's luggage in an international flight to Paris. Syed took his grievance to social media, where he tweeted: "Don't fly with @British\_Airways. They can't keep track of your luggage."<sup>90</sup> This tweet had a twist. Syed paid \$1,000 to Twitter to have this tweet promoted to as many followers of British Airways as possible.<sup>91</sup> Over a short period of time, his tweet was seen by over 70,000 users.<sup>92</sup> His tweet received considerable media attention and was dubbed as the first instance of "complaintvertising."<sup>93</sup> Soon after his campaign, British Airways sent him a special apologetic message, located the bag, hand-delivered it to his dad in Paris, and issued a public apology.<sup>94</sup>

85. UNITED BREAKS GUITARS, <https://www.davecarrollmusic.com/songwriting/united-breaks-guitars/?v=7516fd43adaa> (last visited Nov. 27, 2019).

86. Sonsofmaxwell, *United Breaks Guitars*, YOUTUBE (July 6, 2009), <https://www.youtube.com/watch?v=5YGc4zOqozo>.

87. DAVID DUNNE, ROTMAN, UNITED BREAKS GUITARS CASE, <https://3gz8rn1ntxn33t9p221v8-milgtsq-wpengine.netdna-ssl.com/wp-content/uploads/United-Breaks-Guitars-Case-Jan-11-10-21.pdf>.

88. Eddie Wrenn, *The Sweet Music of Revenge: Singer Pens YouTube Hit After United Airlines Breaks His Guitar . . . and Shares Plunge 10%*, DAILY MAIL (July 24, 2009), <https://www.dailymail.co.uk/news/article-1201671/Singer-Dave-Carroll-pens-YouTube-hit-United-Airlines-breaks-guitar-shares-plunge-10.html>.

89. *Did Dave Carroll Lose United Airlines 4180m?*, THE ECONOMIST (July 24, 2009), <https://www.economist.com/gulliver/2009/07/24/did-dave-carroll-lose-united-airlines-180m>.

90. @HVSVN, TWITTER (Sept. 3, 2013, 3:46 PM), <https://twitter.com/HVSVN/status/37502696-3347304449>.

91. *Id.*; @Kforesti, TWITTER (Sept. 4, 2013, 9:08 AM), <https://twitter.com/Kforesti/status/375289284276006912>.

92. @Kforesti, *supra* note 91.

93. ANGRY TRAVELER PAYS BIG BUCKS FOR TWEETS, CNN MONEY, <https://money.cnn.com/vid-eo/news/2013/09/04/n-british-air-twitter-war-mclaughlin.cnnmoney/index.html> [hereinafter CNN MONEY]; Jason King, *Complainvertising: Word of Mouth's Evil Twin*, HUFFPOST (Oct. 23, 2013, 1:14 PM), [https://www.huffingtonpost.com/jasonking/complainvertising-word-of-b\\_4143-073.html](https://www.huffingtonpost.com/jasonking/complainvertising-word-of-b_4143-073.html) (last updated Dec. 6, 2017).

94. CNN MONEY, *supra* note 93; King, *supra* note 93.

There are various indications that these acts of consumer activism have not only improved things for the specific complaining customer, but also led to a broader change in sellers' policies. When Katchpole's petition gained traction, Bank of America quickly retracted its policy. After the Carroll video broke out, United Airlines promised to change its customer service policy accordingly and asked permission to use the video in its internal training seminars (one trusts as an exemplar of what *not* to do).<sup>95</sup> The ripple effects, interestingly, were felt much more broadly, and Carroll reports that several other companies licensed his video as well for their internal training seminars.<sup>96</sup>

The nudnik's activism is often part of repeat behavior. Recall Professor Edelman's example;<sup>97</sup> it turns out that Professor Edelman had previously complained about various other restaurants around Boston.<sup>98</sup> When his discount coupon was not accepted at a sushi restaurant, he threatened that he would write to the Boston Licensing Board to have their business license revoked.<sup>99</sup> Katchpole's campaign against Bank of Americas was not her last; she also fought against a planned "convenience fee" by Verizon Wireless.<sup>100</sup> The company retracted its policy in less than twelve hours.<sup>101</sup>

The public reaction to nudniks is often negative. When Edelman complained about Sichuan Garden over \$12, many mocked him for being petty, privileged, and ruthless.<sup>102</sup> Even the marketing literature treats nudniks quite unfavorably.<sup>103</sup> An introductory textbook in marketing, for example, calls them "terrorists," that "companies must take measures to get rid of."<sup>104</sup>

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95. *Broken Guitar Song Gets Airline's Attention*, CBC NEWS (July 8, 2009, 3:00 PM), <https://www.cbc.ca/news/entertainment/broken-guitar-song-gets-airline-s-attention-1.802741> (last updated July 8, 2009).

96. DAVE CARROLL, *UNITED BREAKS GUITARS: THE POWER OF ONE VOICE IN THE AGE OF SOCIAL MEDIA* 81 (2013).

97. *See supra* Introduction.

98. Hilary Sargent, *There's More: Edelman Did This Before, And Worse*, BOSTON.COM (Dec. 10, 2014), <https://www.boston.com/culture/restaurants/2014/12/10/theres-more-edelman-did-this-before-and-worse>.

99. *Id.*

100. Minda Zetlin, *Meet Fee-Fighting Vigilante Molly Katchpole*, DEBTHELPER.COM (Jan. 19, 2012), <https://www.debthelper.com/blog/2012/01/meet-fee-fighting-vigilante-molly-katchpole/>.

101. *Id.*

102. Nathan J. Robinson, *Stop Eviscerating the Harvard Professor Who Threatened to Sue a Chinese Restaurant Over \$4. He Has a Point*, THE NEW REPUBLIC (Dec. 13, 2014), <https://newer-public.com/article/120558/ben-edelman-harvard-prof-angry-over-4-overcharge-has-point> ("By now even Ben Edelman thinks Ben Edelman is fairly despicable . . . . The consensus is that he's a cheap, entitled bully and that the immigrant restaurant owner is a hapless victim.").

103. *See, e.g.*, Jagdip Singh, *A Typology of Consumer Dissatisfaction Response Styles*, 66 J. RETAILING 57 (1990).

104. SCHIFFMAN & WISENBLIT, *supra* note 45, at 44.

In summary, we see in these examples how nudniks have an idiosyncratic cost structure, which leads them to take action—sometimes quite radical—in instances where most consumers would remain quiet. Potentially attributable to their unique cost structure, public reception of nudniks is not always favorable. The public mocks them partly because they are different. Yet it is precisely because they are different that nudniks can solve the collective action problems that plague all other consumers. Nudniks take action when most of us do not. And their action can lead to substantial changes in consumer markets—even when nudniks pursue the enforcement of rights not formally grounded in the contract.

*C. Why do Nudniks Prevail where the Informed Minority Fails?*

The theory of the crusading minority sidesteps the issues that plague the informed minority theory along three key dimensions: (1) nudnik-based activism is not predicated on financial cost-benefit analysis, and so is less susceptible to changes in the market environment; (2) nudnik-based activism is not predicated on reading and comprehending contracts; and, (3) nudnik-based activism is not predicated on the existence of a critical mass of similarly minded activists.

The first factor concerns the cost of being an active consumer. Both shoppers and sophisticates are active because it pays for them to do so. They shop around, read contracts, and examine reviews because it allows them to find the best deals on the market, use the product optimally, or find profitable lawsuit opportunities. But this makes their activism contingent and unreliable when the costs of becoming active rise. When the costs of becoming engaged increase, sophisticates and shoppers stop being involved. They will read, negotiate, and sue less.

Nudniks, by contrast, operate mostly based on motivations that are, in a sense, internal. They possess certain idiosyncratic personality traits and beliefs that compel them to sink their teeth in and not let go when they feel wronged, regardless of the financial cost-benefit analysis. Elinor Ostrom argued that group norms are often enforced by a subset of individuals within the group who are “willing punishers”: those for whom fighting wrongs comes naturally (even at a personal cost—think about approaching an able-bodied person parking at a disabled parking spot to scold him).<sup>105</sup> While some may view this aspect of nudnik behavior as irrational or impetuous, for the nudnik it is the right thing to do—you do not let people get away with violating

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105. Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 142 (2000).



their promises. To be sure, there are limits to nudnik activism too. Presumably, when the costs of complaining, enlisting the help of the media, or filing a lawsuit are especially high, they will deter even the nudniks (or at least some of them) from voicing their concerns publicly. Our point here is therefore not absolute but rather relative: An increase in the costs of becoming involved is more likely to deter other types of consumers than it is to deter nudniks.

This difference in responding to the costs of activism makes nudniks a better fit as active players in today's consumer markets, relative to shoppers, sophisticates, and obviously passivists. In today's markets, disclosures and boilerplate terms are copied and reproduced at almost zero marginal cost, leading to an explosion of contractual data.<sup>106</sup> The increase in the length and complexity of contracts will most directly impact shoppers, but less so the nudnik. The limitations on class actions and the trend towards individual arbitration pose the greatest risk for legally active sophisticates, but not necessarily nudniks.<sup>107</sup> Even companies' increasing efforts to limit complaints have a limited impact on nudniks, who tend to find a way.<sup>108</sup>

The same idiosyncratic motivations lead nudniks to produce reputational information, as in posting detailed negative reviews online or sharing stories with other consumers, even when the costs of such activities dwarf any direct benefit. Note that most users of online platforms consult reviews but do not post them. The operation of these reputation markets is predicated on the few who do invest in posting informative reviews, even when it does not pay to do so. In other words, the fact that nudniks are driven by internal motivations and not external cost-benefit analysis helps to solve not just the problems that plague the informed minority theory, but also the problems that plague the reputational discipline theory.

The second key distinction is that nudniks can affect change even without thoroughly reading and comprehending contracts. Nudniks frequently assert claims based on broader *transactional expectations*, that is, what rights they believe they *should* have, regardless of what the contract stipulates. As legal scholars have started to acknowledge, consumers often form transactional expectations that are based not

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106. To reiterate our point from Part I.B: Recent market trends, concerning the rise in consumer disclosure and the explosion of online contracts, privacy policies, and End User License Agreements all put increasing demands on the already-overwhelmed minority of readers. BEN-SHAHAR & SCHNEIDER, *supra* note 32, at 94–101.

107. See *supra* note 63 and accompanying text.

108. Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 ARIZ. L. REV. 213, 233–38 (2016) (detailing companies' efforts to make it increasingly harder for consumers to complain).

necessarily on the specific contract and its fine print, but rather on previous transactions, a general sense of fairness, and market norms.<sup>109</sup> When there is a mismatch between consumer expectations and the contract, most consumers will not fight the company. Nudniks will. When a cable company fails to arrive on time, the nudnik may post a negative review online, even if the fine print actually provides the company the right to delay appointments with no prior notice.<sup>110</sup> Ironically, the reading of the contract might lead sophisticates to be *less* active, as they will find the cable company's actions permissible under the contract.<sup>111</sup>

Reacting to transactional expectations, rather than the language of the contract, makes nudnik-based activism more relevant in today's consumer markets relative to informed minority-based activity. While the volume and complexity of contractual information has increased, making it less likely that consumers will read and comprehend their contractual rights, consumers have been developing an increasingly richer set of transactional expectations. Consumers nowadays experience more market interactions and are exposed to more merchants and dealing styles (think online shopping comparisons). This development broadens and sharpens their ability to compare products and sense what a viable market norm looks like. Indeed, one notable customer service report stated that "the digitally empowered customer [has led to] customer expectations soaring" and "54% of respondents say they have higher expectations for customer service today than they had one year ago."<sup>112</sup> This is to say that in today's consumer markets, consumers read contracts less but expect from the seller more. In such an environment, activism based on breached expectations after

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109. Ayres & Schwartz, *supra* note 35.

110. As others have noted, such claims can be quite effective, even if not grounded in the four corners of the contract. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 830 (2006) (arguing that "reputational considerations" may "induce the seller to treat the buyer fairly even when such treatment is not contractually required"); Jason Scott Johnston, *The Return of the Bargain: An Economic Theory of How Standard Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 858 (2006) ("In practice, acting through its agents, a firm will often provide benefits to consumers who complain beyond those that its standard form obligates it to provide . . ."). See also Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679 (2004).

111. The problem is especially acute when contract terms are *misleading* and unenforceable, yet consumers tend to view them as binding. See Furth-Matzkin, *supra* note 21 (finding the common inclusion of unenforceable terms in residential agreements).

112. 2017 STATE OF GLOBAL CUSTOMER SERVICE REPORT, MICROSOFT (2017), <https://info.micros-oft.com/rs/157-GQE-382/images/EN-CNTNT-Report-DynService-2017-global-state-customer-service.pdf>.

the fact is more relevant than activism based on reading the terms of contract in advance.

Finally, a critical mass of nudniks is not necessarily needed to affect change; a single nudnik may be enough. For the informed minority theory, size matters: If the subset of readers is not sufficiently large, sellers would not have sufficient incentives to adapt the firm's offering to win over these comparison shoppers. Firms would simply ignore this tiny segment of the market.

Nudniks work differently. They put reputational and legal sanctions in motion. For this reason, their power comes not necessarily from numbers. One Ben Edelman was enough to stop the restaurant's practice of overcharging. A single Dave Carroll can create a public relations crisis of large proportions. Just one lawsuit of an aggrieved Bank of America customer resulted in a multi-million-dollar award in punitive damages.<sup>113</sup> To be sure, a single nudnik would not *always* be enough—indeed, sometimes even many nudniks' complaints will not move the seller. The point is that under certain conditions, a single nudnik's fight can draw the attention of many others—a fact that is appreciated by crisis management firms.

Recent changes in consumer markets have therefore made nudnik-based activism relatively more impactful. The increase in contract length and complexity and the rise of class action waivers have made non-nudnik activists (and the informed minority theory) less relevant. At the same time, the internet and in particular social media have increased the ability of a single nudnik's fight to bring a seller to its knees.<sup>114</sup> Posting a negative review online increases the dissemination potential, the permanence, and the ease of accessibility of the damning information about the seller. Everyone searching for that seller in the future can run into the nudnik's detailed concern with the seller's underperformance. In other words, changes in the information environment have boosted the nudnik's signal and ability to shame firms into meeting market norms.

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113. See, e.g., *Sundquist v. Bank of Am., N.A.*, 566 B.R. 563, 620 (Bankr. E.D. Cal. 2017), *vacated in part sub nom. In re Sundquist*, 580 B.R. 536, 556 (Bankr. E.D. Cal. 2018) (ordering \$45 million in punitive damages against bank). Punitive damages can lure consumers into action—especially sophisticates—but the point is that for nudniks, the financial payment is not the primary motive.

114. See generally Matthew S. O'Hern & Lynn R. Kahle, *The Empowered Customer: User-Generated Content and the Future of Marketing*, 18 GLOBAL ECON. & MGMT. REV. 21 (2013) (arguing that the user-generated content on social media “represents a profound shift of power from firms to consumers”).

#### D. Why and How Sellers Accommodate Nudniks' Concerns

To further underscore how nudniks bring about market-wide changes in behavior, let us explore the question of how and why sellers respond to nudniks. When nudniks have legally cognizable claims, the mechanism is fairly straightforward. The pressure comes from nudniks' complaints to the regulator, the filing of lawsuits, or the refusal to pay until the issue is settled. All of these actions impose direct costs on firms, and the threat of these costs can deter seller misbehavior *ex ante*.

Less intuitively, sellers respond to nudniks even when the latter assert claims based on transactional expectations that are not grounded in the four corners of the contract.<sup>115</sup> While firms are not legally obligated to appease the nudnik in such cases, they often have *reputational* incentives to do so. A nudnik that posts a negative review online, or talks with a reporter or a consumer organization may cause more significant damage to the firm than any single lawsuit.<sup>116</sup> Recall how Molly Katchpole fought Bank of America for something that was within the bank's contractual rights—changing its fee structure.<sup>117</sup> Another example is the 2017 incident whereby United Airlines evicted a paying passenger from the flight to accommodate another passenger.<sup>118</sup> Even though the airline company's contract with the passenger stipulated that it can de-board him, treating a consumer that way seemed, in the eyes of United's various stakeholders, as uncalled for, unfair, and bad business.<sup>119</sup> The incident led to a swift and significant

115. For a broad and attentive treatment of these issues, see also Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69 (2019).

116. Even complaints to the regulator may be based on violation of consumer expectations; whether or not the regulator would respond to such complaints is a different matter.

117. See *supra* notes 61–64 and accompanying text.

118. Christina Zdanowicz & Emanuella Grinberg, *Passenger Dragged Off Overbooked United Flight*, CNN TRAVEL (Apr. 10, 2018, 8:13 AM), <https://www.cnn.com/2017/04/10/travel/passenger-removed-united-flight-trnd/index.html>; Erin McCann, *United's Apologies: A Timeline*, N.Y. TIMES (Apr. 14, 2017), <https://www.nytimes.com/2017/04/14/business/united-airlines-passenger-doctor.html> (recounting the various apologies issues. At first, the CEO noted that the “re-accommodat[ion]” of the passenger was according to “established procedures”—a claim that was not repeated in future apologies).

119. CONTRACT OF CARRIAGE DOCUMENT I, 25, UNITED, <https://www.united.com/ual/en/us/fly/co-ntract-of-carriage.html> (last updated Nov. 7, 2019). For an example of the public response, see Alex Abad-Santos, *Why United Airlines Can Get Away With Treating Its Customers Like Garbage*, VOX.COM (Apr. 11, 2017, 12:30 PM), <https://www.vox.com/culture/2017/4/11/15246632/united-airlines-drag-man-off-plane> (“Even if United was well within its rights . . . in bumping the Chicago passenger from his flight, most people can agree that its public explanation in both cases wasn't a good look.”). See also David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1401–02 (2018) (noting the potential reputational fallout of enforcing certain terms against consumers).

decline in passengers' willingness to fly United.<sup>120</sup> In general, the reputational effects of asserting contractual rights narrowly can be devastating from the firm's perspective. Such potential reputational effects may be enough to drive firms to conform to consumers' supra-contractual expectations.<sup>121</sup>

The mere background threat of nudnik activity—the “shadow of the nudnik”—can be enough to affect change. A seller that deals with a large number of consumers and cannot identify in advance who will be a nudnik,<sup>122</sup> faces a choice. The seller could maintain its level of contractual performance and address nudniks once they reveal themselves as such, hoping to be able to buy them off before they draw negative attention to the firm's behavior. Alternatively, the seller could raise its level of contractual performance across the board, so that not even nudniks would have something to complain about.

At least until recently, there were good reasons for firms to choose the latter option and improve their contractual performance across all consumers. The alternative—waiting until you realize you are dealing with a nudnik—is simply too risky.<sup>123</sup> If the firm only reaches a nudnik after she aired her grievances online, the negative review already has a life of its own and the firm's potential future consumers may read it and decide to go elsewhere.<sup>124</sup> Similarly, if a firm only approaches a nudnik after she filed a lawsuit, then even if the firm paid her enough to get her to settle, the mere filing may leave enough

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120. A poll of nearly 2,000 individuals reported a sharp decline in willingness to fly with United Airlines following the incident. Kevin Quealy, *How Much Would You Put Up With to Avoid United Airlines?*, N.Y. TIMES (Apr. 17, 2017), <https://www.nytimes.com/2017/04/17/upshot/how-much-would-people-put-up-with-to-avoid-united-airlines.html>.

121. The incident led to a “marked decrease” in the rate of bumping passengers, from 0.62 per 10,000 to 0.44, the lowest rate in decades. U.S. DEP'T OF TRANSP., AIRLINE BUMPING RATE LOWEST IN DECADES, TRANSPORTATION.GOV (Sept. 7, 2017), <https://www.transportation.gov/briefing-room/dot6417>.

122. We relax this assumption in Arbel & Shapira, showing that when sellers can identify who is a nudnik before the consumer even makes a purchase (assisted by new predictive analytics tools), the prospect of market discipline takes a hit. *Theory of the Nudnik*, *supra* note 9.

123. Our analysis here diverges from that of Professor Amy Schmitz in one important aspect. Professor Schmitz highlights the inefficiencies and unfairness (in terms of cross-subsidies) that follows when firms discriminate in favor of active consumers and against passivists. *See generally* Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279 (2012) [Schmitz, *Access to Consumer Remedies*]. We believe that sellers' ability to discriminate after the fact is limited and may come too late once one accounts for the way reputational channels operate.

124. The existence might also alert disgruntled consumers to the existence of a systemic issue, encouraging them to complain as well. The legitimizing power of a trailblazing complaint is seen most powerfully in the context of complaints of sexual misconduct.

breadcrumbs for others to pick up on.<sup>125</sup> As one of us documents elsewhere, journalists often use lawsuit filings as a source for follow-up investigative projects that hold defendants to account.<sup>126</sup> Moreover, paying the nudnik off to silence her tends to be more difficult after the nudnik had already filed a lawsuit.<sup>127</sup>

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Focusing on the small subset of crusading consumers holds the promise of understanding how market governance works in an age when only few take the trouble to read the fine print. Sellers have strong incentives to respond to nudniks for reasons that are both legal and reputational. And if sellers are unable to identify nudniks in advance, nudniks' activism would prompt sellers to improve their level of service for all consumers. To be sure, nudniks are not omnipotent, and we cannot expect them to fix all (or even most) ills in consumer markets. Our claim here is more modest: Nudniks represent an important force in the marketplace that has remained understudied and should receive more attention from legal scholars and policymakers. We now turn to consider the limits to nudnik-based activism, and how the magnitude of their social contribution varies greatly across markets.

### III. LIMITATIONS OF NUDNIK-BASED CONSUMER GOVERNANCE

Our argument thus far has been straightforward: Instead of focusing on a minority of consumers who read and negotiate terms before the purchase, legal scholars and policymakers should pay greater attention to a minority of crusading consumers who take action when sellers do not meet their transactional expectations. This Part introduces nuance. Nudnik-based behavior is not always socially beneficial. Some nudniks complain frivolously. Their transactional expectations may be unrealistic and untethered. Some complaints only reflect the nudniks' idiosyncratic preferences. Such behavior does not contribute to effective seller deterrence, but rather imposes costs and hurts the functioning of consumer markets. Any theory of nudnik-based activism should therefore attempt to identify the cross-sectional variation—the condi-

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125. See generally Roy Shapira, *Law as Source: How the Legal System Facilitates Investigative Journalism*, 37 YALE L. POL'Y REV. 153 (2018) (detailing how legal breadcrumbs lead to investigative reports).

126. *Id.*

127. This is the result of, among others, the larger leverage plaintiffs have after sinking some of the costs of litigation. See generally Lucian A. Bebchuk & Alon Klement, *Negative Expected-Value Suits*, in ELGAR ENCYCLOPEDIA OF LAW AND ECONOMICS (2d ed. 2009).

tions under which nudniks are more or less likely to bring positive change in seller behavior.

One concern with nudniks is distributional. As the old adage goes, “[t]he squeaky wheel gets the grease.”<sup>128</sup> Applied here, the concern is that sellers will reward only the noisy consumers. More accurately, the concern is twofold: (1) that sellers will reward noisy consumers *at the expense of* other consumers and, importantly, (2) that the noisy consumers tend to be the “haves” rather than the “have-nots.”<sup>129</sup> In other words, to assess the social value of nudnik-based activism we have to ask who gets what and at whose expense. But such distributional concerns about nudnik-based activism should not be overstated, for the following three factors.

First, to the extent these concerns are valid, they are not unique to nudnik-based activism but rather apply equally, or even more forcefully, to other forms of consumer activism. Consider the sophisticates, who pursue legal actions for personal gain or find ways to optimally use the products, or the shoppers who shop around for the best deals. Consumers in both of these categories are likely to be more privileged or sophisticated (by definition) than the rest of the consumer body and extract private benefits—sometimes at the expense of others.

Second and more specifically to nudniks, it is hardly evident that nudniks are overly privileged. While future empirical research is needed on this issue, we can already point out studies in the consumer complaint behavior literature, showing that there actually exists great heterogeneity among serial complainers: nudniks cut across cultural, economic, and social dimensions.<sup>130</sup>

Finally, even if we assume that nudniks are the privileged ones, does it matter? If nudniks squeak loud enough, they can affect market-wide changes that benefit the entire consumer body, including the relatively less well off. The squeaky wheel can alert us all to the possibility that there is a problem with a given seller or a product. And providing this service may sometimes actually *require* privilege. To il-

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128. Schmitz, *Access to Consumer Remedies*, *supra* note 123, at 280.

129. *Id.* at 290. See also Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1326 (2015); Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 723 (1977) (finding that complaints underrepresent poor consumers and racial minorities).

130. Some of the empirical research does suggest that, on average, serial complainers tend to be more educated and affluent. But much more empirical research is needed before we can make the leap to argue against nudniks in the name of distributional concerns. See, e.g., Michelle A. Morganosky & Hilda M. Buckley, *Complaint Behavior: Analysis by Demographics, Lifestyle, and Consumer Values*, 14 NA – ADVANCES IN CONSUMER RES. 223–26 (1987).

lustrate, recall the Ben Edelman example of going on a crusade against an overcharge of \$4. Perhaps it can be said that only someone with sufficient financial security can spend so much time corresponding over a \$4 overcharge as a matter of principle.<sup>131</sup>

Another oft-mentioned concern with nudniks is their motivations. The public, and sometimes even judges, tend to focus on nudniks' supposed motivations and cast them negatively as vengeful and petty. Granted, some consumer crusaders *are* motivated by spite. But we do not view spite as a strong argument against nudnik-behavior. In fact, spite may be a virtue in this context.

Spite drives nudniks to be "willing punishers"—those who contribute to solve consumer collective action problems.<sup>132</sup> While all consumers may suffer from late deliveries or missed appointments by a seller, each consumer sees the costs of a public fight with the seller as dwarfing whatever benefit she might get from a refund. Spite allows nudniks to transcend such cold cost-benefit calculation and motivate public action that would provide a valuable service to all other consumers. In this sense, punishing a misbehaving seller out of spite could be considered "other-regarding" by the nudnik.<sup>133</sup> In fact, there is a certain irony in treating spiteful nudniks negatively: Why not cast the majority's silence in the face of seller violations as a selfish, disinterested attitude towards their fellow consumers? Consider for example how most economic models of market discipline invoke the rhetoric of "consumer sharing" (with its positive connotations), to denote instances where one consumer learns about a product failure, and immediately shares the information with her fellow consumers. In reality, the overwhelming majority of consumers do not share. They do nothing. If spite or pettiness or obsession makes nudniks *de facto* share information with others, then so be it. The only concern should be with whether the information nudniks generate is valuable to others or not.

There is a broader point at play here. Legal scholars and policymakers should focus less on what drives nudniks and more on the social impact that nudniks generate. Focus more on the outputs and less on the inputs. Even if nudniks are after revenge, material compensation, validation from others, or satisfying their own sense of entitlement,

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131. Unfortunately, it would seem that one has to have sufficient social capital to feel legitimized to complain and to have their complaints taken seriously.

132. See Ostrom, *supra* note 105.

133. See LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* 13–15 (2011) (describing "other-regarding behavior" as actions that express "concern for someone or something beyond one's own material interests.").



this should not matter too much, as long as nudniks generate positive spillovers for other consumers.

This brings us to the third and most important issue with nudniks' behavior: representativeness. The biggest question when evaluating nudniks' social impact is whether nudniks' preferences and concerns are representative of the preferences and concerns of other, non-nudnik consumers. Some nudniks may complain about esoteric aspects of seller behavior that are inconsequential to other consumers. A particular issue is that some serial complainers may be "trolls," that is, individuals who make spurious arguments for no other reason than to evoke a reaction from their target. They seek attention rather than improvement. For such troll-based activism, the social contribution is limited, and the negative treatment these troll-nudniks will receive in the courtroom and the court of public opinion is justified.

We start our response to the "unrepresentative" argument by noting that such a critique is not unique to nudnik-based activism. The critique rather applies to other types of active consumers as well. A sophisticate filing a class action may be hunting a "bounty," even if the underlying cause is only technical and they were not really harmed. Indeed, we noted the example of counterfeit hunters in China who go out of their way to find fake products to buy, so that they can later complain that they bought a fake product.<sup>134</sup> Whenever one introduces a bounty (a profit-motive), one raises the risk of negative-value behavior on part of the hunters. There is actually reason to believe that such negative-value behavior will be *more* common among non-nudniks; but more research is needed before reaching definitive conclusions.

As for nudniks, the data there is limited, and future research is much needed. Yet the existing literature contains a few indications that lead us to believe that the "unrepresentative" concern is grossly overstated. Elsewhere we synthesized findings from the consumer complaining behavior literature, indicating that serial complainers often operate in good faith and implicate broader consumer interest.<sup>135</sup> For example, we pointed out studies establishing a link between seller behavior and consumer complaining—better service leads to fewer complaints. Sellers who want to avoid the wrath of nudniks are able to do so by offering a better product. Another finding is that serial complainers are more likely to be loyal to a seller who rectifies

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134. See Sui-Lee Wee, *Though Awash in Fakes, China Rethinks Counterfeit Hunters*, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/business/china-fakes-counterfeit-hunters.html>.

135. Arbel & Shapira, *Theory of the Nudnik*, *supra* note 9.

past issues. Again, this stylized fact of consumer complaining behavior suggests a positive dynamic: It is not that serial complainers are only after making a seller's life miserable. If consumers perceive the seller as making a genuine effort to satisfy their expectations, they will pay the seller back by continuously purchasing from her. To reiterate, we acknowledge that we cannot offer here conclusive proof on the representativeness of nudniks' expectations, or the ratio of valid-to-frivolous complaints. Still, these findings are at least suggestive that nudniks' interests are correlated with those of other consumers.

Another reason to not overstate the concern with idiosyncratic expectations is that sellers do not remain passive. Sellers can, and often do, employ various tools to defend themselves from "bad" nudniks with unwarranted complaints. For example, sellers can avoid unrealistic buyers' expectations through salient and repeated communication. To illustrate, consider how stores that do not accept certain modes of payment frequently communicate this fact clearly to the consumer in advance, with large and visible signs, despite the absence of any legal duty to do so. Consider also the large signs one often encounters with limitations, disclaimers, and special conditions on how meals are non-returnable, sales are final, or seats on a flight are tentative. In other words, sellers can reduce the risk of unrealistic consumer expectations by modifying consumer expectations in advance. This is a feature of nudnik-based consumer governance, rather than a bug in the system. If there are hidden aspects of the transaction that consumers care about, advertising them in a salient manner helps both parties determine in advance if the transaction is mutually advantageous. The background threat of nudniks attacking sellers for violating their expectations incentivizes sellers to mitigate with the gap between transactional expectations and the actual transaction.

Yet another reason to not overstate the costs of bad nudnik behavior is the involvement of other, non-nudnik consumers. Nudniks' complaints create a reputational sanction only to the extent that other consumers learn about, share, and act upon the information they received from nudniks. These other consumers are not clueless; they can decide for themselves whether the nudnik's complaint raises a valid issue or not. Dave Carroll's "United Breaks Guitars" hurt United not just because of Dave's singing talent, but probably also because it resonated with other United consumers, hitting on a widely-shared frustration with how airline companies treat luggage. If Dave would have written a song about how Amazon does not deliver on time, we suspect that his complaint would not have gone viral, because most consumers have a positive experience with Amazon shipments.

To illustrate with another infamous example, consider the case of Taylor Chapman. When Chapman did not receive a receipt at her last visit to Dunkin' Donuts, she sought to avail herself of the "free-donut-if-we-don't-give-you-a-receipt" policy.<sup>136</sup> She recorded an exchange where she demanded—using expletives and blatantly racist and sexist remarks—that the store manager will provide her with a free meal.<sup>137</sup> Chapman posted the exchange on social media, and it received extensive exposure (over a million views), yet the result was not a reputational fallout for Dunkin' Donuts, but rather a hit to Chapman's own reputation.<sup>138</sup> Unlike with the United Airlines example, Dunkin' Donuts did not experience a drop in stock price or in consumers' willingness to purchase.

To reiterate, we readily acknowledge that some nudnik complaints are frivolous. But there is reason to believe that nudniks' net social impact is positive and that they fill in an important gap in the marketplace. It is therefore imperative to not dismiss the contribution of nudniks because they may strike some as spiteful, selfish, or idiosyncratic. Instead, we should strive to continue studying the conditions under which nudniks are more or less valuable to market discipline.

#### CONCLUSION

Where does consumer governance come from? How do consumer markets maintain norms of behavior? Legal institutions are not the only ones deterring seller misbehavior; market mechanisms deter, too. Understanding the effectiveness of market forces is key for legal scholars and policymakers, as these forces set the outer limits on the need for legal intervention. Yet, the legal literature has overly focused on one type of market mechanism, namely, an informed minority, which is seemingly less relevant in today's world. This Essay suggests switching focus to a different mechanism, namely, a minority of crusading consumers—a small subset of consumers who go to great lengths to complain publicly about seller misbehavior, and in the process draw others' attention and put in motion reputational sanctions.

Directing attention to the nudnik phenomenon is a first step toward understanding consumer governance in today's world. But it is just

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136. Tsg600, *Taylor Chapman Dunkin Donuts Rant*, YOUTUBE (June 10, 2013), <https://www.youtube.com/watch?v=juLHmG76P4Q> [hereinafter *Dunkin Donuts Rant*].

137. *Id.*

138. See, e.g., Joe Patrice, *Aspiring Lawyer's Insane Rant at Dunkin' Donuts Staff*, ABOVE THE LAW (June 12, 2013, 10:10 AM), <https://abovethelaw.com/2013/06/aspiring-lawyers-insane-rant-at-dunkin-donuts-staff/>; *Dunkin Donuts Rant*, *supra* note 136 (generating 1,084,248 views, 586 'likes' and 17,000 'dislikes' as of Nov. 28, 2019).

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that: a step. Other necessary steps include understanding how sellers react to nudniks, and how the legal system affects the interactions between sellers and nudniks.<sup>139</sup> While much future research is still needed, the existing evidence from the consumer complaining behavior literature makes us comfortable enough to risk ending on a generalization: Nudniks are the unsung heroes of consumer markets.

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139. We develop these issues in Arbel & Shapira, *Theory of the Nudnik*, *supra* note 9.

